

Chapter 2

The Consumer-Credit Relationship

Credit is essential for the vast majority of Americans. Since World War II, the amount of consumer credit outstanding in the United States has increased more than tenfold, totalling approximately \$182 billion in April 1977.¹ Although this expansion is driven by factors such as increases in discretionary income, urbanization, and changes in the age distribution of the population, it has been greatly facilitated by innovations in the way credit records are kept and used.

Commercial banks, savings and loan associations, finance companies, credit unions, and retailers are the principal grantors of consumer credit today.² Chief among the factors that influence their record-keeping practices is the type of credit being extended. For a "closed-end" loan of a specific amount, such as an automobile loan, the records are set up for payments on a fixed schedule; additional records become necessary only if the consumer defaults on the agreed upon terms of the loan. By contrast, the credit-card program of a commercial bank, an "open-end" loan for no predetermined amount, generates a record (in triplicate) each time one of its cards is used, leaving a data trail in the records of the merchant who accepts the card as well as in the records of the card issuer. Grantors of open-end credit also depend on an elaborate authorization system to control customer fraud and overextension.

Personal interaction in consumer credit transactions has declined markedly in the last several decades, and this, too, has influenced credit grantor record-keeping practices. One manifestation of this decline is that recorded information is now the paramount factor in establishing and maintaining credit relationships. Growing reliance on recorded information has led credit grantors to improve their facilities for sharing information, especially through credit bureaus,³ the traditional vehicle for such interchange. It has also encouraged them to experiment with ways of determin-

¹ *Federal Reserve Statistical Release*, "Consumer Installment Credit-April 1977," June 6, 1977. The figure as of April 1977 is not seasonally adjusted, and excludes thirty-day charge credit held by retailers, oil and gas companies, and travel and entertainment companies amounting to over \$2,303 million at the end of April.

² The National Commission on Consumer Finance, *Consumer Credit in the United States*, 1972, p. 11. The Commission recognizes that savings and loan associations technically do not grant "consumer credit," but in terms of record-keeping consequences considers that an artificial distinction.

³ Most credit bureaus in the early 1900's began by providing service for a specific trade or industry. By 1906, there were 30 retail credit bureaus reporting primarily on individuals rather

ing credit eligibility based on measurable characteristics of categories of individuals rather than on the unique characteristics of any one credit applicant. Finally, it has made the records generated in the context of the consumer-credit relationship increasingly attractive to other types of users, especially to government agencies.

The first part of this chapter focuses on the record-keeping practices of modern-day credit grantors. How is the eligibility of applicants for credit determined? How do credit-card authorization services work? What changes are being made in billing procedures? What information concerning payment habits is reported to credit bureaus, other credit grantors, and collection agencies? How do credit grantors respond to requests for information on their customers that is not necessary to service the credit relationship, including requests by government agencies?

The second section discusses the record-keeping practices of credit bureaus. As the credit grantor's principal source and repository of consumer credit-history information, the credit bureau plays a gatekeeping role which significantly affects not only credit relationships, but also the relationships an individual has with insurers, employers, landlords, and others who make decisions about him on the basis of information in credit bureau records.

The third section examines consumer-credit relationships in the light of the three policy objectives outlined in Chapter 1: (1) to minimize intrusiveness; (2) to maximize fairness; and (3) to create legitimate, enforceable expectations of confidentiality. This section is organized around a set of problems an individual may encounter in the course of establishing and maintaining credit. Business practices, including those prescribed by law, are evaluated in terms of how they comport with the three policy objectives.

Finally, in the last section, the Commission makes specific recommendations, which, if adopted in the context of existing legal protections and business practices, should bring the consumer-credit relationship in line with the three policy objectives.

CREDIT GRANTORS: THE PRIMARY RECORD KEEPERS

ESTABLISHING THE CREDIT RELATIONSHIP

To obtain any form of credit, an individual must apply for it and be evaluated according to a credit grantor's criteria of credit worthiness. Credit grantors need personal information about the applicant as raw material for this evaluative process. Credit grantors differ with respect to the amount of personal information they ask for, the extent to which they verify and supplement it, and the criteria they use to determine credit worthiness. These variations are influenced by the technological sophistication of the credit grantor, its portion of the credit market, and its motives for extending

than on businesses. See written statement of Associated Credit Bureaus, Inc., *Credit Reporting and Payment Authorization Services*, Hearings before the Privacy Protection Study Commission, August 4, 1976, p. 7. (hereinafter cited as "Credit Reporting Hearings.")

credit. For example, a credit grantor with highly reliable methods of predicting responsible credit use, and a system that minimizes irresponsible use, might not need reports from a credit bureau.

An applicant typically starts the credit decision process by divulging some information about himself to the credit grantor, usually by filling out an application. The credit grantor then typically verifies and supplements this information. This may involve an inquiry to a credit bureau, or to other sources, such as another credit grantor or the applicant's employer. It is important to recognize that the applicant seldom provides all the information used in making the credit decision. Moreover, credit applications rarely indicate the full extent of the additional inquiries the credit grantor will conduct.

Verifying information provided by the applicant has been considered until recently an essential step in deciding whether to grant credit. The need for an independent source of information about the applicant was a common theme in the testimony credit grantors presented to the Commission. J. C. Penney Company, Inc., put the matter bluntly:

Let us not overlook a significant fact . . . people tend to state their case most favorably when they know that the information they supply will be the basis of their having their application granted It is essential that we be permitted to verify the information presented to us by the applicant through credit bureaus and others⁴

Historically, evaluating a credit application involved a great deal of judgment, albeit according to general standards of credit worthiness. Today, however, the increasing number of applicants has driven many credit grantors, particularly the larger ones, to experiment with methods that promise to be both less costly and more reliable.⁵

Many are experimenting with a technique called "point scoring." This technique scores an applicant's credit worthiness on the basis of a small cluster of personal characteristics which statistics show to be a reliable measure of ability and willingness to pay. For example, there is statistical evidence that people in some occupations are more likely to repay credit obligations than people in other occupations, and a numerical value can be assigned to the difference. The same is true of people who own their homes as compared to those who rent. How long a person has lived at the same address is another such factor. A credit grantor using this system rates its applicants as credit risks according to the total number of points they score on the characteristics it considers predictive. The characteristics in a particular point-scoring cluster and the numerical value assigned to each may vary from credit grantor to credit grantor and from one geographic area to another, and a credit grantor may revise its formula from time to time to

⁴ Written statement of J. C. Penney Co., Inc., *Credit-Card Issuers and Reservations Systems*, Hearings before the Privacy Protection Study Commission, February 12, 1976, pp. 18-19. (hereinafter cited as "Credit-Card Issuers Hearings.")

⁵ Roland E. Brandel, "New Dangers Arise In Point Scoring, But You Can't Afford To Be Without It," *Banking*, March 1977, pp. 86-94.

take account of its experience with customers and of changing economic conditions. An advantage of point scoring is that it may eliminate the need for a credit report. As Anthony Nicholas, Citibank Vice President for Master Charge operations told the Commission:

Our new credit scoring procedures are expected to allow us to grant or deny credit on the basis of the application in about 20 percent of the cases; formerly, credit reports would have been required to confirm the credit histories of these applicants.⁶

On the other hand, point scoring effectively eliminates the individual's opportunity to challenge the basis for a credit decision. The spread of point scoring and other credit policies predicated entirely on group behavior is diminishing individuality as a factor in granting credit, and threatens to push it out of the credit relationship altogether. The Equal Credit Opportunity Act,⁷ which now permits a rejected applicant to request the reasons for an adverse credit decision, relies on the theory that an adverse decision can be explained in terms of one or more particular characteristics of the individual. Point scoring, however, submerges particular characteristics in an overall score. All the characteristics included in a formula contribute to the score, so that a decision is the result of a combination of factors weighted in a particular way. A change in the credit grantor's weighting of any one of the factors could alter the decision. Thus, legal protections do not appear to be keeping pace with credit evaluation practices.

CREDIT-CARD AUTHORIZATION SERVICES

It is doubtful that any other innovation in the history of consumer credit has had a more profound impact than the credit card. The credit card has virtually transformed the consumer-credit relationship, and a whole new record-keeping industry has grown up around it. A credit-card program cannot operate safely unless the credit grantor can monitor credit-card transactions and deny credit when it sees fit.

The type of authorization system used depends primarily on the size of the card issuer's operations. Large card issuers such as Sears, Roebuck and American Express operate their own authorization systems. Banks that offer Master Charge and BankAmericard belong to service organizations that supplement their own authorization systems to provide worldwide coverage.⁸ Finally, airlines, hotels, and restaurants often use independent authorization services that provide information obtained from American Express, banks, and other card issuers.

The core of any authorization system is a file showing which accounts

⁶ Statement of First National City Bank (Citibank), Credit-Card Issuers Hearings, February 11, 1976, p. 4.

⁷ 15 U.S.C. 1691 *et seq.*

⁸ Written statement of National BankAmericard, Inc., Credit-Card Issuers Hearings, February 11, 1976, pp. 3-9; Statement of Interbank Card Association, Credit-Card Issuers Hearings, February 11, 1976, pp. 4-8.

have been cancelled or are overextended, and which cards have been lost or stolen. An authorization system protects merchants by providing a central list of the card numbers identifying accounts in trouble. A merchant can check this list before accepting a credit card in payment for a purchase. The card issuer guarantees payment to the merchant as long as the card is not on the list. A merchant who accepts a listed card must absorb any loss that results.

An authorization system also protects the credit grantor by limiting its risk. For credit grantors that specify in advance the total amount that may be charged to an account during a billing period, the system stops the card holder from exceeding his limit. For those that do not establish a credit limit in advance, the system triggers intervention when the balance owed on an account reaches sizable proportions. Trained authorizers then decide whether to approve a new charge on the account. In making the decision, the authorizer may use criteria other than available credit. At American Express, the authorizer may review the card holder's original application, for example, to see if the income originally declared makes it likely that the card holder will be able to pay for the purchase in question.⁹ Such *ad hoc* decisions, however, are the exception rather than the rule.

Most authorization systems also monitor credit-card accounts for unusual activity indicating fraud. Most major card issuers are developing systems that allow them to authorize every transaction, no matter how small the amount. This means that instead of relying on files which can show only that a card holder has abused his credit, the card issuer can get instantly a complete, up-to-the-minute status report on any card holder's account.

Card issuers disclose the negative information in their files to independent authorization services which in turn report it to their own subscribers on demand.¹⁰ The main subscribers to these independent services are airlines, hotels, and restaurants, which use them as a supplement to the card issuers' own authorization systems. Although the independent services are functionally similar to the card issuers' authorization systems, they represent yet another source of information that may affect the card holder. It is doubtful, moreover, that many of the card holders on whom an independent service reports derogatory information, card holders with whom the service has no credit relationship, know that it exists. Consequently, a card holder who asks a card issuer to correct inaccurate information in its records about him has no way of knowing if an independent service also has the information in question, much less whether its records will also be corrected.

The adverse impact of billing errors and the growing reliance on independent authorization services underscore the importance of prompt correction of inaccuracies in the records maintained by a credit grantor as well as those maintained outside of its immediate control. Indeed, the harm

⁹ Written statement of American Express Company, Credit-Card Issuers Hearings, February 11, 1976, p. 4.

¹⁰ Submission of TRW Validata, "Background Information on TRW Validata," *Depository and Lending Institutions*, Hearings before the Privacy Protection Study Commission, April 21, 1976. (hereinafter cited as "Depository and Lending Institutions Hearings.")

that can be done by errors in the files of a credit-card authorization service makes the point sharply. Discovering that "it was all a mistake" can be small and bitter comfort to a traveler stranded in a strange city late at night because information about his credit-card account has been inaccurately reported to an independent authorization service.

BILLING

The traditional forms of closed-end credit need involve no monthly bill because the contract between the credit grantor and its customer specifies at the outset how much will be paid and when. With open-end credit plans, however, the monthly bill is often the principal means of communication between credit grantor and individual. This gives the credit grantor's billing practices great significance for the individual.

Most credit-card issuers initially used the so-called "country club" billing system which supplies the individual with two copies of every charge voucher, one from the merchant at the time of purchase, the other from the card issuer with the monthly statement. To reduce paperwork, many card issuers, and particularly the nationwide bank-card systems, have been switching to "descriptive" billing. Under this new system, the individual still gets a voucher from the merchant at the time of purchase, but the monthly statement includes a brief description of each purchase instead of a copy of the voucher.

In September 1975, the Board of Governors of the Federal Reserve System amended its Regulation Z [12 C.F.R. 277.7(b)(ii)(B)] to require credit grantors to furnish enough information on or with their periodic statements of open-end credit-card accounts to enable their customers to identify the transactions for which they are being billed.¹¹ As a consequence, credit-card issuers must now capture and store more information on individual transactions than they would otherwise record. For example, a retailer's statement must identify the goods or services it covers, while the statements of banks, American Express, and other independent card issuers must show the name of the merchant, and the city and State in which the transaction took place.

The card issuers' move to descriptive billing and the Federal Reserve Board's response to it represent something of a trade-off for a card holder. On the one hand, he is given enough information to tell him whether or not he made each purchase, but on the other, more information than before about how he uses his credit privilege goes into the card issuer's records about him. Moreover, new billing practices are generating special problems in reporting disputes over billing to credit bureaus. These problems are discussed in some detail below; here it is enough to note that the impact of computerization is great, both as it affects the incidence and propagation of record-keeping errors, and as it affects an innocent victim's power to mitigate the adverse consequences of such errors in situations where it is not always assumed that the customer knows best.

¹¹ Board of Governors of the Federal Reserve System, *Annual Report to Congress on Truth-In-Lending for the Year 1975*, January 3, 1976.

DISCLOSURES TO CREDIT BUREAUS AND TO OTHER CREDIT GRANTORS

Cooperation among credit grantors is a basic tenet of the credit-granting business. Its most visible manifestation is the way credit grantors have traditionally used credit bureaus to exchange information about their customers.

Most credit grantors do not inform an applicant that information about him will be reported to credit bureaus. As recently as November 1976, Citibank of New York inserted the following clause in its Master Charge card-holder agreement:

Your performance of this agreement may be reported to credit reporting agencies. No one else will be given such information without proper legal process or your prior written approval. We will try to notify you by phone or by mail of a court order in order to give you an opportunity to object to it.¹²

Although this notice does not say whether there will actually be a disclosure, nor to which credit bureau a disclosure may be made, nor where the information will go from there, it represents a step forward from the general practice of no notice at all.

What information is disclosed to credit bureaus? Most of the credit grantors with computer-based record-keeping systems provide the following information to one or more credit bureaus every 30 days: customer account number, customer name, spouse's name (if account is a joint account), street address, city, State, ZIP code, account type, date of last activity, scheduled payment date (if an installment plan account), date account opened (month and year), highest credit accumulated, amount owing, amount past due, the credit grantor's rating of the account, which is typically reported under the heading "usual manner of payment," and an indicator as to any outstanding billing dispute (as required by the Fair Credit Billing Act¹³). This information may be reported to automated credit bureaus directly, and to manual bureaus through a microfiche service offered by Associated Credit Bureaus, Inc., the credit bureau trade association.¹⁴

Of these items regularly disclosed to credit bureaus, "usual manner of payment" and "amount owing," deserve particular attention. As to the former, credit grantors rate an individual (or individuals in a joint account) as illustrated below.¹⁵

- 0 Too new to rate; approved but not used
- 1 Pays (or paid) within 30 days of billing; pays accounts as agreed

¹² Submission of Citibank, Credit-Card Issuers Hearings, February 11, 1976.

¹³ 15 U.S.C. 1601, 1601 note, 1610, 1631, 1632, 1637, 1666, *et seq.*

¹⁴ Known as the "Trade Verification Service," this microfiche service was developed so that small manual bureaus could continue to receive information from large automated credit grantors. The service routes information to credit bureaus on the basis of ZIP codes.

¹⁵ Submission of Associated Credit Bureaus, Inc., "The Common Language of the Consumer Credit Industry," Credit Reporting Hearings, August 4, 1976.

- 2 Pays (or paid) in more than 30 days, but not more than 60 days, or not more than one payment past due
- 3 Pays (or paid) in more than 60 days, but not more than 90 days, or two payments past due
- 4 Pays (or paid) in more than 90 days, but not more than 120 days, or three or more payments past due
- 5 Account is at least 120 days overdue but is not yet rated "9"
- 7 Making regular payments under Wage Earner Plan or similar arrangement
- 8 Repossession. (Indicate if it is a voluntary return of merchandise by the customer.)
- 9 Bad debt; place for collection; skip

Except for TRW Credit Data, which has a more detailed system for recording usual manner of payment,¹⁶ the codes shown above are standard throughout the credit-reporting industry. Moreover, credit grantors have been working together to make the ratings they report to credit bureaus comparable,¹⁷ although the significance of these ratings for credit decisions still varies with different credit grantors. This is but one example of industry efforts to standardize credit-related information.

The second item regularly disclosed to credit bureaus—amount owing—is significant because it enables credit grantors to avoid consumers who are already or may become overextended. Amount owing has always been exchanged freely among credit grantors, but only on direct inquiry either from credit grantor-to-credit grantor, or from credit bureau-to-credit grantor on behalf of another credit grantor. Only in the last few years have credit grantors routinely reported it to credit bureaus.

One result of this routine reporting is to make the credit evaluation process more efficient. Another is to concentrate information that historically was scattered among credit grantors until needed for a specific purpose. Still another result is to facilitate or improve processes such as "prescreening" mailing lists¹⁸ and continuous monitoring of accounts for signs of overextension.

In addition to the regular reports, most credit grantors also notify credit bureaus of other events bearing on the credit relationship. For example, when an account limit is changed, when an account becomes delinquent or a delinquency is paid, when an inactive account is purged from the credit grantor's files, or when a customer dies, credit bureaus will normally be notified.

Not all credit grantors with open-end accounts routinely disclose all of

¹⁶ Submission of TRW Credit Data, "Credit Datagram History Issue," Credit Reporting Hearings, August 4, 1976.

¹⁷ Written statement of Associated Credit Bureaus, Inc., Credit Reporting Hearings, August 4, 1976, pp. 10-11.

¹⁸ According to the Federal Trade Commission, "Prescreening is the process by which a list of potential customers is submitted to a credit bureau which then audits the list by deletion of those names that have an adverse credit record. Normally, such lists would be used for mail order solicitation or credit card solicitation." 16 C.F.R. 600.5 Effective February 23, 1973, 38 *Federal Register* 4947. The use of credit-bureau files to evaluate individuals on a mailing list is further discussed in Chapter 4.

the above customer information to credit bureaus. For example, American Express provides no customer information to credit bureaus, except in response to a specific request. In testimony before the Commission, American Express representatives said that when a credit bureau asks for a reference, the company supplies its card holder's name and address, membership date, highest amount of credit extended during the last six months, and an indication as to whether the account has been maintained satisfactorily, unsatisfactorily, or is the subject of some pending action.¹⁹ American Express does not respond directly to the requests of other credit grantors for information about its card holders. Atlantic Richfield Company testified that its policy is similar, although it will disclose information to another credit grantor if the card holder insists.²⁰

Reports to credit bureaus on closed-end accounts are less frequent than those on open-end accounts. The monthly account balance for a closed-end account is predetermined by the credit agreement. Once a credit bureau records the terms of a new closed-end account, the credit grantor need only report on changes in the account's status, such as delinquencies, repossessions, charge offs,²¹ and final completion of the contract.²²

Depository institutions (e.g., commercial banks, savings and loan associations, and credit unions) testified that they distinguish between their credit and their depository relationships when disclosing information to credit bureaus and other credit grantors. For example, Continental Illinois National Bank and Trust Company of Chicago testified that it will freely disclose information about credit customers to the "legitimate credit-grantor community," but will not even verify the existence of a savings account, let alone disclose the account balance to credit bureaus or other lenders.²³

Bay View Federal Savings and Loan Association of California gave the Commission some insight into the disclosure practices of a large savings and loan institution. When it gets a telephone request for information about a savings account, it verifies the caller's identity by returning the call after checking the telephone directory. It will give a credit grantor the names of all owners of the account, the date the account was opened, the "low-hi" balances, and, for any account closed within the year, the closing date. When the request covers more than one account, each account is described separately.

Bay View Federal testified that it will not respond to a written request for information about a savings account unless the request is accompanied by the depositor's signed authorization. Even then, the bank will only verify items specified in the request, such as balance as of a particular date, the

¹⁹ Written statement of American Express Company, Credit-Card Issuers Hearings, February 11, 1976, p. 7.

²⁰ Written statement of Atlantic Richfield Company, Credit-Card Issuers Hearings, February 11, 1976, p. 7.

²¹ A credit grantor will "charge off" a delinquent account when its efforts to collect the outstanding balance prove unsuccessful, or when it learns that an individual has been adjudicated bankrupt.

²² Written statement of Continental Illinois National Bank and Trust Company of Chicago, Depository and Lending Institutions Hearings, April 21, 1976, p. 5.

²³ *Ibid.*, p. 6.

date the account was opened, and the names of other parties on the account. Most written requests come from welfare agencies, outside auditors, and other banks. Bay View Federal keeps copies of them all, and a record of the disclosures made in response to them.²⁴

At Western Electric Employees Federal Credit Union (WEEFCU), no information about a member's depository account is provided in response to an inquiry from a third party without first notifying the member. When an inquiry about an account comes in, WEEFCU discloses ". . . only that the person is on payroll deduction and that the account is current."²⁵ (The member is immediately notified of any inquiry and any disclosure.) No adverse information is disclosed unless the inquirer obtains the member's explicit authorization. A Western Electric representative explained: "Ordinarily, we disclose . . . information to third parties only upon written request of the credit union member."²⁶

The bylaws of the National Credit Union Administration stipulate that:

The officers, members of committees, and employees of [a] credit union shall hold in confidence all transactions of [the] credit union with its members and all information respecting their personal affairs, except to the extent deemed necessary by the [credit union] board in connection with the making of loans and the collection thereof.²⁷

These bylaws help to shape the disclosure policy of Federal credit unions, and the bylaws of State-chartered credit unions contain similar provisions.²⁸

The Lender's Exchange

Consumer finance companies are a source of closed-end credit for many Americans. In addition to the disclosures they routinely make to credit bureaus and other creditors, finance companies maintain an industry index called the Lender's Exchange. According to FinanceAmerica Corporation:

The Lender's Exchange is a nonprofit, cooperative organization which serves as a clearinghouse for information among members, and membership is limited to licensed lenders engaged in the business of making loans. . . .

The Exchange functions to assist lenders in identifying

²⁴ Written statement of Bay View Federal Savings and Loan Association, Depository and Lending Institutions Hearings, April 22, 1976, pp. 5-6.

²⁵ Written statement of Credit Union National Association, Depository and Lending Institutions Hearings, April 21, 1976, p. 8.

²⁶ *Ibid.*, p. 9.

²⁷ Article XIX, Section 2 of the standard form of Federal credit union bylaws, as set forth in National Credit Union Administration (NCUA) Regulation Section 701.14(e). See also NCUA Regulation Sections 720.3, "Information Made Available to the Public" and 720.4, "Unpublished, Confidential, and Privileged Information."

²⁸ Written statement of Credit Union National Association, Depository and Lending Institutions Hearings, April 21, 1976, p. 11.

individuals who already have existing obligations . . . unlike a credit bureau, the Lender's Exchange does not keep records of indebtedness [i.e., the outstanding balance owed] to members or nonmembers and has no information on an individual's paying habits.²⁹

An inquiring lender must provide the exchange with the applicant's name, address, date of birth, Social Security number, present place of employment, and occupation. These categories of information are maintained by the Exchange, and it therefore has some similarity to a credit bureau's files. As a practical matter, however, it simply serves as a pointer for lenders who want to know which other lenders have outstanding loans or applications from an individual. The function of this index, in other words, is to alert lenders to possible overextension and to facilitate direct communication among them about it.³⁰ An individual's name is removed from the Lender's Exchange when a member company reports that it was listed in error, or that the loan application has been declined, or that the obligation has been paid in full.³¹

DISCLOSURES TO COLLECTION AGENCIES

A grantor of open-end credit can take various steps to curtail credit abuse. When a credit-card account becomes delinquent, the card issuer notifies both the card holder and one or more credit bureaus and identifies the account in its authorization system's "negative file." It may also notify an independent authorization service. If the delinquency continues, the card issuer may try to retrieve the card or collect the unpaid balance, or both, or it may turn the account over to a collection agency.

There are firms that specialize in retrieving the credit cards of card holders whose privileges are revoked. Bank of America characterizes card-retrieval firms as investigative agencies, and gives them the following information: card holder's name, last-known address, account number, and, in some instances, last-known employer's address.³² Bank of America puts no restrictions on the use of card-holder information by investigative agencies either during the retrieval efforts or afterwards.

Some of these investigative agencies may also prepare background reports for insurance underwriters, so that disclosures made to them for a collection purpose could jeopardize the card holder's insurance application. Such second- and third-order impacts underscore the importance of giving card-retrieval firms information only on individuals who actually have failed to meet a credit obligation.

When Bank of America assigns an account to a collection agency, it

²⁹ Written statement of FinanceAmerica Corporation, Depository and Lending Institutions Hearings, April 21, 1976, pp. 18-19.

³⁰ The Lenders Exchange is designed to facilitate direct inquiries among its subscribers. In contrast, as credit bureaus receive more information about individuals, their subscribers' need to communicate among themselves seems likely to disappear.

³¹ Written statement of FinanceAmerica Corporation, Depository and Lending Institutions Hearings, April 21, 1976, p. 20.

³² Written statement of Bank of America, Credit-Card Issuers Hearings, February 11, 1976, p. 15.

provides the following information: the card holder's name, account number, and payment history, plus any other possibly useful information on the card holder's original application, e.g., name and address of closest relative. Again, there are no restrictions on how a collection agency may use this information either during or after collection. As a consequence, information may be disclosed to potential users who have no role at all in the credit relationship.

Other credit grantors testified before the Commission that they, too, employ investigative agencies, both for locating card holders and for obtaining payment from them. Because such agencies are subject to the Fair Credit Reporting Act (FCRA),³³ the credit grantor must notify the card holder that an investigation of him may be conducted. To meet the FCRA requirement, some credit grantors include in their letters to customers with delinquent accounts paragraphs like these:

This is to advise you . . . that an investigation may be made whereby information may be obtained through personal interviews with neighbors, friends, or others with whom you are acquainted. Such an investigation may be found necessary by us to aid in our efforts to collect the outstanding balance on your account.

You have the right to make a written request within a reasonable period of time for a complete and accurate disclosure of additional information concerning the nature and scope of this investigation.

Why make it difficult? Pay now or call us for suitable terms.³⁴

The implied but nonetheless obvious threat in these statements is that unless the delinquent pays, interviewers will inevitably reveal information damaging to his reputation and job security.³⁵ The threat of disclosing a person's financial difficulties to his friends, neighbors, or employer before a debt is on public record raises fundamental questions about the confidentiality of the debtor-creditor relationship. The fact that collection efforts are sometimes initiated on the basis of inaccurate information, or directed at the wrong person, makes its doubtful legitimacy all the more questionable.

DISCLOSURES TO GOVERNMENT AGENCIES

A credit grantor's records about an individual can tell a great deal about his expenditures, possessions, lodging and eating habits, and travel.

³³ 15 U.S.C. 1687 *et seq.* See Chapter 8 for a discussion of investigative-reporting agencies and the Commission's recommendations concerning them.

³⁴ Written statement of Federal Trade Commission Staff, Credit-Card Issuers Hearings, February 12, 1976, p. 29, footnote 33.

³⁵ The National Commission on Consumer Finance concluded: "Threat to job security and application of social pressure are not proper methods to induce payment of debt. Until such time as a debt has been reduced to judgment, it should be a private matter between the debtor and creditor. Any communication regarding a debt to the debtor's employer or neighbors or others without the debtor's consent is an invasion of the debtor's privacy and is not a legitimate collection practice." The National Commission on Consumer Finance, *Consumer Credit in the United States*, 1972, p. 39.

They may also tell something about the individual's associates, as some credit cards are used for billing long-distance telephone calls. This kind of information has obvious value for government agencies with investigative, regulatory, or law enforcement missions.

A government agency can gain access to a credit grantor's records about an individual by various methods: court order and judicial subpoena (a writ carrying the force of legal compulsion); administrative subpoena³⁶ (a writ backed by the threat of binding judicial enforcement, but holding no actual legal penalty for noncompliance); pursuant to compulsory reporting statutes or regulations;³⁷ and through informal requests made by letter or telephone or in person.

In deciding which of these procedures to use in any particular instance, an agency must weigh their relative efficiencies. The compulsory procedures are more certain, but the informal procedures are less costly. The time and talent used in getting a single judicial subpoena could probably produce dozens of informal inquiries. Moreover, unlike a compulsory procedure, even the broadest informal request for information need not be justified to a court. Agencies understandably tend to rely on informal procedures more than on compulsory ones, especially if they have a sympathetic working relationship with the credit grantor.³⁸

No statute regulates the voluntary disclosure of a credit grantor's records to government agencies and, as far as the Commission could determine in public hearings and research, many credit grantors have no consistent policy concerning such disclosures. In a Commission survey of local and national credit-card issuers other than banks, approximately half of the 26 that responded had no explicit policy. Moreover, the policies described to the Commission varied widely.

For example, one card issuer said that it honors all government inquiries except those made by telephone, while another averred that it discloses no record information except as required by "compulsory process."³⁹ Some credit grantors alert a customer when they receive a formal government inquiry, a subpoena, for example, but because many government inquiries do not appear to be made that way, the practical effect of such a policy is necessarily limited. Moreover, no statute, regulation, or judicial ruling now obligates any credit grantor, except a bank in California, to advise an individual that information from his account records has been given to a government agency; a credit grantor does so entirely at its own discretion.

Except for the Internal Revenue Service, no government agency at any

³⁶ Sometimes referred to as an "administrative summons."

³⁷ See Chapter 9.

³⁸ For example, the Federal Bureau of Investigation investigates crimes committed against a federally insured bank and also routinely checks criminal histories of prospective bank employees.

³⁹ Compulsory process includes an administrative summons, judicial subpoena, and court order.

level notifies the individual that it wants or has obtained access to his credit records.⁴⁰ Indeed, agencies usually take the position that notifying an individual may prompt him to alter his pattern of activity or to destroy evidence, and thus specifically asks the credit grantor not to tell him.

Moreover, the evidence before the Commission suggests that, as a general rule, government agencies can expect credit grantors to assist them voluntarily in their search for records. The 26 firms that responded to the Commission's survey collectively have more than 80 million credit cards in circulation. The survey asked each respondent how many times during the last two years it had complied with various types of requests for information about individual card holders from: (1) the Internal Revenue Service (IRS); (2) the Federal Bureau of Investigation (FBI); (3) the Securities and Exchange Commission (SEC); (4) the Department of Justice (divisions other than the FBI); (5) the Central Intelligence Agency (CIA); (6) other Federal agencies; (7) State law enforcement agencies; (8) other State agencies; (9) local law enforcement agencies; (10) other local agencies; and (11) congressional committees. Six of the firms that responded—Diners Club, Exxon, Gulf (for one of its two credit-card record systems), Mobile, Chevron, and Dayton-Hudson—were able to provide statistics for 1974 and 1975.

Of a total of 1,474 such disclosures the six firms made during the two-year period, 66 percent were made to Federal agencies, 25 percent to local government entities, and the remaining 9 percent to State agencies. Of the disclosures to Federal agencies, 438 or 45 percent were to the FBI, and of those, 99.5 percent were in response to informal FBI requests; that is, requests made on letterhead stationery, during personal visits by agents, or by telephone. These data strongly suggest that the FBI's usual mode of direct access to card-holder records is *not* through one of the forms of compulsory process mentioned above.

Approximately 16 percent (239) of the total number of disclosures the six card issuers made in 1974 and 1975 were to the IRS. In contrast to the FBI, however, the IRS relied heavily on formal procedures, and in particular the administrative subpoena, which was the vehicle for 65 percent of its successful requests to the six firms.

The Department of Justice (divisions other than the FBI) ranked third among the agencies named as recipients by the six firms. It used judicial subpoenas to obtain 68 percent of the 104 disclosures made to it.

The SEC and the CIA each received only two of the reported disclosures. Diners Club acceded to two administrative subpoenas from the SEC, while Gulf twice disclosed card-holder records to the CIA after receiving a personal visit or telephone call. Thirteen percent of the reported disclosures were to other Federal agencies, the Federal Energy Administration and the Postal Service accounting for many of them. Sixty-nine percent of the disclosures in this category were made in response to a personal visit or a telephone call.

At the State and local level, more than 98 percent (189) of the

⁴⁰ See Chapter 9 for a discussion of recent changes in the Internal Revenue Code concerning the use of the administrative summons to collect information.

disclosures made were to local law enforcement agencies in response to informal requests. Based on these data, it would appear that local law enforcement agencies, like the FBI, make most of their requests informally.

In sum, 1,070 of the 1,474 requests complied with by the six firms that kept records of their disclosures to government agencies did not entail any form of legal compulsion or even the prospect of compulsion. Rather, they were made informally in letters, personal visits, or by telephone.

The Commission recognizes that these data were provided by a small number of firms and thus, at best, only illustrate practices and suggest patterns of behavior. As the Commission's inquiry also established, however, accurate estimates of the number of credit-grantor disclosures to government agencies are impossible to make because many credit grantors keep no records of such disclosures.

Consumer-credit records, particularly those necessary for a credit-card account, are, as noted above, an ever richer source of detailed information about individuals. For government agencies to tap this source is a relatively recent development and one which cannot be dismissed lightly. The Commission addresses this issue more fully in Chapter 9.

CREDIT BUREAUS: THE GATEKEEPERS

A credit bureau⁴¹ is essentially a clearinghouse for information supplied by credit grantors and collection agencies, and culled by the bureau itself from public records. Although there have been credit bureaus since the late 19th century, the advent of open-end credit coupled with new applications of computers and telecommunications has increased their importance both to the credit grantor and to the consumer.

A credit bureau satisfies one of the credit grantor's basic needs: a centralized source of information about an applicant's ability and willingness to pay. In recent years, automation has enabled some credit bureaus to monitor an individual's performance in a variety of credit relationships, thereby fulfilling another of the credit grantor's needs: to be on the alert for changes in an individual's financial situation which might affect his ability to meet obligations already incurred.

There are approximately 2,000 credit bureaus in operation today. Although most are small local monopolies serving communities of 20,000 or fewer households,⁴² computerization has allowed a few to operate virtually nationwide. The five largest—TRW Credit Data, TransUnion, Credit

⁴¹ Prior to the Fair Credit Reporting Act of 1970, credit grantors were served by "credit bureaus" and insurance companies were served by "inspection bureaus." The FCRA introduced the common nomenclature of "consumer-reporting agencies." However, the law recognizes the substantive difference between the credit and insurance areas, and it is important to bear this distinction in mind. Fundamentally, they differ from inspection bureaus with respect to type of subscribers (credit grantors rather than insurers), the type of information reported, their methods of collection, and some of their sources. For a discussion of inspection bureaus, commonly referred to in this report as "investigative-reporting agencies," see Chapter 8.

⁴² Written statement of Associated Credit Bureaus, Inc., Credit Reporting Hearings, August 4, 1975, p. 1.

Bureau, Inc., Chilton Corporation, and Credit Bureau of Greater Houston—together maintain more than 150 million individual credit records. Moreover, because the large nationwide (and regional) bureaus often compete within the same geographic area, a current record on a great many Americans is maintained by more than one bureau.

Except for TRW Credit Data's limitations on the types of public-record information it reports,⁴³ there is consensus within the industry as to the categories of information on an individual a bureau should maintain and report. These include: *identifying information*, usually the individual's full name, Social Security number, address, telephone number, and spouse's name; *financial status and employment information*, including income, spouse's income, place, position, and tenure of employment, other sources of income, duration, and income in former employment; *credit history*, including types of credit previously obtained, names of previous credit grantors, extent of previous credit, and complete payment history; *existing lines of credit*, including payment habits and all outstanding obligations; *public-record information*, including pertinent newspaper clippings, arrest and conviction records, bankruptcies, tax liens, and law suits; and finally a *listing of bureau subscribers that have previously asked for a credit report on the individual*.⁴⁴

Although credit grantors are a credit bureau's principal subscribers, and regulation of the industry is mainly predicated on credit grantors' need to exchange information, other important bureau clients include other credit bureaus, collection agencies, inspection bureaus, insurance companies, employers, landlords, and law enforcement agencies.⁴⁵ In other words, a credit bureau report will be available to subscribers with whom the individual has no credit relationship, although it cannot be assumed that the individual himself knows that.

Credit reports are the principal revenue producer for most credit bureaus, but the modern bureau also provides a number of other services. Most have at least a debt collection division.⁴⁶ Some automated bureaus "pre-screen" mailing lists to be used in targeted marketing campaigns. Some of the larger automated bureaus offer an account-monitoring service which automatically warns a subscriber if activity in an individual's file indicates that his credit worthiness ought to be reexamined. An unusual payment

⁴³ TRW Credit Data limits its reporting of public-record information to legal items that bear upon the financial standing of an individual, such as bankruptcies, tax liens and judgments. TRW Credit Data does not maintain information concerning arrests, indictments, or convictions. Written statement of TRW Information Services, Credit Reporting Hearings, August 4, 1976, p. 5.

⁴⁴ Submission of Associated Credit Bureaus, Inc., "Sample Copy of Form 100 Showing Typical Credit Report," Credit Reporting Hearings, August 4, 1976.

⁴⁵ These subscribers were legitimated by the Fair Credit Reporting Act in part because no distinction was drawn between credit bureaus and inspection bureaus other than the type of report prepared. Nonetheless, the Fair Credit Reporting Act was intended to limit, if only in broad terms, the availability of credit and inspection reports.

⁴⁶ Of the 1,800 credit bureaus belonging to Associated Credit Bureaus, Inc., 1,100 have debt collection divisions. Written statement of Associated Credit Bureaus, Inc., Credit Reporting Hearings, August 4, 1976, p. 20.

pattern, charging the limit on several credit cards, and divorce are the kinds of activity that trigger a warning.⁴⁷ Finally, some credit bureaus have developed check authorization⁴⁸ and medical billing services.⁴⁹

Several factors account for these changes in the credit-reporting industry. Central to the explosive growth of the automated bureaus has been the growth of consumer credit itself, most notably in automobile financing and in the variety of open-end credit plans developed by retailers, by credit-card companies, and, most recently, by commercial banks.⁵⁰

Changes in credit-granting methods bring new forms of credit reporting. The spread of open-end credit redefines the credit risk, which must now be measured by the total amount of credit available to an individual rather than by the amount of debt he has already incurred. As a result, credit grantors are beginning to rely on credit bureaus not only for information to use in making the initial decision to grant or deny credit, but also as monitors of the successful applicant's performance across a variety of credit relationships.⁵¹

Once credit grantors began to computerize their records, credit bureaus had to follow suit, and a bureau with the capacity to receive and report credit information in computerized form⁵² also acquired the capacity to serve multiple markets. This change introduced competition to an industry previously composed of local monopolies.⁵³ Many local bureaus with manual record keeping and limited geographic coverage have been forced out of business or into cooperative arrangements with other bureaus.⁵⁴

Much of this change has occurred since passage of the Fair Credit Reporting Act which has had its own, independent impact on the industry. Most importantly, the Act encourages specialization. The cost of complying with the Act's requirements regarding investigative reports has forced most

⁴⁷ Other items which may trigger a warning by the credit bureau include: death notice, bankruptcy filing, divorce filing, non-responsibility notice, new address on a "watch subject," new employment on a "watch subject," and major and minor "derogatory" reports from credit grantors. See written statement of Chilton Corporation, Credit Reporting Hearings, August 4, 1976.

⁴⁸ *Ibid.*, p. 27.

⁴⁹ Credit Bureau Inc. of Georgia, a subsidiary of Equifax, Inc., provides a service called "Professional Administrative Processing System." Two basic services are involved: (1) posting accounts, payments, and charges for physicians; and (2) preparation of insurance claim forms for the doctor's signature. The first service requires a physician to provide information indicating the purpose of the office visit, e.g., x-ray, consultation, or immunization. Based on codes, a bill is prepared and sent to the patient. Written statement of Credit Bureau Inc. of Georgia, Credit Reporting Hearings, August 5, 1976, p. 20.

⁵⁰ At the end of 1976, 7,889 financial institutions participated in BankAmericard/Visa and 8,594 participated in Master Charge. More than 74 million card holders belonged to the two systems and accounted for a gross dollar volume in excess of \$24 billion during 1976. More than 855 million sales slips were processed to achieve this volume by the two bank-card associations. See American Bankers Association, "ABA Bank Card Letters," March 1977.

⁵¹ In addition to the alert or warning services discussed above, credit grantors also use credit bureaus to review periodically, e.g., once every 12 months, an individual's credit standing.

⁵² There are approximately 200 automated credit bureaus in the United States.

⁵³ Written statement of Associated Credit Bureaus, Inc., Credit Reporting Hearings, August 4, 1976, p. 1.

⁵⁴ *Ibid.*, p. 3.

of the bureaus that previously performed both credit-reporting and investigative functions to choose one area or the other. As a consequence, the proportion of investigative reports that credit bureaus prepare for employers, for example, has markedly decreased.⁵⁵ Finally, the growing percentage of people who abuse credit or try to defraud the credit system influences the kind of services credit bureaus provide.

INFORMATION FLOWS IN THE CREDIT-REPORTING INDUSTRY

The credit bureau is a natural outgrowth of a cooperative credit system. Each credit grantor helps minimize the risk to other credit grantors by contributing its information about applicants to a central repository. In addition, a credit bureau may collect and report information from public-record sources, debt-collection agencies, and interviews with individuals who come to the bureau to learn about the contents of its files on them.

Information flows into, within, and out of credit bureaus in the form of reports. The same information may be used to prepare a standard credit profile, contribute to a credit guide,⁵⁶ trigger a warning to a group of subscribers, or locate a debtor.

While the telephone greatly influenced the collection and dissemination of credit information, most of it still flowed on paper until the late 1960's. Today, many credit information channels are automated, especially those to, from, and within major national and regional credit-granting institutions. Bureaus large and small are pooling resources in various ways. For example, Associated Credit Bureaus, Inc., the credit bureau trade association, helps small bureaus improve their competitive position by putting the automated files of large credit-granting institutions onto microfiche for distribution to bureaus whose records are not automated.⁵⁷ In areas where they do not compete, two major automated bureaus have agreed to switch a subscriber's inquiry automatically from one to the other when the one receiving it has no file on the individual.⁵⁸

Various factors limit both the amount of activity in which a credit bureau participates, and the variety of services it offers. These include its level of automation, the geographic area it serves, the number of contributing credit grantors, the number of individuals on whom it maintains files, and economic conditions in its market area. The Commission has taken these differences into account in developing its recommendations, though

⁵⁵ Letter from Associated Credit Bureaus, Inc. to Privacy Protection Study Commission, March 3, 1977.

⁵⁶ Credit guides are coded lists of individuals prepared for credit grantors by credit bureaus. Credit guides approved by the Federal Trade Commission must be limited to good credit risks; have the key to coding systems under tight control at the credit grantor's place of business; be used after an application is initiated by an individual; and result in a disclosure pursuant to 15 U.S.C. 1681m(a) if a credit guide is the basis for an adverse decision. See submission of Chilton Corporation, Credit Reporting Hearings, August 4, 1976.

⁵⁷ *Ibid.*, p. 22. Associated Credit Bureaus, Inc. also provides a centralized service for collection divisions and recently developed a computerized medical billing service for manual credit bureaus.

⁵⁸ Submission of Chilton Corporation, Credit Reporting Hearings, August 4, 1976.

the problems the recommendations address are commonly found throughout the credit-reporting industry.

THE OPERATIONS OF A CREDIT BUREAU

The reach of the credit-reporting industry is illustrated by its trade association's classification of contributors to credit bureau files. It includes: automobile dealers; banks; clothing, department, and variety stores; finance agencies; grocery and home furnishings dealers; insurers; jewelry and camera stores; contractors; lumber, building materials, and hardware suppliers; medical-care providers; national credit-card companies and airlines; oil companies (credit-card divisions); personal services other than medical; mail-order houses; real estate agents; hotel keepers; sporting goods and farm and garden supply dealers; utilities; fuel distributors; government agencies (e.g., the Federal Housing Administration and the Veterans Administration); wholesalers; advertisers; and collection agencies.⁵⁹

CREATING AND MAINTAINING CREDIT BUREAU FILES

When a person applies for credit for the first time, it is unlikely that any credit bureau has a file on him. The credit bureau, however, promptly uses the information given the credit grantor on the individual's application to establish one, or if one already exists, to update it.

For a credit bureau to create its files and keep them current, it must maintain continuing contact with its sources of information. It needs the information credit grantors provide about each of their active accounts, both in routine reports and in the specialized reports described earlier. Its contacts also include other credit grantors; other credit bureaus; employers, landlords, and references listed on the individual's credit application; and often public records and collection agencies.

Legal records, particularly ones pertaining to suits and judgments, bankruptcies, arrests and convictions, divorces, and property transactions, are the most significant public-record sources for a credit bureau's files. Interested parties, such as a credit grantor engaged in a suit, may supply public-record information, and some credit bureaus use public-record reporting services.⁶⁰ Newspapers are also sources of public-record information for credit bureaus.⁶¹

The Fair Credit Reporting Act gives an individual the right to find out the nature and substance of what a credit bureau's file on him contains.⁶² Some bureaus interview those who inquire about the contents of their

⁵⁹ Submission of Associated Credit Bureau, Inc., "Common Language of the Consumer Credit Industry," Credit Reporting Hearings, August 4, 1976.

⁶⁰ Such services may range from large-scale companies that systematically review public-record sources to a courthouse clerk doing a records search as a part-time job.

⁶¹ Newspaper articles may be clipped and retained but with automation affecting the manner of storing information newspapers are relied on more for items such as notices of non-responsibility and death.

⁶² The inadequacies of this right are discussed in the next section of this chapter.

records as a way of developing new information and as a check on information already on file.

Reports from collection agencies pertaining to debts that have been placed for collection are another means of updating a credit file. Because most collection agencies are owned by credit bureaus, and because the fact of having an account placed for collection has great significance for an individual's credit record, this updating procedure is the way credit bureaus often learn about accounts placed for collection by doctors and other collection agency clients who do not routinely disclose information to credit bureaus.⁶³

If a credit grantor asks a credit bureau for information neither the bureau nor its usual sources can provide, the bureau may turn to other credit grantors in order to obtain it. Bureaus also check with other credit grantors when a subscriber wants the most current possible picture of an individual's credit situation, and call employers to verify salary and other employment-related information.⁶⁴

QUALITY CONTROLS

No description can do justice to the dynamic interchange of information that credit reporting represents. Nor can it convey the magnitude of operational problems the bureaus have had to face in recent years. Correctly identifying an individual is chief among the problems that the automated bureaus have had to address. With information from hundreds of sources on literally millions of individuals being compiled and collated in one place, identification methods, some of which partially rely on the Social Security number, must be improved over methods that are adequate in smaller scale operations.⁶⁵ Proper matching of information in existing files with information coming from outside sources is especially important, and special efforts have been made to assure it.⁶⁶

Matching reports with inquiries has also been a problem for the large automated bureaus. In the early days of automation, one automated bureau tried to solve it by reporting information on more than one individual when more than one of its files could meet the inquiry's specifications.⁶⁷ Recently, some automated credit bureaus have developed sophisticated systems for making sure that inquiries and files are correctly matched. The Commission was not able to determine whether all large credit bureaus have been equally successful in coping with this common problem. One thing that does seem

⁶³ Submission of Chilton Corporation, Credit Reporting Hearings, August 4, 1976.

⁶⁴ *Ibid.*

⁶⁵ Written statement of TRW Information Services, Credit Reporting Hearings, August 4, 1976, p. 8.

⁶⁶ *Ibid.*; see also written statement of Chilton Corporation, Credit Reporting Hearings, August 4, 1976, pp. 6-10.

⁶⁷ This practice obviously created problems for the applicant whose credit record might not be used by the credit grantor. More importantly, the declined individual would be sent to the credit bureau with no assurance that the same credit file reviewed by him was also used by the credit grantor.

clear is that credit bureaus find the Social Security number a helpful tool for verifying identity.

The Fair Credit Reporting Act requires credit bureaus to have "reasonable procedures" to assure the accuracy of the information they report to their subscribers.⁶⁸ The updating procedures described in the preceding section, together with special precautions to assure the accuracy of public-record information,⁶⁹ are considered by credit bureaus to constitute "reasonable procedures." The timeliness of information in bureau reports is defined by the Act's statutory standards for obsolete information.⁷⁰

Due to FCRA requirements, space limitations, and rapid decay in the value of certain credit information, credit bureaus must also regularly purge their files. Except for bankruptcies, all "adverse" information more than seven years old is usually purged. While the FCRA only limits the *reporting* of such information, prudent business practice dictates purging it to avoid the cost of storing and segregating it, and to prevent inadvertent reporting of it for which the credit bureau would be liable. One advantage of computerizing credit records is that information can be purged automatically, efficiently, and continuously according to programmed criteria.⁷¹

The FCRA has promoted completeness of records by giving an individual the right to file an explanatory notice of dispute with a credit bureau when he questions the accuracy of information in its files. Nonetheless, not all credit bureaus include the individual's statement in a credit report. Some simply indicate that a statement of dispute has been filed and that the credit grantor may inquire further if it so desires.⁷² The relevance of information in credit reports is determined by the subscribing

⁶⁸ No specific standards exist for "reasonable procedures." The Federal Trade Commission staff has noted two general types of problems associated with this requirement. The first deals with the collection of information, for example, recording suits and not recording their disposition. The second, and in their view more complex, deals with the storage and retrieval systems used for information once collected. Written statement of Federal Trade Commission staff, Credit-Card Issuers Hearings, February 12, 1976, p. 19, footnote 21.

⁶⁹ Information from public-record sources usually requires a status check to assure its accuracy.

⁷⁰ Section 605 of the Fair Credit Reporting Act (15 U.S.C. 1681c) defines "obsolete" information as follows: (1) bankruptcies which, from the date of the judicial decision of the most recent bankruptcy, antedate the report by more than 14 years; (2) suits and judgments, which from date of entry, antedate the report by more than 7 years; (3) paid tax liens which, from date of payment, antedate the report by more than 7 years; (4) accounts placed for collection or charged off which antedate the report by more than 7 years; (5) records of arrest, indictment, or conviction of crime which from date of disposition, release, or parole, antedate the report by more than 7 years; and (6) any other adverse item of information which antedates the report by more than 7 years. The above restrictions, however, do not apply when a consumer report is to be used in connection with: (1) a credit transaction which involves, or may reasonably be expected to involve, a principal amount of \$50,000 or more; (2) the underwriting of life insurance involving, or which may reasonably be expected to involve, a face amount of \$50,000 or more; or (3) the employment of an individual at an annual salary which equals or which may reasonably be expected to equal \$20,000 or more.

⁷¹ Written statement of Chilton Corporation, Credit Reporting Hearings, August 4, 1976, p. 15.

⁷² This is one example of how computerized operations are less flexible than a manual operation and thus of how they may be making some consumer protections ineffective.

organizations. Thus, primarily for economic reasons, credit bureaus try to report only information that is both necessary and relevant to the decisions in which their reports are used.

Despite these quality controls, mistakes can and do happen. Consequently, the following standard disclaimer usually appears on a credit report:

This information is furnished in response to an inquiry for the purpose of evaluating credit risk. It has been obtained from sources deemed reliable, the accuracy of which this organization does not guarantee. The inquirer has agreed to indemnify the reporting bureau for any damage arising from misuse of this information and this report is furnished in reliance upon that indemnity. It must be held in strict confidence, it must not be revealed to the subject reported on, except by a reporting agency in accordance with the Fair Credit Reporting Act.⁷³

USES AND DISCLOSURES OF THE CREDIT-REPORTING FILE

A credit grantor may ask a credit bureau for a full credit report, for a report of only the information currently held by the bureau, or for a report covering only some specific aspect such as a single credit reference, employment and credit experiences, credit experiences only, or nothing more than previous residential address. In addition, insurance companies and their inspection bureaus may want credit reports for a variety of purposes. They may use a report to confirm the information on an insurance application, or for clues as to an individual's place of employment or previous address. An insurer may also want the substantial information about an individual's current financial situation a credit report provides in order to avoid "overinsuring" him.⁷⁴ For inspection bureaus, credit reports are an important source of public-record information which inspection bureaus need but do not regularly compile.⁷⁵

Employers are a third major category of credit report users. In addition to reporting employment history information, an employer may ask a credit bureau to find out such information as the individual's reason for leaving a previous employer and whether the previous employer would rehire him. Employers often ask credit bureaus for information pertaining to an individual's education, including grades and class rank.⁷⁶

Collection agencies are still another major category of credit report users.⁷⁷ The FCRA permits them to use a credit report in reviewing or collecting an amount owed on an account. [15 U.S.C. 1681b(3)(A)] A credit

⁷³ Submission of Associated Credit Bureaus, Inc., "Sample Copy of Form 100 Showing Typical Credit Report," Credit Reporting Hearings, August 4, 1976.

⁷⁴ For a discussion of the information needs of insurance underwriters, see Chapter 5.

⁷⁵ Written statement of Equifax Services, Credit Reporting Hearings, August 3, 1976, p. 14.

⁷⁶ Submission of Associated Credit Bureaus, Inc., "ACB Report for Employment Purposes," Credit Reporting Hearings, August 4, 1976.

⁷⁷ Written statement of Associated Credit Bureaus, Credit Reporting Hearings, August 4, 1976, p. 20.

report can give a collection agency a great deal of helpful information, such as the debtor's address, place and type of employment, income level, and total outstanding debt. Because notifying employers is a common practice in the collection business, knowing where an individual currently works is especially helpful.

Government agencies are a special subset of credit-bureau subscribers. The FCRA permits government access to credit bureau files for any purpose, including law enforcement, where there is a court order or the information requested is identifying information limited to an individual's name, current and former addresses, and current and former places of employment. Government agencies, however, can still purchase reports like anyone else if they want them for credit or employment-related purposes, or to determine eligibility for certain licenses and benefits. Such access is specifically provided for in the "permissible purposes" section of the FCRA. Federal agencies falling within this last category include the Federal Housing Administration, the Veterans Administration, the Federal Bureau of Investigation, the Civil Service Commission, and the Defense Investigative Service.

METHODS OF REPORTING

Traditionally, credit reports were mailed to subscribers. Today, the mail is used mainly by an institution sending an individual's application to a credit bureau for verification, or when an intermediary such as a report broker collects and sends reports to a large national credit grantor.⁷⁸

The telephone is widely used for reporting credit information. Most credit bureaus have trained telephone operators to receive calls from subscribers. When the caller has been adequately identified (for billing as well as for confidentiality reasons), the credit bureau operator reads the contents of the individual's file to the inquiring subscriber. Subscribers have special forms for recording these oral transmissions. What is important to note about this method, however, is that it deprives the credit bureau of control over the way information is actually recorded at the subscriber's end. The bureau has no way of knowing if the subscriber makes a mistake in transcribing or fails to record some of the reported information.

A third transmission method is by a computer. The subscriber makes its inquiry with a typewriter-like device in its office, which transmits the inquiry to the bureau and also displays or prints out the bureau's response. Identification and authorization codes are programmed into the computer system to bar automatically unauthorized disclosures. The previously mentioned computer switch that two of the major automated bureaus recently installed is an elaboration of this method. Another variation is the service now being marketed by TRW Credit Data which uses the subscriber's point scoring formula to process individual applications. Information is retrieved from TRW Credit Data files only when the

⁷⁸ For a discussion of the role and operation of the nation's largest report broker, see written statement of Credit Bureau Reports, Inc., Credit Reporting Hearings, August 4, 1976.

applicant's score warrants it. This has the effect, in some instances, of suppressing the disclosure of credit-bureau information to the subscriber.⁷⁹

COPING WITH FRAUD

Individuals have discovered ways to use a credit bureau to defraud credit grantors. Recently, the systems of TRW Credit Data and Credit Bureau, Inc. were each used to fabricate favorable credit records.⁸⁰ Credit bureaus take various precautions against such acts. For example, they screen prospective subscribers on the basis of their need for credit bureau reports.⁸¹ Some large automated credit bureaus have set up separate departments for updating credit files, and some give polygraph tests to employees suspected of improperly altering credit reports.⁸² Most automated credit bureaus also employ a wide range of physical, administrative, and technical precautions to prevent fraud.⁸³

TRENDS IN CREDIT REPORTING

The testimony of industry witnesses before the Commission identified some significant trends. One that both an industry trade association and large national credit grantors have been promoting is movement toward a standardized format for routine disclosures to credit bureaus.⁸⁴ As nationwide credit grantors consolidate their data-processing programs into regional or national data-processing centers, national and regional credit-reporting firms have been established to service them. Because credit grantors deal with more than one credit bureau, however, they favor standardized reports to minimize inconvenience and error. The trade association also favors standardized formats to facilitate the distribution of information from regional and national credit grantors to small local credit bureaus.⁸⁵

The development of large automated credit bureaus has started a trend toward centralization of information about individuals. Some manual bureaus have had to close, while others have service agreements with automated bureaus in order to get the advantages of computer technology without losing their autonomy.⁸⁶

The accelerating pace at which information circulates within the credit-reporting world today suggests another trend. First mail set the pace,

⁷⁹ Submission of TRW Information Services, "The Time to Automate Your Credit Application Processing is NOW," Credit Reporting Hearings, August 4, 1976.

⁸⁰ In both cases, the fraud was perpetrated with the aid of credit-bureau employees.

⁸¹ 15 U.S.C. 1681e requires, in part, credit bureaus to have procedures that require that "... prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify the information will be used for no other purpose."

⁸² Submission of Chilton Corporation, Credit Reporting Hearings, August 4, 1976.

⁸³ Submission of Associated Credit Bureaus, Inc., "Credit Reporting Industry Security Standards," Credit Reporting Hearings, August 4, 1976.

⁸⁴ Written statement of Associated Credit Bureaus, Inc., Credit Reporting Hearings, August 4, 1976, p. 10.

⁸⁵ *Ibid.*, p. 19.

⁸⁶ *Ibid.*, p. 3.

then the telephone, but the advent of computers with their processing capability means that credit grantors can tap credit bureau files without either the help or the knowledge of bureau employees. A logical next step is the elimination of practically all human intervention, both in answering inquiries and in evaluating credit applications. The TRW Credit Data experiment mentioned earlier is a significant step in this direction.⁸⁷

The information that is now regularly reported to credit bureaus also shows how information flow is changing. For example, the amount owing on a particular account could always be obtained from credit grantors, but at the cost of some effort and time. Now that credit bureaus routinely store current amount-owing information, the time and effort needed to retrieve it is close to zero.⁸⁸

The marketing and monitoring services now offered by automated credit bureaus demonstrate how improving a record-keeping system can multiply the uses made of it. As society becomes more dependent on open-end credit, credit-reporting agencies can also be expected to refine their ability to monitor individuals' use of credit for both control and marketing purposes.

The credit bureaus that offer billing services for doctors, and check-authorization services for banks and merchants, illustrate a trend toward diversification in the credit-reporting field. One possible reason for this kind of diversification is that it permits automated credit bureaus to make use of their computer facilities in ways that are not subject to Fair Credit Reporting Act requirements.

There is also an increased realization that concern for the individual subject of a credit bureau report benefits the industry. In contrast to the usual practice before passage of the FCRA,⁸⁹ some credit bureaus today voluntarily give an individual a copy of their credit reports on him. This and a few other harbingers suggest a progressive approach to consumer relations. Unfortunately, however, this trend is far from universal, as the next section of this chapter shows.

THE INDIVIDUAL IN THE CREDIT RELATIONSHIP

Preceding sections have examined personal-data record keeping in credit granting and credit reporting. This section describes problems individuals encounter as a consequence of the way credit records are made, kept, and used, and of weaknesses in the protections currently available to them.

⁸⁷ Submission of TRW Information Services, "The Time to Automate Your Credit Application Processing is NOW," Credit Reporting Hearings, August 4, 1976.

⁸⁸ Written statement of Associated Credit Bureaus, Inc., Credit Reporting Hearings, August 4, 1976, p. 45.

⁸⁹ See *The Credit Industry*, Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U.S. Senate, 90th Congress, 2d Session, 1968; also, *Fair Credit Reporting*, Hearings before the Subcommittee on Consumer Affairs of the Committee on Banking and Currency, U.S. House of Representatives, 91st Congress, 2d Session, 1970.

CONTROL OVER THE COLLECTION OF INFORMATION

Credit grantors extend credit selectively. They need personal information about applicants in order to evaluate their risk. Individuals who apply for credit in effect consent to an intrusion on their privacy by the credit grantor. Whether the degree of intrusiveness is commensurate with the risk the credit grantor is being asked to assume is a question that has never been systematically addressed. Nonetheless, various laws enacted for other purposes, as well as the cost of compiling and keeping credit records, have served to limit the scope of the credit grantor's inquiry in recent years.

The Fair Credit Reporting Act has limited the scope of inquiry since 1971 by prohibiting credit bureaus from reporting certain categories of adverse information if the information is more than seven years old. Bankruptcies, however, may be reported for 14 years.⁹⁰ Other categories of adverse information currently reported by most credit bureaus are regulated in some States. For example, in California, New Mexico, and Kentucky, arrests and indictments that do not ultimately result in convictions may not be reported.⁹¹ In New Mexico, a conviction may not be reported following a grant of full pardon.⁹² Virginia and Florida bar the reporting of an outstanding debt as unpaid or delinquent if it is being disputed by the individual. It should be noted, however, that these restrictions only relate to the *reporting* of information by credit bureaus. A credit grantor who obtains such information from some other source, is free to use it as the basis for credit decisions.

The Equal Credit Opportunity Act, as amended, and its implementing regulations [12 C.F.R. 202] have also curbed the collection of certain types of information. The Act proscribes the use of race, sex, marital status, and some other kinds of information in making decisions about the granting of credit. It does so on the grounds that the use of such information in arriving at credit decisions is unfair rather than on the grounds that collecting it is an unwarranted intrusion on personal privacy. The changes resulting from enactment of the law and its amendment underscore the fact that individual efforts to limit the scope of the credit grantor's inquiry are not always enough.

From the Commission's point of view, there are a number of arguments for further government regulation of the collection of personal information by credit grantors. First, an applicant for credit is not well informed about the scope of the inquiry to which he will be subjected. Although most credit application forms state that the credit grantor will verify the information provided in the application, they do not identify which institutions and people will be asked for verification or what additional information will be sought.

Second, and perhaps more important, the more an individual needs credit, the harder it is to withhold any information the creditor may ask for, no matter how irrelevant. With the growing need for credit, the applicant

⁹⁰ See note 70.

⁹¹ Calif. Civ. Code §1785.13; N.M. Stat. Ann. §50-18-6(5); Ky. Rev. Stat. §331.350.

⁹² N.M. Stat. Ann. §50-18-6(5).

usually worries only about getting it. Later, when he can turn his attention to the import of certain questions, the application process has already been completed.

CONTROL OVER THE CONTENT OF RECORDS

Although their scope and particular requirements differ, the Fair Credit Reporting Act and the Privacy Act of 1974 share a common aim: that the policies and practices of record-keeping institutions minimize unfairness to individuals in the collection, maintenance, use, and disclosure of records about them. Fairness in record keeping is also an implicit objective of the Fair Credit Billing Act and, to a lesser degree, of the Equal Credit Opportunity Act, especially as it relates to the credit-history records maintained by credit bureaus. [12 C.F.R. 202.6]

Existing legal protections establish some minimum ground rules for interaction between individuals and the various institutional record keepers involved, but provide only partial, and sometimes self-defeating, solutions to the problems they were intended to address. Odd as it may seem that laws should be needed to guarantee an individual access to a record about himself, a way to have inaccurate information corrected, or a right to be told the reasons why credit was refused, the legislative history is replete with examples showing that governmental intervention is, indeed, necessary.⁹³ For all the effort needed to produce current protections, record-keeping problems continue to plague individuals in their consumer-credit relationships. One reason is that many of the legal requirements imposed on credit grantors and credit bureaus do not apply until the individual makes certain specific requests. To protect only those who are fully aware of their rights in the credit relationship leaves a great many individuals at a disadvantage. A brief review of existing law and business practice shows why.

What can an individual learn from a credit grantor regarding the basis for an adverse decision? When an individual is the subject of an adverse credit decision, [15 U.S.C. 1691(d)(3)] the credit grantor is required to notify him of his *right* to learn the reason(s) why, and, if information reported by a credit bureau was the basis for the decision, it must give the individual the bureau's name and address. [15 U.S.C. 1681m(a)] The credit grantor need not volunteer its reasons, however; the individual must specifically ask for them, despite the burden of additional correspondence this imposes on both parties.

When an individual asks specifically for reasons, credit grantors typically respond with a form letter or preprinted checklist, models of which have been prepared by the Federal Reserve Board. As to information the credit grantor obtained from sources other than credit bureaus, the individual is entitled to learn only its nature and, again, only if he specifically asks. [15 U.S.C. 1681m(b)]

Even more significant is what an individual may *not* learn from a

⁹³ *Ibid.*; also *Consumer Information*, Hearings before the Subcommittee on Consumer Affairs of the Committee on Banking, Currency, and Housing, U.S. House of Representatives, 94th Congress, 1st Session, 1975.

credit grantor. A credit grantor is not obligated to disclose to the individual the contents of any credit report that served as the basis for the adverse decision. In fact, a credit bureau's contract with each of its subscribers usually prohibits the subscriber from disclosing such information directly to the individual.⁹⁴ If the individual wants to try to figure out which items in a credit report were responsible for the adverse decision, he must inquire at the credit bureau. Nor is the credit grantor required to reveal the identity of any sources other than credit bureaus that contributed to an adverse decision. If the adverse decision was based on information from some other type of source, the credit grantor must disclose the nature (but not the substance) of the information to the individual if the individual asks within 60 days, and must tell the individual at the time the decision is made that he has a right to ask, but the source(s) need not be revealed.⁹⁵ Thus, in no case is the individual entitled to learn from the credit grantor the actual items of information supporting the specific reason(s) the credit grantor gives for its adverse decision.

What can an individual learn from a credit bureau regarding the basis for an adverse decision? The credit bureau must tell the individual the nature and substance of its report on him, the sources of the information in it, and the identities of all recent recipients of reports. [15 U.S.C. 1681g(a)] As noted earlier, some credit bureaus allow the individual to see his credit file and, in some cases, to make a copy of it. Some will mail a copy to the individual.⁹⁶ Such practices are, however, entirely voluntary and far from universal. The credit bureau, in other words, can legally choose not to apprise the individual of the specific words and phrases in the report, and not to let him see the report or copy it for further analysis. Not even the credit bureaus that provide service nationwide are required to mail a copy of a report to the individual. The Fair Credit Reporting Act does stipulate, however, that a credit bureau may not charge for any mandated disclosures to the individual if the individual has recently been notified that he was denied credit on the basis of one of its reports. [15 U.S.C. 1681j]

From the individual's standpoint, current law and practice are deficient in a number of respects. First, it forces him to spend a great deal of time and, in some instances, money, chasing after information that is already in the hands of the credit grantor. Second, even if the individual is able to see and copy the entire credit bureau file on him, the file may not include the information that influenced the credit grantor's decision. This can happen if the bureau reports orally to the credit grantor and the credit grantor makes a mistake in taking it down, or if the credit bureau revises its own file after forwarding its report to the credit grantor. Finally, the role of the credit report and the individual's rights *vis-a-vis* the credit bureau are not

⁹⁴ The standard industry report, prepared by Associated Credit Bureaus, Inc., contains the following: "It [the information] must be held in strict confidence, and must not be revealed to the subject reported on, except by reporting agency in accordance with the Fair Credit Reporting Act."

⁹⁵ Except in the case of a "consumer investigative report" if the information is adverse.

⁹⁶ Written statement of TRW Information Services, Credit Reporting Hearings, August 4, 1976, p. 15.

normally known by the individual at the time he must decide to contact the credit bureau.

How can an individual get a record corrected or amended? Arrangements between credit grantors and credit bureaus for routine monthly disclosure of information about active accounts have contributed greatly to the efficiency and utility of credit-reporting services. There are, however, some disadvantages for individuals. Credit bureaus note a credit grantor's rating of an individual's manner of payment and report it to their other subscribers. Until quite recently, credit bureaus might report an account delinquent when in fact the individual had not paid his account with one creditor because of a billing dispute. A legitimate dispute with one creditor could thus cause difficulty for him with others. The recently enacted Fair Credit Billing Act forbids reporting a disputed account as delinquent during the 90-day period in which the individual may legally withhold a disputed payment. [15 U.S.C. 1666] Credit grantors now report such accounts as being *in dispute* rather than delinquent, and other credit grantors (but only credit grantors, not all users of credit reports) are forbidden to use the dispute as grounds for refusing an individual's credit application. [15 U.S.C. 1691(a)(3)]

The Fair Credit Billing Act also prescribes procedures for resolving billing disputes. Although these procedures have helped individuals, they too are inadequate in several respects. When a credit grantor notifies a credit bureau or any other organization that an account is in dispute, it seldom sends either the individual's letter notifying it that a dispute exists or any other statement of the individual's version of the facts of the dispute. Furthermore, neither the credit bureau nor any credit report user is obligated to seek an explanation from the individual, and there is no requirement that the individual be notified that his dispute with the credit grantor has entered various credit-reporting systems. If the dispute continues beyond 90 days, credit grantors are then permitted to report the individual's account as being *both disputed and delinquent* and thereafter, but only thereafter, the credit grantor must notify the individual when it apprises anyone of the account's status, and give the name and address of recipients. [15 U.S.C. 1666]

Once either a dispute or a delinquency has been reported to a credit bureau, the Fair Credit Reporting Act provides a way for the individual to get a statement of his version of the facts in every subsequent report that mentions it. [15 U.S.C. 1681i(c)] The individual must specifically ask that this be done, however, and cite the Fair Credit Reporting Act, rather than the Fair Credit Billing Act, as his authority for asking. This assumes, of course, that he is familiar with both statutes and can distinguish between them, and also that he knows the credit bureaus to contact during the dispute settlement period, which, as suggested above, he has no way of knowing. Further, as indicated earlier, not all credit bureaus include the individual's statement in a credit report. Some simply indicate that a statement of dispute has been filed and that the recipient may inquire further if he so desires.

With no way of making sure he has a complete list of those who

received information about a billing dispute, an individual cannot be sure of any limit on the damage to his credit, even after a dispute is resolved. He may settle, compromise, win, or even get vindication in court, but the credit grantor is still under no obligation to so notify the recipients of its dispute and delinquency reports. A credit bureau will try to keep its record of disputed accounts up to date, especially if a dispute escalates into a law suit, but in doing so it cannot always count on assistance from the credit grantor that originally reported the dispute.

In sum, procedures for settling billing disputes have four major deficiencies. First, institutions other than credit grantors that receive a dispute notice during the 90-day grace period are not prohibited from using it as the basis for an adverse decision, nor are they required to seek the individual's version of the facts of the dispute. Second, credit grantors do not have to inform individuals that a dispute indicator gets into the credit-reporting system during the 90-day dispute-settlement period. Third, an individual who wants to exercise his Fair Credit Reporting Act rights to have his own version of the facts of a dispute filed with a credit bureau must take all the initiative himself and cannot learn the name and address of credit bureaus that receive the dispute information during the 90-day settlement period. Fourth, credit grantors are not obligated to report resolutions of disputes in the individual's favor.

The FCRA, as noted above, prohibits credit bureaus from reporting adverse information that is more than seven years old, except in the case of bankruptcies. The Act does not, however, define "adverse" nor has any specific definition of the term been established by regulation. Since the credit-reporting industry is legally liable for reporting obsolete adverse information, it has, perforce, adopted its own definition. In general industry usage, the term "adverse" applies to information about bankruptcies, suits and judgments, tax liens, arrests and convictions, and to the information that a credit account is more than 90 days overdue.

A serious deficiency of the FCRA is its failure to assure the correction of adverse information erroneously disclosed by a credit grantor to a credit bureau. The situation is even worse with respect to credit cards, where the negative consequences of reporting erroneous adverse information to an independent authorization service can be even more certain than when such information is reported to credit bureaus. Representatives of independent authorization services told the Commission that they and their clients comply with the Fair Credit Reporting Act as far as possible.⁹⁷ What this means in practice is that if an individual's credit card is declined at an airport, for example, he will be given the name of the authorization service and left to deal with it directly as best he can. If the authorization service was indeed acting on the basis of erroneous information, the individual will have to suffer until he can get the error corrected.

This example highlights an important point. *As information in systems is used more and more to take preemptive action against individuals, institutional record-keeping policies and practices must become preventive*

⁹⁷ Written statement of TRW Validata, Depository and Lending Institutions Hearings, April 21, 1976, p. 6.

rather than curative. Emerging information system capabilities and uses are making irrelevant the FCRA approach of rectifying errors made on the basis of inaccurate information *after* the "adverse decision" has been made.

CONTROL OVER THE DISCLOSURE OF INFORMATION IN RECORDS

The credit relationship demands cooperation, both among institutions and between institutions and individuals. Credit grantors regularly share information about their individual customers because it is to their mutual advantage to do so, and because, in many instances, it is to the advantage of the individual. Given this inherent need for information exchange, can an individual legitimately expect the records generated about him in the context of the credit relationship to be treated as confidential?

Industry spokesmen consistently maintain that the individual who applies for credit implicitly consents to the exchange of information about him among credit grantors. Because credit application forms almost invariably request the names of a few credit grantors with whom the applicant already has a relationship, it is argued that the individual must know third-party sources will be contacted to verify and supplement the information he himself provides. The industry relies mainly on this implied consent to justify the free flow of information within it.

Although the Commission accepts the view that an individual should not expect absolute control over disclosures of the information about himself that credit grantors need if they are to establish or service a credit relationship, it believes that the individual should have an explicit, enforceable expectation of confidentiality. Achievement of this balanced objective is, however, undermined by the following practices.

First, while credit grantors themselves do not routinely disclose information about their customers to inquirers whose interests do not involve credit granting, their arrangements with credit bureaus allow for a substantial amount of disclosure for purposes unrelated to the granting of credit. Even assuming that an individual understands that information about his credit relationship will be shared among credit grantors, can it be assumed that he also knows it may be disclosed to employers, insurers, and government agencies? The Commission thinks not. Nor did any of the credit-bureau and credit-grantor witnesses who appeared before the Commission offer any evidence that individuals recognize a nexus between the reporting of credit information to a credit bureau for credit-related purposes and its subsequent uses for other purposes.

Second, the widespread acceptance of credit cards has created vast amounts of recorded information that is extremely useful to marketers. The data bases of both credit grantors and credit bureaus, particularly those who have automated their records; have emerged as an important institutional asset. Commercial banks and consumer-finance companies use their records

on individuals to screen prospective customers for other commercial enterprises.⁹⁸ Credit bureaus refine marketers' mailing lists by weeding out individuals with unsatisfactory credit records. A consequence of these practices is that information derived from confidential relationships may be disclosed without the individual's knowledge, let alone authorization. The Commission's views on these practices and other marketing activities dependent on the compilation and use of mailing lists are discussed in Chapter 4.

Third, credit grantors disclose information to collection agencies without restrictions on subsequent use or disclosure by these agencies. As noted in the earlier discussion of credit grantor record-keeping practices, the implied threat that one's financial difficulties will be disclosed to neighbors and one's employer by a collection agency conflicts with the credit grantor's obligation to keep an individual's affairs confidential. Often the individual's expectation of confidentiality is outweighed by the desire of the credit grantor or its agent to protect itself against economic losses.

Fourth, although the Fair Credit Reporting Act regulates the disclosure of credit-bureau records to government agencies, disclosures by credit grantors are not now controlled. The individual simply has no legally recognized interest to be balanced against a governmental need for information about him held by a credit grantor, even when there are procedures for informing him of a pending disclosure that might be inimical to him. The Commission finds that the growing attractiveness of credit-card records to government investigators makes it more urgent than ever to strengthen the legal basis for an individual's expectation of confidentiality in his credit relationships. The broad issue of controlling governmental access to records held by various private-sector institutions is addressed in Chapter 9.

RECOMMENDATIONS

Information about an applicant has always been the basis for a consumer-credit decision, and there must always be records to document transactions. The emergence of point scoring and the newer forms of open-end credit, however, greatly increase dependence on records, profoundly affecting credit-related record-keeping practices. Today, many credit grantors accumulate a vast amount of detailed information about their individual account holders. Coupled with their growing reliance on modern record-keeping technologies, this accumulation of detail raises concerns about the content and quality of records, and about the degree of control an individual should have over their use and disclosure.

Records about individuals are also shared ever more widely as necessary credentials for an individual seeking credit, as essential tools for institutions' monitoring an individual's total indebtedness, and for other purposes such as marketing. As a result, ever larger amounts of recorded information are facilitating increasingly fine-grained decisions about an

⁹⁸ Written statement of FinanceAmerica Corporation, Depository and Lending Institutions Hearings, April 21, 1976, p. 25.

individual. This is evident not only in decisions to accept or reject a credit applicant, but also in the development of authorization systems that can preempt any credit-card transaction, large or small.

With respect to the legal protections the individual has recently acquired, the findings of the Commission clearly indicate that they are neither strong enough nor specific enough to solve the problems they were designed to address. In some cases, moreover, changes in record-keeping practices have already made them obsolete.

It is evident to the Commission that the credit consumer's prerogatives in the record keeping of credit grantors are being progressively attenuated. The individual's relationship with a credit grantor may be contractual, but the record-keeping practices that facilitate it now involve so many separate institutions that, confronted with this maze, the individual who is not versed in the law and the complexities of the credit system cannot protect himself against honest mistakes, let alone against deliberate abuses by credit institutions.

The recommendations that follow reflect more than a year's consideration of the privacy protection issues these aspects of the consumer-credit relationship raise. The recommendations are presented as they relate to the Commission's three broad policy objectives: (1) to minimize intrusiveness; (2) to maximize fairness; and (3) to create legitimate, enforceable expectations of confidentiality. The Commission believes they constitute a balanced approach to solving the specific problems identified in the preceding section on the place of the individual in the modern-day credit relationship, while at the same time satisfying the credit grantor's need to base its decisions about the individual on an accurate evaluation of his credit worthiness.

Intrusiveness

GOVERNMENTAL MECHANISMS

As noted in the section on the individual's place in the credit relationship, the Equal Credit Opportunity Act as amended, and its implementing regulations, are one form of public-policy response to the use of certain types of information as the basis for credit decisions. The ECOA, however, which proscribes the *use* rather than the *collection* of certain items of information, reflects a congressional concern with fairness rather than intrusiveness. Fairness may demand that items of information be collected even though they may not be used so as to be able to demonstrate that they are, in fact, no longer being used. For example, a credit grantor is hard put to prove that sex and race are not being systematically used to discriminate in its credit decisions unless it can show that it has, in fact, extended credit to women and minorities.

Protections against unwarranted intrusiveness make different and sometimes contrary demands on institutional record keepers. There the first thing that must be prohibited is collection, inasmuch as merely asking the question is intrusive. Use of certain information may also have to be

prohibited to protect against unwarranted intrusion, but only to make sure that the item is totally excised from the decision-making process.

In the Commission's view, questions of this nature are best resolved on a case-by-case basis because of the sensitivity of government interference in private-sector information flows. The Commission also believes that all such determinations must be limited to future acts by the information collector, so as to avoid retroactive punishment for inquiries which at the time they were made were consistent with prevailing societal norms. So far, few items of information have been proscribed on grounds of unwarranted intrusiveness. Most such proscriptions have been aimed at eliminating unfair discrimination on the basis of characteristics that are readily observable, such as sex and race. Nonetheless, the Commission believes that society may in the future have to cope with objections to the collection of certain items of information about an individual on the grounds that they are "nobody's business but his own."

Accordingly, out of its desire to prevent unreasonable invasions of personal privacy, the Commission recommends:

Recommendation (1):

That governmental mechanisms should exist for individuals to question the propriety of information collected or used by credit grantors, and to bring such objections to the appropriate bodies which establish public policy. Legislation specifically prohibiting the use, or collection and use, of a specific item of information may result; or an existing agency or regulatory body may be given authority or use its currently delegated authority to make such a determination with respect to the reasonableness of future use, or collection and use, of a specific item of information.

The Commission believes that the mechanism proposed in *Recommendation (1)* will bring the issue of intrusive information collection practices to the surface and allow it to be dealt with responsibly. Random complaints should not be enough to justify government action. In each case, it will have to be shown that (1) there is a widespread problem; (2) the item in question is irrelevant to or unnecessary in the decision-making situation in which it is used; or (3) regardless of relevance, the item is objectionable enough to justify either legislation or action by a governmental institution that has been given specific authority to deal with such matters.

Because consumer credit is already regulated at the Federal level, the Commission believes that *Recommendation (1)* should be implemented primarily at the Federal level. The Congress should vest authority in the Federal Reserve Board, the Federal Home Loan Bank Board, and the other regulatory agencies responsible for enforcing the Fair Credit Reporting Act, to collect complaints from individuals about institutions subject to the regulations of those agencies, and to report to the Congress as to the need for additional legislation, if any, to control or regulate the collection, or collection and use, of particular items of information.

REASONABLE CARE IN THE USE OF SUPPORT ORGANIZATIONS

The Fair Credit Reporting Act requires a credit bureau to have procedures which assure that prospective subscribers have a legitimate need, as defined by the FCRA, for information about individuals. Indeed, a bureau's subscribers must certify that information they obtain from it will be used only for one of the permissible purposes specified in the Act. The FCRA, however, levies no requirement on any credit-bureau subscriber with respect to its selection of a reliable bureau. If a credit bureau flagrantly violates the FCRA, or is careless in its screening of new subscribers, the existing subscribers are under no obligation to sever their relationships with it. This is also the case with respect to a credit grantor's use of independent authorization services and collection agencies.

As in other areas into which it has inquired, the Commission firmly believes that implementation of its recommendations, together with existing laws, will be enhanced considerably if credit grantors have a strong incentive to assure that the activities of their support organizations are proper. Hence, the Commission recommends:

Recommendation (2):

That the Federal Fair Credit Reporting Act be amended to provide that each credit grantor must exercise reasonable care in the selection and use of credit bureaus, independent authorization services, collection agencies, and other support organizations, so as to assure that the collection, maintenance, use, and disclosure practices of such organizations comply with the Commission's recommendations.

If it could be shown that a credit grantor contracted for or used the services of a support organization with knowledge, actual or constructive, that the organization was engaging in illegal practices, an individual or the Federal Trade Commission (FTC) could initiate action against both the credit grantor and the support organization and hold them jointly liable for the support organization's actions.

Fairness

FAIRNESS IN COLLECTION

NOTICE REGARDING COLLECTION FROM THIRD PARTIES

The Commission believes the type of governmental mechanism called for in *Recommendation (1)* will be necessary mainly when the forces of the marketplace are not strong enough to mitigate concern about the propriety of certain inquiries. If market forces are to protect the individual credit customer, however, he must know what types of information a particular credit grantor may use as a basis for credit decisions. Otherwise, he has no way of judging whether to take his business elsewhere. The application form itself serves to apprise individuals of some of the information that will be gathered, but as previously noted, application forms provide only incom-

plete clues to the type or extent of inquiries that may be made of sources other than the individual himself.

Thus, to minimize the need for public-policy determinations concerning the propriety of credit-grantor inquiries about an individual, and to let the credit applicant know what divulgence he must make in order to obtain a favorable decision, the Commission recommends:

Recommendation (3):

That Federal law be enacted or amended to provide that when an individual applies for credit, a credit grantor must notify the individual of:

- (a) **the types of information expected to be collected about him from third parties that are not collected on the application; and**
- (b) **the types of institutional sources that are expected to be asked to provide information about him.**

This recommendation would require an individual to be apprised not only of the scope of the credit grantor's inquiry but also of the disclosures the credit grantor will ask others to make about him. The Commission recognizes that the credit grantor may inquire of some institutions with which the individual has a confidential relationship, including other credit grantors. When such institutions are *not* credit grantors, the Commission would expect the credit grantor to use an authorization procedure like the one called for in *Insurance Recommendation (8)* and *Employment Recommendation (16)*. When the inquiry is to another credit grantor, however, the interdependence of credit-granting institutions, and the likelihood that an individual will be aware of that interdependence as a consequence of the questions typically asked on a credit application, make the Commission believe that a stringent authorization procedure is not necessary.

With respect to the implementation of this recommendation, the Federal statute establishing the notification requirement should give regulatory authority to the Federal Reserve Board to supplement similar regulatory authority the Board now has under the Truth-in-Lending, Equal Credit Opportunity, and Fair Credit Billing Acts. The resulting Federal Reserve Board regulations could then be enforced by the agencies having authority over particular credit-granting institutions, as well as by the individual, as is currently provided in the Truth-in-Lending Act. Truth-in-Lending allows an individual to obtain damages for violation of standards promulgated by the Federal Reserve Board, either on his own behalf, or on behalf of a class.

NOTICE AS THE COLLECTION LIMITATION

The anticipated benefits of *Recommendation (3)* for the individual would be seriously negated if a credit grantor deviated from its notification to an applicant. Further, credit grantors depend on credit bureaus and other support organizations, whose collection practices could go considerably

beyond what is stated in such a notice. Thus, to guard against these possibilities, the Commission recommends:

Recommendation (4):

That Federal law be enacted or amended to provide that a credit grantor must limit:

- (a) **its own information collection practices in connection with an application for credit to those specified in the notice called for in *Recommendation (3)*; and**
- (b) **its request to any organization it asks to collect information on its behalf to information and sources specified in the notice called for in *Recommendation (3)*.**

Recommendation (4) should be implemented in conjunction with *Recommendations (2)* and *(3)*. The purpose of this recommendation is to make clear that both the credit grantor and any organization it utilizes to collect information on its behalf are equally subject to the limitations implicit in the notice required by *Recommendation (3)*.

FAIRNESS IN USE

ACCESS TO CREDIT GRANTOR RECORDS

If an individual suspects that inaccurate, incomplete, or obsolete information was the cause of an adverse credit decision concerning himself, the first thing he will want to do, indeed the first thing he must do, is find out what information the credit grantor used in making the decision. At the present time, however, a credit grantor is not obligated to reveal to such an individual anything other than the reasons for the decision and the nature of the information that was the basis for it, and then only if the information came from someone other than a credit bureau. In no case is the individual entitled to learn from the credit grantor the actual items of information that supported the decision. Moreover, if the information came from a credit bureau the individual may never be able to confront the specific items, since the credit bureau may have updated its file and thus no longer have them. To solve this problem, and to establish the basic statutory framework for *Recommendation (6)*, below, the Commission, therefore, recommends:

Recommendation (5):

That Federal law be enacted or amended to provide that an individual shall have a right to see and copy, upon request, all recorded information concerning him that a credit grantor has used to make an adverse credit decision about him.

This recommendation would not provide an individual with a see-and-copy right applicable to all aspects of a credit relationship at any time, but rather is focused on the adverse decision situation when the individual most

clearly needs such a right. In contrast to other areas in which the Commission recommends a much broader right of access, it concluded that the decision to deny a credit application, to offer credit on other than standard terms, or to modify an existing credit agreement, are the points where existing law and business practice do not give an individual access to information about himself which is available to the credit grantor. Also, they are the points at which the individual has no regular, convenient means of correcting errors. Once the credit relationship is established, and particularly when it is open-ended, the individual has his own copies of the information that accumulates in the credit grantor's records about him. It should be noted, moreover, that *Recommendation (5)* is not intended to add any new record retention requirements.

ADVERSE CREDIT DECISIONS

The Commission also believes that the credit grantor should be obligated to explain its adverse decision to an affected individual. Current procedures described in the earlier discussion of what an individual can learn from a credit grantor regarding the basis for an adverse decision are patently inadequate. Accordingly, the Commission recommends:

Recommendation (6):

That Federal law be enacted or amended to provide that a credit grantor must:

- (a) **disclose in writing to an individual who is the subject of an adverse credit decision:**
 - (i) **the specific reason(s) for the adverse decision;**
 - (ii) **the specific item(s) of information, in plain language, that support the reason(s) given pursuant to (a)(i);**
 - (iii) **the name(s) and address(es) of the institutional source(s) of the item(s) given pursuant to (a)(ii); and**
 - (iv) **the individual's right to see and copy, upon request, all recorded information pertaining to him used to make the adverse decision; and**
- (b) **inform the individual of his rights provided by the Fair Credit Reporting Act, when the decision is based in whole or in part on information obtained from a credit bureau.**

Recommendation (6) departs from current legal requirements in that it would obligate the credit grantor to disclose, *automatically, all* of the reasons, supporting items of information, sources, and additional rights the individual needs if the Commission's fairness objective and, for that matter, the objective of existing law is to be fulfilled. Additionally, the recommendation coordinates the notification requirements of the Fair Credit Reporting Act with those of the Equal Credit Opportunity Act so that differences in timing will not confuse the individual or unnecessarily complicate inquiries to the declining credit grantor, other credit grantors, and credit bureaus.

The automatic disclosure of items of information that support the specific reasons given is important because without such disclosure it may be impossible for the individual to determine whether the decision was based on inaccurate, obsolete, or incomplete information. The names and addresses of institutional sources should be disclosed so that an individual can correct at the source erroneous information that has affected him adversely and may continue to do so.

The Commission recognizes that most contracts between credit bureaus and their subscribers forbid the subscriber to disclose information obtained from the bureau directly to an individual. The Commission also recognizes the credit bureau's concern that it be allowed to correct inaccurate information for which it is responsible. Nonetheless, the primary goal of this recommendation is to make it possible for an individual to discover the basis for an adverse decision. To simply shunt the individual to the credit bureau where he can request disclosure of the information in its files may leave him uninformed as to the real basis for an adverse decision and will certainly complicate his efforts to discover it. It is the Commission's understanding that a credit grantor that uses point scoring would necessarily have to disclose all items of information it used in scoring the individual.

The Commission considered requiring automatic disclosure of all information, not just the items that support the reasons given, but found such wholesale disclosure unnecessary to achieve the Commission's primary objective. However, an individual who is not satisfied with the reasons and supporting items of information for an adverse decision should have a right to see and copy, *upon request*, all information about himself that is available to the decision maker. Thus, the Commission considers use of the right established by *Recommendation (5)* as underlying this recommendation but unnecessary in most situations.

Finally, the Commission is concerned about deficiencies in the way individuals who have been declined credit are apprised of their rights pursuant to the Fair Credit Reporting Act. An individual told that a credit bureau provided information that contributed to an adverse credit decision must decide whether to contact the bureau, but current law does not require that he be told what the FCRA permits him to require of the credit bureau. The Commission views this failure to apprise the individual of his FCRA rights, and of the bureau's responsibilities to him before he decides whether to follow up, as a self-defeating feature of the Act. If the intent of the Act is to bring individuals and credit bureaus together, and if this can occur only at the initiative of the individual, then the notice the Act requires a credit grantor to give an individual about whom an adverse decision has been made should be more explicit about what the individual can expect if he takes the initiative.

The Commission believes an individual should be given the ability to force a credit grantor to perform the duties owed to him by making a credit grantor that fails to comply liable to the individual. An individual should be able to sue a credit grantor in Federal court or another court of competent jurisdiction if the credit grantor failed to perform one of the duties set forth in *Recommendation (5)* or *(6)*. This would include suit for failure to state

specific reason(s) for an adverse decision when the individual has cause to believe that the real reason is other than the one stated by the credit grantor. The court should have the power to order the credit grantor to comply and to award attorney's fees and court costs to any plaintiff who substantially prevails. If it could be shown that the credit grantor willfully or intentionally denied the individual any of the rights *Recommendations (5) and (6)* would give him, the court should have the power to award up to \$1,000 to the individual.

Systematic denials of access by credit grantors could be subject to enforcement by the Federal Trade Commission and the other agencies that currently have enforcement authority under the Fair Credit Reporting and Equal Credit Opportunity Acts. The remedy would be an order directing a credit grantor to disclose records upon request. Once the FTC or other agency issued such an order, the credit grantor would then be subject to the usual enforcement mechanisms available to the agency to secure compliance with its orders.

The burden should be on the individual to describe reasonably the documents sought and the credit grantor should be able to defend itself on the basis that it could not reasonably locate or identify the records sought by the plaintiff. For example, an individual could sue for any document developed as the result of an application for credit if the individual could reasonably identify the date and the nature of the application. If, however, an individual requested any information that relates to him in a file, and could not identify with some specificity the circumstances pursuant to which such a file was developed, the credit grantor would not be under an affirmative obligation to search through every record to locate a possible passing reference to the individual. Like *Recommendation (5)*, *Recommendation (6)* is not intended to add any new record retention requirements.

ACCESS TO CREDIT BUREAU AND INDEPENDENT AUTHORIZATION SERVICE RECORDS

If an individual so requests, the Fair Credit Reporting Act requires a credit bureau to disclose to him the "nature and substance" of all information it maintains about him. This requirement was intended to allow an individual to find out the contents of the credit file on him as a first step, and only a first step, in the process of protecting himself against the adverse consequences of inaccurate, incomplete, or obsolete information compiled and reported about him by credit bureaus. The efficacy of the FCRA hinges largely on the ease with which an individual can take this first step. Unless an individual can confront the contents of a credit file on him in a manner that is not unduly burdensome, the benefit of other protections guaranteed by the Act with respect to correcting or disputing a file's contents may never be realized.

Both critics and supporters of disclosure, including the credit-bureau trade association, recognize that disclosing only "nature and substance" of an individual's credit record can easily create anxiety and uncertainty for him. Some members of the credit-reporting industry have exceeded the

minimum requirements of the FCRA by giving a copy of their credit reports to individuals who make a personal visit to them. In the Commission's view, this practice places an unwarranted burden on the individual. At a minimum, it causes the individual to take time out to visit the credit bureau and, in a mobile society served increasingly by national credit bureaus, could well require both expense and time. That, of course, is even more likely to be the case when an independent authorization service is involved, since such services are even less likely to have conveniently located offices. Thus, the Commission recommends:

Recommendation (7):

That the Federal Fair Credit Reporting Act be amended to provide that, upon request by an individual, a credit bureau or independent authorization service must:

- (a) **inform the individual, after verifying his identity, whether it has any recorded information pertaining to him; and**
- (b) **permit the individual to see and copy any such recorded information, in plain language, either in person or by mail; or**
- (c) **apprise the individual of the nature and substance of any such recorded information by telephone; and**
- (d) **permit the individual to use one or the other of the methods of access provided in (b) and (c), or both if he prefers.**

The credit bureau or independent authorization service may charge a reasonable copying fee for any copies provided to the individual.

Recommendation (7) would not alter procedures currently used by credit bureaus to identify individuals prior to disclosing information to them. The Commission assumes that both automated credit bureaus and independent authorization services will use computer software to prepare copies of credit reports.

The recommended amendment to the FCRA should allow an individual to sue a credit bureau or independent authorization service that fails to comply with the requirements of *Recommendation (7)* for specific performance and collect attorney's fees and court costs if he substantially prevails. This could be in addition to his action for recovery of damages under the existing terms of the FCRA.

FAIRNESS IN DISCLOSURE

INACCURACIES REPORTED TO CREDIT BUREAUS AND AUTHORIZATION SERVICES

Although existing laws regulate the flow of information from credit-granting institutions to credit bureaus, there are no requirements which focus specifically on inaccurate information a credit grantor may disclose to a credit bureau or independent authorization service.

The Fair Credit Reporting Act provides one approach to coping with

negative consequences of inaccurate information, but it unfortunately fails to take account of the fact that in many instances credit grantors disclose information to more than one credit bureau or authorization service. Therefore, while the individual can correct inaccurate information, or file a statement of dispute concerning information at one credit bureau or service, he is not well enough informed nor is he likely to have the ability to avoid the unnecessary negative consequences of having inaccurate information disclosed to several of them.

The development of account monitoring services by automated credit bureaus is another reason to be concerned about the propagation of corrections *before* inaccurate information adversely affects an individual. These services expand the range of negative consequences to the individual beyond simply the denial of an application for credit; such information can jeopardize existing credit relationships. Therefore, the Commission recommends:

Recommendation (8):

That the Federal Fair Credit Reporting Act be amended to provide that if a credit grantor learns it has reported any inaccurate information about an individual to a credit bureau or independent authorization service, it must notify the credit bureau or authorization service within a reasonable period of time so that the credit bureau or authorization service can correct its files.

Although the Commission realizes that the phrase "within a reasonable period of time" is open to interpretation, the alternative would appear to be a regulatory agency with authority to establish specific time limits, along the lines of the regulations implementing the Fair Credit Billing Act. While this may be necessary eventually, the Commission hopes it will not; that the Fair Credit Billing Act experience will be an incentive to credit grantors to initiate corrections within periods of time that are reasonable.

PREVENTION OF INACCURACIES IN AUTHORIZATION SERVICE RECORDS

An individual whose credit-card account is incorrectly reported to an independent authorization service can experience serious difficulties which the Fair Credit Reporting Act does little to ameliorate. The FCRA contemplates an adverse credit decision of a different sort (e.g., rejection of an application) involving a different type of service organization (e.g., a credit bureau), so its protections are primarily curative. An independent authorization service, on the other hand, acts preemptively, and often speedily, with the result that preventive rather than curative protections are needed. Thus, to allow the FCRA to take *explicit* account of this new application of computer technology to consumer-credit decision making, the Commission recommends:

Recommendation (9):

That the Federal Fair Credit Reporting Act be amended to provide:

- (a) that a credit-card issuer must have reasonable procedures to assure that the information it discloses to an independent authorization service is accurate at the time of disclosure; and**
- (b) that an independent authorization service shall be subject to all requirements of the Act, except the requirement to disclose corrected information to prior recipients upon completion of a reinvestigation of disputed information.**

Given the fact that once an error in an independent authorization service record is discovered, the damage has already been done, and indeed usually cannot be remedied, a requirement that previous recipients be notified of any corrections would, in most instances, be gratuitous. If a credit-card issuer or independent authorization service fails to meet the requirements called for in *Recommendation (9)*, it should be liable for actual damages in the event an individual is harmed by its failure.

DISCLOSURES TO COLLECTION AGENCIES

The notation in an individual's credit record that his account has been placed for collection, like a similar disclosure to an authorization service, is unambiguously adverse to an individual's credit reputation. Unlike information flows from a credit grantor to a credit bureau, however, information flows to collection agencies are currently unregulated. Moreover, as indicated in one of the first sections of the chapter, it is the practice of some collection agencies to send an individual threatening letters and to contact him at his place of employment. These tactics are both annoying and embarrassing, and completely unwarranted in the case of an individual who has been reported in error. Unless, however, the credit grantor tells the collection agency to desist, the individual may not be able to escape the collection agency's badgering. Thus, the Commission recommends:

Recommendation (10):

That the Federal Fair Credit Reporting Act be amended to provide that a credit grantor must have reasonable procedures for notifying a collection agency within a reasonable period of time if an individual has been referred to the agency as a delinquent debtor on the basis of inaccurate information; also, if a debt previously referred to a collection agency has been satisfied, or a satisfactory partial payment has been made, the credit grantor must so notify the collection agency within a reasonable period of time and provide the individual with proof of its notification.

The Commission has not addressed the larger question of what constitutes proper treatment of individuals in the conduct of legitimate collection

efforts. The complexity of this issue merits a fuller examination than the Commission's resources permitted.

The Commission considered a recommendation that would restrain credit grantors or collection agencies from revealing the existence of a delinquent debt to other than the individual before the debt has been entered on a public record. It rejected this proposal, however, because of the lawsuits, sometimes even more damaging to an individual's reputation, which such a requirement would encourage.

If harm results from a credit grantor's failure to comply with the requirements called for in *Recommendation (10)*, the credit grantor should be liable for actual damages.

DISCLOSURE OF PREVIOUS CREDIT BUREAU INQUIRIES

Credit bureaus compile detailed information about an individual's various credit relationships, including the identity of his credit grantors, his total outstanding debt, and his payment habits. In addition, the Fair Credit Reporting Act requires a credit bureau to keep a list of all recipients of its credit reports so that an individual who wants to know can find out who has inquired about him during the preceding six months. Today, a credit report often contains the identity of all of those recipients as well as the identity of all recipients with whom the individual has, in fact, established a credit relationship. While a seemingly innocuous practice, some credit grantors in fact compare inquiries with relationships established, and where a relationship has not been established conclude that the individual's application must have been rejected. Although this conclusion is not totally reliable, it is certainly one possible interpretation, and can be the cause of an adverse credit decision.

The Commission views the practice of including previous inquiries in reports to credit grantors as unfair because of the broad range of eligibility requirements among credit-granting institutions. The Commission finds no reason to stigmatize an individual, either directly or by implication, by disclosing the identity of prior recipients of a credit report, except as a protection against fraud. Thus, the Commission recommends:

Recommendation (11):

That the Federal Fair Credit Reporting Act be amended to provide that a credit bureau must not disclose to its subscribers information about previous inquiries concerning an individual except the number and date of inquiries received.

Recommendation (11) would not affect the FCRA requirement that a credit bureau *retain* the identity of credit-report recipients and the date of disclosure. This information would still be collected and available to the individual but not to others.

Expectation of Confidentiality

CONFIDENTIALITY OF CREDIT-GRANTOR RECORDS

As noted earlier in this chapter, information is shared widely within the credit community and is disclosed to institutions that are not credit grantors either directly by credit grantors or indirectly through credit bureaus. Although the need for such disclosure is understandable, an individual's expectation of confidentiality with respect to a consumer-credit relationship can be distorted by the failure of most credit grantors to apprise him of their disclosure policies. More importantly, an individual has no legally recognized interest in the records maintained about him by a credit grantor and, consequently, cannot prevent a disclosure that may be inimical to him. Therefore, the Commission recommends:

Recommendation (12):

That Federal law be enacted or amended to provide:

- (a) that a credit grantor must notify an individual with whom it has or proposes to have a credit relationship of the uses and disclosures which are expected to be made of the types of information it collects or maintains about him; and that with respect to routine disclosures to third parties which are necessary for servicing the credit relationship, the notification must include the specific types of information to be disclosed and the types of recipients;
- (b) that information concerning an individual which a credit grantor collects to establish or service a credit relationship, as stated in the notification to the individual called for in (a), must be treated as confidential by the credit grantor; and thus any disclosures to third parties other than those necessary to service the credit relationship must be specifically directed or authorized by the individual, or in the case of marketing information, specifically described in the notification;
- (c) that an individual must be considered to have a continuing interest in the use and disclosure of information a credit grantor maintains about him, and must be allowed to participate in any use or disclosure that would not be consistent with the original notification, except when a credit grantor discloses information about an individual in order to prevent or protect against the possible occurrence of fraud; and
- (d) that any material changes or modifications in the use or disclosure policies of a credit grantor must be preceded by a notification that describes the change to an individual with whom the credit grantor has an established relationship.

Recommendation (12) is intended to make explicit the individual's expectation of confidentiality. It recognizes the need for routine disclosures and allows for such disclosures without authorization if the individual is

aware that they may occur. An example of a routine disclosure would be the credit grantor's monthly disclosure to credit bureaus. One advantage of this approach is that, with a few exceptions, it leaves the basic decisions on disclosure policy to credit grantors and their customers. For such a policy to be worked out in the marketplace, however, individuals must be informed of institutional practices.

The notification requirement in *Recommendation (12)* establishes the basic ground rules for disclosure of information about an individual. To the extent that credit grantors inform their clients of information flows within the credit community, such flows would not be impeded. An authorization is recommended only for those disclosures which are an exception to the individual's expectation of confidentiality as established by the notification given at the beginning of the credit relationship.

The individual needs a continuing, legally assertable, interest in the uses and disclosures of information about him so that he can defend himself against demands for information levied on the credit grantor by persons who are not in any way parties to the credit relationship. The rationale for this assertion is fully explained in Chapter 1.

The Commission does not endorse an absolute right of control by the individual, as noted in numerous instances throughout this report. In this context, the Commission is sensitive to the credit grantor's need to disclose information about an individual to prevent or protect against the occurrence of fraud. In such instances, the credit grantor should not be bound by its duty of confidentiality and the corresponding requirement to obtain the individual's authorization.

In addition to enacting the recommendation, the statute should give the Federal Reserve Board regulatory authority similar to the regulatory authority it now has under the Truth-in-Lending, Equal Credit Opportunity, and Fair Credit Billing Acts. The resulting Federal Reserve regulations could then be enforced both by the agencies having authority over particular credit-granting institutions, and by the individual, as is currently provided under the Truth-in-Lending Act, which as indicated earlier, allows an individual to seek damages for a violation of standards promulgated by the Board, either on his own behalf or on behalf of a class.

CONFIDENTIALITY OF CREDIT-BUREAU RECORDS

Credit bureaus facilitate the exchange of credit information. Industry spokesmen have consistently argued that the individual implicitly consents to and benefits from this exchange. The Commission accepts both the basic need for a free flow of information among credit grantors and the implied consent of individuals to it, but the Commission rejects the view that individuals also consent to the free flow of credit information outside the credit system. In short, the Commission sees no justification for unfettered access to credit information by employers, insurance companies, licensing authorities, or other institutions. Thus, the Commission recommends:

Recommendation (13):

That the Federal Fair Credit Reporting Act be amended to provide that information concerning an individual maintained by a credit bureau may be used only for credit-related purposes, unless otherwise directed or authorized by the individual.

Implementation of this recommendation would require that the "permissible purposes" clause of the Fair Credit Reporting Act be changed so that purposes other than credit evaluation, account reviews, pre-screening, and debt collection would require an explicit authorization. This requirement comports with the Commission recommendations pertaining to records maintained by support organizations that service insurers and employers.

* * * * *

A NOTE ON THE COMMERCIAL-CREDIT RELATIONSHIP

Commercial establishments seek credit from banks, other commercial enterprises, and government agencies like the Small Business Administration. In fact, businesses commonly sought and received extensions of credit long before most individuals sought such credit extensions. Commercial-credit grantors, like consumer-credit grantors, collect information from and about applicants in order to evaluate their credit worthiness. When a business applies for credit, personal information about the individuals involved in the business may be collected and evaluated in making the decision to grant or deny credit to the business. Although decisions made by commercial-credit grantors primarily affect business entities, rather than individuals, they inevitably affect the livelihood of the individuals who own or operate the entities. The impact of commercial-credit decisions on individuals is particularly acute when the business seeking credit is a partnership, sole proprietorship, or closely held corporation.

While the Commission heard testimony on the record-keeping practices of commercial-reporting services, it had neither the time nor the resources to study in any detail the practices of commercial-credit *grantors*. Thus, the Commission's examination of commercial credit granting focused on the role of commercial-reporting services in the collection and evaluation of information bearing on credit worthiness. Like consumer-reporting agencies, commercial-reporting services collect information about applicants for credit from a variety of sources and report this information to their subscribers, the credit grantors. Unlike consumer-reporting agencies, however, commercial-reporting services are not subject to the Fair Credit Reporting Act; and thus individuals and firms about whom they collect information cannot avail themselves of the Act's existing protections against unfairness in record keeping.

Although the Commission has generally interpreted its mandate to include an examination of the impact of record keeping on individuals and to exclude inquiry into the effect of record keeping on legal entities, such as corporations, the boundary between record keeping that affects individuals and that which affects legal entities is not always entirely clear. This is particularly true in the case of commercial-credit granting. For example, a great deal of personal information about a sole proprietor who seeks credit will be collected in order to evaluate his business' general condition and, in particular, its ability to pay a debt. A decision about whether to grant or deny credit to a sole proprietor inevitably has great import for the individual who owns the firm. Thus, the Commission considered it important to examine the record-keeping practices of commercial-reporting services to determine what their impact on individuals is and to assess whether legal protections against unfairness to individuals in the commercial-credit relationship are necessary.

COLLECTION OF INFORMATION BY COMMERCIAL-REPORTING SERVICES

There are two main types of commercial-reporting services. The first type—which can be characterized as investigative—involves the collection

of information about an applicant firm from its past and current creditors, as well as from a variety of other sources during the course of an investigation carried out by representatives of the commercial-reporting organization. Dun and Bradstreet and Equifax Services are the primary providers of this first type of service.

The second type of commercial-reporting service involves only the collection of information about an applicant firm from other credit grantors with which the firm has, or once had, a credit relationship. This second type of service is provided by TRW Business Credit Services for the National Association of Credit Management, as well as by other smaller firms.

An examination of the information collection practices of Dun and Bradstreet provides a good illustration of investigative commercial-reporting services. Dun & Bradstreet (D&B) collects information about commercial enterprises from a variety of sources and uses it to evaluate the current condition and future prospects of an enterprise. The most important source of information for D&B is the owners or managers of the business under investigation. Interviews with them naturally suggest other sources of information about the business, including banks, landlords, public records, the firm's major suppliers, and other creditors. Companies under investigation usually cooperate with D&B by naming other sources of information and authorizing the collection of information from them. Dun & Bradstreet executives state that more than 95 percent of businesses under investigation cooperate in this manner.⁹⁹ On the other hand, if a company does not cooperate in an investigation, that fact may be reported to its prospective credit grantors. A reported failure to cooperate, or D&B's inability to produce a report because of a lack of cooperation, can arouse suspicions about a company's credit worthiness, and have a chilling effect on its ability to obtain credit. Thus, a company might prefer to cooperate in the preparation of a negative report rather than be reported as uncooperative or as a firm on which no report exists.

Dun & Bradstreet investigators are instructed to inquire into eight areas in collecting information for their reports:¹⁰⁰

1. Who owns the business?
2. What is the business-related background of the owners?
3. Where did the business get its capital, and how much?
4. What exactly do they do in their business?
5. What does their business owe and own?
6. How are they operating?
7. What do the figures mean?
8. How does the company pay?

An examination of these eight areas gives some insight into the nature and scope of a D&B commercial report.

⁹⁹ Testimony of Dun and Bradstreet, *Credit Reporting and Payment Automation Services*, Hearings before the Privacy Protection Study Commission, August 5, 1976, p. 591 (hereinafter cited as "Credit Reporting Hearings").

¹⁰⁰ Dun and Bradstreet, *Eight Keys to Basic Business Reporting*, Revised August 1976.

WHO OWNS THE BUSINESS?

The Dun & Bradstreet employee manual states:

unless people granting credit know with whom they are dealing, they have no way of knowing who is responsible for the payment of bills . . . the very first essential in investigating a business is to find out precisely who owns it. In addition, we check the ownership whenever an investigation is made, or whenever an inquiry is received which indicates a possible change in the ownership of the business.¹⁰¹

In answering the question "Who owns the business?," D&B investigators use the interview with a company's owners or executives as the first source of information. They then seek further documentation of ownership from sources such as incorporation papers and records of licenses. In the absence of satisfactory documentation of ownership from these sources, investigators are urged to have each owner or partner sign a financial statement of the company with his signature and title. Dun & Bradstreet will not issue a financial rating (known as a Capital and Credit Rating), an important factor in its report, until the firm has provided satisfactory assurances of ownership. This provides an incentive for company executives to disclose and document ownership fully.

WHAT IS THE BUSINESS-RELATED BACKGROUND OF THE OWNER?

A D&B investigation of the business-related background of the owner of a business must account for the individual's activities during each year from the time he was 21 until the present. Investigators are cautioned to be suspicious of any gaps in the description of a businessman's background. If the individual under investigation was once employed by others, the name of the employer, dates of employment, and description of the job record are obtained from the individual, if possible, and verified with previous employers.

The Dun & Bradstreet investigator may occasionally have to seek information about business-related background from sources other than the individual. The D&B manual states, "suppose the person . . . doesn't want to talk about his or her business experience? What then? Well, in the smaller town you can find people who know the business person, or just as important, may not know him or her. In the larger cities, go to the nearby bank, landlord, or someone who must have done business with the person. They'll know something about prior business background."¹⁰²

In addition to information regarding the individual's business background, D&B investigators seek information regarding his education, marital status, and, most significantly, any involvement in criminal activity or bankruptcies. According to D&B, investigators do not collect informa-

¹⁰¹ *Ibid.*, p. 7.

¹⁰² *Ibid.*, p. 11.

tion regarding “. . . an individual’s personal health, lifestyle, or . . . his personal financial dealings.”¹⁰³

While D&B constantly updates the information in its reports and discards obsolete information, information about criminal convictions of the owner or managers of a company under investigation are maintained and reported to credit grantors indefinitely by Dun & Bradstreet. Only if the conviction has been expunged or reversed, or the individual has been pardoned, will the mention of it be omitted from a report. Dun & Bradstreet reports pending criminal charges to subscribers as well until the charges are disposed of by a dismissal, acquittal, or a notation on the record that no further prosecution is intended. Arrests not followed by a complaint, affidavit, or indictment may be reported for six months and then dropped from the report.¹⁰⁴

WHERE DID THE BUSINESS GET ITS CAPITAL, AND HOW MUCH?

Inquiries regarding where the business got its capital and how much capital it has become intensely personal because it involves inquiries about how much money an entrepreneur has and from where the money was obtained. Investigators for Dun & Bradstreet are, however, urged to think of such questions as business rather than personal inquiries.

Now we are going to ask you whether you might hesitate to ask a person how much money is invested in the business and where he or she got it. Does it seem a “personal” question to you? It isn’t. We are asking business questions for business reasons. We are asking the same questions the prospective supplier would ask if *he* or *she* calls on the new business person.¹⁰⁵

WHAT EXACTLY DO THEY DO IN THEIR BUSINESS?

The D&B manual notes “this information is about the easiest to obtain.”¹⁰⁶ In many cases, a great deal of the information necessary to answer this question can be obtained by an investigator’s visit to the business premises. As the manual also notes, most people are proud of their business and are delighted to describe it to a willing listener. This portion of a D&B report does not usually contain personal information about the owners or executives of a company.

WHAT DOES THEIR BUSINESS OWE AND OWN?

It is difficult for an investigator to compile this information without obtaining a balance sheet and other financial statements from the company. Thus, the active cooperation of the firm under investigation is normally required to answer this question. Dun & Bradstreet instructions to its

¹⁰³ Testimony of Dun and Bradstreet, Credit Reporting Hearings, August 5, 1976, p. 587.

¹⁰⁴ Dun and Bradstreet, *op. cit.*, p. 12.

¹⁰⁵ Dun and Bradstreet, *op. cit.*, p. 15.

¹⁰⁶ *Ibid*, p. 17.

employees seem to indicate, however, that companies resist turning over copies of their financial statements to outsiders, such as D&B investigators. Thus, Dun & Bradstreet's instructions to employees focus on tactics that might be used to convince a firm that is under investigation to produce its financial statements for examination by D&B. The instructions include lists of reasons why the company's cooperation with D&B is wise, sample letters from retailers outlining some of the advantages that accrue to businesses as a result of disclosing information to D&B, and other assertions from firms that cooperation with credit investigators leads to increased sales and profits. Investigators are furnished with blank authorization forms that company executives can sign to authorize bankers and accountants to disclose company financial records to investigators. In the event that a business refuses to disclose information to D&B, investigators are urged to make their own on-site estimate of visible assets.

HOW ARE THEY OPERATING?

If the owners or managers of a business have disclosed its balance sheets and other financial data to the D&B investigator, he can use it to answer the question "How are they operating?" The investigator attempts to determine business trends by analyzing net worth and sales figures, and evaluates management efficiency by scrutinizing indicators, such as rate of merchandise turnover and return on invested capital. Investigators are apparently able to obtain sales and profit figures more easily than indebtedness and asset figures. For this reason, Dun & Bradstreet investigators are urged to ask for sales and profit figures and then use them as a basis for other computations.

WHAT DO THE FIGURES MEAN?

In answering inquiry 7, "What do the figures mean?", investigators must develop an assessment of the company's standing in the business world and its prospects. This is far from an exact science and is difficult even for professionally-trained accountants and financial analysts. Dun & Bradstreet bases its projections almost entirely on a company's past performance.

HOW DOES THE COMPANY PAY?

The willingness and ability of a company to meet its credit obligations is the single most important information that the buyers of commercial credit reports are seeking. Therefore, commercial reporting services such as Dun & Bradstreet will go to great lengths to contact each creditor, large and small, to gather information regarding a company's creditworthiness. In determining how well a company meets its obligations, Dun & Bradstreet investigators use information from the company under investigation to learn who its creditors are. The creditors themselves are the primary source of information in answering this inquiry.

A change in payment habits is often the first indication of a change in a company's financial situation. A company encountering financial difficul-

ties will often create what are essentially unauthorized, interest-free, short-term loans by systematically deferring payment on its accounts payable. Such activity may reflect the attitudes of the company's executives toward its expected future performance.

In sum, a Dun & Bradstreet commercial report is a detailed report about a business which includes information about its owners or managers as well as an analysis of the company's financial condition and performance.

Equifax, Inc., the information services conglomerate discussed earlier and in Chapter 8, offers investigative commercial reporting services similar in most respects to those offered by Dun & Bradstreet. The information collected by Equifax does not appear to be substantially different from that contained in Dun & Bradstreet's reports. One significant difference between Dun & Bradstreet and Equifax, however, is that

Equifax has designed its Business Credit Report to give [its subscribers] specific information on *medium and small size businesses*.¹⁰⁷ (emphasis added)

Dun & Bradstreet's work involves the collection of information about large firms as well as small- to medium-size companies. Thus, concerns about the impact of the record-keeping practices of commercial-reporting services on individuals are especially pertinent in the case of Equifax because they specialize in providing information about small firms—sometimes owned by a single individual—to credit grantors.

The second type of commercial reporting service examined by the Commission is TRW's National Credit Information Service (NACIS), operated on behalf of the National Association of Credit Management. NACIS differs from the services offered by Dun & Bradstreet and Equifax because it does not investigate firms but merely compiles information obtained from commercial credit grantors and reports this information to other credit grantors. In addition, NACIS collects and reports information about a firm's relationships with banks. In essence, NACIS operates an automated clearinghouse for commercial credit information. Unlike Dun & Bradstreet and Equifax, NACIS provides no evaluative information about firms to credit grantors, such as an assessment of a business' creditworthiness, nor does NACIS provide credit grantors with information about the business-related background of a company's owners or managers.

PROTECTIONS FOR INDIVIDUALS AND FIRMS

Commercial-reporting services are not subject to the Fair Credit Reporting Act. Thus, subjects of commercial reports are not entitled by law to learn the nature and substance of the information in the report or to file a statement disputing information in the report. Nor are commercial reporting services subject to restrictions on the reporting of obsolete information, or constraints on the use or disclosure of the reports it prepares, but commercial credit grantors are generally subject to the Equal Credit Opportunity Act, as amended. Regulations implementing the Act [12 C.F.R.

¹⁰⁷ Equifax, Inc., *Equifax Business Credit Report*, March 1977, p. 1.

202.3(e)(2)] require commercial credit grantors to tell an applicant firm the specific reasons it has been declined credit *if* the firm makes a written request for the reasons within 30 days after it has been notified of the adverse decision. Thus, commercial reporting services are generally not subject to any laws governing fairness in record keeping, and the record-keeping practices of commercial credit grantors are prescribed at the Federal level only by the Equal Credit Opportunity Act. In its testimony before the Commission, however, representatives of Dun & Bradstreet said that its policies regarding its commercial reports conform in some respects to the provisions of the Fair Credit Reporting Act. For example, Dun & Bradstreet representatives testified:

Any time a company wishes to see what we are saying about it, we will give the firm a copy of our report. On occasion, where a report contains information which would reveal the names of individual firms which have provided information on how a company pays its bills, we do not disclose that particular information without the consent of the supplier.¹⁰⁸

They also testified that if:

. . . we have received adverse information, and the businessman challenges our conclusions or data, we will gladly reinvestigate the disputed facts and report back to him If substantive changes are made, we send the revised report to all appropriate subscribers.¹⁰⁹

Moreover, Dun & Bradstreet representatives told the Commission that:

. . . we regularly interview the businesses we report on and afford them opportunities to confirm, augment and correct the information we have about them.¹¹⁰

Dun & Bradstreet's practice, as noted above, is to interview the owners or managers of a business that is under investigation. As a consequence,

Businesses are fully aware that we are writing the report and part of [the] reporter's job in the initial interview is to get across the reason why we are doing it.¹¹¹

Finally, Dun & Bradstreet's agreement with its subscribers specifies that the use of its commercial reports must be limited to business decisions relating to a firm or its stockholders, directors, officers, partners, proprietors or employees in their capacity as such and that:

It is expressly prohibited to use such information as a factor in establishing an individual's eligibility for (1) credit or insurance to

¹⁰⁸ Testimony of Dun and Bradstreet, Credit Reporting Hearings, August 5, 1976, p. 588.

¹⁰⁹ *Ibid.*, pp. 588, 590.

¹¹⁰ *Ibid.*, p. 594.

¹¹¹ *Ibid.*, p. 612.

be used primarily for personal, family, or household purposes, or (2) employment.¹¹²

In response to questioning by the Commission regarding whether subscribers ever violate this agreement and use information about an individual contained in commercial reports for the purpose of making decisions about him, rather than about the firm he owns or with which he is associated, a Dun & Bradstreet representative stated:

I cannot say categorically, but if there are any, it [sic] is very few.¹¹³

The Commission did not explore whether TRW and Equifax follow the kinds of procedures described above, and thus it cannot draw general conclusions about the adequacy of the record-keeping policies of these two commercial reporting services. The Commission notes, however, that Dun & Bradstreet is by far the largest of the commercial-reporting services, and thus its policies have great significance within the industry.

A court case involving abuses arising from the use of information about the owner of a commercial enterprise, as well as information about the enterprise itself, to make business-related decisions lends support for the recommendations the Commission makes below. The case in point involved Michael Goldgar.¹¹⁴ In 1961, Goldgar was an owner of a conglomerate of companies including clothing stores and supermarkets, as well as other enterprises. According to Goldgar, a bankruptcy petition was filed against one of his companies in 1962 while he was out of the country. Goldgar returned to the United States and discovered that the bankruptcy petition was invalid. Dun and Bradstreet had, however, reported to credit grantors that Goldgar's company was bankrupt, as well as other derogatory information about Goldgar himself. This report, according to Goldgar, damaged the reputation of his companies and resulted eventually in actual bankruptcy. Goldgar then took Dun and Bradstreet to court. In reviewing the verdict against Dun and Bradstreet, the Supreme Court of New York State noted that as a consequence of D&B reporting "a false rumor was bruited about that Goldgar was leaving the country and could not meet his bills." The court noted, in sum, that:

The record presents the picture of a feud carried on by defendant, the well known credit rating organization, against one Goldgar who had incurred defendant's ill-will. Concededly, defendant was "out to get" Goldgar and the corporate conglomerate he was attempting to erect. Unfortunately, for Goldgar and his two chief companies, Dejay and Star, dissemination of derogatory information about *him* and his enterprises brought them crashing down into bankruptcy. Had this come about as a result of straightforward and honest credit reporting, that would have been the end of the matter. Unfortunately for defendant, the record discloses that its coup was

¹¹² Dun and Bradstreet, "Terms of Agreement."

¹¹³ Testimony of Dun and Bradstreet, Credit Reporting Hearings, August 5, 1976, p. 610.

¹¹⁴ *National Apparel Adjustment Council et al. v. Dun & Bradstreet, Inc.*, No. 6836 (N.Y. Sup. Ct. App. Div., 1st Dept., April 1973).

accomplished by intrigue, deliberate assault on a business, planted rumor, and reckless disregard of consequences, going far beyond what the trial justice characterized as no more than a high degree of incompetence.

The Goldgar case illustrates that personal information about the owners or executives of a company can form part of the basis for an adverse commercial credit decision. The Goldgar case also demonstrates the need for procedures to assure that information collected and reported by commercial-reporting services is accurate. Finally, this case confirms the Commission's belief that an individual who is the subject of a commercial credit report should be able to see the report and request its correction. Without such a right, the firm's owners and managers may not be able to determine what information is being used to make adverse credit decisions affecting the business and to assure that inaccurate information in the files of a commercial-reporting service is corrected or amended.

CONCLUSIONS AND RECOMMENDATIONS

The Commission believes that the impact of the record-keeping practices of commercial credit grantors and commercial-reporting services have significance for individuals, as well as for the business entities with which they are associated. If credit is denied to a partnership, sole proprietorship, or closely held corporation, the consequences for the sole proprietor, partner, or owner may be grave. Moreover, the basis on which a commercial credit decision is made may involve personal information about individuals who own or manage a business, and personal information in a commercial report that is circulated widely may affect an individual's own reputation or career.

Intrusiveness

Commercial credit grantors, like consumer credit grantors, collect and use personal information about individuals in making credit decisions. Although the consumer credit grantor's interest is primarily in information about individuals, and the commercial credit grantor's inquiries focus on businesses that are seeking credit, information about individuals may enter into decisions about the extension of commercial credit. When a sole proprietorship or partnership applies for credit, a great deal of the information necessary to make a credit decision concerns, and is collected from, the individual or individuals who own the business.

Thus, the concerns about intrusive inquiries by credit grantors that were described in the section of this chapter dealing with consumer credit may arise as well in the commercial credit relationship. Therefore, the Commission believes that governmental mechanisms should exist to consider the extent to which an individual should be required to submit to inquiries about him as a consequence of an application made by a firm that he owns or with which he is associated. The Commission recommends:

Recommendation (14):

That governmental mechanisms should exist for individuals to question the propriety of information about individuals collected or used by commercial credit grantors, and to bring such objections to the appropriate bodies that establish public policy. Legislation specifically prohibiting the use, or collection and use, of a specific item of information may result; or an existing agency or regulatory body may be given authority or use its currently delegated authority to make such a determination with respect to the reasonableness of future use, or collection and use, of a specific item of information.

Fairness

Although the Commission believes that the procedures established voluntarily by Dun & Bradstreet to permit the owners or managers of a firm to see commercial reports, to dispute their accuracy, and to request their correction are entirely laudable, it finds that such procedures are not entirely sufficient to protect individuals from unfairness in the use of commercial reports. Voluntary procedures that permit a firm's owners or managers to inspect and request correction of a commercial report can be modified or done away with altogether whenever a commercial-reporting service finds them too costly or burdensome, and some commercial-reporting services may never voluntarily establish such procedures in the first place. Therefore, the Commission believes that Federal legislation to establish see-and-copy rights is necessary. Moreover, the Commission believes that a commercial credit grantor should be required by law to tell the managers or owners of a firm that is the subject of an adverse commercial credit decision based in whole or in part on information about individuals contained in a commercial report *which* commercial-reporting service provided the report to the credit grantor, and of the individual's rights to see, copy, and request correction of the report. Without such a notification by the commercial credit grantor, the firm's owners or managers may be unable to determine the source of the commercial report, and may not know of the rights that would be afforded the individual or firm if the Commission's recommendations were adopted.

Therefore, the Commission recommends:

Recommendation (15):

That the Congress amend the Fair Credit Reporting Act to provide that, upon request, a commercial credit grantor must disclose in writing to an individual who is associated with a firm that is the subject of an adverse credit decision, based in whole or in part on information provided by a commercial-reporting service, where such information pertains in whole or in part to that individual;

- (a) **the name and address of the commercial-reporting service that provided the information; and**

- (b) the individual's rights provided by law with respect to a commercial-reporting service.

Recommendation (16):

That the Congress amend the Fair Credit Reporting Act to provide that, upon request by an individual, a commercial-reporting service must:

- (a) inform the individual, after verifying his identity, whether it has any recorded information pertaining to him connected with a report about a firm;
- (b) permit the individual to see and copy any such recorded information, except the identity of sources, in plain language, either in person or by mail;
- (c) apprise the individual of the nature and substance of any such recorded information by telephone; and
- (d) permit the individual to use whichever of the methods of access provided in (b) and (c) he prefers. The commercial-reporting service may charge a reasonable copying fee for any copies provided to the individual.

Recommendation (17):

That the Congress amend the Fair Credit Reporting Act to provide that an individual has a right to correct or amend information pertaining to him that is maintained by a commercial-reporting service or is provided an opportunity to file a concise statement of disagreement with the commercial reporting service.

Three details of these recommendations deserve special mention. First, the word "individual" as used in this recommendation and in succeeding recommendations in this section means the owner, manager, or other employee of a firm that is the subject of a commercial report, and who is mentioned in the report concerning the firm.

Second, the Commission's recommendations would not require that subjects of commercial reports be told the sources of information in the report. Commercial-reporting service and credit-grantor representatives argue that permitting the subjects of commercial reports to learn the identity of sources of the information in them would either "dry up" sources of information, or reduce the candor of sources' disclosures. For example, a letter from Robert Morris Associates (an association of commercial credit grantors) to the Commission stated that revealing the identity of the sources of information in a commercial-credit report

. . . would pose a serious threat to the meaningful exchange of credit information, reducing it to the reporting of favorable, or no information, which would lead to poor loan decisions and the perpetration of fraudulent business activities. The effect on the

economy would be massive if the flow of credit information is curtailed.¹¹⁵

In other areas the Commission has studied in detail, it has rejected similar arguments. Because the Commission was not able to explore this area in enough detail to prove or disprove these arguments, however, it believes that commercial-reporting services should not at this time be required to reveal to individuals or firms the identity of the sources of information in a commercial report. The Commission does believe, however, that the subject merits further study, and so recommends below.

Third, the burden should be on an individual seeking access to information maintained by commercial-reporting services to reasonably describe the records sought by identifying the firm(s) with which he has been associated and about which they may have reports.

The Commission also believes that commercial-reporting services should be required by law to have reasonable procedures to assure the accuracy of the information in their reports.

Therefore, the Commission recommends:

Recommendation (18):

That the Congress amend the Fair Credit Reporting Act to provide that commercial-reporting services must have reasonable procedures to assure the accuracy of information pertaining to individuals included in reports produced by them.

As noted above, *Recommendations (14), (15), (16), and (17)* call for amendment of the Fair Credit Reporting Act. This approach parallels the one recommended by the Commission in the section of this chapter dealing with consumer credit. The Commission believes that an individual should be able to sue a commercial-reporting service for failure to comply with one of these recommendations. The court should have the power to order the commercial-reporting service to comply and to award attorney's fees and court costs to any plaintiff who substantially prevails. If it could be shown that the commercial-reporting service willfully or intentionally denied the individual any of the rights *Recommendations (14), (15), and (16)* provide him, or failed to institute and follow the procedures called for in *Recommendation (17)*, the court should have the power to award up to \$1,000 to the individual.

In addition, the Commission believes that the Federal Trade Commission should be able to enforce the recommended measures when systematic or repeated failures to comply by a commercial-reporting service occur. The remedy would be a FTC order directing the commercial-reporting service to comply, and the FTC could use the statutory powers it currently has to force compliance.

¹¹⁵ Letter from Jerome L. Roderick, Director, Credit Division, Robert Morris Associates to the Privacy Commission, April 15, 1977.

THE NEED FOR FURTHER STUDY

The Commission believes that further study is required to evaluate certain issues regarding the record-keeping practices of commercial credit grantors that either were not addressed at all, or were not addressed fully, by the Commission. Accordingly, the Commission recommends:

Recommendation (19):

That further examination of the need for additional requirements appropriate for commercial credit granting and credit reporting record-keeping practices be undertaken.

With respect to commercial credit granting, the following specific areas should be examined:

- (a) information collection practices;
- (b) the need to protect the identity of sources other than commercial-reporting services; and
- (c) the adequacy of credit grantors' explanation of adverse credit decisions, pursuant to the Equal Credit Opportunity Act.

With respect to commercial-reporting services, the following specific areas should be examined:

- (a) the time limits for reporting certain types of information, e.g., arrests and convictions;
- (b) the need to protect identity of sources; and
- (c) the use of commercial-reporting services for insurance underwriting and other decisions.

The Commission's recommendations regarding commercial reporting and commercial-credit granting are not as extensive as those it has made in the consumer credit area. The Commission did not explore the commercial-credit relationship in great detail, and businesses are more likely than most individuals to be able to exert pressure to obtain redress when they have been harmed by the record-keeping practices of commercial-credit grantors or reporting services.

Nonetheless, the Commission believes that owners or managers of businesses should be given basic legal rights *vis-a-vis* their records: the right to learn which commercial-reporting services produced a report that formed the basis of an adverse credit decision; and the right to see, copy, and request correction of commercial reports. Without such basic rights, an attempt by a firm's owners or managers to learn the source of an erroneous report and to obtain correction of it may be long and arduous. Thus, the Commission's recommendations provide simple mechanisms by which affected individuals and their firms can make their concerns known and seek redress when they are harmed by unfair record-keeping practices.