



1700 G Street NW, Washington, D.C. 20552

June 20, 2023

Office of Science and Technology Policy
The White House
Washington, DC

Comment on Request for Information on Automated Worker Surveillance and Management

Thank you for the opportunity to comment on the important issue of automated worker surveillance and management. The CFPB is the administrator and one of the primary enforcers of the Fair Credit Reporting Act (FCRA),¹ which provides critical protections involving fairness, impartiality, and privacy with respect to consumer reports.² The FCRA provides a range of protections, including accuracy standards, dispute rights, and restrictions on how data can be used, and covers companies that collect and sell consumer information, including information used for employment purposes,³ and companies that provide information to these firms. Congress provided a broad definition of employment purposes in the FCRA that includes not just information used for the purpose of evaluating a worker initially, but also information used for the purpose of promotion, reassignment, or retention.⁴ The FCRA can be enforced in appropriate circumstances by workers themselves⁵ as well as by the CFPB, Federal Trade Commission, Federal banking agencies, other Federal agencies, and States' chief law enforcement officers.⁶

¹ 15 U.S.C. § 1681s(b)(1)(H), (e).

² 15 U.S.C. § 1681(a)(4).

³ 15 U.S.C. § 1681a(d)(1)(B).

⁴ See 15 U.S.C. § 1681a(h).

⁵ See 15 U.S.C. §§ 1681n, 1681o.

⁶ See 15 U.S.C. § 1681s (providing enforcement authority in appropriate circumstances to the CFPB, Federal Trade Commission, appropriate Federal banking agencies, National Credit Union Administration, Secretary of Transportation, Secretary of Agriculture, Commodity Futures Trading Commission, Securities and Exchange Commission, and State chief law enforcement officers); see also CFPB, *Authority of States to Enforce the Consumer Financial Protection Act of 2010* (May 19, 2022),

With respect to tools that Federal agencies and States should consider to guard against consumer harm from worker surveillance and management, the CFPB emphasizes that, as companies offer employers new technologies to gather, share, and sell information about workers in a variety of different ways, the FCRA – including the expansive definition of “employment purposes” provided by Congress – offers important protections. Depending on the type of information and relationship between the company offering the technology and the employer, these protections may apply both to workers’ hiring and ongoing employment and to information collected by workplace surveillance that is subsequently bought, sold, or used in the broader consumer reporting marketplace.

As markets and technology evolve, agencies that administer and enforce consumer protection statutes must ensure that the law is applied effectively to those changes. It is therefore imperative that the Federal government and States take steps under applicable law to address concerns raised by significant changes in the labor market brought on by automated worker surveillance and management.

I. The FCRA’s Protections Regarding the Collection and Sale of Personal Data

Congress passed the FCRA in response to concerns about companies that assemble detailed dossiers about consumers and sell this information to those making employment, credit, and other decisions.⁷ Before the FCRA, when a consumer report contained inaccurate information, a consumer had little recourse against the consumer reporting agency that prepared the report.⁸

Since the enactment of the FCRA, companies using business models that sell consumer data have emerged and evolved with the growth of the internet and advanced technology. Many companies whose business models rely on newer technologies and novel methods purport not to be covered by the FCRA. These companies are sometimes labeled “data brokers,” “data aggregators,” or “platforms,” but they all share a fundamental characteristic with consumer reporting agencies – they collect and sell personal data. People typically have little choice about whether they will be tracked by these companies, yet the data these companies collect may

https://files.consumerfinance.gov/f/documents/cfpb_section-1042_interpretive-rule_2022-05.pdf (“[W]hen a covered person or service provider violates any of the Federal consumer financial laws, section 1042 [of the Consumer Financial Protection Act] gives States authority to address that violation by bringing a claim under section 1036(a)(1)(A) of the [Consumer Financial Protection Act].”).

⁷ See S. Rep. 91-517, at 2 (Nov. 5, 1969) (describing the growth of the credit reporting industry since the end of World War II and the practice of gathering and furnishing detailed information about consumers to creditors, employers, and insurers).

⁸ See S. Rep. 91-517, at 3 (“[E]ven when individuals gain access to the information in their credit file, they sometimes have difficulty in correcting inaccurate information. Some credit reporting agencies proceed on the assumption that an individual is guilty until proven innocent and refuse to delete information which is no longer verifiable unless the consumer can prove otherwise. In other cases, the consumer may have difficulty in getting his version of a legitimate dispute recorded in his credit file.”).

nevertheless play a decisive role in significant life decisions, like buying a home or finding a job. The CFPB is concerned about the business models and practices of the data broker market, including the types of data the brokers collect and sell and the sources they rely upon.

These concerns extend to information collected about consumers in the workplace. With respect to worker surveillance and management, workers are increasingly subject to the collection of information about them through automated workplace surveillance. Workers cannot prevent this information from being sold to data brokers and therefore eventually being relied upon by financial institutions, insurers, and other employers.⁹ The use of worker surveillance information across all aspects of people’s lives may have profound implications for many of their life decisions – from renting a home to buying a car – extending well beyond their current workplace. The CFPB has launched an inquiry seeking information about business practices employed in the data brokers market today to inform the CFPB’s efforts to administer the law, including planned rulemaking under the FCRA.¹⁰

II. The FCRA’s Protections Regarding Hiring and Ongoing Employment

The CFPB is also concerned about companies that offer increasingly invasive worker surveillance products designed to augment employers’ decisions about everything from hiring to promotions, reassignment, and retention. The FCRA applies to consumer reporting agencies,¹¹ and defines “consumer report” broadly to include “any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for . . . employment purposes.”¹² In turn, the FCRA provides that the term “employment purposes” when used in connection with a consumer report means “a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.”¹³ The FCRA therefore can apply both to information used for the purpose of evaluating a consumer for employment initially and also to

⁹ See ACLU, *Privacy in America: Electronic Monitoring*, <https://www.aclu.org/other/privacy.-america-electronic-monitoring>; Merve Hickok and Nestor Maslej, *A Policy Primer and Roadmap on AI Worker Surveillance and Productivity Scoring Tools*, AI Ethics (Mar. 2023), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10026198/>.

¹⁰ See CFPB, *Request for Information Regarding Data Brokers and Other Business Practices Involving the Collection and Sale of Consumer Information* (Mar. 15, 2023), https://files.consumerfinance.gov/f/documents/cfpb_request-for-information_data-brokers_2023-3.pdf.

¹¹ The FCRA defines “consumer reporting agency” to mean “any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.” 15 U.S.C. § 1681a(f).

¹² 15 U.S.C. § 1681a(d)(1).

¹³ 15 U.S.C. § 1681a(h).

information used for ongoing employment purposes, i.e., promotion, reassignment, or retention.

The FCRA provides important protections for workers. The drafters of the FCRA emphasized that people should have access, among other things, “to all information in any form which would be relayed to a prospective employer, insurer or creditor in making a judgment as to the worthiness of the individual’s application.”¹⁴ Accordingly, among other things, the FCRA provides workers the right to know what is in their consumer reports and dispute incomplete or inaccurate information.¹⁵ The FCRA also requires consumer reporting agencies to correct or delete inaccurate, incomplete, or unverifiable information, and generally prohibits reporting of outdated negative information.¹⁶ Additionally, the FCRA provides specific requirements about the use or furnishing of consumer reports for employment purposes. For example, subject to some exceptions, a company using a consumer report for employment purposes must notify the consumer “before taking any adverse action based in whole or in part on the report.”¹⁷ “Adverse action” in the employment context is defined broadly as “denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee.”¹⁸

As part of its statutory responsibility to collect, research, monitor, and publish information to ensure the proper functioning of markets for consumer financial products and services,¹⁹ the CFPB releases an annual list of many consumer reporting agencies, including those that focus on providing information to employers.²⁰ This information includes, among other things: credit history; employment, salary, and education and professional license verification; residential address history and Social Security Number verification; criminal arrest and conviction information; fingerprint information from state and Federal criminal record databases; status on

¹⁴ 116 Cong. Rec. 36,572 (Oct. 13, 1970).

¹⁵ See CFPB, *A Summary of Your Rights Under the Fair Credit Reporting Act*, https://files.consumerfinance.gov/f/documents/bcfn_consumer-rights-summary_2018-09.pdf.

¹⁶ See CFPB, *A Summary of Your Rights Under the Fair Credit Reporting Act*, https://files.consumerfinance.gov/f/documents/bcfn_consumer-rights-summary_2018-09.pdf.

¹⁷ 15 U.S.C. § 1681b(b)(3).

¹⁸ 15 U.S.C. § 1681a(k)(1)(B)(ii).

¹⁹ 12 U.S.C. § 5511(c)(3).

²⁰ See CFPB, *List of Consumer Reporting Companies*, at 11 (2023), https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-companies-list_2023.pdf. The list includes entities that have identified themselves as “consumer reporting agencies” (as that term is defined in the FCRA) or have indicated they provide consumers access to information they have collected about them. The list incorporates information from the companies’ own self-descriptions that has not been independently verified by the Bureau. The list does not cover every company in the industry. It is not intended to be all-inclusive. Nor does it reflect determinations as to whether any particular entity is subject to the FCRA. Further, presence on, or absence from, the list does not indicate whether the consumer reporting company is subject to the Bureau’s supervisory or enforcement authority. To provide suggested corrections or additions to the list, contact the Bureau at CFPB_CCPD2@cfpb.gov and include “Consumer Reporting Company List” in the subject line. See CFPB, *List of Consumer Reporting Companies*, at 3 n.1 (2023), https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-companies-list_2023.pdf.

global watchlists; motor vehicle and driver's record information; drug and alcohol testing and health screening information; and non-profit and volunteer activity verification.²¹ There are more than twenty such agencies on the list that the CFPB released in 2023.²²

Evidence of Ongoing Noncompliance by Firms Providing Information to Employers

Although the use of new technologies raises novel and significant concerns about intrusive information-gathering and surveillance of workers, concerns about companies that provide information used by employers are longstanding.

In response to this Request for Information, the CFPB examined consumer complaints about consumer reporting agencies that focus on providing information to employers. One of the CFPB's primary functions is collecting, investigating, and responding to consumer complaints,²³ and the CFPB has a statutory obligation to monitor consumer complaints.²⁴ Consumer complaints and companies' responses provide the CFPB with important information about the types of challenges consumers are experiencing with financial products and services and how companies are responding to consumers' concerns. The CFPB has received thousands of complaints about companies that provide information to prospective employers, and complaints about these companies have increased steadily over the years. In fact, the CFPB received significantly more complaints about companies that provide information to employers in 2022 than in any previous year.

These complaints reflect numerous recurring problems that consumers experience in their interactions with consumer reporting agencies that focus on providing information to employers. Two topics that are particularly prominent in these complaints are: (1) difficulties in having inaccurate information removed from or corrected on reports,²⁵ and (2) inaccurate infraction history (such as misclassified traffic or criminal offenses) appearing on reports. For example, one consumer complained:

I have worked for Uber and Lyft in the past years and have passed background as I have no criminal record whatsoever nor have I had a moving violation in roughly

²¹ See CFPB, *List of Consumer Reporting Companies*, at 11 (2023), https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-companies-list_2023.pdf

²² See CFPB, *List of Consumer Reporting Companies*, at 11-19 (2023), https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-companies-list_2023.pdf

²³ 12 U.S.C. § 5511(c)(2).

²⁴ 12 U.S.C. § 5493(b)(3)(A).

²⁵ Most consumers who submit complaints about employment screening companies first report that they attempted to dispute the information with the company but were ultimately unsuccessful. They report dispute processes taking greater than 30 – or in some instances 45 – days, outcomes that do not address the disputed information, or never receiving a response at all. As the complaints indicate, these problems often lead to lost employment.

15 years so there hasn't been a problem. A year ago, [company] flagged me as ineligible to work and provided this information to Lyft and Uber. I requested a copy of this report roughly 10 times and gave up. I'm now trying to work for these companies again and have not been able to due to the background report provided by [company]. I have again requested a copy of this report multiple times in the past couple weeks only to be ignored.²⁶

These companies have also been the subject of significant law enforcement actions by the CFPB and other Federal agencies,²⁷ as well as private litigation,²⁸ including for conduct that mirrors the concerns frequently raised by consumers in complaints to the CFPB. The CFPB's experience raises significant questions about the pervasiveness of legal noncompliance by companies that focus on providing information to employers.

Additional Concerns about Noncompliance with the Rise of Worker Surveillance

Based on the CFPB's experience with companies that focus on providing information to employers, the CFPB has significant concerns about whether entities offering evolving technologies to employers, including increasingly invasive worker surveillance tools, are complying with applicable law. The CFPB has concerns about both entities that purport to comply with laws such as the FCRA but fail to do so fully and companies that operate as if these laws do not apply to them at all.

As companies offer employers new technologies to gather, share, and sell information in a variety of different ways, the FCRA – including the expansive definition of “employment purposes” provided by Congress – may offer protections, depending on the type of information and relationship between the company offering the technology and the employer. A wide range of changes in the labor market may be facilitated by employers' use of this information. These changes include, for example, geographic and temporal flexibility,²⁹ computerization and

²⁶ Consumer Complaint 5803730, <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/5803730>. Minor misspellings, and grammatical and punctuation errors have been corrected in narratives to increase readability.

²⁷ See, e.g., CFPB, *Consumer Financial Protection Bureau Settles with Employment Background Screening Company* (Nov. 22, 2019), <https://www.consumerfinance.gov/about-us/newsroom/bureau-settles-employment-background-screening-company/>.

²⁸ See, e.g., Todd Feathers, *Lawsuits allege gig-economy workers fall victim to Checkr's artificial intelligence*, New Hampshire Union Leader (Mar. 3, 2019), https://www.unionleader.com/news/business/lawsuits-allege-gig-economy-workers-fall-victim-to-checkr-s/article_37df2830-df83-5b19-b090-31556804d8d4.html.

²⁹ Brian Kropp and Emily Rose McRae, *11 Trends that Will Shape Work in 2022 and Beyond*, Harvard Business Review (Jan. 13, 2022), <https://hbr.org/2022/01/11-trends-that-will-shape-work-in-2022-and-beyond?registration=success>.

digitalization,³⁰ alternative and independent work arrangements,³¹ “data-driven” promotions,³² and ever-increasing automation.³³

As specifically relevant here, the gathering and use of information resulting from worker surveillance technologies has proliferated in recent years, including as a consequence of more employers adjusting work schedules and revising workplace norms in the wake of the Covid-19 pandemic.³⁴ Academic research and workplace studies make clear that much of the information gathered by worker surveillance is used for the purpose of promotion, reassignment, or retention. For example, employers use surveillance information to schedule workers for shifts or generate warnings or terminations based on productivity.³⁵ Platforms that engage workers on an episodic basis – such as ride-hailing platforms – calibrate payments, bonuses, and additional work opportunities based on the analysis of data, including information obtained by monitoring individuals’ past performance.³⁶ Again, as companies offer employers new technologies, including workplace surveillance tools, to gather, share, and sell this information in different ways, ensuring the protections afforded by the FCRA where applicable is critical.

It is also well-documented that automated technologies may produce incomplete or inaccurate information or exacerbate biases.³⁷ The use of this technology by companies that offer worker surveillance tools may therefore exacerbate the consumer harm that we already see from companies that provide information to employers. Indeed, companies that provide information to employers have already been subject to lawsuits by workers for FCRA violations based on their

³⁰ Mark Muro, Sifan Liu, Jacob Whiton, and Siddharth Kulkarni, *Digitalization and the American Workforce*, Brookings Institution (Nov. 2017), <https://www.brookings.edu/research/digitalization-and-the-american-workforce/>.

³¹ Lynn A. Karoly and Krishna B. Kumar, *Evolving 21st-Century Workplace and the American Workforce: Trends and Policy Responses*, RAND Corporation (Aug. 23, 2016), <https://www.rand.org/blog/2016/08/evolving-21st-century-workplace-and-the-american-workforce.html>.

³² Veena Dubal, *On Algorithmic Wage Discrimination*, UC San Francisco Research Paper (Jan. 19, 2023), available at <https://ssrn.com/abstract=4331080> or <http://dx.doi.org/10.2139/ssrn.4331080>.

³³ Office of the Director of National Intelligence, *Global Trends 2040: Technology and the Future of Work* (Mar. 2021), <https://www.dni.gov/index.php/gt2040-home/gt2040-deeper-looks/future-of-work>.

³⁴ Danielle Abrill and Drew Harwell, *Keystroke Tracking, Screenshots, and Facial Recognition: The Boss May Be Watching Long After the Pandemic Ends*, Washington Post (Sept. 24, 2021), <https://www.washingtonpost.com/technology/2021/09/24/remote-work-from-home-surveillance/>.

³⁵ Jodi Kantor and Arya Sundaram, *The Rise of the Worker Productivity Score*, New York Times (Aug. 14, 2022) <https://www.nytimes.com/interactive/2022/08/14/business/worker-productivity-tracking.html>.

³⁶ Veena Dubal, *On Algorithmic Wage Discrimination*, UC San Francisco Research Paper (Jan. 19, 2023), available at <https://ssrn.com/abstract=4331080> or <http://dx.doi.org/10.2139/ssrn.4331080>.

³⁷ See, e.g., Daniel E. O’Leary, *An Analysis of Three ChatBots: BlenderBot, ChatGPT and LaMDA*. UNIV. OF S. CAL. INST. FOR OUTLIER RSCH. IN BUS. (forthcoming Feb. 1, 2023), available at <https://ssrn.com/abstract=4424953>; Geoffrey A. Fowler, *Say what, Bard? What Google’s new AI gets right, wrong, and weird*, Washington Post (Mar. 21, 2023), <https://www.washingtonpost.com/technology/2023/03/21/google-bard/>.

use of automated technology.³⁸

As described above, Congress intended the FCRA’s protections to govern the use of consumer reports during the entire employment life cycle, including not only hiring but also promotion, reassignment, and retention. And the growth of new companies mediating and augmenting employers’ monitoring of workers affects every stage of the employer-worker relationship across a range of industries. From recruitment, initial evaluation, and onboarding to productivity monitoring, periodic assessment, and separation, new developments in surveillance and analytics promise to change the nature of employer-worker relations in coming years. Each of these stages in the employment lifecycle is regulated by existing Federal and state laws.

As the CFPB has noted in other contexts, a company’s choice to use new technologies does not absolve it from its legal obligations.³⁹ Accordingly, worker surveillance companies and employers must comply with applicable law even if they choose to use “artificial intelligence” or other forms of automated technologies. As automated technologies become increasingly utilized, the CFPB will continue to enforce compliance with the Federal consumer financial laws regardless of the technology used.

The CFPB is monitoring the growth of companies that offer products, including those that use automated technologies, designed to augment employer decisions involving information used for “employment purposes.” As the information gathered by these companies and others grows more invasive – and its use more intertwined with workers’ everyday experiences – the risk increases of even more significant consumer harm from inaccurate information, as well as from difficulties in have inaccuracies removed or corrected. These problems could have an increasingly detrimental effect on workers’ experiences and ability to earn a living.

Conclusion

Thank you for the opportunity to comment on the important issue of automated worker surveillance and management. The CFPB looks forward to further work and discussion on this topic.

³⁸ See Todd Feathers, *Lawsuits allege gig-economy workers fall victim to Checkr's artificial intelligence*, New Hampshire Union Leader (Mar. 3, 2019), https://www.unionleader.com/news/business/lawsuits-allege-gig-economy-workers-fall-victim-to-checkr-s/article_37df2830-df83-5b19-b090-31556804d8d4.html.

³⁹ See CFPB, *CFPB Acts to Protect the Public from Black-Box Credit Models Using Complex Algorithms* (May 26, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-acts-to-protect-the-public-from-black-box-credit-models-using-complex-algorithms>; CFPB, DOJ Civil Rights Division, EEOC & FTC, *Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems* (Apr. 25, 2023), https://files.consumerfinance.gov/f/documents/cfpb_joint-statement-enforcement-against-discrimination-bias-automated-systems_2023-04.pdf.

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