Final Report of the Small Business Review Panel on the CFPB's Proposals and Alternatives Under Consideration for the Consumer Reporting Rulemaking

December 15, 2023

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1. Introduction

Under the Small Business Regulatory Enforcement Fairness Act (SBREFA), which amended the Regulatory Flexibility Act, the Consumer Financial Protection Bureau (CFPB) must convene and chair a Small Business Review Panel (Panel) if it is considering a proposed rule that could have a significant economic impact on a substantial number of small entities.[1] The Panel considers the impact of the proposals under consideration by the CFPB and obtains feedback from representatives of the small entities that would likely be subject to the rule. The Panel is comprised of a representative from the CFPB, the Chief Counsel for Advocacy of the Small Business Administration (Office of Advocacy),[2] and a representative from the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget.

This Panel Report addresses the CFPB's Consumer Reporting Rulemaking. In that rulemaking, the CFPB is considering addressing a number of consumer reporting topics under the Fair Credit Reporting Act (FCRA). The proposals under consideration would regulate many activities of data brokers as covered under the FCRA and address the problem of unreliable or unnecessary medical collection tradelines appearing on consumer reports used by creditors making credit determinations. The CFPB is also considering proposals to address other issues that have arisen in the years since the FCRA's enactment, or that are areas of particular risk for consumer harm.

On September 15, 2023, the CFPB provided small entity representatives its Outline of Proposals and Alternatives under Consideration (Outline) for this rulemaking.[3] The Outline, which summarizes and asks questions about the CFPB's proposals under consideration, formed the basis for discussion with small entity representatives at two Panel Outreach Meetings that took place on October 18 and 19, 2023.

This Panel Report reflects feedback provided by the small entity representatives to the Panel and identifies potential ways for the CFPB to shape the proposals under consideration to minimize the burden of an expected consumer reporting rule on small entities while achieving the purposes of the rulemaking. Options identified by the Panel for reducing the regulatory impact of the rulemaking on small entities may require further consideration, information collection, and analysis by the CFPB to ensure that the options are practicable, enforceable, and consistent with the FCRA and the Dodd-Frank Act and their statutory purposes.

Pursuant to the Regulatory Flexibility Act, the CFPB will consider the Panel's findings when preparing the initial regulatory flexibility analysis in a proposed rule. This Panel Report will be included in the public record for the CFPB's expected consumer reporting rulemaking.

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[1] 5 U.S.C. 609(b).

[2] The Office of Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by the Office of Advocacy do not necessarily reflect the views of the SBA.

[3] Consumer Fin. Prot. Bureau, Small Business Advisory Review Panel For Consumer Reporting Rulemaking - Outline of Proposals and Alternatives Under Consideration (Sept. 15, 2023), https://www.consumerfinance.gov/rules-policy/small-business-review-panels/small-business-review-panel-for-consumer-reporting-rulemaking/.

In accordance with the Regulatory Flexibility Act, the Panel conducts its review at a preliminary stage of the CFPB's rulemaking process. This Panel Report is based on information available at the time the Panel Report was prepared. As the CFPB proceeds in the rulemaking process, the CFPB will conduct additional analyses and obtain additional information, including in response to the small entity representatives' feedback and the Panel's findings. A proposed consumer reporting rule will reflect such additional analyses and information.

This Panel Report includes the following:

- A description of the proposals that the CFPB is considering and that the Panel reviewed;
- Background information on small entities that would likely be subject to the proposals under consideration and the small entity representatives selected to advise the Panel;
- A summary of feedback from the small entity representatives; and
- The findings and recommendations of the Panel.

The Panel's findings and recommendations address the following:

- A description of and, where feasible, an estimate of the number and type of small entities that would likely be impacted by the proposals under consideration;
- A description of the projected compliance requirements of the proposals under consideration;
- A description of any significant alternatives to the proposals under consideration that may accomplish the stated objectives of the CFPB's rulemaking and minimize the economic impact on small entities of the proposals under consideration; and
- An identification, to the extent practicable, of relevant Federal laws or regulations that may duplicate, overlap, or conflict with the proposals under consideration.

2. Background

2.1 Market background

Consumer reporting agencies collect and assemble or evaluate information about, among other things, the credit, criminal, employment, and rental histories of hundreds of millions of Americans. They package this information into consumer reports, which generally are restricted for use by creditors, insurers, landlords, employers, and others making eligibility and other decisions about consumers. This collection, assembly, evaluation, dissemination, and use of vast quantities of often highly sensitive personal and financial data about consumers poses significant risks to consumer privacy.

In 1970, Congress enacted the Fair Credit Reporting Act (FCRA), one of the first data privacy laws in the world, to regulate the consumer reporting market.[4] Before passing the FCRA, Congress investigated the growing data surveillance industry and found that, while consumer reporting agencies had assumed a vital role in assembling and evaluating consumer credit and other information on consumers to meet the needs of commerce, there was a need to ensure that they acted fairly, impartially, and with respect for consumers' right to privacy.

The consumer credit reporting industry has consistently been a major source of consumer complaints. Complaints about credit or consumer reporting represented roughly 76 percent of consumer complaints submitted to the CFPB during 2022, far more than any other category of consumer product or service.[5] Credit or consumer reporting has been the most-complained-about category of consumer financial product or service to the CFPB every year since 2017.[6]

In addition, since the FCRA's enactment in 1970, advances in technology have led, particularly in recent years, to a rapid evolution of the consumer reporting marketplace. For example, companies using business models that rely on newer technologies and novel methods to collect and sell consumer data have emerged and evolved with the growth of the internet and advanced technology. These companies, sometimes labeled "data brokers," "data aggregators," or "platforms," broadly engage in activities that the FCRA was designed to regulate.

As noted above, the CFPB is considering proposals to address a number of consumer harms that can arise in the consumer reporting market, including proposals to regulate many data broker activities as covered under the FCRA and to address the problem of unreliable or unnecessary medical collection tradelines appearing on consumer reports that creditors use in making credit determinations.

2.2 Statutory authority

Congress enacted the FCRA to allow certain congressionally sanctioned uses of consumer report data to continue while strictly prohibiting other uses of consumer report data. In addition, Congress created accuracy requirements and gave consumers a right to see their data and to

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[4] *See* 15 U.S.C. 1681 through 1681x, https://www.govinfo.gov/content/pkg/USCODE-2021-title15/pdf/USCODE-2021-title15-chap41-subchapIII.pdf.

[5] Consumer Fin. Prot. Bureau, *Consumer Response Annual Report*, at 11 (Mar. 2023), https://files.consumerfinance.gov/f/documents/cfpb_2022-consumer-response-annual-report_2023-03.pdf (noting that the CFPB received nearly 980,000 credit or consumer reporting complaints in 2022).

[6] *Id*.; Consumer Fin. Prot. Bureau, *Consumer Response Annual Report*, at 3 (Mar. 2022), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_2021-consumer-response-annual-report_2022-03.pdf; Consumer Fin. Prot. Bureau, *Consumer Response Annual Report*, at 9 (Mar. 2021), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_2020-consumer-response-annual-report_03-2021.pdf; Consumer Fin. Prot. Bureau, *Consumer Response Annual Report*, at 9 (Mar. 2020), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2019.pdf; Consumer Fin. Prot. Bureau, *Consumer Response Annual Report*, at 9 (Mar. 2019), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2018.pdf; Consumer Fin. Prot. Bureau, *Consumer Response Annual Report*, at 9 (Mar. 2018), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2017.pdf.

dispute inaccurate or incomplete information in their files.[7] The FCRA and its implementing regulation, Regulation V, 12 CFR part 1022, have been amended from time to time since the statute's enactment and impose obligations on consumer reporting agencies, entities that provide information to consumer reporting agencies (*i.e.*, furnishers), and users of consumer reports.[8]

The CFPB has rulemaking, enforcement, and supervisory authority to administer the FCRA.[9] Regarding rulemaking, section 621(e) of the FCRA authorizes the CFPB to issue regulations as may be necessary or appropriate to administer and carry out the purposes and objectives of the FCRA, and to prevent evasions thereof or to facilitate compliance therewith.[10]

2.3 Closely related Federal laws and regulations

The CFPB has identified the following Federal statutes and regulations that address consumer credit eligibility, debt collection, and privacy issues as having provisions that may duplicate, overlap, or conflict with certain aspects of the proposals under consideration.

The Truth in Lending Act (TILA)[11] and the CFPB's implementing regulation, Regulation Z, 12 CFR part 1026, impose disclosure and other requirements on creditors. For example, TILA and Regulation Z generally prohibit creditors from making mortgage loans unless they make a reasonable and good faith determination that the consumer will have the ability to repay the loan. TILA and Regulation Z also contain ability-to-repay requirements for credit cards.

The Equal Credit Opportunity Act (ECOA)[12] and the CFPB's implementing regulation, Regulation B, 12 CFR part 1002, prohibit creditors from discriminating in any aspect of a credit transaction, including a business-purpose transaction, on the basis of race, color, religion, national origin, sex, marital status, age (if the applicant is old enough to enter into a contract), receipt of income from any public assistance program, or the exercise in good faith of a right under the Consumer Credit Protection Act.

The Fair Debt Collection Practices Act (FDCPA)[13] and the CFPB's implementing regulation, Regulation F, 12 CFR part 1006, govern certain activities of debt collectors, as that term is defined in the FDCPA. Among other things, the FDCPA and Regulation F prohibit debt collectors from engaging in unfair, deceptive, or abusive conduct when collecting or attempting

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[7] 15 U.S.C. 1681e(b) (accuracy procedures); 15 U.S.C. 1681g (disclosures to consumers); 15 U.S.C. 1681i (procedures in case of disputed accuracy).

[8] Regulation V, www.ecfr.gov/current/title-12/chapter-X/part-1022.

[9] Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Public Law 111–203, section 1088, 124 Stat. 1376, 2086 (2010); *see also* Dodd-Frank Act sections 1024, 1025, and 1061, 124 Stat. 1987 (codified at 12 U.S.C. 5514, 5515, and 5581). Authority over 15 U.S.C. 1681m(e) and 1681w is limited to the Federal banking agencies and the National Credit Union Administration, the Federal Trade Commission, the Commodity Futures Trading Commission, and the U.S. Securities and Exchange Commission.

[10] Dodd-Frank Act section 1088(a)(10)(E), 124 Stat. 2090 (codified at 15 U.S.C. 1681s(e)).

[11] 15 U.S.C. 1601 *et seq*.

[12] 15 U.S.C. 1691 *et seq*.

[13] 15 U.S.C. 1692 *et seq*.

to collect debts and require debt collectors to make certain disclosures to consumers in debt collection.

The Gramm-Leach-Bliley Act (GLBA)[14] and the CFPB's implementing regulation, Regulation P, 12 CFR part 1016, require financial institutions subject to the CFPB's jurisdiction to provide their customers with notices concerning their privacy policies and practices, among other things. They also place certain limitations on the disclosure of nonpublic personal information to nonaffiliated third parties, and on the redisclosure and reuse of such information. Other parts of the GLBA, as implemented by regulations and guidelines of certain other Federal agencies (*e.g.*, the Federal Trade Commission's Safeguards Rule and the prudential regulators' Safeguards Guidelines), set forth standards for administrative, technical, and physical safeguards with respect to financial institutions' customer information.

3. Overview of proposals and alternatives under consideration

This section summarizes the CFPB's proposals and alternatives under consideration as set forth in the Outline. The Outline is attached to this Panel Report as Appendix C. A copy of the FCRA is included with the Outline in Appendix C.

3.1 Definitions of consumer report and consumer reporting agency

FCRA section 603(d)[15] defines the term "consumer report" to mean, in general, 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 (A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other permissible purpose authorized under FCRA section 604.

FCRA section 603(f)[16] defines the term "consumer reporting agency" as 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.

The CFPB is considering several proposals related to the definitions of "consumer reporting agency" and "consumer report."

[14] 15 U.S.C. 6801 *et seq.*

[15] 15 U.S.C. 1681a(d).

[16] 15 U.S.C. 1681a(f).

3.1.1 Data brokers

The CFPB is considering proposals to address the application of the FCRA to data brokers, including to codify current law.[17] These include proposals to provide that:

- Consumer information provided to a user who uses it for a permissible purpose is a "consumer report" regardless of whether the data broker knew or should have known the user would use it for that purpose, or intended the user to use it for that purpose;
- Data brokers that sell certain types of consumer data (*e.g.*, data typically used for credit and employment eligibility determinations) are selling consumer reports;
- A data broker that collects consumer information for permissible purposes may not sell it for non-permissible purposes; and
- A data broker may not obtain consumer report information from a consumer reporting agency without a permissible purpose or sell such information to a user unless the user has a permissible purpose.

3.1.2 Defining "assembling or evaluating"

The CFPB is considering a proposal to provide a more bright-line definition for the terms "assembling" and "evaluating" in the definition of "consumer reporting agency."[18] Specifically, the CFPB is considering addressing the "assembling or evaluating" component of the definition of consumer reporting agency with respect to entities that facilitate electronic data access between parties when they act as intermediaries or vendors (*e.g.*, by transmitting public records information from public records databases to users) or otherwise transmit consumer data electronically between data sources and users. The CFPB's proposal under consideration would address when such companies' activities constitute "assembling or evaluating."

3.1.3 "Credit header" data

"Credit header" data are certain consumer-identifying data maintained by consumer reporting agencies. Credit header data has historically been considered to include, for example, an individual's name (and any other names previously used), current and former addresses, Social Security number, and phone numbers. The CFPB is considering a proposal to clarify the extent to which credit header data constitutes a consumer report.

3.1.4 Targeted marketing and aggregated data

The FCRA prohibits consumer reporting agencies from furnishing consumer reports to third parties except for certain statutorily enumerated permissible purposes. Marketing and

[17] For purposes of this Report, "data broker" is an umbrella term used to describe firms that collect, aggregate, sell, resell, license, or otherwise share personal information about consumers with other parties. This includes first-party data brokers that interact with consumers directly and third-party data brokers with whom the consumer does not have a direct relationship.

[18] 15 U.S.C. 1681a(f).

advertising generally are not an FCRA permissible purpose.[19] The FCRA thus generally prohibits consumer reporting agencies from furnishing consumer reports to third parties for marketing or advertising purposes, such as to target a consumer with an invitation to apply for credit. The CFPB is considering proposals to clarify that certain activities consumer reporting agencies undertake to help third-party users market to consumers violate this prohibition. For example, the CFPB is considering proposals that would provide that, in certain scenarios where a consumer reporting agency uses consumer report information on behalf of a third party, a consumer reporting agency has furnished a consumer report on a consumer to a user without a permissible purpose.

Consumer reporting agencies might also share, for marketing or other purposes, consumer report information that has been "aggregated" and wrongly assume that it is not a consumer report simply because the information is aggregated. The CFPB is also considering proposals to clarify whether and when aggregated or anonymized consumer report information constitutes or does not constitute a consumer report.

3.2 Permissible purposes

One of the FCRA's principal goals is to protect consumer privacy.[20] The statute seeks to accomplish this by, among other things, prohibiting consumer reporting agencies from furnishing consumer reports to third parties except for certain statutorily enumerated "permissible purposes." The proposals under consideration would interpret certain of those permissible purposes and clarify circumstances in which data breaches may result in a consumer reporting agency violating the FCRA's permissible purpose provision.

3.2.1 Written instructions of the consumer

FCRA section 604(a)(2)[21] states that a consumer reporting agency has a permissible purpose to furnish a consumer report if the report is provided "[i]n accordance with the written instructions of the consumer to whom it relates." The CFPB is considering proposals to address what is needed for a consumer report to be furnished by a consumer reporting agency in accordance with the consumer's written instructions under this provision. The proposals under consideration include proposals concerning the steps companies must take to obtain a consumer's written instructions, who can collect written instructions, limits on the scope of authorization to ensure the consumer has authorized all uses of the consumer's data (including limits on the number of purposes or entities that can be covered by a single instruction), and methods for revoking any ongoing authorization.

[19] An exception exists for the purpose of making firm offers of credit or insurance. 15 U.S.C. 1681b(c)(1)(B).

[20] *See* 15 U.S.C. 1681(a)(4).

[21] 15 U.S.C. 1681b(a)(2).

3.2.2 Legitimate business need

FCRA section 604(a)(3)(F) provides that a consumer reporting agency may furnish a consumer report to a person if it has reason to believe that the person "otherwise has a legitimate business need for the information—(i) in connection with a business transaction that is initiated by the consumer; or (ii) to review an account to determine whether the consumer continues to meet the terms of the account."[22] The CFPB is considering proposals to specify that: (1) FCRA section 604(a)(3)(F)(i) requires a transaction to have been initiated by the consumer for personal, family, or household purposes and permits use of consumer reports only for the purpose of determining the consumer's eligibility for the business transaction, and (2) FCRA section 604(a)(3)(F)(ii) requires that there is an account review for which the use of a consumer report is actually needed to make a decision about whether the consumer continues to meet the terms of the account.

3.2.3 Data security and data breaches

The CFPB is considering a proposal to address a consumer reporting agency's obligation under the FCRA to protect consumer reports from unauthorized third-party access. For example, the CFPB is considering providing that failure to protect against unauthorized access to consumer reports by third parties may violate FCRA sections 604[23] or 607(a).[24]

3.3 Disputes

The FCRA and Regulation V permit consumers to dispute the completeness and accuracy of information in in their consumer reports. Consumers may file disputes with consumer reporting agencies or furnishers, or both. The FCRA requires entities that receive disputes to investigate and respond to them.

The CFPB is considering proposals related to two types of disputes: (1) those that are classified by a consumer reporting agency or furnisher as involving legal matters and (2) those involving systemic issues.

3.3.1 Disputes involving legal matters

The FCRA does not distinguish between legal and factual disputes, and accordingly it does not exempt "legal disputes" from its requirement that consumer reporting agencies and furnishers must reasonably investigate disputes. For example, the CFPB has previously stated in amicus curiae filings that the FCRA dispute provisions cover state foreclosure law interpretation

[22] 15 U.S.C. 1681b(a)(3)(F).

[23] 15 U.S.C. 1681b.

[24] 15 U.S.C. 1681e(a).

disputes regarding whether a reported debt is collectible[25] and contractual liability disputes regarding obligations to pay.[26] The CFPB is considering a proposal to codify this interpretation.

3.3.2 Disputes involving systemic issues

The CFPB is considering proposals concerning disputes that relate to systemic issues affecting the completeness or accuracy of data furnished to consumer reporting agencies and included in consumer reports. Specifically, the CFPB is considering proposals that would address how furnishers and consumer reporting agencies must investigate and address such systemic issues. The CFPB is also considering whether to provide consumers with a specific process through which they could notify a consumer reporting agency or furnisher of possible systemic consumer reporting issues that affect other similarly situated consumers. Additionally, the CFPB is considering whether a notice to consumers affected by systemic issues may be appropriate. These proposals could facilitate consumers' ability to receive collective relief from consumer reporting agencies and furnishers that do not appropriately address systemic issues.

3.4 Medical debt collection information

In the FCRA, Congress restricted creditors' ability to obtain or use medical information in credit decisions.[27] However, it granted the Federal banking agencies and the National Credit Union Administration authority to create regulatory exceptions to that restriction.

Those agencies promulgated exceptions to allow consideration of certain medical information. One exception is for financial information ("medical financial information"), which can be used by creditors to consider medical debts in underwriting decisions. When the CFPB was created, Congress transferred this authority to the CFPB. In 2011, the CFPB republished, in general with only technical and conforming changes, the consumer financial protection regulations it inherited from other agencies under the Dodd-Frank Act, including Regulation V for consumer reporting. As part of that process, the CFPB republished without substantive change the medical financial information exception in Regulation V § 1022.30(d).[28]

The CFPB is considering proposals to: (1) revise Regulation V, § 1022.30(d), to modify the exception such that creditors are prohibited from obtaining or using medical debt collection information to make determinations about consumers' credit eligibility (or continued credit eligibility) and (2) prohibit consumer reporting agencies from including medical debt collection

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[25] Br. Amicus Curiae of CFPB, *Gross v. Citi Mortg., Inc.*, Case No. 20-17160 (9th Cir. Apr. 19, 2021), cfpb_amicus-brief_gross-v-citimortgage_2021-14.pdf.

[26] Br. Amicus Curiae of CFPB, *Holden v. Holiday Inn Club Vacations Inc and Mayer v. Holiday Inn*, Case No. 22-11734 (11th Cir. Dec. 16, 2022), cfpb_holden-v-holiday-inn-club-vacations-inc-and-mayer-v-holiday-inn_amicus-br_TPSrY16.pdf; Br. Amicus Curiae of CFPB, *Milgram v. JP Morgan Chase*, Case No. 22-10250 (11th Cir. Apr. 7, 2022), cfpb_milgram-v-jpmorgan-chase_amicus-brief_2022-04.pdf; Br. Amicus Curiae of CFPB, *Sessa v. Trans Union LLC*, Case No. 22-87 (2d Cir. May 5, 2022), cfpb_sessa-v-trans-union-llc_amicus-brief_2022-05.pdf.

[27] 15 U.S.C. 1681b(g)(2).

[28] *See* 76 FR 79308 (Dec. 21, 2011).

tradelines on consumer reports furnished to creditors for purposes of making credit eligibility determinations.

3.5 Implementation period

The CFPB seeks to ensure that consumers promptly benefit from a final rule and that covered entities have sufficient time to implement the rule. As such, the CFPB is considering the proper implementation period for complying with a rule finalizing the proposals under consideration.

3.6 Potential impacts on small entities

The CFPB expects that the proposals under consideration would likely impose one-time and ongoing costs on small entities.

The proposals under consideration related to data brokers and defining "assembling or evaluating" would require certain small entities that currently do not comply with the FCRA to begin doing so. Such small entities would be required to comply with the FCRA and Regulation V as amended by any CFPB final rule (*i.e.*, including all the other proposals under consideration, if adopted and to the extent applicable to the small entity's business). The CFPB expects that many of these entities do not have FCRA-compliant systems, processes, and policies and procedures in place and will incur a one-time cost to develop them, and ongoing costs to maintain them. The requirements of such systems, processes, and policies and procedures will depend on whether the small entity is a consumer reporting agency or a furnisher. These entities would also be subject to liability under the FCRA, which could cause them to incur costs related to FCRA litigation.

The proposals under consideration related to the other provisions would also impose one-time and ongoing compliance costs, as applicable, on entities that currently comply with the FCRA and Regulation V. The CFPB expects consumer reporting agencies to have systems, processes, and policies and procedures in place to ensure that consumer reports are only furnished for permissible purposes, and expects consumer reporting agencies and furnishers to have systems, processes, and policies and procedures to handle disputes as required by the FCRA and Regulation V. There may be one-time costs to update these systems, processes, and policies and procedures for compliance with the proposals under consideration as well as ongoing costs, for example to manage increases in the number of disputes. The medical debt collection tradeline proposals under consideration may impose one-time costs on some consumer reporting agencies to remove all medical debt collection tradelines from certain consumer reports, and one-time and ongoing costs on creditors to change their underwriting practices and models.

In addition to the one-time and ongoing compliance costs that small entities would likely incur if the proposals under consideration were adopted, the CFPB must also consider how the proposals under consideration could impact the business operations and revenues of the affected entities. In the Outline, the CFPB stated that it would use the information received from small entity representatives on the anticipated impacts to business operations and revenues to measure the change expected if the proposals are adopted. In the Outline, the CFPB also requested that small

entity representatives provide information and data on any expected impacts of the proposals under consideration on cost and availability of credit to small entities.

4. Applicable small entity definitions

The Regulatory Flexibility Act defines "small entities" as small businesses, small organizations, and small governmental jurisdictions, as those terms are defined elsewhere in the Act.[29] The term "small business" has the same meaning as "small business concern" under section 3 of the Small Business Act.[30] Thus, to determine whether a small business is a "small entity" under the Regulatory Flexibility Act, the CFPB considers the SBA's size standards.[31]

The SBA has adopted more than one thousand industry-specific size standards, classified by six-digit North American Industry Classification System (NAICS) codes, to determine whether a business concern is "small." The term "small organization" is defined as any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.[32] The term "small governmental jurisdiction" is defined as the governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000.[33]

5. Small entities that may be subject to the proposals under consideration

The Panel is required to collect advice and recommendations from representatives of small entities that are likely to be subject to the regulation that the CFPB is considering proposing.

The entities subject to the consumer reporting proposals under consideration include (1) entities that meet (or would meet, if the proposals were adopted) the definition of consumer reporting agency in FCRA section 603(f), (2) entities that furnish information to consumer reporting agencies, and (3) creditors that use medical debt collection information in making credit eligibility determinations. These entities will include consumer reporting agencies, data brokers, data aggregators, data furnishers, and creditors that use medical debt information in credit eligibility or continued credit eligibility determinations. An entity can be classified in multiple categories. The CFPB sought feedback from small entities within each of these categories.

The Panel has identified 34 NAICS code categories of small businesses that are likely to represent most small entities that may be subject to a consumer reporting rule. The Panel has

[29] 5 U.S.C. 601(6).

[30] Small Business Act, Pub. Law No. 85-536, sec. 2, § 3, 72 Stat. 384, (1958) (codified at 15 U.S.C. 632).

[31] *See* 13 CFR 121.201. *See also* U.S. Small Bus. Admin., *Table of Small Business Standards Matched to North American Industry Classification System Codes* (effective Mar. 17, 2023), https://www.sba.gov/sites/sbagov/files/2023-06/Table%20of%20Size%20Standards_Effective%20March%2017%2C%202023%20%282%29.pdf.

[32] 5 U.S.C. 60(4).

[33] *See* 5 U.S.C. 601(5).

also identified the maximum number of employees, asset size, or average annual receipts to be considered a small business under each NAICS code, as follows.

Table 1: Categories of small entities likely to be subject to the proposals under consideration, by NAICS industry

NAICS industry	NAICS code	Small Business Administration Size Standard ($ Million)
Directory and Mailing List Publishers	513140	1000 (Employees)
Newspaper Publishers	513110	1000 (Employees)
Software Publishers	513210	47 (Revenue)
Wired Telecommunications Carriers	517111	1500 (Employees)
Wireless Telecommunications Carriers (except Satellite)	517112	1500 (Employees)
Computing Infrastructure Providers, Data Processing, Web Hosting, and Related Services	518210	40 (Revenue)
Web Search Portals and All Other Information Services	519290	1000 (Employees)
Commercial Banking	522110	850 (Assets)
Credit Unions	522130	850 (Assets)
Saving Institutions and Other Depository Credit Intermediation	522180	850 (Assets)
Sales Financing	522220	47 (Revenue)
Consumer Lending	522291	47 (Revenue)
Real Estate Credit	522292	47 (Revenue)
Mortgage and Nonmortgage Loan Brokers	522310	15 (Revenue)
Financial Transactions Processing, Reserve, and Clearinghouse Activities	522320	47 (Revenue)
Other Activities Related to Credit Intermediation	522390	28.5 (Revenue)
Lessors of Residential Buildings and Dwellings	531110	34 (Revenue)
Offices of Real Estate Agents and Brokers	531210	15 (Revenue)
Residential Property Managers	531311	19.5 (Revenue)
Payroll Services	541214	39 (Revenue)
Custom Computer Programming Services	541511	34 (Revenue)

NAICS industry	NAICS code	Small Business Administration Size Standard ($ Million)
Computer Systems Design Services	541512	34 (Revenue)
Administrative Management and General Management Consulting Services	541611	24.5 (Revenue)
Marketing Consulting Services	541613	19 (Revenue)
Other Management Consulting Services	541618	19 (Revenue)
Advertising Agencies	541810	25.5 (Revenue)
Direct Mail Advertising	541860	22 (Revenue)
Marketing Research and Public Opinion Polling	541910	22.5 (Revenue)
Collection Agencies	561440	19.5 (Revenue)
Credit Bureaus	561450	41 (Revenue)
Repossession Services	561491	19 (Revenue)
Investigation and Personal Background Check Services	561611	25 (Revenue)
Casinos (except Casino Hotels)	713210	34 (Revenue)
Other Gambling Industries	713290	40 (Revenue)

6. Summary of small entity outreach

6.1 Summary of the Panel's outreach meetings with small entity representatives

The CFPB formally convened the Panel on October 16, 2023. The Panel held a total of two Panel Outreach Meetings on October 18 and 19, 2023, conducted via video conference.

In preparation for the Panel Outreach Meetings and to facilitate a discussion of the proposals under consideration, discussion questions for the small entity representatives were included throughout the CFPB's Outline.

In advance of the Panel Outreach Meetings, the CFPB, SBA's Office of Advocacy, and OIRA held video conferences (pre-Panel video conferences) with the small entity representatives to provide background about the SBREFA process, obtain important background information about each small entity representative's current business practices, and begin discussing certain of the proposals under consideration.

Representatives from 16 small businesses were selected as small entity representatives for the consumer reporting SBREFA process. The small entity representatives attended the pre-Panel video conferences and Panel Outreach Meetings. Panel representatives from the CFPB, SBA's Office of Advocacy, and OIRA provided introductory remarks for the Panel Outreach Meetings. Staff from the CFPB's Division of Research, Monitoring, and Regulations then facilitated discussions about each of the proposals under consideration and the potential impact of the proposals on small businesses. The presentation slides used during the discussions are attached at Appendix E. The CFPB also provided the small entity representatives with an opportunity to submit written feedback by November 6, 2023. Thirteen of the 16 small entity representatives provided written feedback, copies of which are attached at Appendix A.

6.2 Other outreach efforts, including to small entities

On March 15, 2023, the CFPB issued a Request for Information (RFI) regarding data brokers and other business practices involving the collection and sale of consumer information.[34] The RFI sought information to help inform the CFPB about new business models that sell consumer data and to collect information on consumer harm that could result from such business models. The initial comment deadline for the RFI was June 13, 2023, but the CFPB extended that deadline to July 15, 2023, to allow interested persons more time to gather the requested information and submit comments. The CFPB is considering the roughly 7,000 comments received in response to the RFI.

The CFPB has long been engaged on the issue of medical debt, including by conducting outreach to stakeholders.[35] For example, on July 7, 2023, the CFPB, Department of Health and Human Services, and the Department of the Treasury (collectively, the agencies) issued an RFI regarding medical credit cards, loans, and other financial products used to pay for health care.[36] Among other things, the agencies sought comment on the effects such products may have on patients and the health care system, including on whether they harm patients' mental, physical, and financial well-being through downstream credit reporting and debt collection practices. In line with the agencies' work to lower health care costs and reduce the burden of medical debt, the agencies also sought comment on policy options to protect consumers from harm. The comment deadline was September 11, 2023, and the agencies are considering the nearly 5,000 comments received.

Also, on July 11, 2023, the CFPB hosted a hearing on medical billing and collections, with a focus on medical payment products, such as medical credit cards and installment loans. The CFPB and members of the public heard from partner agencies and organizations on high-cost specialty financial products that are offered to patients as a way to pay for medical care.

[34] 88 FR 16951 (Mar. 21, 2023).

[35] The CFPB's website includes a summary of the CFPB's activities in the medical debt market to date. *See* https://www.consumerfinance.gov/rules-policy/medical-debt/ (last visited Oct. 25, 2023).

[36] 88 FR 44281 (July 12, 2023).

As part of its rulemaking process, the CFPB will continue to conduct outreach to stakeholders, including to consumer groups, community advocates, and industry participants of a range of sizes.

7. List of small entity representatives

The following 16 small entity representatives participated in the consumer reporting SBREFA process.

Table 2: List of small entity representatives

Name & Title	Business Name, City, and State	Business Type
Mara Berman Commercial Counsel	Pinwheel New York, NY	Data Broker[37]
Jack W. Brown III President	Gulf Coast Collection Bureau, Inc. Tallevast, FL	Debt Collector
B. Nichoel Casey President & CEO	Raymond Federal Bank Raymond, WA	Bank
Phil Chang General Counsel	Method Financial Austin, TX	Data Broker
Bryan Garcia Chief Technology Officer	FinLocker St. Louis, MO	Data Broker
Tim Gordon Chief Compliance Officer	InfoMart Marietta, GA	Consumer Reporting Agency
Christopher Hartsough Vice President of Lending and Risk Mitigation	Credit Union of New Jersey Ewing, NJ	Credit Union
Jeff Jacobson VP/Compliance Officer	New Market Bank Elko New Market, MN	Bank
Nick Lawson General Counsel	Argyle New York, NY	Data Broker
Krystal Pekala Compliance Manager	ACRANet Spokane, WA	Consumer Reporting Agency

[37] For purposes of this Table 2 and as used in this Report, "data broker" describes firms that collect, aggregate, sell, resell, license, or otherwise share personal information about consumers with other parties and do not identify as consumer reporting agencies.

Name & Title	Business Name, City, and State	Business Type
Heather Russell-Schroeder President	Credit Bureau of Council Bluffs Council Bluffs, IA	Consumer Reporting Agency
Evelyn Schroeder VP/Compliance Manager	First Security Bank & Trust Charles City, IA	Bank
Giovanni Sollazzo CEO	AIDEM US, Inc. New York, NY	Data Broker
Jennifer Whipple President	Collection Bureau Services, Inc. Missoula, MT	Debt Collector
Jim Wilmot Chief Lending Officer	Arlington Community Federal Credit Union Falls Church, VA	Credit Union
Walt Wojciechowski CEO	MicroBilt Kennesaw, GA	Consumer Reporting Agency

8. Summary of feedback from small entity representatives

Through the SBREFA process, the Panel solicits feedback from small businesses early in a rulemaking proceeding and prior to the CFPB's development of a notice of proposed rulemaking. To obtain information about the costs of complying with an expected rulemaking, and to assist the CFPB in refining the proposals under consideration, the CFPB provided small entity representatives with questions to consider about the potential impacts of the proposals under consideration on their businesses. These discussion questions, which were part of the Outline (Appendix C), formed the basis of the Panel Outreach Meetings and the small entity representatives' subsequent written feedback.

During the Panel Outreach Meetings, as well as during the pre-Panel video conferences and in their subsequent written feedback, the small entity representatives provided feedback on all aspects of the proposals under consideration. The small entity representatives provided information to the Panel about their business operations and how the CFPB's proposals under consideration could impact their businesses. The Panel appreciates the meaningful feedback and data that small entity representatives provided and the time they spent assisting the Panel. This section summarizes small entity representative feedback on the various parts of the Outline. Written comments provided by small entity representatives are included in Appendix A.

8.1 Small entity representative feedback related to the definitions of consumer report and consumer reporting agency

8.1.1 Data brokers

Scope. Some small entity representatives raised concerns about the scope of entities that could become consumer reporting agencies under the data broker proposals under consideration. One consumer reporting agency small entity representative, for example, stated that neither the FCRA nor the proposals under consideration define the term "data broker" and expressed concern that the data broker proposals under consideration could result in an unintentionally large number of entities being considered consumer reporting agencies under the statute. A debt collector small entity representative stated that the statutory definitions of "consumer report" and "consumer reporting agency" are clear and unambiguous and that data brokers do not fall within the plain language definition of "consumer reporting agency" because they simply aggregate information without evaluating it.

Certain small entity representatives expressed concerns about the time and cost that would be required to come into and maintain compliance with the FCRA. The small entity representatives also noted that the proposals under consideration could result in FCRA compliance obligations for entities that use information provided by data brokers for non-FCRA-covered purposes and for entities that provide information to newly covered data brokers.

One data broker small entity representative recommended that entities that only allow for the sharing of consumer data with consumers' express authorization and at consumers' direction should not qualify as consumer reporting agencies under the FCRA because covering them would add substantial complexity and confusion with little benefit to consumers. For example, this small entity representative noted that applying to these platforms the FCRA's duties to investigate disputes and correct consumer information could result in discrepancies between the information displayed by the platform and by the entity that was the source of information. Additionally, this small entity representative noted that requiring such entities to provide consumers the FCRA summary of rights could lead consumers to believe that disputing information with the consumer-authorized data platform is the most effective way to correct errors. This small entity representative also expressed concern that, under the data broker proposals under consideration, the many entities that provide data to these platforms would be furnishers under the FCRA.

Another data broker small entity representative stated that the FCRA's dispute resolution and accuracy requirements would be particularly burdensome for entities that work with consumer-authorized data. The small entity representative stated that such entities may not have access to the information needed to investigate a consumer dispute related to, for example, a charge on the consumer's credit card, or bank account deposit or withdrawal information. Such information would be housed at the consumer's financial institution, and, according to the small entity representative, it would be exceptionally costly and potentially infeasible for a data broker to investigate. This small entity representative stated that the cost of FCRA compliance might be sufficiently high such that some data aggregators, including the data aggregator that this entity

uses, might cease operating, which could result in market consolidation and higher costs for consumers.

A different data broker small entity representative stated that entities that provide a platform for consumers to retrieve and share their data, such as payroll information, do not transmit "consumer reports" under the FCRA because they transmit only information about the platforms' own transactions and experiences with the consumer. This small entity representative stated that treating consumer-authorized data platforms as consumer reporting agencies would lead to treating consumers themselves as furnishers under the FCRA and would run counter to the spirit and purpose of the statute.

Types of data. Some small entity representatives stated that more detailed definitions or examples of the types of data that the CFPB understands to be "typically used" for FCRA-covered purposes would be beneficial. Some consumer reporting agency small entity representatives raised concerns that the data broker proposals under consideration would limit the use of criminal record information to FCRA permissible purposes, with one suggesting that it could potentially hinder the use of criminal records by law enforcement agencies. This small entity representative also queried whether individuals who collect public records information from courthouses would be consumer reporting agencies under the rule. Another stated that criminal records are currently used for fraud prevention and that applying the FCRA's accuracy standards to such information in that context would require adjustments to current practices and create a large burden. A debt collector small entity representative raised concerns that the data broker proposals under consideration would hinder debt collectors' ability to use certain types of public record information to find consumers' current addresses and contact information, making it more difficult and costly to collect certain types of debts.

One consumer reporting agency small entity representative suggested that the CFPB should exempt from the data broker proposals under consideration the many entities that supply information to employment screening consumer reporting agencies, suggesting that, if such entities were themselves to become consumer reporting agencies, it would be difficult for consumers to identify which consumer reporting agency to contact to ask questions, to submit disputes, or to obtain a copy of their consumer report. The small entity representative stated that this would increase data security risk because employment screening consumer reporting agencies would need to share more consumer information with those data providers so that the data providers could comply with their FCRA obligations. This small entity representative recommended that, to limit consumer confusion, any notices provided to consumers (such as adverse action notices) should not list all upstream data providers.

This small entity representative further suggested that the purpose for which data is collected, the use to which it is to be put, the permissible purpose of the user, and the identity of the person to whom the data is sold should be relevant to determining whether a transmission of data about a consumer is a consumer report (*e.g.*, data should not be deemed a consumer report if the purchaser is not making an eligibility decision). A data broker small entity representative suggested that the question of whether data sold by a data broker is considered a consumer report should depend on (1) whether the data broker received it from a furnisher, (2) whether the consumer provided consent for the data to be used for certain purposes, (3) whether the data

broker purchased the data from a third party that collected the data, and (4) consumer expectations.

Several small entity representatives expressed concern that the data broker proposals under consideration could lead to many small businesses exiting the market, especially those that supply information to entities such as background screeners and small financial institutions. Another small entity representative stated that the proposals under consideration would result in many small entities being newly required to comply with the FCRA, which would lead to market consolidation from entities either going out of business or being acquired by larger firms. Certain consumer reporting agency small entity representatives expressed doubt that their businesses would be able to continue to compete with larger entities in such an environment and another stated that, at a minimum, their costs to obtain information would increase, and those costs ultimately would be passed to consumers. One consumer reporting agency small entity representative predicted that these higher costs could have a disparate impact on certain populations' access to financial services.

Two small entity representatives raised concerns about the impact of the data broker proposals under consideration on fraud prevention, transaction monitoring, identity verification, and compliance with other Federal statutes such as the Bank Secrecy Act. One financial institution small entity representative suggested that the CFPB should exclude the use of data by regulated financial institutions for fraud prevention, collections and other lawful banking activities, and industry-specific compliance purposes.

One data broker small entity representative suggested that the CFPB carefully consider the implications of the data broker proposals under consideration on digital advertising. This small entity representative noted that programmatic advertising algorithms commonly use personal data like a consumer's income, address, and payment history to reach certain consumer audiences. This small entity representative stated that this practice would mean several types of technology platforms used in digital advertising would be consumer reporting agencies under the proposals under consideration.

Use of the written instructions of the consumer permissible purpose. In response to a question about whether the proposals under consideration would increase reliance on consumer consent to allow certain uses of data, a financial institution small entity representative expressed concern that the need for consumer consent before obtaining certain data could make it harder to detect fraud and comply with other Federal statutes. A data broker small entity representative stated that their business currently obtains consumer consent before providing information to third parties. A consumer reporting agency small entity representative stated that it would be challenging for their company to obtain or verify consumer consent, since it relies on its end users to obtain consumer consent. One consumer reporting agency small entity representative stated that it would be challenging and potentially confusing in the employment screening context to obtain consumer consent regarding each provider of data that goes into an eventual consumer report.

Use of data for a permissible purpose. Some data broker small entity representatives raised concerns about the proposal to provide that consumer information sold to a user who uses it for a permissible purpose is a consumer report regardless of whether the data broker knew or should

have known the user would use it for that purpose or intended the user to use it for that purpose. These small entity representatives disagreed that entities should be liable for users' downstream use of data regardless of contractual limitations and other measures that entities adopt to restrict the use of such data.

One such small entity representative stated that there is no perfect system to control downstream users and that the costs to try to do so would be prohibitive for small businesses. This small entity representative also questioned how the proposal under consideration would work in practice because it would seem to retroactively transform companies into consumer reporting agencies, with attendant FCRA compliance obligations, based on a downstream entity's use of data. The small entity representative stated that companies would not be able to plan or budget because they might become consumer reporting agencies based on other parties' unforeseen actions.

One consumer reporting agency small entity representative stated that the proposal under consideration might cause data brokers to restrict or limit the amount of consumer information they provide to any recipient, including downstream data brokers or consumer reporting agencies. This small entity representative suggested that the CFPB permit data brokers to provide consumer information to consumer reporting agencies that certify FCRA compliance and to other data brokers that certify they will only provide such information to entities that make the same certification as the selling data provider.

Sale for a non-permissible purpose. This same consumer reporting agency small entity representative also stated that the proposal to prohibit a data broker that collects consumer information for permissible purposes from selling it for non-permissible purposes would have a chilling effect on the flow of consumer information. This small entity representative stated that credit header data is often sold to consumer reporting agencies that use that data internally to prepare consumer reports. If credit header data were treated as a consumer report, as discussed further in section 8.1.3, this small entity representative stated that the data broker proposal under consideration could prohibit consumer reporting agencies from purchasing credit header data for these purposes, which would deprive them of an important tool for preparing consumer reports.

8.1.2 Defining "assembling or evaluating"

General feedback. One debt collector small entity representative stated that the meaning of "assembling or evaluating" as used in the definition of "consumer reporting agency" is clear and unambiguous and that it is beyond the CFPB's authority to provide a more detailed definition.

Some small entity representatives raised concerns that the proposal under consideration would result in various types of entities becoming consumer reporting agencies. A few data broker small entity representatives stated that entities that provide consumer-authorized data retrieval and delivery services without retaining consumer data do not engage in "assembling or evaluating" consumer information because they simply engage in a one-time transmittal of information to a user at the consumer's request and do not store or redeliver that data to others. These small entity representatives likened their company's role with respect to consumers' data to a "dumb pipe" that passes the information from a data provider to a data user. A consumer reporting agency small entity representative questioned whether the proposal under consideration

would mean that public record researchers, consumers' previous employers, and developers of software applications that transmit consumer data to users would be consumer reporting agencies. This small entity representative noted that such an outcome could lead to consolidation and small entities exiting the market.

One consumer reporting agency small entity representative stated that existing case law and Federal Trade Commission (FTC) statements provide sufficient guidance on the meaning of "assembling or evaluating." This small entity representative noted that courts have held that entities that provide software used in processing credit reports and entities that serve as conduits of information, such as search engines, do not assemble or evaluate information, and also noted that the FTC has stated that entities that perform only mechanical tasks in connection with transmitting consumer information are not consumer reporting agencies. This small entity representative further stated that industry has come to rely on this precedent and guidance and stated that, if the CFPB were to clarify that these third-party technology providers are consumer reporting agencies, it would increase costs for small reseller consumer reporting agencies, resulting in market consolidation and reduced competition.

Access to personal financial data. Two data broker small entity representatives stated that an expansive interpretation of "assembling or evaluating" could harm the CFPB's own efforts to enhance consumers' access to their personal financial data, for example through the recently issued Personal Financial Data Rights Proposed Rule,[38] because entities would stop facilitating the transmission of consumer data to avoid becoming consumer reporting agencies. One small entity representative predicted that the proposal under consideration would cause their company to consider reducing the features it offers to consumers, switch data aggregators, or cease using data aggregators to collect consumer information. This small entity representative stated that they believe that there is less risk of consumer harm when an intermediary simply facilitates the transmission of data without retaining that data, selling it to third parties, or delivering derivative products. The other small entity representative stated that the proposal under consideration would require small businesses and start-ups to spend resources on administrative and technical compliance measures rather than developing new products and services for consumers.

Impact on specific types of entities. A consumer reporting agency small entity representative stated that the CFPB should carve out from the proposal under consideration certain technology providers and platforms, including those used by reseller consumer reporting agencies to create and deliver "tri-merge" reports to end users for use in mortgage lending. This small entity representative stated that a far-reaching interpretation of "assembling or evaluating" could result in loan operating systems used by mortgage lenders falling under the definition of consumer reporting agency. This small entity representative stated that excluding such technology providers from the definition of a consumer reporting agency would not cause consumer harm because each transaction involves an already-regulated consumer reporting agency. In addition, this small entity representative noted that these entities are already subject to compliance obligations under the GLBA and vendor agreements with the financial institutions they serve. If these technology providers were to increase costs or exit the market to avoid becoming consumer reporting agencies, this small entity representative predicted that the impact would disproportionately fall on small consumer reporting agencies that are unable to develop their own

[38] 88 FR 74796 (Oct. 31, 2023).

technology platforms. Other small entity representatives stated that there were vendors providing similar services across several markets in addition to mortgage origination, including auto lending, student lending, personal lending, and tenant and employment screening.

Another consumer reporting agency small entity representative stated that the proposal under consideration could result in software-as-a-service providers and cloud-based platform-as-a-service providers that facilitate access to and transmission of public records becoming consumer reporting agencies. This small entity representative stated that they believe that the mere collection and transmission of consumer information is not "assembling or evaluating" consumer information, that software applications licensed by state court systems to provide access to documents are not consumer reporting agencies, that entities that electronically transmit consumer information to or at the request of a consumer reporting agency are not themselves consumer reporting agencies, and that the providers of software do not assemble and evaluate consumer information, even if the licensee of such software may be doing so. This small entity representative stated that many data providers and software providers would not find it economically viable to become FCRA-compliant consumer reporting agencies and would therefore exit the market.

8.1.3 "Credit header" data

Definition of consumer report. Several consumer reporting agency small entity representatives and a debt collector small entity representative stated that credit header data are merely identifying information such as a consumer's names, addresses, Social Security number, and phone numbers. They stated that such data does not meet the FCRA's definition of consumer report and that these data have not historically been considered a consumer report. Two consumer reporting agency small entity representatives questioned how credit header data could be used for credit decision-making or similar purposes. One of these small entity representatives requested that the CFPB clarify the characteristics that it believes makes the communication of credit header data a consumer report and the rationale for the proposal under consideration.

Current uses of credit header data. Several small entity representatives stated that credit header data is used today by financial institutions, consumer reporting agencies, government agencies, and others in a variety of contexts, including, for example, for identity verification and fraud prevention in financial and other transactions, in law enforcement and criminal investigations, in tenant and employment background checks and child support matters, for updating property values on existing loans, and by debt collectors to locate consumers.

Several consumer reporting agency and financial institution small entity representatives, as well as a debt collector small entity representative, focused on the use of credit header data for identity verification and fraud prevention and detection, particularly in the financial services sector and for online transactions. They stated that financial institutions use credit header data for identity verification when, for example, a consumer applies for a loan, opens a checking account, or applies for a credit limit increase. They also noted that credit header data is used for identity verification before permitting a consumer to complete an online transaction, including using electronic signatures or remote notarization, or to access a post office box. Other small entity representatives noted that credit header data is used to verify that a human, not a computer

program, is engaging in online activity, and to verify a consumer's identity before sharing account-level information with them.

Several consumer reporting agency and financial institution small entity representatives stated that credit header data is used to comply with legal obligations related to identity verification, including those intended to prevent money laundering and terrorism financing. One or more of these small entity representatives offered as examples the FTC Red Flags Rule, the Bank Secrecy Act and Know Your Customer requirements, and other suspicious activity monitoring, which they stated are not FCRA permissible purposes. Two consumer reporting agency small entity representatives stated that they use credit header data in providing third-party fraud prevention services to small financial institutions, as a way for the financial institutions to fulfill such legal obligations. One of these consumer reporting agencies stated that such small financial institutions lack the resources for their own, internal fraud prevention systems, so restricting the use of credit header data for use in such third-party tools would disproportionately affect small businesses. Another consumer reporting agency small entity representative similarly stated that not having access to credit header data would severely harm small banks and credit unions that do not have other means to comply with identity verification obligations.

Two consumer reporting agency small entity representatives stated that they use credit header data to ensure accuracy when conducting tenant and employment background investigations. For example, they use credit header data to improve the likelihood that their investigation is focused on the correct consumer, to identify for further investigation past addresses a consumer may not have included on an application or resume, and to check for other red flags, such as an incorrect Social Security number being included in an application.

Specific costs. The small entity representatives who commented on the importance of credit header data for identity verification expressed concern that, if the communication of these data were to be considered a consumer report, it would be more difficult or impossible to use such data for this purpose (*e.g.*, if it were unclear whether an FCRA permissible purpose existed to use the data) and that, even if the data could be used, the cost of obtaining the data from sources such as consumer reporting agencies and data brokers would increase. One data broker small entity representative estimated that the cost would increase from well under one dollar to several dollars per consumer. One financial institution small entity representative suggested that the CFPB consider narrowing the proposal under consideration so that entities could continue to use credit header data for specifically tailored operational needs.

Several consumer reporting agency and financial institution small entity representatives noted that, while a company could, in theory, satisfy the FCRA's permissible purpose requirement by getting a consumer's consent to obtain credit header data, obtaining consent would slow down transactions, which would frustrate consumers. One or more of these small entity representatives also stated that obtaining consent would increase financial institutions' costs, which would be passed to consumers in higher pricing, and would increase the vulnerability of sensitive identity information. A few of these small entity representatives further stated that some consumers might decline to provide consent out of concern about the consequences that a pull of consumer report information could have on their credit score, out of confusion about the request, or because they were engaging in, or trying to engage in, fraudulent activity. One consumer reporting agency small entity representative stated that, even if there were a permissible purpose

to use the data, any security freezes placed on the data, or FCRA disputes made with respect to the data, could delay or prevent its use for fraud and identify theft prevention.

One consumer reporting agency small entity representative stated that, when their company obtains credit header data from a data broker, it agrees that the information will not be used in making employment eligibility determinations or otherwise as a consumer report, and the company does not include the credit header data in the reports provided to its customers. The small entity representative stated that, if the use of credit header data were restricted, then larger background screeners might be able to adapt, but smaller entities would no longer be able to prepare meaningful background reports for their clients. The small entity representative stated that this ultimately would result in harm to consumers.

One debt collector small entity representative stated that, if they could no longer use, or if it became too burdensome to use, credit header data to locate consumers, their company would increasingly rely on litigation as a collection tool. This small entity representative stated that a decrease in successful collections due to an inability to locate consumers would eventually increase the cost of credit to consumers.

Certain small entity representatives expressed concerns about other compliance obligations that would flow from treating credit header data as a consumer report. For example, one debt collector small entity representative noted that needing a permissible purpose for, and being required to respond to disputes regarding, such data would cause substantial confusion and further noted that debt collectors' sharing of such data is already protected and regulated under the GLBA and the FDCPA and their implementing regulations. One consumer reporting agency small entity representative stated that adverse action notices would need to be provided to consumers who were denied credit based on credit header data (*e.g.*, due to a failure to confirm a consumer's identity), and that this could place sensitive identifying information about consumers into the hands of fraudsters. The small entity representative also asked the CFPB to consider how the credit header data proposal under consideration would interact with the permissible purpose proposals under consideration.

One data broker small entity representative stated that data that is often identical to traditional credit header data is used in an automated fashion in the digital advertising supply chain by entities that would be consumer reporting agencies under the CFPB's proposals under consideration. The small entity representative stated that defining credit header data to be a consumer report would create compliance hurdles because the digital advertising ecosystem currently has no system for limiting the purposes for which such data is used, or the entities with whom it is shared. The small entity representative further noted that the dynamic nature of the ecosystem would make it infeasible to enumerate all the entities in the supply chain that might touch such data, which would make it challenging to verify the identities and intentions of prospective users.

Consumer harms. A consumer reporting agency small entity representative stated that the proposal under consideration could harm consumers by making it harder for certain consumers—such as those who had recently moved and did not yet have updated identification information, or those who had changed their name—to be approved for certain financial products because it would be harder to verify their identity. Two consumer reporting agency small entity

representatives further stated that an inability to rely on objective data could increase the risk that decisionmakers would rely on personal biases or subjective judgment and, in turn, raise the risk of discrimination.

Several consumer reporting agency and financial institution small entity representatives variously stated that, as a fraud control, credit header data is efficient, effective, and one of the best methods available. They expressed concern that, if credit header data were considered to be a consumer report, consumer fraud, identity theft and other crimes would increase, imposing costs on businesses and harming consumers. They indicated that transaction and security costs for online transactions and account openings would increase.

8.1.4 Targeted marketing and aggregated data

Aggregated data and definition of consumer report. A data broker and several consumer reporting agency small entity representatives commented that aggregated or anonymized data do not bear on a single consumer's characteristics and therefore, in their view, the communication of such data is not a consumer report under the plain text of the FCRA's definition of that term. The consumer reporting agency small entity representatives stated that FTC and court interpretations of the statute support this conclusion.

One of the consumer reporting agency small entity representatives further stated that the proposal under consideration runs counter to the spirit of the FCRA and Congress's intent that the statute regulate only sensitive financial data about a particular consumer. Another small entity representative noted that data provided about, for example, the number of consumers who have an account with a particular institution, is sufficiently aggregated that it does not divulge anything about a particular consumer and should not be considered a consumer report. The small entity representative suggested the CFPB should consider providing that data is not a consumer report if, for example, it would be extremely difficult to deduce a particular consumer's identity.

The small entity representatives suggested that the CFPB clarify the consumer harms it would be addressing by limiting the use of aggregated data when it is aggregated at a high enough level that no specific consumer is identified. They suggested that the CFPB should define more clearly the privacy harms it is seeking to prevent, and then define clearly and in a narrowly tailored way the level of aggregation that would be required to address those harms or create exceptions for non-harmful uses like portfolio reviews and research.

Current uses of aggregated data. A few small entity representatives stated that aggregated data currently is used for many reasons other than marketing, such as by government agencies and others for economic research, and by financial institutions to refine their credit and pricing policies (including internal models) to avoid losses and offer consumers the most competitive pricing possible. The small entity representatives stated that, if creditors could not use aggregated data for these purposes, they would tighten their credit policies or increase pricing, which would harm consumers as well as businesses. One data broker and one consumer reporting agency small entity representative stated that the aggregated data proposal under consideration would particularly harm certain consumers, such as gig workers and other independent contractors, as well as consumers who do not have access to traditional financial

products and services, by limiting the amount of data available to analyze how financial products could be offered to such consumers.

One consumer reporting agency small entity representative similarly stated that their company uses aggregated data to improve its products and services, and that financial institutions use aggregated data to vet those same products and services. This small entity representative stated that the data is crucial to these processes and that, if it were not available, it would dramatically change the way companies improve and innovate their products and services. This small entity representative stated, for example, that, if financial institutions could not rely on aggregated data for these purposes, they would need to pull live credit data from consumers in real time.

One data broker small entity representative stated that entities in the digital advertising supply chain extensively use and share consumer data, including aggregated data, for marketing, often without adequate safeguards or transparency, or FCRA compliance. This small entity representative stated this can result, for example, in information that was obtained for one purpose being repurposed for advertising, without consumers' knowledge or consent. In addition, the small entity representative stated, such entities' practice of obtaining consumer data from open web scraping and third parties can lead to a deterioration in the quality of consumers' data, and such entities also can facilitate re-association and de-aggregation of consumer data for use in additional targeted advertising. The small entity representative supported regulation of these practices to protect consumer privacy.

Targeted marketing. One consumer reporting agency small entity representative expressed concern that the targeted marketing proposal under consideration could prevent consumers from receiving marketing materials from different lenders, which could cause them to miss better offers for which they might qualify. This small entity representative asked that the CFPB continue to consider how consumers are harmed by receiving marketing materials that inform them of their options.

Another small entity representative noted their frustration with "trigger leads," which occur when a consumer applies for mortgage credit and the consumer reporting agency sells information about the application to other data brokers or lenders. The small entity representative stated that they would support a proposed rule that would prohibit the practice unless the consumer has opted into the creation and sale of such leads.

8.2 Small entity representative feedback related to permissible purposes

8.2.1 Written instructions of the consumer

Current practices. Small entity representatives described several ways that companies use the written instructions of the consumer permissible purpose. Several small entity representatives noted that financial institutions use this permissible purpose when doing annual reviews for accounts to ensure consumers continue to meet account requirements. Other small entity representatives identified uses of written instructions permissible purpose in connection with credit underwriting, when consumers sign up for online budgeting programs, and in employment background checks, as well as in other areas of financial business such as commercial or small business lending underwriting and account monitoring, qualification for non-government

benefits, and screening for fraudulent transactions or suspicious activity. One consumer reporting agency small entity representative stated that the written instructions of the consumer permissible purpose may be used as a failsafe, obtained in case another permissible purpose is challenged. One data broker small entity representative stated that this permissible purpose is used in the context of employment and payroll data sharing. Small entity representatives also indicated that a consumer's written instructions are often obtained by the end user of the report, but sometimes the authorization is obtained by the consumer reporting agency who assembles the consumer report information for the end user.

Small entity representatives stated that their written authorizations are generally one-time use. One data broker small entity representative stated that they do use durable authorizations, although rarely. The data broker small entity representative stated that they have gotten feedback from consumers and have performed consumer experience surveys that suggest that consumers do not understand why they need to provide authorization each time their consumer report is obtained, and that doing so leads consumer participation to drop off after the first authorization is provided.

Authorization process requirements. Some small entity representatives indicated the proposal under consideration would not be too burdensome for them, if the authorization process was not onerous and the content was plain language. They indicated that electronic authorization should be permitted in lieu of wet-ink signatures and hard copy authorization, as most processes where written authorization is used are electronic. Some suggested that permitting consumer opt-in through a check box, rather than an electronic signature, would be preferable based on their research and given other statutory requirements such as the E-Sign Act. One data broker small entity representative stated that the CFPB should permit an opt-out setup, where rather than requiring consumers to complete a new authorization for every transaction or to reauthorize ongoing access, consumers could opt-out of ongoing authorizations. One data broker small entity representative suggested the CFPB might, instead, consider requiring data deletion upon consumer request. Additionally, a data broker small entity representative advocated for the CFPB to ensure that any requirements do not conflict with other consumer authorization data sharing laws.

Content requirements. A data broker small entity representative suggested that the information provided to the consumer in an authorization should be simple and short, as their user experience research has shown that consumers are more likely to read and comprehend written authorization instructions provided in summary, bullet-point format rather than paragraph, letter format. One consumer reporting agency small entity representative stated that, if the authorization must identify each entity and each purpose, it may become too long or burdensome for the consumer.

Specific costs. Small entity stated indicated that, depending on how broadly the proposal under consideration were construed, it could require them to hire additional staff to perform inspections and audits, as well as to acquire consumer identification confirmation technology. Two consumer reporting agency small entity representatives stated that the proposal under consideration would require consumer reporting agencies to confirm that the consumer's written authorization was obtained, and they stated that they would not have a way to confirm that the consumer was the person that signed the authorization. They also stated that, even if consumer reporting agencies were able to confirm the consumer's identity, any such confirmation process

would delay provision of the consumer report and the consumer's transaction. Two data broker small entity representatives stated that, because their process is fully electronic, they can audit signatures through timestamps and system processes. One data broker small entity representative stated that they receive written authorization indirectly from third parties, but that they review the authorization to make sure the disclosure about the authorization is clear and conspicuous.

Consumer impacts. One consumer reporting agency small entity representative stated that the proposal under consideration may harm consumers, as requirements that impair or burden consumers' ability to provide written instructions to allow access to their consumer reports may impact their timely access to credit. They also stated that, if finalized, the proposal under consideration could impact consumers' access to certain financial services that would no longer meet the requirements of this permissible purpose and do not meet the requirements of the other permissible purposes in the statute.

Other considerations. Another consumer reporting agency small entity representative asked the CFPB to distinguish in a final rule between written instructions and authorization, noting that the term "authorization" is used in other permissible purpose contexts and any use of the term in this proposal under consideration could impact its use in other permissible purposes. Two consumer reporting agency small entity representatives suggested that the proposal under consideration, if too broad, could be beyond the bounds of the legal authority provided to the CFPB by the FCRA or conflict with prior regulatory guidance.

8.2.2 Legitimate business need

Scope. Several small entity representatives asked the CFPB to clarify the scope of the proposal under consideration related to the legitimate business need permissible purpose, including how any intervention would affect the FCRA permissible purpose that permits consumer reports to be provided in connection with consumers' credit transactions. One financial institution small entity representative indicated, for example, that there is a need in small business lending to obtain consumer reports on the individuals who own the businesses, both at the time of an initial credit transaction and for annual reviews as required by safety and soundness protocols. This small entity representative asked that the CFPB not interpret the legitimate business need permissible purpose (or the credit permissible purpose) to prevent such activities.

Consumer-initiated transactions. As to the "consumer-initiated transaction" prong of this permissible purpose, some small entity representatives stated that consumer reporting agencies and consumer report users often do not have a way of knowing whether the transaction at issue is for personal, family, or household purposes. A consumer reporting agency small entity representative stated, for example, that if a consumer rents a vehicle and uses a debit card, the consumer's credit report is often obtained under the legitimate business need permissible purpose. However, the user does not necessarily know if the consumer's rental purpose is for business or personal use or a combination of both. This small entity representative also stated that, in the construction context, there could be a need to verify the personal credit of a builder or of a third-party sub-contractor, even though the transaction at issue would not be for personal, family, or household purposes. This small entity representative suggested that limiting this

prong to only personal, family, or household purposes would also make this provision unnecessary given other FCRA permissible purposes.

Two consumer reporting agency small entity representatives stated that they use the legitimate business need permissible purpose to furnish consumer reports to end users such as property managers and landlords, relying on the users' certification to ensure that the report is provided for the permissible purpose. One of those small entity representatives stated that, if it could no longer rely on the end user's certification that the permissible purpose was satisfied, it would face increased costs to verify that information.

A financial institution small entity representative stated that there might be additional use cases for the legitimate business need permissible purpose due to the CFPB's data broker proposals under consideration for this rulemaking. This small entity representative stated that their company uses a vendor to pull information from consumers' credit reports or a department of motor vehicles, and consumers are asked questions about that information to verify their identities before their electronic signature is accepted. The small entity representative queried whether such vendors would be consumer reporting agencies under the data broker proposals under consideration, and if so, what the vendors' permissible purpose would be.

Account reviews. Some consumer reporting agency small entity representatives asked for clarification about what would be permitted under the account review prong of the proposal under consideration and when a user would be considered to have an actual need for a consumer report. For example, one consumer reporting agency small entity representative asked whether a business must wait for certain specific events to occur, such as a missed payment, before the requirement would be satisfied. Another consumer reporting agency small entity representative stated that consumer reporting agencies may not be able to determine, or may have difficulty determining, if a user "needs" a consumer report. They stated that they would not have the staff or resources to manually audit each request for a consumer report, if that were required, and that the proposal under consideration could result in a consumer reporting agency becoming an arbiter of a user's business practices.

Other considerations. One consumer reporting agency small entity representative suggested that the proposal under consideration, in particular the "consumer-initiated transaction" prong, could contradict the FCRA, depending on how any rule would be finalized, and therefore could be beyond the bound of the CFPB's legal authority.

8.2.3 Data security and data breaches

Scope. Several consumer reporting agency small entity representatives asked the CFPB to clarify the scope of the proposal under consideration. They indicated that, if the proposal under consideration were construed in the broadest way possible and a consumer reporting agency would be strictly liable for any data breach, no matter the safeguards the company had taken to prevent the breach, then the cost of the proposal under consideration would put them out of business. They stated, for example, that such a rule would make commercial crime and cybersecurity insurance coverage prohibitively expensive. Some consumer reporting agency small entity representatives similarly stated that the amount of money they would be required to pay under a strict liability standard should they be sued for a data breach would put them out of

business, particularly given the private right of action available under the FCRA provisions that are the subject of the proposal under consideration. They stated that the proposal under consideration would unfairly hold consumer reporting agencies accountable for others' criminal acts. Additionally, one consumer reporting agency small entity representative expressed concern that consumers would not be better protected under the proposal under consideration, as both furnishers and users of consumer reports would also have the data and could also experience data breaches.

Existing protections and alternatives. Consumer reporting agency small entity representatives stated that they generally already have rigorous data security protocols and procedures. Several stated that they follow the FTC's rules for data security and provide significant training for data end users and employees. One consumer reporting agency small entity representative stated that the proposal under consideration could result in their company increasing data security beyond what is necessary or advisable by the FTC because the proposal suggests strict liability and does not include a damages cap. The small entity representative stated that this would be inefficient and overly burdensome.

One consumer reporting agency small entity representative suggested that the CFPB consider limiting the amount that could be recovered if a consumer reporting agency were sued for a data breach, similar to some state liability laws that cap damages at a set number of dollars per consumer. Another consumer reporting agency small entity representative suggested that the CFPB look to state liability laws for exemption models, such as exempting certain consumer reports that either do not contain adverse consumer information or contain adverse information that is publicly available. A data broker small entity representative suggested that, in lieu of strict liability, the CFPB should consider data security standards, and recommended extending the FTC's GLBA Safeguards Rule to consumer reporting agencies that are not already covered.

Other considerations. One financial institution small entity representative supported the proposal under consideration, stating that, when data breaches occur at any point in the financial lifecycle, financial institutions taking immediate action to protect consumer accounts bear the upfront costs of the breach, even if the breach occurred at another party such as a consumer reporting agency. The small entity representative suggested that the proposal under consideration could make consumer reporting agencies take further precautions that would help save financial institutions costs in the future.

One data broker small entity representative suggested that, if the CFPB finalized its proposal under consideration related to data brokers, the amount of consumer data that could be subject to a data breach would increase because data brokers understand the FCRA to impose longer record retention requirements than the requirements to which data brokers are currently subject.

Two consumer reporting agency small entity representatives suggested that the proposal under consideration could conflict with existing case law.

8.3 Small entity representative feedback related to disputes

8.3.1 Disputes involving legal matters

General feedback. Among the small entity representatives that provided feedback on this proposal under consideration, most stated that they currently do not distinguish between disputes that are factual in nature versus disputes that are legal in nature. They emphasized that they already investigate all disputes that they receive, and some indicated that they would face a bigger burden if the CFPB were to take the opposite approach from the proposal under consideration and require them to distinguish between different types of disputes. One consumer reporting agency small entity representative stated that they and their peers do distinguish how they respond between disputes involving legal matters and other disputes, but that their process for intake and investigation is the same for all disputes.

Scope. The small entity representatives generally suggested that the CFPB clarify what is meant by a "legal dispute." For example, one financial institution small entity representative noted that, depending on the facts, banks might not recognize concerns about legal issues brought to them directly by consumers (for example, about whether a debt was validly owed under a contract), as FCRA disputes that require investigation and suggested that a clearer definition could help. Another financial institution small entity representative stated that there may be some legal issues, such as identity theft and fraudulently opened accounts, that are more easily recognized, and that staff that manage disputes are more capable of addressing those issues as opposed to other legal issues.

Two consumer reporting agency small entity representatives and a financial institution small entity representative suggested that the CFPB may need to clarify the basis a consumer needs to assert a legal dispute. They stated that, if a consumer asserts that they do not owe a debt, this may be considered a legal dispute, but such a dispute would be difficult for the consumer reporting agency to resolve, and difficult for the financial institution to resolve without court intervention. Another consumer reporting agency small entity representative stated that, in the employment verification context, the CFPB may want to consider whether it is appropriate to include in the proposal under consideration disputes of criminal convictions when the consumer is disputing either the validity of the conviction or the reporting of a conviction after a pardon.

Other small entity representatives suggested that a clear definition of "legal dispute" would be necessary if the CFPB were to take the opposite approach of the proposal under consideration and require entities to distinguish between different types of disputes whether in making an initial decision to investigate or in determining how to investigate. One financial institution small entity representative indicated that the example provided in the Outline related to foreclosure law requirements may not be appropriate because it would, in their view, require their company to hire outside counsel licensed in every state to properly be able to interpret state foreclosure law and investigate disputes of that nature. This small entity representative, and others, suggested the costs for hiring outside counsel to investigate legal matters would be significant.

Some small entity representatives suggested that certain entity types should be exempt from the proposal under consideration. Two consumer reporting agency small entity representatives

stated that, while they may receive disputes, consumer reporting agencies may not have the means to investigate the dispute if it relates to legal matters. These small entity representatives stated, for example, that if a tenant disputed that they owed a landlord an unpaid balance, their companies would not be able to confirm whether the tenant legally owed that amount, as only the landlord would be able to confirm the balance owed. One consumer reporting agency small entity representative stated that the proposal under consideration likely would cause consumer reporting agencies to incur increased litigation costs. Another consumer reporting agency small entity representative stated that, because they are a reseller, they are further limited in their ability to investigate disputes, as they are farther removed than other consumer reporting agencies. They stated that they also do not have the staff or resources to investigate legal disputes. Two debt collector small entity representatives stated that, because the FDCPA and Regulation F already impose requirements related to disputed debts in addition to those imposed by the FCRA, the CFPB need not apply another FCRA requirement to debt collector furnishers related to disputed debts.

Consumer impacts. Several small entity representatives expressed concern that, if the proposal under consideration were adopted, credit repair companies might begin to file excessive numbers of legal disputes, which ultimately would harm consumers. One financial institution small entity representative stated that the proposal under consideration could result in financial institutions removing tradelines, rather than investigating legal issues, which could result in false legal claims by consumers to take advantage of the tradeline removal policy. One such consumer reporting agency small entity representative stated that a narrow definition of "legal dispute" could help to avoid any such unintended consequences. Some small entity representatives also expressed concern that consumers might be confused by overly legalistic dispute responses.

Specific costs. Some small entity representatives expressed concern that their existing staff would not have the necessary training or educational background to make determinations regarding legal disputes. They expressed concern that the CFPB might require them to respond in particular ways to disputes that might be considered legal in nature, and they stated that, depending on what was required, they would be concerned about either engaging in the unauthorized practice of law or needing to hire or consult with attorneys to help them investigate and respond to such disputes, which they stated could be cost prohibitive. One financial institution small entity representative stated that the need to hire or consult with attorneys to respond to such disputes could disproportionately impact smaller entities that might not have in-house counsel or a legal team on staff. This small entity representative also stated that the proposal under consideration might result in increased litigation and legal expenses for furnishers. As noted above, this small entity representative stated that some furnishers might choose to delete tradelines, rather than investigate legal disputes. They stated that this might result in legal claims attacking the validity of the debt based on the furnisher's inability to substantiate the debt in response to a dispute.

Other considerations. Some small entity representatives opposed the proposal under consideration and stated they supported exempting disputes concerning legal matters from the dispute requirements under the FCRA, citing to case law and industry amicus briefs. Two consumer reporting agency small entity representatives suggested that the proposal under consideration, if too broad, could be beyond the bounds of the legal authority provided to the CFPB by the FCRA and inconsistent with case law.

8.3.2 Disputes involving systemic issues

Scope. Small entity representatives requested that the CFPB better define what it means by a "systemic issue." One consumer reporting agency small entity representative suggested that the CFPB could define a systemic issue as one involving a minimum number or percentage of affected consumers. This small entity representative also stated that consumers might not be able to identify which errors affecting them would be systemic in nature. Other small entity representatives suggested that the CFPB identify the types of issues that might qualify as "systemic," asking whether technical errors or errors made by staff would qualify.

Some small entity representatives asked the CFPB to define certain types of disputes as not involving "systemic issues." They suggested, for example, that disputes relating to third-party vendor errors, where consumer reporting agencies or furnishers cannot fully control correction of the error, should not be considered disputes involving systemic issues. One consumer reporting agency small entity representative asked the CFPB to distinguish between errors that arise from actions by consumer reporting agencies and actions by furnishers, and place responsibility for resolution with the responsible entity. Some small entity representatives requested that the CFPB consider exempting from the definition disputes from certain industries, such as credit repair industries, that use form-letter disputes that could be mistaken for disputes concerning systemic issues. These small entity representatives expressed concern that such entities could abuse a "systemic dispute" provision to overwhelm consumer reporting agencies. Some small entity representatives suggested that disputes relating to consumer reports that are for one-time use, such as those provided by certain data brokers, should be outside the definition of disputes concerning "systemic issues" because there is no possibility of ongoing harm to consumers, and any inaccurate data would expire before any resolution could be provided.

A consumer reporting agency small entity representative suggested the CFPB consider exempting certain entities from the proposal under consideration, suggesting for example that employment background check consumer reporting agencies who only compile information from other parties and do not maintain a database themselves would not have reason to encounter systemic issues that are within their control. Aside from specific exceptions, one consumer reporting agency small entity representative suggested any identification by a consumer of a systemic issue must be rebuttable by the consumer reporting agency's (or furnisher's) determination that the issue is not widespread or does not meet the definition of systemic under any finalized rule.

Specific costs. Some small entity representatives expressed concern about the compliance burden for small entities, who may only have one staff member in the dispute department, if the CFPB's proposal under consideration required them to review every dispute for the possibility of systemic issues. Two financial institution small entity representatives stated that they already investigate and address systemic issues they self-identify, but that treating every dispute as a potential systemic issue dispute would add cost. For example, one of these small entity representatives stated that the proposal under consideration would require them to develop and maintain a manual dispute tracking system to provide trend analysis reports that demonstrate systemic issues were not received. One consumer reporting agency small entity representative stated they would need to double their dispute department staff if the proposal under consideration were finalized. Conversely, some small entity representatives stated they already

check for systemic issues as they review the disputes they receive, and thus a requirement to do so would not impose too much additional cost.

Notice to consumers. Some small entity representatives suggested that the CFPB omit from any proposed rule the aspect of the proposal under consideration related to the provision of notice to affected consumers. One consumer reporting agency small entity representative stated that, in the employment screening context, consumers already receive several notices related to the use of their consumer report and cautioned that adding a notice regarding corrections related to systemic issues would overwhelm consumers.

A furnisher and a consumer reporting agency small entity representative stated that a systemic issue notice could cause consumer confusion. The furnisher small entity representative stated that confusion may be caused if the consumer receiving the notice had not filed the dispute; the consumer might not know what prompted the notice or might think that it was related to a separate dispute the consumer might have filed that might have had a different result. The small entity representatives also expressed concern that a notice could result in increased call volumes and burdens on their dispute staff due to potential consumer confusion about the notice, particularly if the notice were worded in a formulaic manner or used boilerplate language.

A financial institution small entity representative stated that, if a notice were formulaic in nature, it could harm the entity's reputation with consumers who might be accustomed to more individualized conversations about their concerns. A furnisher small entity representative stated that the cost of mailing notices, particularly if multiple notifications were required, would be particularly burdensome on small entities, and a consumer reporting agency small entity representative suggested that this burden might not be warranted given that many consumers receiving the notice may not have been harmed by the systemic error, *e.g.*, if an error was corrected before a consumer report containing the error had been provided to a user. This consumer reporting agency small entity representative stated that a notice might raise privacy concerns, as their company does not always have complete or current contact information for every consumer, and it therefore might be difficult to ensure that a notice is sent to the correct address. This consumer reporting agency small entity representative suggested that electronic delivery of notices might impose additional challenges.

A financial institution small entity representative expressed concerns related to timing, noting that their institution's current practice upon discovering a systemic issue is to figure out a solution, build a program, fix the problem, and then notify consumers. The small entity representative indicated that, if they were required to notify consumers as soon as a systemic issue is identified, they might need to divert resources from fixing the problem to answering those consumers' questions that they may not yet be able to answer. Regarding timing of a notice, another financial institution small entity representative noted that it can take additional time to rectify technical issues because core processors or third-party vendors relied on for furnishing may be slow to fix issues.

Consumer impacts. Two small entity representatives expressed concern that consumers could abuse the proposal under consideration and stated that consumers might benefit from education on the dispute process or the underlying issues that cause certain disputes, such as insurance practices, in lieu of the proposal under consideration. Another consumer reporting agency small

entity representative stated that the proposal under consideration could result in a general increase in litigation for both consumer reporting agencies and furnishers, particularly if a notice to consumers is provided. They stated that the increased litigation costs for furnishers could increase the cost of credit and cause furnishers to limit what they report, impacting the viability of the consumer reporting ecosystem.

A data broker small entity representative noted that, if the rulemaking included an obligation to correct records on multiple consumers, some consumers might be negatively impacted when their information is run through some of the scoring models. A consumer reporting agency and a financial institution small entity representative stated that consumers could also be harmed if furnishers reduce reporting to consumer reporting agencies out of concern about liability or cost resulting from the proposal under consideration, particularly those furnishers in industries that only recently began furnishing, which could harm the unbanked and underbanked consumer populations. A financial institution small entity representative stated that because systemic issues were so rare, the benefit of the proposal under consideration to consumers would be minimal while the burden for small entities would be great.

Other considerations. A financial institution small entity representative suggested that the CFPB consider, as an alternative to the proposal under consideration, strengthening its examination of entity dispute processes to ensure all entities are determining the root cause of errors so they may identify systemic errors. Two debt collector small entity representatives stated that, because the FDCPA and Regulation F already impose requirements related to disputed debts in addition to those imposed by the FCRA, the CFPB should consider an exemption for debt collectors.

Two consumer reporting agency small entity representatives suggested that the proposal under consideration could be outside the CFPB's authority under the FCRA.

8.4 Small entity representative feedback related to medical debt collection information

Definition of medical debt collection information. Two debt collector small entity representatives expressed concern that the CFPB has not clearly stated what types of debts the proposals under consideration were designed to cover. They asked, for example, whether debts arising from gym memberships, counseling or therapy sessions, veterinarian services, and dental care, or medical expenses charged to credit cards, would be covered. One stated that the CFPB should exempt payments made for medical services on credit cards due to concerns about operational challenges. These small entity representatives also asked whether the proposals under consideration were meant to cover credit scores, stating that any creditor using credit scores is currently using medical debt information, because some of those scores still consider medical debt information even if it is given less weight. They stated that their costs would vary greatly depending on the answers to such questions regarding scope.

A financial institution small entity representative similarly stated that the CFPB should clearly define medical debt. This small entity representative suggested that the term should include a collection arising from an unpaid medical bill from a medical establishment or procedure and

should exclude debts in the form of loans (*e.g.*, personal or home equity) or credit cards obtained or used to pay medical debts through contractual agreements with periodic payments over time.

One debt collector small entity representative suggested that the CFPB issue an Advance Notice of Proposed Rulemaking to gather more information before a proposed rule or consider a second SBREFA process to discuss the proposals under consideration once the scope of the proposals under consideration is clarified.

Impacts on creditors and underwriting. Two financial institution small entity representatives stated that, although they do not always consider a consumer's medical debt information in their underwriting, they are aware of other financial institutions that do, and they believed that financial institutions should have the option to take this information into account to manage their credit risk if they choose to do so. One suggested that the CFPB should obtain input from other stakeholders and safety-and-soundness regulators on the potential impact of the proposals under consideration for sound underwriting.

Another financial institution and two debt collector small entity representatives stated that information on consumer reports about a consumer's medical debts is relevant to the consumer's overall financial profile and ability to repay a loan. The debt collector small entity representatives stated that this is particularly true for medical debts, which cause a large majority of bankruptcies. The debt collector small entity representatives stated that the proposals under consideration would result in creditors evaluating consumers based on artificially low debt-to-income ratios. The financial institution small entity representative similarly stated that the proposal under consideration would impair their company's ability to calculate borrowers' debt-to-income ratios, posing a risk to their company's ability to accurately underwrite borrowers. The debt collector small entity representatives stated that prohibiting the consideration of accurate medical debt is inconsistent with the FCRA's purpose to ensure fair and accurate credit reporting and, in turn, the efficient functioning of credit markets. One consumer reporting agency small entity representative expressed concern that the CFPB might eventually propose to exclude other debts from consumer reports, as well.

Two financial institution small entity representatives noted that, in developing the proposals under consideration, the CFPB should consider all the ways in which information about a consumer's medical debts might flow to financial institutions, including being reported by the consumer on a credit application. One of these small entity representatives suggested the CFPB should consider what to tell consumers about whether they should disclose such information on applications, and what to tell financial institutions about using consumer-provided information for underwriting.

Finally, several financial institution and furnisher small entity representatives stated that the CFPB must consider how the proposals under consideration would interact with requirements under TILA and the CFPB's Regulation Z that generally prohibit creditors from making mortgage loans unless they make a reasonable and good faith determination that the consumer will have the ability to repay the loan, and that also contain ability-to-repay requirements for credit cards. They stated that these laws require creditors to consider all of a consumer's current debt obligations, such that the proposal under consideration would hinder their ability to make the required determination.

Underwriting-related impacts on consumers. Two financial institutions and two debt collector small entity representatives expressed concern that the proposals under consideration ultimately could harm consumers who have medical debts. They stated that, if creditors were prohibited from considering those obligations, consumers might later find themselves with too much debt, and might be unable to repay the loans underwritten by those creditors or to manage other financial obligations.

A few small entity representatives expressed concern about the proposals under consideration disadvantaging certain consumers relative to others, such as consumers without medical debt relative to consumers with such debt, and consumers who pay their medical debts relative to those who do not. Two debt collector small entity representatives also stated that the proposals under consideration could harm consumers with positive medical debt payment histories because creditors would no longer see that on consumer reports and might turn to other, less predictive and potentially biased information about the consumers to make credit decisions.

Two debt collector small entity representatives expressed concern that creditors, facing increased credit risk, would employ more stringent underwriting standards, leading to a credit crunch that would harm both consumers and small businesses. One of these small entity representatives stated that this "credit score creep" would increase the cost of credit for all consumers and have the opposite effect from what the CFPB intends. This small entity representative stated that "credit score creep" could increase their cost to obtain small business credit, as well, and could disadvantage small entities relative to larger ones that rely on bond ratings, rather than their owners' personal credit scores, to obtain credit.

Impacts on medical providers and consumer access to healthcare. Two debt collector small entity representatives expressed concern about the unintended consequences of prohibiting credit reporting of unpaid bills owed to, for example, a consumer's primary doctor or dentist. They stated that, unless consumers were sued, many would view the removal of medical debts from their consumer reports as making payment voluntary or would forget about their debts, and they expressed concern about the economic consequences that would result. They stated that debt collection communications would become more difficult and collection efforts less successful.

These small entity representatives predicted that, if such medical providers face decreased recoveries on defaulted accounts due to the proposals under consideration, they might begin increasing prices or requiring consumers to pay for services upfront and remove options for payment plans. They noted that this would disadvantage lower-income consumers relative to higher-income consumers, as lower-income consumers might forego care or turn to more expensive payment options such as credit cards. They stated that it would also harm consumers in rural areas, where there may be only a few local care providers available. These small entity representatives stated that, if such providers began to require upfront payments, lower-income, rural consumers could be forced to drive long distances to obtain emergency room care or forgo medical treatment. They also stated that local medical providers could go out of business due to the costs of the proposals under consideration, which would further reduce options for care for rural consumers and, in the end, likely increase the costs to consumers to obtain care.

These small entity representatives also stated that the proposals under consideration could result in reduced access to healthcare and cause more consumers to go to emergency rooms for non-

emergency care, to delay needed care or not receive it at all, and to drop out-of-pocket health insurance as unnecessary, all of which they said would increase healthcare costs generally and exacerbate the issues that already exist in the healthcare industry. They expressed concern that medical providers, who they stated would experience significant impacts in the form of lost revenue from the proposals under consideration, had not been included as small entity representatives in the SBREFA process.

Impacts on medical debt collectors. Two debt collector small entity representatives stated that the proposals under consideration would increase their costs to collect medical debt and negatively affect their collection rates. They stated that they would have to rely more heavily on collection methods other than credit reporting, like letters, telephone calls and litigation. They stated that these methods would be less private and more intrusive for consumers, and significantly more expensive for collectors than credit reporting, such that consumers would see fewer offers for discounts and settlements. One such small entity representative estimated that collecting an account through litigation would cost approximately $500 per account, whereas collecting through credit reporting costs less than ten dollars per account.

The debt collector small entity representatives stated that they expected significant costs associated with switching to alternative collection methods and making compliance changes, including rewriting policies and procedures, training employees, updating systems, and renegotiating contracts with, and explaining changes to, medical clients. They believed that they would need to increase staff by approximately 10 percent, in part to pursue more time-intensive collection methods, and that they would experience a decrease of 10 percent or more in collections and legal costs possibly totaling $1 million per year or more.

Recent market changes. A financial institution and two debt collector small entity representatives expressed concerns about whether the proposals under consideration were necessary given recent market changes regarding medical debt credit reporting. The small entity representatives noted that recent policy changes by the nationwide consumer reporting agencies to no longer include on consumer reports medical collections under $500, paid medical debts, and unpaid medical debts that are less than a year old have caused medical debts appearing on consumer reports to decline and consumers' credit scores to improve. They also noted changes in credit scoring models that give less weight to medical debts than to other types of debts. The debt collector small entity representatives also pointed to provisions in the CFPB's Regulation F designed to protect consumers from debt collectors furnishing medical debts to consumer reporting agencies without first attempting to contact the consumers to inform them of the debts, and to protections regarding surprise medical billing afforded by the No Surprises Act and federally mandated payment assistance programs provided by nonprofit hospitals.

Two debt collector small entity representatives stated that the CFPB should conduct additional research before moving forward with the proposals. They expressed concern that the CFPB's 2014 study regarding medical debt is outdated, particularly given the market changes discussed above. They also stated that the report found that medical debt is less predictive than other types of debt but not unpredictive.

Alternatives to the proposals under consideration. Two debt collector small entity representatives addressed an alternative proposal under consideration to delay the furnishing of

medical debts or prohibit the furnishing of medical debts under certain dollar amounts. They also discussed an alternative under consideration to impose obligations on furnishers regarding investigating disputed medical debts, including for insurance issues.

The small entity representatives noted that, depending on how a proposal to delay or prohibit furnishing were crafted, it could increase the likelihood that consumers would not become aware of their medical debts, or would become aware of them too late to engage with insurance companies or explore other payment options including charity care, which ultimately could increase the number of consumers sued for unpaid debts. The small entity representatives stated that a waiting period for furnishing of 120 days from the date of first discharge billing is an industry best practice for allowing consumers to resolve any relevant insurance claims and ensure accuracy in final adjusted amounts owed.

Regarding the dispute-related alternative proposal under consideration, the small entity representatives indicated that such a rule would duplicate the many legal requirements and protections already in place for debt collectors related to investigating and responding to disputes and could exacerbate the problem of mass generic disputes, which they stated are harmful to both collection agencies and consumers.

Both of the debt collector small entity representatives stated that adopting a rule to remove from consumer reports medical debts that have been paid in full could provide consumer benefits.

One of the debt collector small entity representatives stated that the CFPB should explore other alternatives such as consumer education about, for example, insurance issues and payment assistance options. The small entity representative stated that the CFPB could also clarify how debt collectors could convey information about such assistance in debt collection communications required under the CFPB's Regulation F.

This debt collector small entity representative also suggested that the CFPB consider limiting the proposal under consideration to debts arising from emergency care, citing several reasons that confusion and consumer complaints are often concentrated around this type of care and noting that, given the legal obligations that exist to provide emergency care irrespective of consumers' ability to pay, a rule limited to debts incurred from emergency services would not have the same unintended consequences regarding access to care as a rule applied to private medical providers.

Other considerations. One financial institution small entity representative remarked that the issue of medical debt in general is a complex one that cannot and should not be addressed through a CFPB rulemaking. This small entity representative stated that, instead, Congress should enact legislation to reform medical billing and insurance practices. Two debt collector small entity representatives stated that the problem with medical debt is not credit reporting but the high costs of care and insurance, and those problems should be addressed through other vehicles, not the FCRA.

Two debt collector small entity representatives cited several reasons that they believe the CFPB lacks the statutory authority to finalize the proposals under consideration, including that the effect of the proposals under consideration would be to improperly regulate healthcare policy, an area for which Congress has delegated oversight to other Federal agencies.

8.5 Small entity representative feedback related to implementation date

In general. Small entity representatives generally stated that the proposals under consideration, if adopted, would require significant changes in terms of FCRA compliance. They also stated that it was challenging to provide a suggested implementation timeframe given the lack of detail in some of the proposals under consideration but that a period of at least several years would be needed.

Consumer reporting agency small entity representatives. Two consumer reporting agency small entity representatives stated that implementation would require, at a minimum, time to receive and understand the rule, to update internal compliance procedures, to complete internal and customer education and training, and to revise customer contracts and audit processes. They stated that it might be necessary to add staff, who would then need to be trained, as well. The small entity representatives stated that at least two to three years would be needed based on prior experience, and perhaps more if new internal technology platforms needed to be built. One of the consumer reporting agency small entity representatives stated that, depending on the scope of an eventual rule, they might decide to leave the consumer reporting market altogether rather than implement the rule, which they stated could harm consumers.

Two data broker small entity representatives stated that entities that would be newly required to comply with the FCRA would incur significant costs to build operational processes, procedures, and controls, and to begin monitoring and testing for compliance. These small entity representatives stated that coming into compliance would take years. One estimated that a period of five years was optimistic because changes might need to be made at every step of the information flow process from data provider to data user. This small entity representative specifically mentioned implementation burdens and costs associated with building a dispute system, maintaining cybersecurity insurance, working with data providers that might be considered FCRA furnishers under the rule, and increased time and effort dedicated to audits. This small entity representative stated that, if the CFPB pursued all the proposals under consideration in the broadest manner possible, their company might exit the market instead of implementing the rule.

Financial institution small entity representatives. One financial institution small entity representative stated that a minimum of three years would be essential. This small entity representative asked the CFPB to consider the cumulative effects of other rules that small financial institutions might need to implement in the coming years, including the CFPB's small business lending rule, the CFPB's Personal Financial Data Rights rule, and revisions to the Community Reinvestment Act, on top of routine compliance work. The small entity representatives stated that the proposals under consideration are complex and, if broadly construed, would affect every operational facet of their institution. One financial institution small entity representative stated that they could not estimate an implementation period because of the high-level nature of the proposals under consideration. The small entity representative stated that, in general, entities in their market typically require 18 to 24 months to implement a smaller-scale rule, and that they would need longer if the rule revised the definition of credit report or included requirements regarding the resolution of legal disputes.

Debt collector small entity representatives. Two small entity representatives provided feedback on an implementation period for the medical debt collection proposals under consideration. Both stated that a period of at least three years would be appropriate. They stated that this would be the time required to review and understand any final rule, obtain outside assistance such as legal counsel, rewrite their policies and procedures and client contracts, update and conduct audits and compliance training, update internal technology and systems, discuss any changes with medical providers, and work through any compliance questions that might arise. For example, the small entity representatives stated that, if the medical debt-related proposals under consideration were finalized, they would need to shift focus from credit reporting medical accounts in collections to other collection methods.

8.6 Small entity representative feedback related to potential impacts on small entities

8.6.1 General feedback regarding scope

In general, the small entity representatives expressed appreciation for having been included in the CFPB's SBREFA process but voiced concerns that many of the proposals under consideration, as described in the Outline and by the CFPB during the Panel meetings, lacked clarity and important details. Several small entity representatives remarked that, for example, the scope of certain proposals under consideration and of certain key definitions was unclear and that, as a result, they could not estimate the likely costs of the proposals under consideration on their businesses. A few small entity representatives stated that they were not given sufficient time with the Outline to provide cost estimates.

A few small entity representatives stated that the CFPB should study the issues under consideration further before proceeding to a proposed rule. One stated that the CFPB should withdraw the proposals under consideration and consider less burdensome alternatives before determining how to proceed. Others stated that the CFPB should complete a follow-up SBREFA process or an Advance Notice of Proposed Rulemaking before proceeding to a proposed rule.

As discussed in section 8.5, several small entity representatives expressed concern about possible unintended consequences of the proposals under consideration and stated that certain of the proposals could, if broadly construed, cause many small entities to close their businesses, which they stated would harm businesses and consumers.

8.6.2 Small entity representative feedback related to potential disproportionate impacts of the proposals under consideration on small businesses

Consumer reporting agency small entity representatives. A consumer reporting agency small entity representative asked the CFPB to pay close attention to the potential impacts the rulemaking could have on small businesses. This small entity representative stated that, because small businesses operate with limited financial resources and leaner margins than larger players, they have less ability than larger players to absorb the costs of regulatory changes. As a result, the proposals, if finalized, could require them to scale down or sell their current product and service offerings. While supportive of the overall goal of promoting fair and accurate credit

reporting, they asked the CFPB to be mindful of such unintended consequences and resulting negative effects for consumers such as restricted access to, and increased cost of, credit.

A background screener small entity representative expressed concern that the data broker proposal under consideration could eliminate the $1 to $2 billion small-business segment of the employment screening market by causing small data providers and small employment screeners to close their businesses—the former because they would not be able to, or want to, incur the costs of being FCRA consumer reporting agencies, and the latter because their information sources would no longer exist. The small entity representative stated that this would harm consumers because small businesses provide consumers better, more personalized service than larger firms.

One consumer reporting agency small entity representative stated that small entities could face disproportionate costs from the data security and systemic disputes proposals under consideration. The small entity representative stated that the proposals could lead to a significant class action regarding data security that could quickly put a small entity out of business. The small entity representative stated that this would harm consumers because small entities are sometimes the only consumer reporting agencies that serve certain consumer populations. The small entity representative also expressed concern about the costs of handling credit header data disputes, if that data were to be defined as a consumer report, particularly given the prevalence of dispute mills. The small entity representative stated that handling such disputes would significantly increase their company's ongoing costs, and those costs would be passed to consumers in the form of more expensive consumer reports.

One data broker small entity representative that works with consumer-authorized data stated that their company has already invested significantly in compliance infrastructure, including for FCRA compliance for certain of its services. This small entity representative believed that the company's current infrastructure could support the proposals under consideration but that additional staff could be necessary if disputes increased. This small entity representative believed that their company would not need to restrict or eliminate any service offerings, that current non-FCRA services would not lose revenue, and that additional regulatory clarity would help it develop new services in compliance with relevant laws and regulations.

Financial institution small entity representatives. Two financial institution small entity representatives stated that community banks already face disproportionate compliance costs relative to larger institutions due to limited resources, including limited staffing and technology. They asked the CFPB to consider that small entities rely on manual processes, so it is more difficult and costly for them than for larger institutions to implement large-scale operational changes.

Debt collector small entity representatives. Two debt collector small entity representatives stated that the proposals under consideration would significantly negatively affect the debt collection industry, which is almost entirely comprised of small businesses, as well as the companies the debt collectors serve, including but not limited to medical providers. The small entity representatives stated that larger entities would be better able to incur costs related to the proposals under consideration, with the result being further consolidation in the debt collection market. The small entity representatives provided a report that advocated for the CFPB to study

how changing the information on consumer reports, such as by removing medical debt information, could affect both consumers and users of consumer reports, such as financial institutions.

8.6.3 Small entity representative feedback related to the cost and availability of credit to small entities

Two debt collector small entity representatives stated that the medical debt collection proposals under consideration could cause creditors to increase their minimum credit scores for obtaining credit as consumers' credit scores increase (*i.e.*, credit score creep), their cost-of-living factors, or both. They stated that this would decrease small entities' access to, or increase their cost to obtain, credit, which would make it harder or more expensive to expand their businesses, buy supplies, or support their employees.

One small entity representative stated that, depending on what the CFPB requires regarding the FCRA's written instructions of the consumer permissible purpose, it could slow down their process of getting approved for a small business loan because creditors lending to small businesses check the personal credit of the business owner and may rely on the owner's written authorization to do so. The small entity representative noted that this could cause problems for small businesses that need to obtain credit quickly.

9. Panel findings and recommendations

9.1 Findings regarding number and types of small entities affected

For the purposes of assessing the impacts of the proposals under consideration on small entities, "small entities" are defined in the Regulatory Flexibility Act to include small businesses, small nonprofit organizations, and small government jurisdictions. A "small business" is defined by the SBA's Office of Size Standards for all industries in the NAICS. The CFPB has identified several categories of small entities that may be subject to the proposals under consideration: (1) entities that meet (or would meet, if the proposals were adopted) the definition of consumer reporting agency in FCRA section 603(f), (2) entities that furnish information to consumer reporting agencies, and (3) creditors that use medical debt collection information in making credit eligibility determinations. These entities would include consumer reporting agencies, data brokers, data aggregators, data furnishers, and creditors that use medical debt information in credit eligibility or continued credit eligibility determinations. An entity can be classified in multiple categories.

According to the SBA's Office of Size Standards, depository institutions are small if they have no more than $850 million in assets. Non-depository firms that may be subject to the proposals under consideration have a maximum size of $47 million in annual receipts, though several have lower thresholds (see Table 1 above). Other small entities are defined by their industries. The specific size standards are included in Table 1.

Table 3 shows the number of small businesses that may be subject to the proposals under consideration, in order of NAICS code. The numbers in Table 3 are based on December 2022 credit union and bank Call Report data, 2017 Statistics of U.S. Businesses (SUSB) data from the U.S. Census Bureau, and 2017 SBA size standards (for 2023 SBA size standards, see Table 1 above).[39] Not all small entities within each included NAICS category would be subject to the proposals under consideration. The CFPB is not able to estimate with precision the share of entities that would be affected by a rule finalizing the proposals under consideration.

Table 3: Estimated share of small entities by NAICS category

NAICS Codes	NAICS Description	Total Number of Entities	Number of Small Entities	Percent Small	Small Business Administration Size Standard (2017) ($ Million)
511140	Directory and Mailing List Publishers	534	522	97.8%	1250 (Employees)
511110	Newspaper Publishers	4,206	4,159	98.9%	1000 (Employees)
511210	Software Publishers	10,014	9,395	93.8%	38.5 (Revenue)
517311	Wired Telecommunications Carriers	3,364	3,308	98.3%	1500 (Employees)
517312	Wireless Telecommunications Carriers (except Satellite)	3,090	3,065	99.2%	1500 (Employees)
518210	Data Processing, Hosting, and Related Services	10,860	9,868	90.9%	32.5 (Revenue)
519130	Internet Publishing and Broadcasting and Web Search Portals	6,546	6,435	98.3%	1000 (Employees)
519190	All Other Information Services	1,167	1,143	97.9%	27.5 (Revenue)
522110	Commercial Banking	4102	3149	76.8%	850 (Assets)

[39] Calculations for NAICS 522110, 522130, and 522180 are based on credit union and Call Report data from December 2022 using 2023 Small Business Administration size standards (effective Jan. 1, 2022). Calculations for all other NAICS codes are based on revenue or employee size from the latest 2017 SUSB data by the U.S. Census Bureau, *The Number of Firms and Establishments, Employment, Annual Payroll, and Receipts by Industry and Enterprise Receipts Size: 2017* (May 28, 2021), https://www2.census.gov/programs-surveys/susb/tables/2017/us_6digitnaics_rcptsize_2017.xlsx and https://www2.census.gov/programs-surveys/susb/tables/2017/us_state_naics_detailedsizes_2017.xlsx. Calculations for the number and share of small entities were made using the 2017 Small Business Administration Table of Small Business Size Standards (effective Jan. 1, 2017) for consistency to avoid over-estimates due to inflation in later years. The tabulations and shares were computed according to available enterprise size cells.

NAICS Codes	NAICS Description	Total Number of Entities	Number of Small Entities	Percent Small	Small Business Administration Size Standard (2017) ($ Million)
522130	Credit Unions	4862	4366	89.8%	850 (Assets)
522180	Saving Institutions and Other Depository Credit Intermediation	604	417	69.0%	850 (Assets)
522220	Sales Financing	2,367	2,112	89.2%	38.5 (Revenue)
522291	Consumer Lending	3,037	2,905	95.7%	38.5 (Revenue)
522292	Real Estate Credit	3,289	2,872	87.3%	38.5 (Revenue)
522310	Mortgage and Nonmortgage Loan Brokers	6,809	6,643	97.6%	7.5 (Revenue)
522320	Financial Transactions Processing, Reserve, and Clearinghouse Activities	3,068	2,916	95.0%	38.5 (Revenue)
522390	Other Activities Related to Credit Intermediation	3,772	3,610	95.7%	20.5 (Revenue)
531110	Lessors of Residential Buildings and Dwellings	52,030	51,328	98.7%	27.5 (Revenue)
531210	Offices of Real Estate Agents and Brokers	106,844	105,445	98.7%	7.5 (Revenue)
531311	Residential Property Managers	35,884	34,869	97.2%	7.5 (Revenue)
541214	Payroll Services	4,328	4,077	94.2%	20.5 (Revenue)
541511	Custom Computer Programming Services	62,205	60,959	98.0%	27.5 (Revenue)
541512	Computer Systems Design Services	44,324	43,471	98.1%	27.5 (Revenue)
541611	Administrative Management and General Management Consulting Services	73,910	72,499	98.1%	15 (Revenue)
541613	Marketing Consulting Services	36,605	36,063	98.5%	15 (Revenue)
541618	Other Management Consulting Services	7,461	7,409	99.3%	15 (Revenue)
541810	Advertising Agencies	12,336	11,897	96.4%	15 (Revenue)
541860	Direct Mail Advertising	2,282	2,143	93.9%	15 (Revenue)

NAICS Codes	NAICS Description	Total Number of Entities	Number of Small Entities	Percent Small	Small Business Administration Size Standard (2017) ($ Million)
541910	Marketing Research and Public Opinion Polling	4,296	4,063	94.6%	15 (Revenue)
561440	Collection Agencies	3,224	3,016	93.5%	15 (Revenue)
561450	Credit Bureaus	307	266	86.6%	15 (Revenue)
561491	Repossession Services	701	690	98.4%	15 (Revenue)
561611	Investigation Services	3,917	3,860	98.5%	20.5 (Revenue)
713210	Casinos (except Casino Hotels)	221	126	57.0%	27.5 (Revenue)
713290	Other Gambling Industries	1,716	1,640	95.6%	32.5 (Revenue)

9.2 Findings and recommendations regarding related Federal laws and regulations

As discussed in section 2.3 above, the CFPB identified other Federal statutes and regulations related to consumer reporting that have potentially duplicative, overlapping, or conflicting requirements with the proposals under consideration. Small entity representatives also provided suggestions of potentially related Federal statutes and regulations. The statutes and regulations identified by both the CFPB and by small entity representatives include TILA and Regulation Z, the FDCPA and Regulation F, and the GLBA and Regulation P.

Some small entity representatives added that the proposals under consideration might be duplicative in certain respects of requirements or prohibitions in Federal laws and regulations including the Electronic Fund Transfer Act and Regulation E, the Federal Trade Commission Act, the Affordable Care Act, the No Surprises Act, and the Health Insurance Portability and Accountability Act. Some small entity representatives also stated that the CFPB should consider the potential implications of the proposals under consideration for entities' compliance with the Bank Secrecy Act, the USA PATRIOT Act, Equal Employment Opportunity laws, and Medicare cost reporting rules. A few small entity representatives noted that the CFPB should consider the intersection between the proposals under consideration and the CFPB's proposed Personal Financial Data Rights rulemaking.

One consumer reporting agency small entity representative noted that the CFPB should consider how the proposals under consideration would interact with state consumer reporting laws, noting that uniform Federal standards are preferable to a patchwork of state laws. One debt collector small entity representative stated that many state laws already address the CFPB's concerns related to reporting of inaccurate information and protecting consumer privacy.

The Panel recommends that the CFPB continue to evaluate the extent to which Federal laws and regulations have potentially duplicative, overlapping, or conflicting requirements with the proposals under consideration, and that the CFPB continue to coordinate with the other Federal agencies responsible for relevant laws and rules. The Panel also recommends that the CFPB consider whether any state laws already address any of the concerns the proposals under consideration are designed to target.

9.3 Compliance burden and potential alternative approaches

9.3.1 Recommendations regarding data brokers

The Panel recommends that the CFPB carefully consider the scope of entities that it is proposing to cover as consumer reporting agencies and the type of communications that it is proposing would constitute "consumer reports," including the impacts of such coverage on uses of certain information for purposes such as fraud prevention and law enforcement. The Panel also recommends that the CFPB consider how best to provide guidance regarding the types of data that are "typically used" for FCRA-covered purposes in order to provide clarity concerning coverage under the rule. For example, the Panel recommends that the CFPB consider providing a list of examples of types of data that would qualify as typically used data.

The Panel also recommends that the CFPB consider whether the data broker proposals under consideration might cause unintended consequences for consumers and certain industries, and if so, whether there are ways to minimize those consequences. For example, the Panel recommends that the CFPB consider whether the burdens related to the proposals under consideration could cause some small entities to exit the market.

9.3.2 Recommendations regarding defining "assembling or evaluating"

The Panel recommends that the CFPB further clarify what activities fall within the scope of its proposed interpretation of "assembling or evaluating" in the FCRA definition of "consumer reporting agency." The Panel also recommends that the CFPB consider whether the CFPB's recently issued Personal Financial Data Rights Proposed Rule impacts how the CFPB should approach the proposals under consideration. The Panel further recommends that the CFPB request public comment on the potential implications of the proposal under consideration for technology providers and platforms used by consumer reporting agencies and others in mortgage lending and other industries.

9.3.3 Recommendations regarding "credit header" data

The Panel recommends that the CFPB continue to consider whether and when the communication of credit header data by consumer reporting agencies constitutes a consumer report. To the extent that the CFPB proposes that the communication of credit header data constitutes a consumer report, the Panel recommends that the CFPB consider clarifying the characteristics of credit header data that support that interpretation. The Panel also recommends that the CFPB consider the ways that entities currently use credit header data, including for identity verification; fraud prevention and detection; in employment background checks and

other investigations; and in digital advertising. The Panel recommends that the CFPB consider the impacts on such uses if communications of credit header data are consumer reports, and ways to mitigate any negative effects.

9.3.4 Recommendations regarding targeted marketing and aggregated data

The Panel recommends that, in evaluating whether and when the communication of aggregated consumer report information constitutes or does not constitute a consumer report, the CFPB continue to consider the consumer harms it is seeking to prevent and whether the CFPB's definition might preclude the continued use of aggregated data for purposes like internal account reviews by financial institutions and economic research by government agencies and others. Regarding targeted marketing, the Panel recommends that the CFPB consider whether the proposal under consideration could be revised to permit targeted marketing in situations where there is low risk of consumer harm.

9.3.5 Recommendations regarding written instructions of the consumer

The Panel recommends that, in developing any content to be included in a consumer's written instructions, the CFPB carefully consider how to maximize consumer understanding of the scope of their authorization, for example by using plain language and avoiding lengthy disclosures. The Panel further recommends that the CFPB permit consumers' written instructions to be obtained electronically (whether by using an electronic signature, check box, or otherwise), as well as through more traditional methods such as paper disclosure forms. The Panel also recommends that the CFPB request public comment on the appropriate scope and duration of a consumer's authorization, as well as on which entities in the consumer reporting ecosystem should be required to memorialize or confirm consumers' written instructions. The Panel also recommends that the CFPB endeavor to ensure that any written instructions requirements do not conflict with other regulatory frameworks for consumer authorization of data sharing, including any framework adopted in a final CFPB Personal Financial Data Rights Rule. As an alternative approach, the Panel recommends that the CFPB consider requiring data deletion upon consumer request rather than one-time-use consumer authorization.

9.3.6 Recommendations regarding legitimate business need

The Panel recommends that the CFPB consider clarifying how the proposal under consideration regarding legitimate business need would relate to or impact other FCRA permissible purposes. The Panel also recommends that the CFPB consider whether limiting the consumer-initiated transactions prong of this permissible purpose to eligibility determinations for transactions that are for a consumer's personal, family, or household purposes might impede the use of consumer reports in circumstances where their use would be beneficial to consumers. Finally, regarding the account review prong, the Panel recommends that the CFPB consider providing examples of when the use of a consumer report is actually needed to make a decision about whether the consumer continues to meet the terms of an account.

9.3.7 Recommendations regarding data security and data breaches

The Panel recommends that the CFPB consider options to minimize the burden of the proposal under consideration on small entities while achieving the purposes of the rulemaking. For example, the Panel recommends that the CFPB consider capping damages that consumer reporting agencies would be required to pay in the event of a data breach and exempting breaches involving certain types of consumer reports to the extent the CFPB has authority to do so. The Panel also recommends the CFPB consider, as an alternative, extending the application of the FTC's GLBA Safeguards Rule to entities that are not already covered by that rule. The Panel also recommends that the CFPB consider whether burdens related to the proposal under consideration could cause some small consumer reporting agencies to exit the market.

9.3.8 Recommendations regarding disputes involving legal matters

The Panel recommends that the CFPB clarify in any proposed rule that the CFPB is not proposing to require consumer reporting agencies or furnishers to distinguish between disputes involving legal matters and other disputes for purposes of the FCRA's dispute obligations, but rather to investigate all disputes in accordance with the FCRA's requirements, regardless of how they might be characterized. The Panel also recommends that the CFPB consider providing examples of types of disputes that could be characterized as legal in nature but that must nonetheless be investigated under the FCRA.

9.3.9 Recommendations regarding disputes involving systemic issues

The Panel recommends that the CFPB clarify the definition of a systemic issue for purposes of the proposal under consideration. The Panel recommends that, in doing so, the CFPB should consider providing examples of types of errors that would or would not be considered "systemic" if they were the basis of a consumer dispute. The Panel also recommends that the CFPB consider how to mitigate any unintended consequences of the proposal under consideration, such as potential abuse by, for example, credit repair organizations, and whether a different approach is warranted for consumer reporting agencies that furnish "one-time-use" consumer reports.

The Panel further recommends that the CFPB consider ways to reduce any logistical challenges or potential consumer confusion that might result from the aspects of the proposal under consideration that would provide consumers with a specific process for disputing potentially systemic issues and that would require a notice to affected consumers of the outcome of a dispute concerning systemic issues.

The Panel notes that it appreciates small entity representatives' feedback about the importance of consumer education regarding consumer reporting.

9.3.10 Recommendations regarding medical debt collection information

The Panel recommends that the CFPB clarify the types of medical debts that would be subject to the prohibitions in the proposals under consideration. The Panel recommends that, in doing so, the CFPB consider whether it will be feasible for creditors and consumer reporting agencies to determine if certain types of medical debts meet the CFPB's definition. The Panel recommends

that the CFPB request public comment on how the proposals under consideration may impact the options that consumers have to obtain and pay for medical services. The Panel also recommends that the CFPB continue to gather information about the likely impacts of any rule on any small medical care providers that may be impacted by the rule. The Panel further recommends that the CFPB request public comment on the potentially negative effects to consumers and small entities if certain medical debts cannot be considered in making underwriting decisions or be included on consumer reports, and that the CFPB consider any conflicting obligations on creditors under TILA and Regulation Z. The Panel also recommends that the CFPB consider whether the burdens related to the proposals under consideration could cause some small medical care providers and small debt collectors to exit the market.

9.3.11 Recommendations regarding implementation period

The Panel recommends that the CFPB continue to consider an appropriate implementation period for any final rule and that the CFPB tailor the implementation period according to the scope of any such rule, with a focus on the time necessary for entities who are not currently complying with the FCRA to begin to do so. The Panel recommends that the CFPB also consider the time that vendors would need to complete the work necessary to assist small entities in coming into compliance with any final rule. The Panel also recommends that the CFPB request public comment on ways to facilitate implementation for small entities and on the proposed implementation period.

9.3.12 Recommendations regarding potential impacts on small entities

The Panel recommends that the CFPB continue to solicit input from small entities about the costs of, and alternatives to, the proposals under consideration, including how costs might disproportionately affect small entities and small entities' access to and cost of credit

APPENDIX A: WRITTEN FEEDBACK SUBMITTED BY SMALL ENTITY REPRESENTATIVES

Written feedback submitted by the following small entity representatives is attached:

- Mara Berman, Pinwheel
- Jack Brown, Gulf Coast Collection Bureau, Inc.
- Phil Chang, Method Financial
- Tim Gordon, InfoMart
- Jeff Jacobson, New Market Bank Comment Letter
- Nick Lawson, Argyle Systems Inc.
- Krystal Pekala, ACRAnet
- Heather Russell-Schroeder, Credit Bureau of Council Bluffs
- Evelyn Schroeder, First Security Bank & Trust
- Giovanni Sollazzo, AIDEM Technologies
- Jennifer Whipple, Collection Bureau Services, Inc.
- Jim Wilmot, Arlington Community Federal Credit Union
- Walt Wojciechowski, MicroBilt

November 6, 2023
Via electronic submission to: CFPB_consumerreporting_rulemaking@cfpb.gov

Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Small Business Advisory Review Panel for Consumer Reporting Rulemaking: Outline of Proposals and Alternatives Under Consideration

Pinwheel thanks the Consumer Financial Protection Bureau (CFPB) for convening the Small Business Advisory Review Panel for its Consumer Reporting Rulemaking, inviting Pinwheel to participate as a Small Entity Representative (SER), and providing an opportunity for Pinwheel to submit written comments.

I. Introduction

Pinwheel was founded in 2018 with the mission to create a fairer financial system by unlocking consumers' access to their payroll information. Pinwheel helps empower consumers to take control of their data and to use it to gain access to financial services, credit, and for other purposes a consumer may request. As both a consumer reporting agency and a furnisher, Pinwheel also provides a means of recourse for consumers who believe their data is incorrect.

The CFPB's stated objective of this rulemaking is to regulate many data broker activities as covered under the Fair Credit Reporting Act (FCRA), which would prohibit the sale of covered data for purposes other than those authorized under the FCRA. Most notably, this would limit the sale of certain data broker data for advertising or marketing, for the most part constraining the sale of data to only those companies or persons to whom the consumer applied for credit, insurance, employment, housing, or some other service, or to whom the consumer otherwise authorized access. This would also subject certain data brokers to FCRA obligations, ensuring, for example, that consumers have a right to obtain data about themselves held by data brokers and to dispute inaccuracies in that data.[1]

The proposals identify the need for clear rules defining what entities are considered a "data broker," when a data broker is a consumer reporting agency, and what constitutes a "consumer report." Pinwheel supports the CFPB's goal to clarify these definitions.

Further, the FCRA proposals align with the CFPB's proposed rule to implement section 1033 of the Dodd-Frank Act by aiming to increase consumer control of financial information and transparency as to how and why entities access and use consumers' information. The Consumer Reporting Rulemaking and the proposal to implement Section 1033 could also allow consumers to make use of their financial and payroll data to enable access to financial services, and provide "credit invisibles" and thin-file consumers more opportunities to participate in credit markets.

Pinwheel is generally supportive of the proposals set forth in the outline intended to help consumers assert control of and protect their personal information and financial data. While there

[1] CFPB, Small Business Advisory Review Panel for Consumer Reporting Rulemaking, Outline of Proposals Under Consideration, p. 3, (Sep. 15, 2023), https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-rule-sbrefa_outline-of-proposals.pdf.

are some substantive issues to clarify and fine-tune in the proposals, the overall approach will provide more clarity to help businesses comply with the FCRA and better protect consumers. A clearer regulatory framework for companies that handle consumer information should ensure that important concepts such as data minimization and data privacy are not sacrificed.

II. Data Security and Data Breaches

Q29. What data security improvements, and associated costs, would consumer reporting agencies incur if they were liable under the FCRA for all data breaches & Q7. What factors disproportionately affecting small entities should the CFPB be aware of when evaluating the proposal under consideration? Would the proposal under consideration provide unique benefits to small entities?

> *In the Consumer Reporting proposal, the CFPB is considering placing strict liability for data breaches on consumer reporting agencies and furnishers. However, even if new rules determine where liability resides, the consumer is still harmed by the very occurrence of a data breach. Pinwheel believes that strict liability would not lead to improved compliance practices by consumer reporting agencies and furnishers, but instead will likely put many small entities out of business. Specifically, expanding a small business consumer reporting agency's liability for "data breach" to unauthorized access of a consumer report by a user would likely put an undue and unfair burden on small consumer reporting agencies. Consumer reporting agencies are obligated under the FCRA to implement reasonable procedures which should include due diligence of users and contractual requirements of users to have permissible purpose and maintain information security safeguards and standards. If users are bad actors and it's not reasonable for the consumer reporting agency to have known this, then it shifts an undue burden to consumer reporting agencies.*
>
> *Additionally, insurance may be unavailable to small entities which could negatively impact consumers. Class action litigation could also increase, leading to enormous settlements and verdicts, which would benefit plaintiffs' attorneys and harm consumers. Moreover, the consumer will still be harmed by identity theft's downstream consequences including financial loss, inconvenience, emotional trauma, the stress of data monitoring, and uncertainty about when and where such data may be used against the consumer by a bad actor. Importantly, the proposals to impose strict liability on consumer reporting agencies that may have done nothing wrong fail to address the consumer harm caused by the actual bad actors.*

Q5. Other than compliance costs, what costs, burdens, or unintended consequences should the CFPB consider with respect to the proposal under consideration? Please quantify if possible. What alternatives, if any, would mitigate such costs, burdens, or unintended consequences?

> *Consumers have the right to request disclosures of and to dispute information on their consumer reports, and consumer reporting agencies and furnishers must retain consumer information for extended periods to be able to comply with those requirements. Two factors that increase the risks of data and privacy breaches are the amount of data retained and how long data is retained. An unintended consequence of the FCRA's application to a broad spectrum of data brokers is the greater potential and opportunity for data breaches due to the longer data retention requirements, beyond which is required for*

the intended use of the data.[2] *The General Data Protection Regulation (GDPR), the Gramm-Leach-Bliley Act (GLBA), the California Consumer Privacy Act (CCPA), and other privacy laws are based on privacy by design and data minimization, and allow consumers to require deletion of their data. These privacy laws work in conjunction with the FCRA to avoid overlap and the unintended consequences of too much data being held for too long.*[3]

Pinwheel supports an information security safeguards standard with which consumer reporting agencies would need to comply under the FCRA. One approach would be to extend the GLBA Safeguards Rule to consumer reporting agencies. The Safeguards Rule, promulgated under GLBA, requires financial institutions to implement and maintain certain controls to protect the security, integrity, and confidentiality of consumer data. Specifically, the Rule imposes standards prohibiting the unauthorized disclosure of customer information, requiring service providers to implement and maintain those same controls, and requiring the secure disposal of customer information.

III. Definitions of "Consumer Report" and "Consumer Reporting Agency"

Q8. If the CFPB proposes the approaches described above, what types of entities would fall within the definition of "consumer reporting agency"? Are there certain types of entities that should not fall within the definition of "consumer reporting agency"?

Depending on specific consumer permissions, Pinwheel may fall within the definition of "consumer reporting agency." Consumers engage directly with Pinwheel after initially seeking out a specific financial service through a financial institution. The consumer provides written instructions and consent to Pinwheel to access the consumer's payroll provider account to pull income and employment data to be used for a product or service of the financial institution selected by the consumer. Then, at the direction of the consumer, Pinwheel compiles that data and sends it to companies selected by the consumer that will make a lending or other decision for that consumer.

Under the proposals under consideration, it appears that most entities that handle or transmit consumer data would fall under the definition of "consumer reporting agency." If the definition of "consumer reporting agency" is broadened to include entities that previously may not have been subject to FCRA, these entities would need clarity as to their obligations as a consumer reporting agency and to understand which exceptions, if any, may apply and under what circumstances.

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[2] Currently, data brokers are not required to retain data (even though they may chose to retain data).

[3] Federal Trade Commission, Data Brokers A Call for Transparency and Accountability, FN 88, (May 2014), https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf (Commissioner Wright believes that in enacting statutes such as the Fair Credit Reporting Act, Congress undertook efforts to balance the benefits of information collection and sharing (fair and accurate credit reporting is beneficial to both businesses and consumers) against the costs of such information collection and sharing (potential risks to confidentiality, accuracy, relevancy, and appropriate use). In doing so, Congress carefully articulated the types of information to be protected, limited the use and access to such information, and provided certain consumer protections relating to the accuracy of and the ability to dispute and correct such information. In the instant case, Commissioner Wright is wary of extending FCRA-like coverage to other uses and categories of information without first performing a more robust balancing of the benefits and costs associated with imposing these requirements.).

Q10. If the CFPB proposes the approach described above with respect to data brokers that sell certain types of data, would it be sufficient to provide a standard for (or guidelines about) what types of data are "typically" used for an FCRA-covered purpose or should the CFPB provide a list of such data types? What standards, guidelines, or data types should the CFPB consider for each FCRA-covered purpose?

A standard for or guidelines about what types of data are typically used for a FCRA-covered purpose would provide clarity to entities that handle that type of data. Entities should always obtain consumer permission to access the data.

An example is payroll data held by a payroll provider or employer. Pinwheel believes it would be beneficial to consumers for this data to be covered under the CFPB's final rule to implement Section 1033 and the FCRA. This data can enable consumers to access credit and can be used for employment eligibility determinations because it bears on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. However, if income information is used for a non-FCRA purpose, such as determining if a consumer reaches an income threshold to be eligible for a vacation package, FCRA governance may not be appropriate. A chart that matches data type to data use, would be a useful tool to provide clarity.

Q11. Are there other ways in which the CFPB should be thinking about how and when data broker data should be considered a consumer report furnished by a consumer reporting agency?

To determine when data broker data should be considered a consumer report, it is important to understand how the data is collected and for what purpose. Specifically, the CFPB should consider whether a data broker receives data from a "furnisher" as defined by FCRA, whether the consumer provides consent for the data to be used for certain purposes, whether the data broker purchases the data from a third party that has collected the data, and consumer expectations.

Compiling data to create a consumer report should trigger FCRA and require the compiler of such data to be considered a "consumer reporting agency" (even before there is "reporting"), and then sharing the consumer report with third parties would trigger FCRA obligations for "users." Also, the definitions of "consumer report" and "consumer reporting agency" should not be circular or interdependent.

Q12. If any of the proposals under consideration that would make a data broker subject to the FCRA as a consumer reporting agency were finalized, do you anticipate that your firm or your customers will seek to obtain consumer consent before providing consumer reports to third parties? If so, what challenges do you foresee with obtaining consumer consent?

Pinwheel obtains consumer consent before accessing any consumer information that is used in Pinwheel's services. Pinwheel also requires its customers to obtain all consents required as part of the services Pinwheel's customers offer to consumers. Pinwheel believes that data brokers should obtain consumer consent if data brokers provide consumer reports to third parties. This may be a challenge to "third-party data brokers" that do not interact directly with consumers.

Q14. What are the types of intermediaries, vendors, and other entities that transmit consumer data electronically between data sources and users? For any such company, describe the types of information the company obtains, from which data sources, who determines the sources of

information to use, and how the information is transmitted, used, interpreted, or modified by the company.

Pinwheel is an "intermediary" that a consumer has authorized to transmit the consumer's payroll data from a payroll provider to a user that the consumer has requested to receive such information. In the "intermediary" role, Pinwheel obtains information from a consumer's payroll account maintained by a payroll provider or an employer to enable consumers to receive valuable financial services from the user of the information, such as enabling a consumer to switch banks, income verification, personal financial management, or access to credit.

Q15. Are there any circumstances under which the activities of an intermediary, vendor, or other entity that transmits consumer data electronically does not create a risk of harm to a consumer?

Data transmission always creates some risk of harm as the possibility exists that the data could be accessed by outsider hackers or other bad actors or could be used in an unauthorized manner. When a consumer consents to transmission of data, presumably such consumer is doing so because there is an articulated and desired benefit to the consumer which balances against the risk of harm. In sum, it should be transparent to the consumer that the risk of harm always exists but may be mitigated by a benefit to the consumer.

Q16. What types of information do firms typically consider to be credit header data? What types of credit header data are typically sold or purchased and for what purpose(s)? How is data collected for those purposes and how is it stored?

Credit header data typically describes the "above the line" identifying information in a consumer report database including name, address, SSN, telephone numbers, DOB, and other personally identifiable information (PII). This type of information is valuable in fraud prevention and identity services. Pinwheel collects this data with the consumer's permission and stores such data as necessary for the particular Pinwheel service that a customer purchases and to help with fraud prevention. Storage of PII at Pinwheel is subject to Pinwheel's internal policies and external compliance review.

<u>Uses for Identity Verification and Authentication</u>: In an increasingly mobile society, consumer data applications are integral to authenticating the right person, location, and device. Identity verification and authentication solutions demonstrate to users indicia of fraud or other improper activity. These products are not used solely to deny applications, so these uses are not eligibility uses. They rely on data like credit header data that are governed by laws other than the FCRA, namely the Gramm-Leach-Bliley Act (GLBA). For example, online authentication plays a key role in customer convenience in online transactions, where consumers can use their trusted online identities to complete transactions on their timelines through the use of third-party data. At the airport, trusted identity programs driven by consumer data speed travelers through security while enhancing public safety. Identity verification and authentication solutions reduce friction in person and online to make transactions more seamless.

<u>Consumer Fraud Prevention</u>: Consumer data and analytics solutions enhance protection against identity theft while meeting consumers' convenience expectations outside of identity verification and authentication applications. The FTC recognized the benefit that

data has in fraud prevention in its report on Big Data.[4] Fraud prevention and detection services provide information on known fraudsters and fraud strategies and identify potential fraud risks based on comparing applicant-supplied data with data available from third-party sources, historic transactions, and observed behaviors. Subscribers of these types of services use the information provided to mitigate fraud losses. The savings realized by the subscribers result in lower-cost products and services, ultimately benefiting consumers. Consumers are also able to access monitoring products directly to be alerted to identity or fraud issues that may impact them. For example, fraudulent tenant and mortgage applications, as well as fake landlord offers and mortgage swindles, are reduced by consumer data and analytics providers' fraud prevention and verification tools. Fast consumer lending fraud prevention relies on a consumer data network supported by a sophisticated system of consumer data aggregators, analysts, and application providers. Even fraud in consumer disputes from credit repair organizations—which the CFPB has rightly targeted—is reduced with anti-fraud verification from consumer data and analytics providers.[5]

Q17. Under what circumstances do firms typically consider the sale or purchase of credit header data *not* to be a consumer report, and why? What costs would be incurred if such sales or purchases of credit header data were to be considered a consumer report?

Pinwheel does not sell credit header data and currently does not plan to do so. Generally, firms do not consider credit header data to be a consumer report because the data is only identifying information and does not include any credit scores or attributes. Identifying information alone should have no bearing on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. However, firms should take care to avoid using any identifying information that may reflect any of the foregoing. For example, an address may be reasonably reflective of mode of living, and date of birth (DOB) including the year may reflect personal characteristics.

IV. CFPB review of implementation processes and costs

Q42. For the proposals under consideration that are relevant to their businesses, small entity representatives are encouraged to provide specific estimates, information, and data on the projected one-time and ongoing costs of compliance if the proposals were adopted. Information and data on current FCRA compliance costs (baseline costs) will be valuable as well.

Pinwheel has invested significantly in an information security infrastructure that protects consumer data and complies with GLBA safeguards. Pinwheel employs a CISO (Chief Information Security Officer) who works to ensure Pinwheel adheres to ISO, NIST, and PCI compliance standards and has been certified by a third party to such adherence. In connection with Pinwheel's income and employment verification services, Pinwheel has invested resources to establish practices and policies required of a nationwide specialty consumer reporting agency and furnisher and currently complies with the FCRA

[4] FTC, Big Data: A Tool for Inclusion or Exclusion, at 5, (Jan. 2006), https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusionunderstanding-issues/160106big-data-rpt.pdf ("[M]ining large data sets to find useful, nonobvious patterns is a relatively new but growing practice in… fraud prevention.").

[5] *See* CFPB, Don't Be Misled by Companies Offering Paid Credit Repair Services, (Sep.. 2016), https://files.consumerfinance.gov/f/documents/092016_cfpb_ConsumerAdvisory.pdf.

requirements. An increase in the number of disputes may result if FCRA is extended to other areas of Pinwheel's business which may require hiring additional staff to address. However, since all data Pinwheel assembles and evaluates for all of its service offerings is consumer permissioned, disputes and complaints have been minimal, so Pinwheel does not anticipate an immediate increase in staffing and support requirements.

V. Consideration of the impacts on business operation and revenues

Q43. For each of the proposals under consideration above, do you expect that your firm would restrict or eliminate any product or service offerings to comply with the rule? If so, how would the proposals impact those products or services?

Pinwheel would not need to restrict or eliminate any of its current offerings and additional regulatory clarity will help Pinwheel develop new services in the future in compliance with the relevant laws and regulations.

Q44. For each of the proposals under consideration above, please provide information, data, and/or estimates of impacts to your firm's business operations and revenue, including to both current operations and revenues and to future operations and revenues that could potentially be lost.

As discussed above, Pinwheel is currently both a CRA and a furnisher. Pinwheel determined that it was in the best interest of consumers for Pinwheel to implement policies and procedures applicable to a consumer reporting agency as required by the FCRA for the purpose of Pinwheel providing income and employment verification information about consumers to financial institutions and lenders at the request of consumers. Pinwheel wanted to make sure it was protecting consumers by making privacy and security a priority, so it invested resources in setting up security and internal policies and procedures in compliance with the FCRA. Costs incurred at the time involved using outside legal and compliance experts to help develop the policies and set up operations. Pinwheel is currently staffed to continue to support ongoing compliance. If the rulemaking requires Pinwheel to comply with the FCRA in other aspects of its business outside of income and employment verification reports, then Pinwheel believes that current operations will support the new rules as proposed. Pinwheel does not anticipate that revenues associated with current non-FCRA services will be lost since Pinwheel's FCRA-compliant operations would be extended to those other areas of Pinwheel's business.

VI. Conclusion

In conclusion, Pinwheel appreciates the opportunity to submit this feedback to the CFPB in response to its Consumer Reporting Rulemaking. We look forward to continuing to work with the Bureau to promote innovation, consumer protection, and financial inclusion.

Sincerely,

Mara Berman

Mara Berman,
Commercial Counsel, Pinwheel

VIA EMAIL: CFPB_consumerreporting_rulemaking@cfpb.gov and Jennifer.smith@sba.gov

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552
c/o Comment Intake Consumer Financial Protection Bureau

RE: Small Entity Representative ("SER") Jack W. Brown III's Comment to Small Business Review Panel regarding the Fair Credit Reporting Act Proposal (the "Proposal")

Dear Director Chopra and Bureau Staff:

I. Background

My name is Jack W. Brown III, and I am a second-generation operator of a consumer collection agency focused on healthcare self-pay and revenue cycle receivables management. I am a past president of ACA International, the trade association for credit and collection professionals. Over the past 23 years, I have helped develop best practices for healthcare revenue cycle management including credit reporting policies, 501(r) compliance, and communication of charity care policies from the provider to the patient. Accordingly, my comments will mostly focus on the medical debt proposals for the Fair Credit Reporting Act ("FCRA").

Each day, my team has hundreds of interactions with patients regarding their medical bills. Our team works collaboratively with the patient to find the proper resolution of each account we handle. This is a difficult process that requires skill and expertise. The financial component of a healthcare visit is a very complicated process that many consumers do not understand how to navigate. Debt collectors in the healthcare space are some of the top experts in understanding the challenges presented with the financial component of a healthcare visit.

My colleagues and I are concerned that the Proposal as it is now articulated will cause more harm to consumers, not help them with the costs of medical care. First, the Proposal missed several steps in engaging all stakeholders to address the affordability problem. Further, the Proposal may exacerbate America's problem of underinsured families by making it less attractive to have health insurance.

Finally, the proposals to prohibit creditors from reviewing all debts related to a potential borrower conflicts with ability-to-repay requirements for creditors. This undermines the very reason the CFPB was created under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). The Dodd-Frank Act was passed in the wake of the 2008 mortgage crisis to ensure that the American taxpayer would not be on the hook to bail out financial institutions that provided mortgages and other loans to consumers who could not afford the loan. It seems the lessons learned during the Great Recession have been forgotten. Now the very same agency is inserting its opinion that medical debt is not as predictive as other debt to determine a consumer's ability to repay the loan in contrast to actions already taken to address the concerns regarding medical debt in underwriting decisions.

I urge the CFPB, as a first step, to refrain from issuing the Proposal until there is comprehensive research studying the impact of recent changes announced by the Consumer Reporting Agencies (CRAs) to require a one year waiting period before a medical debt can be credit reported; raising the minimum account balance for furnishing to $500; and the deletion of paid in full medical accounts from the consumer's report. These changes, in addition to the heightened notice requirements under Regulation F,[1] and the implementation of the No Surprise

[1] 85 FR 76887, Nov. 30, 2020.

Billing Act have marked a major shift in the marketplace and those changes have not been considered in the underlying reasoning that the CFPB has pursued this rule.

The Real Problem is not Credit Reporting

Medical debt stems from much more than a financial transaction. Healthcare providers deliver lifesaving and prolonging care when we need them most. Recently, they have been referred to as Healthcare Heroes for putting their own safety at risk while caring for patients suffering effects from the COVID-19 virus.

The Healthcare industry constitutes nearly 20 percent of the nation's total Gross Domestic Production (GDP).[2] In 2020, Hospitals provided more than $42 Billion in uncompensated care.[3] Providers are responding to the challenges faced by patients by automatically applying self-pay discounts for uninsured patients and providing other solutions to help consumers grapple with the high cost of care.

The Affordable Care Act has gone a long way in expanding health insurance coverage in the United States, however, there are still too many uninsured Americans. Affordable, comprehensive health care coverage is the most important protection against medical debt. Affordability is the main reason for persons not having coverage.

The systems to allow for consumers to save for and plan for healthcare expenditures has not kept pace with the rate of increase in deductible and out-of-pocket maximum amounts. Over the last 30 years, the health insurance market has seen major changes to how costs are divided between premiums, higher deductibles, and higher share-of-costs plans. A bronze plan under the

[2] Keehan et. al., *National Health Expenditure Projections, 2022-31*, 42 Health Affairs 886 (June 14, 2023) https://www.healthaffairs.org/doi/epdf/10.1377/hlthaff.2023.00403.
[3] Am. Hosp. Assoc. "Uncompensated Hospital Care Cost Fact Sheet" (Feb. 2022) https://www.aha.org/system/files/media/file/2020/01/2020-Uncompensated-Care-Fact-Sheet.pdf.

health exchange created pursuant to the Affordable Care Act carries a maximum out-of-pocket cost of $9,100 per year for an individual and $17,400 for a family.[4] But health savings accounts allow for a maximum annual contribution of $7,300 per year.[5] This simply will not cover a typical family's medical care out-of-pocket expenses.

II. The Proposal Would Have Deleterious Effects on Consumers, Markets, Small Businesses, and the Entire Credit and Debt Collection Industry

- To ensure clear and consistent interpretation, it is important that the CFPB create a definition of medical debt that ties the medical debt to the entity to which the debt is owed. For example, there are significant nuances between surprise medical expenses from emergency room visits and elective or preventive procedures, and health-related items like Advil and Band-Aids routinely purchased at places like Target. To avoid such an overbroad interpretation, and to provide clarity on what is being referred to as "medical debt," we respectfully ask for a clear set of definitions of "medical debt" that differentiates between emergency services and other types of incurred health care related debt.
- Even for medical providers and collection agencies that do not credit report, we have data which highlights that the "message behind the message" that you do not have to pay medical debt, has already harmed providers and their collection agency partners. This will lead to a variety of consequences including the need for more cash-upfront payments and an increase in medical providers turning directly to litigation to seek to recover payment. The economic analysis showing this, and anecdotal support will be provided in comments.
- The Affordable Care Act requires that nonprofit hospitals establish "charity care"—essentially financial assistance policies—for patients unable to cover their expenses. IRS Regulation 501(r) already addresses extraordinary collection activities. For providers in many states, ACA members have seen the threshold at 200% or 300% of the Federal Poverty Level as the starting point before any copays or deductibles need to be paid to a non-profit provider. Since there are already many programs and laws in place to help consumers that truly cannot afford medical debt, the CFPB's efforts are more likely to encourage people that can pay their debt to become free-riders on the medical system, not to address unaffordability. This may not benefit them since hospitals or medical providers can take legal action, or in the case of non-emergency care, not provide care.
- Medical providers and their third-party collection agency partners will need to consider changes to their collection practices for unpaid medical care including

[4] HealthCare.Gov "Out-of-Pocket Maximum/Limit" (last visited Nov. 4, 2023) https://www.healthcare.gov/glossary/out-of-pocket-maximum-limit/.
[5] 26 CFR 601.602 § 2.01.

litigation, denial of care, or pulling out of a market all together. If the CFPB removes the incentive to maintain good credit, consumers will have no reason to pay their medical bills, which will force stakeholders to turn to other remedies sooner and more often. This will ultimately lead to more costs for consumers as a whole to absorb the highs costs associated with litigation, increased costs for small businesses, and a loss of privacy for consumers when their medical debts become part of the public legal record.

- By the CFPB's own admission, medical debt information is less predictive, not "not predictive". Thus, underwriters will have less information to make credit determinations if the CFPB moves forward with its goal to remove all medical debt from credit reports, and credit will be extended in situations when consumers do not have the ability to repay. As such, the host of negative consequences that the CFPB itself has outlined in its ability to repay test in mortgage, and other rules when creditors do not have accurate information will come into play. Similar to the factors of the 2008 financial crisis, which led to the creation of the CFPB, lenders will be operating with blind spots and overlooking debt and legal obligations for consumers who are seeking credit.
- The data analysis supporting the Proposal has serious methodological defects and did not consider data that reflects the current state of the industry or the critical economic impacts of medical debt reporting.
- The Proposal will create overly burdensome costs to small businesses, which will likely result in the reduction of consumer choice, increased upfront costs and costs overall, and less access for patients to lifesaving care services. This Proposal will increase the cost and availability of credit for ACA members, as well as their medical provider clients, since this fundamentally changes the law and will make it harder to collect payment for medical bills. Stymieing collections and changing the credit reporting process will hurt both clients and their third-party collection agencies' bottom lines.
- The Proposal fails to consider, and has done no research, on less expensive alternatives that avoid the significant constitutional problems and reduce monetary impacts on small businesses, and consumers, and governments, such as implementing a waiting period before a medical debt can be reported; allow for deletion of paid medical debt; review marketplace responses to the issue including the vantage score model that reduces the weight of a medical debt on the consumer's score.

Thank you for the opportunity to allow me to participate in this process and share my experiences on these issues. Please find attached with this letter a discussion and analysis of the Proposal along with data and supportive materials.

Best Regards,

Jack Brown III

Jack W. Brown III, President
Gulf Coast Collection Bureau, Inc.

Attachments (1)

Comments of Jack Brown
to
Small Business Review Panel for the Fair Credit Reporting Act Proposal

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Contents

COMMENTS

I. THE CFPB FAILS TO SUPPORT ITS POSITION WITH ANALYSIS AND LACKS LEGAL AUTHORITY TO ISSUE RULES IN THIS AREA

A. The Proposal Lacks Data and Analysis; it Fails to Consider Recent Changes in the Marketplace

Recently, the CRAs changed how medical debt is reported including requiring the deletion of paid medical debt, requiring a one year waiting period before medical debt can be reported, and raising the minimum balance to $500 for medical debt to be included on a consumer's credit report. **Even without CFPB rulemaking, t**he market is responding to concerns about medical debt.

There is evidence that American consumers have seen medical debt on their credit reports decline over the past year as major credit rating agencies removed small unpaid bills and debts that were less than a year old.[6] In addition to the changes announced by the CRAs, Regulation F requires debt collectors to take additional steps to ensure that a consumer has received their validation notice under the Fair Debt Collection Practices Act ("FDCPA") before an account may be reported. Section 1006.38(d)(2) of Regulation F states the upon receipt of a dispute submitted by the consumer in writing within the validation period, a debt collector must cease collection of the debt, or any disputed portion of the debt, until the debt collector: (i) Sends a copy either of verification of the debt or of a judgment to the consumer in writing or electronically in the manner required by § 1006.42; or (ii) In the case of a dispute that the debt collector reasonably determines is a duplicative dispute, either: (A) Notifies the consumer in writing or electronically in the manner required by § 1006.42(a)(1) (requirements for sending the required disclosures) that the dispute is duplicative, provides a brief statement of the reasons for the determination, and refers the consumer

[6] Fredric Blavin et al, "Medical Debt Was Erased From Credit Records for Most Consumers, Potentially Improving Many Americas' Lives" Urban Institute (Nov. 2, 2023) https://www.urban.org/urban-wire/medical-debt-was-erased-credit-records-most-consumers-potentially-improving-many.

to the debt collector's response to the earlier dispute; or (B) Satisfies paragraph (d)(2)(i) (sends verification/judgment) of this section.

This provision has helped ensure that consumers **can** contact the debt collector and provide any information that is needed to get the account properly resolved, including providing any information regarding an insurance company's liability for payment on the account.

In addition to the new regulations, the No Surprises Act[7] is just starting to show improvements in the way consumers are covered when visiting an out of network provider**;** ensuring patients don't get stuck in a dispute between the provider and the insurance company about the proper payment amount when the consumer's insurance carrier does not have a contract with the provider.

The CFPB should not move forward until it first studies and considers the impacts of the changes already made and include the changes that have occurred in their analysis.

B. **The CFPB's Jurisdiction Only Extends to Financial Products and Services**

1. CFPB Authority Under the Dodd-Frank Act

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act[8] (the "Dodd-Frank Act") in response to consumer abuses in mortgages, credit cards, and other financial products. The Dodd-Frank Act made substantial changes to many of the statutes in the Consumer Protection Act and established in Title X, the CFPB. The Dodd-Frank Act assigns to the CFPB some of the rulemaking and enforcement authority that the FTC and banking regulators

[7] Pub. L. No. 116-260 (2021).
[8] Pub. L. No 111-203(2010).

previously held. It also grants the CFPB rulemaking authority regarding unfair, deceptive, or abusive practices.

Notably, the language in the CFPB's Enabling Act grants it the authority to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."[9] The CFPB's jurisdiction is thus limited to "financial products" and "financial services."

A consumer financial product or service is a financial product or service that is offered or provided for use by consumers primarily for personal, family, or household purposes. A financial product or service means one of a handful of specified activities (with certain exceptions):

- Extending credit and servicing loans;
- Extending or brokering leases;
- Providing real estate settlement services;
- Engaging in deposit-taking or funding custodial activities;
- Selling, issuing, or providing stored value cards or payment instruments;
- Check cashing, check collection, or check guaranty services;
- Providing payments or other financial data processing products or services;
- Providing financial advisory services;
- Collecting, maintaining, or providing consumer report information or other account information;
- Debt collection related to consumer financial products or services;
- Products or services permissible for a bank or financial holding company to offer that will impact consumers.

[9] 12 U.S.C. § 5491(a).

Moreover, the CFPB's rulemaking and enforcement authority related to consumer financial products and services is strictly limited to "covered persons." This includes only those who offer or provide a financial product or service, and anyone controlling, controlled by, or under common control with such a person who acts as a service provider for such a person.

Here, the CFPB's consideration of the proposals discussed above goes far beyond the CFPB's statutory authority. While it is clear that the CFPB may regulate the offering and provision of debt collection, what the CFPB is now considering—whether and to what extent, medical debt appears on a consumer's credit report—goes far beyond the realm of mere debt collection. Indeed, while the intention behind the proposals is aimed at credit reporting agencies, the practical effect is a regulation of the healthcare system. The rules now being considered therefore do not fit within the definition of a "financial product" or "service" and the CFPB lacks jurisdiction to issue rules in this area.

2. <u>The Proposal to Restrict Creditors' Ability to Review all of a Borrower's Debt Obligations is Contrary to the Mission of the CFPB.</u>

The CFPB was created in the wake of the "Great Recession" to change the regulatory environment to ensure that financial institutions were not underwriting loans to consumers who could not afford the loan. It appears that the lessons learned in the crisis have been forgotten and the very agency that is charged with preventing another Great Recession is laying the groundwork for the next Great Recession by prohibiting creditors from considering all debt obligations of a potential borrower.

C. By Attempting to Regulate in the Field of Healthcare and Associated Medical Transactions, the CFPB Exceeds its Statutory Authority

The CFPB does not have the authority, expertise, or proper tools to regulate the medical, healthcare, and insurance industries and cannot do so through Regulation V. When Congress

passed the FCRA, it did so with a narrow and explicit prerogative: to promote fair and accurate credit reporting.[10] It did not intend for the Act to be used to regulate the non-financial products and services simply because they are purchased on credit.

Financial services and products play a very limited role in the healthcare and medical services industries and the CFPB has a correspondingly limited authority to regulate or make policies in those fields. In fact, the CFPB has already acknowledged that it lacks authority to regulate within the medical industry by specifically *excluding* medical debt from its definition of "large market" participants in the consumer debt collection market.[11] While promulgating regulations of large market participants, the CFPB stated that it has authority to regulate the debt collection market because that "is a market for financial products and services under the Act" but that debt arising from medical expenses should be excluded because it is "unrelated to consumer financial products or services."[12]

Similarly, and as further detailed below, in many of its public statements, the CFPB takes aim at complex insurance coverage related to healthcare. It is true insurance coverage is a nuanced and complicated process. That is why there are certain Congressional Committees and agencies such as the U.S. Departments of Health and Human Services ("HHS"),[13] Labor ("DOL"),[14] and the Treasury,[15] that are tasked with creating laws and regulations surrounding insurance.[16] In fact, Congress recently passed the No Surprises Act to address some of these issues.[17] Unfortunately,

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[10] *See e.g.*, 3 Fair Credit Reporting Bill, 115 Cong. Rec. S2410-11 (daily ed. Jan. 31, 1969) ("Credit reporting agencies are absolutely essential in today's credit economy. . .my objective in introducing the fair credit reporting bill is to correct certain abuses which have occurred within the industry and to insure that the credit information system is responsive to the needs of consumers as well as creditors.").
[11] 12 C.F.R. § 1090.105.
[12] 77 FR 9597.
[13] 42 U.S.C. § 3501 *et. seq*.
[14] 29 U.S.C. § 551 *et seq*.
[15] 31 U.S.C. § 301 *et. seq*.
[16] *See e.g.*, 26 U.S.C. §§ 9801–9834 (regulating group health plans and assigning enforcement and regulation to the IRS); 42 U.S.C. § 300gg (regulating insurance requirements including limiting cost-sharing and assigning enforcement and regulation to HHS); 42 U.S.C. 1320f (directing HHS to establish a Drug Price Negotiation Program).
[17] Pub.L. 116–260 (2021).

the "research" and data that the CFPB cites for its interest in this issue was collected years before this sweeping law that already addresses many of the issues the CFPB raises about the healthcare system.

Credit reporting laws are not intended to combat high medical costs or simplify insurance coverage. The CFPB's authority to promulgate rules under Regulation V is limited to rules that effectuate the purpose of the FCRA, which is narrow and entirely unrelated to healthcare policy or insurance issues. The FCRA's stated purpose is to support the needs of commerce by providing fair and accurate credit information. Manipulation of what consumer information can appear on a credit report based on external policy considerations is directly contrary to that purpose and exceed the CFPB's grant of authority. Congressional intent regarding the role of the CFPB is clear: first, the FCRA simply does not authorize the CFPB to make industry specific credit reporting regulations; second, the FCRA does not authorize the CFPB to regulate the healthcare industry; and third Congress has specifically delegated rulemaking power in the healthcare and medical industries to other specialized agencies.

1. The FCRA Does Not Grant the CFPB Discretion to Exempt Medical Debt From Credit Reporting.

The CFPB does not have the authority to unilaterally determine what types of consumer debt can be reported and used by creditors. The FCRA grants the CFPB the authority to "prescribe such regulations as may be necessary and appropriate to administer and carry out the purposes of [the FCRA]".[18] The stated purpose of the FCRA is to create rules and procedure for credit reporting that balance the need for access to complete and accurate credit reports with the consumer's

[18] 15 U.S.C. 1681(s)(e)(1).

interest in privacy and fair access to credit products.[19] Congress did not delegate how to strike this balance to the CFPB. Rather it enacted a law that that makes consumer information broadly reportable, with the exception of specifically enumerated categories of protected information.

The CFPB asserts that it has authorization to prohibit reporting or use of medical debt to lower the burden of healthcare costs because the FCRA already limits the use of medical information. This is a misreading of the statute. The CFPB's Proposal states its proposed rulemaking is necessary because: (1) "[m]edical debt collection tradelines appearing on consumer reports can have negative consequences for consumers, including impacting consumers' ability to obtain credit (or to obtain it at favorable rates) after experiencing, for example, a medical emergency"[20] and (2) that medical debt collection tradelines appearing on consumer reports "can also be used as leverage by collectors to coerce consumers to pay sometimes spurious or false unpaid medical bills."[21] But these concerns have no specific tie to medical debt: any consumer with a high amount of consumer debt on their credit report will have more difficulty obtaining new credit; and any debt tradeline can be used as leverage for repayment by a creditor. Indeed, that credit reporting allows creditors to limit its risk by not lending to or imposing higher rates on people with a large amount of debt are features, not bugs, of the credit reporting system created by the FCRA.

Congress empowered the CFPB to regulate the use of medical information consistent with the overall purpose of the statute—to protect consumer privacy while preserving creditor access to accurate debtor information.

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[19] 15 U.S.C. 1681(b); (*See also* Fair Credit Reporting Bill, 115 Cong. Rec. S2410-11 (daily ed. Jan. 31, 1969).
[20] Small Business Advisory Review Panel for Consumer Reporting Rulemaking Outline of Proposals and Alternatives Under Consideration ("Rulemaking Outline") at 17-18.
[21] *Id*. at 18.

2. Congress' Limits on Medical Debt Reporting set a Boundary for CFPB Regulation.

Congress already did the work that the CFPB proposes concerning medical debt. Congress prohibits reporting of medical information that could allow third parties to determine what type of medical product or service the consumer received at 15 U.S.C. 1681(b). This statutory text reflects the stated policy goal of protecting privacy. But the FCRA also implicitly allows medical debt reporting. In 15 U.S.C. 1681(c), Congress specifically excludes a narrow category of medical debt. That is, CRAs may not report medical debt owed by veterans for medical services received more than a year before the report was created.[22] Again, this reflects a legislative policy determination that veterans should not have accurate medical debt reported, but that this protection does not apply to other categories of consumers.

Importantly, Congress clearly considered the impact of medical debt reporting and specifically chose not to exclude all categories of medical debt from consumer reports, even though it could have if that was its intent. In the context of the FCRA's stated purpose of providing accurate credit reports, the choice *not* to exclude reporting of medical debt reflects a policy determination: medical debt is the type of information necessary to provide fair and accurate credit reports.

The Bureau's Proposal raises a major question concerning the balance between accurate credit reporting, consumer privacy, and fairness. It did so by specifically enumerating what types of information are exempt from reporting. The FCRA does not delegate to the CFPB the authority to unilaterally upend this balance by deciding without any mandate or guidance from Congress that medical debt—or any other category of consumer debt—is uniquely harmful to consumers.

[22] 15 USC § 1681c(a)(6).

Those decisions are inherently legislative; the FCRA does not have any indication that Congress intended to delegate them to the CFPB.

Congress did not intend for the CFPB to use its authority under FCRA to impact healthcare policy or mitigate the effect of healthcare policy on consumers. The legislative intent of the medical debt limitations in the FCRA is to prevent a scenario where a consumer's access to credit is limited or impacted because the creditor determined that a person with their specific medical needs or condition should not be granted credit. This is entirely distinct from the harm the CFPB seeks to prevent by eliminating the reporting or use of all medical debt. The CFPB's Proposal makes clear that the concern its rule is meant to address is that consumers have large amounts of medical debt, and having debt reduces access to credit. This purpose is entirely inconsistent with the legislative purpose of the FCRA.

3. The FCRA does not Authorize the CFPB to Prevent the Reporting of Accurate Information About Credit and Doing so Defies the FCRA's Stated Purpose

The very first line of the FCRA is a congressional finding that "the banking system is dependent upon fair and accurate credit reporting."[23] "Accurate" credit reporting is that which correctly identifies the transactions, accounts, and debts of the consumer. A report that does not reflect significant debts owed by a consumer is, by definition, inaccurate. By finding that the banking system depends on accurate reporting, Congress has expressed its intent to create a system under which all valid debts, including those incurred for medical expenses, appear on a consumer's credit report. While it is arguably not "fair" that consumers are burdened with medical debt in the first instance, that is not the fairness that Congress contemplates or intended to address through

[23] 15 USC §1681(a)(1).

the FCRA. Our banking system does not "depend" on a credit reporting system that only reports debts incurred out of choice rather than necessity. Rather, it depends on creditors having access to the information necessary to accurately predict the risk associated in lending to a particular individual. Ability to pay, amount of debt, past payment history, and history of default are essential to that prediction regardless of how the debt was incurred.

A procedure that prevents agencies from accurately reporting the amount of debt owed by a consumer and prevents lenders from issuing credit based on an accurate assessment of a consumer's finances neither meets the needs of commerce for consumer credit nor results in a system that is fair and equitable to consumers. The stated purpose of the FCRA is to "require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit. . . in a manner which is fair and equitable to the consumer. . . and proper utilization of such information."[24] If creditors are not able to accurately assess the default risk of consumers, the result will be (1) consumers will be allowed to take out more credit than they can repay, resulting in default or bankruptcy and (2) creditors will increase the cost of credit for all consumers to account for the increased risk in lending. Neither of these outcomes benefits consumers.

The CFPB twists language in the statute and incorrectly states that Congress, "has raised concerns with the presence of medical debt information on credit reports."[25] In fact, the CFPB incorrectly added the term "debt" and "debt collection" to a statutory provision that states, "medical information." Here the CFPB is rewriting the statute to concoct an argument about

[24] 15 USC §1681(b).
[25] Rulemaking Outline at 18.

medical debt credit reporting that is clearly not backed by the legislative history or Congressional intent.

4. Rulemaking Authority About Medical Payment and Cost Lies with Other Federal Agencies

Congress has enacted significant legislation addressing healthcare policy and has expressly delegated regulation and implementation of those policies to other agencies. And this is for good reason—the CFPB's involvement in medical care is tangential. Authority aside, the CFPB does not have the expertise or tools to implement policy that would significantly alter the landscape of medical services and payments. The CFPB has no role in the sale or delivery of medical services, the medical insurance market, or the medical billing system. This is by Congressional design and reflects Congress' intent that the CFPB only regulate financial products and services, not healthcare or medical products and services.

Indeed, Congress has squarely delegated the authority to make policy related to healthcare costs and spending to other agencies. As mentioned above, the recently passed No Surprises Act aims to reduce burdens by helping consumers understand healthcare costs in advance of care to minimize unforeseen medical bills. The No Surprises Act delegated interpretive and rulemaking authority to the HHS, DOL, and the Treasury.[26]

Congress, through its work in the No Surprises Act, makes several points clear: (1) it believes that legislation is needed to make sweeping changes in this market, not that agencies have unfettered unilateral authority; (2) it does not discuss debt collection, so did not identify that market as part of the problem;[27] and (3) it identified certain agencies to address these issues and

[26] *See* 87 FR 52618 (final rules implementing the No Surprises Act issued by the Internal Revenue Service, the Employee Benefits Security Administration, and the Health and Human Services Department).
[27] *See generally*, Pub.L. 116–260, the Consolidated Appropriations Act of 2021. The text of the Act focuses on front-end billing and not collections.

specifically did not include the CFPB. Unless and until Congress acts, nothing changes their directives on these issues.

Similarly, Congress has passed the Affordable Care Act,[28] which contains comprehensive legislations aimed to reduce the cost of healthcare, streamline insurance claims, and increase access to quality medical care. The ACA delegates rulemaking authority primarily to the Department of Health and Human Services, but also to several other federal agencies, yet does not delegate any regulatory authority to the CFPB.[29] Indeed, the Affordable Care Act specifically legislates requirements for the reporting and collection of medical debt but delegated the authority to interpret and enforce this provision to the IRS, *not* the CFPB.[30] The fact that Congress has repeatedly determined that the CFPB is not an appropriate agency and/or does not have the appropriate powers and authority to implement healthcare policy shows that Congress did not intend to grant the CFPB the authority to do so, either under the FCRA or any other financial regulation.

II. THE PROPOSAL WILL HARM SMALL BUSINESSES AND CONSUMERS

Apart from the legal deficiencies and constitutional infirmities discussed above, the Proposal as currently contemplated, will cause substantial harm to both businesses and consumers. Various portions of the Proposal lack clarity, which will undoubtedly lead to confusion about who is covered by the FCRA on a going forward basis and what any given company's precise compliance obligations consist of. This uncertainty will create significant compliance burdens, increased costs (which will likely be passed onto consumers), as well as regulatory and litigation risk. Additionally, the prohibition of medical debt reporting will cause significant harms to small

[28] Pub. L. 111-148 (2010)
[29] *See generally*, *Id*.
[30] *See* Pub. L. 111-148 § 9007.

businesses, medical and healthcare providers, and consumers. As discussed below, the type of transactions covered by the Bureau's interpretation of the phrase "medical information" will certainly create sweeping and unintended negative consequences in all credit markets. This in turn will harm many small businesses, as well as consumers.

A. The Proposal Undermines the Purpose of the FCRA

As detailed above, Congress enacted the FCRA to ensure fair and accurate credit reporting.[31] This is important because accurate and complete credit reporting facilitates the efficient functioning of credit markets. Those who have consistently repaid their debts and have sufficient income to meet their liabilities qualify for ongoing credit. And those who have a poor history of repayment behaviors or simply lack sufficient income to accommodate their various debt obligations will be offered less credit or on more stringent terms.

The Proposal, as currently contemplated, runs afoul of the FCRA's guiding purpose. Specifically, the Proposal arbitrarily assumes, without sufficient evidence, that one type of debt, medical debt, is nonpredictive of consumer risk. Without any supporting data, the Bureau takes the position that the reporting of medical debt harms consumers and prevents them from obtaining credit to which they would otherwise be entitled to. The Bureau then proposes that medical debt tradelines should be removed entirely from consumer reports.

As a threshold matter, the Bureau's determination that medical debt should be afforded less protections and different treatment than other types of debt is arbitrary and capricious, not to mention likely unconstitutional. As discussed more below, the Bureau's Proposal relies on a skewed reading of data that is nearly ten years old and fails to consider any of the recent regulations

[31] 15 U.S.C. § 1681.

that have been implemented to address the Bureau's perceived failings of the healthcare system. And even that (arguably obsolete) data acknowledges that medical debt information has some predictive value of credit risk. But the Bureau ignores this and takes the unsupported position that medical debt data has no value in credit risk predictions. On the contrary, medical debt data, like any other debt obligation financial data is critical to the determination of a consumer's capacity to take on more debt and repay that debt in a timely and consistent manner. Thus, the removal of medical debt information from consumer reports will directly contravene the stated purpose of the FCRA and its goal of ensuring fair and accurate credit reporting.

1. Fair and Accurate Credit Reporting

Our entire financial market depends on accurate credit reporting. This is because when a potential lender or creditor evaluates whether to extend credit to any particular person, they must have a complete picture of the applicant's financial profile. Certainly, this inquiry considers an individual's borrowing and repayment behaviors. But, critically, it also shows what liabilities that individual already has. If a consumer report omits certain information, then potential creditors are left without the information they need to assess repayment and delinquency risk. The Bureau takes the position that medical debt is less, or even non-predictive of consumer risk. However, the reality is that medical debt, like any other type of consumer debt, must be considered when evaluating the creditworthiness of any particular applicant.

For example, if a consumer has $24,000 in medical debt that they are supposed to be paying in monthly installments of $1,000 per month, this information is absolutely critical to other potential lenders. If the same consumer goes to a dealership to purchase a new vehicle, the lender will be able to see that any financing it offers should account for that existing $1,000 per month liability. However, under the Proposal, this medical debt obligation would be invisible to the

dealership lender. The result would be that the lender may be willing to extend more credit than the consumer can actually afford, because the lender does not know about the prior obligation. If the consumer then took on the additional debt for a vehicle, they could easily become over leveraged. Now, the lender is at risk of non-repayment, and the consumer is at heightened risk of delinquency across all their financial obligations. All of this is due to having inaccurate and incomplete information.

B. **The Proposal Will Hurt Access to Credit in the Market Generally**

The above example illustrates the risks that will lead to a credit crunch, thereby damaging economic mobility for many financially healthy consumers, as well as small businesses.

1. Incomplete Credit Data will Result in a Credit Crunch

When lenders and creditors are faced with incomplete credit data, their risk increases. This then translates to more stringent underwriting standards and subsequent reductions in lending activity. And those that are hurt the most are consumers and small businesses. The incremental steps already taken have shown that the market can implement solutions that consider the unique nature of medical debt while also ensuring access to information about a potential borrower that could impact their ability to repay the loan obligation. While the intent of the Proposal is to increase consumer's credit scores so that they can more easily access credit and obtain credit at better terms, the actual impact of the Proposal would be to increase the cost of credit to all consumers, not just those consumers who have outstanding debt obligations. Many creditors have discussed the impact of these changes and have already introduced "FICO creep" in their underwriting decisions – meaning the related FICO underwriting requirements for scores increases across each segment.

C. The Proposal Will Result in Increased Inaccuracy in Consumer Reports

As detailed by several SERs during the SBREFA panel discussions, incomplete financial data creates inaccurate consumer reports. When lenders and creditors cannot rely on the information provided in consumer reports, they either refuse to extend credit altogether or use other, less particularized methods, to ascertain credit worthiness on a statistical basis. This leads to the exclusion of certain groups and people that can no longer set themselves apart through their historically positive payment behaviors. It also increases the risk that lenders and creditors are forced to rely on statistical information that may further promote systemic biases in the financial markets, further excluding individuals who would otherwise have been offered credit.

For example, take an individual who lives in an older and less affluent area. This person has $10,000 in medical debt but has consistently been paying it on time, each month, and is almost finished paying it off. Under the Proposal, this medical debt tradeline, along with all its positive payment history, would be erased from the individual's consumer report. Now, potential creditors have less information about this individual and will be forced to rely on less predictive and potentially biased information about this person. Indeed, a potential creditor may only be able to consider this person's statistical probability of repayment based on their demographic information, where they live, and generally whether people in that area are good about repaying their debts. Now, the consumer suffers because, while their own payment history is exemplary, they have no way to distinguish themselves from others in their statistical group who may have less positive repayment history. All this consumer's efforts to be responsible and honor their debt obligations are for naught, and now they will be assessed in a way that ignores the reality of their financial situation and repayment behaviors.

Not only does this reality harm the consumer who has been financially responsible; it also creates a direct disincentive for consumers to pay their medical debts. If all the money poured towards paying off their medical debt is invisible to lenders, why bother making payments at all? A reasonable consumer would elect to spend that money elsewhere, paying down other debts, or putting it in savings. Credit reporting efficiencies are based on a carrot and stick approach. People want to pay their debts so that they are attractive to lenders and qualify for superior credit offers. Likewise, people want to avoid becoming delinquent on their debts because they understand that negative marks on their consumer reports will hinder their eligibility for credit in the future. The Proposal ignores these realities.

D. **The Proposal Will Harm Small Businesses**

Multiple commentators during the SBREFA process explained that the Proposal, even as vague as it is right now, will create significant harms to small businesses. As a threshold matter, the Proposal is unclear on who and what types of businesses will be covered by the expansive definitions of consumer reports and medical debt. The CFPB even acknowledged that this Proposal was not fully thought out and only included broad policy ideas. Additionally, some of the coverage will be triggered by conduct outside of the particular businesses' control. For example, one SER commented that third-party use of certain information would be the ultimate determining factor of whether the provider of such information was a credit reporting agency. Multiple SERs commented that the Proposal is unclear regarding what constitutes medical debt. Does medical debt include veterinarian services? Does it include dental or eye care? Does it include counseling and therapy? Would the prohibition against medical debt tradelines apply to consumers who finance cosmetic procedures? And what about consumers who use credit cards to pay for medical care and devices like OTC medications, bandages, or a trip to the dermatologist? The Proposal

includes no indication of who and what is covered, leading to regulatory risk and a situation where small businesses will be forced to accept the costs of compliance "just in case."

1. Compliance with the Proposal will be Unduly Expensive.

Given the nonspecific nature of the Proposal, as well as uncertainty about who it covers, it is difficult for companies to ascertain the full scale of their compliance costs at this time. However, what is clear is that the sweeping coverage and regulatory changes contained in the Proposal will be significant and will harm many small businesses. One category of small businesses that stand to lose the most are those providing medical and health care. Doctors, dentists, physical therapists, etc. will undoubtedly suffer severe consequences under the CFPB's Proposal. However, given the broad language in the current Proposal, essentially any lender, creditor, debt collector, data broker, and anyone who shares or uses consumer data, could be significantly impacted.

For those that might be considered credit reporting agencies under the new proposed definition, they will have to revamp their entire businesses to comply with the FCRA obligations specific to CRAs. This will be cost prohibitive for many companies. Among other costs, numerous SER commentators explained that the current Proposal would require substantial financial investment, both as an initial matter and for ongoing compliance. Many small businesses would need to hire additional staff to meet the compliance burdens. They would also need to hire legal counsel to help guide them through the regulatory morass. Computer programs and software will need to be updated and companies will need to invest in different technologies. Many will be forced to renegotiate contracts with vendors and third parties to accommodate the changing nature of each business and how they are covered by the FCRA. A conservative estimate from some of that initial compliance costs for affected small businesses is that the initial cost will exceed $250,000.00, with annual follow-on compliance costs of at least $125,000.00.

For ACA's members, the cost will further accelerate the pace of small business closures. Small businesses in the collection industry have been going out of business at an increasing rate and the leading reason that these companies claim as the driving factor for the closing is the increased compliance costs required to remain in the industry. As the CFPB has acknowledged, nearly 93% of companies in the debt collection industry fall within the definition of a "small business." Thus, it cannot be overstated that the Bureau's current Proposal will have extremely detrimental effects for nearly the entire debt collection industry and those that they serve, including but not limited to doctors and other healthcare providers.

2. The Proposal will Result in the Reduction or Elimination of Small Businesses.

For many small businesses, the Proposal will ultimately result in their reduction or elimination. As mentioned by multiple SERs during the SBREFA panel discussions, when compliance costs become too burdensome, small businesses pay the highest price. They are often forced to reduce offerings or cut entire business lines and products. In the worst-case scenarios, they either go out of business completely, or they are acquired by a larger company that has the ability to absorb the compliance burdens. This leads to market and industry consolidation, whereby only the biggest companies, who already utilize vertical integration, can survive. Small businesses that operate through the use of many vendors and third parties will simply be unable to compete. The trickle-down effect then also hurts consumers. Where a consumer might have previously had better access to care, they are now dependent on large companies that may not have a meaningful presence in their community. And even for those who still have physical access to care, the reduced competition in the market drives up consumer pricing, meaning that some will be prevented from accessing care because of increasing consumer costs.

The compliance burden is not the only part of the Proposal that will harm small businesses. The practical effects of the medical debt tradeline prohibition will also create significant financial harms to small businesses, some of which have not been included in the SBREFA process. For example, medical providers have already seen a marked reduction in successful collection efforts based on the CFPB's public opinion that medical debt should not be reflected in consumer reports. As multiple SER commentators noted, many consumers believe that if a debt is not reflected on their report, they don't have to pay it. And even for those that do understand that they still have a financial obligation to repay, there is absolutely no incentive to pay their medical debts if it will not go on their consumer report and impact their future eligibility for and access to credit. The result is that medical providers, who have become creditors by nature of allowing consumers to finance their healthcare procedures, are put into a position where there is no incentive for consumers to actually pay their bills. Critically, medical and healthcare providers were not invited to participate in the SBREFA panel and therefore, the CFPB has failed to include input from potentially the most important stakeholders who will be affected most directly by this Proposal. Not only does the CFPB's arbitrary singling out of medical debt place our healthcare professionals in second class status, but the long-term results will be deleterious to consumers, the very people that the Bureau claims to be protecting.

E. **The Proposal Will Harm Consumers**

Turning back to the portion of the Proposal that seeks to eliminate the reporting of medical debt, we explain how that particular provision will harm consumers. As detailed above, when lenders, creditors, or even medical providers are evaluating whether to extend financing to a particular consumer, they are handicapped in this process when they only have access to incomplete and inaccurate consumer information.

1. Lack of Access to Credit for Critical Care.

When medical debt is eliminated from consumer reports, many consumers believe that it is not owed. And for those that understand they still have a debt liability outstanding, there is no incentive to pay it. The result is that many medical providers will see a marked decrease in results from their collection efforts. While many healthcare providers currently allow their patients to finance services, this option will be eliminated in favor of pre-payment. If doctors and other healthcare workers are unable to collect payment after services have been rendered, they will undoubtedly stop offering financing options and will only provide services to those who can pay for them beforehand. This means that those consumers who cannot afford the out-of-pocket costs for care will be forced to use high-cost financing methods like credit cards, or in the worst case, forego medical treatment altogether. This predictably will hurt consumers generally but will harm traditionally underserved communities like minorities and rural people the most. While affluent consumers may be frustrated by the lack of convenience offered through financing options, they will still be able to get the care they need by paying for it upfront. However, for those who do not have the means to pay for an entire procedure upfront, they will be denied access to care. And then, what may have been a small or preventable issue, could grow into a life-threatening emergency, where the individual is forced into emergency care at the ER. Not only is this person's health more at risk, but the cost of care has increased significantly. And because hospitals are not able to turn away life threatening emergencies, those providers are forced to absorb even higher costs of care (which otherwise could have been prevented), that are then passed onto society in the form of higher healthcare costs generally. Given the Bureau's stated goal in reducing some of the healthcare burdens, the result of the Proposal will exacerbate the issues that already exist in the healthcare industry.

2. Lack of Care Altogether where Small Businesses have Closed Locations or Entire Lines of Business.

In addition to care denial caused by lack of credit and financing options, the Proposal and its associated costs will also harm consumers by eliminating their physical access to healthcare. In many communities, including those in rural areas, there is a dearth of healthcare access already. Small towns and disadvantaged communities are less likely to have large medical facilities, including hospitals. They are also less likely to have specialists in critical areas like oncology. It is not uncommon for these locations to only be served by small medical providers. If the cost of compliance becomes too great, these small businesses will be forced to close or merge with a large company, leading to further market consolidation. The closure of these practices will mean reduced access for consumers. Consumers will now be forced to drive excessive distances to reach care. While this may be a matter of convenience for those who have the luxury of time, it could mean life or death for others. It is easy to see how having to drive 45 minutes to reach a hospital could be too long for some healthcare emergencies. Alternatively, if the medical need is great enough to warrant flight for life, the consumer is then saddled with excessive costs for that emergency transport. Even for those small businesses and providers that remain in a community, they may have insufficient staff or funding to be open more than a few days a week. Again, consumers are the ultimate losers in this situation.

III. RESPONSES TO SPECIFIC QUESTIONS POSED IN THE PROPOSAL

A. General Response about Questions Related to Disputes

Debt collectors do not differentiate between legal and factual disputes. This would be impossible to do because it would require collectors to make legal determinations, which could result in the unauthorized practice of law. However, under the FDCPA, consumers have the ability to dispute a debt orally or in writing. A disputed debt must be marked as disputed in a debt

collector's records, and if the debt is subsequently reported to a CRA, the report must reflect the dispute. If a consumer disputes a debt in writing and within thirty days of receiving the validation notice, a debt collector must send verification of the debt to the consumer before continuing collection activity. Under Regulation F, if a debt collector furnishes information to CRAs, the debt collector also has additional compliance obligations under the FCRA if a consumer disputes a debt. Despite rhetoric from the CFPB not acknowledging this, the law already prohibits a debt collector from communicating to any person credit information, which the debt collector knows or should know to be false, including the failure to communicate that a debt is disputed. Therefore, if a debt collector reports the debt to a CRA, either method of dispute requires the debt collector to mark the account as disputed on the consumer's credit report when initially reporting the debt.

A consumer, under current law, does not need to state a reason for the dispute to trigger the debt collector's duty to mark the account as disputed when the debt collector reports the debt to a CRA. The disputed status must remain on the report until the consumer no longer disputes the information.

Since debt collectors are already prohibited from knowingly reporting false information, they already have a system in place to address any one-off issues that would result in a so-called "systematic dispute." Any additional regulation in this area would be duplicative to the many protections under the FDCPA and FCRA that do not allow for reporting inaccurate information, and the various legal mechanisms to address it if it happens.

B. Response to Medical Debt Questions

Q. **Under the proposals under consideration, would you anticipate that medical debt collectors would stop furnishing medical debt collection information to consumer reporting agencies and use alternative debt collection methods? If so, which ones?**

- If the Proposal to prohibit data furnishers from reporting medical debt to the consumer reporting agencies is moved forward, medical debt collectors would ensure they are in compliance with all applicable laws and regulations. If the proposals to permit data furnishers to continue to report medical debts but would prohibit creditors from considering this information in an underwriting decision were to move forward, it is uncertain whether medical debt collectors would continue to furnish the data to the consumer reporting agencies. There would most likely be a split approach with each medical debt collector to continue to analyze the cost of reporting against the perceived benefit received. If the costs outweigh the benefits, most reasonable operators would cease from engaging in that activity.
- If medical debt collection information was prohibited from being used on consumer reports, providers will likely pursue a variety of modifications to their billing strategy including requiring upfront payments, restricting access to care, and to consider pursuing a litigation strategy if that was their only avenue to collect the balances due for services provided.

Q. To what extent do creditors currently use medical debt collection information when making credit eligibility determinations, including to comply with other laws or requirements? Do creditors use medical debt collection information for other purposes in connection with a credit transaction?

- Creditors review an applicant's eligibility for credit based on income, expenses, assets, and liabilities. Creditors and regulators alike may disregard certain assets and certain liabilities (i.e. medical debt) when making their net worth evaluations. CRA's have various scoring

models that are also adjusted to weight certain items on a consumer's report higher than other items based on the circumstances.

- The CFPB's own research says medical debt is less predictive, not non-predictive. Even though some credit reporting agencies have given less weight to medical debt, they still consider it. Thus, any lender providing credit and relying on credit scores is using this information. The CFPB does not appear to have studied this issue at all, and it is too soon to determine how the CRA change related to debts under $500 will impact lending.
- If medical debt tradelines have no value in identifying risk, then the market would not use the information. As outlined in the economic analysis, the CFPB's own research shows that medical tradelines are informative in assessing a potential consumer's risk. However, given that there is no obligation to use credit report data, if medical debt had no value in assessing risks, then good risks, having depressed credit scores due to medical debts, were being offered bad terms of financing. Enterprising firms would be incentivized to identify this mispriced risk and offer better terms of financing. The business stealing effect is real, powerful, and works to discipline markets. By removing medical tradelines, the CFPB is removing valuable information for the pricing of risk and causing other issues associated with tinkering with credit scores and modeling.

Q. What are the pros and cons of an alternative approach of mandating a delay in the furnishing and reporting of medical debt for a particular period of time, and not reporting or furnishing medical debt below a particular dollar amount?

- A benefit in delaying credit reporting for a particular period of time is that, in theory, it provides more opportunity for the medical debt collector resolve the account for the consumer before the debt negatively affects the consumer's credit history.

- The biggest con with the delay in the furnishing of medical debt for a particular period of time would be related to the "Timely Filing" requirements of many insurance contracts that removes the liability of the insurance company to have to pay for a covered claim. If a patient doesn't provide information to allow the insurance company to process a claim within the timely filing requirements, the patient will be liable for the entirety of the bill despite the fact that they paid for insurance coverage. If a provider's attempts to assist the patient with their insurance claim are unsuccessful, the credit reporting action provides incentives to provide the necessary information to get the insurance company to process the claim.
- Learning about a financial obligation on their credit report may alert a consumer about an issue with their insurance company, or act to avoid future litigation. Taking away this option for learning about financial obligations means more consumers will be surprised when the first time they become aware of a debt is after they are served with a lawsuit. At that point, they must immediately spend additional resources to respond. They also may miss important insurance deadlines and be forced to pay out of pocket for medical care that could have been covered by insurance or charity care. Credit reporting provides for the most efficient mechanism to achieve resolution of the account and at much reduced cost as compared to the costs of litigation or delay. Further, the stress and embarrassment of having to respond to a lawsuit as opposed to not getting approved for a new car loan more than likely prefers the denial of credit option especially considering the account will be deleted once paid or otherwise resolved.
- Healthcare Financial Management Association ("HFMA") and ACA International in 2020 jointly published the 2nd edition of Best Practices for Resolution of Medical Accounts with

input from consumer groups and providers. These Best Practices further enhanced controls over credit reporting, and purposefully arrived at 120 days from the date of first discharge billing as an appropriate time for credit reporting to ensure accuracy in the final adjusted amounts as well as for the consumer to file a claim with the payer if needed. In addition, the 120-day period could be extended if the claim was subject to an insurance dispute. Extended deadlines provide the appearance that the matter isn't important and don't need to be addressed.

Q. What are the pros and cons of an alternative approach of requiring consumer reporting agencies and furnishers, upon receiving a dispute, to conduct an independent investigation to certify that a disputed medical debt is accurate and not subject to pending insurance disputes?

- A Benefit of an approach requiring CRA's and furnishers to conduct an independent investigation to certify that a disputed medical debt is accurate and not subject to pending insurance disputes is that this would presumably improve the accuracy of medical debt being reported when the account should have been paid by insurance. The con to this approach is that it overlooks the reality that the medical provider and/or its revenue cycle partners are able to resolve the insurance dispute without the cooperation of the patient. The medical provider would much prefer to get paid by an insurance company and to imply that medical debt collectors attempt to collect amounts from patients that they know is due from an insurance company is illogical.
- If a matter is subject to a "pending insurance dispute" is not clearly defined. If the medical provider has done all they can do to resolve the insurance dispute, it still may be subject to a dispute by the consumer that is beyond the control of the medical provider.

- It is important that any insurance disputes would require the consumer to provide all necessary information to submit the claim, substantiate the claim, or otherwise coordinate benefits with other liable parties for whom the consumer believes is liable for payment of the account.
- As discussed above, there are already many legal requirements and protections related to disputes. If an insurance company should be paying and it is disputed, there is already a mechanism and legal requirements in place to address that. This is a matter of law that the CFPB does not have jurisdiction over.
- At a higher level, this seems like a problem with insurance companies that should be fixed on the front end, not on the back end, by adding even more complexity to the credit reporting process.

Responses to High Level Questions Related to the Entire Proposal

Q. How, if at all, will the proposal under consideration require your firm to change its operations, products, or services?

- The proposals under consideration would require our firm to conduct a comprehensive compliance review to determine all areas in our company that are affected by the final rule. We would need to determine which policies and contracts would need to be updated to reflect the new regulations. New contracts or addendums would need to be provided to all clients who credit report along with outreach about why the new regulations required an update in the contracts with our clients.
- As far as how it would require our firm to change its services, we would need to evaluate each client agreement to determine if fees for services need to be adjusted as a result of any new regulations.

- Many clients would choose to no longer do business with our company if we are not able to credit report their medical account balances and instead the clients would require payment before any services are rendered.
- Costs to collect outstanding medical debt would skyrocket. Debt collectors would not be able to handle the expected increase volume and reduced liquidity under existing fee structures. Administration costs already contribute to the affordability of healthcare problem, this Proposal would further exacerbate the affordability of healthcare issue.
- There would be significant costs associated with making compliance changes, including rewriting policies and procedures, employee training, and system updates. If ultimately it became more difficult to collect, and there was a need for an increase in litigation, hiring attorneys and retaining law firms would be a significant costs increase.

Q. What do you anticipate will be the initial and ongoing costs to your firm, if any, of complying with the proposal under consideration? If applicable, how do those costs compare to your firm's current costs to comply with the provision(s) of the FCRA or Regulation V related to the proposal under consideration? Please quantify all such costs by type and amount to the extent possible.

- The data provided in this comment outlines that there would be nearly a 10 percent decrease in collections, or approximately $800,000 in annual revenue to an average small business in the consumer collection industry (less than $15 million in Revenue).
- Medical debt collectors measure their unit cost which, in rough format, would be total costs of operation divided by the total number of accounts placed during the same period (cost / accounts). Utilizing credit reporting allows debt collectors to keep their unit costs below $10 per account on average. If debt collectors were required to pursue a litigation strategy

instead, the unit costs increase to around $500 per account depending on the account balance. This is a 500% increase in unit costs. These costs are attributed to the court costs and service of process costs along with the attorney fees.

- The Bureau's Proposal would essentially make medical debt payment voluntary. The economic consequences of this will be massive and cannot even be quantified in the short time frame provided for comments.
- For many ACA members and creditors, adding or expanding legal programs would be a significant cost. Hiring in-house or outside law firms, and the cost of litigation may be approximately a million dollars a year, and much more for businesses with larger volumes of healthcare debt.

Q. What aspect or aspects of complying with the proposal under consideration would be the most challenging?

- The most challenging aspect of complying with the Proposal under consideration is that we would need to review and amend every customer contract and explain the changes in the law to our clients.
- The proposals would require more firms to increase the frequency of communication attempts and increase overall FTE count by 10% to maintain the same results achieved by utilizing credit reporting as an efficient tool to aid in recovery of justly owed debts.
- Communications with consumers would be more challenging and complaints against medical debt collectors will most likely increase because the message being sent by the CFPB in these proposals is that consumers do not need to pay their medical bills or that the medical bill is somehow less important than other obligations.

Q. What alternative approaches, if any, should the CFPB consider in lieu of the proposal under consideration?

- The CFPB should consider studying the impacts of the changes enacted by the CRAs related to medical debt including raising the minimum balance for reporting to $500.00.
- There is universal support for removal of paid medical debt from a consumer's report.
- Consumer education and outreach on understanding the complex healthcare financial transaction including how to read an Explanation of Benefits received from the insurance carrier and comparing that to the itemized statement from the provider to help consumers better understand the process. The Bureau could work cooperatively with industry to deliver that education.
- The CFPB should consider providing guidance to medical debt collectors that the inclusion of a medical provider's financial assistance policy in any debt collection communications would be covered under the safe harbor provisions of Regulation F.
- Consider limiting the application of the rule to emergency medical situations such as care provided in the Emergency room. This type of medical issue is distinctly different from a scheduled procedure. Issues surrounding challenges to the billing component of an emergency medical situation include the consumer not having the proper insurance information (whether they don't have their health insurance card, know who their employer's work comp carrier is, or information related to the liability insurance for the accident); intake paperwork is not as accurate as pre-scheduled procedures because of the rushed nature of the intake; and the services are generally not planned or expected. The CFPB should consider limiting the application of the rule to emergency medical situations.

- Provide a clear definition of medical debt specifically exempting payments made for medical services on a credit card. If payments made for medical services on a credit card are considered medical debts, credit card companies would need to implement new processes to ensure that the portion of the balance that was used for medical services is not credit reported or communicated to creditors.
- Provide a clear definition of medical debt and the scope of application. Exempt out certain types of medical procedures, including veterinarian, dental, primary and specialty care to ensure continued access to these services.
- The No Surprises Act went into effect on January 1, 2022, which will reduce the level of emergency services costs and out-of-network insurance bills. This will reduce the easier to challenge medical tradelines that may be driving the Bureau's observed results. The No Surprises Act and Regulation F have already reduced the level of medical debt tradelines on credit reports. Both of these just recently went into effect. We suggest the CFPB wait and study this issue to determine if there is a problem before moving forward.

Q. Other than compliance costs, what costs, burdens, or unintended consequences should the CFPB consider with respect to the proposal under consideration? Please quantify if possible. What alternatives, if any, would mitigate such costs, burdens, or unintended consequences?

- The Proposal provides an incentive for consumers and employers to drop their employer sponsored health plans. Health insurance premiums are expensive; small businesses pay the highest level of premiums since they do not have the bargaining power of a larger employer or government plan. The Proposal will increase the costs of insurance and reduce

the consequences of not paying medical bills. This impact would make the worsen the affordability of healthcare challenges.

- Consumers who pay an out-of-pocket premium on health insurance may choose to no longer carry health insurance if medical debt is no longer credit-reported. Even for individuals who qualify for Medicaid, they may not see the value of taking the time to apply if there is no impact on their credit score. The unintended consequence may be a large reduction in insurance dollars to Medical providers, leading to a reduction in services or staff available to consumers.
- FICO Creep may increase the cost of credit to consumers who didn't have medical debt on their credit report. A recent urban institute study stated that 5% of Americans have medical debt on their credit report after the changes instituted by the CRA's.[32] If these accounts are removed for the 5% of Americans that have medical debt reported on their credit, the 95% of Americans who pay their medical bills will be forced to pay for the increased defaults resulting from the higher credit risk assumed.
- Reduction in funds to government entities at the state and federal levels. Increased need for funds out of the general budget.
- The costs of litigation will be increased and borne by consumers. As more debt collectors and health care providers turn to the legal system, the costs will be charged to the consumers and raise the overall costs for all patients.

Q. Are there any statutes or regulations with which your firm must comply that may duplicate, overlap, or conflict with the proposal under consideration? What challenges or

[32] https://www.urban.org/urban-wire/medical-debt-was-erased-credit-records-most-consumers-potentially-improving-many

costs would your firm anticipate in complying with any such statutes or regulations and the CFPB's proposal under consideration?

- The FDCPA, the FCRA, GLBA, the Health Insurance Portability and Accountability Act, several other privacy laws, and many state laws already address the CFPB's concerns related to reporting of inaccurate information and protecting consumer privacy. Duplicative regulations create a number of compliance burdens including rewriting policies and procedures, employee training, and system updates. If ultimately it became more difficult to collect, and there was a need for an increase in litigation, hiring attorneys and retaining law firms would be a significant cost increase.
- Medicare cost reporting rules require hospitals to engage in "reasonable collection efforts" to attempt to collect Medicare beneficiaries' share of costs. Medicare recognized that it is in the best interest of taxpayers for medical providers to attempt to collect the patient share of costs as determined by the Medicare benefit calculation. Included in the reasonable collection efforts discuss credit reporting of those accounts as a reasonable collection effort.
- The Bureau's ability-to-repay requirements cannot be met when creditors do not have access to all the information about consumer's expenses and obligations.

Q. What factors disproportionately affecting small entities should the CFPB be aware of when evaluating the proposal under consideration? Would the proposal under consideration provide unique benefits to small entities?

- All of the outlined compliance and costs burdens are exacerbated for small businesses who have fewer staff members, less in-house legal counsel, in some instances very specific

client bases that will be disproportionally impacted, and fewer resources to devote to duplicative compliance requirements.

- Small businesses pay higher premiums for health care than larger employers. As the market adapts to the proposed changes, increased health premiums are expected as medical providers become more reliant on the insurance payment. Small businesses would absorb a higher percentage of the increases as they lack the bargaining position of larger employers or government employers.
- Most of the medical providers that credit report their bad debt accounts are small businesses. Dentists, family practitioners, and other such small businesses are unable to absorb the credit losses as easily as a large health system. There is already a consolidation trend and challenges for the small and solo practitioners in the healthcare industry; the proposals will accelerate this shift and make it nearly impossible for the small provider to remain independent from a health system.

Other Questions Related to Impact, Implementation and Costs

Q. Please provide input on an appropriate implementation period for complying with a rule finalizing the proposals under consideration. Are there any aspects of the CFPB's proposals under consideration that could be particularly time consuming or costly to implement? Are any of these challenges particular to small entities? Are there any factors outside a covered entity's control that would affect its ability to prepare for compliance?

- At least three years. This is a massive change, so small entities will need as much time as possible and could go out of business regardless of what the timeframe is. Section 501(r) of the internal revenue code was implemented as part of the Affordable Care Act that

addressed similar provisions relating to Medical debt. That law was implemented in a three-year period.

Q. Please provide feedback on the CFPB's understanding of the small entities that could be affected by the proposals under consideration.

- As discussed above, the CFPB does not appear to have any healthcare or housing providers, both groups that could be impacted by these changes.

Q. For the proposals under consideration that are relevant to their businesses, small entity representatives are encouraged to provide specific estimates, information, and data on the projected one-time and ongoing costs of compliance if the proposals were adopted. Information and data on current FCRA compliance costs (baseline costs) will be valuable as well.

- Medical debt collectors generally appoint a compliance officer over their operations to develop and maintain the compliance management system for the business. During the implementation period, the compliance manager would need to focus substantially all of their time dedicated to updating the company's policies and procedures. Outside counsel will need to be retained on an hourly basis to review and approved the changes to the policy at an estimated expense of $20,000 that would not otherwise be required.
- Client communication and updated contracts would require the medical debt collector to review every client contract that includes credit reporting as a service and negotiate a new contract. This would require legal review of each contract modification. The client services requirement would require the hiring of an additional FTE for a period of one year to complete the process at an estimated total costs for that FTE at $72,000 for the year. The legal review portion is estimated between $10,000-$20,000.

- Implementation of alternative collection strategies including litigation. This would require the hiring of one FTE (for a small business) to manage the new workflow at an estimated costs of $72,000 for the first year and continuing thereafter. Processes to invoice clients for courts costs and maintaining a client costs trust account would require further additional costs to implement and maintain.
- Ongoing costs of compliance would require the continued employment of the compliance officer (approximately $125,000 annually), litigation manager FTE ($72,000 annually), and increased expenses of alternative collection strategies (litigation) would be $500 per account. The volume of accounts anticipated to be pursued would equate to close to $500,000 annually, if not higher.

Q. For each of the proposals under consideration above, do you expect that your firm would restrict or eliminate any product or service offerings to comply with the rule? If so, how would the proposals impact those products or services?

- If credit reporting medical accounts becomes prohibited, we would stop offering these services to medical providers. This is a complete elimination of service offerings of many medical debt collectors and would cause many small businesses to close their doors.

Q. What benefits do you expect small entities may experience from any of the proposals under consideration listed above?

- None. Instead, we think instead there are many unintended consequences as outlined above and in the attached economic analysis.

Q. Would the proposals under consideration affect the cost and availability of credit to small entities?

- Yes, please see attached economic analysis.

IV. THE BUREAU SHOULD CONDUCT ANOTHER SBREFA OR ISSUE AN ADVANCED NOTICE OF PROPOSED RULEMAKING

During the panel, the CFPB on multiple occasions was not able to provide specifics or to define aspects of the proposal that were needed to give a conclusory response to estimates about the full impact on small businesses. Specifically, not knowing how the CFPB defines medical debt, makes it nearly impossible to respond to a number of questions the CFPB poses. Since multiple stakeholders, including the American Hospital Association[33] have indicated that the Proposal could have a sweeping impact on the health care market and the economy, it is critical for the CFPB to solicit more comprehensive feedback from a variety of stakeholders before moving forward. Accordingly, I request that the CFPB hold another Small Business Review Panel with more complete information, or alternatively issue an Advanced Notice of Proposed Rulemaking, to allow stakeholders to understand and comment on the CFPB's policy making goals.

V. THE PROPOSAL LACKS DATA, RIGOROUS ANALYSIS, AND MAKES UNFOUNDED ASSUMPTIONS

Separately attached, please see economic analysis provided by Dr. Andrew Rodrigo Nigrinis.

[33] "It is also possible that this proposal may incentivize patients to forego paying bills for care that they received and for which they have been determined liable. However, it is not possible to quantify the cost of either of these potential consequences." American Hospital Assoc., Letter to the Consumer Financial Protection Bureau on Consumer Reporting Rulemaking and Medical Debt.

Economic Analysis of the Consumer Financial Protection Bureau's FCRA Rule Proposals

By Andrew Rodrigo Nigrinis, Ph.D.

Contents

Qualifications and Assignment

1. I am an economist at Legal Economics LLC., a consulting firm specializing in economic and statistical analysis. Before joining Legal Economics, I was the sole enforcement economist at the Consumer Financial Protection Bureau (CFPB) in consumer financial services. I led the Bureau's economic analysis and evaluation of over 70 cases. Throughout my career, I have managed investigations related to allegations of unfair or deceptive practices, fair lending, disputes between financial services providers and lenders, allegations of mortgage and student loan servicing issues, credit card fees, debt collections, and dark patterns. I also provided economic analysis of consumer financial regulations and policies and have extensive experience with sampling and big data. While at the CFPB, I worked with State Attorney Generals, DOJ, and OCC officials on various matters. I earned a Ph.D. in Economics from Stanford University. I completed a master's in economics at Queen's University in Canada and my bachelor's degree at the University of Alberta in Canada. I won the economics medal at the University of Alberta. I was a Carmichael Fellow at Queens University and a Stanford Institute for Economic Policy Research fellow at Stanford.

2. Brownstein Hyatt Farber Schreck LLP hired me to provide my opinion concerning the economic analyses and empirical evidence cited in the Consumer Financial Protection Bureau's (CFPB) Proposed Rule addressing several consumer reporting topics under the Fair Credit Reporting Act (FCRA). Brownstein Hyatt Farber Schreck LLP also asked me to provide my opinion concerning the possible economic impact of the proposed rule on the debt collection industry and the

expected impact on the consumer finance industry. I am being compensated for this report.

Summary of conclusions

3. My review of the proposed changes to the regulatory framework of the FCRA is that the CFPB (Bureau) needs to do a meaningful analysis of the effects on consumers, lenders, small businesses, or the broader market that relies on credit reporting. The CFPB did not provide a valid economic analysis of the impact of the proposed rule:

- There would be increased levels of financing for unqualified borrowers.
- There would be decreased access to credit-qualified borrowers.
- There would be an increase in difficulty in meaningfully repairing credit scores.
- The loss of income to medical providers from losses due to non-payment for services.
- Potential increase in litigation costs to collect debts.
- There would be increased uncertainty in consumer finance as predictive information is removed from credit reports.
- The loss in consumer benefits from the internet if data brokerage rules materially reduce the effectiveness of digital marketing.
- There is potential to harm consumers without health insurance, chronic diseases, or protected class members.
- The unintended consequence would be the loss of predictive information on credit reports, which may result in more lending of the type that precipitated the financial crises that culminated in the formation of the CFPB.

- Expected liquidation rates of referred debts to collectors to lower by 10%.[1]
- Reduction in collections for physicians.
- Disproportionately impact the South and Mid-West States.

4. The CFPB should have provided an analysis of the impact this rule will have on small business providers of healthcare services. There is no analysis of how consumers of private market healthcare providers can finance these services. The CFPB has yet to study whether providers will respond by refusing to provide credit and cutting off the consumers the Bureau purports to be helping from health services or whether healthcare providers will respond by raising prices on all consumers and hurting everyone, or if they will respond by requesting cash up-front for co-pays and deductibles, hurting low-income community members who can't afford to pay those all at once, thereby reducing their access to health care. They've also not studied if negatively impacted small and/or rural Providers will be an impetus for those physicians to move to urban areas or to change their practice models—such as to the concierge model, thereby reducing access for low-income community members.

Background

5. Medical debt tradelines are a large portion of consumer debt reported in the U.S. A recent CFPB study found that[2]

- From Q1 2018 to Q1 2022, the total number of collections tradelines on credit reports declined by 33 percent, from about 261 million tradelines in 2018 to about 175 million in 2022.

[1] I am using industry nomenclature. To decrease by 10% means the value of accounts collectors are collecting, "liquidating", has fallen by 10%. I.e., Collectors receive less from accounts referred to them.
[2] Market Snapshot: An Update on Third-Party Debt Collections Tradelines Reporting, Feb 2023

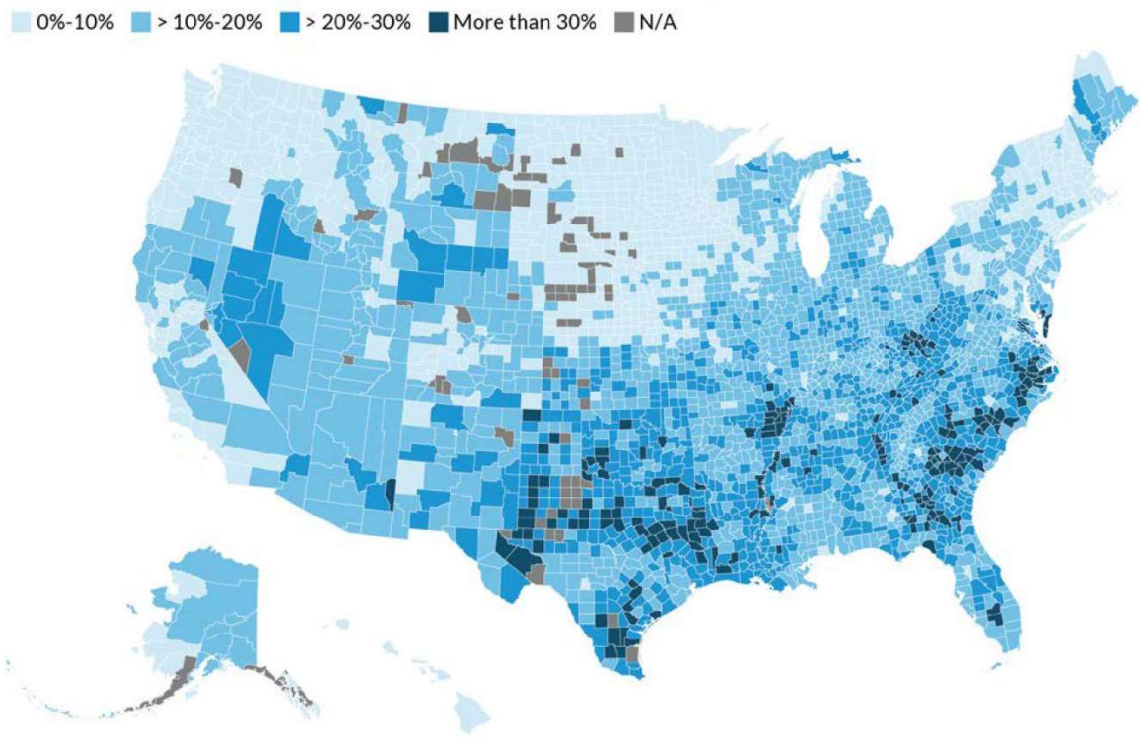
- Medical bills account for 68.9 percent of furnished collections by contingency-fee-based debt collectors, followed by telecommunications at 12.5 percent and utilities at 4.5 percent.
- Medical collections tradelines still constitute a majority (57 percent) of all collections on consumer credit reports.

The last point emphasizes how the Bureau's proposal to remove medical collections is a significant change in credit reporting with market-wide implications. This rule will drastically reduce the information available to lenders on the creditworthiness of potential borrowers.

6. The distribution of these medical debt tradelines around the U.S. is not random. The Urban Institute[3] produces the following graph with 2021 data:

FIGURE 1

Percentage of Consumers with Medical Debt in Collections, August 2021



Source: Urban Institute Analysis of August 2021 credit bureau data.
Note: N/A = not available because the sample size is too small.

[3] Blavin, Fredric, Breno Braga, and Anuj Gangopadhyaya. "Which County Characteristics Predict Medical Debt?." *Washington, DC: Urban Institute* (2022).

As can be seen from the national map, medical debt is overwhelmingly a problem for consumers in the rural Southern United States. The following table from the same report shows the ten counties with the highest percentage of consumers with medical debt compared to the U.S. average:

TABLE 1

Counties with the Highest Share of Consumers with Medical Debt in Collections as of August 2021 and the Counties' Characteristics

County	State	Pop.	% with medical debt in Collections	% Uninsured	Avg. Income	% Hispanic	% Black non-Hispanic	% 6+ CCP
Warren	GA	5,215	50.5	13.0	$53,077	1.0	58.4	20.3
Greene	NC	20,451	46.0	16.6	$53,007	14.4	35.2	17.3
Lenoir	NC	55,122	44.7	12.5	$56,708	7.9	40.0	20.3
McDuffie	GA	21,632	43.1	12.1	$55,341	3.7	40.0	19.7
Anson	NC	22,055	41.6	11.1	$52,077	3.0	44.6	19.5
Nolan	TX	14,738	40.9	19.0	$64,120	36.3	4.2	24.5
Pecos	TX	15,193	40.8	18.1	$68,797	71.4	3.3	16.4
Brooks	GA	16,301	40.7	18.1	$60,621	5.9	34.9	23.7
Haskell	TX	5,416	40.6	20.8	$49,230	25.4	3.3	17.2
Harmon	OK	2,488	40.3	15.2	$65,261	29.7	6.0	22.8
Average top 10			42.9	15.7	$57,824	19.9	27.0	20.2
Average top 100			36.9	14.8	$57,825	19.2	23.6	20.5
US			13.9	8.8	$88,607	18.7	12.1	17.7

Sources: Urban Institute Analysis of August 2021 credit bureau data combined with county-level characteristics (see table A.1 for additional details).

Notes: Pop. = population, CCP = chronic condition prevalence.

A few key takeaways can be gleaned from this table. Medical debts are high in counties with a high percentage of uninsured consumers. As of this writing, Texas and North Carolina have not implemented the Medicaid expansion. Oklahoma implemented the Medicaid expansion in July 2021 (just before the Urban Institute's analysis)[4]. These counties are in the rural South with low average incomes and a high percentage of a non-Hispanic Black population. According to CMS data, the 6+CCP is the percent of the Medicare population with six or more

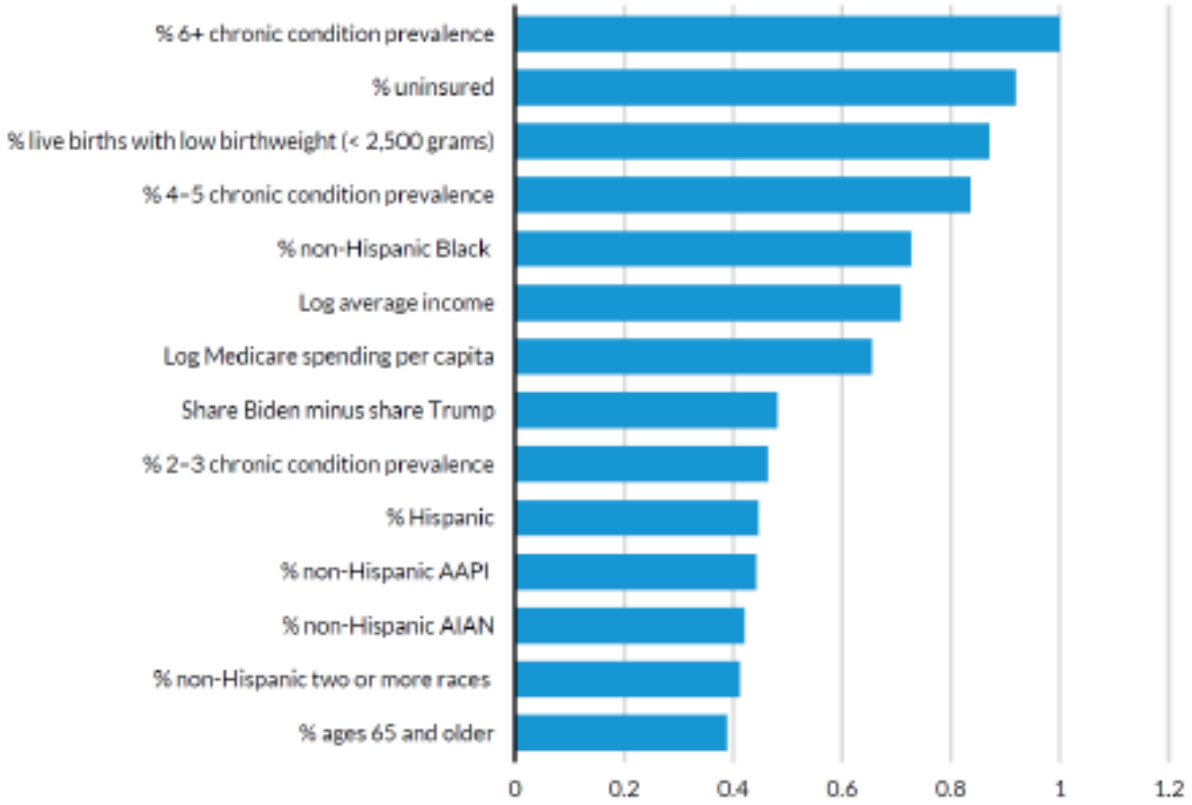
[4] The other states that have not implemented the Medicaid expansion are AL, GA, FL, KS, MS, SC, TN, WI, and WY.

out of 21 chronic conditions. It is a proxy for the underlying health of the people. Medical debt is concentrated in counties with high levels of chronic disease.

7. The study then uses a machine learning algorithm to determine the factors most contributing to medical debt. The following table shows the results:

FIGURE 3

The Relative Importance of Predictors for Percentage with Medical Debt in Collections



Sources: Urban Institute August 2021 credit bureau data combined with county-level characteristics (see table A.1 for additional details).

Notes: We use a machine learning random forest algorithm to predict the share of adults with medical debt in collections. Variable importance is calculated by adding up the improvement in the objective function given in the splitting criterion over all internal nodes of a tree and across all trees in the forest, separately for each predictor variable. In the implementation of random forest, the variable importance score is normalized by dividing all scores over the maximum score; the importance of the most importance variable is always 100 percent. AAPI = American Asian and Pacific Islander, AIAN = American Indian and Alaska Native.

Though this is not a causal analysis, it is informative. Counties with high levels of medical debt on credit reports are impoverished counties in politically conservative jurisdictions (that rely on market-based healthcare) with high percentages of

uninsured people. The high levels of chronic disease in the Medicare population and the high rate of low-birth-weight live births point to a general problem of poverty. Medical debt appears not to be the problem but rather a symptom of decisions made in the medical system. Removing medical debts from credit report tradelines will not fix people's inability to make payments. This solution will make financing financial services more difficult for people who require financing options.

What is the purpose of credit scores?

8. The fundamental question in assessing the proposed rule by the CFPB is, what is a credit score? The CFPB provides a basic answer: "A credit score is a prediction of your credit behavior, such as how likely you are to pay a loan back on time, based on information from your credit reports."[5]

9. In practice, there are two dimensions. The first is the 3-digit score, and the second is the tradelines with information on a consumer's accounts. These accounts can be active, closed, delinquent, etc. The 3-digit score is meant to compress the data to a single number that predicts an adverse credit outcome (delinquency or default). Thus, each credit score can be the result of a multitude of factors. To paraphrase Tolstoy, each perfect credit score is alike, and each imperfect credit score is unique.

10. The economic value of a credit report is to facilitate financing by allowing financing firms to assess the true riskiness of a potential borrower. The value of the credit score is increased by increasing its precision. Market forces determine the actual pricing of risk. Because of competition, firms cannot expect sustained long-

[5] https://www.consumerfinance.gov/ask-cfpb/what-is-a-credit-score-en-315/

run profits by mispricing risk. Nor can they be expected to remain solvent by extending credit to poor risks that are not profitable.

11. Risk assessment is critical to efficient credit markets' functioning. Without information, all borrowers would be priced at the same terms. Market forces would ensure a fair equilibrium price of credit, and all would have credit extended at the same terms. However, a consumer with a history of paying debts should be considered a safer risk than one with a default history. Thus, the safer borrower is a profit center for the financing firm, and the risky borrower is a source of losses. If the safer borrower can be reliably identified, they can be provided better terms of financing that reflect their lower risk. Conversely, the poor risk would pay more to compensate for expected losses. Providing financing on the same terms forces good risks to pay more as an implicit subsidy to the poor risk customers. The poor risks gain, but the good risks lose.

12. Credit scores and reports aim to identify the type of risk a consumer is. Both types of borrowers can be serviced by the financial markets but at different financing terms. This is a gamble, as safe risks can default, and risky customers can pay. However, the more information there is, the more nuanced and customized financial markets can be. This may seem a remedial point, but it is fundamentally missing from the CFPB's proposal. The CFPB is proposing the degradation of credit reporting.

13. As markets can segment consumers by risk, they can expand. As consumers are more finely judged by risk, more specialized financing can be available. Mechanisms such as collateral, the threat of credit reporting, and down payments can be deployed to reduce exposure to financing risks. Credit reporting facilitates this by allowing different customers to be given other options to reveal risk types (as an augmentation to a credit report) or to identify risk pools where risks can be

shared to extend credit. The increase in credit reporting accuracy makes companies more profitable by risk segment and expands the market for consumer credit.

14. Credit reports are not definitive in credit decisions but are an essential input. The market is dynamic, and competition encourages experimentation to identify better risks. Credit reports and scores are valuable inputs but do not determine lending. Credit scores are used in mortgage markets, as are other metrics, such as loan-to-home value. Many firms have proprietary risk algorithms that use credit scores and reports as inputs. No one is obligated to use this data. However, if these data are degraded, there is no alternative input.

15. The market will not use the information if medical debt tradelines do not identify risk. As will be shown later (Section 2014 Model Critique), the CFPB's research indicates that medical tradelines are informative in assessing a potential consumer's risk. However, given that there is no obligation to use credit report data, ***if*** medical debt had no value in assessing risks, then good risks, having depressed credit scores due to medical debts, were being offered bad financing terms. Enterprising firms would be incentivized to identify this mispriced risk and provide better financing terms. The business stealing effect is real, powerful, and disciplines markets. By removing medical tradelines, the CFPB is, on the one hand, eliminating valuable information for the pricing of risk or removing information the market would not use if it were not relevant.

16. By the CFPB's admission, the market is responding. In the CFPB's 2023 report on medical debt, they state that "The FHFA has further announced that it will implement FICO 10T and VantageScore 4.0 as the credit scores that Fannie Mae and Freddie Mac will use as thresholds for screening in loans. These credit scores underweight or do not include medical collections, unlike the credit score models that FHFA-backed loans have historically used for screening-in

decisions."[6] Presumably, the market demanded credit scores that removed or underweight medical debt, and now the market has alternative credit scores that exclude or exclude underweight medical debt. If medical debt depresses credit scores in an uninformative manner for predicting delinquency, profits incentivize the market to incorporate these new tools. The CFPB proposal is a solution without a problem.

Effect on protected classes and others

17. If the Bureau's proposed rule is implemented, a significant unintended consequence will be a restriction of lending to various protected classes. The information on how much uncollected medical debt exists and who is not paying is well known (see background section). Financial firms in the market understand the distribution of this debt. Financial firms are under competitive pressure to maximize profits and avoid losses from lending to bad risks. It is common knowledge that medical debt predicts delinquency or default. As a result, financial firms will engage in statistical discrimination. Statistical discrimination occurs when there is imperfect information about individuals, such as their lending risk, but there is information about group averages. From the Urban Institute report,[7] it is well known that one of the most significant predictors of medical debt is the percentage of the non-Hispanic black population in a county. Lesser predictors are Hispanics, Asian Americans, and Native Americans percentages in a county. The market will use all the information it has due to competitive pressures. As firms try

[6] Alyssa Brown and Eric Wilson "Data Point: Consumer Credit and the Removal of Medical Collections from Credit Reports", *Washington, DC: CFPB* (2023). Pg24

[7] Blavin, Fredric, Breno Braga, and Anuj Gangopadhyaya. "Which County Characteristics Predict Medical Debt?." *Washington, DC: Urban Institute* (2022).

to avoid losses or be compensated for taking on extra risks, they will restrict access to credit to these protected classes or offer credit on worse terms.

18. The Bureau's rule will disproportionately damage financing to the poor, sick, rural, and conservative populations. The Urban Institute also finds that counties with lower levels of income, significant levels of chronic disease, located in the rural South, and that voted for Trump over Biden have higher levels of medical debt. Income and chronic illness as indicators of the likelihood of holding medical debt are straightforward to explain as these populations interact with the medical system more and have lower levels of income to pay various co-pays and deductibles. The effect of the Bureau's rule on Southern counties that supported Trump is that the regions of the U.S. that supported Trump over Biden are more likely to rely on market mechanisms in their health care and are more likely to have uninsured populations due to not expanding Medicaid with the implementation of the Affordable Care Act. Any rule that makes the financing of medical debt more complicated will disproportionately affect jurisdictions that rely on market mechanisms and minimize the transfer of resources to poorer populations. Regardless of one's political views, profit-maximizing firms must restrict financing or increase the cost of financing medical services based on easily verifiable data.

Deterrence

19. No analysis of the effect of removing medical debt from credit reports on the deterrence to consumers in not paying legal medical debts. In a simple model of deterrence, there are two actions. Pay the debt or not pay it. The probability of being caught is 100 percent, and not being caught is 0 percent. Thus, a consumer is deterred from not paying if the non-payment cost exceeds the alternative use of the

funds. Many people are cash-constrained, so a market without a legal deterrent is not feasible.

20. This gets to the central failing of the CFPB's analysis of deterrence. It fails to account for the fact that deterrence is a continuum. Medical debts are medical income for medical goods and service providers. These providers need to be paid, and the market has three methods to ensure payment:

- Forgiveness or ignoring the debt and not reporting it.
- Report the debt to a credit reporting agency.
- Litigate to collect the debt in court.

The Bureau is proposing the end of reporting medical debts. This will allow for only one of two responses. The first is to refrain from reporting medical debts. The second is litigation for repayment.

21. If the ability to report medical debts is eliminated, some consumers will not have medical debts reported, and some will see litigation. Currently, medical debts are only reported to credit reporting agencies if sent there by the debt collector or the health care provider. There will be a substitution from reporting medical debt to not reporting medical debts. Undeniably, these consumers will benefit. However, on the other end of the continuum, some firms will substitute credit reporting for litigation.

22. The social costs of litigation will be increased and borne by consumers. As more debt collectors and health care providers turn to the legal system, the consumers the Bureau's rule was intended to benefit will be forced to pay for litigation and court expenses. Although the civil judgment cannot be disclosed in a credit report, the civil judgment would still exist and can be discovered by checking public records. From a social viewpoint, litigation is an expensive method to transfer resources from a debtor to a creditor and is a loss to society. All

consumers will bear the ultimate costs of this litigation since one can only estimate the bad debtors in advance through increased financing costs or by providers refusing to see patients who require credit. This loss of access to health care would make these and other consumers net losers if the Bureau's proposal is accepted.

23. If there is no litigation over medical debts, then the Bureau's proposal would make medical debt payment voluntary. Since litigation is expensive for all parties (including debt collectors), the result would be a voluntary payment system if litigation is never used as a substitute for the loss of credit reporting. Some consumers will pay their debts due to strong cultural norms of honoring obligations. But this would quickly unravel the medical debt market. If health providers cannot expect to be paid for services rendered (even if it is just a deductible or co-payment), they will react to protect themselves. One option could be to raise prices to account for losses due to uncollectable medical debt. Another option would be to refuse to see patients who require financing. Finally, one option would be to require payments of cash up-front for the co-pay and deductible. Or to require levels of collateral for patients based on their credit scores. It's realistic to expect some mixture of these options to unfold in the market. All these scenarios are inefficient and destructive for consumers. Specifically, bad for the consumers, the Bureau intends to assist with this policy. Beyond that, if the Provider community, especially small or rural physicians and/or dentists, get too frustrated, they might move to urban areas, or they might switch their practices to the concierge model where they only take cash-paying patients, again leaving low-income community members without access to care.

Credit Repair

24. The credit score and tradelines are not constant but can be improved by consumer action. Credit scores are not one-way streets that only go down. Since failure to pay medical debts is predictive of default (see Section: 2014 Model Critique), clearing those debts is predictive of a consumer being a reasonable risk to lend to. Consumers can improve their credit reports by resolving medical tradelines – by paying off debts or correcting erroneous tradelines. This avenue for improving credit scores would be lost for those who want to improve them. The desire and actions to raise a credit score are often done before a major purchase, such as a house. A contrary opinion holds that removing all medical debts would raise credit scores. This is true, but the credit scores would be less predictive, resulting in more default risk and lower financing terms. Those who diligently work to raise their credit scores would be denied the opportunity and lumped into a general risk pool, with those who do not resolve their medical debts and would not be able to signal to lenders their better risk profile through meaningful actions.

Lack of analysis of the potential consequences

25. The Bureau cites internal research that does not predict or illuminate the expected consequences of its proposed rule. There are many blog posts and documents, but everything comes down to two key pieces of research. The first is "Data Point: Consumer Credit and the Removal of Medical Collections from Credit Reports" from April 2023. This report finds a 25-point increase in credit scores after their last medical collection is removed. They also find that consumers with a medical collection deleted are more likely to have a first-lien mortgage inquiry. This is to be expected given that those who are in the market for a mortgage are active in clearing tradelines off their credit report. Except for this

immediate consequence, there is no study of the general impact on medical debt collection or consumer credit. Second, the CFPB cites a 2014 work, "Data point: Medical debt and credit scores." This work finds that medical debts are not as predictive as other types of unpaid debt. This is an interesting result, but it is not to be interpreted as medical debt tradelines have no predictive power in credit scores. The Bureau repeatedly uses the less predictive claim to justify removing medical debt, which, according to the CFPB's research, would make credit reports less accurate.

26. None of the CFPB's research has been peer-reviewed or had the results questioned or vetted. If the CFPB seeks to make decisions in an evidence-based way, its results need to be open to public scrutiny. In economics, this is by publishing results. At the least, they should turn over all data and codes to industry to verify their results.

27. Additionally, none of these results shed any light on the implications of their rule on consumer financial markets. A study should be conducted to determine the effect of their rule's implementation on medical debt payment. An investigation should be performed into how medical providers respond to falls in collections. The Bureau may be protecting consumer finance consumers, but these same consumers will also need to access healthcare services. Finally, the degradation of consumer credit reports will affect every industry that relies on them for risk assessment. Currently, there are no Bureau studies or estimates in an evidence-based way to answer these preliminary concerns.

2023 Model Critique

28. The 2023 report[8] by the CFPB Office of Research is the primary citation used to quantify the change in credit scores from removing medical debt credit lines. The authors find that the average person who removes medical tradelines of less than $500 has a 21-point increase in their credit score. For debts over $500, the increase is 32 points on average. This result is used to justify the potential for a significant consumer benefit by eliminating the reporting of medical debt.

29. The study is based on an event analysis conducted by the Bureau and not on a more rigorous difference-in-differences analysis. The Bureau's analysis is a simple event analysis that analyzes how credit scores change over time after removing a medical debt tradeline. However, time often cures credit scores as tradelines drop off credit reports. Old tradelines are often given less weight. Thus, a comparable group should be created to provide a basis for comparison. No control group is ever built. If a control group is included, the magnitude should fall significantly. A rise in credit score should happen regardless since removing negative information should make a consumer appear to be a safe risk. However, the magnitude of benefits is likely overstated by this analysis.

30. The study constructs its measure incorrectly, which makes any accurate measurement of benefits impossible to interpret. The study uses as its sample consumers who have had a medical debt removed from their credit reports. This excludes consumers who never had a medical debt tradeline nor those who had medical tradelines and could not remove them. An obvious hypothesis is that those who can have a medical debt tradeline removed are disproportionately likely to have a medical debt reported by mistake. Alternatively, they have clean records

[8] Alyssa Brown and Eric Wilson "Data Point: Consumer Credit and the Removal of Medical Collections from Credit Reports", *Washington, DC: CFPB* (2023).

with this anomalous tradeline. This means that these records included in the sample *are likely different from* those with a medical debt tradeline.

31. The ability to remove medical debt tradelines means the consumers are different from the norm. By actively monitoring and acting to clear up their credit reports, these consumers have shown diligence and attentiveness to their records, which likely means that the Bureau used a non-representative sample.

32. The results indicate reverse causation. One of the results of this study shows that those who have cleared up a medical tradeline were more likely to have a first-lien mortgage inquiry. The authors responsibly acknowledge that "Because medical collections are not removed from credit reports randomly, the event study analysis does not provide causal evidence."[9] Simply put, are consumers removing medical debt tradelines because they intend to use more credit? Or is it because removing the medical tradeline gave them more access to credit? If it is the former, where consumers actively remove medical tradelines in anticipation of using credit, then the results are biased. A simple example is a consumer who is planning to purchase a home. When buying a home, it helps to have a higher credit score. But also, the need to save for a downpayment and clear up old debts and tradelines results in a behavioral change involving removing medical tradelines as part of a general move to boost their credit score. Thus, the analysis is overstating the benefits of the medical tradeline removal as it is concurrent with other changes. The results are most likely a mixture of the two effects. But, the results of this research would be overstated.

33. Additionally, the study design allows consumers to remove multiple medical tradelines. In a more rigorous difference-in-differences design, repeated treatment of the change in credit reports from medical tradeline removal would bias the

[9] Alyssa Brown and Eric Wilson "Data Point: Consumer Credit and the Removal of Medical Collections from Credit Reports", *Washington, DC: CFPB* (2023). Pg.25

results. Recent work has shown that the formation of the groups and the frequency and timing of treatment would radically change the results.[10]

34. The data used is out of date. The data used in this study is from March 2011 to June 2022, where medical collections were removed between June 2012 and December 2020. The first problem is that data is being used from vastly different time periods with no statistical controls. The data from the COVID-19 period is different from pre-COVID data. And hopefully, it will not be comparable to future data. During COVID, there were massive transfers from government to consumers. Additionally, student loan payments were suspended. It is shown in another Bureau research that consumers with medical debt delinquencies are also likely to have student loan delinquencies. The increase in credit scores from removing medical debt tradelines may result in consumers having more resources to devote to student loan debt. The pre-COVID period was before the implementation of the changes to Regulation F that decreased the expected number of reported medical tradelines.

35. In the future, the results will be less informative. The No Surprises Act was enacted on January 1st, 2022,[11] which will reduce emergency services costs and out-of-network insurance bills. This will reduce the easier-to-challenge medical tradelines that may drive the Bureau's observed results. The No Surprises Act and Regulation F have already reduced medical debt tradelines on credit reports.

36. Even if one accepts the results, the rise in credit scores shouldn't be surprising -- but the unintended consequences may be. The results of this study likely overstate the benefits to consumers from removing medical tradelines. But it

[10] Technical note: To estimate the effect would require a difference in differences instrumental variables analysis as proposed in Baker et al (2022). The decision to seek out medical tradelines is potentially endogenous. In addition, repeated treatments that may also be endogenous will bias any results.

[11] "Complaint Bulletin: Medical billing and collection issues described in consumer complaints", *Washington D.C.: CFPB* April 2022

isn't a surprising result. Those who have negative information removed should have their credit scores increased. However, this research doesn't capture the unanticipated effects of this rule. It has no predictions for the increase in unpaid debts due to less deterrence from the possibility of having a negative tradeline. It does not estimate the cost to consumer lending markets from the degradation of credit reports that lenders rely on to assess risk. Nor does it quantify the higher borrowing costs borne by diligent and responsible borrowers with high credit scores. In short, the Bureau has identified the obvious beneficiary of this rule without studying the costs paid by others.

2014 Model Critique

37. The subsequent major work that the Bureau cites to justify its claim that eliminating medical debt from credit reports is "Data point: Medical debt and credit scores" from May 2014. This paper is the source that justifies the following statement:

> "The CFPB has long-standing concerns about the usefulness of medical debt collections tradeline information in predicting a consumer's creditworthiness. For example, research by the CFPB and others has raised questions about the predictive value of this information."[12]

There are two problems with this statement. First, the research into the predictive problems of medical debt has serious methodological issues. Second, the Bureau has misinterpreted the research's conclusion to justify its rulemaking.

38. The research splits consumers into two groups that fail to isolate the effect of medical debts on delinquency – their measure of risk. Their research design assigns consumers into one category: medical (MM) debt and non-medical debt

[12] SMALL BUSINESS ADVISORY REVIEW PANEL FOR CONSUMER REPORTING RULEMAKING OUTLINE OF PROPOSALS AND ALTERNATIVES UNDER CONSIDERATION, September 15, 2023, Pg. 17

(MNM). They also do tests with unpaid and paid debts. That would be mostly paid medical debts (MPM) and unpaid (MUM). They then study delinquency by credit score for the MM and MNM groups over time. The problem is that an MM and a MNM are a mixture of credit lines.[13] This is not a clean test of the effect of medical tradelines on a credit report at the margin.

39. By not providing data on the composition of the groups, it is impossible to make an apples-to-apples comparison. We do know that medical debt is not random in the U.S. population. Medical debt falls most heavily on low-income counties that have a high percentage of uninsured people.[14] This study does not use any standard statistical controls of economic research. The effect of medical debt may be confounded with the income and healthcare policy of the states in which the people of the sample reside. This analysis is not performed.

40. The work is interesting but has yet to be peer-reviewed or published outside the CFPB. Before using research to make major policy changes, the CFPB should open up its code and data to the public to scrutinize it. A data-driven agency should welcome transparency.

41. The data used needs to be updated for any policy analysis today. The dates used are from October 2011 to September 2013. This data is more than a decade old. Specifically, it predates the Medicaid expansion of the Affordable Care Act, which decreased the percentage of uninsured people. The Urban Institute shows that a county's percentage of uninsured people significantly drives medical bills.[15] Additionally, this work predates the changes to Regulation F and the No Surprises

[13] Consumers with an even split are removed.

[14] Blavin, Fredric, Breno Braga, and Anuj Gangopadhyaya. "Which County Characteristics Predict Medical Debt?." *Washington, DC: Urban Institute* (2022).

[15] Blavin, Fredric, Breno Braga, and Anuj Gangopadhyaya. "Which County Characteristics Predict Medical Debt?." *Washington, DC: Urban Institute* (2022).

Act that reduced medical debt tradelines on credit reports. These final two changes are particularly relevant as, by the author's admission:

> "The account-level information that is included in the credit records comprising the CCP allows us to identify which debts reported by third-party collection agencies were from medical or non-medical bills. While we can identify those collections that were from medical bills, nothing in the data reveals anything about the identity of the medical service provider, the type of institution that provided the service, or the nature of the services that were performed."

This analysis cannot distinguish between medical debts that would have been removed by the No Surprises Act and Regulation F. Given that these rules were to eliminate or regulate expensive emergency healthcare services, out-of-network charges, and debt misreporting, the remaining medical debts may be equally predictive as non-medical debts. Without further studies, there is no way to tell.

42. Even if we took the results at face value, the conclusion that medical debt tradelines can be removed with little impact on credit scores is false. The authors have a motivating example:

> "To understand the approach we take, consider two consumers with identical credit records, at the start of the performance period, neither of whom has any collections. Because their credit records are identical, both will have the same credit score, say 780, and would be expected to have the same likelihood of delinquency during the ensuing performance period. Now assume that at the start of the performance period each of the consumers had a debt collection reported on their credit record, one a medical collection and the other a non-medical collection. If the scoring model treats medical and non-medical collections equally, then the scores of both consumers will be decreased by

the same amount. Using the estimates published by Johnson (2012), we might expect the scores of these consumers to be decreased by about 115 points relative to the starting assumed credit score of 780. Both consumers would now have scores of 665. Since lower credit scores suggest greater risk, lenders would interpret this as reflecting an increased likelihood of delinquency during the performance period."[16]

The authors are not saying that medical debt removal is irrelevant to the predictive value of the credit score. As they state:

> "If the credit scoring model nonetheless treated both types of collections equally, these consumers would both have 665 scores. This means that, if medical collections are truly less predictive about a consumer's creditworthiness than are non-medical collections, consumers with medical collections should perform better."[17]

This work results in an estimated credit score difference of 16 to 21 points for medical debts. This is an average effect, and the impact will depend on the observed credit score level. But as a first-order approximation, it will give a decent approximation. So, in their example, an accurate credit score would be from 780 to 665 for non-medical debts and 665 plus 16 to 21 points, or 681-686 credit score for medical debt. Yes, medical debts are less predictive, but medical debt has an informative value (780 to 681-686) for risk assessment. There are methodological issues that make the estimates suggestive but not definitive. But the Bureau's work,

[16] Kenneth P. Brevoort and Michelle Kambara "Data point: Medical debt and credit scores", *Washington, DC: CFPB* (2014) Pg. 9
[17] Kenneth P. Brevoort and Michelle Kambara "Data point: Medical debt and credit scores", *Washington, DC: CFPB* (2014) Pg. 9

which they base policy on, concludes that medical debts have a predictive value that their removal from credit reports would lose.

43. Given the competitive nature of consumer finance, once this issue is realized, the market will be incentivized to re-price risk based on medical versus non-medical tradelines**.** An example of this from the CFPB's work is that "The FHFA has further announced that it will implement FICO 10T and VantageScore 4.0 as the credit scores that Fannie Mae and Freddie Mac will use as thresholds for screening in loans. These credit scores underweight or do not include medical collections, unlike the credit score models that FHFA-backed loans have historically used for screening-in decisions."[18] Firms are not obliged to use credit scores and reports, but they often use them as part of their internal decision-making and can weight medical debt tradelines as they are compelled to by market forces.

The CFPB needs a valid analysis of the consequences of the data brokerage changes they propose.

44. In the proposed changes to data brokerage stating that:

> "provide that consumer information provided to a user who uses it for a permissible purpose is a "consumer report" regardless of whether the data broker knew or should have known the user would use it for that purpose or intended the user to use it for that purpose."[19]

This overbroad definition could limit marketers' ability to use basic levels of consumer information for targeting ads.

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[18] Alyssa Brown and Eric Wilson "Data Point: Consumer Credit and the Removal of Medical Collections from Credit Reports", *Washington, DC: CFPB* (2023). Pg.25

[19] SMALL BUSINESS ADVISORY REVIEW PANEL FOR CONSUMER REPORTING RULEMAKING OUTLINE OF PROPOSALS AND ALTERNATIVES UNDER CONSIDERATION, September 15, 2023, Pg. 7

The Attention Economy

45. One of the most interesting issues in digital economics is that a plethora of content and services are provided at zero prices on the Internet. This has led to an interest in "Attention Markets." Attention markets are where consumers consume content, and advertisers offer advertisement placements. The value of these ads increases the more they are customized to a customer's profile. A personal finance blog may serve up mortgage or credit card ads. If customers are sub-prime and view the page to get advice, then ads for credit products aimed at sub-prime consumers are beneficial. Alternatively, diligent consumers who read about personal finance and have super-prime credit would benefit from advertisements for consumer products specialized for them. Both types of consumers may visit the webpage or App. Thus, the ability to buy data to target individuals or sub-groups makes the ad placement more profitable. This ad-driven model is the primary funding source for the free services of Google, Facebook, and many websites and Apps.[20]

46. The value of the Attention Economy is enormous, and any regulation that shrinks it can be economically destructive. The most recent estimate of the internet portion of the Attention economy by Evens (2020)[21] is determined by looking at the time Americans spend on these services. The value of time is the implicit price being paid for these free goods. In 2019, Americans spent 514 billion hours on ad-supported content. The time value used was $13.60 per hour, taken from a U.S. Department of Transportation study. This led to a valuation of $7 trillion for ad-supported content in 2019. Because this value is so high, I include other valuations as cited by Evans:

[20] An interesting take is on the personal finance blog Mr. Money Mustache https://www.mrmoneymustache.com/2011/06/01/an-experiment-with-blog-moneymaking/

[21] Evans, David S. "The economics of attention markets." *Available at SSRN 3044858* (2020).

Study	Summary	Yearly Value Per U.S. Adult User of the Medium	Aggregate Yearly Value (in billions)
Brynjolfsson, Collis, and Eggers (2019)	Utilized online discrete choice experiments during 2017 to estimate the monetary compensation consumers needed to compensate losing access to various digital goods.	Search engines: $17,957 Social Media: $330 Online video: $274 Online music: $70	$3,797
Allcott, Braghieri, Eichmeyer, and Gentzkow (2019)	Used a Becker-DeGroot-Marschak mechanism to elicit Facebook users' willingness to-accept (WTA) to stay deactivated from Facebook for four weeks during 2018.	Facebook: $2,340	$410
Brynjolfsson and Oh (2012)	Used data on consumers time spent using the internet and their opportunity cost of time (income) to estimate consumer surplus from the internet during 2011.	Internet: $4,880	$928
Goolsbee and Klenow (2006)	Used data on consumers time spent using the internet and their opportunity cost of time (income) to estimate consumer surplus from the internet during 2005.	Internet: $2,053 - $3,120	$287-436

Note: Authors' estimates are multiplied by a factor that represents my estimate of the proportion of the media that is accounted for by an ad-supported model. If the author estimates are on a per-user basis, I compute aggregate valuations based on estimates of the number of U.S. adults that use the media form. See Appendix B for details.

The Brynjolfsson and Oh[22] estimates are from the most defensible methods. In 2011, this was $928 Billion **a year** in value. This would be about $1.2 trillion in 2023. If the data brokerage rules reduce the value of ad-supported content by a mere 1%, then $12 Billion of economic value could be destroyed **annually**. Of course, the CFPB has no estimates on how they will affect this market. With

[22] Brynjolfsson, Erik, Seon Tae Kim, and Joo Hee Oh. "The attention economy: measuring the value of free goods on the internet." *Information Systems Research* (2023).

numbers this large, the Bureau should proceed carefully and analyze the implications of restricting data access.

The effect of this rule on other industries

47. The CFPB needs to study the effect a degradation in the quality of credit reports would have on the consumer finance lending industry. Currently, analysis has yet to be done on the end users of the credit reports and the potential consequences of removing the predictive information in the medical debt tradelines. Below are two case studies based on academic work.

Case Study: Improved credit assessment

48. Few studies document how improving credit scoring affected lenders and lending. The Bureau is proposing reducing the information value, i.e., degrading, of the credit reports by removing predictive information about risks faced in consumer lending to potential consumers. Einev et al. (2013)[23] studied the effects on a car dealership with a few locations that provided auto financing in a low-income, high-risk market. This firm operates in a high default population where profitability depends on identifying consumer risk quality. Furthermore, the firm matches cars (high or low value) to consumers and offers customized lending terms. It is important to remember that computational, data-intensive, and readily available credit scores are a relatively modern phenomenon. Credit reports are ubiquitous today, but even 30 years ago, they were not commonly used. The benefits of credit reports to the financial markets are often taken for granted.

49. This firm went from a low to a higher information environment. The lender adopted credit scoring by the end of June 2001. Before this, employees made judgments on credit based on information they elicited out of the sales process.

[23] Einav, Liran, Mark Jenkins, and Jonathan Levin. "The impact of credit scoring on consumer lending." *The RAND Journal of Economics* 44.2 (2013): 249-274.

This firm began using credit reports and inputting the information into its proprietary algorithms to assess risk. This is a case study of using data to make more informed decisions.

50. The effects of improved risk assessment are apparent. The firm was able to identify better risks and extend more credit to them to increase profitability. This was achieved by more accurately identifying customers as low or high risks. The company closed deals with less than half the high-risk customers than before. However, the default rate fell as the firm was better at avoiding bad risks. Additionally, as higher risks, they were required to put higher down payments for purchases. Credit became tighter for this population. The applicants identified as low-risk were able to take out bigger loans.

51. The Bureau's proposed rule is to take this process of improving lending through predictive credit information backward. The proposed rule changes would result in credit reports being less accurate, and consequently, lenders in consumer finance will be less able to assess default risks. The low-risk borrowers will be less able to signal their lower risk level and have access to credit constrained. Lenders will see a fall in profitability as they unwittingly take on risky borrowers. This will result in more credit for the risky borrowers. But more defaults.

Case Study: Data Privacy

52. There are few studies about how the restriction in the flow of data through privacy laws affects consumer financial markets. Kim and Wagman (2015) study the effect of privacy on consumer finance on theoretical and empirical levels. They show that a firm's ability to sell consumer information can lead to lower prices, higher screening intensities, and increased social welfare. Empirically, they show their model is consistent with the fall in denial rates in home loans and refinancing in counties that adopted more stringent privacy regulations. Subsequently, these

counties had higher foreclosure rates in the 2007-2008 financial crises. This issue of unstable mortgage origination and high foreclosure during this exact crisis was the raison d'etre for establishing the CFPB itself.

53. The motivation for this academic work was the 1999 enactment of the Gramm-Leach-Bliley Act (GLBA), allowing a variety of financial institutions to sell, trade, share, or give out nonpublic personal information about their customers. In their model, financial institutions use data to reduce customer service costs. Market competition results in cost savings passed to consumers via price cuts or better financing terms. For this to be profitable, firms use the newly available information more heavily to screen applicants, and as a result, potentially high-risk borrowers are denied credit. Thus, industry and borrowers, but not rejected applicants who would not have defaulted[24], benefit as consumer information increases.

54. The test for this theory was when three out of five counties in the San Francisco-Oakland-Fremont Metropolitan Statistical Area (MSA) adopted a privacy ordinance on January 1, 2003, requiring consumers to opt-in to releasing information under GLBA. Given most people's status quo bias, this effectively reduced the amount of privacy information lenders could access. By studying loan data of conventional home purchases at the census tract levels in these counties from 2001 to 2006, they established market behavior before and after the enactment of the privacy ordinance.

55. The theoretical results are consistent with their empirical findings. The theory predicts that these weaker privacy laws would result in less screening of mortgage applicants. This would result in a fall in loan denial rates. But foreclosure rates eventually rise as these weaker risks are more likely to default. When looking

[24] Rejected applicants who would have defaulted would have benefited if the costs of default, e.g., foreclosure, is high.

at the data, the census tracts with higher shares of 2003-04 originated loans in the counties that enacted the privacy opt-in had a higher foreclosure rate. As the authors put it:

> "The results in this paper give rise to the conjecture that privacy acts may have played some role in the subprime mortgage crisis by weakening lenders' incentives to screen loan applications."[25]

56. The Bureau's rule is essentially a privacy rule against medical debt tradelines. The result would be a move to a lower information environment. Only if consumers voluntarily disclose their medical collections history will lenders have a complete picture. This will result in more credit being available to unqualified borrowers.

The effect of this rule on debt collection

57. To quantify the magnitude of these proposed changes on debt collectors, I have used a data set contributed directly to me by collection agency members of ACA International (ACA). These data contain 1,615 client accounts (not consumers, but 1,615 creditor organizations) from 19 self-reported debt collection agencies. These data include the number of referrals, collections, and the estimated impact of the rule change on liquidation rates of referred debts to collectors (or writing off debt) due to the changes. This data reflected the restrictions on reporting medical debts under $500[26]. The Bureau is proposing restricting all medical debt balances—a more drastic rule with more drastic consequences. Unfortunately, a more rigorous analysis was not conducted due to the rushed nature

[25] Kim, Jin-Hyuk, and Liad Wagman. "Screening incentives and privacy protection in financial markets: A theoretical and empirical analysis." *The RAND Journal of Economics* 46.1 (2015): Pg. 7

[26] This change went into effect April 1, 2023. The credit reporting agencies also took two other actions prior to that (removing paid medical debt, and delaying credit reporting for a year), none of which has been empirically studied for potential degradation of the lending environment.

of the SBREFA process. However, this is more evidence of the effects of the proposed rule change on the industry than the Bureaus have conducted.

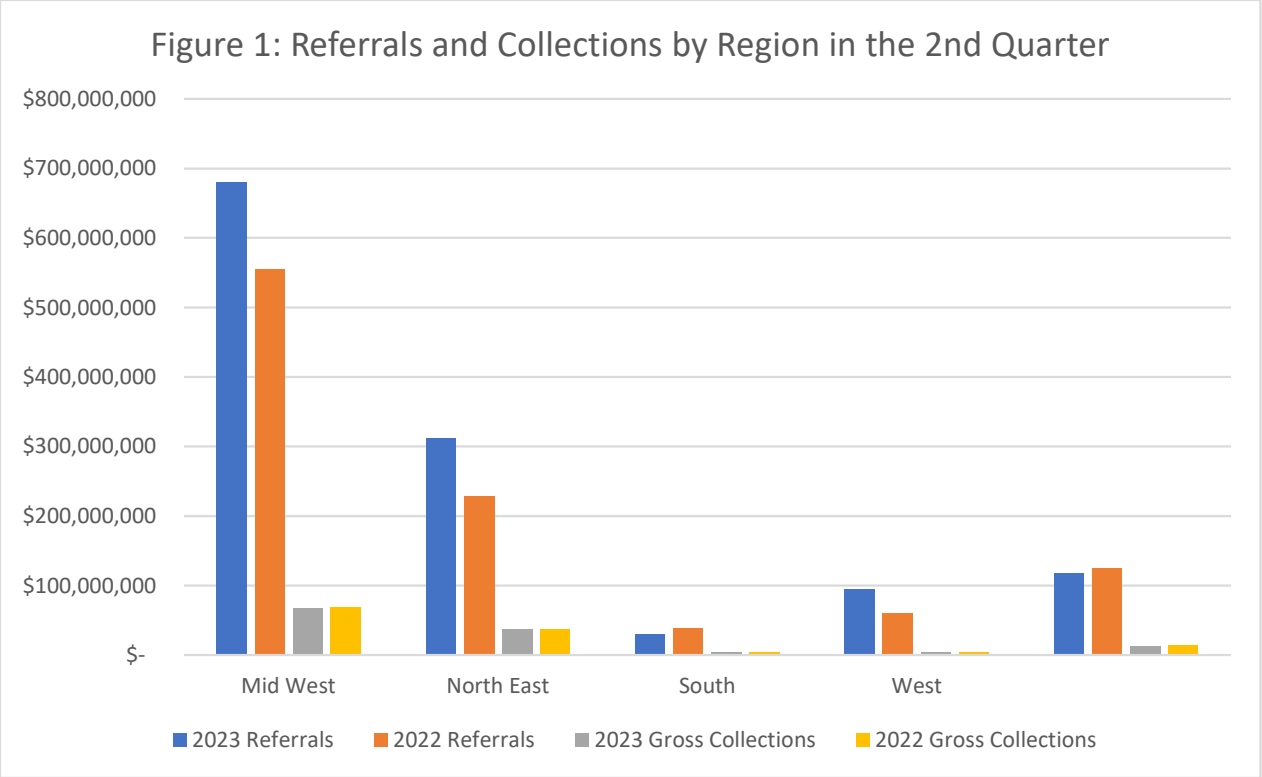
58. The data is disproportionately weighted to California. California makes up 60.3% of the sample. This is not a representative sample of the U.S. However, I split the data into the four regions defined by the Census Bureau: North-East, Mid-West, South, and West. Despite this aggregation, the general results will reflect the West and California.

Table 1: Data by Region

region	Freq.	Percent
Mid-West	193	14.89
North-East	30	2.31
South	113	8.72
West	960	74.07
Total	1,296	100

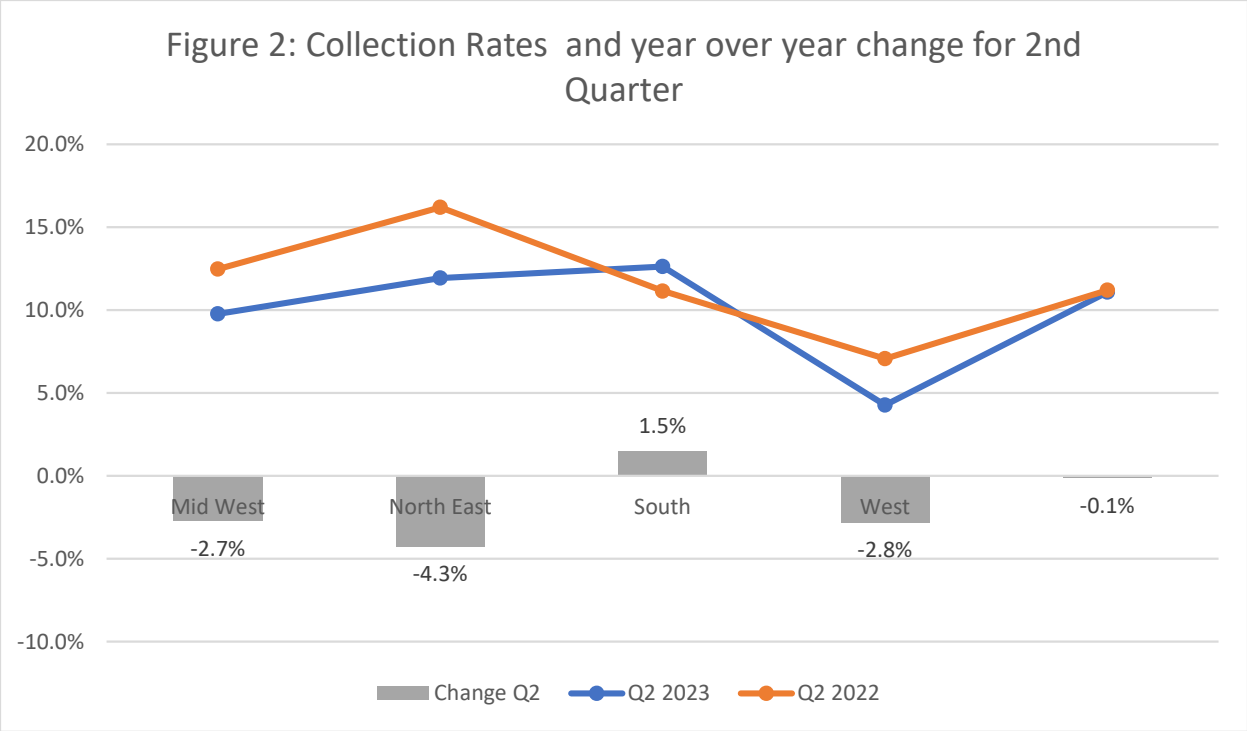
The remaining observations did not have an identified State and, thus, region.

59. The data includes referrals (amounts to be collected) and gross collections. I used the 2nd Quarter data for 2022 and 2023. Debts might not be collected in the quarter they are referred so this approach is an approximation. Figure 1 shows the referrals and collections for Q2 2022 and 2023 for the data collected by ACA. This data will be skewed by who submitted the data. Referrals to collect increased in the U.S. increased in 2023 compared with 2022. The cause of the increase in these referrals is unknown. However, this could result from providers receiving fewer payments for their medical services and consequently making more debt collection referrals. Gross collections remained stable from 2022 to 2023.



60. The geographic distribution of the data does not reflect the data overall. The West constitutes about 74% of the data, but most collections originate in the Mid-West.

61. The number of collections determines the size of the market, but the collection rate indicates whether payments are occurring. I find the collections rates by dividing gross collections by referrals for 2022 and 2023. The results by region are in Figure 2. Collection rates are between 10-15%, with the Mid-West in 2022 as a high outlier and the South as a low outlier.



62. The data was collected after new rules limiting the ability to report medical debts came into effect. Thus, the fall in collection rates in Figure 2 may already reflect the reduction in creditors' rights these last few years. The change in the collection rates by region suggests that the message behind the message is that medical debts do not need to be paid. For the U.S., in Figure 2, the collection rate fell by 2.7%. However, this obscures meaningful differences within the U.S. In the regions where obstructions to the reporting of medical debt have spread, the North-East and West (mainly California), we see a slight increase in collections or no change. However, in the Mid-West and the South, there are large reductions in the collections of medical debts. This could be an anticipatory effect of the belief that debts would not have to be paid. These amounts are large and could be a harbinger of future problems for the industry created by the proposed rule change. A good metric would be to see the decrease in expected liquidation rates of referred debts to collectors that could be attributed to limits to credit reporting.

63. The ACA data has estimates if the rate of liquidation of referred debts to collectors is caused by ceasing credit reporting and indicates that it will decrease[27]. The data submitted by the ACA members show the expectations of a decrease in liquidation of referred debts due to the proposed rule, see Table 2.

Table 2: Estimate of Change in decrease of Liquidation of Referred Debts Percentage due to not Credit Reporting

	Mean	Median
U.S.	-10.1%	-4%
U.S. less California	-10.8%	-4%
Mid-West	-13.1%	-8%
North-East	-7.3%	-4%
South	-9.8%	-3%
West	-9.5%	-3%

I present two sets of numbers, the mean and median response. The mean/average is the best estimate for the actual value, but extreme values may skew it. The median is a more conservative number.

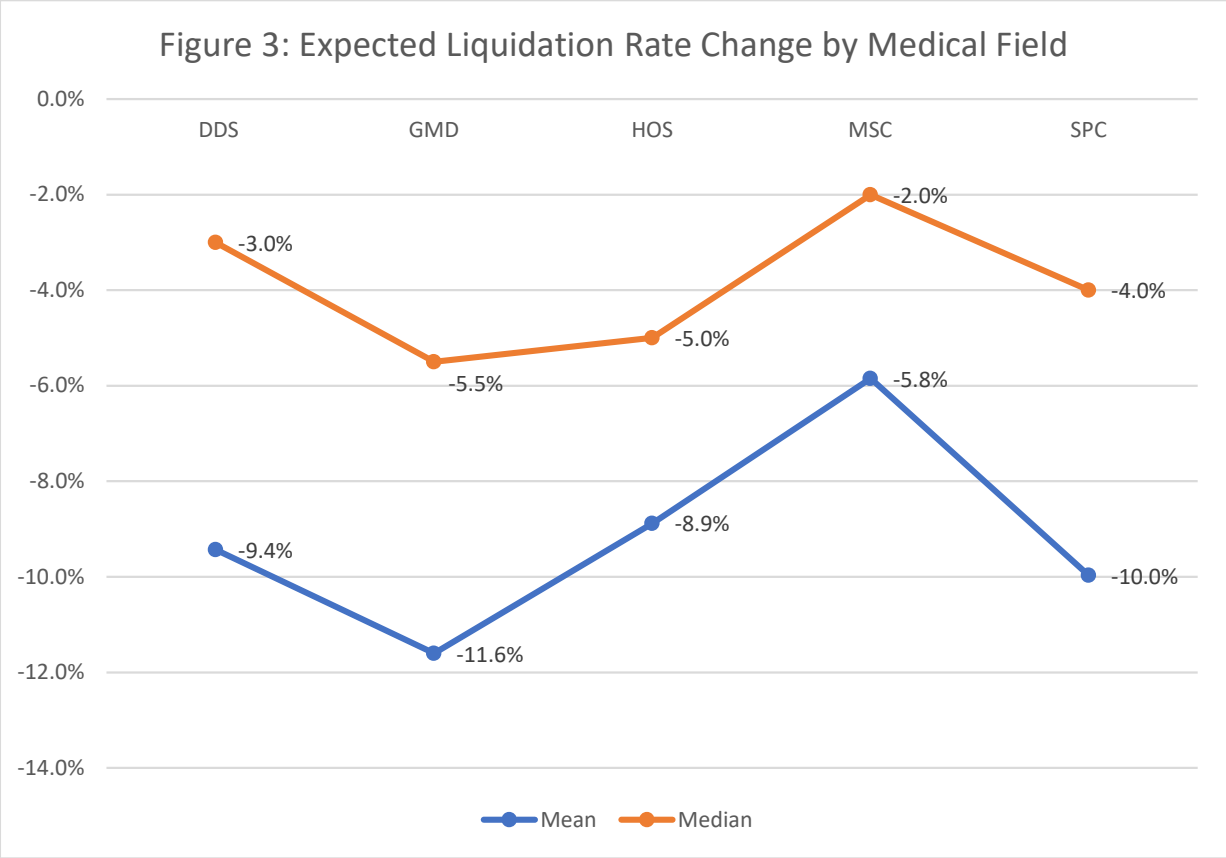
64. The effect of ending credit reporting on liquidation rates of referred debts to collectors varies by region. The overall amount decreases by 10.1% on average or a median of -4%. Because the data is so heavily California-centric, I calculated the difference for the rest of the U.S. I get a slight rise in the average and the same median. By region, we see that the Mid-West will be most affected by the proposed rule changes—a shockingly high average decrease of 13.1% on average. Even the more conservative median value is an 8% decrease.

65. **T**he median values align with what has been seen elsewhere. In an amicus brief filed by the Nevada Hospital Association (NHA), the NHA estimated that an

[27] I am using industry nomenclature. To decrease by 10% means the value of accounts collectors are collecting, "liquidating", has fallen by 10%. I.e., Collectors receive less from accounts referred to them.

increase of a "cooling off" period on reporting medical debts to 60 days would result in an expected loss of 1.5% to 5% for 2022[28]. This proposed rule differs because the "cooling off" period is permanent. Thus, the losses should be higher and align with the mean values reported in Table 2 (-9.5% in Western States). This is not proof but evidence that my estimates are reasonable.

66. I repeat the exercise of observing the estimated liquidation rates of referred debts to collectors by medical specialty in Figure 3. Again, to be conservative, I graph the mean of the estimated rate and the median (which is more conservative).



The highest change is in GMD -- general medicine. These are primarily family physicians and general practitioners. The fall in expected liquidations of referred

[28] Brief for the Nevada Hospital Association as Amicus Curiae, *Aargon Agency, Inc. v. O'Laughlin*, 70 F.4th 1224 (9th Cir. 2023).

debts is 11.6%. Even the conservative estimate using the median is a 5.5% decrease. Thus, industry is expecting a large decline in the local physicians' ability to collect revenue. Additionally, we see a considerable reduction in HOS, hospital services, DDS, dental services, SPC, specialty medicine, and MSC, miscellaneous (for difficult-to-categorize services). The Bureau has not considered how the impact will vary by medical practice. However, few businesses operating under market principles can sustain such sudden drops in revenue by collectors that will pass them on to medical practices.

67. The impact on small businesses is substantial. Table 3 shows the data's decrease in expected liquidations of referred debts from small business clients[29]. The small business rate is slightly higher than the average for the U.S. The key takeaway is that this proposed rule change will drastically affect the ability of small business physician practices to collect revenue via collections.

Table 3: Small Businesses and Metro Area
Estimate of Change in Liquidation of
Referred Debts Percentage

	Mean
Small Business	-10.2%
Non-Metro	-10.4%
Metro	-9.9%

68. The impact disproportionately hurts rural physicians. The data was matched via zip codes to the Rural-Urban Commuting Area (RUCA) defined by the U.S. Census Bureau. These codes measure census tracts and zip codes and the flow of people living in that area into a primary metropolitan area. For example, Hoboken, N.J., is part of New York City. The code I used for a business to be included in a

[29] I am using industry nomenclature. To decrease by 10% means the value of accounts collectors are collecting, "liquidating", has fallen by 10%. I.e., Collectors receive less from accounts referred to them.

metro is 10% commuting or higher. This captures most suburban communities that use a metro area's medical facilities. Thus, my definition of non-metro is towns sufficiently far away from metro areas, so commuting is uncommon. Physicians in non-metro zip codes have a more considerable decrease in expected liquidations of referred debts. 10.4% of these accounts represent a substantial loss of revenue to collections on behalf of rural physicians.

69. The impact on expected liquidation of referred debts in the data depends on whether a firm was already credit reporting delinquent accounts. Table 4 shows the fall in the expected liquidations of referred debts for non-credit reporting collection agencies is -5.8% and -10.9% for credit reporters. This could be due to credit reporters being in States that severely limit their ability to report or collect debts, or it could be due to the type of medical debt collected. In the data, 84.7% of accounts are credit reporters; thus, the impact will be substantial if the proposed rule changes are implemented. This is consistent with the deterrent effect of credit reports. The removal of credit reporting causes a large decrease in liquidations. Firms that don't report to credit reporting agencies have already adjusted to this policy. However, non-credit reporters expect a fall of almost 6% since the message that medical debts need not be paid will be clear and well-known amongst borrowers.

Table 4: Credit Reporting and Usage of Legal System Estimate of Change of Liquidation of Referred Debts Percentage

	Mean
No Credit Reporting	-5.8%
Credit Reporting	-10.5%
Do not use legal collections	-10.9%
Uses legal collections	-7.3%

70. Using the legal system to enforce collections is an essential differentiator amongst collection firms, and consequently, the expected liquidation rate of referred debts decreases due to non-credit reporting. In the deterrence section, I emphasized there were three levels of consequences for non-payment of debt. The first was not to have the debt reported or no consequence. The second was to report delinquency to the credit bureaus – the medium step. The third was to use legal collections. The data shows that 84.7% are credit reporters, but only 25% use legal collections.[30] Table 4 shows that collectors who do not use legal collections expect a fall of 10.9%, but firms that use legal collections expect only a 7.3% decrease. This difference cannot be known from this data, but presumably, this may be due to legal collectors planning to use the legal system to enforce their rights to receive payment. If some debts could be collected via credit reporting but now require legal action, this would entail a net social loss due to the costs of the legal system.

The effect of this rule on debt collectors

71. The net effect of these data is to show a contraction in the debt collection industry. Debt collection is a necessary part of financial markets. The service they provide is to enforce payment of contracts. They, of course, do this for a fee. It is a competitive industry, resulting in fees aligning with costs. Thus, by reducing the effectiveness of collectors, the result will be a rise in collection costs or a reduction in collectible amounts, which will be passed on to their consumers –companies providing financing. Some firms will leave the market, reducing competition, employment, and options for collection companies and, by extension, healthcare providers.

[30] There is no limit to using credit reporting and legal collections. Given legal collections are more costly to initiate than a credit report, I assume legal collectors are credit reporters and that legal collections are an escalation in the collections process.

The effect of this rule on medical providers

72. The struggles of debt collectors will be passed on to companies financing medical procedures and, ultimately, medical providers. Without efficient debt collection, medical providers would have to raise the cost of financing or cut consumers off from medical services. America has a market-based healthcare system, and with competitive pressures, systematically losing revenue cannot be written off. The data shows net losses in collections can be over 5-10% and concentrated in rural areas and general medicine. Given the competitive nature of this industry, much of these losses will be passed on to medical providers and subsequently – their patients. Further, this will be a systematic issue across the entire country. Unfortunately, there is no data documenting the losses to providers from the reduction in the ability to collect medical debts. Given that Americans pay co-pays, deductibles, and out-of-pocket expenses in market-based healthcare, this amounts to a large portion of provider's incomes being put at risk by the proposed Bureau rule change. However, in Figure 1, I have shown how referrals of debts for collections have increased. It is consistent with the data to hypothesize that the message consumers are getting is that they do not need to pay their medical debts. If true, this would result in providers receiving less compensation. This hypothesis should be studied before any new rules are promulgated because, ultimately, medical providers will need to protect themselves and deny care. This could result in heavier government or non-profit care usage or people going without medical treatments, goods, or services.

The effect of this rule on medical consumers

73. The final stakeholder who will ultimately lose is the consumer of medical services. Consumers who gain by having their medical debt records removed or never reported will potentially suffer from worse financing terms or the inability to

access health care and, ultimately, debt financing. Consumers who diligently pay their medical debts will not get credit for doing so but potentially lose access to medical access. A market-based health system without financing would be a terrible equilibrium.

Andrew Nigrinis

Andrew Nigrinis, Ph.D.

November 6th, 2023

November 6, 2023

Comment Intake
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552

SENT VIA ELECTRONIC MAIL TO CFPB_consumerreporting_rulemaking@cfpb.gov

Re: Small Business Advisory Review Panel for Consumer Reporting Rulemaking; Outline of Proposals and Alternatives Under Consideration

Method Financial ("Method") was pleased to have had the opportunity to participate as a Small Entity Representative ("SER") in the Consumer Financial Protection Bureau's ("CFPB" or "the Bureau") Small Business Regulatory Enforcement Fairness Act ("SBREFA") panel, which was convened to provide perspective regarding the implications for small businesses of the Bureau's potential rulemaking pertaining to consumer reporting. As I shared throughout my participation in the SBREFA process, while Method is absolutely committed to ensuring consumers may access and share access to their financial data with full transparency, control, and safety, we:

1. Urge the Bureau to recognize a bright line distinction between "data brokers," who maintain and sell their warehoused consumer data (a product), and data aggregators or data access platforms (collectively "data access platforms"), who facilitate consumer-permissioned data access (a service) where the data is obtained directly from the data provider in real-time and is used only once for the purpose consented to by the consumer. Data access platforms should not be considered "data brokers";
2. Urge the Bureau—to the extent that it proposes a Fair Credit Reporting Act ("FCRA") rulemaking—to carve out such data access platforms from the definition of a "consumer reporting agency" under the FCRA; and
3. Believe that application of the FCRA to consumer-permissioned data access platforms is impracticable, counterproductive, adds unnecessary complexity, and would lead to confusion among stakeholders including consumers. Further, the resulting burdens and negative impacts to all stakeholders far outweigh any consumer protection benefit.

I appreciate this opportunity to submit a more detailed written summary of these views.

About Method

Method is a business-to-business software-as-a-service ("SaaS") provider to entities such as banks, credit unions, and financial technology companies (collectively, "Partners") that provide financial products and services to their end users ("consumers"). Our services are driven by our mission to facilitate efficient consumer debt management. Through Method's secure consumer authentication and account connection flow, our Partners can obtain consumer-permissioned, real-time data on their consumers' liability accounts including credit cards, student loans, personal, auto, mortgage, and other loans using elements of their personally identifiable information ("PII") so that they can provide use cases that provide their consumers with safe, secure, and convenient debt management and repayment solutions.

Through our required consumer-facing disclosures and contractual prohibitions, our Partners can use this data for the single and sole purpose for which that data was accessed and that the consumer authorized: namely, to provide the financial product or service their consumer requested, such as personal financial management, bill pay, refinancing, debt consolidation loans, or balance transfers, among other use cases. Importantly, while Method retains the data in an SSL encrypted datastore that meets or exceeds SOC 2/Type 2 and PCI DSS requirements, it only does so for record retention purposes. Method never re-discloses or reuses data for commercial purposes; not even internally.

Method authenticates consumers using their PII through a process that is already commonly used by financial institutions to satisfy their KYC/CIP requirements. Namely, Method integrates with vendors including mobile network operators ("MNOs") and the major credit bureaus to authenticate the consumer using those organizations' existing, regulated consumer authentication processes. Further, Method's integration with the MNOs also bolsters authentication and fraud mitigation with one-time-passcodes, SIM swap checks, and silent verification. This authentication process has provided hundreds of thousands of consumers with the ability to share their liability data to obtain valuable debt management products and services.

Importantly, Method's authentication and account connection processes do not require any consumer credentials or implementation by the data provider of new authentication tools, such as OAuth or other token-based technologies. Our tools demonstrate that existing technology solutions can enable safe and secure consumer authentication and eliminate the need for data providers to invest in significant technology enhancements.

Method is not a "Data Broker"

In its SBREFA memo, the CFPB suggests it may include consumer-permissioned data access platforms including Method to fall under its definition of "data brokers." As I shared during the SBREFA panels, we strongly reject this categorization.

Informed consumer consent is the basic principle around which all of Method's products and processes are based. Method does not relay any consumer's data without the consumer's knowledge and meaningful, informed consent through clear and conspicuous disclosures. Any data that we relay is obtained directly from the data provider in real-time when the consumer permissions and directs it. And the data can be used only for the strict use case that the consumer authorized at that time.

Unlike a data broker, Method never provides data from its own "files." We never sell, market, assemble, evaluate, or maintain consumer data. The data is never redisclosed or reused. Method merely operates as a conduit or a "dumb pipe" to relay real-time, consumer-permissioned data directly from a data provider to the data recipient that the consumer has selected to help them service their debt.[1]

To illustrate: Imagine that John Doe seeks a financial service from our credit union Partner and provides consent to access and share his liability account information with the credit union Partner for purposes of obtaining that requested service. One hour later, John Doe then seeks a financial service from our bank Partner and provides consent to access and share his liability account information with the bank Partner for purposes of obtaining that requested service. The data relayed to the credit union Partner is not later shared with the bank Partner. There would be two distinct and separate "pulls" from John Doe's liability accounts, based on two separate authorizations.

Method would keep the data from both "pulls" in the previously-described, encrypted datastore for record retention purposes only. As stated before, the data from either "pull" is never re-disclosed or reused.

Finally, I would once again emphasize, as I expressed during the SBREFA panels, that Method's agreements with our Partners require express written consent with affirmative acknowledgement,

[1] Method's interaction with the consumer-permissioned data is limited to the mechanical tasks of standardizing the data into a readable format. Given that the typical transaction and experiential data fields obtained from data providers is largely standard, Method's accuracy rate is 99.9999%.

from a consumer prior to conducting *any* activity on their behalf in connection with our services or data we relay. Our agreements also mandate that our Partners can only use the data as authorized by the consumer when the data is accessed, and present disclosures, notifications, and communications as required by applicable law in a clear, conspicuous, easily understood manner.

We strongly believe that the sum of these factors creates a robust consumer protection regime that materially distinguishes the consumer-centric role we play from how "data brokers" operate.

Applying the FCRA to Data Access Platforms is Counterproductive, Impracticable, and Confusing

As the CFPB notes in its SBREFA memo, Congress enacted the FCRA in 1970 to provide consumers with more transparency and control into the data maintained and disclosed by credit reporting agencies that is used for credit decisions (and later, other permissible purposes). To underscore several material points about Method's and other similar consumer-permissioned data access platforms' business model:

- the data that Method accesses and relays is always accessed at the express direction and consent of the consumer;
- the data that Method accesses and relays always comes directly from the data provider in real-time when the consumer permissions it—Method does not "maintain" files that it discloses to any third-parties or uses for internal purposes;
- the data that Method relays is consumer transactional and experiential ("T&E") data, which consumers can access at any time from their account-holding institution; and
- unlike credit reporting agencies prior to the enactment of the FCRA, or data brokers today, there already exist regulatorily-prescribed dispute and error resolution channels for that T&E data that consumers commonly use including, for example, through Regulations E and Z, and chargeback processes.

Extending the FCRA to Method and similar data access platforms is simply unwarranted and would add substantial complexity and confusion to a framework that already provides comprehensive consumer transparency and control with little, if any, consumer benefit. For example as summarized below: if data access platforms were considered to be consumer reporting agencies ("CRAs"), the platforms' compliance with the FCRA's error dispute resolution requirements would lead to confusing and absurd results for all stakeholders.

Data Access Platforms as CRAs

Section 1681i of the FCRA requires CRAs to investigate consumer disputes and correct inaccurate data in their files. But foisting this requirement on data access platforms like Method is an exercise in futility given that Method does not maintain "files," and the disputed data never sees the light of day again. As noted previously, the data is never re-disclosed or reused for any reason. The duty to investigate and correct would thus serve no purpose whatsoever and add no consumer benefit.[2]

Rather, applying those duties to data access platforms would be unreasonable given the lack of consumer benefit and the extremely high costs of compliance, which are discussed later in this comment. And it would have the unintended, adverse consequence of creating differences in the parallel consumer records retained by the data access platform and as compared to the consumer's account-holding institution. As noted in the John Doe illustration above, Method relays real-time, consumer-permissioned data directly from the data provider with each consumer authorization, and retains the data from each of those "pulls" for record retention purposes. If John Doe in the illustration above disputed the data from one "pull" but not the other, an error correction would create differences in what should otherwise be identical, parallel records.[3]

Under § 1681i(a)(2)(A) of the FCRA, a CRA is also required to notify a furnisher of disputed information "at the address and in the manner established with the [furnisher]." But data access platforms like Method operating under Section 1033 of the Dodd-Frank Act would not have an agreed-on address and manner of notification, making compliance confusing and difficult. And given that there are tens of thousands of data providers in the Section 1033 marketplace that would be "furnishers" under a potential FCRA rulemaking, requiring data access platforms to establish an agreed-on notification address and manner with each would be remarkably burdensome, and especially so for small businesses.

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[2] If a potential rulemaking considers data access platforms to be a CRA, it is unclear whether the Bureau would seek to resolve the futility issue by requiring an data access platform to respond to consumer disputes with a frivolous and irrelevant notice under § 1681i(a)(3). This would be insufficient for at least three reasons: (1) it could cause consumer confusion and potentially discourage them from disputing the issue directly with the data provider (furnisher) through well known, existing channels; (2) it does not resolve the underlying futility of considering data access platforms as CRAs; and (3) it still imposes extreme hardship and undue burdens on data access platforms, particularly smaller platforms.

[3] A potential rulemaking could also cause a divergent parallel record issue, and resulting consumer confusion, between a financial institution and a data aggregator, as noted in FN 5.

Consumers

As established during the SBREFA panel meetings, the law is complex and confusing even to sophisticated business parties. Average consumers cannot be expected to be familiar with the FCRA or its intricacies. They are likewise unfamiliar with the various types of entities—and the material differences among them—that are or may be subject to the FCRA as CRAs or furnishers. The vast majority of consumers may only have a vague notion that furnishers regularly provide information to CRAs who regularly provide that information to third parties.

A potential rulemaking that results in data access platforms like Method being a CRA would substantially increase that complexity and confusion, and cause potential harm to consumers under existing provisions of the FCRA. Section 1681g requires CRAs to provide certain disclosures to consumers such as: (1) a summary of rights, including the right to dispute information in the CRA's "file" and the CRA's duty to correct; and (2) all the information in the "file" itself.

The summary of rights disclosure could cause a mistaken belief in consumers that a dispute leading to a correction of information in the data access platform's "files" would be beneficial. But, as noted earlier, that data is never re-disclosed or reused. The data access platform's duty to correct would thus serve no purpose and add no consumer benefit. consumers may also be confused into thinking, to their detriment, that disputing the data with a data access platform is the only or the best way of filing a dispute when, in fact, better avenues exist.[4]

Second, the potential that a correction could lead to a data access platform having divergent parallel consumer records with different T&E data could confuse consumers who request their "file" under § 1681g. Consumers could be confused about what T&E data was actually provided to a data recipient (or a "user" under the FCRA) and what information was corrected. They could

[4] While a correction by the data access platform could mean that the financial institution (furnisher) had corrected their data, the process under the FCRA is indirect, lengthier, less effective, and potentially detrimental to consumers relative to existing processes (e.g., Regulations E and Z) for consumers to correct errors with their financial institutions. Moreover, in the Section 1033 context, data access platforms are typically relaying T&E data. For credit and debit cards, there already exists a commonly used, effective, and regulatorily required dispute and chargeback process that involves back-and-forth communications among the financial institution, consumer, and merchant. The dispute procedures in the FCRA are simply not designed to handle such T&E disputes. And given the punitive liability regime under the FCRA—through enforcement and private right of actions with fee shifting provisions and statutory damages with no showing of harm—financial institutions that could potentially be considered furnishers under a rulemaking would likely just "correct" the transaction rather than face a potential lawsuit, which would lead to losses (to both the FI and the merchant) and increase first-party fraud.

be further confused into thinking that the inconsistent parallel files might all be disclosed in future requests.[5]

Section 1033 "Covered Persons" as Furnishers

Furnishing is voluntary under the FCRA. Entities that choose to be furnishers are subject to complying with myriad requirements under the law. A potential rulemaking would substantively change this framework under the FCRA by forcing "covered persons" who comply with their requirement to provide financial data under Section1033 of the Dodd-Frank Act to be involuntary furnishers of that data under the FCRA. They would then be subject to the duties of furnishers, which, of course, they did not bargain for.[6]

Compliance with those requirements is burdensome, demanding a significant outlay of time, money, and other resources as described more fully later in this comment. The burdens are particularly onerous to smaller entities like community banks and credit unions for whom the outlay may be existentially prohibitive. Worse still, because they would be involuntary furnishers under a potential rulemaking, these data providers may not even be aware of their FCRA obligations, leaving them susceptible to enforcement actions and private litigation.

The points above highlight just some of the concerns, difficulties, and confusion that would stem from a proposed FCRA rulemaking in this space. What's more, these points only focus on disputes, which represents just a sliver of the FCRA's obligations. I would also once again point out, as we discussed during the SBREFA panels, that the application of a credit reporting rulemaking to real-time, one-time use consumer-permissioned data access platforms like Method will have other adverse and counterproductive consequences. To the extent that Method is

[5] Again, Method does not re-disclose or reuse any data. The larger point is that a potential rulemaking that encompasses data access platforms is inconsistent with the FCRA and consumers' understanding of it. A consumer could be further confused if they successfully disputed an error directly with their financial institution and then later requested their "file" under FCRA § 1681g from a data access platform that contained pre-dispute T&E data from that institution. If the institution did not know they were a furnisher under the FCRA and that the data access platform was a CRA, then they may not have communicated the correction to the platform (and even if they did, the requirement would be unnecessarily burdensome and absurd as to companies like Method who never re-disclose or reuse that data). The consumer could then have diverging parallel transaction records.

[6] In turn, this may cause them to seek ways to avoid providing this data to the detriment of consumers who authorized the release of the data—undermining the very purpose of the Bureau's efforts to implement Section 1033 of the Dodd-Frank Act—which consumers require to obtain products and services.

deemed a nationwide credit reporting agency under a future rulemaking, such a rule could actually require our company to collect *more* consumer data than we do today. As the Bureau noted in its SBREFA memo, nationwide consumer reporting agencies have certain obligations in circumstances in which they believe systemic issues are resulting in inaccurate data being reported about multiple consumers.[7] By definition, complying with this requirement would require Method to collect enough data to identify and notify any potentially impacted consumers in such an event. Similarly, if consumer-permissioned data platforms like Method will be required under the FCRA to correct consumer files when a consumer files a dispute, we will be mandated under statute to maintain that consumer's file for a significantly longer period of time than Method typically retains consumer data today. Both unnecessarily create risk of consumer harm due to a cyber event or privacy breach and convey no consumer benefit.

The Undue Burdens on Impacted Stakeholders will Acutely Impact Small Businesses

The proposals under consideration for this potential rulemaking would, if implemented, represent a significant and disproportionate compliance burden for smaller market entities without any meaningful gains to consumer benefits or protections. As one SER stated on the SBREFA panel, it would be "back breaking" for his company. Several other SERs agreed that a potential rulemaking could cause their business and many others to close their doors or consolidate to survive, threatening competition in the marketplace.

If data access platforms like Method were to become CRAs under a potential rulemaking, we would be required to: (1) hire staff with FCRA compliance expertise, including compliance and dispute resolution professionals with subject matter expertise; (2) provide ongoing FCRA training; (3) build operational processes; (4) build controls and ongoing monitoring, testing, and auditing to ensure compliance; and (5) as noted earlier, build and maintain the technical resources required to gather and store additional consumer data.

While Method does not have corresponding cost estimates, the resources required to implement these would be massive. For an early-stage, small business start up like ourselves, it would be extremely difficult to meet core business needs and to grow the company given the allocation of substantial resources to satisfy these burdens.

[7] For Method, such an event would be exceedingly rare. As noted before, Method has a formatting success rate of 99.9999%.

The CFPB Should Exclude Data Access Platforms from any Future FCRA Rulemaking

Method urges the CFPB to mitigate the potential adverse impacts outlined above and shared during the SBREFA panels by carving out from any potential FCRA rulemaking entities that: are consumer-permissioned data access platforms that simply serve conduit functions in obtaining and relaying real-time data directly from a data provider to be used for the sole purpose authorized by consumers, and who do not re-disclose or reuse consumer data or maintain consumer "files" for the purpose of doing so.

There exists a wide range of regulatory precedent supporting this approach. The Federal Trade Commission's ("FTC") 2011 report, *40 Years of Experience with the Fair Credit Reporting Act*, specifically asserts that "[a]n entity that performs only mechanical tasks in connection with transmitting consumer information is not a CRA because it does not assemble or evaluate information."[8] This so-called "conduit function" exclusion from the FCRA has for the last two decades allowed, by the CFPB's own estimations, more than 100 million consumers to electronically share access to their financial data in order to receive the benefit of a more competitive financial product, service, or tool. Further, the 2011 Report advises that a software provider that allows companies to obtain credit report information "is not a CRA" because it itself is not assembling or evaluating any information; though the company using the software may be. Such is the case with a software provider like Method.[9-10]

Most critically, the CFPB proposed in late October a sweeping rule implementing Section 1033 of the Dodd-Frank Act that would create a legally binding consumer financial data access right in the United States. Method is a strong supporter of the Bureau's efforts to implement Section 1033 of the Dodd-Frank Act and notes that rule will, once finalized, require consumer-permissioned data access platforms like Method as well as consumer-permissioned third parties, like our Partners who use our platform service, to comply with a litany of consumer consent, disclosure, data privacy, and data security standards, including elements of the Gramm-Leach-Bliley Act and the FTC's Safeguards Rule. Having only had a short period of

[8] *See* Fed. Trade Comm'n, *40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations*, at 29 (2011).

[9] *Id.* This provides more support for the distinction between data access platforms like Method, on the one hand, and data brokers on the other. Method provides a service to its Partners to facilitate access to real-time data directly from the data provider, whereas data brokers themselves assemble the data to create and maintain a consumer file and sell that file as a product.

[10] Moreover, the T&E data accessed through Method's platform is not a "consumer report" under the FCRA's exception for a "report containing information solely as to transactions or experiences between the consumer and the person making the report." § 1681a(d)(2)(i).

time to review the Bureau's Section 1033 proposed rule, it is impossible to analyze how that rule and the credit reporting rulemaking contemplated by the CFPB in its SBREFA memo would interact, though it seems clear that the consumer protections the Bureau is seeking in the consumer-permissioned data access space are more appropriately effectuated under Section 1033 than under a potential FCRA rulemaking.

Conclusion

Once again, Method greatly appreciated the CFPB's invitation to participate as a SER in its credit reporting SBREFA panels. I hope that our feedback during this process has been beneficial to the Bureau in distinguishing between the characteristics of entities, like Method, that operate with full consumer consent and control, that do not assemble consumer records nor evaluate them, and do not sell, market, or maintain consumer data for the purpose of furnishing or using that data outside of the strict use case for which the consumer has provided their authorization.

While we are strongly aligned with the Bureau's desire to ensure that consumers have control over and transparency into their data when permissioning access to their data for credit decisioning use cases or other permissible purposes, we do not believe that requiring consumer-permissioned data access platforms like Method to become credit reporting agencies will provide the consumer benefits the CFPB is seeking. On the contrary, such a decision would create significant consumer and stakeholder confusion, add substantial market complexity, and meaningfully over-burden smaller entities. Instead, the CFPB should exempt consumer-permissioned data access platforms like Method from any future FCRA rulemaking.

Thank you for your consideration of our perspectives. We welcome any opportunity to discuss these issues further.

Sincerely,

/s/ *Phil Chang*
Phil Chang
General Counsel

November 3, 2023

Via email: CFPB_consumerreporting_rulemaking@cfpb.gov

Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552

Re: Written Comment on Proposals regarding Consumer Reporting Rulemaking

Dear Sir or Madam:

In accordance with the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. §§ 601, et seq., I write to offer advice and recommendations on regulatory alternatives that would minimize the burden on small entities which are likely to result from the issuance of the Consumer Reporting Rulemaking proposed by the Consumer Financial Protection Bureau ("Bureau"). In particular, my comments will focus on identifying significant alternatives to the Proposals which will accomplish the stated objectives of the Bureau and which would minimize the significant economic impact that the Proposals would have on small entities like InfoMart. See, 5 U.S.C. § 603(c).

By way of background, InfoMart, Inc., is a woman-owned, small entity consumer reporting agency ("CRA") that specializes[1] in assembling and compiling consumer reports that are used for employment purposes. InfoMart's customers largely consist of employers. In order to assemble and compile its consumer reports, InfoMart relies on a chain of upstream data providers most of whom do not function as consumer reporting agencies and, with respect to consumer information that is requested by InfoMart, do not seek to furnish consumer reports to end users. These upstream data providers include entities such as state and local government entities, courthouse public record researchers, commercial data aggregators, bulk data providers, including motor vehicle bureaus, employers, educational institutions, as well as some organizations that do identify as consumer reporting agencies such as credit bureaus. Some of these upstream providers are furnishers or sources who relate to InfoMart information about that source's transactions or experiences with a consumer, such as past employers, educational

[1] More than 96% of InfoMart's reports are furnished for employment purposes.

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institutions, or government agencies.[2] Many of the providers, however, are intermediaries that have not had interactions with consumers and are instead merely relaying information from the original source or furnisher. In its contracts with these intermediary providers, InfoMart assumes the responsibility for complying with the requirements of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 et seq. ("FCRA"), before furnishing the consumer report to its employer-end user. The data providers are merely requested to provide an accurate transmission to InfoMart of information obtained from the source or furnisher. This network of data providers is vast, and the majority of the providers are small entities. As explained in greater detail below, some of the Proposals would eliminate and destroy this network of upstream data providers, threatening the existence of small entity CRAs like InfoMart, and forcing the employment screening industry to verticalize and consolidate so that nothing is left but a handful of billion-dollar CRAs directly owning and controlling the chain of information gathering, transmission, assembly and collection.

In summary, and as explained in greater detail below, some of the Proposals will have a significant economic impact on InfoMart and similarly situated small entities. Indeed, the economic impact will be so great that it will likely put hundreds of small entities out of business, prompting many to sell to large competitors able to withstand the sea-change these Proposals would inflict if promulgated as Rules.

Proposal re: Data Brokers.

Proposal A.1.a: *Consumer information provided to a user who uses it for a permissible purpose is a "consumer report" regardless of whether the data broker knew or should have known the user would use it for that purpose, or intended the user to use it for that purpose.*

Comment: Assuming the definition of "user" is not meant to include intermediate data providers who merely relay the consumer information to downstream data providers and CRAs, InfoMart does not currently foresee that this particular proposal would require InfoMart to significantly modify its practices or procedures. The proposal could work an indirect harm on InfoMart, however, by reducing InfoMart's access to the consumer information needed to prepare its consumer reports. To the extent there are data brokers

[2] I understand there is some dispute about whether government agencies are properly considered furnishers under the FCRA. InfoMart is not expressing an opinion on that issue other than to observe that criminal court cases and driver's history reports reflect the government agency's transaction or experience with the consumer.

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that provide consumer information to (i) other data brokers, (ii) CRAs, and (iii) users, this proposal might cause data brokers to restrict or limit the amount of consumer information they are providing to all three classes of recipients in an effort to avoid being classified as CRAs. Accordingly, we would recommend that a clear exception be articulated in this proposal that enables a data broker to provide consumer information to other data brokers and CRAs without the provision of such data being classified as a consumer report.[3]

Proposal A.1.b: *Data brokers that sell certain types of consumer data[4] (e.g., data typically used for credit and employment eligibility determinations) are selling consumer reports.*

Comment: Since this proposal focuses exclusively on the act of selling and not the identity of the purchaser, the use to which the purchaser would put the information, or the reason the consumer data was collected in the first place, we foresee that this Proposal would have catastrophic consequences for InfoMart as a small entity. The Outline defines "data broker" as "an umbrella term used to describe firms that collect, aggregate, sell, resell, license, or otherwise share personal information about consumers with other parties." This definition would appear to encompass public record researchers ("Researchers") who go[5] to courthouses, examine criminal case files, transcribe information, and transmit that information back to CRAs. The vast majority of these Researchers are very small businesses. We are confident they would sooner close shop and go out of business than attempt to become CRAs.[6] If they go out of business, InfoMart will be unable to prepare criminal background checks, depriving the company of one of its core consumer reporting services. For those Researchers that do manage to convert themselves to the category of CRA, they would now become competitors of InfoMart. If they agree to sell public record information to InfoMart, the prices will certainly be retail rates, since the former Researcher will now have the expense and overhead of fully

[3] In recommending this exception, InfoMart does not mean to endorse or approve the underlying proposal. InfoMart reserves the right to submit future comment on the legality of the proposal.

[4] For purposes of this comment, we are assuming that the terms "consumer information" and "consumer data" are used interchangeably by the Bureau.

[5] Either in-person or remotely, via internet access.

[6] A substantial investment of money, technology, and personnel is required to start a consumer reporting agency. Existing Researchers have organized and grown their businesses under the assumption that they are not CRAs. Software applications, business processes, and staff additions have all been centered around the organizing principle that they are data retrieval and transmission services only. InfoMart has discussed this Proposal with some of its Researchers and they have already indicated that they would likely exit the market if they are to be classified as CRAs.

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complying with the FCRA. In turn, InfoMart will have to raise its prices to employers. This price increase will ultimately be passed along to the consumers served by the employers.

Consumers will suffer more than financial harm. Their sensitive personal information will now be shared with every single upstream CRA, all the way to the former Researcher. Each new repository of the consumer's sensitive information is a potential target for data theft. Consumers will face confusion with consents, 613a notices, disputes and file disclosures. The consent might now need to reference four or five consumer reporting agencies in the data stream. Each CRA will be issuing a 613a notice for the same item of adverse public record information. The consumer will not know where to lodge a dispute or from whom she should request a full file disclosure.

With regard to this particular Proposal, InfoMart recommends the Bureau retain[7] the concepts contained in §§ 1681a and 1681b, i.e., the purpose for which data is collected, the use to which it is to be put, and the permissible purpose of the user. The reason the information is collected should be relevant to the question of whether the transmission of consumer information should be classified as a consumer report. And the identity of the person to whom the data is being sold is likewise relevant. If the person purchasing the data is not an end user who is making an eligibility decision, then the data should not be classified as a "consumer report" and the seller should not be classified as a "consumer reporting agency."

Proposal A.1.c: *A data broker that collects consumer information for permissible purposes may not sell it for non-permissible purposes.*

Comment: We do not understand the concept of collecting information for a permissible purpose. Under the FCRA, the term permissible purpose relates to the basis on which a CRA furnishes a report to an end user; it does not relate to the legal basis on which the CRA gathers information. We are also uncertain as to whether this Proposal would mean to forbid a data broker from selling consumer information under terms permitted by the Gramm-Leach-Bliley Act ("GLBA"), e.g., for fraud prevention.

As with A.1.a, if this Proposal has the effect of chilling the flow of consumer information up and down the data stream because certain data brokers find it no longer economically viable to broker data, InfoMart and similarly situated small entity CRAs can be substantially

[7] InfoMart reserves comment on whether the Bureau has the authority to designate certain categories of sold data to be *per se* consumer reports.

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harmed. For example, credit header data is often sold to a CRA that is using that data internally in its preparation of a consumer report that will be furnished to an end user who has a permissible purpose, e.g., employment purposes. Will this sale of credit header data that is only used for internal purposes be deemed a "non-permissible purpose?" If so, depriving InfoMart of this bedrock tool of background screening will pose an existential threat to all the small entities within the employment screening sector.

Proposal A.1.d: *A data broker may not obtain consumer report information from a consumer reporting agency without a permissible purpose or sell such information to a user unless the user has a permissible purpose.*

Comment: In responding to this comment, we are assuming that the term "consumer report information" differs from the terms "consumer information" and "consumer data" used in the three preceding Proposals. We further assume the term "consumer report information" is equivalent to the term "consumer report" as defined in § 1681a. We would therefore read this Proposal to say: A CRA may not furnish a consumer report to a data broker unless the data broker has a permissible purpose, and the data broker may not re-sell the consumer report to a secondary end user unless the data broker and end user comply with § 1681e(e). This, of course, would be nothing other than a re-statement of the FCRA statute. Since we are assuming the Bureau means something more than simply to re-state what is already law, we are supposing that this Proposal relates to the Proposal on credit header data, i.e., consumer data sold by a CRA that has not been classified as a consumer report will now be classified as a consumer report and the recipient (the data broker) will be classified either as a CRA or an end user. Assuming we have understood the nature of this Proposal, we would refer the Bureau to our comment on the credit header data Proposal.

Proposal A.1.e: *A data broker's sale of data regarding a consumer's payment history, income, and criminal records . . . would generally be a consumer report, regardless of the purpose for which the data was actually used or collected, or the expectations of that data broker.*

Comment: This Proposal appears to be closely related to Proposal A.1.b in that it focuses on the act of selling certain categories of data independent of any other consideration. It is almost as if the Bureau is taking the definition of "consumer report" found in § 1681a(d)(1) and deleting all text after the term "mode of living." That is, the new definition found in the statute would be:

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> The term "consumer report" means any written, oral, or other communication of any information by a [data broker] bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.

If this is indeed what the Bureau means by this Proposal, InfoMart would reiterate what it has already said: such an amendment[8] to the FCRA would inflict grievous, if not fatal, harm on small entities in the employment screening sector, and consumers likewise would suffer substantial harm: (1) all upstream data providers, including Researchers, would have the financial, technological, and compliance burden of converting their businesses to becoming CRAs, (2) some of these upstream providers will simply sell or go out of business, (3) others would turn into competitors of InfoMart, (4) sensitive consumer information would proliferate throughout the data stream, (5) consumer confusion would reign as multiple CRAs would now be communicating with the consumer, and (6) the employment screening industry would likely consolidate and verticalize in response to the Bureau's elimination of any category of data provider other than furnisher or CRA.

InfoMart would like to make the Bureau aware that "sale of data" is not a simple, one-size-fits-all concept. A portion of the data purchased by InfoMart from upstream data providers is accomplished through the use of filters selected by InfoMart. That is, the data provider has a database of aggregated consumer information and, using filters provided by the data provider, InfoMart determines the nature, scope, and extent of the data it desires to purchase. This particular dataset is used for internal purposes only by InfoMart; we do not place this data into our consumer report. Instead, we use it as a tool to improve the accuracy and completeness of our consumer reports. To classify this data as a "consumer report" and impose the full requirements of the FCRA on the data set even though it is not being provided to an end user would effectively eliminate this subset of data. The data provider would refuse to sell it to InfoMart and the accuracy and completeness of InfoMart's consumer reports would be harmed. This, of course, would harm consumers and their employers, too.

Summary: Section 603(c) of SBREFA requires the regulating agency to consider exemptions from coverage of the rule. Given the broadly destructive nature of the

[8] InfoMart reserves comment on whether the Bureau has the authority to amend the definition of consumer report by eliminating the purpose and use components of the definition.

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foregoing proposals to the employment screening sector, InfoMart would recommend the Bureau include an exemption that excludes data providers from the new definition of "data broker" if the data provider is providing consumer information (i) to a self-designated CRA who affirms its commitment to comply with the FCRA before furnishing consumer reports to end users containing information, in whole or in part, provided by the data provider, or (ii) to another data provider that has certified by written contract that it will only transmit or sell the consumer information to a CRA or an entity that is making the same certification as the selling data provider. Such an exemption would still preserve protections for consumers, providing the consumer with a single point of contact for obtaining a copy of their consumer report, for disputing inaccurate or incomplete information, and for obtaining a full file disclosure identifying the upstream sources.

PROPOSAL RE: ASSEMBLING & EVALUATING.

Proposal A.2.a: *To provide a more bright-line definition for when the activities of entities that facilitate electronic data access between parties fall within the meaning of "assembling" and evaluating" in the definition of "consumer reporting agency."*

Comment: Since we do not know what the bright-line definition is, we cannot provide any input on the impact this definition would have on InfoMart as a small entity.

The Bureau does seem to suggest that it views "transmitting public records information from public records databases to users" as an example of an intermediary that is "assembling or evaluating." This would appear to encompass a broad set of businesses. For example, many state court systems contract with third-party software-as-a-service providers ("SaaS") to facilitate public access to court records. Any member of the public with internet access is able to access these SaaS platforms to view court records. The SaaS itself is careful to explain that it does not host the original court records, meaning the SaaS is an "entity" that "facilitates electronic data access" between the state administrative office of the courts and the users. Surely the Bureau is not meaning to convert these SaaS entities into CRAs? Doing so might likely reduce electronic access to public record information. The Bureau may wish to consult with state attorneys general and state administrative offices of the courts before taking such a dramatic step.

There are also SaaS providers utilized by data providers. These SaaS providers typically provide a web-based application that enables one data provider to transmit public record data to another data provider.

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Amazon Web Services and Microsoft Azure are used by a great many businesses. Various components and features of these cloud-based platform-as-a-service ("PaaS") and SaaS providers are involved in the transmission of electronic data from courthouses to ultimate end users. AWS and Microsoft would therefore be "facilitating electronic data access."

Microsoft also licenses the Outlook email application to many businesses. Data providers often use email to transmit[9] public record information about consumers to other data providers, CRAs, and users. Microsoft would therefore be "facilitating electronic data access."

Natural persons, working as independent contractors, will examine public record information, transcribe it, and use various web and internet applications to transmit data to the CRA that requested the research. Likewise, many small business public record researchers, consisting of less than 50 employees, for example, engage in this same type of activity, "facilitating electronic access" of public record data "between parties."

Employers will often license various human capital management systems ("HCMS"). These HCMS's are often integrated with the employment screening software platforms of CRAs. The CRAs will securely transmit their consumer reports to employers via the HCMS. This would fall within the concept of "facilitating electronic access" of consumer reports between the CRA and the employer. We suspect companies like Oracle would take exception to being classified as a consumer reporting agency or to the contention that their software application is assembling or evaluating the CRA's consumer report.

All of the foregoing entities rely on the fiberoptic networks used to transmit electronic data. Of course, we assume the Bureau does not mean to classify entities like AT&T as consumer reporting agencies, but we do think it is helpful to point out that the blunt, broad definition provided the Proposal, strictly speaking, even encompasses common carriers and/or utilities.

In light of the foregoing examples, we see several significant issues rising to the surface.

First, mere collection and transmission of consumer information alone does not equate to "assembling or evaluating." The context in which the information is collected, the manner

[9] If the public record information is non-sensitive, unencrypted email may be used. If it is sensitive, encrypted email is typically used.

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in which the information is handled by the collecting entity, and the identity of the recipient are all highly relevant to the analysis of whether an entity is assembling or evaluating. If a CRA like InfoMart is directing and instructing various data providers to collect and transmit various items of consumer information to InfoMart, those data providers are not assembling or evaluating; InfoMart is the party assembling and evaluating.

Second, any bright-line definition should therefore assure that software applications licensed by state courts should not be characterized as engaging in "assembling or evaluating," nor should it classify the SaaS as a consumer reporting agency.

Third, any bright-line definition should also provide that, if an entity is electronically transmitting consumer information, including public record information, to another data provider or to a CRA at the direct or indirect request of a CRA, that entity should be excluded from the characterization of "assembling or evaluating." It is the CRA that is engaging in the assembling and evaluating. If the entity, such as a public record researcher, is not transmitting consumer information directly to an end user who is seeking to make an eligibility decision, the entity should not be classified as a consumer reporting agency.

Fourth, any bright-line definition should provide that, if any entity is a SaaS or a PaaS, it is not the party engaging in assembling or evaluating. To the extent someone is engaging in assembling or evaluating, it would be the licensee of the SaaS or PaaS. This would include SaaS's and PaaS's that are licensed by data providers, public record researchers, CRAs, and employers.

Proposal A.2.b: *To provide that, if such companies[10] are "assembling or evaluating" and otherwise meet the definition of "consumer reporting agency," they would be consumer reporting agencies under FCRA section 603(f).*

Comment. Candidly, we do not understand the purpose of this Proposal. Certainly, if a company is (1) for a fee, (2) regularly engaging in whole or in part (3) in the practice of assembling or evaluating, (4) consumer information, (5) for the purpose of furnishing consumer reports to third parties, and (6) does so in interstate commerce, it is a "consumer reporting agency."

[10] In the immediately preceding sentence, the Bureau uses the term "entities." We are assuming the Bureau is using the terms "entities" and "companies" interchangeably in this particular section.

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If by this Proposal, the Bureau seeks to declare specific classes of entities to be consumer reporting agencies, e.g., all providers of software to state administrative offices of the courts are, *ipso facto*, consumer reporting agencies, then we cannot comment on the impact of this Proposal to InfoMart as a small entity until we know the list of entity types that the Bureau deems to be presumptive consumer reporting agencies.

Summary: As with the data broker proposals, any proposals as to assembling and evaluating would appear to upend the complex network of data providers, SaaS's, and PaaS's that has evolved over the last three decades. The impact of these proposals would not merely "tweak" or "refine" or "cause minor adjustments" to the employment screening industry. These proposals are *radical* – in the original sense of the word; they would uproot the industry. Many data providers, SaaS's and PaaS's would not find it economically viable to convert to a consumer reporting agency and would sell or close shop. For those data providers that are able to adapt, a chain of CRAs would emerge, causing consumer harm and confusion, as previously explained. Any proposals under this section should assure that the employment screening sector is excluded and excepted; the consumer is already protected by virtue of the CRAs at the end of the data chain.

PROPOSAL RE: CREDIT HEADER DATA.

Proposal A.3.a: *To clarify the extent to which credit header data constitutes a consumer report with the likely consequence of reducing, perhaps significantly, consumer reporting agencies' ability to sell or otherwise disclose credit header data from their consumer reporting databases without a permissible purpose*.

Comment: At InfoMart, we use credit header data as an internal tool. For us, credit header data includes names and addresses. Using this data improves the accuracy of our background check reports. Credit header data is a tool used to eliminate false positives, and it is also a locator used to identify jurisdictions in which a consumer may have public record history but which the consumer failed to disclose on their resume or application. We thus know to search those jurisdictions. In our space, credit header data is not used to make an employment eligibility decision; we do not even publish it on our consumer reports. Even though we only furnish consumer reports to end users who certify to a permissible purpose, we are not purchasing credit header data with the intent to resell it. In other words, we – as a CRA – are not buying credit header data as if it were a consumer report. Any proposal should provide that a CRA can sell credit header data,

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directly or indirectly, to another CRA, provided the receiving CRA either certifies that it is using the credit header data for internal business purposes only[11] or, in the event the receiving CRA elects to resell it, it certifies compliance with § 1681e(e).

Even if the proposal permits credit bureaus to sell credit header data to employment screening CRAs like InfoMart, we fear there will still be materially adverse consequences flowing from the proposal. If the ability of the credit bureaus to sell credit header data is so significantly reduced that the bureaus find it economically unviable to sell the product, and they cease selling credit header data, InfoMart would be deprived of an essential tool for its business. The economic impact of this deprivation to InfoMart and similarly situated small entities would be substantial and, currently, not something capable of calculation. InfoMart would not be able to prepare reasonably comprehensive criminal background checks for employers, including public schools, municipalities, hospitals, youth organizations, etc. We do not know whether employers would continue to purchase criminal background checks when such checks will no longer contain comprehensive information about the candidate's past criminal conviction history.

Significantly, we also expect consumers to be harmed if employment screening CRAs are deprived of this tool. Credit header data helps CRAs to *rule out* information as not belonging to consumers and thereby enhance the accuracy of their consumer reports by reducing false positives.

PROPOSAL RE: DATA SECURITY & DATA BREACHES.

Proposal B.3. *Providing that a failure to protect against unauthorized access to consumer reports by third parties may violate FCRA sections 604 and 607(a)*.

Comment: At the outset, we would observe that being a victim of theft does not mean InfoMart "furnished" consumer reports to the thief. One may be negligent in failing to implement and maintain adequate administrative, technical, or physical safeguards such that the thief is successful in stealing from you, but that does not mean the victim gave or furnished the stolen item to the thief. We simply cannot believe that Congress ever intended the concept of "furnishing" to include being stolen from.

[11] Incidentally, InfoMart already makes this representation under the GLBA when purchasing credit header data.

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This proposal would overlap and conflict with the FTC Act, which prohibits unfair and deceptive practices and acts. In its enforcement of the Act and its regulation of data security practices, the Federal Trade Commission has already established a reasonableness standard that is to be commensurate with the size and resources of the entity and the nature of the data at issue.

This proposal would appear to impose a quintuple jeopardy of sorts. The CRA will face liability or regulatory penalties from (1) state attorneys generals for violating state data breach statutes, (2) private consumers under common law causes of action, (3) the Federal Trade Commission under the FTC Act, (4) the FTC under the FCRA, and (5) private consumers under the FCRA. Given that federal and state governments as well as large, sophisticated, well-funded corporations are routinely victims of data theft (i.e., data breaches), it is reasonable to conclude that, despite thoughtful, intentional, reasonable, and industry standard data security measures, every organization that works with consumer data will inevitably be the victim of data theft at some point. Declaring that that small entity CRA has also violated § 1681b(a) would be unnecessarily punitive.

Not all consumer reports are the same. Some consumer reports in the employment screening context contain no negative information. That is, InfoMart is able to verify employment, verify the candidate's graduation from an educational institution, and confirm there is no criminal history information. Other reports may contain potentially adverse information, but the information is freely available to the public already. And yet, the Bureau's proposal would subject small entities like InfoMart to FCRA liability if this benign and/or public information is stolen from InfoMart.[12] Candidly, this does not seem fair or equitable. Under state data breach laws, no breach would have occurred, but under the Bureau's proposal, a violation of the FCRA occurred.

It appears the Bureau's proposal would impose strict liability on a CRA for violating §§ 604 and 607(a) for each consumer report that is stolen by a thief. This would vest consumers with the right of private recovery under §§ 616 and 617. Any such class action would be ruinous to InfoMart, as the measure of damages under the FCRA is far greater than what is currently imposed by state data breach statutes. In our industry, both professional liability and cyber insurance carriers have been dropping out of the market, cancelling coverage even for insureds with little to no claims history. If the Bureau were to impose FCRA strict liability on CRAs for data breaches, InfoMart anticipates it will be unable to secure either

[12] As do most, if not all, CRAs in the employment screening sector, InfoMart truncates or masks sensitive information, such as the candidate's Social Security number, so that it is not visible on the consumer report.

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professional liability or cyber coverage. Professional liability carriers which normally provide coverage for an alleged violation of the FCRA would absolutely and undoubtedly refuse to provide coverage to a CRA if a data breach now also means a violation of the FCRA. Likewise, cyber carriers would certainly refuse to provide coverage for FCRA damages that would be asserted or assessed against a CRA for a data breach. If InfoMart has neither professional liability nor cyber coverage, the owner would be faced with the tough decision of whether to continue her business or sell to a large, self-insured competitor.

Lastly, even if the Bureau issued a rule along the lines proposed, we do not believe consumers would be better protected. In the employment screening sector, employers need to keep hiring records for a period of time in order to comply with other federal laws. InfoMart would not simply delete its consumer reports without notifying the employer, who – in our experience – would then request the reports be transferred to the employer. In other words, *the data will not be deleted*. It will simply be transferred from one custodian to another. Like CRAs and the Bureau itself, employers are also victims of data theft.

PROPOSAL RE: WRITTEN INSTRUCTIONS.

Proposal B.1. *To address what is needed for a consumer report to be furnished by a consumer reporting agency in accordance with the consumer's written instructions under FCRA section 604(a)(2). This proposal will include:*

(1) The steps companies must take to obtain the consumer's written instructions;
(2) Who can collect written instructions;
(3) Limits on the scope of the authorization to ensure the consumer has authorized all uses of the consumer's data (including limits on the number of purposes or entities that can be covered by a single instruction); and
(4) *Methods for revoking any ongoing authorization.*

Comment. InfoMart observes that the Bureau appears to use the terms "written instructions" and "authorization" interchangeably in this proposal. For those in the employment screening sector, when we hear the word "authorization," we think of its use under § 1681b(b)(2)(A)(ii). We assume the Bureau is not intending by its proposal to address both the employment permissible purpose and the written instructions of the consumer permissible purpose. We would therefore encourage the Bureau to dispense with using the term "authorization" in this context.

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In the event the Bureau intends to prescribe regulations regarding the § 1681b(b)(2)(A)(ii) written authorization, InfoMart would caution that requiring every CRA to be listed on the authorization is impossible, since the consumer must provide the authorization before the consumer report is ordered and InfoMart will not know which upstream data providers it will need to use to compile the report until after the report is ordered.

PROPOSAL RE: DISPUTES.

Proposal C.1. Legal Disputes. *To codify the Bureau's interpretation that FCRA does not distinguish between factual and legal disputes.*

Comment. InfoMart reinvestigates the accuracy and completeness of all items of information disputed by consumers, and it does not "pre-screen" these disputes by classifying them as "legal" or "factual." From time to time, however, a consumer may articulate a misapprehension of the significance of her criminal history record during the dispute process. For example, in some states, a pardon does not discharge or vacate a conviction. The consumer may think the pardon means the conviction should not appear on her background check report. The FCRA, of course, does not prohibit reporting a conviction that remains a conviction under state law. In this sense, there is a "legal" component to the dispute. But we nonetheless conduct a reinvestigation - and engage in dialogue with the consumer. In a related vein, some consumers think they should not have been convicted. They claim they did not engage in the underlying act made the basis of the conviction or that their criminal defense attorney told them the "matter was taken care of and the case dismissed." Any rule issued by the Bureau should not inadvertently vest the consumers with the right to collaterally attack the validity or significance of a conviction by and through a § 1681i reinvestigation process. The proper venue for such an attack is in the courts.

Proposal C.2. Systemic Disputes. *To address what a consumer reporting agency and a furnisher must do, pursuant to their obligations under FCRA sections 611 and 623, upon receiving a dispute from a consumer that indicates that there is a systemic issue that could be affecting the completeness or accuracy of consumer reports involving multiple consumers, and:*

(1) to require furnishers and consumer reporting agencies to determine as part of their investigation of such disputes whether there is a systemic issue and to correct any inaccurate reporting on behalf of all affected consumers;

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(2) *to specify how the results of any such investigation should be communicated, including, for example, whether notice should be provided to consumers who may be affected by systemic issues identified in a dispute that was submitted by another consumer; and*

(3) *to provide a rubric or template that consumers could use to submit disputes relating to systemic issues affecting multiple consumers.*

Comment. We believe this proposal is inapplicable to employment screening CRAs like InfoMart, and we would encourage the Bureau to expressly exempt CRAs from this proposal when they are furnishing consumer reports for employment purposes. Unlike other types of CRAs, InfoMart does not maintain a consumer file of information from which it repeatedly extracts information, compiles a report, and furnishes it to the end user; rather, employment screening CRAs compile a brand-new consumer report each time one is ordered. The contents of these unique, individualized reports are dictated by the scope of the background check requested by the employer. As such, InfoMart does not encounter causes that systemically result in inaccurate or incomplete consumer reports.

In further contrast to other types of CRAs, the majority of consumers receive a copy of their consumer report at the same time it is furnished to the employer. It is a feature that is built into our employment screening platforms. Additionally, when adverse public record information is at issue, we transmit a 613a notice to the consumer. And if the error is not caught by the consumer under any of the preceding steps, then the consumer will catch the error when the employer provides the statutorily mandated pre-adverse action notice with a copy of the report. In short, if there is an inaccuracy in our report, the consumer typically catches it quickly, files a dispute, and we promptly reinvestigate. If there was an inaccuracy, we correct it. Requiring small entity CRAs like InfoMart to further attempt to classify the dispute as the product of a cause that is resulting in systemic errors would serve no purpose for the consumer.

ACCESS TO CREDIT

To date, it has been the experience of small entities in this industry that securing a line of credit is challenging given the litigation, compliance, and regulatory environments. We anticipate that banks and other lenders will be even more reticent to extend credit to small entities in the new environment created by these proposals.

IMPLEMENTATION PERIOD.

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As many of the proposals proffered by the Bureau would have an existential impact on small employment screening entities like InfoMart, articulating an implementation period would serve no purpose other than to demarcate the date by which small entities will want to sell their business to the publicly traded and largest privately-held CRAs. If the Bureau intends to proceed with destroying the existing employment screening marketplace, InfoMart would request a three-year implementation period to enable it to determine whether it will transition out of the marketplace.

CONCLUDING REMARKS.

We can see no other way around this fact – the Bureau's Proposals would eviscerate, eliminate, and erase the small business market in the employment screening industry. According to various estimates, the small business segment of the employment screening industry comprises anywhere from 1 to 1.5 billion dollars. By any measure, this is a "significant economic impact."[13] Just as importantly, insofar as the employment screening sector is concerned, the proposals would not offer any additional benefits or protections to consumers. Applicants for employment and employees already enjoy robust due process protections, ranging from written disclosures, written authorizations, 613a notices, pre-adverse action notice, adverse action notice, dispute rights, and file disclosure rights.

Classifying public record researchers and other data providers upstream of the employment screening CRA as consumer reporting agencies would not enhance consumer protections, but it would cause consumer confusion, increase the proliferation of consumer personal information, and substantially harm small entities.

Converting SaaS's and PaaS's upstream and downstream of the employment screening CRA into consumer reporting agencies would not enhance consumer protections, but it would cause consumer confusion, increase the proliferation of consumer personal information, and substantially harm small entities like InfoMart.

Eliminating an employment screening CRA's access to credit header data would not enhance consumer protections, but it would harm the accuracy and completeness of consumer reports and it would substantially harm small entities like InfoMart.

[13] See, 5 U.S.C. § 603(c).

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Declaring that the FCRA's permissible purpose requirement has been violated if an employment screening CRA is the victim of data theft would not enhance consumer protections, but it would substantially harm small entities like InfoMart. Indeed, to avoid the catastrophic fall-out of a data breach, CRAs will shift the hosting of these consumer reports to employers.

In short, when there is a CRA at the tail end of the data stream, and it is the CRA that is providing the consumer report to the end user, the proposals would serve no benefit to consumers, they would actually increase harm to consumers, and they would most certainly disrupt and damage the employment screening small business marketplace. A clear and robust exemption for the employment screening sector needs to be included in any promulgated rules.

Respectfully submitted,

Timothy Gordon
Chief Compliance Officer

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New Market BANK
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November 6, 2023

The Honorable Rohit Chopra
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

RE: SER response to SBREFA Outline for Consumer Reporting Rulemaking

Dear Sir or Madam:

New Market Bank ("NMB") appreciates the opportunity to respond to the Bureau of Consumer Financial Protection's ("CFPB" or "Bureau" or "Agency") Outline of Proposals and Alternatives Under Consideration ("Outline") for Consumer Reporting Rulemaking. New Market Bank is a family-owned community bank serving the southwest Twin Cities Metropolitan area primarily in Dakota and Scott counties of Minnesota. The communities we serve are on the fringe of the metropolitan area where the city meets farm fields. We have just under 188 million in assets as of 10/31/2023. As a data furnisher of loan information to Consumer Reporting Agencies ("CRA's") and a user of credit reports as part of our loan decision making process, we value the importance of accurate and appropriate information and processes.

In addition to submitting this written comment, I participated in the Small Business Review Panel Process (SBREFA) hosted by the CFPB. As a 2nd generation community banker, I have over 25 years of experience as a compliance officer, and I appreciate the opportunity to participate as a SER. Thank you for the opportunity to serve on the SBREFA panel. With that said, there are several comments I would like to raise in response to the SBREFA Outline.

"Data Broker" and "Consumer Report"

New Market Bank is concerned that defined terms in the Outline are too broad and bring unanticipated entities within the scope of FCRA, not likely to intentionally be targeted by the Bureau. For example, the Outline provides that "data brokers that sell certain types of consumer data (e.g., data typically used for credit, employment, and certain other eligibility determinations) are selling consumer reports," and that "consumer information provided to a user who uses it for a permissible purpose is a "consumer report."

Other parts of the Outline make clear that "data brokers" are "firms that collect, aggregate, sell, resell, license, or otherwise share personal information about consumers with other parties," where data brokers can include first parties that interact with consumers directly.

Under this construct, routine commercial activity will render virtually every merchant a data broker if it sells customer information that is eventually used to underwrite a consumer loan. It is not difficult to imagine a hypothetical where a creditor might use something as routine as grocery store purchase data to underwrite a consumer loan. For example, with the increased adoption of alternative data, a creditor might determine a customer that buys more fruits and vegetables is a lower credit risk than someone that predominantly buys highly processed foods.

In such a scenario, the terms defined in this Outline would classify the grocery store as a "data broker" (a first party selling personal information about consumers) that is selling a consumer report (customer information used for a permissible purpose, i.e., credit underwriting).

While it is possible that the Bureau intended to characterize nearly every merchant as a "data broker" and all customer information they sell as "consumer reports," I believe it is more likely that the Bureau has unintentionally defined these terms too broadly and that the proposed rule should employ a narrower definition.

Regardless of how the Bureau eventually defines data broker and consumer report, New Market Bank does not believe that they should not be classified as CRAs. While data brokers should be required to adhere to FCRA's disclosure and transparency requirements, New Market Bank is concerned that such a dramatic increase of entities classified as CRAs will create a corresponding increase in the number and types of disputes that are subject to reinvestigations under FCRA. Such a dramatic increase would become an insurmountable operational burden.

Credit Header Data

The Outline suggests that a proposed rule would clarify the extent to which credit header data—i.e., consumer-identifying data, such as a consumer's current and former addresses and Social Security number, that are maintained by consumer reporting agencies—is a consumer report. New Market Bank has several concerns about this contemplated provision, as highlighted in a recent joint-trades letter submitted by ICBA and other trade associations.

I support the positions raised in that letter. In particular, if this provision were implemented, it would "harm consumers and facilitate fraud, identity theft, and other crimes and thwart know your customer efforts." As the joint trades letter noted, "the information is used… to comply with federal customer identification procedures and customer due diligence rules intended to prevent money laundering and terrorism financing, financial institutions obtain and confirm the name, address, date of birth, and identifying number (e.g., a Social Security number) of applicants for financial services."

By classifying credit header data as a consumer report, the Bureau would increase the burden of acquiring that information, thereby delaying the confirmation of the borrower or applicant. This would in turn delay the ability of the customer to get a timely loan.

Targeted Marketing and Aggregated Data

The Outline discusses how the proposed rule would potentially clarify that certain activities that consumer reporting agencies undertake to help third-party users market to consumers violate the FCRA prohibition on furnishing consumer reports to third parties without a permissible purpose.

New Market Bank would support a proposed rule that would prohibit a credit reporting agency from selling "trigger leads" when a consumer applies for a residential mortgage unless the consumer has opted into the creation and sale of such leads. Today, consumers are inundated with unwanted and invasive solicitations after they apply for a mortgage, yet the current process for a consumer to opt out is confusing and does not take effect immediately. As a result, consumers may believe that their accounts have been hacked. A mortgage application should not be public information.

New Market Bank supports the provision that the sale of data addressed in the proposals by data brokers that qualify as consumer reporting agencies under the proposals would be prohibited without the written instructions of the consumer or another permissible purpose.

Data Security and Data Breaches

When a breach occurs at any point in the financial services chain, community banks take a variety of steps to protect the integrity of their customers' accounts, including, among other things, monitoring for indications of suspicious activity, changing customer identity procedures, responding to customer inquiries, reimbursing customers for confirmed fraudulent transactions, modifying customer limits to mitigate fraud losses, and blocking and reissuing payment cards of affected account holders at a cost to the community bank. Deposit account-holding and payment card-issuing banks repeatedly bear these costs up front because prompt action following a breach is essential to protecting the integrity of customer accounts. But these costs should ultimately be borne by the entity that incurs the breach, not by the party protecting the consumer. This is not only a matter of fairness; a liability shift is needed to properly align incentives for entities that store consumer financial and personally identifiable data to strengthen their data security. When breaches have a material impact on entities' bottom line, they will quickly become more effective at avoiding them.

The Outline discusses how the proposed rule would clarify a consumer reporting agency's obligation to protect consumer reports from data breaches or unauthorized access by third parties.

New Market Bank believes that while CRAs are subject to the data security standards of the Gramm-Leach-Bliley Act (GLBA), they are not examined or supervised for their compliance with these standards in the same manner as financial institutions, yet they hold equally critical, personally sensitive information about consumers. Significant third-party vendors that serve financial institutions are already subject to examination and supervision for compliance with GLBA standards. By the same logic, CRAs should be examined and supervised by the Prudential Financial regulators.

Disputes

The Outlines discusses how the proposal would codify that there is no distinction in the FCRA between "legal" and "factual" disputes, such that consumer reporting agencies and furnishers have obligations to conduct reasonable investigations of both types of disputes.

New Market Bank strongly objects to this new interpretation and does not believe its adoption in the proposed rule would codify existing law. The Outline's discussion would implement a *new* expectation on data furnishers that is not reasonable. New Market Bank supports the positioned raised in ICBA's amicus brief in Holden v. Holliday Inn Club Vacations, where "proposals to expand the FCRA's obligations and require furnishers and consumer reporting agencies to adjudicate legal disputes would raise operating costs and lead to unpredictable and unwarranted legal liability. Our bank does not have the staff to adjudicate these disputes, nor the resources to hire legal counsel to review the legal questions raised in every dispute.

As several SERs raised in the panel discussion, factual disputes are straightforward investigations that don't require interpretation of regulations or law. In contrast, making legal determinations requires expert knowledge of the law, which is only made less practical when considering the different laws and interpretations of laws across jurisdictions.

For example, a consumer might be in default on a loan, but the consumer could dispute that information, claiming that the debt is unenforceable under state law, perhaps due to the state's usury statute. In order to investigate that dispute, my team would have to understand that particular state's law on usury, its effect, and remedies in order to reasonably investigate that consumer's dispute. That's simply not possible, especially when multiplied hundreds or thousands of times.

Medical Debt

The Outline contemplates prohibiting creditors from obtaining or using medical debt collection information to make determinations about consumers' eligibility (or continued eligibility) for credit. While the Bureau continues to have long-standing concerns about the usefulness of medical debt collections tradeline information in predicting a consumer's creditworthiness, the fact remains that the inclusion of medical debt in a consumer's credit report adds relevant information about that consumer's ability to repay a loan.

While medical debt is a growing concern, especially for those that are un- or under-insured, debt of any kind is a factor in a consumer's ability to repay a loan. In certain instances, we are required by other CFPB regulations to determine and reasonably assess the customer's ability to repay a loan. If a portion of a consumer's debt is not included in a consumer report, then our ability to make that determination is hindered.

Further, failing to understand the full financial situation of the borrower and constraints on cashflow poses certain risks to our bank. Obfuscating the total debt liability of a consumer would pose a risk to our bank's ability to accurately underwrite that borrower. A borrower's debt-to-income is a critical risk factor when underwriting loans. A consumer that has a higher debt-to-income is simply a higher credit risk and should be priced at a rate to reflect that risk. Failure to do so would be to the consternation of my prudential bank examiners that require us accurately monitor our credit portfolios and risk the likelihood of defaults.

Finally, if the Bureau were to enact this provision, it would be doing a disservice to consumers. The Bureau fully recognizes that determining a consumer's ability to repay is of benefit to the consumer. After the financial crisis, the Bureau and other regulators required creditors to conduct ability-to-repay calculations as a means to protect consumers. The theory was that, if a consumer is too heavily indebted relative to their income, then he or she should not incur further debts that would inhibit their ability to pay back the loan.

Here, the Bureau is curiously suggesting that only certain debts should be counted as a means to protect consumers from over-burdening themselves with debt when the reality is that every debt – regardless of classification – affects a consumer's cashflow and ability-to-repay.

In conclusion, NMB requests the CFPB to carefully consider our comments and address our concerns. We appreciate the opportunity to provide comments and I appreciate the opportunity to participate as a SER. I would be happy to respond to any questions you may have by contacting me at jjacobson@newmarket.bank, or 952-223-2321.

Sincerely,

/s/

Jeff Jacobson
Vice President, Compliance & CRA Officer

Argyle Systems Inc.

169 Madison Ave #2136
New York, NY 10016

November 6, 2023

VIA ELECTRONIC SUBMISSION TO: CFPB_consumerreporting_rulemaking@cfpb.gov

Hon. Rohit Chopra
Director

Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552

Comments in Small Business Regulatory Enforcement Fairness Act Process regarding Outline of Proposals and Alternatives Under Consideration under the Fair Credit Reporting Act.

Dear Director Chopra,

Argyle Systems Inc. ("**Argyle**") appreciates the opportunity to participate on the Consumer Financial Protection Bureau's ("**CFPB**" or "**Bureau**") Small Business Regulatory Enforcement Fairness Act ("**SBREFA**") panel in connection with the outline of proposals and alternatives ("**Outline**") being explored for a consumer reporting rulemaking under the Fair Credit Reporting Act ("**FCRA**"), and to submit these Small Enterprise Representative comments as part of that process.

Argyle is built on the premise that workers should have control over their payroll and other work-related personal data. We offer a fully consumer-permissioned, secure, and automated payroll connectivity and data portability platform that expands financial access for all types of workers, from traditional W2 employees to gig workers and other freelancers or independent contractors. Argyle offers its solutions to consumers both through its customers (*e.g.*, as embedded into a lenders' loan application processes), and directly to consumers free of charge. We also provide tools that help financial services providers process that data to offer consumers innovative financial products and services.

Consumer-permissioned services like Argyle operate only on the specific instruction of consumers. Consumers use Argyle's multi-sided payroll connectivity and data portability platform to select where they retrieve their data from, who they deliver that data to, and the duration of those deliveries. Argyle maintains integrations with over 450 payroll, gig company, and workforce management platforms, covering hundreds of thousands of employers and over 220 million consumers. In fact, consumers have chosen to use Argyle's services to securely connect their

payroll and employment data to their financial service and other providers over 2 million times, improving and expanding their access to mortgage, personal lending, insurance, and gig-economy products and services while maintaining privacy and control over their data. Because Argyle works to empower consumers, it understands and supports the consumer-protective goals of the CFPB's proposed rulemaking: to ensure that consumers are treated fairly, impartially, and with respect for their privacy.[1]

At the same time, Argyle cautions against taking too broad of an approach that conflates businesses that process consumer-permissioned data with businesses that have no relationship with consumers. The CFPB notes that it is considering proposals to regulate "data broker activities." The term "data broker," though not defined in the proposal, generally refers to companies that have no relationship with consumers. But the proposal refers to a category of "data brokers that facilitate consumer-authorized data sharing," suggesting that entities such as Argyle would be considered data brokers, which may, in turn, be considered consumer reporting agencies ("CRA(s)").[2] Not only would such an approach be contrary to the statutory language of the FCRA, but it would also likely undermine the CFPB's goal of giving consumers more transparency, choice, and autonomy to fulfill their financial goals. Sweeping consumer-permissioned data aggregators into the proposal would likely *harm* the very individuals, workers, and families the FCRA is intended to protect.

With this perspective in mind, we provide the following responses to a select number of the Bureau's specific questions. This comment first addresses why consumer-permissioned data service providers like Argyle are not CRAs under the FCRA. Second, it discusses consumer protection and competition concerns that would result from consumer-permissioned data service providers like Argyle being considered CRAs. Finally, it briefly addresses the CFPB's questions about aggregated and anonymized data.

I. CONSUMER-PERMISSIONED DATA SERVICE PROVIDERS ARE NOT CONSUMER REPORTING AGENCIES UNDER THE FCRA. (QUESTION 8)

The Outline states that, "[d]ata brokers that facilitate consumer-authorized data sharing by accessing consumer information held by data providers and communicating it to third party data recipients are typically engaged in activities that constitute 'assembling or evaluating' consumer information under existing precedent; thus, where they otherwise satisfy the definition of "consumer reporting agency," they are subject to the FCRA." But companies like Argyle that simply allow consumers to select where they retrieve their data from, who they deliver that data to, and the duration of those deliveries do not satisfy the definition of CRAs under the FCRA.

First, because companies like Argyle interact directly with consumers, the data these companies report represents their own "transactions and experiences" with consumers, which are exempt

[1] *See* CFPB Outline, at 1-2.
[2] *See* CFPB Outline, at 9-10.

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from the definition of "consumer report" under the FCRA.[3] Because an entity must furnish "consumer reports" to third parties in order to be considered a CRA, and the definition of consumer report excludes information about a consumer's transactions and experiences with a company, consumer-permissed data providers like Argyle cannot be considered CRAs.

In *Hodge v. Texaco*,[4] the Court explained that an employee drug test fell under the FCRA "transactions and experiences" exception. In that case, the employee had submitted a urine sample through a vendor and signed a form transmitting the sample to the vendor's subprocessor. The Court held that the mere transmittal of the authorization forms and the urine through the vendor's custody procedures did not change the basic nature of the subprocessor's analysis any more than the use of the mail to receive information about a customer would break the chain of "first-hand experience."

Similarly, Argyle's activities are entirely powered by consumers, and their user experience remains firmly within their custody chain. When verifying income or employment, the consumer starts from the data recipient's website or app. The consumer is then prompted to search their desired income source in our menu, logs in to the selected data source account, authorizes Argyle to connect their account and send their desired data to the intended recipient. The consumer's data transmission is initiated, selected, authorized, and completed through a procedure akin to the one in the *Hodge* case. As the court noted, the fact that the consumer's information is transmitted through a third party does not negate the fact that the consumer is engaging in its own transaction, just as they do when they select the U.S. postal mail service to mail a document. Argyle, as the vehicle for the consumer's own transaction and experience information, cannot be considered a CRA because it is not transmitting a consumer report subject to the FCRA.

Second, companies like Argyle cannot be considered CRAs because they do not "assemble or evaluate" information. In *Zabriskie v. Federal Natl Mortgage Assoc.*,[5] the court explained that a company is not "assembling or evaluating" information, and is therefore not a CRA, where its activity is limited to selling a software service.[6] This reasoning is sound. Treating consumer-permissioned data processors like Argyle as CRAs would be akin to treating the postal service as engaged in "assembly or evaluation" because it delivers pay stubs on behalf of employers. Just as

[3] 15 U.S.C. § 1681a(d)(2).
[4] 975 F.2d 1093, 1096 (5th Cir. 1992).
[5] 940 F.3d 1022 (9th Cir. 2019).
[6] *See also Fed. Trade Comm'n, 40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of interpretation*, at 29 (2011) (stating that "[a] seller of software to a company that uses the software product to process credit report information is not a CRA because it is not 'assembling or evaluating' any information"); s*ee also* at 30-31 (stating "[a]n entity acting as an intermediary on behalf of the consumer who has initiated a transaction does not become a CRA when it furnishes information to a prospective creditor to further the consumer's application. Thus, a mortgage broker does not become a CRA by furnishing consumer reports to prospective creditors on behalf of a consumer that has sought the broker's assistance in obtaining a loan. An entity does not become a CRA solely because it conveys, with the consumer's consent, information about the consumer to a third party in order to provide a specific product or service that the consumer has requested.").

the postal service is not "assembling or evaluating" consumer data when it delivers a printed pay stub that the consumer has printed after logging into their payroll platform, consumer-permissioned services like Argyle are similarly not "assembling or evaluating" data.[7]

In fact, treating consumer-permissioned data service providers as CRAs would lead to the natural conclusion that the consumer, as the party that is instructing the service provider to retrieve and share their data, is the "furnisher." This result is contrary to the Furnisher Rule, which explicitly excludes consumers from the definition of furnisher.[8] When a data aggregator retrieves data from a consumer's payroll or other work-related technology platform at the behest of the consumer and shares that data with a third party selected by the consumer, the data aggregator merely acts as a conduit of the consumer's will. Treating consumer-permissioned data aggregators as CRAs would lead to an absurd, circular result where consumers themselves would be considered furnishers subject to the FCRA's accuracy and dispute investigation requirements.[9]

In addition to exceeding the statutory authority of the FCRA, treating consumer-permissioned data service providers as CRAs would violate the spirit and purpose of the statute. The FCRA aims to promote the accuracy, fairness, and privacy of information in consumer reports, while also satisfying the important commercial need for consumer reports in our modern economy.[10] Clearly, the FCRA is intended to provide protection to consumers in situations where they *lack* the transparency and control over the data collected and transmitted about them, especially as it relates to the transmission of inaccurate data. The FCRA does not contemplate circumstances where entities collect and transmit data *at the consumer's direction* and with transparency and consumer control.[11] In fact, many consumer-permissioned data aggregators advance the FCRA's spirit and congressional purpose by empowering consumers to take control of their financial information.[12]

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[7] Moreover, unlike many data brokers that warehouse consumer data and commercialize it as an asset, redelivering or selling the same data multiple times, data service providers like Argyle create a unique, consumer-authorized pull from the specific data source. This is true, even if Argyle has already pulled that same information from that same data source for the same consumer in connection with a different loan, mortgage, or insurance. And because Argyle is retrieving from the same interface the consumer could use directly, the information is more likely to be complete and up-to-date.

[8] 12 C.F.R. §1022.41(c)(3) (stating "an entity is not a furnisher when it: . . . [i]s a consumer to whom the furnished information pertains.").

[9] Nor is the payroll provider a furnisher because it is *the consumer* who initiates the relationship. The data source does not take any affirmative action to furnish information.

[10] *See* 15 U.S.C. § 1681.

[11] *See, e.g., Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995) (stating FCRA "was crafted to protect consumers from the transmission of inaccurate information about them" and "to establish credit reporting practices that utilize accurate, relevant, and current information in a confidential and responsible manner" and "[the FCRA] was the product of congressional concern over abuses in the credit reporting industry... [its] legislative history...reveals that it was crafted to protect consumers from the transmission of inaccurate information about them...").

[12] *See* 114 Cong. Rec. 24,902 (1968) at 24, 903-04.

Indeed, at the heart of the FCRA is the goal to ensure that consumers applying for credit, jobs, and housing are not left helpless in the face of irrelevant or inaccurate information about them, which are bought, warehoused, and sold by parties that the consumer has no relationship with or control over.[13] In line with these accuracy and confidentiality objectives,[14] consumer-permissioned services like Argyle help consumers to avoid errors and inaccuracies that can occur with manual transcription.[15] Argyle only provides potential lenders with information from data sources selected by the consumer.[16] Because the consumer selects the work accounts that it uses Argyle's software to retrieve their data from, and authorizes the software to access their selected accounts, the risk of a lender being provided with inaccurate or incomplete information from those accounts is lower than in the legacy model where a traditional furnisher self-selects reported information, potentially with bias. This is especially important to consumers who want to access credit but lack enough credit history to generate a credit score. By allowing a prospective creditor to assess a consumer's cash flow with various data sources, consumer-permissioned data access has the potential to meaningfully expand access to credit, improve the quality of financial services, and put consumers in the drivers' seat with respect to their data.[17]

II. THE PROPOSED RULES, IF ADOPTED, WOULD HURT CONSUMERS AND COMPETITION. (QUESTIONS 13-15)

Consumer-permissioned tools like Argyle are part of the larger open finance movement that seeks to empower consumers. Perhaps most importantly, they help consumers access and control their financial information by augmenting their ability to port and manage their information in a way they would not be able to on their own. Specifically, open payroll tools facilitate more choice and freedom to consumers by dramatically reducing the cost and friction of moving (and verifying) their income and employment data. On one side of the market, lenders, landlords, and creditors are able to quickly and securely verify information necessary to validate identity and income and avoid a costly and tedious manual verification process. On the other side, consumers are able to access credit and financial products and services faster and cheaper.

Furthermore, by enabling consumers to choose where they port their income and employment information to and from, open payroll tools break up information siloed across different institutions to give consumers an improved chance at accessing alternative financial options. For example, with

[13] *See id.*
[14] In addition, Argyle is already subject to the Gramm-Leach-Bliley Act's Privacy and Safeguards Rules, thus furthering the FCRA's confidentiality objectives.
[15] Today, approximately 70% of payroll verifications are done manually (*i.e.*, with consumers printing out and manually delivering paystubs).
[16] *See* Verify Your Employment and Income, ARGYLE, https://argyle.com/verify/.
[17] *See, e.g.,* U.S. Department of the Treasury, A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation, at p.138 (Released on July 31, 2018), available at https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation_0.pdf.

easier data access, more granular controls, and streamlined, consumer-directed data sharing, the marginal cost of a consumer seeking credit or applying for refinancing is reduced. And without the burden of tedious and expensive manual verification, lenders and third parties are able to dedicate more resources towards offering more innovative services and products.

In addition, consumer permissioned tools serve important clerical functions beyond enabling consumers to supply information necessary for verifying identities or income. They autofill applications for customers, who then verify the accuracy of the autofill, speeding up new customer applications and onboarding while reducing the paperwork barrier to applying for credit. Authorized access (and accompanying account verifications) also allow for more timely transactions by allowing for real time, secure authorizations. Overall, these small efficiencies and improved ease of use make a real difference for ordinary consumers – and can mean the difference between a new mortgage or car loan and an abandoned application.[18]

Covering consumer-permissioned financial management tools as CRAs could put these consumer benefits in jeopardy for several reasons. First, if consumer-permissioned data aggregators are considered CRAs, it would subject them to the FCRA's strict accuracy and dispute requirements, forcing data aggregators to invest time and resources to create dispute procedures that would be ineffectual for consumers, where errors would most likely lie with original employers or payroll processors. Rather than encouraging these firms to invest more resources towards innovation and quality, the proposal could result in resources being diverted to address the inevitable deluge of notices from consumer disputes. In addition, covered aggregators would need to create a mechanism to monitor, process, and investigate consumer disputes, a significant and costly investment that smaller fintech firms and startups may not be able to afford.

Second, many of Argyle's partners aim to provide innovative services for workers. For example, there are companies that provide specific services to gig workers, such as services to help them track their income or mileage or services that tell drivers where to go to pick up the most lucrative fares. If Argyle were a CRA, these types of services could be considered users of consumer reports who would need to comply with FCRA requirements. This could disincentivize innovation and discourage new competitors from entering the market.

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[18] In addition, other financial management products that help consumers include: tools that allow consumers to maintain certain balances in their accounts to avoid bank fees, tools that automatically update their financial information to avoid manual tracking, and tools that allow consumers to view information about the financial products they use at a single provider.
See e.g., Consumer Financial Protection Bureau, Project Catalyst Report: Promoting consumer friendly innovation (Oct. 2016), 22-23, *available at* https://www.consumerfinance.gov/data-research/research-reports/project-catalyst-report-promoting-consumer-friendly-innovation/ (stating consumer-permissioned access to financial data forms the "basis for personal financial management tools and mechanisms [that can] reduce the time to verify consumer [accounts]" and provide other consumer benefits and stating the loss of access to consumer data by consumer-permissioned third parties "could cripple or even entirely curtail the further development of such products and services").

Third, and more broadly, the ease, standardization, security, and consistency of consumer-permissioned data access encourages the proliferation of new and innovative tools and increases competition in the financial services sector, including more competitive interest rates and fee arrangements. Many of the consumer harms the FCRA seeks to address are mitigated and prevented by today's market for competing data services.

Overall, more options, lower prices, more competitive rates, more innovative and useful tools means better outcomes for consumers.[19] Treating all consumer-permissioned data service providers as CRAs would put these competitive forces into jeopardy by raising the cost of business and forcing small businesses and start ups to spend resources on administrative and technical compliance measures rather than developing new products and services for consumers. The increased cost of compliance would raise the cost of market entry and could disproportionately advantage large, established firms while hurting smaller, less-resourced organizations. Over the long-run, this could even raise the price of products and services for consumers. In sum, the marketplace is healthier and more accountable, and consumers are in a better place in no small part because of consumer-permissioned tools.

III. AGGREGATED OR ANONYMIZED DATA IS NOT A "CONSUMER REPORT" UNDER THE FCRA. (QUESTION 21-22)

The Outline considers the extent to which aggregated or anonymized data may qualify as "consumer reports."[20] However, an interpretation that broadly sweeps in aggregated and anonymized data as "consumer reports" would squarely conflict with the FCRA's statutory definition, which requires that the information *"bear[] on a consumer."*[21] Moreover, such an approach could be harmful to consumers. As noted above, Argyle works with companies that aim to provide innovative analytics products to gig workers and other independent contractors. Sweeping aggregate data into the ambit of the FCRA would disincentivize these types of worker-protective products.

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[19] *See, e.g.*, Todd Baker & Snigdha Kumar, *The Power of the Salary Link: Assessing the Benefits of Employer-Sponsored Fintech Liquidity and Credit Solutions for Low-Wage Working Americans and their Employers* (Harvard Kennedy School Mossavar-Rahmani Center for Business and Government Associate Working Paper Series No. 88, 2018), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/working.papers/88_final.pdf (analyzing paycheck linked liquidity offerings for low-income consumers, and concluding that employees with access to FinTech products would have better solutions for pressing day to day crises typical of low-wage employees, at much lower cost than market alternatives, and that this would enable credit-invisible consumers to gain access to traditional financial services products for the first time.

[20] *See* Outline, at 11.

[21] 15 U.S.C. § 1681a(d)(1) (emphases added).

argyle

Thank you again for allowing us the opportunity to comment as the Bureau contemplates potential rules to promote consumer agency and freedom. We appreciate your consideration of our comments and look forward to further opportunities to participate in this process.

Respectfully Submitted,

/s/Nicholas Lawson
General Counsel, Argyle

/s/Maneesha Mithal
Wilson Sonsini Goodrich & Rosati
Outside Counsel to Argyle

November 6, 2023

Via Electronic Delivery to
CFPB_consumerreporting_rulemaking@cfpb.gov

Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

RE: Small Entity Representative Written Feedback to the Consumer Financial Protection Bureau Small Business Advisory Review Panel for Consumer Reporting Rulemaking – Outline of Proposals and Alternatives Under Consideration

To Whom It May Concern:

ACRAnet, Inc. ("ACRAnet") appreciates the opportunity to participate as a small entity representative ("SER") to the Consumer Financial Protection Bureau ("CFPB") Small Business Advisory Review Panel for Consumer Reporting Rulemaking – Outline of Proposals and Alternatives Under Consideration (the "Outline"). ACRAnet provides this written feedback to supplement our remarks delivered directly to the CFPB during the meetings conducted by the CFPB under the Small Business Regulatory Enforcement Fairness Act ("SBREFA") process.

ACRAnet is a national reseller under the Fair Credit Reporting Act ("FCRA") that provides businesses, landlords, and consumers with the ability to conduct in-depth background screenings. ACRAnet has been a family-owned business since 1903. Serving as a consumer reporting agency ("CRA") for nearly 100 years, ACRAnet was formed to specialize in thorough background screening and products. Quality customer interaction and a hands-on approach is the foundation of our company. We have branches from coast to coast that share a common software platform and an extraordinary commitment to customer service, providing our clients with a vast network of resources right at their fingertips. We believe that our commitment to personable service, persistent accuracy and leading-edge technology sets us apart in the industry.

We have concerns about the CFPB proposals that we believe could have a negative impact on us and the other businesses in the consumer reporting industry that are essential for us to operate our business and provide competitive pricing and industry-leading customer service. However, as an initial matter, we want to express our disappointment that the CFPB has not provided more concrete proposals for the SBREFA process. The effectiveness of our feedback is impeded by our inability to have a full understanding of the CFPB's plans, and our ability to assess the potential impacts of the CFPB's proposals on our small business is similarly hindered without more specifics about the final rules.

A. Definitions of Consumer Report and Consumer Reporting Agency

The CFPB has put forward four different proposals to expand the reach of the FCRA by clarifying what products constitute a consumer report and what entities should be considered CRAs.[1] ACRAnet is concerned about the unintended consequences that will result from significantly increasing FCRA compliance costs for companies that we rely on who are not currently treated as CRAs and forcing many smaller entities out of the consumer reporting industry altogether, leading to market consolidation and less competition in the marketplace.

This is particularly true in the realm of tenant and employment screening, which makes up approximately 70% of ACRAnet's products and services. ACRAnet distinguishes itself from its competitors by utilizing manual processing of public records to ensure a higher degree of accuracy than is possible through automation. In order to do so, ACRAnet relies on small data researchers, court runners, and data aggregators as public record research tools. Under the CFPB's proposal, those entities would almost certainly be re-defined as CRAs, which will significantly increase their costs and prices and would very likely cause them to exit the marketplace or significantly change their offered services. That would in turn hinder or completely prevent ACRAnet from employing its manual court search processes while remaining competitively viable. Notably, larger CRAs that own their own public record collection channels or which rely on automation would feel less of an impact. Thus, the end result of the CFPB's proposal would be to *reduce* the available tools for ensuring accuracy in tenant and employment screening and likely render it economically impossible for entities like ACRAnet to perform manual screening while favoring larger CRAs that employ automation. This will ultimately harm consumers. Further, reduced market competition and increased transaction costs will trickle down to consumers in the form of increased application fees and rent. We urge the CFPB to seriously consider these unintended consequences.

1. Data Brokers

We observe that the CFPB has not provided a clear definition or example of what kinds of entities it considers to be "data brokers," which is not a defined term under the FCRA. The vague use of the term "data brokers" makes it very difficult for members of the industry to assess the potential impact of these changes, let alone for individual entities like ACRAnet to assess the potential impact on their own small businesses.

For example, the CFPB proposes a rule change that would dictate that a data broker selling certain types of data "typically" used for credit or employment eligibility determinations is selling consumer reports, regardless of the purpose for which the data is actually used or the data broker's expectations regarding the purpose for which the data will be used. The CFPB has not provided any clarity on the standard it will use to determine what data is "typically" used for eligibility determinations. When asked during the SBREFA panel discussion how the CFPB would define

[1] Consumer Financial Protection Bureau, Small Business Advisory Review Panel for Consumer Reporting Rulemaking – Outline of Proposals and Alternatives Under Consideration (Sept. 15, 2023), at 7-8 [hereinafter "Outline"].

what types of data are "typically" used for credit or employment eligibility purposes, the CFPB responded only that its thinking "is evolving" in that regard.

ACRAnet's clients are tenant screening companies, landlords, or mortgage companies that may be passing along the costs of the consumer reports that ACRAnet compiles to consumers. If our vendor costs go up exponentially, ACRAnet's consumer report costs would similarly go up (and not just ACRAnet, but also any current CRA), and our clients might pass the cost to consumers. This would ultimately affect the consumer and their ability to obtain housing (for tenant screening or for mortgage).

2. Defining "assembling or evaluating"

The CFPB has proposed the adoption of a "bright-line definition" for the terms "assembling" and "evaluating" that the CFPB believes will ensure "entities that facilitate data access between parties" fall within the definition of a CRA.[2] Despite referencing this proposal as a "bright-line definition," the CFPB has not provided any clear definition for the industry to assess. At this juncture, it appears that the proposed definitional change would be a broad expansion of the meaning of "assembling" and "evaluating" to include a vast universe of software providers, electronic platforms, and other data access vendors as CRAs.

Additionally, existing case law and agency guidance has already provided "bright-line" rules for defining what constitutes "assembling" or "evaluating", and the industry has heavily relied on those determinations. For instance, under existing case law, an entity that sells a software product to process credit report information is not "assembling and evaluating" consumer credit information.[3] Courts have held that mere conduits of information, such as search engines and electronic data platforms, are not assembling and evaluating that information.[4] The Ninth Circuit has also held, for example, that Fannie Mae's Desktop Underwriter system does not "assemble or evaluate" by merely providing a software that allows lenders to assemble or evaluate information on their own.[5]

The Federal Trade Commission ("FTC") also made clear in its report, "40 Years of Experience with the Fair Credit Reporting Act" (the "40 Years Report") that "[a]n entity that performs only mechanical tasks in connection with transmitting consumer information is not a

[2] Outline, at 9.

[3] *See Gundersen v Equifax Info. Services*, 1:22-CV-52 (D. Utah Jul. 21, 2023).

[4] *Sandofsky v. Google L.L.C.*, 2021 WL 294118, at *3 (D. Mass. July 13, 2021); *Ori v. Fifth Third Bank*, 603 F. Supp. 2d 1171 (E.D. Wis. 2009).

[5] *Zabriskie v. Federal National Mortgage Association*, 912 F.3d 1192 (9th Cir. 2019). Although the Ninth Circuit later revised the decision to base the holding on the conclusion that, even if Fannie Mae assembles or evaluates information, it does not do so for the purpose of furnishing consumer reports and therefore is not a CRA, 940 F.3d 1022, 1030 (9th Cir. 2019), the reasoning of the original decision is sound and has been relied upon by the industry. Additionally, even the Ninth Circuit's revised decision is contrary to the CFPB's current proposals, which would render the provision of consumer information "typically" used for eligibility purposes a consumer report regardless of the purpose for which it is furnished. *See* Outline, at 8.

CRA because it does not assemble or evaluate information."[6] The FTC referred to these types of tasks as "conduit functions" rather than consumer reporting activity, and specifically provided the example of "a business that delivers records, without knowing their content or retaining any information from them."[7] Separately, the FTC also confirmed that "[a] seller of software to a company that uses the software product to process credit report information is not a CRA."[8]

Abandoning decades of precedent and agency guidance in favor of a broader understanding of "assembling and evaluating" contrary to the ordinary definitions of those words would severely destabilize an industry that has relied on that guidance. Transforming those service providers into consumer reporting agencies would drastically increase costs for small resellers who do not own their own data access channels and must instead rely on those third parties. Once again, this change would almost certainly benefit larger, non-reseller CRAs that are not as dependent on third-party vendors and who can more easily absorb the increased costs. The CFPB's proposal will result in increased transaction costs, market consolidation, elimination of smaller entities from the industry, reduced competition, and, ultimately, harm to consumers.

Realistically, the CFPB's current proposal could be read broadly enough to reach a search engine or web browser that enables access to public records. ACRAnet is concerned by the broad scope of activity that may fall within "facilitating electronic data access" and transmitting consumer data electronically. Currently, ACRAnet's products can be used through multiple platforms, simplifying processes across various industries while remaining in compliance. Further, ACRAnet is able to provide innovative and intuitive Internet-based connections that integrate seamlessly with software used in financial and other industries. However, ACRAnet's ability to continue offering its products and services may be negatively impacted if the other businesses on which it relies choose to leave the market rather than become CRAs.

ACRAnet depends on third-party technology providers to store, process, merge, and transmit the data in consumer reports before delivering them to our clients. These main technology providers are the conduits between our data sources (such as the credit repositories and vendors for public records, flood reports, employment or residential verifications, tax transcripts, and fraud reports). These conduits are used in all divisions for our business, including our main divisions of mortgage reporting and tenant and employment screening. Other than the main technology providers, there are other supporting technology providers in the mortgage industry. These include loan origination software that our clients contract with and software portals wholesale lenders use software for Fannie Mae and Freddie Mac eligibility. These technology vendors are considered to be conduits of the data as well. If all these technology providers were defined as CRAs, we would have many of the same concerns we would with data brokers who only aid in research of the consumer report. We do not believe it makes sense to include these conduits of data in the CRA definition, given that they only store, process, merge, and transmit data between the CRAs, resellers, users, and the two government-sponsored enterprises (i.e., Fannie Mae and Freddie Mac).

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[6] Federal Trade Commission, 40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations (July 2011), at 29 [hereinafter "40 Years Report"].

[7] *Id.*

[8] *Id.*

If these intermediaries were defined as CRAs, it would affect every division of our company (especially mortgage). As a small entity with limited resources, we would not be able to build capacity inhouse or find alternative providers, and we could potentially go out of business.

3. "Credit header" data

The CFPB is proposing to redefine "consumer report" to include the provision of "credit header data," for the express purpose of reducing, "perhaps significantly," the ability of CRAs to sell such data without an FCRA permissible purpose.[9]

We note that credit header data is merely identifying information, such as name, current and past addresses, Social Security number, and phone numbers.[10] Such information has not historically been considered a consumer report. The FCRA expressly provides that a consumer report must "bear on" at least one of seven enumerated characteristics regarding the consumer and must be used or expected to be used for one of the FCRA's enumerated permissible purposes.[11] Credit header data does not "bear on" any of those enumerated characteristics for a consumer; to the contrary, it is merely identifying information. *See Individual Reference Servs. Grp., Inc. v. F.T.C.*, 145 F. Supp. 2d 6, 17 (D.D.C. 2001) (recognizing credit header data is not a consumer report). Indeed, in the 40 Years Report, the FTC affirmed that "[a] report limited to identifying information such as a consumer's name, address, former addresses, or phone numbers, does not constitute a 'consumer report' if it does not bear on any of the seven factors and is not used to determine eligibility."[12]

ACRAnet receives a very small amount of disputes for credit header data directly or indirectly. For our tenant and employment screening services, the credit header data is used in very important ways to ensure accuracy while compiling consumer reports that ultimately have a positive impact on our clients and consumers. We utilize address/person search data as a research tool while doing criminal or eviction record searches in an investigative background screening report. If a consumer does not disclose all of their address history in the application, by using an address/person search, we would be able to determine all possible jurisdictions to search for possible convictions. For example, if we found in the address search that the consumer lived in Wyoming (and this was not disclosed by the applicant), we might find that the consumer actually had criminal records by conducting county searches within Wyoming that normally would not come up on a national pointer database search. Another example might be if a consumer application contained a Social Security number that belonged to another person. Whether accidental or on purpose, having access to credit header data within the person searches ensures our ability to see red flags that may come up during our searches. The person search we purchase is not currently disputable, so the only way it might come up is if we use that information to locate a court case in a jurisdiction. However, in talking it over with our consumer dispute department, it

[9] *Id.*

[10] Outline, at 10.

[11] 15 U.S.C. § 1681a(d)(1).

[12] 40 Years Report, at 21.

rarely comes up where a consumer disputes a court case based on our search that stemmed from information in credit header data we purchased.

Another way ACRAnet depends on credit header data is to service our clients who use ACRAnet for mortgage reporting (this includes banks, credit unions, mortgage lenders, and mortgage brokers). ACRAnet offers fraud prevention products as a way for these financial institutions to fulfill regulatory requirements such as the FTC Red Flags Rule. These fraud prevention products are from vendors that use credit header data. We are not aware of any of these fraud products ever being disputed.

ACRAnet is concerned that the CFPB has not fully considered the consumer harm that would arise from a rule change that restricts the dissemination of credit header data to users in contexts that do not constitute a FCRA permissible purpose. First, such a rule would significantly hinder the ability of companies to use credit header data for fraud detection and identity verification. Many of our clients are businesses and government agencies that rely on fraud detection and identity verification tools that are powered by credit header data. The CFPB should closely analyze the extent to which consumer fraud and identity theft will increase if businesses are prevented from using credit header data for these important purposes. The restriction of credit header data also creates an increased risk of discrimination by removing an objective criterion for verifying a consumer's identity, which opens the door for decisionmakers to rely on personal biases and subjective human judgment.

ACRAnet believes that another risk raised by this proposal is creating situations in which an end user denies an applicant based on a failure to verify the applicant's identity using credit header data. If such credit header data is to be considered a consumer report, the end user would then be required to provide an adverse action notice to the applicant, including providing the credit header "consumer report" to that applicant. In instances where that applicant was, in fact, a fraudster, the adverse action notice would dangerously place more sensitive identifying information regarding the consumer into the hands of a bad actor that has already attempted to perpetrate a fraud, ensuring that a second attempt will have a higher chance for success.

ACRAnet urges the CFPB to consider how the different proposals it is considering will necessarily interplay with one another, and the additional unintended consequences of that interplay. For instance, the CFPB's proposed changes to the "legitimate business need" and "written instructions" permissible purposes could even further limit the ability of users to access and utilize credit header data, and taken together, these rule changes could drastically impact consumer transactions, to the detriment of consumers.

4. Aggregated Data

The CFPB is proposing to clarify whether aggregated data constitutes or does not constitute a consumer report. The plain text of the FCRA already clarifies that aggregated data is not a consumer report.

The FCRA defines "consumer" as "an individual," meaning one person, not many people.[13] The FCRA defines "consumer report" as "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" credit, employment, insurance, or other permissible purposes allowed by the FCRA.[14] The information in the consumer report must have a "bearing on" a single person's specified consumer characteristics (*e.g.,* credit worthiness). Aggregated data does not have a "bearing on" a single person's specified consumer characteristics because the data is an aggregation of many different consumers' information.

This interpretation of the plain text of the FCRA is consistent with how the FTC has historically interpreted the application of the definition of consumer report to aggregated data. The 40 Years Report states the following with respect to aggregated and anonymized data and consumer reports:

> A "consumer report" is a report on a "consumer" to be used for certain purposes involving that "consumer." Information that does not identify a specific consumer does not constitute a consumer report even if the communication is used in part to determine eligibility. For example, a communication that flags a specific Internet transaction as potentially fraudulent based on comparison to aggregate data about Internet transactions (e.g., time-of-day activity, geographic location, amount of the transaction, etc.), without reference to an individual consumer, is not a consumer report.[15]

Because the plain text of the FCRA and the FTC already provide guidance on whether aggregated data is a consumer report, we do not believe the CFPB needs to provide further clarity on this topic. ACRAnet believes that an interpretation of the term "consumer report" that would expand the definition to include aggregated data is only going to hurt businesses and consumers.

Expanding the definition of "consumer report" to include aggregated data will deprive businesses of valuable information they need to operate and offer the best possible products to consumers. For example, a creditor that obtains aggregated data can use that data to refine its credit policy to avoid credit losses, and its pricing policy to offer the most competitive credit pricing. If a creditor loses access to aggregated data because it must have a permissible purpose to obtain that data, the creditor may not be able to test credit and pricing models on aggregated data before putting those models into production, or back-test those models to identify weaknesses and/or model deterioration. Creditors will respond by tightening credit policies or increasing pricing. As a result, consumers will suffer because of reduced access to credit and higher credit costs. Consumers with lower credit scores will suffer the greatest harm because creditors will be unable

[13] *See* 15 U.S.C. § 1681a(c).

[14] *See* 15 U.S.C. § 1681a(d) (emphasis added).

[15] 40 Years Report, at 20.

to use aggregated and anonymized data to find alternative methods to underwrite and price those consumers.

If the CFPB decides that further clarity is needed, we strongly encourage the CFPB to provide additional clarity that is consistent with the plain text of the FCRA and the FTC's interpretation to avoid causing harm to businesses and consumers.

B. Permissible Purposes

1. Written Instructions of the Consumer

The Outline lays out what appears to be plans for a sweeping overhaul of the FCRA's permissible purpose based on the "written instructions of the consumer to whom [the consumer report] relates."[16] The Outline notes several "proposals under consideration," including:

- The steps required to obtain a consumer's written instructions;
- Potential limitations on who may collect such written instructions;
- Limitations on the scope of such written instructions; and
- Methods for revoking modifying such written instructions.[17]

All of these "proposals" suffer from a lack of clarity and specificity. For example, what *kind* of steps would be required to obtain a consumer's written instructions? What *types* of limitations does the CFPB envision for those seeking to obtain written instructions? What *specific* methods is the CFPB contemplating for revocation or modification of written instructions?

Perhaps more concerning, though, is that many of these "proposals" either (a) have no basis in the FCRA, or (b) are counter to established regulatory guidance that ACRAnet and others in the industry have relied on.

In the Outline, the CFPB notes that it is considering proposals on who can collect written instructions.[18] The FCRA merely states that a CRA may furnish a consumer report in accordance with the written instructions of the consumer to whom the report relates.[19] The FCRA imposes no limitations on *who* may obtain those written instructions.[20] Further, the 40 Years Report similarly places no such limitations. Many parties use written instructions to obtain consumer reports for legitimate purposes that may not be covered under other FCRA permissible purposes. Others use written instructions as a "safeguard" against arguments that they may not have a permissible purpose. For example, and appropriate considering the Outline, a party may wish to pull a consumer's report because it has a legitimate business need. However, that party may also wish to get the consumer's written instructions to guarantee it has a permissible purpose to obtain the

[16] *See* 15 U.S.C. § 1681b(a)(2).

[17] Outline, at 12-13.

[18] Outline, at 12

[19] 15 U.S.C. § 1681b(a)(2).

[20] *See id*.

report in the event that the legitimate business need is challenged. Placing limitations on who may obtain a consumer report via written instructions will create situations where certain parties deemed "out of scope" for written instructions may struggle to find another FCRA permissible purpose.

The Outline also highlights the CFPB's apparent desire to limit the scope of a consumer's written instructions, including possible limitations on the number of purposes or entities that can be covered by a single instruction.[21] Again, the FCRA places no limitations on what situations a consumer's written instructions may cover.[22] In fact, the 40 Years Report notes that a simple "I authorize you to procure a consumer report on me," without any specific reasons for the request, provides a permissible purpose.[23] In the Outline, the CFPB also asks for feedback on the processes entities use to allow consumers to modify or revoke their written instructions.[24]

Taking both of these proposals together illustrates the potential for significant consumer burden. For example, if there is a separate set of written instructions for each entity and each purpose, then a consumer will either have to (a) identify which specific set of instructions they wish to modify or revoke, or (b) if the consumer wishes to revoke all outstanding instructions, revoke each specific set of instructions. A system like this, where the consumer must contact multiple parties to revoke permissions, would be very similar to the sort of "dark pattern practices" the CFPB has previously decried.[25]

ACRAnet is truly "the Information Network." When we talk about service, we really mean it. We understand that there are times when a consumer needs to talk to someone, and our specially trained customer service representatives and product managers are there to provide consumers with one-on-one human interaction when they need it. Tying the hands of small businesses when engaging with consumers by dictating the form and content of how consumers can provide written instructions would have immediate, detrimental impact on consumer communications. Furthermore, if ACRAnet were required to validate the written instructions for every consumer, the turnaround time for report completion would increase, resulting in the possibility of consumers losing out on housing.

For example, ACRAnet utilizes the written instructions for soft-inquiry prequalification for our mortgage reporting division. We predict our volume for this purpose to grow in the near future as the demand for housing grows. We need to be able to offer this product in order to compete with other CRAs. Placing additional burdens on consumers that could benefit from this product could affect consumers' ability to obtain housing (for tenant screening or for mortgage).

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[21] Outline, at 12-13.

[22] *See* 15 U.S.C. § 1681b(a)(2).

[23] 40 Years Report, at 43.

[24] Outline, at 13.

[25] *See* Consumer Financial Protection Bureau, CFPB Issues Guidance to Root Out Tactics Which Charge People Fees for Subscriptions They Don't Want (Jan. 19, 2023), *available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-guidance-to-root-out-tactics-which-charge-people-fees-for-subscriptions-they-dont-want/.

2. Legitimate Business Need

ACRAnet currently utilizes the FCRA section 604(a)(3)(F)(i) legitimate business need permissible purpose for our tenant screening division (about 40% of our total revenue) and the FCRA Section 604(a)(3)(F)(ii) legitimate business need permissible purpose for a smaller part of our mortgage division (about 10 % of our total revenue). We certify our clients' permissible purposes as part of the onboarding process and initial training, and we continuously monitor our clients' permissible purpose through internal audits, bureau audits, and our recertification process. During our client monitoring and auditing procedures, we select random consumer reports and request the application/consumer authorization that the consumers should have provided before the client requested the consumer report. We look for the purpose (*i.e.,* that it is in connection with tenant screening), the authorization/consumer consent verbiage, and that the consumer signed/dated prior to the consumer report being procured. For the account review side, this would fall mostly under our lending reporting division. We do have some clients (*e.g.,* all banking institutions) who utilize the account review purpose to ensure the use of a consumer report is needed to make a decision about whether the consumer continues to meet the terms of the account.

In the Outline, the CFPB is considering proposals to specify what is required for both the transaction prong[26] and the account review prong[27] of the permissible purpose for legitimate business need.[28] For the transaction prong, the CFPB is proposing to require that a consumer report may only be procured to determine eligibility for the specific business transaction.[29] This seems to be derived from the FCRA's definition of "consumer report." However, that definition specifically states that the information in a consumer report "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 a permissible purpose.[30] The CFPB would impose a limitation far stricter than what is currently allowed under the FCRA by effectively removing the "in part" language and requiring eligibility as the sole purpose of procurement, which appears to contradict the black letter of the statute.[31]

On the account review prong, the CFPB seeks to limit use of a consumer report to only those situations where it is "actually needed" by the user to make a decision.[32] How would the CFPB define "actually needed"? Each business is different, with different levels of risk tolerance. Implementing an arbitrary standard for "need" will punish conservative entities without providing sufficient clarity. Further, how will a CRA comply with this arbitrary standard? Will a CRA need to manually audit each user and make its own determination about whether the user "actually needs" a consumer report in response to each request? ACRAnet has strong concerns about its

[26] *See* 15 U.S.C. § 1681b(a)(3)(F)(i).

[27] *See* 15 U.S.C. § 1681b(a)(3)(F)(ii).

[28] Outline, at 13-14.

[29] Outline, at 13.

[30] 15 U.S.C. § 1681a(d)(1).

[31] *See, e.g., Keys v. Barnhart*, 347 F.3d 990, 993 (7th Cir. 2003) ("[…] *Chevron* only requires deference to agency interpretations of regulations that are ambiguous; an agency cannot by regulation contradict a statute, but only supplement it.").

[32] Outline, at 13-14.

ability to become an arbiter of each user's business practices. ACRAnet has neither the staff nor the resources to make these types of assessments.

C. Data Security and Data Breaches

The CFPB is considering a proposal to protect consumer reports from data breaches or unauthorized access, possibly by making such a breach or access a violation of the FCRA's provisions on impermissible furnishing of consumer reports.[33] While we applaud the CFPB's purpose, the provision cited by the CFPB – 15 U.S.C. § 1681e(a) – says nothing about either of these situations. Rather, the statute requires that CRAs furnish consumer reports only for permissible purposes.[34] Courts have held that CRAs that fall victim to data breaches are not liable under FCRA Section 1681e because the information was *stolen* from the CRA, not *furnished*.[35]

ACRAnet takes its responsibility to protect consumer's information seriously. We have implemented numerous security measures and already contend with a patchwork of state laws relating to data security and data breaches. However, the FCRA is not a data breach statute, and we question whether the CFPB can make it one through rulemaking.

D. Disputes

1. Disputes Involving Legal Matters

In the Outline, the CFPB claims that the FCRA does not distinguish between legal and factual disputes and requires investigation of legal disputes. However, our understanding and the understanding of our peers in the industry is that the FCRA only requires CRAs to guard against factual inaccuracies, not to resolve legal disputes. We believe that this has been shown through FCRA textual analysis, Congressional intent, and previously decided court cases.

- **FCRA Text:** Our reading of section 1681i(a) or section 1681e(b) of the FCRA is that a consumer must sufficiently allege that a consumer report contains factually, not legally, inaccurate information.[36]
    - For example, section 1681i(a)(1)(A) states that "if the completeness or accuracy of an item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly, or indirectly through a reseller, of such dispute. . ."[37]

[33] Outline, at 14.

[34] *See* 15 U.S.C. § 1681e(a).

[35] *See, e.g., In re Horizon Healthcare Servs. Data Breach Litigation*, Civil Action No. 2:13-cv-07418, 2021 WL 6049549, *6 (D.N.J. Dec. 21, 2021) ("[C]ourts have concluded that information stolen from a defendant is not furnished within the meaning of FCRA.").

[36] *See* 15 U.S.C. §§ 1681i(a); 1681e(b).

[37] *See* 15 U.S.C. § 1681i(a)(1)(A) (emphasis added).

- An "item of information" refers to whether a debt exists, the amount of the debt, payments on the debit, *etc*. Whether the debt is valid is not an "item of information," which is a determination more appropriate to be made by a court.
- In another example, section 1681e(b) requires CRAs to develop procedures to maintain "maximum possible accuracy."[38] That descriptor makes sense in the context of factual accuracy, but not in the context of legal validity. Factual accuracy can be objectively measured. Small businesses like ACRAnet have no ability to make a determination on whether information about a legal dispute is accurate. Even if ACRAnet were to hire a phalanx of attorneys, which we do not have the resources to do, there would be no guarantee that a determination by an in-house attorney would be the same as the conclusion that would be reached by a judge or regulator viewing the same dispute.
- Furthermore, the Eleventh Circuit Court of Appeals has held that "maximum possible accuracy" means "information must be *factually true* and also unlikely to lead to a misunderstanding."[39]
- Additionally, the FCRA generally only allows CRAs 30 days to resolve a dispute.[40] Legal disputes cannot be resolved in such a short timeframe; indeed, resolving disputed questions of law can take months or years for a court that is equipped to resolve such disputes. And, even then, courts from different states, districts, and circuits may disagree. The FCRA's requirement that disputes be resolved in 30 days supports the interpretation that the FCRA only requires resolution of alleged factual inaccuracies, not disputed legal questions. Otherwise, the vast majority of such disputes would be forced to be removed from consumer reports in response to such disputes, which would lead to less predictive consumer reports. Without reliable information, creditors would be forced to make underwriting decisions without such information, which increases risk and increases the cost of credit overall.

- **Congressional Intent:** The FCRA's legislative history further confirms Congress's focus on factual inaccuracy, not legal disputes. The FCRA, as originally enacted in 1970, was introduced in the Senate by a bipartisan group of Senators to "protect consumers against arbitrary, erroneous, and malicious credit information."[41] It was meant to target confusion over individuals with similar names; biased information; malicious gossip; computer errors; and incomplete information. It was not meant to force CRAs to resolve legal disputes. ACRAnet appreciates the balance struck by Congress between protecting consumers and empowering business and urges the CFPB not to upset the intended framework established by the Congress.

[38] *See* 15 U.S.C. § 1681e(b).

[39] *See Erickson v. First Advantage Background Servs. Corp*., 981 F.3d 1246, 1252 (11th Cir. 2020) (emphasis added).

[40] *See* 15 U.S.C. § 1681i(a)(1)(A).

[41] *See* 115 Cong. Rec. 2410 (daily ed. January 31, 1969).

- **Case Law:** The legal vs factual issue has been considered by multiple courts, and at least five courts of appeals that have previously consider the question—the First, Seventh, Ninth, Tenth, and Eleventh Circuits—have signaled that FCRA dispute obligations extend only to investigations of factually inaccurate information.[42]

ACRAnet's process is the same for all disputes, from intaking the dispute and the re-investigation with the source of the information. We do not distinguish these types of disputes in our system. We always notify the source of the dispute and re-investigate the information. Since tenant screening makes up about 40% of ACRAnet's services, the dispute type that we receive that would have a greater chance of being related to legal issues would be residence verification disputes for a report we compiled for tenant screening. In 2022, 42% of the disputes ACRAnet received involved a residence verification. About half of these disputes may lead to us making a determination if the dispute involved a legal issue. For example, if the consumer disputed an unpaid balance owing to a landlord, our process would be to notify the landlord that the consumer is disputing this amount, and we would re-verify the amount owing. If the consumer states that the landlord has no legal right to claim a certain amount owing, this is not something that can readily be investigated by a CRA such as ACRAnet. If the landlord confirms the balance is legally owing, the question of the legality of the amount claimed by the landlord is something entirely outside of our current dispute process or capabilities.

If we are reading the CFPB's Outline correctly along with the supporting amicus briefs in the footnotes, some disputes can be categorized as relating to "factual" issues, while others can be categorized as relating to "legal" issues. However, ACRAnet's compliance/consumer dispute department personnel are not experts on this topic, and currently follow the re-investigation process according to the established industry-wide interpretation of the FCRA. If a small entity such as ACRAnet is caught between the consumer and furnisher of the information to determine the legality of a situation, this seems to be something that would fall entirely outside of the scope of our dispute process.

ACRAnet investigates every dispute that it receives, but such investigation can only go so far. No amount of investigation by ACRAnet could substitute for a binding adjudication of a legal dispute before a court of law. We can only work with CRAs to investigate and report on the facts. Asking us to make legal determinations puts us in an impossible compliance position. It will subject us to increased litigation costs with no certainty as to whether our investigations into legal disputes could ever substitute for a judge's rulings.

2. Disputes Involving Systemic Issues

[42] *See Denan v. Trans Union LLC*, 959 F.3d (7th Circuit, 2020) at 296-297; *see DeAndrade v. Trans Union LLC*, 523 F.3d 61, 68 (1st Cir. 2008); *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d, (9th Circuit, 2010) at 892; *Wright v. Experian Info. Sols., Inc*., 805 F.3d 1232, 1242 (10th Cir. 2015); *Losch v. Nationstar Mortgage LLC*, 995 F.3d 937, 946 (11th Cir. 2021); *Batterman v. BR Carroll Glenridge, LLC*, 829 Fed. Appx. 478, 480 (11th Cir. 2020); *Chiang v. Verizon New England Inc*., 595 F.3d 26, 38 (1st Cir. 2010); *Hunt v. JPMorgan Chase Bank, Nat'l Ass'n*, 770 F. App'x 452, 458 (11th Cir. 2019).

The Outline proposes that CRAs and furnishers identify systemic issues discovered during a dispute investigation and potentially notify all other similarly situated consumers about such systemic issue.

ACRAnet already conducts root cause analysis of any potential issues that may have given rise to an increase in consumer disputes. There is no current obligation to notify consumers whenever a CRA corrects inaccurate information.

For indirect disputes, the FCRA requires CRAs to investigate a *single* consumer's file when the CRA receives a dispute from that consumer.[43] The FTC's interpretation is consistent with the plain text of the FCRA:

> A CRA need not investigate a dispute about a consumer's file raised by a third party – such as a "credit repair organization" defined in 15 U.S.C. §1679a(3) – because the obligation under this section arises only where file information is disputed "by the consumer" who notifies the agency "directly" of such dispute.[44]

The FCRA does not contemplate that investigations would expand beyond a single consumer or that the results of investigations into disputes would be communicated in as broad a fashion as the Outline proposes.

We have concerns that notifying consumers of any issue that needs to be fixed would do nothing other than cause the consumer needless anxiety. It could also incentivize widespread and unnecessary litigation against CRAs and furnishers—which, ultimately, will increase the cost of credit and potentially cause furnishers to stop voluntary consumer reporting in general in order to avoid the increased compliance and litigation costs associated with reporting. Because the consumer reporting system in the United States is wholly voluntary, there is no legal requirement that a furnisher supply any information to CRAs. Yet, the consumer reporting system depends on the availability of consumer reports that reflect the true credit profile of consumers based largely on information that is voluntarily supplied. If furnishers start withholding information because the compliance costs and legal risks simply become too much under the CFPB's proposals, then the quality of consumer reports will only go down. This will hurt both businesses and consumers as credit constricts and becomes more expensive to obtain. Reduced consumer reporting would significantly harm consumers, who could face less access to credit and higher cost of credit. Consumers trying to build their credit profile and improve their consumer reports will suffer because their creditors are less likely to furnish to avoid increased compliance costs and legal risks. Finally, it would harm the ACRAnet's business because users would have less incentive to obtain consumer reports from us because of the diminished value of those reports.

Furthermore, we have concern that mere volume of disputes could be interpreted by the CFPB as indicative of a systemic issue. For example, we receive a large number of similar disputes

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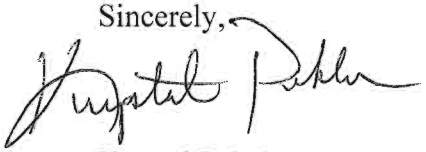
[43] *See* 15 U.S.C. § 1681i(a)(1)(A) (". . . if the completeness or accuracy of any item of information contained in a *consumer's file* at a consumer reporting agency is disputed *by the consumer* and the consumer notifies the agency directly. . .") (emphasis added).

[44] *See* 40 Years Report, at 78.

from credit repair organizations. These disputes all have to do with ACRAnet inquiries posted on consumers' credit files for the three nationwide CRAs. Upon receiving such a dispute (almost always delivered via the U.S. Postal service or by FedEx), we do a search in our system to locate the consumer. Once we locate the file and identify the end user, we send an initial notice to the end user via e-mail requesting a copy of the consumer authorization. We then input all information regarding the dispute into a dedicated internal platform for tracking purposes so that we can respond within the FCRA-required timeline. Once we receive the consumer authorization, we send it to the consumer along with a letter from ACRAnet detailing the permissible purpose connected to the inquiry and the end user's contact information. These disputes that we believe to originate from credit repair organizations almost never include a contact phone number for the consumer, so often the only communication method available is the address provided in the original letter. We hope that the CFPB will consider the potential impact of disputes submitted by credit repair organizations in formulating its FCRA rulemaking.

We thank the CFPB for this opportunity to provide our written feedback to the Outline. We hope that the CFPB will provide us with future opportunities to respond to more specific proposals as the CFPB makes them available. We believe that, once we fully understand the CFPB's plans, additional time for the SERs to gather data and calculate financial information would greatly contribute to the CFPB's process. We encourage the CFPB to keep us and the other SERs apprised of any future developments in the rulemaking. Please feel free to reach out if the CFPB should have any further questions or if we can provide any additional information.

Sincerely,



Krystal Pekala
Compliance Manager
ACRAnet, Inc.

Credit Information Systems

November 5, 2023

Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552
Via Electronic Delivery to
CFPB_consumerreporting_rulemaking@cfpb.gov

RE: Small Entity Representative Written Feedback to the Consumer Financial Protection Bureau Small Business Advisory Review Panel for Consumer Reporting Rulemaking – Outline of Proposals and Alternatives Under Consideration

To Whom It May Concern:

The Credit Bureau of Council Bluffs, Inc., which does business as Credit Information Systems, ("CBCB") would like to thank the Consumer Financial Protection Bureau ("CFPB") for the opportunity to participate as a small entity representative ("SER") to the CFPB's Small Business Advisory Review Panel for Consumer Reporting Rulemaking. In addition to our verbal remarks which we provided during our recent meetings, CBCB respectfully offers the following written feedback for the CFPB's consideration under the Small Business Regulatory Enforcement Fairness Act ("SBREFA") process.

My name is Heather Russell-Schroeder, and I am the owner and president of CBCB. CBCB has been privately owned by my family, the Russells, since 1948. I have worked for the business since 1984 and served in the role of President since 2008. But the company's history reaches back even further, as it has been helping consumers fulfill their financial dreams since 1915. From our original work preparing paper files to the modern reality of instant tri-merge credit reports, we have faithfully executed our mission to provide integral information to our clients so they can confidently make important lending decisions. As the industry has changed over the years, one thing has remained constant: our clients rely on us to provide them, and their customers, with the information they need when they need it to make sound lending decisions. To that end, our credit reporting, appraisal management, and lending risk mitigation products enable consumers to obtain mortgage loans, consumer loans, auto loans, apartment rentals, and employment opportunities.

We maintain an expert staff to assist consumers as they navigate the financial system. That staff consists of over 400 years of combined experience. Our staff is located at our corporate office in Council Bluffs, Iowa and also includes team members in Tennessee, Texas, and Connecticut. We serve clients nationwide. As a small

consumer calls our office, our staff answers the phone ready, willing, and able to assist. As a small business serving the financial industry, we take great pride in our integrity and in meeting our compliance obligations. As such, we maintain policies and procedures in keeping with all local, state, and national regulations to guard consumer information.

We are fully supportive of efforts to promote fair and accurate credit reporting while allowing small entities to thrive and serve their customers and their consumers effectively, but one aspect of the proposed rulemaking that we hope that the CFPB will pay close attention to is the potential impacts on small businesses, like us, if our current product and service offerings must be scaled down or sold off completely due to burdensome regulatory compliance processes. While we value the goal of enhancing consumer protections, we believe these proposals will come with unintended consequences for small entities like ours. Small consumer reporting agencies like us often operate with limited financial resources and leaner margins than the large players. Increased costs could be more easily borne by larger industry players, thus driving smaller entities out of the marketplace and/or causing market consolidation and decreased competition.

In the long run, we believe that such consolidation would harm consumers rather than benefit them by restricting access to credit and increasing costs related to financing and other financial services. Richard Cordray said in his July 16, 2012, Field Hearing: "Given its enormity, given its influence, and given its wide impact on our overall economy, you can see that there is much at stake in ensuring that the credit reporting market is working properly for consumers." I believe it is therefore essential to strike a balance between ensuring consumer protection and ensuring that these proposals do not become overly burdensome for small entities like mine that serve important sectors of the economy and work to benefit consumers.

Once again, thank you for this opportunity, and we look forward to a productive collaboration with the CFPB on an ongoing basis.

A. Definitions of consumer report and consumer reporting agency

The CFPB's Outline of Proposals and Alternatives Under Consideration ("Outline") contains four proposals to expand the definition of "consumer report" and "consumer reporting agency" under the Fair Credit Reporting Act ("FCRA"), which we believe could negatively impact the CBCB. For example, if we use a smaller vendor for part of our services today and that vendor is impacted by the proposed rules in a manner that they cannot afford to stay in business because of the increased compliance costs of becoming a consumer reporting agency ("CRA"), then we may not be able to negotiate a suitable replacement for this vendor. If we are forced to increase the cost of our products and services as a result, these may become less available to the marketplace, and consumers would suffer due to increased costs at the time of application or tightening of the availability of credit overall.

1. Data brokers

The CFPB Outline proposes to expand the scope of the FCRA to cover entities often referred to as "data brokers".[1] Despite participating in the SBREFA process, we remain unable to understand the scope of these proposals as the CFPB has not provided a clear definition or example of what kinds of entities it considers to be "data brokers," which is not a defined term under the FCRA. The vague use of the term "data brokers" makes it very difficult for members of the consumer reporting industry, especially a small business like our company, to assess the potential impact of these proposals or the potential impact on their own businesses.

For example, the CFPB proposes a rule change that could make a data broker a CRA if it sells certain types of data "typically" used for credit or employment eligibility determinations even if the data broker has no intention of selling the data for such an eligibility determination or even if the data is not used for such an eligibility determination. We believe that this could lead to an arbitrary standard that would lead to regulatory uncertainty as the CFPB has not provided any clarity on the breadth of the word "typically" or how the CFPB plans to define what data falls into this category. When asked during the SBREFA panel discussion how the CFPB would define what types of data are "typically" used for credit or employment eligibility purposes, the CFPB responded only that its thinking "is evolving" in that regard. We request that the CFPB either (1) not move forward with this proposal or (2) provide additional information about how this determination will be made.

Despite the non-specificity of the CFPB's data broker-related proposals, it is clear that redefining "consumer reporting agency" and "consumer report" to bring more entities into scope of the FCRA would have unintended consequences by significantly increasing compliance costs and forcing many smaller entities out of business, leading to market consolidation and less competition in the marketplace, resulting in a negative impact on consumers from higher costs to secure financial services. Entities like mine that have operated under the FCRA have very strict and defined policies and procedures for compliance. A new definition of a CRA would require the data broker to comply with all FCRA obligations resulting in new and unfamiliar processes to this ecosystem, the consequences of which may include service delays or disruptions and changes in the information being delivered and how the information gets delivered. Such unintended consequences could cause adverse disparate impacts to certain demographic populations that rely on this information to enter or remain active in the financial services industry.

The CFPB's Outline specifically references criminal records as an "example" of a type of consumer data that is "typically used for credit and employment determinations."[2] However, criminal records are also used by government agencies for law enforcement purposes. Those agencies in some cases rely on private databases and court runners to conduct criminal record research for law enforcement purposes, particularly in the instance of records from rural communities that do not provide full online access for their records. Thus, the CFPB's proposal would end up increasing costs or reducing available

[1] Outline at 7-8.
[2] Outline at 8.

research tools for government agencies engaged in law enforcement as well as other users of such data that fall outside of the FCRA.

2. Defining "assembling or evaluating"

The CFPB's Outline proposed changing the interpretation of the terms "assembling" and "evaluating" as used in the FCRA's definition of consumer reporting agency to ensure that "entities that facilitate data access between parties" fall within the definition of a CRA.[3] I have strong concerns about any expansion of these definitions in a manner that could potentially include a vast array of software providers, electronic platforms, and other data access vendors as CRAs. These potentially impacted software providers already answer to regulators for their compliance with the Gramm-Leach-Bliley Act with respect to protecting consumer data. As service providers to the financial services industry, they also meet various vendor management requirements to prove themselves as secure and responsible partners that have access to, store, transmit or process consumer information.

Consumer report resellers, like CBCB, would be particularly impacted by this proposal. As defined under the FCRA, a "reseller CRA" relies on "information contained in the database of another consumer reporting agency or multiple consumer reporting agencies" and "does not maintain a database of the assembled or merged information from which new consumer reports are produced." 15 U.S.C. § 1681a(u). Thus, resellers regularly use electronic data access to perform their statutorily defined role of reselling information obtained from other entities. Many resellers rely heavily on technology service providers and data access platforms to obtain and deliver the data they are reselling. Additionally, with the advent of tri-merge credit reporting, smaller resellers like CBCB have relied on third-party technology providers and software to draw information from the credit bureaus and perform the technical processes to merge the information into a single report, which we then deliver to our end user clients. Those technology providers are not currently considered CRAs, and they do not have any interaction with the end user receiving the consumer report: instead, a CRA such as CBCB necessarily stands between them and the end user.[4] While some larger CRAs possess their own technology solutions for retrieving, merging, and reformatting tri-merge credit reports, hundreds of smaller businesses currently operate in the United States today on a business model that requires reliance on third-party technology providers.

The CFPB's proposal would have severe unintended consequences on small CRAs by eliminating from the marketplace the data access platforms on which they rely, as the obligations to comply with all sections of the FCRA would simply become too costly and burdensome to these companies. Unlike the large CRAs, small CRAs often do not own their own technologies for accessing data directly, and thus must rely on other entities to facilitate that access. The CFPB's proposal would almost certainly result in

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[3] Outline at 9.

[4] *See* Federal Trade Commission, 40 Years of Experience with the Fair Credit Reporting Act ("40 Years Report") at 29 (explaining that a company that provides a software to process and merge credit information is not a CRA, as distinguished from a consumer reporting agency that utilizes a software to assemble the information for transmission to end users).

many of those entities leaving the marketplace or substantially increasing the prices for their services. CBCB and other small CRAs in a similar position would not be able to create their own technologies quickly or in a cost-effective manner to remain competitive. The need to do so would require a significant investment of resources and time. In short, the system in place today works to support small business CRAs and consumers. We honor our FCRA obligations and serve consumers, and the technology platform companies honor their obligations to support the mortgage industry through innovation in merging and "de-duping" the credit information and delivering this data through secure/compliant transmission.

Additionally, there are other limitations on who can transmit certain data that cannot be overcome even with adequate resources. For example, there is a limited number of platforms that are integrated into government-sponsored enterprises (GSEs), such as Fannie Mae and Freddie Mac. The GSEs are not currently accepting new technology partners. While larger CRAs already have established relationships with those entities, CBCB relies on two electronic platforms to transmit information to the GSEs for its end users. If one or both entities were forced out of business because of the CFPB's proposals, CBCB would be left without a meaningful option for integration with Fannie Mae and Freddie Mac. Even if CBCB could develop its own technology platform quickly, which would be a massive feat in and of itself, it would not be able to obtain the same level of integration as CBCB does not have the same established relationships with the GSEs as currently exist with CBCB's technology partners. The CFPB's proposal could realistically cut CBCB off from integration with Fannie Mae and Freddie Mac, which would force CBCB to shut down its mortgage line of business entirely. CBCB's mortgage line of business currently equates to 90% of the credit reporting services sold by CBCB. Without the ability to serve the mortgage industry we would be forced to go out of business.

CBCB notes that although these impacts would certainly be felt by the mortgage industry, the impacts will also be felt in numerous other industries that similarly rely on third-party intermediaries to move, transmit, and integrate data. The proposal will have profound and costly impacts on CRAs operating in areas such as auto loans, student loans, personal loans, as well as small credit unions and banks that rely on such intermediaries.

3. "Credit header" data

The CFPB Outline proposes to redefine "consumer report" such that it includes transmissions of "credit header data."[5] The CFPB acknowledges this proposal would "likely reduce, perhaps significantly," a CRA's ability to sell or otherwise disclose credit header data without a permissible purpose.[6]

CBCB's understanding is that credit header data refers to a consumer's identifying information such as names, addresses, Social Security number, and phone numbers.[7] Historically, such information has not been considered a "consumer report," as it does not

[5] Outline at 10.
[6] *Id.*
[7] Outline at 10.

meet the plain statutory definition of a consumer report. The FCRA expressly provides that a consumer report must "bear on" at least one of seven enumerated characteristics regarding the consumer and must be used or expected to be used for one of the FCRA's enumerated permissible purposes.[8] Credit header data does not "bear on" any of those enumerated characteristics for a consumer: to the contrary, it is merely identifying information.[9] In the Federal Trade Commission ("FTC") staff report on 40 Years of Experience with the Fair Credit Reporting Act ("40 Years Report"), the FTC affirmed: "A report limited to identifying information such as a consumer's name, address, former addresses, or phone numbers, does not constitute a 'consumer report' if it does not bear on any of the seven factors and is not used to determine eligibility."[10]

Credit header data is frequently used for identity verification and fraud prevention purposes, particularly in the financial services sector and for online transactions. It is also used for checking and savings account openings as a resource to confirm identities. Without access to this information, these products would become more costly, perhaps making them unreachable to the unbanked or underserved consumer. Additionally, credit header data is frequently used by financial institutions to comply with anti-money laundering laws, "know your customer" requirements, and industry red flag rules which are not FCRA permissible purposes. While the FCRA does provide that obtaining the written permission of the consumer to whom the report relates is a permissible purpose, that alternative would likely not be available for fraud prevention and identity verification, because a fraudster or identity thief would be unlikely to provide consent knowing that doing so will uncover their malicious activity. Furthermore, forcing banks to request written permission from consumers to pull a "consumer report" whenever there is a need to verify their identity raises the risk of confusing consumers who don't understand what is entailed and how that may affect their credit or undermine their privacy. We anticipate that many consumers will likely deny such requests due to misunderstanding the nature of the request.

Thus, if the intent or effect of the CFPB's proposal will be to eliminate the ability of credit header data to be sold for a non-permissible purpose, then identity verification and fraud prevention would become prohibited uses of credit header data. Such an effect would cause harm to consumers by making it easier for fraudsters to perpetrate fraud and by increasing transaction and security costs for online transactions and account openings.

Prohibiting the sale of credit header data for such uses would severely harm small banks and credit unions that do not have the resources to conduct due diligence on their customers through other means, preventing them from complying with their legal obligations to do so. In small rural communities, where there may be only one bank serving a relatively small population, that bank may be able to verify identities for longstanding local residents based on personal knowledge. But newcomers or visitors in such communities will be disadvantaged and potentially blocked from using the services of such a bank, such as seeking a checking account, because the bank does not have a

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[8] 15 U.S.C. § 1681a(d)(1).

[9] See *Individual Reference Servs. Grp., Inc. v. F.T.C.*, 145 F. Supp. 2d 6, 17 (D.D.C. 2001) (recognizing credit header data is not a consumer report).

[10] 40 Years Report at 21.

reliable source of nationwide identity verification information. Consumers with recent name changes (e.g., recently married or transgender) or address changes not yet reflected on their official identification documents will be particularly harmed, whereas the use of credit header data ordinarily allows for easy verification that such consumers are who they say they are. Further, the lack of access to credit header data—an unbiased source of identifying information unattached to any indicators that could fuel discrimination—will result in an increase of human bias and prejudice infecting such transactions. Lastly, any changes to access to credit header data would be counterproductive to recent financial services efforts to seek inclusivity and to serve the "unbanked" or "underserved populations" (often including minority populations) with easier access to various services.

4. Aggregated Data

The CFPB Outline proposes to clarify whether aggregated or anonymized consumer report should continue to be considered consumer report information.

The FCRA defines "consumer" as "an individual," meaning one person, not many people.[11] The FCRA defines "consumer report" as "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" credit, employment, insurance, or other permissible purposes allowed by the FCRA.[12] The information in a consumer report must have a "bearing on" a single person's specified consumer characteristics (e.g., credit worthiness). Aggregated and anonymized data does not have a "bearing on" a single person's specified consumer characteristics because the data is either an aggregation of many different consumers' information, or anonymized and therefore is unrelated to any identifiable consumer. This interpretation of the plain text of the FCRA is consistent with how the FTC has historically interpreted the applicability of the FCRA to aggregated and anonymized data. In its 40 Years Report, the FTC states the following with respect to aggregated and anonymized data and consumer reports:

> A "consumer report" is a report on a "consumer" to be used for certain purposes involving that "consumer." Information that does not identify a specific consumer does not constitute a consumer report even if the communication is used in part to determine eligibility. For example, a communication that flags a specific Internet transaction as potentially fraudulent based on comparison to aggregate data about Internet transactions (e.g., time-of-day activity, geographic location, amount of the transaction, etc.), without reference to an individual consumer, is not a consumer report.[13]

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[11] See 15 U.S.C. § 1681a(c).

[12] See id § 1681a(d) (emphasis added).

[13] *See* 40 Years Report at 20 (emphasis added).

Because the plain text of the FCRA and the FTC already provide guidance on whether aggregated and anonymized data is a consumer report, we do not believe the CFPB needs to provide further clarity on this topic. An interpretation of "consumer report" that would expand the definition to include aggregated and anonymized data is only going to hurt businesses and consumers.

Expanding the definition of "consumer report" to include aggregated and anonymized data will deprive businesses of valuable information they need to operate and offer the best products to consumers. For example, a creditor that obtains aggregated and anonymized data can use that data to refine its credit policy to avoid credit losses, and its pricing policy to offer the most competitive credit pricing. If a creditor loses access to aggregated and anonymized data because it must have a permissible purpose to obtain that data, the creditor may not be able to test credit and pricing models on aggregated and anonymized data before putting those models into production, or back-test those models to identify weaknesses and/or model deterioration. Creditors will respond by tightening credit policies or increasing pricing. Consumers will suffer as a result, because of reduced access to credit and higher credit costs. Consumers with lower credit scores will suffer the greatest harm because creditors will be unable to use aggregated and anonymized data to find alternative methods to underwrite and price those consumers.

If the CFPB decides that further clarity is needed, we strongly encourage the CFPB to provide additional clarity that is consistent with the plain text of the FCRA and the FTC's interpretation to avoid causing harm to businesses and consumers.

B. Permissible Purposes

1. Written Instructions of the Consumer

The CFPB Outline proposes to impose rigid new requirements on the FCRA permissible purpose based on the "written instructions of the consumer to whom [the consumer report] relates."[14] The CFPB does not provide much insight into exactly what it plans to do, but the CFPB notes several "proposals under consideration," including:

- The steps required to obtain a consumer's written instructions;
- Potential limitations on who may collect such written instructions;
- Limitations on the scope of such written instructions;
- Defining who can collect such written instructions; and
- Methods for revoking modifying such written instructions.[15]

However, the FCRA places no such restrictions on what should constitute a consumer's written instructions.[16] The FTC noted in its 40 Years Report that a simple "I

[14] *See* 15 U.S.C. § 1681b(a)(2).
[15] Outline at 12-13.
[16] *See* 15 U.S.C. § 1681b(a)(2).

authorize you to procure a consumer report on me," without any specific reasons for the request, provides a permissible purpose.[17]

Many parties rely on written instructions as a permissible purpose to obtain consumer reports for reasons that may not be covered under the existing FCRA permissible purposes. Imposing burdens on a process that could impair the ability of consumers to provide their written instructions will potentially reduce the availability of credit to consumers. In today's world consumers expect to be able to navigate financial services quickly and efficiently and get access to the funding that they need when they need it. Consumers would be harmed by taking away their ability to give their written consent for potential creditors to access their credit reports.

2. Legitimate Business Need

The CFPB Outline proposes to clarify the ability of end users to obtain consumer reports for a legitimate business need in connection with a business transaction that is initiated by the consumer or to review an account to determine whether the consumer continues to meet the terms of the account.

With regard to business transactions, the CFPB appears to be equating such a "need" with the other FCRA permissible purposes by requiring that a consumer report may only be procured to determine eligibility for the specific business transaction.[18] By limiting the ability of companies to seek consumer reports for other needs related to a business transaction outside of an eligibility determination, the CFPB would make this FCRA provision superfluous, which would be contrary to the black letter of the law. This would harm consumers especially if they are unbanked or underserved. For example, if a consumer needs to rent a car, but does not have a major credit card like a VISA or MasterCard, a car rental agency may pull a credit report before allowing a consumer to rent the vehicle using a debit card. The car rental agency has a legitimate business need to ascertain the risk involved with renting the vehicle to this consumer, but it would not otherwise have a permissible purpose under the FCRA.

Regarding account reviews, the CFPB appears to limit the use of a consumer report to only those situations where a business can demonstrate that the consumer report was "actually needed" by the user.[19] It remains unclear how a business would be able to demonstrate such a need or how a CRA would be able to monitor for such needs. We are concerned that the CFPB may establish a requirement for which it would be impossible to comply.

C. Data Security and Data Breaches

The CFPB Outline proposes to protect consumer reports from data breaches or unauthorized access by imposing a strict liability regime on CRAs. The CFPB appears

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[17] 40 Years Report at 43.
[18] Outline at 13.
[19] Outline at 13-14.

to interpret the FCRA as equating a data breach by a threat actor with an intentional provision of a consumer report to an end user. There is nothing in the FCRA that addresses data breaches, and we encourage the CFPB not to legislate through its rulemaking. There are numerous other statutes on both a federal and state level that address data security and breaches. Imposing new requirements on CRAs will simply increase compliance costs, including increased costs for commercial crime and cyber insurance policies, without any corresponding consumer benefit.

CBCB has already seen a steady increase in the cost of coverage for commercial crime and cyber insurance over the years we have had these policies in place. With strict controls and SOC 2 Type II audits conducted annually, the premiums are still in the five figures range for annual coverage. CBCB has invested heavily in threat monitoring and detection and takes the responsibility to safeguard consumer data from criminals very seriously. To penalize CRAs for the unscrupulous actions of criminals whose sole intent is to defraud and cause harm to consumers is unfair and unwarranted. If a strict liability regime were to be imposed on small CRAs, most businesses in this space would be unable to continue due to the inability to plan and pay for the criminal actions of others.

D. Disputes

1. Disputes involving legal matters

The CFPB Outline proposes to undermine years of existing interpretation about the applicability of the FCRA to legal disputes, rather than only factual disputes.

CBCB, as stated before, is a reseller under the FCRA. A reseller's obligation regarding disputes is defined in FCRA 611(f). Summarized here: Once a reseller determines the consumer's dispute was not caused by an act or omission of the reseller, the reseller must forward the notice of the dispute and all relevant information to the CRA that provided the information to the reseller to investigate. The CRA would then investigate the dispute and update their database according to the results of that investigation, and it would communicate those results back to the reseller who then sends the copy of the results to the consumer. CBCB forwards all disputes to the originating CRAs and does not determine if the dispute is legal or factual in nature.

CBCB's main business line is providing tri-merge credit reports (also known as a mortgage credit report) to the mortgage industry. In the course of working with mortgage lenders, information on a consumer credit report could need to be updated or investigated based on the information obtained at the time the credit report was pulled. Our credit support staff verify and update information on mortgage credit reports at the request of our lender clients. The credit support staff at CBCB contact creditors, with the consumer's authorization, to obtain updated account information to supply to the mortgage lender. The credit information supplied by the creditor (or furnisher of the information) is solely information based upon the facts related to the account being verified. Some of these facts are current balance, date of last payment, date next payment is due, address of the property used to secure the loan in the case of a

mortgage, etc. If a consumer were to claim that a specific account should not be reported on their mortgage credit report because of a legal dispute, then CBCB would have no way to verify the authenticity of that claim.

CRAs like CBCB are not in a position to adjudicate legal claims. We do not have the internal staff or resources to develop expertise on the nuances of all potential relevant federal and state laws and regulations that could give rise to legal issues, conduct lengthy reviews of the enforceability of various provisions in consumer agreements, or digest opposing arguments between a furnisher and a consumer.

For example, in a situation where everyone agreed that a consumer borrowed the amounts reflected on a credit report, but the consumer disputed whether the debt was collectible because of a violation of an obscure law, we could not resolve that dispute – only a court could. No amount of investigation by a CRA could substitute for the careful consideration of the facts of a case and the applicability of the law by a court of law. Even if we were able to incur (we are not) the substantial cost of adding attorneys to our current staff to assist with legal disputes, we would not be able make the kinds of determinations that are only appropriate for a judge.

We strongly discourage the CFPB from taking a wildly impractical approach toward this issue that would be out of alignment with prior interpretations of the FCRA over the past 50 years.

2. Disputes involving systemic issues

The CFPB Outline proposes to require CRAs and furnishers to investigate and address systemic issues affecting the completeness or accuracy of data involving multiple consumers. The CFPB, however, has not provided insight into how a CRA would make a determination that an issue is systemic, such as how many consumers would need to be impacted. During the SER meetings, the CFPB staff suggested that this threshold could be set to as low as two consumers.

We believe that the process envisioned by the CFPB is inconsistent with the framework established by the FCRA. For example, the FCRA requires a CRA in response to a dispute to investigate the completeness or accuracy of any item of information contained in ***a*** consumer's file. The items contained in all consumer credit files are provided to the CRA by third party entities who furnish the information, referred to as "furnishers." The FCRA already requires furnishers to have reasonable policies and procedures concerning the accuracy and integrity of furnished information as set forth in 12 CFR Part 1022 – Fair Credit Reporting (Regulation V). Furnishers complying with Regulation V would reasonably be able to identify issues in their own reporting and mitigate any issues discovered through implementing their own procedures, as already required under the law. Furthermore, the FCRA requires furnishers to report the results of its investigation into a dispute to ***the*** consumer, not to all similarly situated consumers that may have been impacted by an issue discovered during the course of the investigation. However, if an issue did affect more than one consumer, such as in the

case of a jointly held account, the furnisher would be obligated to correct the information for all affected consumers whether or not they have disputed the information impacted. Even if the furnisher uncovered a systemic issue in response to reinvestigating a dispute, CRAs like CBCB would have no visibility into such systemic issues that may originate with a furnisher.

This kind of mass-dispute-response procedure would be incredibly burdensome to implement, particularly given the fact that many of the affected consumers in such a scenario may not have been harmed by the issue at all if no consumer report with such information had been provided to any end users. In the litigation context, the Supreme Court has held that a class action cannot be maintained where absent class members suffered no injury from an alleged FCRA violation. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021) ("No concrete harm, no standing."). That same reasoning counsels against imposing a burdensome requirement of providing dispute correction notices and disclosures to potentially thousands of consumers regarding an issue that may have never harmed them. The FCRA does not contemplate that investigations would expand beyond a single consumer or that the results of investigations would be communicated in such a broad fashion as the CFPB Outline proposes.

Although the CFPB noted that it is also considering whether to provide a rubric or template that consumers could use to submit disputes relating to systemic issues, we strongly encourage the CFPB to ensure that any such identification by a consumer should be rebuttable by a CRA's own determination on how widespread the issue may be across consumers. We would also like to note that consumers do not have access to other consumers' credit reports, and they have no permissible purpose to view that information. Therefore, it is unclear to us how a consumer could ascertain that an error which occurred on their own personal credit report was also reflected in another consumer's report unless they were violating the FCRA by viewing such report without a permissible purpose.

Furnishing information to the nationwide CRAs is not obligatory. If furnishers cannot rely on compliance with the reasonableness standard established under Regulation V to protect them from possible class action lawsuits based on consumer supposition (i.e., that if an error occurred on their report, it must have occurred on other's reports), then an unintended consequence of the CFPB's proposal would be that the furnisher might stop reporting altogether. Recently, there has been great movement by the nationwide CRAs to obtain more information from creditors not currently reporting information, such as utilities, telephone companies, landlords, and rental data. This push has been inspired by the need to be more inclusive in the financial services industries to assist the unbanked and underbanked with their financing needs. This additional information allows lenders to make confident lending decisions to those individuals. They are now lending to consumers who would not have been qualified before due to a lack of a traditional credit file, or a thin credit file. All this good work could be undone if these new furnishers decide it is too risky to report information to consumer reporting agencies for fear of a class action lawsuit despite their best efforts to comply with Regulation V.

If furnishers no longer consistently report account information to the CRAs, then lenders will no longer be able to rely on the credit reports supplied to them to fully and accurately assess a consumer's credit worthiness. The lending industry would regress decades and go back to credit bureaus who take information supplied by the consumer and call each creditor listed by the consumer to verify the account information. CBCB was one of those credit bureaus that processed credit reports manually for mortgage lending, and the reports took days, not seconds to process like they do now. Credit is the foundation of commerce. Without a strong credit reporting system, commerce stops. Consumers will be unable to finance education, vehicles, or homes. Students would not be attending universities. Vehicles and homes would not be built because no one would be able to purchase them, leaving many middle-class Americans without jobs. It is essential for the American people that a robust credit reporting system be maintained.

As a small business, CBCB will be greatly impacted by the proposals, leaving us with an uncertain future. The stability and integrity of the United States financial services industry would be greatly impacted by these proposals, leaving American consumers nowhere to turn to get financing for the purchases they cannot complete with cash on hand. Every day my staff helps consumers to achieve the American dream of homeownership. We help consumers navigate the biggest purchase of their lives. We provide the information necessary for lenders to make confident decisions. If the information we currently provide were to be restricted or downgraded due to data brokers leaving the industry or creditors electing not to furnish information, then the impact to the American economy would be catastrophic.

We hope that the CFPB will take into consideration and prioritize our written feedback to the Consumer Reporting Rulemaking Process. We respectfully request that the CFPB continue to work in concert with the SERs as you develop final rules, including the opportunity to provide further comments in response to an Advance Notice of Proposed Rulemaking (ANPRM) that provides more specific details about the CFPB's plans, rather than progressing directly to a Notice of Proposed Rulemaking (NPRM). We look forward to working with the CFPB to find the right balance between consumer protection and the practical needs of small businesses like ours.

Sincerely,

Heather Russell-Schroeder

Heather Russell-Schroeder
President

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November 6, 2023
By electronic delivery to: CFPB_consumerreporting_rulemaking@cfpb.gov

Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: CFPB's Outline of Proposals and Alternatives Under Consideration, Small Business Advisory Review Panel for Consumer Reporting Rulemaking

Dear Sir or Madam:

First Security Bank and Trust[1] (First Security) appreciates the opportunity to participate in the Small Business Advisory Review Panel (SBREFA) comment on the Consumer Financial Protection Bureau's (CFPB) outline of proposals and alternatives under consideration regarding the Consumer Reporting Rule (outline).

First Security supports the need to update the Fair Credit Reporting Act (FCRA)[2], recognizing that the credit reporting industry is a major source of complaints to the CFPB. We also agree that technology advancements and the growth of consumer data collection necessitates the need for increased consumer protection and industry oversight. There are already extensive regulatory requirements governing how financial institutions use and protect consumer data. There are also regulations that require financial institutions to obtain consumer data from outside sources who may now fall under the scope of an updated FCRA. We encourage the CFPB to consider how changes made with the goal of regulating businesses that collect, evaluate, and sell consumer data can adversely impact financial institutions, inadvertently creating additional compliance burden.

Proposals and Alternatives Under Consideration

The CFPB seeks to understand how the proposal could affect the costs of compliance, additional burdens that might arise, or changes that may be required because of this update. Some of the proposed changes lack clear definitions and are vague so it is challenging to make accurate estimations. For instance, if the definition of a data broker is overly broad, some vendors we currently engage with might fall under this definition. This could potentially result in increased expenses associated with using the vendor, prompting vendors to exit the industry due to compliance costs. Vendors who do adjust to

[1] First Security Bank and Trust is an FDIC regulated community bank headquartered in Charles City, IA. With 10 locations across North Central Iowa, First Security had assets of $576,349 as of 6/30/2023.
[2] 12 CFR Part 1022

evolving compliances standards may need to invest in extra resources to meet new requirements which can squeeze their profit margins. To sustain profitability and competitiveness, they may raise prices, and these heightened costs will eventually be transferred to financial institutions. Consequently, financial institutions will have to absorb these extra expenses from vendors as well as covering their own costs of adapting to any changes because of new regulatory requirements. Ultimately, this may necessitate passing a portion of these expenses on to customers.

As a user of data that could potentially fall into the category of a consumer report, there is uncertainty about the additional compliance obligations that may emerge. This could encompass new disclosure requirements. Written permission for permissible purpose might become necessary as current permissible options under FCRA do not align with current banking operations.

New situations that necessitate adverse action, beyond the scope of how the FCRA is currently applied, may arise. Financial institutions could find themselves designated as data furnishers, introducing the potential for new dispute resolution procedures that could impact various functions within the bank.

Community banks like ours already face disproportionate compliance costs compared to larger banks and credit unions due to limited resources. Our staffing capacity is constrained, and acquiring technology to facilitate regulatory compliance is not always feasible. Consequently, many of the processes in place for regulatory compliance at community banks are manual. Introducing additional regulatory requirements may, at the very least, necessitate redistributing the already heavy workloads among limited staff. It will likely lead to the need to hire additional staff–a challenging prospect in rural locations like ours.

We ask that the CFPB consider furnishing a comprehensive Advanced Notice of Proposed Rule Making, incorporating specific definitions, detailed proposals, and potential questions. This would enable industry players to offer more informed insights into the impact on their sectors, suggest alternative solutions, and thoroughly assess the associated costs and operational implications.

Disputes

The CFPB is considering proposals related to two types of disputes: (1) those that are classified by a consumer reporting agency or furnisher as involving legal matters and (2) those involving systemic issues at a reporting agency or furnisher.

The CFPB is seeking to codify its previous interpretation that the FCRA does not distinguish between legal and factual disputes and that "legal disputes" are not exempt from FCRA's requirement regarding the investigation of disputes. First Security believes Congress's original intent with the Fair Credit Reporting Act was to ensure factual accuracy. As the CFPB states in the introduction of the outline, "Congress created accuracy requirements and gave consumers a right to see their data, and due process rights to dispute inaccurate or incomplete information in their files."[3]

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[3] 15U.S.C.1681e(b) (accuracy procedures), 1681g (disclosures to consumers), 1681i (procedures in case of disputed accuracy)

Exempting instances of identity theft or fraudulently opened accounts, we believe a legal dispute is a dispute to the validity of the debt on the consumer's report and thus the validity of the consumer owing the debt to the institution. These should be resolved by the courts not via a dispute under the FCRA. Financial institution employees who process disputes are not attorneys. They don't have the educational background to determine the validity of a contractual obligation from a legality standpoint.

Moreover, community financial institutions lack in-house legal staff for such reviews and lack the resources to engage an attorney each time a legal dispute arises. Unlike larger financial institutions, which have dedicated staff attorneys to navigate the daily complexities of their operations, smaller institutions like ours only reach out to local attorneys for occasional legal inquires or litigation needs. Opting for ad-hoc legal services incurs hourly charges, making it more financially burdensome than maintaining a dedicated legal team. Given that these disputes often required specialized legal advice, community banks will find themselves at a disadvantage compared to larger counterparts who can readily assign these matters to their in-house legal team. The proposed change would disproportionately affect small financial institutions.

Requiring a furnisher to determine the legality of a contract may lead to unintended repercussions. Initially, challenges concerning the contract's validity will necessitate legal examination, which becomes increasingly expensive over time. Instead of resorting to legal counsel, a financial institution might opt to remove the trade from the credit report, citing a lack of resources for a thorough investigation. However, this action could result in potential legal claims from borrowers questioning the contract's legality due to the institution's inability to substantiate the validity of the debt when the dispute was filed. Even without the risk of potential legal claims, institutions who choose to automatically remove a trade because of lack of resources to investigate the dispute will give rise to legal disputes automatically being submitted by consumers.

The CFPB is considering proposals concerning disputes that relate to systemic issues. First Security examines each dispute to assess its validity and ascertain whether a correction is warranted. In instances where a reporting error is identified, the investigation also delves into the reason why the inaccuracy occurred. Given our thorough investigative approach, we do not see the need to institute a new requirement and procedure specifically for addressing systemic issues. Requiring identification of system issues might necessitate manual tracking of disputes. This manual tracking, following trend analysis, would be the only means to document and demonstrate that identical disputes were not received and that system issues were not present.

We believe that systemic issues, if they do occur, are rare. Because there is a low or no risk of occurrence, it would not justify the need for an overly burdensome process of manual tracking and trend analysis. We suggest instead that regulators examine an institution's dispute process to ensure that institutions are determining the root cause of the error when an error is identified. A thorough investigation and root cause analysis will identify systemic errors without the necessity of additional processes or forms.

The CFPB also questions if a systemic issue is identified affecting multiple customers, should those customers be notified even if they did not identify a problem themselves on their credit report and

submit a dispute. We believe that sending notifications to customers who did not otherwise report a dispute would only create confusion for those customers and is not necessary.

First Security acknowledges that a substantial number of complaints received by the CFPB annually are linked to credit reporting errors. We believe that institutions and credit reporting agencies have made progress in enhancing the accuracy of their reporting and are committed to promptly resolving disputes. It is common for financial institutions to encounter a customer dissatisfied with dispute outcomes, particularly when there are derogatory marks on their credit. However, this doesn't necessarily indicate an ineffectiveness in the dispute process or inaccuracies in reported information. We believe that consumer education could be beneficial in acknowledging that borrower circumstances may lead to derogatory credit reporting. By informing consumers about ways to improve their credit in such situations, it may contribute to a reduction in complaints related to the dispute process.

We believe that the ongoing reporting of credit tradelines to credit reporting agencies is crucial for fostering a positive credit culture, benefiting both consumers and institutions. It is important to note that reporting by institutions is a voluntary practice. There is a concern that certain institutions, particularly smaller community banks, might eventually reach a point where they deem the cost of compliance to outweigh the benefits of reporting to credit reporting agencies and decide to discontinue the practice.

Definition of Consumer Report and Consumer Reporting Agency

The CFPB is considering proposals to address the application of the FCRA to data brokers. The proposal would stipulate that "credit header" data containing certain consumer-identifying information would now be considered a consumer report. Consumer information provided to a user who uses it for a permissible purpose is also a "consumer report" and data brokers who sell certain types of consumer data such as data typically used for credit and employment eligibility determinations are selling consumer reports. A data broker that collects consumer information for a permissible purpose may not sell it for a non-permissible purpose and a data broker may not sell such information to a user unless the user has a permissible purpose. Further, a data broker "assembling or evaluating" and selling such data would be a consumer reporting agency because it would be assembling or evaluating information on consumers for the purpose of furnishing consumer reports to third parties.

The CFPB points out that "currently, some data brokers that collect, aggregate, sell, resell, license, or otherwise share personal information about consumers with other party's act as consumer reporting agencies under the statute, but others that engage in very similar activities or sell the same types of data do not. By engaging in these activities outside of FCRA's protections regarding, for example, data confidentiality and accuracy, these companies threaten consumer privacy and arguably evade the FCRA's purposes and objectives."[4] The CFPB appears to be concerned that these data brokers either fall outside the scope of existing regulations or they assert that they are not subject to current rules. First Security acknowledges the importance of subjecting companies of this nature to privacy regulations like those imposed on financial institutions.

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[4] Small Business Advisory Review Panel for Consumer Reporting Rulemaking Outline of Proposals and Alternatives Under Consideration page 8.

It's crucial to recognize that financial institutions are already extensively regulated and adhere to privacy laws, including the FCRA, Regulation P[5], and the Gramm-Leach-Bliley Act[6]. A blanket application of the Consumer Reporting Agency definition to data brokers could have unintended repercussions for financial institutions, and by extension, consumers. We urge careful consideration of the approach to this definition. We ask the CFPB to contemplate providing exemptions to financial institutions subject to examination by prudential regulators from the definition of user or furnisher in specific scenarios. This exemption would apply when financial institutions need to utilize consumer reports to fulfill regulatory obligations outside how the FCRA is traditionally applied, engage in lawful banking activities, and address industry-specific requirements.

Financial institutions require consumer information from numerous vendors for many purposes that may not presently align with the definition of permissible purpose. Moreover, these institutions share information with partners for authorized purposes. First Security uses consumer-identifying information to benefit our customers through activities like fraud prevention and identity theft mitigation. Additionally, reports are procured for the purposes of compliance with the Bank Security Act (BSA), identity verification on existing accounts, and analysis aimed at detecting potential suspicious activities. It is important that data use requirements under the FCRA do not conflict with how financial institutions must comply with customer identification and suspicious activity monitoring requirements.

Apart from the various reports acquired to fulfill the requirements under BSA, we obtain consumer reports for additional reasons that may not meet the definition of permissible purposes under the FCRA. For instance, when utilizing electronic signatures, we employ knowledge-based authentication using a vendor. This involves posing questions sourced from various databases, and the customer must provide correct answers before accessing the document for signature. A similar technology, facilitated by a different vendor, is used for remote notarization. In the case of verifying updated property values on existing loans, a vendor employs public and customer information to generate Automated Valuation Models (AVM). Some financial institutions utilize vendors for skip tracking when attempting to locate customers during debt collection. In all these scenarios, the current definition of permissible purpose does not apply.

The definition of permissible purpose[7] is narrowly confined to specific situations including governmental reasons, court orders, employment, credit, insurance, and consumer-provided written instructions. Initially, when the FCRA outlined permissible purpose, it did not consider the utilization of consumer identifying information within the internal operations of a financial institution beyond the matters related to creditworthiness. The initial framework did not consider the incorporation of consumer reports as part of the operational functions of financial institutions that must offer changing products and services that adapt to consumer needs amid an evolving regulatory landscape. The present diversity of institutions and the range of products and services they provide results in distinct operational functions that align with the size and complexity of each financial institution. This has led to varied uses of consumer reports across the industry.

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[5] 12 C.F.R. Part 1016 Privacy of Consumer Financial Information (Regulation P)
[6] 15 U.S.C. 6801 Protection of nonpublic personal information
[7] 15 U.S.C 1681b Permissible purposes of consumer reports

At present, aside from the credit function, the sole permissible purpose for obtaining a consumer report as part of an operation function is securing written consent. Yet acquiring written consent for every operation-specific need is impractical for a financial institution aiming to operate safely, soundly, and with a consumer-centric approach. To facilitate financial institutions' access to essential information without imposing excessive compliance burdens or costs, there is a need to expand the definition or introduce exemptions specifically tailored to operational needs.

Permissible Purposes

The CFPB is considering proposals to address what is needed for a consumer report to be furnished in accordance with a consumer's written instructions under FCRA. Under consideration would be steps companies must take to obtain written instructions, who may collect it, limits on the scope of authorization, and methods for revoking any ongoing authorizations. First Security appreciates and welcomes any guidance that would be provided.

First Security relies on written authorizations in commercial lending in the process of completing customer reviews. These reviews are not completed at the same time a loan is originated. The authorization signed by the customer authorizes First Security to obtain a credit report for business purposes through a consumer reporting agency. This authorization is only used one time. If a future credit report is needed, another written authorization is obtained.

Medical Debt Collection Information

The CFPB is considering proposals to (1) revise Regulation V to modify the exemption such that creditors are prohibited from obtaining or using medical debt collection information to make determinations about consumers' credit eligibility and (2) prohibit consumer reporting agencies from including medical debt collection tradelines on consumer reports furnished to creditors for purposes of making credit eligibility determinations.

It is important that the CFPB precisely articulates the definition of medical debt. Some creditors offer loans and credit cards specifically designed to pay for medical procedures. Additionally, consumers obtain consumer and real estate loans to pay existing medical debt. Personal credit cards may also be used for this purpose. We believe that none of these debt categories should fall under the classification of medical debt. Our proposed definition of medical debt is limited to a collection arising from an unpaid medical bill from a medical establishment or procedure, excluding any loans or credit cards established through a contractual agreement with periodic payments to pay any type of medical debt over time.

Recently there have been positive changes to how medical collections affect consumer credit. In July 2022, major credit reporting agencies removed paid medical debt from credit reports and no longer report unpaid medical collections until those debts are one year old. As of April 2023, medical collections under $500.00 no longer appear on credit reports.[8] This has resulted in a dramatic decline in

[8] ACA International "First Wave of Medical Debt Credit Reporting Changes Starts July 1", June 23, 2022 First Wave of Medical Debt Credit Reporting Changes Starts July 1 - ACA International

medical debt on consumer credit reports which has increased credit scores. [9] The credit reporting agency's actions have benefited consumers by preventing the negative impact of paid medical collections and minor unpaid medical collections on credit scores.

First Security holds the view that addressing the challenge of medical debt is a broader and more intricate issue beyond the scope of the CFPB's authority to resolve. Mitigating the impact of medical debt on the lives on Americans requires a comprehensive approach, best achieved through congressional action by enacting legislation to reform the medical industry.

Financial institutions approach medical collections and payment agreements between consumers and medical establishments differently. First Security does not consider medical collections that are reported on credit reports unless we are aware that the consumer has made payment arrangements to make periodic payments to a collection agency or medical establishment. If payment arrangements have been made, we will include those payments in their debt-to-income ratio.

Requiring financial institution to entirely overlook a specific category of debt and any associated periodic payments contradicts a key aspect of the Dodd-Frank Wall Street Reform and Consumer Protect Act[10] (Dodd-Frank Act), designed to encourage responsible lending. The inability of financial institutions to factor in payments related to medical debt would result in an inadequate assessment of a consumer's debt-to-income ratio. This oversight could potentially contribute to a borrower facing challenges in meeting their future mortgage payments.

First Security believes that financial institutions should have the flexibility to determine how they treat medical debt. Outstanding debt is one gauge of a borrower's overall credit risk. Significant medical debt increases a borrower's risk and impacts their ability to repay debt. These consumers are at an increased risk for legal actions such as garnishment judgements and bankruptcy. If financial institutions are not aware this debt exists or they can't inquire about it, there is an increased risk for credit loss. Financial institutions need to have the ability to develop credit policies that align with their risk appetite while accounting for market conditions and the economic landscape. Restricting the ability to consider certain debts could put financial institutions at a disadvantage when attempting to manage their risks affectively.

Each financial institution's approach to underwriting, in compliance with regulations and safe and sound business practices, is distinct. It falls beyond the scope of the CFPB's authority to prescribe how financial institutions should assess any type of debt that consumers are legally obligated to pay.

Implementation Period

The CFPB is seeking input on the appropriate timeline for compliance with the final rule. We anticipate the most challenging aspect of compliance will be the determination of data brokers as consumer reporting agencies. As previously mentioned, this is poised to impact the vendors utilized by financial

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[9] Urban Institute "Medical Debit Was Erased from Credit Records for Most Consumers, Potentially Improving Many Americans' Lives, November 2, 2023 Medical Debt Was Erased from Credit Records for Most Consumers, Potentially Improving Many Americans' Lives | Urban Institute

[10] 12 U.S.C. Chapter 53 Wall Street Reform and Consumer Protection

institutions, alter how consumer data is employed, and impact various processes within our current operations. These potential changes extend beyond our existing application of the Fair Credit Reporting Act in lending and account opening; they would permeate every operational facet of the bank.
We urge the CFPB to consider the recent regulatory rules that the financial industry is currently working to implement. Over the next 24-36 months, banks will be actively engaged in implementing policies and procedures for the Small Business Collection Rule (1071).[11] Simultaneously, efforts will be underway to incorporate changes to the Community Reinvestment Act (CRA)[12]. The CFPB's proposed rule on Personal Financial Data Rights[13], set to implement Section 1033 of the Dodd-Frank Act, introduces another layer of complexity, with the final rule expected in 2024.

Our compliance department is currently running at maximum capacity to oversee our Compliance Management System. At present, there are no plans to increase staffing to accommodate the implement of 1071 or the changes to CRA. Over the next two to three years, our priority will shift to concentrate on 1071 and the CRA implementation as an Intermediate-Small Bank. To manage this, we'll enlist support from staff in other departments to aid in the implementation process and to meet the ongoing reporting demands of 1071. The upcoming two to three years will be completely dedicated to diligently addressing these two regulations while ensuring the continued compliance of consumer protection laws by our financial institution.

Given this landscape, we advocate for an extended implementation period that aligns with the complexity of this final rule. We believe a minimum of three years is essential, as we anticipate that addressing changes to the Fair Credit Reporting Act will only be completed after we implement the aforementioned regulations.

Interaction With Personal Financial Data Rights Implementing Section 1033
While not explicitly addressed in the outline, it's crucial for the CFPB to consider the intersection between the proposed section 1033 rule and updates to the FCRA. According to the proposal, financial institutions would be required to furnish comprehensive consumer and account information to a third party upon the consumer's directive. The recipient of this data could potentially be deemed a consumer reporting agency, thereby classifying financial institutions as furnishers. The imposition under section 1033 introduces an additional layer of compliance obligations under the FCRA.

Conclusion
First Security Bank and Trust expresses gratitude to the CFPB for providing us with the opportunity to share our thoughts and concerns regarding the Consumer Reporting Rulemaking process. Of the proposed changes, we believe that the application of the FCRA's definition of consumer reports to data brokers will have the most impact on financial institutions. We recognize that third parties access consumer data for profit without the consumers' knowledge and with no oversight or regulation. We support the notion that consumers have a right to know who is using their data and how it is being utilized.

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[11] 12 C.F.R. Part 1002 Equal Credit Opportunity Act (Regulation B)
[12] 12 C.F.R. 345 Community Reinvestment
[13] Required Rulemaking on Personal Financial Data Rights issued October 19, 2023

Consumers trust financial institutions because they understand we adhere to privacy laws and safeguard their information. They are aware that we do not access their private information without permission and that financial institutions must comply with regulations. While we advocate for holding data brokers to the same standards that financial institutions are already held to, we want to ensure that the pursuit does not inadvertently result in unforeseen consequences for financial institutions already using consumer information legitimately in the course of their business operations.

Evelyn Schroeder

Sincerely,
Evelyn Schroeder
Vice President, Compliance Manager

November 6th, 2023

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New York, NY 10003 US

Attention: Consumer Financial Protection Bureau (CFPB) SBREFA Panel

I am writing on behalf of AIDEM US, Inc. to offer our insights and recommendations regarding the CFPB's proposed rulemaking under the Fair Credit Reporting Act (FCRA). We would like to express our gratitude for the opportunity to participate in the Small Business Review Panel, as it allows us to contribute to the development of regulations that can significantly impact small businesses' operations.

AIDEM offers a self-service, cloud-based, ad-buying supply chain platform that empowers our clients to plan, manage, optimize, and measure digital advertising campaigns. We believe that the proposed rulemaking should also consider the evolving nature of data transactions, especially within the digital advertising ecosystem. The intersection of digital advertising and data brokerage presents unique challenges and opportunities that warrant careful consideration.

We believe that several trends in the advertising industry will result in Programmatic Advertising (the buying and selling of advertising inventory using algorithmic software that automates the process) being the predominant means by which companies reach consumers. A fundamental component utilized by these algorithms is personal data encompassing details such as consumer's name, payment history, income, address, email, and phone number, therefore we believe that the forthcoming rulemaking proposed by the CFPB warrants consideration of its implications on the domain of digital advertising.

Programmatic Advertising is built on top of Real-Time Bidding (RTB) a complex, automated, and instantaneous auction process where ads are bought and sold individually, leveraging data from multiple sources. The supply chain includes buyers (advertisers, and agencies), sellers (publishers), and Technological Enablers (Demand Side Platforms (DSPs), Supply Side Platforms (SSPs), Data Management Platforms (DPMs), and data providers). Information used in RTB comes from cookies, device IDs, browsing history, demographics, personal data, and other behavioral data: the supply chain collects and sell this information to target ads.

There are four key categories of Technological Enablers in RTB: *[Q14]*

Demand Side Platforms (DSPs): enable advertisers to purchase and manage digital advertising space across various websites and platforms. Empower advertisers to target their desired audience and optimize their ad campaigns.

Supply Side Platforms (SSPs): enable publishers to streamline the sale of advertising space on their websites. Help publishers maximize revenue by making their ad inventory available to advertisers and facilitating the pricing and delivery of ads.

Data Management Platforms (DMPs): enable advertisers and publishers to gathers, organizes, and analyzes data related to online user behavior. Assist advertisers and publishers by providing insights into their audience's.

Data Providers: collect and sell consumer data, such as demographic information, user behavior, financials, and interests, often without consumers' direct knowledge or consent. Assists the RTB supply chain in providing consumers' data on advertising spaces.

Under CFPB's rulemaking proposal, all four categories of Technological Enabler would fall within the definition of Consumer Reporting Agencies (CRAs), due to their "assembling or evaluating" of consumer's personal data protected under FCRA. At present, they are not classified as CRAs. *[Q8]*

Technological Enablers interpret and modify the gathered data to infer and build consumer profiles, which are subsequently resold throughout the RTB supply chain to enhance the perceived value of individual advertising placements. These profiles are constructed based on data points gathered and processed through the supply chain. However, these profiles are vulnerable to errors stemming from data degradation, which occurs when the quality of data deteriorates over time or through transmission. This degradation can lead to inaccuracies in the profiles, such as outdated or incorrect information.

While certain cybersecurity controls are implemented by vendors on the RTB supply chain to safeguard data, it is crucial to recognize that these measures do not entirely preclude the risk of data breaches. Furthermore, even in cases where data is securely handled, there remains the potential for consumer harm arising from inaccuracies in the data or from the inferences drawn from such data when employed in decision-making contexts. Furthermore, it is possible for data that is ostensibly secure to be utilized for discriminatory purposes, underscoring the multifaceted nature of the risks involved. *[Q15]*

On credit header data, the RTB supply chain has automated its usage for targeted advertising, with businesses typically not storing this data directly and, instead, relying on Technological Enablers. These enablers may not categorize these transactions as involving credit header data, even though the data used is often identical to traditional credit headers. *[Q16]* To align with the CFPB's proposed rulemaking, these Technological Enablers may incur one-time costs associated with compliance upgrades and system modifications. However, past adaptations to regulations, such as the Telephone Consumer Protection Act (TCPA) and the Do Not Call registry, indicate that achieving compliance can be accomplished with minimal disruption to business operations and with limited impact on profitability. *[Q17]*

The transaction of credit header data in the RTB supply chain appears incongruent with FCRA Section 607(a) due to (i) the absence of procedures to restrict the purposes of consumer reports and the absence of vetting requirements for data sharing, and (ii) the dynamic and open nature of the RTB ecosystem posing challenges in enumerating all Technological Enablers receiving credit header data. *[Q18]*

i. There are currently no established procedures in place to confine the purposes for which consumer reports are utilized. This is partly because the participants in the RTB supply chain do not classify the data they exchange as consumer reports; thus, circumventing the stipulations of Section 607(a). Moreover, there is a notable lack of vetting requirements governing data sharing with vendors and partners, enhancing compliance challenges.
ii. The open and evolving nature of the RTB ecosystem makes it practically impossible to enumerate all the Technological Enablers that may come into contact with credit header data. This intricate and dynamic landscape complicates efforts to verify the identity and intentions of prospective users, as stipulated by Section 607(a). Consequently, the transaction of credit header data within the RTB supply chain faces compliance hurdles under the current framework.

On the furnishing of consumer reports for marketing and advertising, concerns arise regarding compliance with FCRA, as the RTB supply chain extensively uses and shares consumer data for marketing - often without adequate safeguards or transparency. While aggregated data products may escape being categorized as consumer reports, there is a potential for misuse - underscoring the need for clarity on purpose limitations and privacy implications.

In the realm of marketing and advertising services, there are multiple concerns related to FCRA compliance:

i. Technological Enablers perform a wide range of tasks (including identification of target audiences and delivery of advertising materials to consumers) without adherence to FCRA. While established CRAs possess the infrastructure to ensure compliance, ancillary service companies appear to prioritize profitability over legal adherence. *[Q19]*

ii. Technological Enablers lack comprehensive understanding of the FCRA and do not have sufficient safeguards in place to prevent the misuse of consumer report information within the RTB supply chain. Revisions to vendor contracts may be necessary to enforce purpose limitations. Furthermore, identity solutions providers may repurpose data originally intended for security services for targeted advertising, often without the direct knowledge and consent of consumers. *[Q20]*

iii. Aggregated data products, frequently sourced from open web scraping and third-party contributors, are subjected to processes of inferencing and categorization with the intent of facilitating targeted advertising. Such practices may potentially lead to a deterioration in the quality of the data and do not invariably guarantee improved accuracy in targeting. Consequently, this raises pertinent questions regarding the effectiveness and ethical considerations associated with the application of targeted advertising and predictive analytics. *[Q21]*

iv. Technological Enablers refrain from categorizing aggregated data products as consumer reports - a practice that could, potentially, place an emphasis on profitability over adherence to the FCRA and the safeguarding of consumer interests. The CFPB's rulemaking proposal should enforce all entities within the RTB supply chain to collectively uphold their respective responsibilities. That is, ensure that the utilization of data aligns with its intended purpose; thereby ensuring consumer protection and compliance with regulatory standards. *[Q22]*

v. As data aggregation continues apace, the issue of consumer privacy becomes increasingly complex. The RTB supply chain enables the linking of aggregated information back to specific consumers: Technological Enablers allow advertisers to target groups of consumers based on aggregate criteria such as household income, gather personal data from consumers on advertisers' websites and, subsequently, utilize the re-associated and de-aggregated data for measurement purposes or to deliver additional targeted advertising. *[Q23]*

The reliance on consumer authorizations or certifications of written instruction, to obtain consumer reports, especially in the context of marketing, appears to be uncertain. We recommend that existing systems, such as Data Subject Access Request (DSAR), should be expanded to facilitate the revocation of data processing authorizations. Anticipated global privacy controls and state-specific regulations (for example, the California Delete Act), emphasize the need for a streamlined process for data deletion upon consumer request, aligning with developments in the European Union and California. *[Q24]*

We believe that an inclusive and cooperative approach is crucial in achieving the desired objectives of this rulemaking, and we look forward to collaborating with the CFPB and fellow panel participants in the development of effective regulations under the FCRA.

Thank you once again for the opportunity to participate in this Small Business Review Panel.

Giovanni Sollazzo
Founder & Chairman
AIDEM US, Inc.

VIA EMAIL: CFPB_consumerreporting_rulemaking@cfpb.gov and Jennifer.smith@sba.gov

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552
c/o Comment Intake Consumer Financial Protection Bureau

RE: Small Entity Representative Jennifer Whipple's Comment to CFPB regarding the Small Business Review Panel regarding the Fair Credit Reporting Act Proposal (the "Proposal")

Dear Director Chopra and Bureau Staff:

I. Background About Myself and ACA International

My name is Jennifer Whipple, and I am the owner of a woman-owned collection agency in Missoula, Montana. Our small agency provides valuable services to many individuals, businesses, and government entities across the great state of Montana, and beyond. My grandfather, Gilbert Koch, the founder of Collection Bureau Services, Inc. ("CBSI") always said, "Treat consumers with respect, you never know when you will meet them again as potential customers." My father learned the business from him and, in turn, has passed his expertise on to me. Today, I am proud to be the third generation of CBSI and to be representing our industry as a small entity representative ("SER") for collection agencies. My business is a local, family-owned and operated agency in Montana. As a local agency we understand the needs of Montana businesses and consumers alike. Over the years we've found that our clients appreciate our willingness to work with consumers and also our understanding that a consumer may need

additional flexibility on a specific account. At CBSI, we prioritize excellence in employee training and compliance with all state and federal laws. Our agency is accredited, and our staff maintains certification through ACA International, the trade association for credit and collection professionals.

ACA International is the leading trade association for credit and collection professionals. Founded in 1939, and with offices in Washington, D.C. and Minneapolis, Minnesota, ACA represents approximately 1,700 members, including credit grantors, third-party collection agencies, asset buyers, attorneys, and vendor affiliates in an industry that employs more than 150,000 people worldwide.

ACA members include the smallest of businesses which operate within a limited geographic range of a single state, and the largest of publicly held, multinational corporations that operate in every state. The majority of ACA-member debt collection companies, however, are small businesses. According to recent ACA member data, 35% of ACA members are 10 employees or fewer, 56% of ACA members are 25 employees or fewer, and 70% of ACA members are 100 employees or fewer.

As part of the process of attempting to recover outstanding payments, ACA members are an extension of every community's businesses. ACA members work with these businesses, large and small, to obtain payment for the goods and services already received by consumers. In years past, the combined effort of ACA members has resulted in the annual recovery of billions of dollars – dollars that are returned to and reinvested by businesses and dollars that would otherwise constitute losses on the financial statements of those businesses. Without an effective collection process, the economic viability of these businesses and, by extension, the American economy in general, is threatened. Recovering rightfully owed consumer debt enables organizations to survive,

helps prevent job losses, reduces the need for tax increases to cover governmental budget shortfalls, and keeps credit, goods, and services available to consumers.

An academic study about the impact of debt collection confirms the basic economic reality that losses from uncollected debts are paid for by the consumers who meet their credit obligations:

> In a competitive market, losses from uncollected debts are passed on to other consumers in the form of higher prices and restricted access to credit; thus, excessive forbearance from collecting debts is economically inefficient. Again, as noted, collection activity influences on both the supply and the demand of consumer credit. Although lax collection efforts will increase the demand for credit by consumers, the higher losses associated with lax collection efforts will increase the costs of lending and thus raise the price and reduce the supply of lending to all consumers, especially higher-risk borrowers.[1]

In short, consumer harm can result in several ways when unpaid debt is not addressed and ACA members work to help consumers understand their financial situation and what can be done to address it and improve it.

ACA members play a critical role in protecting both consumers and lenders. ACA members work with consumers to resolve consumers' debts, which in turn saves every American household, on average, more than $700, year after year.[2] The accounts receivable management ("ARM") industry is instrumental in keeping America's credit-based economy functioning with access to credit at the lowest possible cost. For example, in 2018 the ARM industry returned over $90 billion to creditors for goods and services they had provided to their customers.[3] And in turn, the ARM industry's collections benefit all consumers by lowering the costs of goods and services—especially when rising prices are impacting consumers' quality of life throughout the country.

ACA members also follow comprehensive compliance policies and high ethical standards to ensure consumers are treated fairly. The Association contributes to this end goal by providing

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[1] Todd Zywicki, The Law of Economics of Consumer Debt Collection and its Regulation, 28 Loy. L. Rev. 187 (2016).
[2] https://kaulkin.com/survey-says-arm-industry-returns-90-1-billion-to-the-economy/
[3] *Id.*

timely industry-sponsored education as well as compliance certifications. In short, ACA members are committed to assisting consumers as they work together to resolve their financial obligations, all in accord with the Collector's Pledge that all consumers are treated with dignity and respect.

I'm honored to serve as the current Treasurer of ACA International for 2023-2024. My agency, CBSI, provides debt collection and billing work for many medical providers here in rural Montana, as well as government, utility, and a multitude other private businesses who provide service to our Montana consumers. I am committed to our clients, the ARM industry, and the work that we do to help every American consumer keep costs low in our economy by returning monies to healthcare, government, and every other industry too. My background in our industry starts earlier than most, in 2001, when I was a sophomore in high school I started working in the business. Today, I am the president of our company with a staff of 22. I take such pride in being an employer in Montana and for being the one to carry on the legacy of my father and grandfather.

In my tenure with CBSI, I've helped create many policies and procedures to ensure that clients are listing accounts that are accurate, consumers are receiving statements that are accurate, agents on calls are providing information that is accurate, and credit reporting is accurate. Accuracy is key in our industry, and my agency and the agencies who are part of ACA International work hard every day to make certain accurate information is received and presented in every segment of our businesses. I have studied, received training, and provided training on Confidentiality, HIPAA, 501(r), FDCPA, GLBA, FCRA, Identity Theft, Red Flags, Accuracy & Integrity, Bankruptcy, and more. I even traveled to attend a town hall in 2021 so that you, Director Chopra, would finally have the opportunity to meet an actual member of the industry. I attended the town hall to discuss rural banking in Montana, to provide insight about my agency, and to answer any questions you have in-person.

Throughout the SBREFA process, I learned that the CFPB was presenting high-level and vague ideas about medical debt credit reporting, data brokers, permissible purpose, and legitimate business need. It was nearly impossible for me to accurately quantify some of the information requested because of the "vague" and "high-level" concepts the CFPB staff spoke of. My understanding of the process was to provide direct feedback and information on the impact on my business or industry based on the Proposal. I cannot do this with a "vague" Proposal. Some of my most basic questions were difficult for the staff members to answer, such as what the definition of medical debt is in the Proposal. This Proposal makes sweeping changes that will have a significant impact on our entire American economy. It is my personal and professional belief that this Proposal was presented prematurely and the CFPB must withdraw it. The CFPB must take time to seek substantive feedback, study the issue in a meaningful way, and reconsider if this is the best course of action for America. I have serious concerns that this will do more harm than good for American consumers and the economy as a whole.

II. The Proposal Would Have Deleterious Effects on Consumers, Markets, Small Businesses, and the Entire Credit and Debt Collection Industry

In addition to the serious policy concerns associated with this Proposal, it will violate existing law:

- The Proposal will create overly burdensome costs to my business and other businesses in the collections industry. This will likely result in the reduction of consumer choice, increased upfront costs for medical care and other products and services, and less access to medical services in rural Montana. This Proposal will increase the cost and availability of credit for ACA members, as well as their medical provider clients since this fundamentally changes the law and will make it harder to collect payment for medical bills.
- The data analysis supporting the Proposal has serious methodological defects and did not consider data that reflects the current state of the industry or the critical economic impacts of medical debt reporting;
- The Proposal fails to consider, and has done no research, on less expensive alternatives that avoid the significant constitutional problems and reduce monetary impacts on small businesses, consumers, and governments. The CFPB, an agency

with unlimited funding resources, should not come up with "vague" ideas and hypothesis, and then place the burden on the back of small rural businesses like mine to come up with the research and alternatives to refute unresearched ideas and undefined concepts.

- To ensure clear and consistent interpretation, it is important that the CFPB create a definition of medical debt that ties the medical debt to the entity to which the debt is owed. To avoid such an overbroad interpretation, and to provide clarity on what is being referred to as "medical debt," we respectfully ask for a clear set of definitions of "medical debt" that differentiates between emergency services and other types of incurred health care related debt and daily goods and services.
- By the CFPB's own admission, medical debt information is less predictive, not "not predictive". Thus, underwriters in Montana will have less information to make credit determinations if the CFPB moves forward with its goal to remove all medical debt from credit reports, and credit will be extended in situations when consumers do not have the ability to repay.
- Medical providers and their third-party collection agency partners will need to consider changes to their collection practices for unpaid medical care including litigation, denial of care, or pulling out of a market all together. In Montana, if medical providers leave or consolidate, patients may be left traveling hundreds of miles for medical care.
- The Proposal conflicts with language in the FCRA concerning the definitions of consumer report and consumer reporting agency.
- The CFPB lacks authority to rewrite laws passed by Congress that are unambiguous by their plain terms.

Please find attached with this letter a discussion and analysis of the Proposal along with data and supportive materials.

Jennifer Whipple
President
Collection Bureau Services

Attachments (1)

Comments of Jennifer Whipple
to
Small Business Review Panel for the Fair Credit Reporting Act Proposal

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Contents

COMMENTS

I. THE PROPOSAL WILL HARM SMALL BUSINESSES AND CONSUMERS

The Proposal as currently contemplated, will cause substantial harm to both businesses and consumers. This harm will initially be economic, but will causes changes in the medical and healthcare markets that could ultimately harm the health and well-being of all Americans. These harms will be borne most by small businesses and Americans in rural areas.

Various portions of the proposal lack clarity, which will undoubtedly lead to confusion about who is covered by the FCRA on a going forward basis and what any given company's precise compliance obligations consist of. This uncertainty will create significant compliance burdens, increased costs (which will likely be passed onto consumers), as well as regulatory and litigation risk. Additionally, the prohibition of medical debt reporting will cause significant harms to small businesses, medical and healthcare providers, and consumers. As discussed below, the type of transactions that may be covered by the Bureau's interpretation of the phrase "medical information" will certainly create sweeping and unintended negative consequences in all credit markets. This in turn will harm many small businesses, as well as consumers. Outlined below, I discuss some of the specific harms to my business from what can be determined based on the "high-level" and "vague" ideas presented from the CFPB.

II. THE CFPB LACKS LEGAL AUTHORITY TO ISSUE RULES IN THIS AREA

A. The CFPB Can Only Regulate When the Statute is Ambiguous

Like any administrative agency, the Consumer Financial Protection Bureau ("CFPB" or the "Bureau") must act within the scope of authority Congress delegated to it by statute. A court may ignore a regulation promulgated through notice and comment if it does not earn deference.[4]

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[4] *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Issues surrounding judicial deference to agency interpretations of statutes enacted by Congress are guided by the *Chevron* doctrine.

Under the *Chevron* analysis, first set forth by the Supreme Court in 1984, courts review agency rules by looking at the rule in two distinct steps. First, a reviewing court must determine whether the meaning of the statute addressing the precise issue before the court is clear. If the statutory text is clear, then that is the end of the matter; the court and the agency must give effect to the unambiguously expressed intent of Congress.[5] Only when the statute is silent or unclear on the issue can a court move on to step two.

Further, the CFPB's rulemaking must comply with the Administrative Procedure Act ("APA"),[6] which requires a reviewing court to set aside agency action under certain conditions, including when agency rulemaking is arbitrary or capricious.[7] When applying the arbitrary and capricious standard, courts generally focus on: (1) whether the rulemaking record supports the factual conclusions upon which the rule is based; (2) the rationality or reasonableness of the policy conclusions underlying the rule; and (3) the extent to which the agency has adequately articulated the basis for its conclusions. Reviewing courts' interpretations of the terms "arbitrary and capricious" have changed over time. Indeed, the Supreme Court has recently certified for review the question of whether a court must defer to an agency of an ambiguous statute at all.[8] Based on the current composition of the Supreme Court, it is likely that they will significantly narrow agency authority to interpret statutes, particularly where a statute is silent on a particular issue.

Any rulemaking the CFPB engages in to implement a new rule or modify an existing rule faces two primary statutory requirements. First, the rule must conform to the authority set forth in

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[5] *Id.* at 843 n.9 (*Chevron* instructs courts at step one to employ all of the traditional tools of statutory interpretation first).
[6] *See generally* 5 U.S.C §§ 551-559.
[7] 5 U.S.C. § 706.
[8] *Loper Bright Enterprises v. Raimondo*, 143 S. Ct. 2429 (2023).

the Consumer Financial Protection Act ("CFPA"). Second, there must be a "concise general statement of [the amendment's] basis and purpose,"[9] reflecting rational and reasonable policy conclusions in the rulemaking record to support the change and thus avoid being overturned as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[10] An agency's interpretation is most likely to receive deference when "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies."[11]

Here, the CFPB attempts to wade into an area of law whose statutory text is clear and whose Congressional intent is unambiguous. Moreover, the current regulatory scheme governing consumer reporting agencies ("CRAs") is not highly technical or complex, and the CFPB's attempt to rewrite the governing regulations is not in line with sound policy or law. For the foregoing reasons, the CFPB lacks authority to issue rules in this area.

1. The FCRA Language Considered by the Bureau is Not Ambiguous

a. *Definitions of Consumer Report and CRA*

Section 603(d) of the Fair Credit Reporting Act ("FCRA") defines the term "consumer report" as, 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 (A) credit or insurance to be used primarily for personal, family, or household

[9] 5 U.S.C. § 553.
[10] 5 U.S.C. § 706(2)(A).
[11] *Chevron*, 467 U.S. at 865..

purposes; (B) employment purposes; or (C) any other permissible purpose authorized under FCRA section 604.[12]

The term "consumer reporting agency" is also defined under the FCRA as 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.[13]

Congress enacted the subchapters containing these definitions to protect consumers from having inaccurate information concerning them circulated to lending institutions by consumer reporting agencies,[14] and used great care in constructing the definitions of "consumer report" and "consumer reporting agency." The definitions of these terms are clear and unambiguous, and key to the Congressional intent of preventing consumers from being unjustly damaged by inaccurate credit information. To the extent that the CFPB attempts to change these key terms, it oversteps its statutory authority under the *Chevron* doctrine. As noted, under *Chevron*¸ if Congress has delegated authority to an agency to decide a particular question—that is, if *Chevron* applies—a court will determine whether Congress directly addressed the precise issue before the court. Where the statute is clear on its face with respect to the issue before the court, the court will defer to the statutory text rather than the agency interpretation. Here, the statute defines both "consumer report" and "consumer reporting agency" clearly and with specificity. Therefore, any attempt by the CFPB to rewrite these definitions goes beyond its statutory authority.

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[12] 15 U.S.C. 1681a(d).
[13] 15 U.S.C. 1681a(f).
[14] *Nikou v. INB Nat. Bank*, 638 N.E.2d 448, 453 (Ind. Ct. App. 1994) ("The purpose of the FCRA is to protect consumers from having inaccurate information concerning them circulated to lending institutions by consumer reporting agencies.").

b. *Data Brokers*

With respect to the CFPB's proposal addressing the application of the FCRA to data brokers, the CFPB lacks authority to regulate in this area. One of the CFPB's proposals currently under consideration would provide that a data broker that sells certain types of consumer data would be a "consumer reporting agency." The CFPB is also considering other interpretations determining when and how data brokers are or would be consumer reporting agencies furnishing consumer reports.

As noted above, both "consumer reporting agency" and "consumer report" are defined terms under the FCRA, and while the CFPB is authorized to implement the FCRA through rulemaking under Regulation V,[15] only Congress may revise defined terms under the FCRA.

A review of the plain language makes clear that a data broker simply does not fall within the statutory definition of a CRA. Data brokers are individuals or companies that specialize in collecting personal data (such as income, ethnicity, political beliefs, or geolocation data) or data about companies, mostly from public records, and selling or licensing such information to third parties for a variety of uses. Many times, data is utilized for marketing purposes to understand consumer preferences. Sources, which have since the 1990s been internet-based, may include census and electoral roll records, social networking sites, and court reports. Unlike a consumer reporting agency, as defined in the FCRA, data brokers do not "evaluate" consumer credit information. They simply aggregate it from primarily public sources as a matter of convenience for their clients. Moreover, this aggregating function and subsequent sale of data to clients is not for the purpose of preparing or furnishing consumer reports to third parties. Critically, data brokers do not analyze the data they collect or use it to generate a prediction of any particular

[15] 12 CFR § 1022.1-1022.142.

consumer's creditworthiness or permissible purpose. Thus, as consumer reporting agency has been defined by Congress, data brokers simply do not fit the statutory definition.

Indeed, the CFPB was recently reminded of its function when it unsuccessfully tried to expand the definition of "applicant" under the Equal Credit Opportunity Act[16] ("ECOA"), which was struck down in the *Townstone Mortgage* case.[17]

Also notable, the CFPB recently suggested in the March 2023 request for information ("RFI") that many data brokers who act as "consumer reporting agencies" under the FRCA nevertheless disclaim FCRA coverage.[18] The arbitrary and capricious standard under the APA assesses the rationality or reasonableness of the policy conclusions underlying the rule, and here, a reviewing court would very likely conclude that expanding upon Congressionally defined terms in this way does not comply with the APA.

c. *Assembling or Evaluating*

The CFPB's consideration of providing a more "bright-line" definition of when a data broker's activities fall within the meaning of "assembling" and "evaluating" in the definition of "consumer reporting agency" is beyond the scope of the CFPB's authority for the same reasons discussed above. Again, the definition of "consumer reporting agency" is clear and unambiguous, and Congress took great care in crafting this definition.

The phrases "assembling" and "evaluating" are clear and unambiguous. In the context of Congress' definition of a consumer reporting agency, they plainly mean that a person or company regularly "assembles or evaluates" consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties with a permissible purpose.

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[16] 15 U.S.C. 1691 *et seq*.
[17] *Bureau of Consumer Fin. Prot. v. Townstone Fin., Inc.*, No. 20-cv-4176, 2023, LEXIS 18405, at * 2 (N.D. Ill. Feb. 3, 2023) (Appeal filed April 4, 2023).
[18] 88 FR 16951.

Marketing is not a permissible purpose. Read, as it must be, with the Congressional definition of a consumer report, it is clear precisely what activities constitute assembling and evaluating for the purpose of the statute. Thus, any assembly or evaluation of consumer data that does not "bear[ ] 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 (A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other permissible purpose authorized under FCRA section 604" does not bring a person within the ambit of the consumer reporting agency definition. Thus, the Bureau's proposed bright-line rule is a regulatory overreach.

If Congress had wanted to specify certain activities constituting "assembling" or "evaluating" or otherwise define these terms, it is likely it would have done so. Indeed, every word within a statute is there for a purpose and should be given due significance. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[19]

d. *Credit Header Data*

The CFPB's Proposal to clarify the extent to which credit header data constitutes a consumer report is similarly improper. "Credit header data" includes certain consumer-identifying data such as an individual's name, date of birth, and Social Security number. The CFPB's consideration of the proposal to include "credit header data" in the FCRA's definition of what constitutes a "consumer report" is impermissible for the same reasons discussed above, including

[19] *Russello v. United States*, 464 U.S. 16, 23 (1983).

but not limited to, the fact that the legislature has thoroughly defined "consumer report" and adding language into the statute where the legislature declined to do so is beyond the scope of the CFPB's statutory authority.

As discussed above, Congress has explicitly defined a consumer report. Critically, to be a consumer report, the information conveyed must "bear[ ] 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 (A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other permissible purpose authorized under FCRA section 604." Credit header data, standing alone, does none of these things. In fact, as discussed more below, credit header data is used most often to verify consumer identities and prevent fraud. The Bureau's proposed inclusion of credit header data in the definition of a "consumer report" runs afoul of Congress' already clear definition.

Additionally, there are significant policy concerns with this Proposal. As it stands, the FCRA has established requirements for how a creditor or other furnisher of information to a credit bureau must respond to direct and indirect disputes involving credit report information appearing on an individual's credit report. The FCRA also requires that any attempt to access a consumer's credit report be made with a "permissible purpose." By broadening the definition of consumer report to include "credit header data," the CFPB will create substantial confusion as to many financial institutions' compliance obligations and will likely call into question certain customary procedures.

2. The Proposal would have Negative Consequences that Outweigh its Benefits

Credit header information is routinely used by financial institutions to verify a consumer's identity in order to complete a variety of transactions as well as to determine whether certain

account-level information can be legally shared with an individual purporting to be the consumer. Furthermore, this credit header data is integral to most institutions' current methods of fraud prevention. By subjecting such routine information to the FCRA's requirements, the CFPB will substantially hinder banks' routine identity verification and fraud prevention practices. Indeed, subjecting credit header data to the FCRA could have the unintended consequence of aiding would-be identity thieves. If – during the time sensitive initial investigations into whether a consumer is the victim of identity theft – a bank must "proactively identity a 'permissible purpose'" before accessing an individual's credit header data, the fraudster could have additional time to successfully complete any fraudulent transaction. Additionally, credit header data is already protected and regulated under the Gramm-Leach-Bliley Act ("GLBA")[20] and Regulation P[21], so expanding the FCRA to cover such information is arbitrary and unnecessary.

We note also that when Congress initially drafted the FCRA, the same information that is contained in credit headers—name, address, and phone number—were publicly available through printed telephone books. It has historically been the case that this information is freely available unless a consumer expressly opts-out of sharing it. It is no surprise that the FCRA text already takes the same approach. FCRA §1681b(e) already has in place provisions to allow consumers to opt-out of credit header sharing for marketing purposes.[22] The Bureau's Proposal would negate this carefully crafted provision and would be unlikely to receive deference as a result.

3. The Economic Data Illustrates that Broadening of these Definitions would have Significantly Detrimental Impact on the Small Businesses

[20] Pub. L. No. 106-102 (1999)
[21] 12 CFR § 1016
[22] FCRA §1681b(e) (CRA can't sell firm offer lists for credit or insurance if consumer opts-out of being on those lists; CRA must have a system to allow opt-outs).

As the economic analysis detailed below explains, the CFPB has failed to conduct a valid analysis of the consequences that will result from the definitional changes in the Bureau's Proposal. For example, Dr. Andrew Nigrinis, in discussing the proposed expansion of the "consumer report" definition, states, "[t]his overbroad definition could limit marketers' ability to use basic levels of consumer information for targeting ads.

In sum, the CFPB's consideration of this Proposal would have far-reaching impacts across multiple systems. And when an agency interprets legal requirements that apply broadly across agencies, a reviewing court will not defer to the agency's interpretation.[23] A full economic analysis of the CFPB's Proposal is attached.[24]

B. The CFPB's Jurisdiction Only Extends to Financial Products and Services

1. CFPB Authority under the Dodd-Frank Act

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") in response to consumer abuses in mortgages, credit cards, and other financial products. The Dodd-Frank Act made substantial changes to many of the statutes in the Consumer Protection Act and established in Title X, the Consumer Financial Protection Bureau. The Dodd-Frank Act assigns to the CFPB some of the rulemaking and enforcement authority that the FTC and banking regulators previously held. It also grants the CFPB rulemaking authority regarding unfair, deceptive, or abusive practices.

Notably, the language in the CFPB's Enabling Act grants it the authority to "regulate the offering and provision of consumer financial products or services under the Federal consumer

[23] *See Chevron*, 467 U.S. at 842–44, 865.
[24] Nigrinis, Dr. Andrew Rodrigo, Economic Analysis of the Consumer Financial Protection Bureau's FCRA Rule Proposals (Nov. 6, 2023).

financial laws."[25] The CFPB's jurisdiction is thus limited to "financial products" and "financial services."

A consumer financial product or service is a financial product or service that is offered or provided for use by consumers primarily for personal, family, or household purposes. A financial product or service means one of a handful of specified activities (with certain exceptions):

- Extending credit and servicing loans;
- Extending or brokering leases;
- Providing real estate settlement services;
- Engaging in deposit-taking or funding custodial activities;
- Selling, issuing, or providing stored value cards or payment instruments;
- Check cashing, check collection, or check guaranty services;
- Providing payments or other financial data processing products or services;
- Providing financial advisory services;
- Collecting, maintaining, or providing consumer report information or other account information;
- Debt collection related to consumer financial products or services;
- Products or services permissible for a bank or financial holding company to offer that will impact consumers.

Moreover, the CFPB's rulemaking and enforcement authority related to consumer financial products and services is strictly limited to "covered persons." This includes only those who offer or provide a financial product or service, and anyone controlling, controlled by, or under common control with such a person who acts as a service provider for such a person.

[25] 12 U.S.C. § 5491(a).

Here, the CFPB's consideration of the proposals discussed above goes far beyond the CFPB's statutory authority. While it is clear that the CFPB may regulate the offering and provision of debt collection, what the CFPB is now considering—whether and to what extent, medical debt appears on a consumer's credit report—goes far beyond the realm of mere debt collection. Indeed, while the intention behind the proposals is aimed at consumer reporting agencies, the practical effect is a regulation of the healthcare system. The rules now being considered therefore do not fit within the definition of a "financial product" or "service" and the CFPB lacks jurisdiction to issue rules in this area.

a. *Case Law Limiting Scope of Authority*

In addition to the CFPB's enabling statute, the APA, and *Chevron*, the CFPB's rulemaking and enforcement authority is also limited by case law. It is well settled that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[26] Sweeping grants of regulatory authority are rarely accomplished through "vague terms" or "subtle device[s],"[27] and courts must "presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies."[28] Recognizing these fundamental principles, the United States District Court for the Eastern District of Texas ruled earlier this year that the CFPB exceeded its statutory authority to regulate unfair acts or practices by updating its rules to direct examiners to scrutinize companies for discrimination and for how well companies introspected about statistical disparities in data concerning business practices.[29] Notably, the Court came to this conclusion despite Congress directing the CFPB to ensure that consumers were "protected (1) from

[26] *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989).
[27] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 4682001).
[28] *United States Telecom Assn. v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing *en banc*).
[29] *Chamber of Com. of United States of Am. v. Consumer Fin. Prot. Bureau*, No. 6:22-CV-00381, 2023 WL 5835951 (E.D. Tex. Sept. 8, 2023)

unfair, deceptive, or abusive acts and practices and (2) from discrimination."[30] In coming to this conclusion, the Court reasoned that the issue was one of major economic and political significance and permitting the CFPB to rule in this area "would have large implications for the financial-services industry."[31]

The Proposal under consideration now bears a striking similarity to that discussed above. Indeed, while Congress has granted the CFPB rulemaking and enforcement authority over financial products and services, it has clearly demarcated what these categories entail. The Proposal changes go far beyond this statutory boundary. Moreover, the Proposal, which considers adding to, or changing statutory definitions under the FCRA, would have major economic implications as discussed above, and in situations such as these, courts must presume that Congress intends to make such major policy decisions itself.

The CFPB's rulemaking authority has also been clarified in another recent case involving a statute that the CFPB administers. In *Consumer Finance Protection Bureau v. The Mortgage Law Group, LLP,* the United States District Court for the Western District of Wisconsin, ruled that the Bureau's regulations requiring attorneys to comply with certain state professional conduct rules were invalid because the rulemaking was in excess of the CFPB's authority.[32] Specifically, the court found that the CFPB's interpretation of the regulating statute was not subject to deference under *Chevron* and was arbitrary and capricious because Congress never intended the CFPB to address issues related to attorney conduct and attorney-client relationships.[33] The Court reasoned that the CFPB's authority under the CFPA and the Omnibus Act, as clarified by the Credit Card Act, gave the CFPB rulemaking authority only with respect to unfair or deceptive mortgage loan

[30] *Id.* at 18.
[31] *Id.* at 8.
[32] *Consumer Fin. Prot. Bureau v. The Mortg. L. Grp*., LLP, 157 F. Supp. 3d 813, 820 (W.D. Wis. 2016), *aff'd in part sub nom. Consumer Fin. Prot. Bureau v. Consumer First Legal Grp., LLC*, 6 F.4th 694 (7th Cir. 2021).
[33] *Id.* at 824–25.

practices, and an attorney's violation of a state rule of professional conduct regarding client trust accounts does not automatically equate to an unfair or deceptive mortgage loan practice.[34]

This case is instructive to the medical debt aspects of the Proposal because once again, the CFPB is attempting to regulate outside of its congressionally proscribed bounds. The Proposal goes far beyond the scope of mere debt collection and attempts to regulate the healthcare system. Since the CFPB refused during the SBREFA process to define medical debt, it is also impossible to know the extent to which this Proposal impacts certain medical providers. However, it is certainly clear that it does, and the CFPB does not have the unfettered authority to create definitions in this area to impact any certain type of medical provider or part of the medical system however it deems appropriate. This Proposal is outside the CFPB's jurisdiction, and if challenged, it is highly unlikely that the CFPB's interpretation would not be subject to *Chevron* analysis.

Finally, in another recent case involving the CFPB's regulatory authority, the United States District Court for the Northern District of Illinois, dismissed with prejudice the Complaint filed by the CFPB, and held that the plain language of the ECOA does not prohibit discrimination against prospective applicants. The Complaint filed by the CFPB alleged that Townstone Financial, Inc., a nonbank retail-mortgage creditor and broker, had engaged in discriminatory acts or practices in violation of the ECOA.[35] The court summarized the allegations as follows: "The CFPB alleges that Townstone's acts and practices would discourage African-American prospective applicants, as well as prospective applicants in majority- and high-African-American neighborhoods in the Chicago MSA from seeking credit."[36] The court then applied *Chevron* to determine whether the CFPB's allegation of discrimination against "prospective applicants" was permissible under the ECOA. Indeed, upon applying the first step of the *Chevron* analysis, the court found that "Congress

[34] *Id.*
[35] *Townstone*, LEXIS 18405 at *7.
[36] *Id.*

has directly and unambiguously spoken on the issue at hand and [that ECOA] only prohibits discrimination against applicants".[37] In granting Townstone's motion to dismiss, the court reasoned that the plain text of the ECOA applies to "applicants," which the ECOA "clearly and unambiguously defines as a person who applies to a creditor for credit" – and not to "prospective applicants." Given this, the court was not required to move on to the second step of the *Chevron* analysis and consider the CFPB's interpretation of the statute.[38]

Again, this case is instructive to the matter at issue here. As discussed, the CFPB is attempting to regulate an area of the FCRA that has been thoroughly prescribed by Congress, and moreover, is considering expanding upon current definitions under the Act. This case makes clear, that where Congress has explicitly and unambiguously spoken on the issue at hand, the CFPB's interpretation and expansion, is not entitled to deference.

C. By Attempting to Regulate in the Field of Healthcare and Associated Medical Transactions, the CFPB Exceeds its Statutory Authority

The CFPB does not have the authority, expertise, or proper tools to regulate the medical, healthcare, and insurance industries and cannot do so through Regulation V. When Congress passed the FCRA, it did so with a narrow and explicit prerogative: to promote fair and accurate credit reporting.[39] It did not intend for the Act to be used to regulate the non-financial products and services simply because they are purchased on credit.

Financial services and products play a very limited role in the healthcare and medical services industries and the CFPB has a correspondingly limited authority to regulate or make policies in those fields. In fact, the CFPB has already acknowledged that it lacks authority to

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[37] *Id.*
[38] *Id.*
[39] *See e.g.*, 3 Fair Credit Reporting Bill, 115 Cong. Rec. S2410-11 (daily ed. Jan. 31, 1969) ("Credit reporting agencies are absolutely essential in today's credit economy. . .my objective in introducing the fair credit reporting bill is to correct certain abuses which have occurred within the industry and to insure that the credit information system is responsive to the needs of consumers as well as creditors.").

regulate within the medical industry by specifically *excluding* medical debt from its definition of "large market" participants in the consumer debt collection market.[40] While promulgating regulations of large market participants, the CFPB stated that it has authority to regulate the debt collection market because that "is a market for financial products and services under the Act" but that debt arising from medical expenses is usually incidental credit and should be excluded because it is "unrelated to consumer financial products or services."[41]

While a consumer may obtain a medical service prior to payment, and debt incurred for that care may be reported to a CRA later by a debt collector, collectors and credit agencies have no role in the underlying transaction that gives rise to the consumer's obligation to pay for the medical services received. Determinations of when, how, and at what price a consumer may purchase medical goods or services is entirely outside the purview of the CFPB. And this is not unique to the healthcare industry. The CFPB plays no bigger role in determining what healthcare services a consumer receives than it does what pair of shoes that consumer chooses to buy, even if each is purchased on credit. And if that consumer defaults on both debts, the result will be the same—a debt collection tradeline will be reported in the same manner and have the same effect on a consumer's credit whether that debt was from a trip to the ER or the purchase of Manolo Blahniks. In short, the statutory laws that Congress has authorized the CFPB to affect through rulemaking were not intended to create broader policy. Attempts do to so exceed the CFPB's statutory authority.

Similarly, and as further detailed below, in many of its public statements, the CFPB takes aim at complex insurance coverage related to healthcare. It is true insurance coverage is a nuanced and complicated process. That is why there are certain Congressional Committees and agencies

[40] 12 C.F.R. § 1090.105
[41] 77 FR 9597.

such as the U.S. Departments of Health and Human Services ("HHS"),[42] Labor ("DOL"),[43] and the Treasury,[44] that are tasked with creating laws and regulations surrounding insurance.[45] In fact, Congress recently passed the No Surprises Act to address some of these issues.[46] Unfortunately, the "research" and data that the CFPB cites for its interest in this issue was collected years before this sweeping law that already addresses many of the issues the CFPB raises about the healthcare system.

Credit reporting laws are not intended to combat high medical costs or simplify insurance coverage. The CFPB's authority to promulgate rules under Regulation V is limited to rules that effectuate the purpose of the FCRA, which is narrow and entirely unrelated to healthcare policy or insurance issues. The FCRA's stated purpose is to support the needs of commerce by providing fair and accurate credit information. Manipulation of what consumer information can appear on a credit report based on external policy considerations is directly contrary to that purpose and exceeds the CFPB's grant of authority. Congressional intent regarding the role of the CFPB is clear: first, the FCRA simply does not authorize the CFPB to make industry specific credit reporting regulations; second, the FCRA does not authorize the CFPB to regulate the healthcare industry; and third Congress has specifically delegated rulemaking power in the healthcare and medical industries to other specialized agencies.

1. The FCRA Does Not Grant the CFPB Discretion to Exempt Medical Debt From Credit Reporting

The CFPB does not have the authority to unilaterally determine what types of consumer debt can be reported and used by creditors. The FCRA grants the CFPB the authority to "prescribe

[42] 42 U.S.C. § 3501 *et. seq*.
[43] 29 U.S.C. § 551 *et seq*.
[44] 31 U.S.C. § 301 *et. seq*.
[45] *See e.g.*, 26 U.S.C. §§ 9801–9834 (regulating group health plans and assigning enforcement and regulation to the IRS); 42 U.S.C. § 300gg (regulating insurance requirements including limiting cost-sharing and assigning enforcement and regulation to HHS); 42 U.S.C. 1320f (directing HHS to establish a Drug Price Negotiation Program).
[46] Pub.L. 116–260, the Consolidated Appropriations Act of 2021.

such regulations as may be necessary and appropriate to administer and carry out the purposes of [the FCRA]".[47] The stated purpose of the FCRA is to create rules and procedure for credit reporting that balance the need for access to complete and accurate credit reports with the consumer's interest in privacy and fair access to credit products.[48] Congress did not delegate how to strike this balance to the CFPB. Rather it enacted a law that that makes consumer information broadly reportable, with the exception of specifically enumerated categories of protected information.

The CFPB asserts that it has authorization to prohibit reporting or use of medical debt to lower the burden of healthcare costs because the FCRA already limits the use of medical information. This is a misreading of the statute. The CFPB's Proposal states its proposed rulemaking is necessary because: (1) "[m]edical debt collection tradelines appearing on consumer reports can have negative consequences for consumers, including impacting consumers' ability to obtain credit (or to obtain it at favorable rates) after experiencing, for example, a medical emergency"[49] and (2) that medical debt collection tradelines appearing on consumer reports "can also be used as leverage by collectors to coerce consumers to pay sometimes spurious or false unpaid medical bills."[50] But these concerns have no specific tie to medical debt: any consumer with a high amount of consumer debt on their credit report will have more difficulty obtaining new credit; and any debt tradeline can be used as leverage for repayment by a creditor. Indeed, that credit reporting allows creditors to limit their risk by not lending to or imposing higher rates on people with a large amount of debt are features, not bugs, of the credit reporting system created by the FCRA.

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[47] 15 U.S.C. 1681(s)(e)(1).
[48] 15 U.S.C. 1681(b); (*See also* Fair Credit Reporting Bill, 115 Cong. Rec. S2410-11 (daily ed. Jan. 31, 1969).
[49] Small Business Advisory Review Panel for Consumer Reporting Rulemaking Outline of Proposals and Alternatives Under Consideration ("Rulemaking Outline") at 17-18.
[50] *Id*. at 18.

Congress empowered the CFPB to regulate the use of medical information consistent with the overall purpose of the statute—to protect consumer privacy while preserving creditor access to accurate debtor information.

2. Congress has Explicitly Spoken about Limits on Medical Debt Reporting

In contrast to the Bureau's *ultra vires* proposals, Congress' concerns regarding the furnishing and use of medical information are much narrower: first, is a privacy concern—medical data is sensitive, and the specifics of a consumer's healthcare needs as reflected by the medical services they receive or medications and devices they purchase should not be publicly available. Second, and related, is a concern that personal medical information could be improperly used as the basis for employment or credit decisions. Based on these concerns, Congress included in the FCRA a section titled "protection of medical information" setting out how and when medical information may be obtained and used in connection with credit decisions. Section 1681(g)(2), governing use of medical information by creditors states that:

> Except as permitted pursuant to paragraph (3)(C) or regulations prescribed under paragraph (5)(A), a creditor shall not obtain or use medical information (*other than medical information treated in the manner required under section 1681c(a)(6) of this title*) pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit. (emphasis added).

The "manner required under section 1681c(a)(6)" is that the information must be "restricted or reported using codes that do not identify or provide information sufficient to infer the specific provider or the nature of such services, products, or devices to a person other than the consumer."[51] Thus, the FCRA *allows* creditors to obtain and use medical information—including medical debt—to make credit determinations so long as that information is not reported in a way

[51] 15 USC § 1681c(a)(6).

that would allow the creditor to obtain information about the consumer's specific medical treatment or condition.

Finally, that Congress only intended to delegate to the CFPB the authority to regulate reporting of medical debt to the extent required to protect the privacy of consumers need not be inferred—it is explicitly stated. Section 1681b(g)(5) grants the CFPB the authority to promulgate rules to *permit* creditors to obtain or use medical information that would otherwise be prohibited under Section 1681b(g)(2) as is necessary "to protect legitimate operational, transactional, risk, consumer, and other needs. . . consistent with *the intent of paragraph (2) to restrict the use of medical information for inappropriate purposes*." (emphasis added). Notably, Congress does not grant the CFPB authority to further limit the use of medical information at all. Instead, it authorizes the CFPB to allow *more* medical information to be reported. And it clearly does not authorize the CFPB to regulate any specific industry or to reduce the burden of debt on consumers—it authorizes the CFPB to create regulations necessary to facilitate complete and accurate credit reporting.

In sum, prohibiting creditors from using or obtaining information regarding medical debt is entirely inconsistent with the FCRA. Congress has clearly stated that the Act is intended to set a procedure for fair and accurate credit reporting. This intent forecloses the possibility that the CFPB also intended to allow the CFPB to use credit reporting as a tool to effect policy changes in healthcare or any other non-financial industry.

3. Congress' Limits on Medical Debt Reporting set a Boundary for CFPB Regulation

Congress already did the work that the CFPB proposes concerning medical debt. As discussed above, Congress prohibits reporting of medical information that could allow third parties to determine what type of medical product or service the consumer received at 15 U.S.C. 1681(b). This statutory text reflects the stated policy goal of protecting privacy. But also implicitly allows medical debt reporting. Also in 15 U.S.C. 1681(c), Congress specifically excludes a narrow

category of medical debt. That is, CRAs may not report medical debt owed by veterans for medical services received more than a year before the report was created.[52] This reflects a legislative policy determination that veterans should not have accurate medical debt reported outside narrow parameters, but importantly, Congress determined that this protection does not apply to other categories of consumers.

Congress clearly considered the impact of medical debt reporting and specifically chose not to exclude all categories of medical debt from consumer reports, even though it could have if that was its intent. In the context of the FCRA's stated purpose of providing accurate credit reports, the choice *not* to exclude reporting of medical debt reflects a policy determination: medical debt is the type of information necessary to provide fair and accurate credit reports.

The Bureau's Proposal raises a major question concerning the balance between accurate credit reporting, consumer privacy, and fairness. It did so by specifically enumerating what types of information are exempt from reporting. The FCRA does not delegate to the CFPB the authority to unilaterally upend this balance by deciding without any mandate or guidance from Congress that medical debt—or any other category of consumer debt—is uniquely harmful to consumers. Those decisions are inherently legislative; the FCRA does not have any indication that Congress intended to delegate them to the CFPB.

Congress did not intend for the CFPB to use its authority under FCRA to impact healthcare policy or mitigate the effect of healthcare policy on consumers. The legislative intent of the medical debt limitations in the FCRA is to prevent a scenario where a consumer's access to credit is limited or impacted because the creditor determined that a person with their specific medical needs or condition should not be granted credit. This is entirely distinct from the harm the CFPB

[52] 15 USC § 1681c(a)(6).

seeks to prevent by eliminating the reporting or use of all medical debt. The CFPB's Proposal makes clear that the concern its rule is meant to address is that consumers have large amounts of medical debt, and having debt reduces access to credit. This purpose is entirely inconsistent with the legislative purpose of the FCRA.

4. The FCRA does Not Authorize the CFPB to Prevent the Reporting of Accurate Information about Credit and Doing so Defies the FCRA's Stated Purpose

The very first line of the FCRA is a Congressional finding that "the banking system is dependent upon fair and accurate credit reporting."[53] "Accurate" credit reporting is that which correctly identifies the transactions, accounts, and debts of the consumer. A report that does not reflect significant debts owed by a consumer is, by definition, inaccurate. By finding that the banking system depends on accurate reporting, Congress has expressed its intent to create a system under which all valid debts, including those incurred for medical expenses, appear on a consumer's credit report. While it is arguably not "fair" that consumers are burdened with medical debt in the first instance, that is not the fairness that Congress contemplates or intended to address through the FCRA. Our banking system does not "depend" on a credit reporting system that only reports debts incurred out of choice rather than necessity. Rather, it depends on creditors having access to the information necessary to accurately predict the risk associated in lending to a particular individual. Ability to pay, amount of debt, past payment history, and history of default are essential to that prediction regardless of how the debt was incurred.

A procedure that prevents agencies from accurately reporting the amount of debt owed by a consumer and prevents lenders from issuing credit based on an accurate assessment of a consumer's finances neither meets the needs of commerce for consumer credit nor results in a system that is fair and equitable to consumers. The stated purpose of the FCRA is to "require that

[53] 15 USC §1681(a)(1).

consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit. . . in a manner which is fair and equitable to the consumer. . . and proper utilization of such information."[54]. If creditors are not able to accurately assess the default risk of consumers, the result will be (1) consumers will be allowed to take out more credit than they can repay, resulting in default or bankruptcy and (2) creditors will increase the cost of credit for all consumers to account for the increased risk in lending. Neither of these outcomes benefits consumers.

5. Rulemaking Authority about Medical Payment and Cost Lies with Other Federal Agencies

Congress has enacted significant legislation addressing healthcare policy and has expressly delegated regulation and implementation of those policies to other agencies. And this is for good reason, as discussed above, the CFPB's involvement in medical care is tangential. Authority aside, the CFPB does not have the expertise or tools to implement policy that would significantly alter the landscape of medical services and payments. The CFPB has no role in the sale or delivery of medical services, the medical insurance market, or the medical billing system. This is by Congressional design and reflects Congress' intent that the CFPB only regulate financial products and services, not healthcare or medical products and services.

Indeed, Congress has squarely delegated the authority to make policy related to healthcare costs and spending to other agencies. As mentioned above, the recently passed No Surprises Act aims to reduce burdens by helping consumers understand healthcare costs in advance of care to minimize unforeseen medical bills. The No Surprises Act delegated interpretive and rulemaking authority to the HHS, DOL, and the Treasury.[55]

[54] 15 USC §1681(b).
[55] *See* 87 FR 52618 (final rules implementing the No Surprises Act issued by the Internal Revenue Service, the Employee Benefits Security Administration, and the Health and Human Services Department).

Congress, through its work in the No Surprises Act, makes several points clear: (1) it believes that legislation is needed to make sweeping changes in this market, not that agencies have unfettered unilateral authority; (2) it in no place in the legislation discusses debt collection, so did not identify that market as part of the problem;[56] and (3) it identified certain agencies to address these issues and specifically did not include the CFPB. Unless and until Congress acts, nothing changes their directives on these issues.

The Affordable Care Act,[57] which contains comprehensive legislations aimed to reduce the cost of healthcare, streamline insurance claims, and increase access to quality medical care delegates rulemaking authority primarily to the Department of Health and Human Services, but also to several other federal agencies, yet does not delegate any regulatory authority to the CFPB.[58] Indeed, the Affordable Care Act specifically legislates requirements for the reporting and collection of medical debt but delegated the authority to interpret and enforce this provision to the IRS, *not* the CFPB.[59] The fact that Congress has repeatedly determined that the CFPB is not an appropriate agency and/or does not have the appropriate powers and authority to implement healthcare policy shows that Congress did not intend to grant the CFPB the authority to do so, either under the FCRA or any other financial regulation.

6. The CFPB Cannot Issue a Rule Suppressing Medical Debt under the Major Questions Doctrine

The CFPB clearly lacks the authority to make a rule that suppresses the reporting or furnishing of accurate information about medical debts. The FCRA does not grant the CFPB broad discretion to dictate the types of information on consumer reports.[60] Nor did it provide the CFPB

[56] *See generally*, Pub.L. 116–260, the Consolidated Appropriations Act of 2021. The text of the Act focuses on front-end billing and not collections.
[57] Pub. L. 111-148 (2010).
[58] *See generally*, *Id.*
[59] *See* Pub. L. 111-148 § 9007.
[60] *Supra* 22.

specific authority over medical debt.[61] The FCRA statutory text already imposes restrictions and limits on medical debt reporting and the statutory text both expressly and impliedly allows reporting of medical debt.[62] Finally, Congress has granted federal agencies other than the CFPB authority over major questions of healthcare policy.[63]

A rule requiring the suppression of accurate information about medical debts—paid or unpaid—would not survive analysis under the major questions doctrine. Under the major questions doctrine, the Supreme Court has rejected agency claims of regulatory authority when: (1) the underlying claim of authority concerns an issue of "vast 'economic and political significance;'" and (2) Congress has not clearly empowered the agency with authority over the issue.[64] The Supreme Court has explained that, in general, courts interpret statutory language "in [its] context and with a view to [its] place in the overall statutory scheme."[65] In cases where there is something extraordinary about the "history and breadth of the authority" an agency asserts or the "economic and political significance" of that assertion, however, the Court indicated courts should "hesitate before concluding that Congress meant to confer such authority."[66]

The Court has used the doctrine to reject agency claims of regulatory authority, including in regard to:

- the Internal Revenue Service's ("IRS's") decision that a federal health care exchange is "an exchange established by the State" for purposes of determining eligibility for tax credits (*King v. Burwell*, 576 U.S. 473 (2015)),

[61] *Id.*
[62] *Supra* 27.
[63] *Supra* 28.
[64] *Util. Air Regul. Grp. (UARG) v. EPA*, 573 U.S. 302, 324 (2014).
[65] *FDA v. Brown & Williamson Tobacco Corp.*, 529 .S. 12, 133 (2000).
[66] *West Virginia v. EPA*, 142 S. Ct. 2587, 2607–2608 (2022).

- the Centers for Disease Control and Prevention's ("CDC's") nationwide eviction moratorium (*Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (per curiam)),

- the Federal Communication Commission's ("FCC's") waiver of a tariff requirement for certain common carriers under its statutory authority to "modify" such requirement (*MCI Telecomms. Corp. v. AT&T Co*., 512 U.S. 218 (1994)).

The CFPB's claim to authority over medical debt reporting is even more spurious than these provided examples.

D. The Proposal Undermines the Purpose of the FCRA

As detailed above, Congress enacted the FCRA to ensure fair and accurate credit reporting.[67] This is important because accurate and complete credit reporting facilitates the efficient functioning of credit markets. Those who have consistently repaid their debts and have sufficient income to meet their liabilities qualify for ongoing credit. And those who have a poor history of repayment behaviors or simply lack sufficient income to accommodate their various debt obligations will be offered less credit or on more stringent terms.

The Proposal, as currently contemplated, runs afoul of the FCRA's guiding purpose. Specifically, the Proposal arbitrarily assumes, without sufficient evidence, that one type of debt, medical debt, is nonpredictive of consumer risk. With only weak and aged supporting data, the Bureau takes the position that the reporting of medical debt harms consumers and prevents them from obtaining credit to which they would otherwise be entitled to. The Bureau then proposes that medical debt tradelines should be removed entirely from consumer reports.

As a threshold matter, the Bureau's determination that medical debt should be afforded less protections and different treatment than other types of debt is arbitrary and capricious, not to

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[67] 15 U.S.C. § 1681.

mention likely unconstitutional. As discussed more below, the Bureau's Proposal relies on a skewed reading of data that is nearly ten years old and fails to consider any of the recent regulations that have been implemented to address the Bureau's perceived failings of the healthcare system. And even that arguably obsolete data acknowledges that medical debt information has some predictive value of credit risk.

But the Bureau ignores this and takes the unsupported position that medical debt data has no value in credit risk predictions. On the contrary, medical debt data, like any other debt obligation financial data is critical to the determination of a consumer's capacity to take on more debt and repay that debt in a timely and consistent manner. Thus, the removal of medical debt information from consumer reports will directly contravene the stated purpose of the FCRA and its goal of ensuring fair and accurate credit reporting.

1. Fair and Accurate Credit Reporting

Our entire financial market depends on accurate credit reporting. This is because when a potential lender or creditor evaluates whether to extend credit to any particular person, they must have a complete picture of the applicant's financial profile. Certainly, this inquiry considers an individual's borrowing and repayment behaviors. But, critically, it also shows what liabilities that individual already has. If a consumer report omits certain information, then potential creditors are left without the information they need to assess repayment and delinquency risk. The Bureau takes the position that medical debt is less, or even non-predictive of consumer risk. However, the reality is that medical debt, like any other type of consumer debt, must be considered when evaluating the creditworthiness of any particular applicant.

Medical debt must be transparently reported because it is a major driver of bankruptcies. In 2019, authors contributing to an article in the American Journal of Public Health performed a

study of consumers filing bankruptcy.[68] In that year, 530,000 people reported falling into bankruptcy annually due partly to medical bills and time away from work. This was 66.5 percent of all bankruptcies that year. The Bureau's Proposal to exclude from credit reports the very debts that drive a majority of personal bankruptcies creates a myriad of problems.

For example, if a consumer has $24,000 in medical debt that they are supposed to be paying in monthly installments of $1,000 per month, this information is absolutely critical to other potential lenders. If the same consumer goes to a dealership to purchase a new vehicle, the lender will be able to see that any financing it offers should account for that existing $1,000 per month liability. However, under the Proposal, this medical debt obligation would be invisible to the dealership lender. The result would be that the lender may be willing to extend more credit than the consumer can actually afford, because the lender does not know about the prior obligation. If the consumer then took on the additional debt for a vehicle, they could easily become over leveraged. Now, the lender is at risk of non-repayment, and the consumer is at heightened risk of delinquency across all their financial obligations. All of this is due to having inaccurate and incomplete information.

Consider also the total impact on the credit reporting system if the types of accounts that drive 63% of bankruptcies are not reported. This could mean that a consumer has a 700+ credit score immediately before filing for bankruptcy protection. This scenario need only occur a few times to a few creditors before faith in credit scoring models is entirely lost.

E. The Proposal Will Hurt Access to Credit in the Market Generally

The above example illustrates the risks that will lead to a credit crunch, thereby damaging economic mobility for many financially healthy consumers, as well as small businesses.

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[68] David U. Himmelstein, Robert M. Lawless, Deborah Thorne, Pamela Foohey, Steffie Woolhandler, "Medical Bankruptcy: Still Common Despite the Affordable Care Act", American Journal of Public Health 109, no. 3 (March 1, 2019): pp. 431-433.

1. Incomplete Credit Data will Result in a Credit Crunch

When lenders and creditors are faced with incomplete credit data, their risk increases. This then translates to more stringent underwriting standards and subsequent reductions in lending activity. And those that are hurt the most are consumers and small businesses.

F. **The Proposal Will Result in Increased Inaccuracy in Consumer Reports**

As detailed by several SERs during the SBREFA panel discussions, incomplete financial data creates inaccurate consumer reports. When lenders and creditors cannot rely on the information provided in consumer reports, they either refuse to extend credit altogether or use other, less particularized methods, to ascertain credit worthiness on a statistical basis. This leads to the exclusion of certain groups and people that can no longer set themselves apart through their historically positive payment behaviors. It also increases the risk that lenders and creditors are forced to rely on statistical information that may further promote systemic biases in the financial markets, further excluding individuals who would otherwise have been offered credit.

For example, take an individual who lives in an older and less affluent area. This person has $10,000 in medical debt but has consistently been paying it on time, each month, and is almost finished paying it off. Under the Proposal, this medical debt tradeline, along with all its positive payment history, would be erased from the individual's consumer report. Now, potential creditors have less information about this individual and will be forced to rely on less predictive and potentially biased information about this person. Indeed, a potential creditor may only be able to consider this person's statistical probability of repayment based on their demographic information, where they live, and generally whether people in that area are good about repaying their debts. Now, the consumer suffers because, while their own payment history is exemplary, they have no way to distinguish themselves from others is their statistical group, who may have less positive repayment history. All this consumer's efforts to be responsible and honor their debt obligations

are for naught, and now they will be assessed in a way that ignores the reality of their financial situation and repayment behaviors.

Not only does this reality harm the consumer who has been financially responsible; it also creates a direct disincentive for consumers to pay their medical debts. If all the money poured towards paying off their medical debt is invisible to lenders, why bother making payments at all? A reasonable consumer would elect to spend that money elsewhere, paying down other debts, or putting it in savings. Credit reporting efficiencies are based on a carrot and stick approach. People want to pay their debts so that they are attractive to lenders and qualify for superior credit offers. Likewise, people want to avoid becoming delinquent on their debts because they understand that negative marks on their consumer reports will hinder their eligibility for credit in the future. The Proposal ignores these realities.

G. The Proposal Will Harm Small Businesses

Multiple commentators during the SBREFA process explained that the Proposal, even as vague as it is right now, will create significant harms to small businesses. As a threshold matter, the Proposal is unclear on who and what types of businesses will be covered by the expansive definitions of consumer reports and consumer reporting agencies. Additionally, some of the coverage will be triggered by conduct outside of the particular businesses' control. For example, one SER commented that third-party use of certain information would be the ultimate determining factor of whether the provider of such information was a credit reporting agency. Data brokers and furnishers cannot guarantee that the third parties to which they provide information will use it in a narrowly defined way. At most, they can state their expectations via contract and then sue for breach of contract if the third party uses such information beyond the permissible purpose outlined in the contract. But a private breach of contract action will not save a company that is determined to be a CRA by the CFPB's broad language. The practical effect is that nearly every business will

need to assume that they could be considered a CRA at any point in time, and thus must comport with the compliance obligations of a CRA.

The Proposal is also deficient because it lacks the clarity necessary for companies to understand the scope of the proposed rules. For example, multiple SERs commented that the Proposal is unclear regarding what constitutes medical debt. Does medical debt include veterinarian services? Does it include dental or eye care? Does it include counseling and therapy? Would the prohibition against medical debt tradelines apply to consumers who finance cosmetic procedures? And what about consumers who use credit cards to pay for medical care and devices like OTC medications, bandages, or a trip to the dermatologist? The Proposal includes no indication of who and what is covered, leading to regulatory risk and a situation where small businesses will be forced to accept the costs of compliance "just in case."

1. Medical Providers will Lose Revenue

One category of small businesses that stand to lose the most from the Proposal are those providing medical and health care. Doctors, dentists, physical therapists, etc. will undoubtedly suffer severe consequences under the CFPB's Proposal.

For example, medical providers have already seen a marked reduction in successful collection efforts based on the CFPB's public opinion that medical debt should not be reflected in consumer reports.[69] As multiple SER commentators noted, many consumers believe that if a debt is not reflected on their report, they don't have to pay it. And even for those that do understand that they still have a financial obligation to repay, there is no incentive to pay their medical debts if it will not go on their consumer report and impact their future eligibility for and access to credit.

[69] See, Andrew Nigrinis Report, attached.

The result is that medical providers, who have become creditors by nature of allowing consumers to receive healthcare in advance of payment, are put into a position where there is no incentive for consumers to actually pay their bills.

Critically, medical and healthcare providers were not invited to participate in the SBREFA panel and therefore, the CFPB has failed to include input from potentially the most important stakeholders, who will be affected most directly by this Proposal. Not only does the CFPB's arbitrary singling out of medical debt place our healthcare professionals in second class status, but the long-term results will be deleterious to consumers, the very people that the Bureau claims to be protecting.

2. Compliance Costs will be Heavy

Given the nonspecific nature of the Proposal, as well as uncertainty about who it covers, it is difficult for companies to ascertain the full scale of their compliance costs at this time. However, what is clear is that the sweeping coverage and regulatory changes contained in the Proposal will be significant and will harm many small businesses.

For those that might be considered consumer reporting agencies under the new proposed definition, they will have to revamp their entire businesses to comply with the FCRA obligations specific to CRAs. This will be cost prohibitive for many companies. Among other costs, numerous SER commentators explained that the current Proposal would require substantial financial investment, both as an initial matter and for ongoing compliance. Many small businesses would need to hire additional staff to meet the compliance burdens. They would also need to hire legal counsel to help guide them through the regulatory morass. Computer programs and software will need to be updated and companies will need to invest in different technologies. Many will be forced to renegotiate contracts with vendors and third parties to accommodate the changing nature of each business and how they are covered by the FCRA.

As the CFPB has acknowledged, nearly 93% of companies in the debt collection industry fall within the definition of a "small business." Thus, it cannot be overstated that the Bureau's current Proposal will have extremely detrimental effects for nearly the entire debt collection industry and those that they serve, including but not limited to doctors and other healthcare providers.

3. The Proposal will Result in the Reduction or Elimination of Small Businesses

For many small businesses, the Proposal will ultimately result in their reduction or elimination. As mentioned by multiple SERs during the SBREFA panel discussions, when compliance costs become too burdensome, small businesses pay the highest price. They are often forced to reduce offerings or cut entire business lines and products. In the worst case scenarios, they either go out of business completely, or they are acquired by a larger company that has the ability to absorb the compliance burdens. This leads to market and industry consolidation, whereby only the biggest companies, who already utilize vertical integration, are able to survive. Small businesses that operate through the use of many vendors and third parties will simply be unable to compete. The trickle-down effect then also hurts consumers. Where a consumer might have previously had better access to care, they are now dependent on large companies that may not have a meaningful presence in their community. And even for those who still have physical access to care, the reduced competition in the market drives up consumer pricing, meaning that some will be prevented from accessing care because of increasing consumer costs.

The compliance burden is not the only part of the Proposal that will harm small businesses. The practical effects of the medical debt tradeline prohibition will also create significant financial harms to small businesses, some of which have not been included in the SBREFA process.

4. The Proposal Will Harm Consumers

Turning back to the portion of the Proposal that seeks to eliminate the reporting of medical debt, we explain how that particular provision will harm consumers. As detailed above, when lenders, creditors, or even medical providers are evaluating whether to extend financing to a particular consumer, they are handicapped in this process when they only have access to incomplete and inaccurate consumer information.

5. Lack of Access to Care in Rural Montana

When medical debt is eliminated from consumer reports, many consumers believe that it is not owed. And for those that understand they still have a debt liability outstanding, there is no incentive to pay it. The result is that many medical providers will see a marked decrease in their collection efforts. While many healthcare providers currently allow their patients to receive services prior to payment, this option will be eliminated in favor of pre-payment. If doctors and other healthcare workers are unable to collect payment after services have been rendered, they will undoubtedly stop offering services in advance and will only provide services to those who can pay for them beforehand. In a rural area like mine, this could create dire consequences in which consumers are not seeking and receiving preventative care. Furthermore, this means that those consumers who cannot afford the out-of-pocket costs for care will be forced to use high-cost financing methods like credit cards, or in the worst case, forgo medical treatment all together.

While affluent consumers in Montana may be frustrated by the lack of convenience offered through financing options, they will still be able to get the care they need by paying for it upfront. However, for those who do not have the means to pay for an entire procedure upfront, they will be denied access to care. And then, what may have been a small or preventable issue, could grow into a life-threatening emergency, where the individual is forced into emergent care at the ER. In a rural area like Montana, this may mean traveling dozens, or even hundreds of miles.

As a result, not only is this person's health more at risk, but the cost of care has increased significantly. And because hospitals are not able to turn away life threatening emergencies, those providers are forced to absorb even higher costs of care (which otherwise could have been prevented), that are then passed onto society in the form of higher healthcare costs generally. Contrary to the Bureau's stated goal of reducing some of the healthcare burdens, the result of the Proposal will exacerbate the issues that already exist in the healthcare industry.

6. Lack of Care Altogether where Small Businesses have Closed Locations or Entire Lines of Business

In addition to care denial caused by lack of credit and financing options, the Proposal and its associated costs will also harm consumers by eliminating their physical access to healthcare. In Montana, there is a dearth of healthcare access already. It is not uncommon for certain towns to only be served by small medical providers. If the cost of compliance becomes too great, these small businesses will be forced to close or merge with a large company, leading to further market consolidation. Unfortunately, we are already seeing this happen in Montana, even without this change, and the CFPB's Proposal will exacerbate it. Eagle Ambulance stopped providing emergency medical services in Granite County, Montana in July 2023. According to the public article, reimbursement and payment were the main factors.[70] The increased closure of these practices will mean reduced access for consumers.

As mentioned, consumers will now be forced to drive excessive distances to reach care. While this may be a matter of convenience for those who have the luxury of time, it could mean life or death for others. A likely result in rural areas like Montana is that a sick or injured person must drive 45 minutes or more to receive care. If the medical need is great enough to warrant

[70] "Eagle Ambulance to Stop Emergency Medical Services in Granite Co." NBC Montana (July 13, 2023) https://nbcmontana.com/news/local/eagle-ambulance-to-stop-emergency-medical-services-in-granite-co.

ambulance services or an air lift, the consumer is then saddled with excessive costs for that emergency transport.

Even for those small businesses and providers that remain in a community, they may have insufficient staff or funding to be open more than a few days a week. Again, consumers are the ultimate losers in this situation.

7. Absence of Certain Liabilities Paints an Incomplete Picture for Lenders Leading to Risk of Consumers Overleveraging Themselves with Debt that Lenders did Not Know About

Finally, consumers will also be hurt by a system that allows them to overleverage themselves. When any type of creditor evaluates the creditworthiness of a potential borrower, they are not just looking at repayment history and spending behaviors. They are also looking to understand the totality of a consumer's financial liabilities. If a payment obligation is not reflected in a consumer report, the debt-to-income ratio will be artificially deflated.

III. RESPONSES TO SPECIFIC QUESTIONS POSED IN THE PROPOSAL

A. General Response to Questions Concerning Data Brokers

Data brokers and aggregators can be a resource to obtain publicly available information about consumers that can help debt collectors learn more about where a consumer may live and work, and their contact information. Impeding the ability to use publicly available information about consumers through these tools, by adding unnecessary compliance burdens and CRA coverage to data brokers, would make it harder to collect and ultimately lead to an increased cost of credit for all.

B. General Response About Questions Related to Credit Header Data

Debt collectors are already subject to a plethora of state and federal regulations that ensure privacy and protect Personally Identifiable Information ("PII"). Subjecting credit header data to yet another layer of privacy restrictions and compliance would make it extremely complex and burdensome to use it. This would ultimately make it harder to find contact information for

consumers who owe debt, which will lead to an increase in going straight to litigation, and also an increase in the cost of credit when less debt is collected.

The GLBA already imposes obligations on financial institutions regarding disclosures of a consumer's non-public personal information. Specifically, it requires certain disclosures to consumers at the time of establishing a "customer relationship. The GLBA also already requires customers to be provided the opportunity to opt out of the sharing of this information with third parties if the financial institution does or plans to share such information. Debt collectors also already have heightened requirements related to third-party disclosures under the Fair Debt Collection Practices Act ("FDCPA") and Regulation F.

C. General Response about Questions Related to Disputes

Debt collectors do not differentiate between legal and factual disputes. This would be impossible to do because it would require collectors to make legal determinations, which could result in the unauthorized practice of law. However, under the FDCPA, consumers have the ability to dispute a debt orally or in writing. A disputed debt must be marked as disputed in a debt collector's records, and if the debt is subsequently reported to a CRA, the report must reflect the dispute. If a consumer disputes a debt in writing and within thirty days of receiving the validation notice, a debt collector must send verification of the debt to the consumer before continuing collection activity. Under Regulation F, if a debt collector furnishes information to CRAs, the debt collector also has additional compliance obligations under the FCRA if a consumer disputes a debt. Despite rhetoric from the CFPB not acknowledging this, the law already prohibits a debt collector from communicating to any person credit information, which the debt collector knows or should know to be false, including the failure to communicate that a debt is disputed. Therefore, if a debt collector reports the debt to a CRA, either method of dispute requires the debt collector to mark the account as disputed on the consumer's credit report when initially reporting the debt.

A consumer, under current law, does not need to state a reason for the dispute in order to trigger the debt collector's duty to mark the account as disputed when the debt collector reports the debt to a CRA. The disputed status must remain on the report until the consumer no longer disputes the information.

Since debt collectors are already prohibited from knowingly reporting false information, they already have a system in place to address any one-off issues that would result in a so-called "systematic dispute." Any additional regulation in this area would be duplicative to the many protections under the FDCPA and FCRA that do not allow for reporting inaccurate information, and the various legal and practical mechanisms to address it if it happens.

D. **Response to Medical Debt Questions**

Q. Under the proposals under consideration, would you anticipate that medical debt collectors would stop furnishing medical debt collection information to consumer reporting agencies and use alternative debt collection methods? If so, which ones?

- Credit reporting is only one small piece of the collections process. So from that standpoint, this question does not make sense.
- I anticipate increased call campaigns. Under CFPB's Regulation F, it is possible to make seven calls in seven days. Many agencies, like mine, are currently way under that limitation because we use a variety of tools to connect with consumers. Limiting options that have proven successful in delivering needed information to consumers will result in a focus on only calling, or only litigating. It can be expected that there would be an increase in both calls and litigation.
- I also expect a reduction of settlement options to consumers. Due to increased costs of collection and reduction in remedies under the proposal, healthcare clients and agencies would reduce offerings for discounts and settlements.

Q. To what extent do creditors currently use medical debt collection information when making credit eligibility determinations, including to comply with other laws or requirements? Do creditors use medical debt collection information for other purposes in connection with a credit transaction?

- The CFPB's own research says when comparing medical debt to other debt, the medical debt is slightly less predictive, not non-predictive. However, as mentioned in the attached economic analysis, the CFPB's conclusion about medical debt might be based on confounding factors and not causal.
- Even though some CRAs have given less weight to medical debt, they still consider it. Thus, any lender providing credit and relying on credit scores is currently using this information. The CFPB does not appear to have studied this issue at all.
- A large majority of bankruptcies are caused by medical debt; any creditor who wishes to avoid lending to a person about to file bankruptcy should want to be aware of medical tradelines.
- Creditors may use medical debt collection information on credit reports to ascertain those who pay, and those who do not pay their debts. The CFPB needs to study this issue to also determine if consumers lose positive benefits when they pay their medical debt, compared to others who choose not to pay.

Q. What are the pros and cons of an alternative approach of mandating a delay in the furnishing and reporting of medical debt for a particular period of time, and not reporting or furnishing medical debt below a particular dollar amount?

- Learning about a financial obligation on their credit report may be the first time a consumer realizes they need to address this issue with their insurance company, or act to avoid future litigation, or act before a provider drops them as a patient in their practice. Taking away

this option for learning about financial obligations means more consumers will be surprised when the first time they become aware of a debt is after they are served with a lawsuit, that they will need to immediately spend additional resources on to respond to. They also may miss important insurance deadlines and be forced to pay out of pocket for medical care that could have been covered by insurance or charity care.

- Many physician practices already have written into their managed care contracts that if a bill is not submitted to the insurance company within six months (or a specified time period) from the date of service, the insurance company does not have to pay that bill. This is known as denial for missing timely filing.
- Consumers who want to pay but moved and lost the notice have historically used credit reports to locate such balances and creditors. These consumers may not remember or locate the information before they are dropped by their provider for nonpayment. This could lead to embarrassment or hardship that the consumer does not want.
- Healthcare Financial Management Association ("HFMA") and ACA International, in 2020, jointly published the 2nd edition of Best Practices for Resolution of Medical Accounts with input from consumer groups and providers. These Best Practices further enhanced controls over credit reporting, and purposefully arrived at 120 days from the date of first discharge billing as an appropriate time for credit reporting to ensure accuracy in the final adjusted amounts as well as for the consumer to file a claim with the payer if needed.
- As an alternative, adopting a rule to remove a debt once it is paid in full could provide consumer benefits.
- If the Bureau believes that this piece of its Proposal is meant as a solution to medical billing or insurance denial issues, a back-end approach is not a solution to a front-end concern.

This is why as outlined it is problematic when the CFPB wades into issues not under its jurisdiction and without a full picture of the healthcare spectrum.

E. **Rural and Impoverished Areas**

Q. What are the pros and cons of an alternative approach of requiring consumer reporting agencies and furnishers, upon receiving a dispute, to conduct an independent investigation to certify that a disputed medical debt is accurate and not subject to pending insurance disputes?

- As discussed above, there are already many legal requirements and protections in place for debt collectors related to disputes. If an insurance company should be paying and it is disputed, there is already a mechanism and legal requirements in place to address that.
- Mass generic disputes are a problem. They refer to uninformative or generic form letters that appear to originate from consumers, but are actually mailed in bulk by consumer law firms or credit repair companies to debt collection agencies. This tactic includes sending multiple letters disputing information on a consumer's credit report that is often accurately reported. The intended outcome of this tactic is to encourage collection agencies who furnish credit information to either delete all of the consumer's trade lines or report them as "disputed," even in cases where there is no basis for a dispute. Furthermore, this approach is used to inundate collection agencies with disputes expecting that the data furnisher will be overwhelmed by the volume of disputes and fail to appropriately respond. As a consequence of this failure to respond, the credit information provider can then be targeted with an FDCPA or FCRA lawsuit. The practice is harmful to both collection agencies and consumers.
- At a higher level, many of the problems voiced by the CFPB seem like problems with insurance companies that should be fixed on the front end, not on the back end, by adding even more complexity to the credit reporting process. If the Bureau believes that this piece

of its Proposal is meant as a solution to insurance denial issues, a back-end approach is not a solution to a front-end concern. This is also beyond the scope of the CFPB. Many of the complaints the CFPB references related to medical debt are actually in fact related to insurance denials.

F. **Responses to High Level Questions Related to the Entire Proposal**

Q. How, if at all, will the proposal under consideration require your firm to change its operations, products, or services?

- Again, this is an approximation because the CFPB has not provided clear definitions or specifics in many areas. However, I would expect to increase staff by approximately 10%, which would equate to more than $100,000 per year.
- One particular cost arises from the Ninth Circuit Pintos decision. *Pintos v. Pacific Creditors Ass'n*, 605 F.3d 665 (9th Cir. 2009). This case says that collectors do not have a permissible purpose to acquire consumer reports as a result of involuntary transactions, like debts arising from parking or traffic tickets. Any collection agency with a "government" client must be aware of issue. The cost of training for collection for government clients would increase exponentially. Information would be severely limited by *Pintos* under FCRA, and the Proposal would now put even public information that is sold/purchased also under the FCRA. As just one example, I would need to create a training program to increase the amount of information a police officer enters into its system at traffic stops, and in instances of other law violation. This would also have other outcomes further down the line, such as increasing the time of each traffic stop, potentially increasing the need for additional public safety officers in America. This is just one example, so you can imagine how this impacts a variety of debts and processes when severely limiting public information.

- There would be significant costs associated with making compliance changes, including rewriting policies and procedures, re-negotiating contracts with all medical clients, employee training, and system updates. If ultimately it became more difficult to collect, and there was a need for an increase in litigation, hiring attorneys and retaining law firms would also be a significant cost increase.
- I also anticipate having to hire additional staff to make more phone calls and send more letters.

Q. What do you anticipate will be the initial and ongoing costs to your firm, if any, of complying with the proposal under consideration? If applicable, how do those costs compare to your firm's current costs to comply with the provision(s) of the FCRA or Regulation V related to the proposal under consideration? Please quantify all such costs by type and amount to the extent possible.

- We want to again point out that since the CFPB has been unclear on definitions, it is impossible to give an accurate estimate. As discussed in the attached economic analysis, it is expected that there would be a drop of 10 percent or more in collections, which equates to hundreds of thousands of dollars even for a smaller agency like mine, varying on how things are defined.
- The Bureau's Proposal would essentially make medical debt payment voluntary. The economic consequences of this will be massive and cannot even be quantified in the short time frame provided for comments.
- For many ACA members and creditors, adding or expanding legal programs would be a significant cost. Hiring in-house or outside law firms, and the cost of litigation may be approximately a million dollars a year, and much more for businesses with larger volumes of healthcare debt.

Q. What aspect or aspects of complying with the proposal under consideration would be the most challenging?

- Without the ability to credit report medical debt (in a meaningful way), it would be difficult to get consumers to pay or resolve their bills when they were paid by the insurance companies directly. When the insurance company sends a check to a consumer, they don't always use that money to pay the provider.
- In an environment where employment hiring is extremely challenging, it would be severely difficult to increase my staff by 10% within a short time period. I am concerned about attrition in current staff, by having limited resources due to loss of ability to collect. I would need ample time to prepare my company and my clients for such a large change.
- This would fundamentally change the relationship of clarity of information to consumers and creditors, charge-offs would be increased, and available information would be restricted.
- System Changes and compliance update costs.
- New legal costs.

Q. What alternative approaches, if any, should the CFPB consider in lieu of the proposal under consideration?

- The No Surprises Act went into effect on January 1, 2022, which will reduce the level of emergency services costs and out-of-network insurance bills. This will reduce the easier to challenge medical tradelines that may be driving the Bureau's observed results. The No Surprises Act and Regulation F have already reduced the level of medical debt tradelines on credit reports. Both of these just recently went into effect. We suggest the CFPB wait and study this issue to determine if there is a problem before moving forward.

- If there are issues in Regulation F that need to be fixed, that is under the CFPB's jurisdiction, unlike medical debt or healthcare policy. Regulation F just recently went into effect, so the CFPB should give the market several years to see how it has changed things, as is standard for many new regulations.

Q. Other than compliance costs, what costs, burdens, or unintended consequences should the CFPB consider with respect to the proposal under consideration? Please quantify if possible. What alternatives, if any, would mitigate such costs, burdens, or unintended consequences?

- Reduction in funds to government entities at the state and federal levels. Increased need for funds out of the general budget.
- Financial institutions currently have a "cost of living factor" in their lending decisions. The financial institution I met with in Montana told me it would likely increase its "cost of living factor" to account for this change. Should that happen, there is an unintended consequence for consumers who do not have medical debt in that they will have to have higher earnings for the same loan amount, thus reducing their access to credit.
- Consumers who pay an out-of-pocket premium on health insurance may choose to no longer carry health insurance if medical debt is no longer credit-reported. Even for individuals who qualify for Medicaid, they may not see the value of taking the time to apply any longer if there is no impact on their credit score. The unintended consequence may be a large reduction in insurance dollars to Montana hospital systems, leading to a reduction in services or staff available to our Montana consumers (those who do pay their medical debts included). Worst case, hospital or provider closures in our rural communities, where it can be more than 100 miles to the next available facility.

- The social costs of litigation will be increased and borne by consumers. As more debt collectors and health care providers turn to the legal system, the consumers the Bureau's rule was intended to benefit will be forced to pay for litigation and court expenses.
- If there is no litigation over medical debts, then the Bureau's Proposal would make medical debt payment voluntary. Given that litigation is expensive for all parties (including debt collectors), if litigation is never used as a substitute for the loss of credit reporting, the result would be a voluntary payment system. Some consumers will pay their debts, as there are strong cultural norms for honoring debts. But this would quickly unravel the medical debt market. If health providers cannot expect to be paid for services rendered (even if it is just a deductible or co-payment), they will react to protect themselves. One option could be to raise prices to account for losses due to uncollectable medical debt. Another option would be to refuse seeing patients who require financing. Alternatively, they could require collateral or reject financing for patients whose credit scores are below a certain threshold. It's realistic to expect some mixture of these options to unfold in the market. All these scenarios are inefficient and bad for consumers.

Q. Are there any statutes or regulations with which your firm must comply that may duplicate, overlap, or conflict with the proposal under consideration? What challenges or costs would your firm anticipate in complying with any such statutes or regulations and the CFPB's proposal under consideration?

- The FDCPA, the FCRA, GLBA, the Health Insurance Portability and Accountability Act, several other privacy laws, and many state laws already address the CFPB's concerns related to reporting of inaccurate information and protecting consumer privacy. Duplicative regulations create a number of compliance burdens including rewriting policies and procedures, employee training, and system updates. If ultimately it became more difficult

to collect, and there was a need for an increase in litigation, hiring attorneys and retaining law firms would be a significant costs increase.

Q. What factors disproportionately affecting small entities should the CFPB be aware of when evaluating the proposal under consideration? Would the proposal under consideration provide unique benefits to small entities?

- All of the outlined compliance and costs burdens are exacerbated for small businesses who have fewer staff members and less in-house legal counsel. In some instances very specific client bases will be disproportionally impacted, and fewer resources will be available to devote to duplicative compliance requirements.

G. **Other Questions Related to Impact, Implementation and Costs**

Q. Please provide input on an appropriate implementation period for complying with a rule finalizing the proposals under consideration. Are there any aspects of the CFPB's proposals under consideration that could be particularly time consuming or costly to implement? Are any of these challenges particular to small entities? Are there any factors outside a covered entity's control that would affect its ability to prepare for compliance?

- At least three years. This is a massive change, so small entities will need as much time as possible, and could go out of business regardless of what the timeframe is.

Q. Please provide feedback on the CFPB's understanding of the small entities that could be affected by the proposals under consideration.

- As discussed above, the CFPB does not appear to have any healthcare or housing providers, both groups that could be impacted by these changes.

Q. For the proposals under consideration that are relevant to their businesses, small

entity representatives are encouraged to provide specific estimates, information, and data on the projected one-time and ongoing costs of compliance if the proposals were adopted. Information and data on current FCRA compliance costs (baseline costs) will be valuable as well.

Q. For each of the proposals under consideration above, do you expect that your firm would restrict or eliminate any product or service offerings to comply with the rule? If so, how would the proposals impact those products or services?

- My agency would be looking at removing its offering of a Public Record Bulletin.
- My agency would look at the cost/benefit of certain medical and governmental debt and could restrict certain accounts or balances from acceptance to our listing process.

Q. For each of the proposals under consideration above, please provide information, data, and/or estimates of impacts to your firm's business operations and revenue, including to both current operations and revenues and to future operations and revenues that could potentially be lost.

- See attached economic analysis for a scientific discussion of potential costs impacts.

Q. What other, additional impacts do you think might occur that have not been covered above?

- Impact to the consumers in rural Montana who rely on access to credit for tires, propane, and buy-here, pay-here auto programs. Without the ability to differentiate consumers, these industries will change who can utilize these services on credit, having a large impact in Montana and throughout the United States.
- Black Market impact. Access to credit will likely be reduced, leading consumers to the black market for healthcare items.
- Consumers preparing for Bankruptcy- someone with substantial medical debt who is preparing for bankruptcy, may show a 700 credit score. This person could be least

sophisticated and roused into purchasing a boat, car, or item that they do not need and then filing bankruptcy on said items, increasing the cost to all Americans by default.

- The CFPB will harm more consumers than it will 'help'. If medical items are removed from credit reports for financial lending decisions, then lenders will statistically be discriminating against those who actually are 800 credit scores, this would degrade the credit score and make everyone an 800, those who really are 800 will pay a 'tax' for those who aren't.

Q. What benefits do you expect small entities may experience from any of the proposals under consideration listed above?

- None – we think instead there are many unintended consequences as outlined above.

Q. Would the proposals under consideration affect the cost and availability of credit to small entities?

- Yes, see attached economic analysis for a scientific discussion of estimated costs.

IV. THE BUREAU MUST BEGIN ANEW TO DRAFT A RULE THAT IS SUPPORTED BY DATA, RELIABLE STUDIES, AND ADDRESSES THE STATUTORY MANDATE

In closing, I do not believe the CFPB has the solution in this Proposal. The issues described in the consumer reporting rulemaking have many factors that require attention in developing healthcare policy solutions. Unfortunately, that is not under the CFPB's jurisdiction and it would be extremely dangerous for the health of Americans if the Bureau attempts to make changes without looking at the larger picture and policy questions.

V. THE PROPOSAL LACKS DATA, RIGOROUS ANALYSIS, AND MAKES UNFOUNDED ASSUMPTIONS

Separately attached, please see economic analysis provided by Dr. Andrew Rodrigo Nigrinis, a former economist within the CFPB's Office of Enforcement.

ARLINGTON COMMUNITY
FEDERAL CREDIT UNION

November 6, 2023

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

RE: FCRA Proposals and Alternatives Under Consideration

Dear Director Chopra:

On behalf of Arlington Community Federal Credit Union (Arlington Community FCU), and in my role as a Small Entity Representative (SER), I am writing in response to the Consumer Financial Protection Bureau's (CFPB or Bureau) Outline of Proposals and Alternatives Under Consideration for the Small Business Advisory Review Panel for Consumer Reporting Rulemaking ("the Outline"). The proposed changes to the interpretation of the Fair Credit Reporting Act (FCRA) would have wide-ranging negative impacts on small financial institutions, including Arlington Community FCU.

I have been with Arlington Community FCU for 13 years as the Chief Lending Officer. We exist to serve members and small businesses in Northern Virginia. Our service mission is to hear our members' stories and provide solutions that will empower their financial lives. Arlington Community FCU is a low-income designated credit union (LICU) and was recently approved for a Community Development Financial Institution (CDFI) grant to expand our lending programs to low-income households. We are submitting a second CDFI grant application for 2024 funding specifically for lending to women- and minority-owned businesses.

General Comments

I am a SER because I have seen the disproportionate impact of new regulations on small businesses, especially credit unions, and believe it is important for to have representation in the administrative rulemaking process. The SBREFA program is an important step in giving small businesses both a voice and recourse within the regulatory process. While proud to be part of this process, I was disappointed that the CPFB treated the input as a "check the box" exercise that was necessary to move forward with the Outline. Many SERs took valuable time away from their day jobs to explain the significant effect the potential rules derived from the Outline would have on their businesses and that information should be the basis of any future rules. It was not possible to estimate cost implications on Arlington Community FCU because there was simply not enough information in the Outline to project costs. For that reason, I would endorse another round of SER panels once the Bureau can share more specific proposals.

Timeline Considerations

The timeline for providing feedback was too short. The circulation of the Outline was only two weeks before the original scheduled pre-panels, and the delay necessitated by the threat of a government shutdown allowed only an extra week of review. Although the additional week for providing written comments is appreciated, SERs were provided less than three weeks from the final panel to submit written comments. If the Outline had provided sufficient information to develop cost estimates, two and a half weeks would still be insufficient time to execute and describe those calculations.

The FCRA Only Requires Factual Issues to be Resolved in Disputes

Legal Disputes

As I noted in the panels, we review every dispute thoroughly. We look at all the notes in the systems, documents, and processes. Integrity is one of our core values and it is our goal to uncover any error or miscommunication in the process so we can resolve things appropriately and quickly. We are not large enough to be able to afford an attorney on staff. If the Bureau were to require furnishers such as small and medium sized credit unions to resolve all legal issues presented in disputes, Arlington Community FCU, and many other small credit unions would have to either hire legal counsel or obtain outside counsel at significant cost. The example provided in the Outline, to make FCRA dispute provisions cover state foreclosure law interpretations disputes regarding whether a reported debt is collectible, would require access to attorneys barred in every state. This is a decision best left to the courts.

Systemic Disputes

The Outline states that the Bureau is considering rules regarding how furnishers would investigate and address systemic issues, including providing consumers with a specific process to notify furnishers of what they feel are systemic issues. Credit unions, including my own, already review, address, and correct systemic issues to any impacted member. Investigation and review of whether all disputes are systemic issues would certainly incur additional and cost. It is unclear what the benefits of sharing information regarding systemic issues with consumers would be, but it is unlikely that they would outweigh the burdens imposed on smaller credit unions.

Credit Headers Should Not be Classified as Consumer Reports

Credit unions have historically used credit data headers for identity verification. Credit unions require identify verification for requests for credit, increasing a credit limit, or adding a card to an account. It aids in fraud detection and prevents identity theft. It is the fastest way to identify a consumer and vital to the credit union's Bank Secrecy Act and Know Your Customer requirements. Asking consumers for additional identity verification slows the approval process and increases the vulnerability of such sensitive identity information. Further, when consumers become accustomed to sharing their information freely, they are more likely to share with a bad actor. Making credit headers a consumer report would require credit unions to take on more time and more cost to verify their own customers and slow the process for the consumer.

Creditors Should be Permitted to Continue Using Medical Debt Information

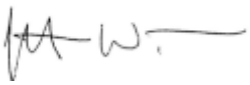
Creditors should have the option to use medical debt information to assess a borrower's ability to repay. Arlington Community does not currently use medical debt in underwriting but that is a risk that was assessed and approved by the credit union's leadership. Other credit unions have different considerations, including fields of membership,

products, missions, and risk tolerances that may impact their decision to include certain information like medical debt in their underwriting. They may not have the ability to disregard significant amounts of debt when calculating repayment and will want to include medical bills. The Bureau should not supplant the judgment of credit union leaders when estimating the appropriate amount of risk for their organizations.

The CFPB Should Provide Covered Data Providers with Ample Time to Implement a Future Proposal

As a furnisher, my organization would need at least 24 months to implement any final rule. If the rule includes any change to the definition of credit reports or imposes legal dispute requirements on dispute resolution, we may need additional time. As previously noted, the Outline was vague, and it has been impossible to estimate what the cost and time of implementation might be with so many distinct variables.

Sincerely,



Jim Wilmot
Chief Lending Officer
Arlington Community Federal Credit Union

November 6, 2023

Via Electronic Delivery to
CFPB_consumerreporting_rulemaking@cfpb.gov

Consumer Financial Protection Bureau
c/o Comment Intake Request
1700 G Street, NW
Washington, DC 20552

Re: Small Business Advisory Review Panel for Consumer Reporting Rulemaking – Outline of Proposals and Alternatives Under Consideration

To Whom it May Concern:

MicroBilt Corporation ("MicroBilt") submits this comment letter in response to the Small Business Review Panel for Consumer Reporting Rulemaking – Outline of Proposals and Alternatives Under Consideration ("Outline") from the Consumer Financial Protection Bureau ("CFPB"). As a small entity representative ("SER") that has engaged with the CFPB regarding the Outline, MicroBilt appreciates the opportunity to provide our view about the significantly negative impact these proposals will have on consumers and our business.

MicroBilt provides a single source solution of decision critical information that assists businesses in reducing risk and making informed decisions. We offer a comprehensive suite of products and services designed to help small-to-medium sized businesses manage risk, prevent fraud and optimize their operations. Our solutions, including consumer reports, background information and public records, identity verification and business reports and business credentialing services, are all tailored to meet the unique needs of our clients. MicroBilt is also a reseller of consumer reports furnished by the nationwide consumer reporting agencies ("NCRAs") and maintains its own database of information from which it provides consumer reports.

As a leader in alternative credit data and risk management solutions, MicroBilt has over forty-five years of experience in the consumer reporting industry. The broad and drastic changes that are being contemplated by the CFPB in the Outline upend well-established legal and regulatory processes under which we operate, and precedents that have guided MicroBilt for decades with little to no explanation as to why those changes are needed. The ultimate purpose of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA") is to ensure small businesses have a voice in the regulatory process and that regulations are designed to minimize their impact on small businesses. It is in that spirit that MicroBilt unequivocally states that many of these proposals will not only significantly increase the complexity and cost of operating our business, but we believe it will also have far-reaching implications that will ultimately harm consumers and their ability to obtain financial services.

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This letter details specific concerns with the SBREFA process and the Outline's proposed changes to the way certain data is used, the consumer dispute process, and the liability companies have in the wake of security breaches.

I. The Brief Timeline to Provide Comment and the Lack of Specificity in the Outline Limits MicroBilt's Ability to Provide Detailed Feedback on Certain Proposals.

As noted above, MicroBilt appreciates the opportunity to participate in the SBERFA process. The brief timeline for engagement with SERs, however, limits our ability to provide detailed feedback on expansive proposals that would fundamentally change the way MicroBilt operates. For example, even with the one-week extension, we have not had sufficient time to thoroughly study the changes MicroBilt would have to make in response to potential changes to how "credit header" data is used or the potential cost increases of significantly expanding the dispute process. Unlike larger companies, MicroBilt does not have resources and capacity to deliver meaningful data and statistics that the CFPB could find useful in analyzing potential rulemaking within the allotted time. As it stands now, the SBREFA panel will have more time to publish a final report than MicroBilt had to analyze and comment on the Outline.

Further, the lack of clarity of the proposals itself, and the purposes that underlie them limits the kind of feedback the CFPB will receive. The Outline lacks details that are needed for MicroBilt to fully explain why a proposal would increase our costs or affect our business model. For example, the CFPB mentions "systemic issues" several times but fails to define or even hint as to what a systemic issue is and how it differs from other issues that consumers report to consumer reporting agencies and furnishers.

This lack of clarity is further complicated by the fact that the CFPB does not offer specific reasons why certain proposals are needed in the first place. For example, the CFPB does not articulate why changing the use of credit header data is necessary. Without articulating concrete concerns, it is challenging, if not impossible, for MicroBilt to propose alternative proposals for the CFPB to consider or to scope out impacts. This ultimately defeats the entire point of the SBREFA process.

II. Credit Header Data is Vital to Fraud Prevention and Should Not Be Regulated by the Fair Credit Reporting Act ("FCRA").

The Outline notes that the CFPB is considering a proposal to treat credit header data as a "consumer report." It is important to note that credit header data is consumer-identifying data and using the term "credit header" is for convenience. The term does not mean it is consumer credit report data. Rather it is a consumer's current and former addresses, Social Security number, and similar identifying information. That information may be obtained from many sources, including public records and consumer reporting agencies. Therefore, it is not information that relates to the "seven factors" that define "consumer report" in FCRA as it does not impact a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. Treating this data as a consumer report will make it nearly impossible to use in fraud prevention because the requirements of the FCRA would unnecessarily restrict data sources, which will allow fraudsters to exploit consumers.

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MicroBilt uses credit header data to validate a consumer's personally identifiable information ("PII") and match it to known fraudulent activity that used the same identifying data. The information is collected for non-FCRA purposes from various sources and is used to, for example, help ensure consumer payments are directed to the appropriate bank account, help prevent unauthorized transactions, help prevent fraud, identity theft or to validate the identity of a consumer in accordance with "Know Your Customer" rules. MicroBilt even provides ID verification for local, state and federal agencies for child support, student finance and state tax payments.

These fraud detection and identity theft prevention services not only protect consumers, but they also protect businesses, which ultimately lowers the cost of services for consumers. These services help businesses manage their losses by limiting the risk of fraud. As a third-party service provider, MicroBilt provides these services to small businesses that do not have the resources to build internal fraud detection and identity theft prevention tools. Restricting access to credit header data would disproportionately impact those businesses.

On the other hand, subjecting credit header data to the FCRA would introduce many restrictions that would only benefit fraudsters. Restricting the use of credit header data to only those permissible purposes under the FCRA would interfere with MicroBilt's ability to help customers detect fraud patterns and associations where credit header information is vital. Even if there was an FCRA permissible purpose to use the information, any security freezes placed on the credit header data would prevent its use for fraud and identity theft prevention. Further, adding the requirements of the FCRA dispute process where consumers could challenge credit header data as if it were a consumer report would allow fraudsters to improve their chance of success with future fraud schemes. By its very nature, credit header data is difficult to verify because, unlike a consumer report tradeline, the data is derived from a wide variety of sources.

Requiring MicroBilt to handle disputes of credit header data, even if it had the ability to do so, would also be expensive and would likely push many of MicroBilt's customers and data providers out of business—we have already heard from several of them in the SBREFA panel meetings that they are not able to take on the cost of implementing such a process. MicroBilt already absorbs the expense caused by the abusive tactics of fraudsters and credit repair organizations; expanding the scope of disputes would exacerbate it. To the extent such a dispute would not be something MicroBilt would be able to address, that information would be sent upstream to the originating NCRA, further clogging the system with additional disputes that must be resolved in less than a month's time. This has drastic implications for all consumer reporting agencies because of the increase in dispute volumes alone.

The CFPB has not explained why this proposal is necessary except to provide, without evidence, vague references that the data is "more frequently used for eligibility determinations." The CFPB surely has other, more tactical tools available to help stem this concern instead of broader, systemic change. Without credit header data, there is no reasonable alternative to match and verify the identity of consumers in an efficient and effective manner. Because the information contained in credit header data is widely used and replicated in billions of transactions, it is the core piece of any identity validation tool. Further, although the CFPB is much less clear on why this change is necessary, regulators and courts have been clear for decades that credit header data is not a consumer report. Until there are reasonable

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alternatives to the use of credit header data in fraud detection and identity theft prevention are available, this precedent must not change.

III. The Proposal Limiting the Use of Aggregated and Anonymized Data Would Stifle Innovation and the Effectiveness of Financial Products.

Although there is little detail, the Outline states that the CFPB would like to "clarify whether and when aggregated or anonymized consumer report information constitutes or does not constitute a consumer report." Outline at 11. Such a proposal runs counter to the definition of a consumer report and the spirit of the FCRA. It would also dramatically change the way companies improve and innovate products and services.

At its core, the FCRA is a consumer privacy statute, but is intended to regulate only a class of data on consumers – that which is of the most sensitive financial nature about a particular consumer. Therefore, if data does not pertain to an identifiable consumer, the FCRA does not apply.[1] That is consistent with the interpretation of regulators and courts for over forty years.[2] MicroBilt uses aggregated and anonymized data to gain insight and train models for its customers. We also use anonymized data sets to evaluate criteria and other standards. Financial institutions use aggregated and anonymized data sets to satisfy their due diligence requirements to vet vendors like MicroBilt under federal law. Without the ability to analyze the products to be purchased, the financial institution would not be able to test the sufficiency of the data and its impact on its business *without pulling live credit data on consumers in real time*. As the CFPB is aware, there is no permissible purpose for testing or evaluating providers or products. The current proposal cannot be the right balance. This information is crucial to improving the effectiveness of our products and services.

Further, we use the data to research products and identify consumer trends, which ultimately leads to newer and better products for consumers and businesses. For example, the use of aggregated and anonymized non-traditional payments data helped companies develop financial products for underserved consumers who do not have access to traditional financial products and services. Limiting the ability to do these kinds of analyses would slow down the progress that has been made on creating more opportunities for every consumer to meet their financial needs. As with credit header data, the CFPB offers little explanation as to the problem this proposal is trying to solve, which makes it challenging for MicroBilt to offer an alternative for the CFPB to consider.

IV. Adding FCRA Liability to Data Breaches Would Drive Up Insurance Costs.

The Outline indicates that the CFPB is considering making the "failure to protect against unauthorized access to consumer reports by third parties" a violation of FCRA sections 604 and 607(a). Outline at 14. While such a proposal does nothing to add to the obligations or standards businesses must follow to safeguard consumer report data, it adds a significant amount of liability to scenarios that already carry significant scrutiny and penalties under existing law.

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[1] See 15 U.S.C. § 1681a(d)(1); *McCready v. eBay, Inc.*, 453 F.3d 882 (7th Cir. 2006) (holding that a consumer under the FCRA must at a minimum "be an identifiable person").

[2] 55 Fed. Reg. 18804 (May 4, 1990); *Tailford v. Experian Information Solutions, Inc.*, 26 F.4th 1092 (9th Cir. 2022).

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MicroBilt is proud to invest substantially in a comprehensive approach to data security to ensure it safeguards consumer information. We have implemented security policies and procedures, regularly conduct risk assessments and perform security testing. We audit our security controls using internal and third-party auditors. We use a web isolation security platform to ensure we protect our network internally, and continuously monitor our network environment to detect suspicious activity. We also implemented a process to ensure security updates and patches are timely to fix known vulnerabilities.

In implementing these practices, MicroBilt follows existing state and federal requirements, including the Safeguards Rule,[3] promulgated under the Gramm-Leach-Bliley Act ("GLBA"), and the New York Cybersecurity Requirements for Financial Services Companies.[4] These statutes are broad and hold businesses like MicroBilt accountable for a breach that exposed consumer report data. There are also state data breach laws that govern MicroBilt and others. Indeed, the CFPB, Federal Trade Commission ("FTC"), attorneys general, other state regulators and consumers have repeatedly shown that they have sufficient tools to hold companies accountable under existing law.

As a result, SERs, even industry leaders like MicroBilt, have found it difficult to find cyber insurance coverage. In our last renewal, our cyber insurance costs increased by 300% and our deductible increased by 200% even though we have not had a reportable incident. Because we are a small business, we are not able to self-insure and need to maintain coverage to meet fiscal and contractual obligations to our customers. Several cyber insurance underwriters that were in the market a few years ago have now exited the market. The proposal would significantly add to the challenge in obtaining insurance coverage and likely make it nearly impossible. This ultimately impacts our ability to do business and limits competition and new product innovation. This would also likely drive a number of smaller companies out of the industry entirely, further consolidating the market and stifling competition.

Ironically, other proposals in the Outline would require MicroBilt to retain more sensitive consumer report data, while this proposal increases the exposure and potential liability for retaining that information. Businesses should be doing all we can to reduce that exposure and risk because, as the CFPB knows, bad actors frequently target even the most robust security systems and are, at times, successful.

V. The Proposed Changes to the Dispute Process Would Dramatically Increase Operational Costs and Increase Abusive Tactics.

The CFPB is considering proposals to change the dispute process by requiring consumer reporting agencies to adjudicate legal disputes during a reinvestigation and adding a new process to address potential "systemic issue" disputes. These changes would increase the cost of an already burdened dispute process, while providing little value to consumers.

As it relates to disputes involving legal matters, MicroBilt has already explained during the SERs hearing that we handle all disputes in the same manner, regardless of the stated basis of the dispute. MicroBilt does as much as we can to reinvestigate disputes with the information available to us. When a

[3] 16 C.F.R. § 314.
[4] 23 NYCRR Part 500.

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consumer, however, raises a legal challenge to the validity of a debt, there is no way for MicroBilt to verify the information. Adjudicating legal disputes is something MicroBilt is not equipped to handle and would take a robust legal team to be able to implement. If this process were required, MicroBilt would likely delete the disputed information rather than attempt to adjudicate it. This would result in inaccurate consumer reports and fraud. Further, the cost of building that team and implementing a process would be cost-prohibitive to pursue. Several U.S. circuit courts have agreed that adjudicating legal disputes should not be our responsibility, especially given the resources and limited information that consumer reporting agencies have when reinvestigating a dispute.

On the flip side, the CFPB has provided little information as what it considers to be "systemic issues" and how it might propose MicroBilt handle them. The vague nature of the proposal reflects the complicated nature of a "systemic issue." Systemic issues, like disputes, are likely to be highly fact specific. Consumers rarely have a way of knowing if their dispute is "systemic," and even businesses have a challenging time identifying them without observing incidents over a period of time and reviewing multiple indicators that an issue extends beyond a handful of consumers. Because this new process would likely require some kind of escalated review to determine if a dispute is systemic, consumers (and particularly credit repair organizations and consumer litigation attorneys) would designate nearly every dispute as a "systemic issue." That would invariably stall an already overburdened system. Indeed, we estimate that MicroBilt would have to double its disputes team if the proposals were adopted.

MicroBilt spends, on average, approximately 10 to 15% of annual revenues for security, compliance and consumer services. Nevertheless, we have seen a dramatic increase in abusive tactics by attorneys and credit repair organizations. These tactics have clogged the dispute system with frivolous disputes and increased the cost of the process. This dramatic rise in dispute submissions was not caused by an increase of inaccurate data, it is part of an intentional strategy by attorneys and credit repair organizations to harass consumer reporting agencies into making changes to consumer reports that artificially improve credit scores and generate fees. For example, MicroBilt has processed four times the number of "form disputes" from credit repair organizations than we did just last year. These letters look identical—they include the same grammatical errors, cite the same incorrect information about the FCRA and request the same outcome on behalf of consumers. This increase has contributed to the need for MicroBilt to increase resources and invest even more in the dispute process. For those furnishers and CRAs that cannot keep up with this huge uptick in disputes, their often truthful and accurate information is removed from the system. While at first blush this may seem helpful to the consumer, it can in fact result in an inflated appearance of credit worthiness or credit capacity that results in a consumer becoming over-leveraged. While the CFPB has brought enforcement actions against certain credit repair organizations, a significant number of bad actors remain and continue to make it harder for consumers with legitimate disputes to have their disputes appropriately reinvestigated. As a result, any changes to the dispute process should focus on reducing abusive tactics, and not incentivizing them.

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VI. Conclusion

MicroBilt again appreciates the opportunity to engage in this process as a SER and hope the CFPB gives these comments serious consideration in its efforts to minimize the potential impact of new regulations on small businesses. We would be happy to discuss any of these issues further.

Best,

Walter R. Wojciechowski, CEO

Walt Wojciechowski
Chief Executive Officer
MicroBilt Corporation

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APPENDIX B: LIST OF MATERIALS PROVIDED TO SMALL ENTITY REPRESENTATIVES

In advance of the Panel Outreach Meetings, the CFPB provided each of the small entity representatives with the materials listed below. These items were also made available on the CFPB's website at https://www.consumerfinance.gov/rules-policy/small-business-review-panels/small-business-review-panel-for-consumer-reporting-rulemaking/.

- Small Business Advisory Review Panel for Consumer Financial Protection Bureau Consumer Reporting Rulemaking—Outline of Proposals and Alternatives Under Consideration (Sept. 15, 2023) (see Appendix C).

- Small Business Advisory Review Panel for Consumer Financial Protection Bureau Consumer Reporting Rulemaking—Discussion Guide for Small Entity Representatives (Sept. 15, 2023) (see Appendix D).

APPENDIX C: OUTLINE OF PROPOSALS AND ALTERNATIVES UNDER CONSIDERATION

See attached.

SMALL BUSINESS ADVISORY REVIEW PANEL FOR CONSUMER REPORTING RULEMAKING

OUTLINE OF PROPOSALS AND ALTERNATIVES UNDER CONSIDERATION

September 15, 2023

Table of Contents

I. Introduction

Consumer reporting agencies collect and assemble or evaluate information about, among other things, the credit, criminal, employment, and rental histories of hundreds of millions of Americans. They package this information into consumer reports, which are restricted for use typically to creditors, insurers, landlords, employers, and others making eligibility and other decisions about consumers. This collection, assembly, evaluation, dissemination, and use of vast quantities of often highly sensitive personal and financial data about consumers poses significant risks to consumer privacy.

In 1970, Congress enacted the Fair Credit Reporting Act (FCRA), one of the first data privacy laws in the world, to regulate the consumer reporting market.[1] Before passing the FCRA, Congress investigated the growing data surveillance industry and found that, while consumer reporting agencies had assumed a vital role in assembling and evaluating consumer credit and other information on consumers to meet the needs of commerce, there was a need to ensure that they acted fairly, impartially, and with respect for consumers' right to privacy. In 1969, Senator Proxmire introduced S. 823, the Fair Credit Reporting Bill, which eventually became the FCRA.[2] When introducing the bill, Senator Proxmire described the problem as follows:

> Although a number of congressional committees have recently begun to investigate the activities of credit reporting agencies, most Americans still do not realize the vast size and scope of today's credit reporting industry or the tremendous amount of information which these agencies maintain and distribute. For example, the Associated Credit Bureaus of America have over 2,200 members serving 400,000 creditors in 36,000 communities. These credit bureaus maintain credit files on more than 110 million individuals and in 1967 they issued over 97 million credit reports. Credit bureaus typically supply information on a person's financial status, bill paying record, and items of public record such as arrests, suits, judgments and the like. The information is furnished to creditors for the purpose of extending credit.
>
> . . . .
>
> While the growth of this information network is somewhat alarming, what is even more alarming is the fact the system has been built up with virtually no public regulation or supervision. A few years ago, the executive branch proposed the establishment of a national data bank with personal information on every U.S. citizen. The "big-brother is watching" overtones of this project plus congressional opposition led to its quick abandonment. Yet we are building roughly the same type of data bank under private auspices but with none of the public safeguards.
>
> I do not mean to suggest that credit reporting agencies perform no worthwhile function or that we should arbitrarily curb their growth. Credit reporting agencies

[1] 15 U.S.C. 1681 *et seq*. The full text of the FCRA appears in Appendix A, below.

[2] 115 Cong. Rec. S1168 (daily ed. Jan. 31, 1969), https://www.govinfo.gov/content/pkg/GPO-CRECB-1969-pt2/pdf/GPO-CRECB-1969-pt2-8.pdf.

> are absolutely essential in today's credit economy where consumer debt has passed the $100 billion mark. The credit reporting industry has come into being and has grown in response to the demand by retailers, banks, and other financial institutions for sound information about the credit worthiness of consumers. Creditors need this information, and they need it as quickly as possible, in order to make sound credit decisions. And consumers need an efficient credit reporting industry in order to obtain credit promptly with a minimum of redtape [sic].
>
> Therefore, my objective in introducing the fair credit reporting bill is to correct certain abuses which have occurred within the industry and to insure that the credit information system is responsive to the needs of consumers as well as creditors.[3]

Confidentiality was one of the main concerns expressed by Senator Proxmire in his statement introducing the bill. Senator Proxmire stated:

> The fact that credit reporting agencies maintain files on millions of Americans, including their employment, income, billpaying record, marital status, habits, character and morals is not in and of itself so disturbing. What is disturbing is that this practice will continue, and will have to continue, if we continue to have an insurance system and a consumer credit system of the kind we have. What is disturbing is the lack of any public standards to insure that the information is kept confidential and used only for its intended purpose. The growing accessibility of this information through computer- and data-transmission techniques makes the problem of confidentiality even more important.[4]

The FCRA was designed to allow certain Congressionally sanctioned uses of consumer report data to continue, but to strictly prohibit other uses of consumer report data. In addition, Congress created accuracy requirements and gave consumers a right to see their data, and due process rights to dispute inaccurate or incomplete information in their files.[5] The FCRA and its implementing regulation, Regulation V, 12 CFR part 1022, have been amended from time to time since the statute's enactment and impose obligations on consumer reporting agencies, entities that provide information to consumer reporting agencies (*i.e.*, furnishers), and users of consumer reports.[6] The Consumer Financial Protection Bureau (CFPB) has rulemaking, enforcement, and supervisory authority to administer the FCRA.[7]

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[3] Fair Credit Reporting Bill, 115 Cong. Rec. S2410-11 (daily ed. Jan. 31, 1969).

[4] *Id.* at S2413.

[5] 15 U.S.C. 1681e(b) (accuracy procedures), 1681g (disclosures to consumers), 1681i (procedures in case of disputed accuracy).

[6] Regulation V, www.ecfr.gov/current/title-12/chapter-X/part-1022.

[7] Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Public Law 111–203, section 1088, 124 Stat. 1376, 2086 (2010); *see also* Dodd-Frank Act sections 1024, 1025, and 1061, 124 Stat. 1987 (codified at 12 U.S.C. 5514, 5515, and 5581). Authority over 15 U.S.C. 1681m(e) and 1681w is limited to the Federal banking agencies and the National Credit Union Administration, the Federal Trade Commission, the Commodity Futures Trading Commission, and the U.S. Securities and Exchange Commission.

The consumer credit reporting industry has consistently been a major source of consumer complaints. Complaints about credit or consumer reporting represented roughly 76 percent of consumer complaints submitted to the CFPB during 2022, far more than any other category of consumer product or service.[8] Credit or consumer reporting has been the most-complained-about category of consumer financial product or service to the CFPB every year since 2017.[9]

In addition, since the FCRA's enactment in 1970, advances in technology have led, particularly in recent years, to a rapid evolution of the consumer reporting marketplace. For example, companies using business models that rely on newer technologies and novel methods to collect and sell consumer data have emerged and evolved with the growth of the internet and advanced technology. These companies, sometimes labeled "data brokers," "data aggregators," or "platforms," broadly engage in activities that the FCRA was designed to regulate.

The CFPB is considering proposals to regulate many data broker activities as covered under the FCRA, which would prohibit the sale of covered data for purposes other than those authorized under the FCRA. Most notably, this would limit the sale of certain data broker data for advertising or marketing, for the most part constraining the sale of data to only those companies or persons to whom the consumer applied for credit, insurance, employment, housing, or some other service, or to whom the consumer otherwise authorized access. This would also subject certain data brokers to FCRA obligations, ensuring, for example, that consumers have a right to obtain data about themselves held by data brokers and to dispute inaccuracies in that data.

Separately, the CFPB is considering proposals to address the problem of unreliable or unnecessary medical collection tradelines appearing on consumer reports. Such proposals would modify a regulatory exemption originally promulgated by a group of Federal banking agencies and the National Credit Union Administration that allows creditors to consider a consumer's medical debt information when underwriting credit and would prohibit consumer reporting agencies from including medical collection tradelines in consumer reports provided to creditors. Research has shown that medical collections are less predictive of serious delinquency than non-medical collections. This may be in part because of medical billing and insurance practices, or the fact that the very nature of medical debt is unpredictable.[10] This can result in coercive credit

[8] Consumer Fin. Prot. Bureau, *Consumer Response Annual Report*, at 11 (Mar. 2023), https://files.consumerfinance.gov/f/documents/cfpb_2022-consumer-response-annual-report_2023-03.pdf (noting that the CFPB received nearly 980,000 credit or consumer reporting complaints in 2022).

[9] *Id.*; Consumer Fin. Prot. Bureau, *Consumer Response Annual Report*, at 3 (Mar. 2022), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_2021-consumer-response-annual-report_2022-03.pdf; Consumer Fin. Prot. Bureau, *Consumer Response Annual Report*, at 9 (Mar. 2021), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_2020-consumer-response-annual-report_03-2021.pdf; Consumer Fin. Prot. Bureau, *Consumer Response Annual Report*, at 9 (Mar. 2020), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2019.pdf; Consumer Fin. Prot. Bureau, *Consumer Response Annual Report*, at 9 (Mar. 2019), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2018.pdf; Consumer Fin. Prot. Bureau, *Consumer Response Annual Report*, at 9 (Mar. 2018), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2017.pdf.

[10] *See generally* Consumer Fin. Prot. Bureau, *Consumer credit reports: A study of medical and non-medical collections*, at 12-16, 38-48, 51-52 (Dec. 2014),

reporting, which can force people to pay medical bills they may not or should not owe. For these reasons, the CFPB is considering proposals that would revise an exemption that allows creditors to consider a consumer's medical debt when underwriting credit and would prohibit consumer reporting agencies from including medical collection tradelines on consumer reports.

The CFPB is also considering proposals to address other issues that have arisen in the years since the FCRA's enactment, or that are areas of particular risk for consumer harm. Among others, these include proposals related to the obligations of consumer reporting agencies to investigate disputes, including disputes involving systemic issues.

II. The SBREFA Process

Federal law provides that, prior to issuing a proposed rule that could have a significant economic impact on a substantial number of small entities, the CFPB must consult with small entities that are likely to be subject to the regulation.[11] As part of the consultation process, the CFPB must convene a Small Business Review Panel (Panel)[12] to collect advice and recommendations from these small entities or their representatives (small entity representatives). Small entities likely to be affected by the FCRA proposals the CFPB currently is considering include: (1) entities that meet (or would meet, if the proposals were adopted) the definition of consumer reporting agency in FCRA section 603(f), (2) entities that furnish information to consumer reporting agencies, and (3) creditors that use medical debt collection information in making credit eligibility determinations.

SBREFA requires the CFPB to collect the advice and recommendations of small entity representatives about whether the proposals under consideration might increase the cost of credit for small entities and if alternatives exist that might accomplish the stated objectives of applicable statutes while minimizing any such increase.[13] The small entity representatives will have the opportunity to provide input on these topics during the CFPB's SBREFA consultation process, including at the Panel meeting.

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https://files.consumerfinance.gov/f/201412_cfpb_reports_consumer-credit-medical-and-non-medical-collections.pdf. *See also* Michelle Singletary, *Finally, Medical Debt Under $500 Has Been Removed From Credit Reports*, Wash. Post (Apr. 12, 2023), https://www.washingtonpost.com/business/2023/04/12/medical-debt-credit-reports/ (reporting nationwide consumer reporting agencies' removal of paid medical collections, medical collections under $500, or medical debts less than 180 days old on consumer reports); AnnaMaria Andriotis, *Major Credit-Score Provider to Exclude Medical Debts*, WSJ (Aug. 10, 2022) https://www.wsj.com/articles/major-credit-score-provider-to-exclude-medical-debts-11660102729 (credit score provider VantageScore to stop factoring medical debt as not necessarily reflective of consumer ability to repay).

[11] *See* Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104-121, tit. II, 110 Stat. 857 (1996) (codified at 5 U.S.C. 609) (amended by Dodd-Frank Act section 1100G); the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq*.

[12] *See* 5 U.S.C. 609(b). The Panel consists of representatives from the CFPB, the Small Business Administration's Chief Counsel for Advocacy, and the Office of Information and Regulatory Affairs in the Office of Management and Budget. The Office of Advocacy is an independent office within the Small Business Administration, so its views do not necessarily reflect the views of the Small Business Administration or the Administration.

[13] Dodd-Frank Act section 1100G, 124 Stat. 2112.

In accordance with the above requirements, the CFPB is convening a Panel to obtain input from small entity representatives on the proposals under consideration for an FCRA rulemaking. The CFPB has prepared this Outline to provide background to the small entity representatives and to facilitate the SBREFA process.

Within 60 days of convening, the Panel will complete a report (Panel Report) on the feedback received from the small entity representatives, and the CFPB will consider that feedback and the Panel Report as it prepares a proposed rule. The CFPB will coordinate with small entity representatives on the timing for their feedback. Written feedback from small entity representatives will be appended to the Panel Report. Once a proposed rule is published, the Panel Report will be placed in the public rulemaking record.

The SBREFA process is only one step in the CFPB's rulemaking process. No entity will be required to comply with any of the proposals addressed in this Outline before a proposed rule is published, public comment on the proposed rule is received and reviewed by the CFPB, a final rule is issued, and the implementation period between the final rule's issuance date and its compliance date concludes.

The CFPB is conferring with other Federal agencies, including the prudential regulators and the Federal Trade Commission, on the proposals under consideration.[14] The CFPB is also interested in hearing feedback about the proposals under consideration from other stakeholders, including small stakeholders who are not small entity representatives. Stakeholders are welcome to provide written feedback on the proposals under consideration by emailing it to *CFPB_consumerreporting_rulemaking@cfpb.gov* no later than October 30, 2023. Such feedback will not be included in the Panel Report but may be subject to public disclosure.[15]

III. Proposals and Alternatives Under Consideration

Here, the CFPB describes the proposals and alternatives under consideration and lists questions on which it seeks small entity representative feedback. In addition to the listed questions, the CFPB is interested in any other input small entity representatives wish to provide on any of the proposals under consideration.

[14] In addition to conferring with staff from the Office of Advocacy at the Small Business Administration, staff from the Office of Information and Regulatory Affairs at the Office of Management and Budget, and staff from the Federal Trade Commission, the CFPB has invited discussion on these proposals under consideration with staff from Federal agencies including the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Bureau of Fiscal Service of the Department of the Treasury, and the Department of Health and Human Services. The CFPB plans to continue conferring with these and other agencies throughout the rulemaking process.

[15] Sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Small entity representatives and other stakeholders considering submitting proprietary or confidential business information should contact the CFPB in advance to discuss whether and how that information should be provided.

The questions in this Outline are numbered sequentially throughout for ease of reference. When providing feedback, please note the relevant topic and question number(s). The questions begin here with several inquiries that apply to all the proposals under consideration.

Q1. How, if at all, will the proposal under consideration require your firm to change its operations, products, or services?

Q2. What do you anticipate will be the initial and ongoing costs to your firm, if any, of complying with the proposal under consideration? If applicable, how do those costs compare to your firm's current costs to comply with the provision(s) of the FCRA or Regulation V related to the proposal under consideration? Please quantify all such costs by type and amount to the extent possible.

Q3. What aspect or aspects of complying with the proposal under consideration would be the most challenging?

Q4. What alternative approaches, if any, should the CFPB consider in lieu of the proposal under consideration?

Q5. Other than compliance costs, what costs, burdens, or unintended consequences should the CFPB consider with respect to the proposal under consideration? Please quantify if possible. What alternatives, if any, would mitigate such costs, burdens, or unintended consequences?

Q6. Are there any statutes or regulations with which your firm must comply that may duplicate, overlap, or conflict with the proposal under consideration? What challenges or costs would your firm anticipate in complying with any such statutes or regulations and the CFPB's proposal under consideration?

Q7. What factors disproportionately affecting small entities should the CFPB be aware of when evaluating the proposal under consideration? Would the proposal under consideration provide unique benefits to small entities?

A. Definitions of consumer report and consumer reporting agency

FCRA section 603(d)[16] defines the term "consumer report" to mean, in general, 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 (A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other permissible purpose authorized under FCRA section 604.

[16] 15 U.S.C. 1681a(d).

FCRA section 603(f)[17] defines the term "consumer reporting agency" as 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.

The CFPB is considering several proposals related to the definitions of "consumer reporting agency" and "consumer report." Certain of these proposals would address whether and how the FCRA applies to newer actors and practices in the credit reporting marketplace, including questions such as coverage of data brokers and certain consumer reporting agency practices regarding marketing and advertising.

1. Data brokers

Consumers regularly engage in activities that reveal their personal information, often without realizing it.[18] For example, they may visit a website, charge an item to a credit card, or download an app, in each instance providing information to the entity with whom they interact. These entities may, in turn, provide or sell the information they collect to third-party data brokers with whom the consumer does not have a direct relationship.[19]

Some of the information data brokers collect and sell is private, such as information about a consumer's finances or health conditions. Other information is public, such as information about criminal records or lawsuits. Data brokers use the information they collect for a variety of purposes, including to generate reports for use in credit and employment decisions, to create lists of consumers with certain attributes for use in marketing, and to operate databases to detect fraud. In addition to the privacy harms it poses, the collection and sale of consumer information by data brokers can facilitate fraud, identity theft, harassment, discrimination, and abusive and unfair conduct. Many data brokers are consumer reporting agencies under current law.

The CFPB is considering proposals to address the application of the FCRA to data brokers, including to codify current law. These include proposals to provide that: consumer information provided to a user who uses it for a permissible purpose is a "consumer report" regardless of whether the data broker knew or should have known the user would use it for that purpose, or intended the user to use it for that purpose; data brokers that sell certain types of consumer data (*e.g.*, data typically used for credit and employment eligibility determinations) are selling

[17] 15 U.S.C. 1681a(f).

[18] *See* Fed. Trade Comm'n, *Data Brokers: A Call for Transparency and Accountability*, at 1-2 (May 2014), https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf.

[19] For purposes of this Outline, "data broker" is an umbrella term used to describe firms that collect, aggregate, sell, resell, license, or otherwise share personal information about consumers with other parties. This includes first-party data brokers that interact with consumers directly and third-party data brokers with whom the consumer does not have a direct relationship. *See* Request for Information Regarding Data Brokers and Other Business Practices Involving the Collection and Sale of Consumer Information, 88 FR 16951, 16952 (Mar. 21, 2023) (similarly defining "data brokers"). Data brokers may or may not be consumer reporting agencies under the FCRA.

consumer reports; a data broker that collects consumer information for permissible purposes may not sell it for non-permissible purposes; and a data broker may not obtain consumer report information from a consumer reporting agency without a permissible purpose or sell such information to a user unless the user has a permissible purpose.

Currently, some data brokers that collect, aggregate, sell, resell, license, or otherwise share personal information about consumers with other parties act as consumer reporting agencies under the statute, but others that engage in very similar activities or sell the same types of data do not. By engaging in these activities outside of the FCRA's protections regarding, for example, data confidentiality and accuracy, these companies threaten consumer privacy and arguably evade the FCRA's purposes and objectives.

As noted above, one of the CFPB's proposals under consideration would provide that a data broker that sells certain types of consumer data would be a consumer reporting agency. Under such a proposal, the CFPB would provide that a data broker's sale of data regarding a consumer's payment history, income, and criminal records, for example, would generally be a consumer report, regardless of the purpose for which the data was actually used or collected, or the expectations of that data broker, because that type of data is typically used for credit and employment determinations (both permissible purposes).[20] A data broker "assembling or evaluating" and selling such data would be a consumer reporting agency (assuming the other elements of the definition of consumer reporting agency were satisfied) because it would be assembling or evaluating information on consumers for the purpose of furnishing consumer reports to third parties.[21]

The proposals under consideration also would mean that the sale of data addressed in the proposals by data brokers that qualify as consumer reporting agencies under the proposals would be prohibited without the written instructions of the consumer or another permissible purpose. That prohibition would extend, for example, to selling such data for marketing (except as permitted for prescreening under FCRA section 604(c)). The CFPB is also considering other interpretations clarifying when and how data brokers are or would be consumer reporting agencies furnishing consumer reports.

For the proposals under consideration, please provide feedback on questions 1 through 7 above and the following questions:

Q8. If the CFPB proposes the approaches described above, what types of entities would fall within the definition of "consumer reporting agency"? Are there

[20] Such a sale of data would not be a consumer report if a statutory exclusion applies, such as if the data consists of "information solely as to transactions or experiences" between the consumer and the data broker. *See* 15 U.S.C. 1681a(d)(2)(A)(i).

[21] This particular proposal would not cover data types that are only infrequently used to make eligibility determinations, such as alternative data used to make credit decisions. Nevertheless, an entity selling such data could still be a consumer reporting agency (assuming the other elements of the definition were satisfied) if the data were actually collected, used, or expected to be used for a permissible purpose. Other proposals the CFPB is considering, as described above, would address the application of the FCRA in these circumstances, including to codify existing law.

certain types of entities that should not fall within the definition of "consumer reporting agency"?

Q9. If consumer data communicated to a third party and used by the third party for credit decisions, employment purposes, insurance decisions, or other permissible purposes were a consumer report regardless of the data broker's knowledge or intent concerning the third party's use of the data, what costs would entities selling such data incur to monitor or control how their customers use purchased data?

Q10. If the CFPB proposes the approach described above with respect to data brokers that sell certain types of data, would it be sufficient to provide a standard for (or guidelines about) what types of data are "typically" used for an FCRA-covered purpose or should the CFPB provide a list of such data types? What standard, guidelines, or data types should the CFPB consider for each FCRA-covered purpose?

Q11. Are there other ways in which the CFPB should be thinking about how and when data broker data should be considered a consumer report furnished by a consumer reporting agency?

Q12. If any of the proposals under consideration that would make a data broker subject to the FCRA as a consumer reporting agency were finalized, do you anticipate that your firm or your customers will seek to obtain consumer consent before providing consumer reports to third parties? If so, what challenges do you foresee with obtaining consumer consent?

Q13. What costs do you believe the proposal under consideration would be likely to impose on the entities from which your firm obtains consumer data (known as "furnishers" under the FCRA) and on the entities to which your firm provides consumer data (known as "users" under the FCRA)? Are there additional burdens or unintended consequences to such entities the CFPB should consider? What steps could the CFPB take to reduce or lessen those potential impacts?

2. Defining "assembling or evaluating"

Data brokers that facilitate consumer-authorized data sharing by accessing consumer information held by data providers and communicating it to third party data recipients are typically engaged in activities that constitute "assembling or evaluating" consumer information under existing precedent; thus, where they otherwise satisfy the definition of "consumer reporting agency," they are subject to the FCRA.

Other entities that facilitate electronic data access between parties may also engage in "assembling or evaluating" information when they act as intermediaries or vendors (*e.g.*, by transmitting public records information from public records databases to users) or otherwise transmit consumer data electronically between data sources and users. The CFPB is considering a proposal to provide a more bright-line definition for when such entities' activities fall within

the meaning of the terms "assembling" and "evaluating" in the definition of "consumer reporting agency." The CFPB's proposal under consideration would address when such companies' activities constitute "assembling or evaluating" and would provide that, if such companies are "assembling or evaluating" and otherwise meet the definition of "consumer reporting agency," they would be consumer reporting agencies under FCRA section 603(f).

For the proposal under consideration, please provide feedback on questions 1 through 7 above and the following questions:

Q14. What are the types of intermediaries, vendors, and other entities that transmit consumer data electronically between data sources and users? For any such company, describe the types of information the company obtains, from which data sources, who determines the sources of information to use, and how the information is transmitted, used, interpreted, or modified by the company.

Q15. Are there any circumstances under which the activities of an intermediary, vendor, or other entity that transmits consumer data electronically does not create a risk of harm to a consumer?

3. "Credit header" data

"Credit header" data are certain consumer-identifying data maintained by consumer reporting agencies. Credit header data has historically been considered to include, for example, an individual's name (and any other names previously used), current and former addresses, Social Security number, and phone numbers.

The CFPB is aware that some consumer reporting agencies sell credit header data for purposes not authorized under the FCRA, such as marketing or certain law enforcement purposes. The CFPB also recognizes that the evolution and expansion of the consumer data marketplace, as well as increased computing power and increased reliance on complex algorithms to identify insights, has resulted in credit header data being used more frequently for eligibility determinations and that this information may bear on a consumer's personal characteristics or other enumerated factors in ways not currently recognized by consumer reporting agencies.

The CFPB is considering a proposal to clarify the extent to which credit header data constitutes a consumer report. The proposal under consideration would likely reduce, perhaps significantly, consumer reporting agencies' ability to sell or otherwise disclose credit header data from their consumer reporting databases without a permissible purpose.

For the proposal under consideration, please provide feedback on questions 1 through 7 above and the following questions:

Q16. What types of information do firms typically consider to be credit header data? What types of credit header data are typically sold or purchased and for what purpose(s)? How is data collected for those purposes and how is it stored?

Q17. Under what circumstances do firms typically consider the sale or purchase of credit header data *not* to be a consumer report, and why? What costs would be

incurred if such sales or purchases of credit header data were to be considered a consumer report?

Q18. If the CFPB proposes a rule clarifying when credit header data is a consumer report, are there certain categories of credit header data you believe should be included or excluded as a consumer report? If so, under what circumstances?

4. Targeted marketing and aggregated data

The FCRA prohibits consumer reporting agencies from furnishing consumer reports to third parties except for certain statutorily enumerated permissible purposes. Marketing and advertising generally are not an FCRA permissible purpose.[22] The FCRA thus generally prohibits consumer reporting agencies from furnishing consumer reports to third parties for marketing or advertising purposes, such as to target a consumer with an invitation to apply for credit. The CFPB is considering proposals to clarify that certain activities consumer reporting agencies undertake to help third-party users market to consumers violate this prohibition.

For example, a consumer reporting agency might use information from consumer reports and its other databases, combined with information from a third party, such as a set of consumer attributes or a list of consumer names, to enable the third party to better target individual consumers for a particular marketing or advertising campaign. The consumer reporting agency might then deliver the marketing material or advertising campaign on behalf of the third party to the specific consumers identified for targeting. Because the consumer reporting agency is not directly providing information to a third party, it may believe that no consumer report has been "furnished" and therefore that the activity is permissible under the FCRA. The CFPB is considering proposals that would provide that, in this scenario or in similar circumstances where a consumer reporting agency uses consumer report information on behalf of a third party, a consumer reporting agency has furnished a consumer report on a consumer to a user without a permissible purpose.

In other instances, a consumer reporting agency might share, for marketing or other purposes, consumer report information that has been "aggregated" and wrongly assume that it is not a consumer report simply because the information is aggregated. For example, a consumer reporting agency might share household-level data, or data aggregated at broader geographic levels, that relate to a consumer. The CFPB is considering proposals to clarify whether and when aggregated or anonymized consumer report information constitutes or does not constitute a consumer report.

For the proposals under consideration, please provide feedback on questions 1 through 7 above and the following questions:

Q19. What is your understanding of how consumer reporting agencies or service providers perform marketing or advertising services on behalf of third-party users? What services are performed (*e.g.*, identification of target audiences, delivery of marketing or advertising materials to consumers)? What data are

[22] An exception exists for the purpose of making firm offers of credit or insurance. *See* 15 U.S.C. 1681b(c)(1)(B).

relied on to perform these services, and do firms typically consider such data to be protected by the FCRA? Why or why not?

Q20. What is your understanding of how firms share consumer report information in marketing or advertising platforms? What capabilities do these platforms offer to third-party users for targeting marketing or advertising campaigns? What steps do firms typically take to prevent consumer report information from being used for impermissible purposes under the FCRA?

Q21. What is your knowledge about products that include aggregated data drawn from consumer reporting databases? For what purposes do firms typically use or offer the products? What type of information is aggregated? How is the aggregation done? At what level are the data aggregated?

Q22. Do firms typically consider aggregated data products they use or offer to be consumer reports? Why or why not?

Q23. Is there a level of aggregation of consumer report information at which consumer privacy would not be implicated? Are you aware of instances in which aggregated information that is drawn from a consumer reporting database is later linked back by a third party to specific consumers, for example when a consumer responds to an advertisement?

B. Permissible purposes

One of the FCRA's principal goals is to protect consumer privacy.[23] The statute seeks to accomplish this by, among other things, prohibiting consumer reporting agencies from furnishing consumer reports to third parties except for certain statutorily enumerated "permissible purposes." The proposals under consideration would interpret certain of those permissible purposes and clarify circumstances in which data breaches may result in a consumer reporting agency violating the FCRA's permissible purpose provision.

1. Written instructions of the consumer

FCRA section 604(a)(2)[24] states that a consumer reporting agency has a permissible purpose to furnish a consumer report if the report is provided "[i]n accordance with the written instructions of the consumer to whom it relates."

The CFPB is considering proposals to address what is needed for a consumer report to be furnished by a consumer reporting agency in accordance with the consumer's written instructions under FCRA section 604(a)(2). The proposals under consideration include proposals concerning the steps companies must take to obtain a consumer's written instructions, who can collect written instructions, limits on the scope of authorization to ensure the consumer has authorized

[23] *See* 15 U.S.C. 1681(a)(4).

[24] 15 U.S.C. 1681b(a)(2).

all uses of the consumer's data (including limits on the number of purposes or entities that can be covered by a single instruction), and methods for revoking any ongoing authorization.

For the proposal under consideration, please provide feedback on questions 1 through 7 above and the following questions:

Q24. Describe the consumer authorizations or certifications of written instruction typically relied upon to furnish or obtain consumer reports pursuant to this permissible purpose. How specific are these authorizations, and if your firm relies on the certification of a user, does the user disclose the language of the consumer's authorization? How can a consumer revoke or modify their authorization? What are the products or services offered to consumers for which your firm relies on the written instructions of the consumer to obtain a consumer report?

Q25. What should the CFPB take into consideration when evaluating proposals to ensure that consumers understand the scope and import of their authorization to furnish or obtain their consumer report?

Q26. If your firm requires consumer authorization to furnish or obtain consumer reports, what methods (*e.g.*, electronic signature, check box, wet-ink signature, etc.) does your firm use to document the consumer's instructions or authorization? What feedback has your firm received from consumers regarding the convenience or challenges caused by such methods, if any?

2. Legitimate business need

FCRA section 604(a)(3)(F)[25] provides that a consumer reporting agency may furnish a consumer report to a person if it has reason to believe that the person "otherwise has a legitimate business need for the information—(i) in connection with a business transaction that is initiated by the consumer; or (ii) to review an account to determine whether the consumer continues to meet the terms of the account."

Some users may invoke the section 604(a)(3)(F)(i) permissible purpose to justify obtaining and using consumer reports for purposes other than determining a consumer's eligibility for a transaction. In addition, some users may invoke the section 604(a)(3)(F)(ii) permissible purpose when a consumer report is not necessary to make a decision about whether a consumer continues to meet the terms of an account.

The CFPB is considering a proposal to specify that: (1) FCRA section 604(a)(3)(F)(i) requires a transaction to have been initiated by the consumer for personal, family, or household purposes and permits use of consumer reports only for the purpose of determining the consumer's eligibility for the business transaction, and (2) FCRA section 604(a)(3)(F)(ii) requires that there

[25] 15 U.S.C. 1681b(a)(3)(F).

is an account review for which the use of a consumer report is actually needed to make a decision about whether the consumer continues to meet the terms of the account.

For the proposal under consideration, please provide feedback on questions 1 through 7 above and the following questions:

Q27. Under what circumstances do firms currently use the legitimate business need permissible purpose in connection with consumer-initiated business transactions and account reviews?

Q28. Would the proposal under consideration limit your firm's ability to get consumer reports? If so, how? Would it be feasible for your firm instead to rely on the written instruction permissible purpose or some other permissible purpose?

3. Data security and data breaches

The CFPB is considering a proposal to address a consumer reporting agency's obligation under the FCRA to protect consumer reports from unauthorized third-party access. FCRA section 604[26] prohibits a consumer reporting agency from furnishing a consumer report other than under the circumstances described in that section. FCRA section 607(a)[27] requires consumer reporting agencies to maintain reasonable procedures designed to limit the furnishing of consumer reports to the permissible purposes listed in FCRA section 604. Section 607(a) also prohibits a consumer reporting agency from furnishing a consumer report to any person "if it has reasonable grounds for believing that the consumer report will not be used for a permissible purpose listed in" section 604.

The CFPB understands that some consumer reporting agencies may operate consumer reporting databases without adequate or reasonable data security safeguards, exposing consumer report data to unauthorized access and increasing the risk of identity theft, fraud, and other consumer harms. The CFPB is aware that unauthorized users have gained access to consumer reports maintained by consumer reporting agencies on a number of occasions.

The CFPB is considering a proposal to address a consumer reporting agency's obligation under the FCRA to protect consumer reports from a data breach or unauthorized access. For example, the CFPB is considering providing that failure to protect against unauthorized access to consumer reports by third parties may violate FCRA sections 604 or 607(a).

For the proposal under consideration, please provide feedback on questions 1 through 7 above and the following question:

Q29. What data security improvements, and associated costs, would consumer reporting agencies incur if they were liable under the FCRA for all data breaches?

[26] 15 U.S.C. 1681b.

[27] 15 U.S.C. 1681e(a).

C. Disputes

Consumers have two avenues to dispute the completeness or accuracy of information contained in their consumer reports. First, FCRA section 611(a)(1)[28] permits a consumer to file a dispute with a consumer reporting agency as to the completeness or accuracy of their file. Second, FCRA section 623(a)(8)[29] and Regulation V allow a consumer to file a dispute directly with the entity that furnished the disputed information.

FCRA section 611(a) requires a consumer reporting agency that receives a dispute to investigate it and respond within certain time periods. The consumer reporting agency must also notify the furnisher of the information of the dispute.[30] Whether a furnisher receives a dispute directly from a consumer or indirectly through a consumer reporting agency, the FCRA and Regulation V require the furnisher to investigate the dispute and respond within certain time periods.[31]

Consumer complaints to the CFPB reflect how costly, ineffective, and time-consuming the consumer reporting dispute process can be for consumers. In each of the past three calendar years, the top two most frequently identified issues in complaints submitted to the CFPB were "Incorrect information on your report" and "Problem with a credit reporting company's investigation into an existing problem."[32] The CFPB is considering proposals related to two types of disputes: (1) those that are classified by a consumer reporting agency or furnisher as involving legal matters and (2) those involving systemic issues at a consumer reporting agency or furnisher.

1. Disputes involving legal matters

The CFPB understands that some consumer reporting agencies and furnishers have attempted to distinguish between "legal" and "factual" disputes and have asserted that the FCRA requires consumer reporting agencies and furnishers to investigate only "factual" disputes. The FCRA does not distinguish between legal and factual disputes, and accordingly it does not exempt "legal disputes" from its requirement that consumer reporting agencies and furnishers must reasonably investigate disputes. For example, the CFPB has previously stated the FCRA dispute provisions cover state foreclosure law interpretation disputes regarding whether a reported debt

[28] 15 U.S.C. 1681i(a).

[29] 15 U.S.C. 1681s-2(a).

[30] 15 U.S.C. 1681i(a).

[31] *See* 15 U.S.C. 1681s-2(a), (b); 12 CFR 1022.43(e).

[32] Consumer Fin. Prot. Bureau, *Circular 2022-07, Reasonable investigation of consumer reporting disputes*, at 3 (Nov. 2022), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_reasonable-investigation-of-consumer-reporting-disputes_circular-2022-07.pdf.

is collectible[33] and contractual liability disputes regarding obligations to pay.[34] The CFPB is considering a proposal to codify this interpretation.

For the proposal under consideration, please provide feedback on questions 1 through 7 above and the following questions:

Q30. Do you have knowledge about the practice of distinguishing between disputes classified as relating to legal issues and those classified as relating to factual issues, and if so, how do those that engage in this practice distinguish these types of disputes? Do they process or handle the disputes differently, and if so, what are the differences?

Q31. What portion of your firm's annual disputes relate to legal issues, and what policies and procedures are in place related to disputes your firm classifies as relating to legal issues?

2. Disputes involving systemic issues

The CFPB is considering proposals concerning disputes that relate to systemic issues affecting the completeness or accuracy of data furnished to consumer reporting agencies and included in consumer reports. Specifically, the CFPB is considering proposals that would address how furnishers and consumer reporting agencies must investigate and address such systemic issues. The CFPB is also considering whether to provide consumers with a specific process through which they could notify a consumer reporting agency or furnisher of possible systemic consumer reporting issues that affect other similarly situated consumers. These proposals could facilitate consumers' ability to receive collective relief from consumer reporting agencies and furnishers that do not appropriately address systemic issues.

A systemic issue at any consumer reporting agency or furnisher can lead to errors on the consumer reports of numerous consumers. For example, the CFPB has taken enforcement action regarding furnisher errors caused by systemic issues that affected significant numbers of consumers, such as outdated software and deficiencies in a furnisher's policies and procedures.[35]

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[33] Br. Amicus Curiae of CFPB, *Gross v. Citi Mortg., Inc.*, Case No. 20-17160 (9th Cir. Apr. 19, 2021), cfpb_amicus-brief_gross-v-citimortgage_2021-14.pdf.

[34] Br. Amicus Curiae of CFPB, *Holden v. Holiday Inn Club Vacations Inc and Mayer v. Holiday Inn*, Case No. 22-11734 (11th Cir. Dec. 16, 2022), cfpb_holden-v-holiday-inn-club-vacations-inc-and-mayer-v-holiday-inn_amicus-br_TPSrY16.pdf; Br. Amicus Curiae of CFPB, *Milgram v. JP Morgan Chase*, Case No. 22-10250 (11th Cir. Apr. 7, 2022), cfpb_milgram-v-jpmorgan-chase_amicus-brief_2022-04.pdf; Br. Amicus Curiae of CFPB, *Sessa v. Trans Union LLC*, Case No. 22-87 (2d Cir. May 5, 2022), cfpb_sessa-v-trans-union-llc_amicus-brief_2022-05.pdf.

[35] Systemic issues generally can lead to widespread errors on consumer reports and affect significant numbers of consumers. *See, e.g.*, *CFPB Orders CarHop to Pay $6.4 Million Penalty for Jeopardizing Consumers' Credit* (Dec. 17, 2015), https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-carhop-to-pay-6-4-million-penalty-for-jeopardizing-consumers-credit/ (describing a "buy-here, pay-here" auto dealer and its affiliated financing company's failure to establish and implement reasonable written policies and procedures regarding the accuracy and integrity of the consumer information that the financing company furnished to consumer reporting agencies as a significant systemic deficiency that increased the risk of, and likely contributed to, numerous furnishing errors, failures, and problems).

Accordingly, the CFPB is considering a proposal to address what a consumer reporting agency and a furnisher must do, pursuant to their obligations under FCRA sections 611 and 623, upon receiving a dispute from a consumer that indicates that there is a systemic issue that could be affecting the completeness or accuracy of consumer reports involving multiple consumers. The CFPB is considering, for example, whether to: require furnishers and/or consumer reporting agencies to determine as part of their investigation of such disputes whether there is a systemic issue and to correct any inaccurate reporting on behalf of all affected consumers; and specify how the results of any such investigation should be communicated, including, for example, whether notice should be provided to consumers who may be affected by systemic issues identified in a dispute that was submitted by another consumer. The CFPB is also considering whether to provide a rubric or template that consumers could use to submit disputes relating to systemic issues affecting multiple consumers, to facilitate the submission of such disputes.

For the proposals under consideration, please provide feedback on questions 1 through 7 above and the following questions:

Q32. How might the CFPB define "systemic" issues for purposes of the proposals it is considering? What may be the cause(s) for a furnisher or consumer reporting agency to have erroneous reporting for multiple consumers of the same type (*e.g.*, issues with common processes, policies and procedures, infrastructure limitations, training)? How does your firm become aware of systemic issues that cause consumer reporting errors?

Q33. If furnishers or consumer reporting agencies (or both) investigate and address systemic issues that may be causing consumer reporting errors affecting multiple consumers, based upon a single consumer's notice of dispute, what kind of notice should go to other potentially similarly situated consumers affected by the systemic issue? At what point(s) of the process? What should that notice(s) say?

Q34. What kind of information would be helpful for a consumer to include in a dispute notice to your firm to determine whether an error may be caused by a systemic issue?

D. Medical debt collection information

The CFPB has long-standing concerns about the usefulness of medical debt collections tradeline information in predicting a consumer's creditworthiness. For example, research by the CFPB and others has raised questions about the predictive value of this information.[36] Nevertheless, medical debt collection tradelines have historically been the most common debt collection tradelines on consumer reports.[37] Medical debt collection tradelines appearing on consumer

[36] *See supra*, note 10.

[37] Consumer Fin. Prot. Bureau, *Market Snapshot: An Update on Third-Party Debt Collections Tradelines Reporting*, at 3 (Feb. 2023), https://files.consumerfinance.gov/f/documents/cfpb_market-snapshot-third-party-debt-collections-tradelines-reporting_2023-02.pdf (looking at debt collection tradeline data from 2018 to Q1 2022). *See also* Consumer Fin. Prot. Bureau, *Consumer Credit Trends: Paid and Low-Balance Medical Collections on Consumer Credit Reports*, at 4 (July 2022), https://files.consumerfinance.gov/f/documents/cfpb_paid-and-low-balance-

reports can have negative consequences for consumers, including impacting consumers' ability to obtain credit (or to obtain it at favorable rates) after experiencing, for example, a medical emergency. They can also be used as leverage by collectors to coerce consumers to pay sometimes spurious or false unpaid medical bills.

Congress, too, has raised concerns with the presence of medical debt information on credit reports. In the FCRA, Congress restricted creditors' ability to obtain or use medical debts in credit decisions[38], but it granted the Federal banking agencies and the National Credit Union Administration authority to create regulatory exemptions to that restriction. Those agencies promulgated exemptions, including one for medical debt financial information, which is primarily used by creditors to consider medical debts in underwriting decisions. When the CFPB was created, Congress transferred this authority to the CFPB. In 2011, the CFPB republished, in general with only technical and conforming changes, the consumer financial protection regulations it inherited from other agencies under the Dodd-Frank Act, including Regulation V for consumer reporting. As part of that process, the CFPB republished without substantive change the medical debt financial information exemption in Regulation V § 1022.30(d).[39]

The CFPB is considering proposals to: (1) revise Regulation V § 1022.30(d), to modify the exemption such that creditors are prohibited from obtaining or using medical debt collection information to make determinations about consumers' credit eligibility (or continued credit eligibility) and (2) prohibit consumer reporting agencies from including medical debt collection tradelines on consumer reports furnished to creditors for purposes of making credit eligibility determinations.

For each of the proposals under consideration, please provide feedback on questions 1 through 7 above and the following questions:

Q35. Under the proposals under consideration, would you anticipate that medical debt collectors would stop furnishing medical debt collection information to consumer reporting agencies and use alternative debt collection methods? If so, which ones?

Q36. To what extent do creditors currently use medical debt collection information when making credit eligibility determinations, including to comply with other laws or requirements? Do creditors use medical debt collection information for other purposes in connection with a credit transaction?

Q37. From what sources do creditors obtain consumers' medical debt collection information, other than consumer reports?

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medical-collections-on-consumer-credit-reports_2022-07.pdf (analyzing likely impact of recent changes by nationwide consumer reporting agencies and finding that half of people with medical collection tradelines on their consumer reports will continue to have medical collections on their reports).

[38] 15 U.S.C. 1681b(g)(2).

[39] *See* 76 FR 79308 (Dec. 21, 2011).

Q38. What are the pros and cons of an alternative approach of mandating a delay in the furnishing and reporting of medical debt for a particular period of time, and not reporting or furnishing medical debt below a particular dollar amount?

Q39. What are the pros and cons of an alternative approach of requiring consumer reporting agencies and furnishers, upon receiving a dispute, to conduct an independent investigation to certify that a disputed medical debt is accurate and not subject to pending insurance disputes?

E. Implementation period

The CFPB seeks to ensure that consumers promptly benefit from a final rule and that covered entities have sufficient time to implement the rule. As such, the CFPB is considering the proper implementation period for complying with a rule finalizing the proposals under consideration.

To assist industry with an efficient and effective implementation of any final rule, the CFPB intends to provide guidance in the form of plain language compliance guides and aids, and by conducting meetings with stakeholders to discuss the rule and implementation issues.

Q40. Please provide input on an appropriate implementation period for complying with a rule finalizing the proposals under consideration. Are there any aspects of the CFPB's proposals under consideration that could be particularly time consuming or costly to implement? Are any of these challenges particular to small entities? Are there any factors outside a covered entity's control that would affect its ability to prepare for compliance?

IV. Potential Impacts on Small Entities

A. Overview

As discussed above, Federal law requires the CFPB to consider the economic impact that rules will have on small entities. In Part III above, the CFPB describes the proposals under consideration and asks a number of questions about each, many of which relate to potential impacts on small entities.

In this Part IV, the CFPB discusses the general framework under which it currently believes it can best assess the potential impacts of the proposals under consideration on small entities. This information is intended to help small entity representatives and others offer the CFPB additional data and information regarding potential impacts. The CFPB encourages contributions of data and other factual information to inform its assessment of potential compliance costs and other impacts on small entities. In addition to seeking supporting data and information concerning costs and impacts of the proposals under consideration, the CFPB also seeks feedback on the framework discussed here.

B. Small entities covered by the proposals under consideration

This section aims to quantify the number of small entities that may be affected by the proposals under consideration. Doing so requires determining whether an entity would be affected and whether it is small. As discussed above, the entities subject to the proposals under consideration include (1) entities that meet (or would meet, if the proposals were adopted) the definition of consumer reporting agency in FCRA section 603(f)[40], (2) entities that furnish information to consumer reporting agencies, and (3) creditors that use medical debt collection information in making credit eligibility determinations. These entities will include consumer reporting agencies, data brokers, data aggregators, data furnishers, and creditors that use medical debt information in credit eligibility or continued credit eligibility determinations. An entity can be classified in multiple categories.

Second, the CFPB adopts the Small Business Administration's industry-specific size standards for determining which entities are "small." The following table lists the industries that may be affected by the proposals under consideration, in order of North American Industry Classification System (NAICS) code[41], along with the number of entities in each category and the percent of small entities for that category.

Table B.1[42]

NAICS Codes	NAICS Description	Total Number of Entities	Number of Small Entities	Percent Small	Small Business Administration Size Standard ($ Million)
511140	Directory and Mailing List Publishers	534	219	41.0%	1250 (Employees)

[40] 15 U.S.C. 1681a(f).

[41] The Regulatory Flexibility Act defines "small entities" as small businesses, small organizations, and small governmental jurisdictions. 5 U.S.C. 601(6). The term "small business" has the same meaning as "small business concern" under section 3 of the Small Business Act. 5 U.S.C. 601(3). The term "small organization" is defined as any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. 5 U.S.C. 601(4). The term "small governmental jurisdiction" is defined as the governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000. 5 U.S.C. 601(5). The Small Business Administration has developed size standards to carry out the purposes of the Small Business Act and those size standards can be found in 13 CFR 121.201. A link to those size standards is available at https://www.sba.gov/document/support-table-size-standards. Table B.1 lists NAICS codes from 2017.

[42] Calculations for NAICS 522110, 522130, and 522180 are based on credit union and Call Report data from December 2022 using 2023 Small Business Administration size standards (effective Jan. 1, 2022). Calculations for all other NAICS codes are based on revenue or employee size from the latest 2017 Economic Census data by the U.S. Census Bureau, *The Number of Firms and Establishments, Employment, Annual Payroll, and Receipts by Industry and Enterprise Receipts Size: 2017* (May 28, 2021), https://www2.census.gov/programs-surveys/susb/tables/2017/us_6digitnaics_rcptsize_2017.xlsx and https://www2.census.gov/programs-surveys/susb/tables/2017/us_state_naics_detailedsizes_2017.xlsx. Calculations for the number and share of small entities were made using the 2017 Small Business Administration Table of Small Business Size Standards (effective Jan. 1, 2017) for consistency to avoid over-estimates due to inflation in later years. The tabulations and shares were computed according to available enterprise size cells.

NAICS Codes	NAICS Description	Total Number of Entities	Number of Small Entities	Percent Small	Small Business Administration Size Standard ($ Million)
511110	Newspaper Publishers	4,206	2,333	55.5%	1000 (Employees)
511210	Software Publishers	10,014	9,395	93.8%	38.5 (Revenue)
517311	Wired Telecommunications Carriers	3,364	1,875	55.7%	1500 (Employees)
517312	Wireless Telecommunications Carriers (except Satellite)	3,090	945	30.6%	1500 (Employees)
518210	Data Processing, Hosting, and Related Services	10,860	9,868	90.9%	32.5 (Revenue)
519130	Internet Publishing and Broadcasting and Web Search Portals	6,546	1,908	29.1%	1000 (Employees)
519190	All Other Information Services	1,167	1,143	97.9%	27.5 (Revenue)
522110	Commercial Banking	4102	3149	76.8%	850 (Assets)
522130	Credit Unions	4862	4366	89.8%	850 (Assets)
522180	Saving Institutions and Other Depository Credit Intermediation	604	417	69.0%	850 (Assets)
522220	Sales Financing	2,367	2,112	89.2%	38.5 (Revenue)
522291	Consumer Lending	3,037	2,905	95.7%	38.5 (Revenue)
522292	Real Estate Credit	3,289	2,872	87.3%	38.5 (Revenue)
522310	Mortgage and Nonmortgage Loan Brokers	6,809	6,643	97.6%	7.5 (Revenue)
522320	Financial Transactions Processing, Reserve, and Clearinghouse Activities	3,068	2,916	95.0%	38.5 (Revenue)
522390	Other Activities Related to Credit Intermediation	3,772	3,610	95.7%	20.5 (Revenue)
531110	Lessors of Residential Buildings and Dwellings	52,030	51,328	98.7%	27.5 (Revenue)
531210	Offices of Real Estate Agents and Brokers	106,844	105,445	98.7%	7.5 (Revenue)
531311	Residential Property Managers	35,884	34,869	97.2%	7.5 (Revenue)
541214	Payroll Services	4,328	4,077	94.2%	20.5 (Revenue)
541511	Custom Computer Programming Services	62,205	60,959	98.0%	27.5 (Revenue)
541512	Computer Systems Design Services	44,324	43,471	98.1%	27.5 (Revenue)

NAICS Codes	NAICS Description	Total Number of Entities	Number of Small Entities	Percent Small	Small Business Administration Size Standard ($ Million)
541611	Administrative Management and General Management Consulting Services	73,910	72,499	98.1%	15 (Revenue)
541613	Marketing Consulting Services	36,605	36,063	98.5%	15 (Revenue)
541618	Other Management Consulting Services	7,461	7,409	99.3%	15 (Revenue)
541810	Advertising Agencies	12,336	11,897	96.4%	15 (Revenue)
541860	Direct Mail Advertising	2,282	2,143	93.9%	15 (Revenue)
541910	Marketing Research and Public Opinion Polling	4,296	4,063	94.6%	15 (Revenue)
561440	Collection Agencies	3,224	3,016	93.5%	15 (Revenue)
561450	Credit Bureaus	307	266	86.6%	15 (Revenue)
561491	Repossession Services	701	690	98.4%	15 (Revenue)
561611	Investigation Services	3,917	3,860	98.5%	20.5 (Revenue)
713210	Casinos (except Casino Hotels)	221	126	57.0%	27.5 (Revenue)
713290	Other Gambling Industries	1,716	1,640	95.6%	32.5 (Revenue)

Q41. Please provide feedback on the CFPB's understanding of the small entities that could be affected by the proposals under consideration.

C. CFPB review of implementation processes and costs

For the CFPB to assess the economic impacts of the proposals under consideration, it needs information on the FCRA compliance systems currently in place at small entities, and on the projected compliance implementation processes and associated one-time and ongoing costs that small entities would likely incur if the proposals were adopted. This section describes the general implementation processes and costs that the CFPB believes the proposals under consideration would impose on small entities. In general, the CFPB believes that the implementation processes and costs would differ depending on whether a small entity currently complies with the FCRA.

Q42. For the proposals under consideration that are relevant to their businesses, small entity representatives are encouraged to provide specific estimates, information, and data on the projected one-time and ongoing costs of compliance if the proposals were adopted. Information and data on current FCRA compliance costs (baseline costs) will be valuable as well.

1. Costs imposed on entities not currently complying with the FCRA

The proposals under consideration in part III.A.1 (data brokers) and A.2 (assembling and evaluating) would require certain small entities that currently do not comply with the FCRA to begin doing so. Such small entities would be required to comply with the FCRA, and Regulation V as amended by any CFPB final rule (*i.e.*, including all the other proposals under consideration, if adopted and to the extent applicable to the small entity's business). The CFPB expects that many of these entities do not have FCRA-compliant systems, processes, and policies and procedures in place and will incur a one-time cost to develop them, and ongoing costs to maintain them. The requirements of such systems, processes, and policies and procedures will depend on whether the small entity is a consumer reporting agency or a furnisher. These entities would also be subject to liability under the FCRA, which could cause them to incur costs related to FCRA litigation.

2. Costs imposed on entities currently complying with the FCRA

The proposals under consideration in part III.A.3 (credit header), A.4 (targeted marketing and aggregated data), B (permissible purposes), C (disputes), and D (medical debt collection information) would also impose one-time and ongoing compliance costs, as applicable, on entities that currently comply with the FCRA and Regulation V. The CFPB expects consumer reporting agencies to have systems, processes, and policies and procedures in place to ensure that consumer reports are only furnished for permissible purposes, and expects consumer reporting agencies and furnishers to have systems, processes, and policies and procedures to handle disputes as required by the FCRA and Regulation V. There may be one-time costs to update these systems, processes, and policies and procedures for compliance with the proposals under consideration as well as ongoing costs, for example to manage increases in the number of disputes. The medical debt collection proposals under consideration may impose one-time costs on some consumer reporting agencies to remove all medical debt collection tradelines from certain consumer reports, and one-time and ongoing costs on creditors to change their underwriting practices and models.

D. Consideration of the impacts on business operation and revenues

In addition to the one-time and ongoing compliance costs that small entities would likely incur if the proposals under consideration are adopted, the CFPB must also consider how the proposals under consideration could impact the business operations and revenues of the affected entities. The CFPB will use this information to measure the change expected if the proposals are adopted.

For example, data brokers that currently profit from the sale of certain data without a permissible purpose may experience a reduction in revenue from the restriction of such sales under the proposals under consideration. Similarly, consumer reporting agencies that currently profit from the sale of credit header data to users without a permissible purpose may under certain circumstances experience a reduction in revenue from the restriction of such sale under the proposals under consideration. Further, consumer reporting agencies that engage in certain marketing activities or sell aggregated data for marketing may experience a reduction in revenue under the proposals under consideration. Also, creditors could incur ongoing costs related to the

exclusion of medical debt collection information from underwriting to the extent that it negatively affects their ability to predict risk of default.

Q43. For each of the proposals under consideration above, do you expect that your firm would restrict or eliminate any product or service offerings to comply with the rule? If so, how would the proposals impact those products or services?

Q44. For each of the proposals under consideration above, please provide information, data, and/or estimates of impacts to your firm's business operations and revenue, including to both current operations and revenues and to future operations and revenues that could potentially be lost.

E. Additional impacts of proposals under consideration

There may be additional impacts of the proposals under consideration not discussed above. Given the breadth of proposals under consideration, the CFPB is requesting that small entity representatives provide additional information and data on impacts not discussed, including benefits that small entities may experience from the proposals.

Q45. What other, additional impacts do you think might occur that have not been covered above?

Q46. What benefits do you expect small entities may experience from any of the proposals under consideration listed above?

F. Impact on the cost and availability of credit to small entities

The CFPB is requesting that small entity representatives provide information and/or data on any expected impacts on cost and availability of credit to small entities.

Q47. Would the proposals under consideration affect the cost and availability of credit to small entities?

Appendix A—Fair Credit Reporting Act[43]

§1681. Congressional findings and statement of purpose

(a) Accuracy and fairness of credit reporting

The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(b) Reasonable procedures

It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

§1681a. Definitions; rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) CONSUMER REPORT.—

(1) IN GENERAL.—The term "consumer report" means 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—

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.

(2) EXCLUSIONS.—Except as provided in paragraph (3), the term "consumer report" does not include—

(A) subject to section 1681s–3 of this title, any—

(i) report containing information solely as to transactions or experiences between the consumer and the person making the report;

(ii) communication of that information among persons related by common ownership or affiliated by corporate control; or

(iii) communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may

[43] This appendix sets forth the text of the Fair Credit Reporting Act as it appears in the U.S. Code as published online by the Government Publishing Office, https://www.govinfo.gov/content/pkg/USCODE-2021-title15/pdf/USCODE-2021-title15-chap41-subchapIII.pdf. Although the CFPB has made every effort to transcribe the statute accurately, this appendix is intended only as a convenience for small entity representatives and not as a substitute for the text in the U.S. Code.

be communicated among such persons and the consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons;

(B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device;

(C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his or her decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made, and such person makes the disclosures to the consumer required under section 1681m of this title; or

(D) a communication described in subsection (*o*) or (x).[44]

(3) RESTRICTION ON SHARING OF MEDICAL INFORMATION.—Except for information or any communication of information disclosed as provided in section 1681b(g)(3) of this title, the exclusions in paragraph (2) shall not apply with respect to information disclosed to any person related by common ownership or affiliated by corporate control, if the information is—

(A) medical information;

(B) an individualized list or description based on the payment transactions of the consumer for medical products or services; or

(C) an aggregate list of identified consumers based on payment transactions for medical products or services.

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

(f) The term "consumer reporting agency" means 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.

(g) The term "file", when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.

(h) 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.

(i) MEDICAL INFORMATION.—The term "medical information"—

(1) means information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to—

(A) the past, present, or future physical, mental, or behavioral health or condition of an individual;

(B) the provision of health care to an individual; or

(C) the payment for the provision of health care to an individual.[45]

(2) does not include the age or gender of a consumer, demographic information about the consumer, including a consumer's residence address or e-mail address, or any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy.

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[44] Subsection (x) of this section, referred to in subsection (d)(2)(D), was redesignated subsection (y) of this section by Dodd-Frank Act section 1088(a)(1), 124 Stat. 2086.

[45] So in original. The period probably should be "; and".

(j) DEFINITIONS RELATING TO CHILD SUPPORT OBLIGATIONS.—

(1) OVERDUE SUPPORT.—The term "overdue support" has the meaning given to such term in section 666(e) of title 42.

(2) STATE OR LOCAL CHILD SUPPORT ENFORCEMENT AGENCY.—The term "State or local child support enforcement agency" means a State or local agency which administers a State or local program for establishing and enforcing child support obligations.

(k) ADVERSE ACTION.—

(1) ACTIONS INCLUDED.—The term "adverse action"—

(A) has the same meaning as in section 1691(d)(6) of this title; and

(B) means—

(i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance;

(ii) a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee;

(iii) a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 1681b(a)(3)(D) of this title; and

(iv) an action taken or determination that is—

(I) made in connection with an application that was made by, or a transaction that was initiated by, any consumer, or in connection with a review of an account under section 1681b(a)(3)(F)(ii) of this title; and

(II) adverse to the interests of the consumer.

(2) APPLICABLE FINDINGS, DECISIONS, COMMENTARY, AND ORDERS.—For purposes of any determination of whether an action is an adverse action under paragraph (1)(A), all appropriate final findings, decisions, commentary, and orders issued under section 1691(d)(6) of this title by the Bureau or any court shall apply.

(l) FIRM OFFER OF CREDIT OR INSURANCE.—The term "firm offer of credit or insurance" means any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer, except that the offer may be further conditioned on one or more of the following:

(1) The consumer being determined, based on information in the consumer's application for the credit or insurance, to meet specific criteria bearing on credit worthiness or insurability, as applicable, that are established—

(A) before selection of the consumer for the offer; and

(B) for the purpose of determining whether to extend credit or insurance pursuant to the offer.

(2) Verification—

(A) that the consumer continues to meet the specific criteria used to select the consumer for the offer, by using information in a consumer report on the consumer, information in the consumer's application for the credit or insurance, or other information bearing on the credit worthiness or insurability of the consumer; or

(B) of the information in the consumer's application for the credit or insurance, to determine that the consumer meets the specific criteria bearing on credit worthiness or insurability.

(3) The consumer furnishing any collateral that is a requirement for the extension of the credit or insurance that was—

(A) established before selection of the consumer for the offer of credit or insurance; and

(B) disclosed to the consumer in the offer of credit or insurance.

(m) CREDITOR INSURANCE TRANSACTION THAT IS NOT INITIATED BY THE CONSUMER.—The term "credit or insurance transaction that is not initiated by the consumer" does not include the use of a consumer report by a person with which the consumer has an account or insurance policy, for purposes of—

(1) reviewing the account or insurance policy; or

(2) collecting the account.

(n) STATE.—The term "State" means any State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States.

(*o*) EXCLUDED COMMUNICATIONS.—A communication is described in this subsection if it is a communication—

(1) that, but for subsection (d)(2)(D), would be an investigative consumer report;

(2) that is made to a prospective employer for the purpose of—

(A) procuring an employee for the employer; or

(B) procuring an opportunity for a natural person to work for the employer;

(3) that is made by a person who regularly performs such procurement;

(4) that is not used by any person for any purpose other than a purpose described in subparagraph (A) or (B) of paragraph (2); and

(5) with respect to which—

(A) the consumer who is the subject of the communication—

(i) consents orally or in writing to the nature and scope of the communication, before the collection of any information for the purpose of making the communication;

(ii) consents orally or in writing to the making of the communication to a prospective employer, before the making of the communication; and

(iii) in the case of consent under clause (i) or (ii) given orally, is provided written confirmation of that consent by the person making the communication, not later than 3 business days after the receipt of the consent by that person;

(B) the person who makes the communication does not, for the purpose of making the communication, make any inquiry that if made by a prospective employer of the consumer who is the subject of the communication would violate any applicable Federal or State equal employment opportunity law or regulation; and

(C) the person who makes the communication—

(i) discloses in writing to the consumer who is the subject of the communication, not later than 5 business days after receiving any request from the consumer for such disclosure, the nature and substance of all information in the consumer's file at the time of the request, except that the sources of any information that is acquired solely for use in making the communication and is actually used for no other purpose, need not be disclosed other than under appropriate discovery procedures in any court of competent jurisdiction in which an action is brought; and

(ii) notifies the consumer who is the subject of the communication, in writing, of the consumer's right to request the information described in clause (i).

(p) CONSUMER REPORTING AGENCY THAT COMPILES AND MAINTAINS FILES ON CONSUMERS ON A NATIONWIDE BASIS.—The term "consumer reporting agency that compiles and maintains files on consumers on a nationwide basis" means a consumer reporting agency that regularly engages in the practice of assembling or evaluating, and maintaining, for the purpose of furnishing consumer reports to third parties bearing on a consumer's credit worthiness, credit standing, or credit capacity, each of the following regarding consumers residing nationwide:

(1) Public record information.

(2) Credit account information from persons who furnish that information regularly and in the ordinary course of business.

(q) DEFINITIONS RELATING TO FRAUD ALERTS.—

(1) ACTIVE DUTY MILITARY CONSUMER.—The term "active duty military consumer" means a consumer in military service who—

(A) is on active duty (as defined in section 101(d)(1) of title 10) or is a reservist performing duty under a call or order to active duty under a provision of law referred to in section 101(a)(13) of title 10; and

(B) is assigned to service away from the usual duty station of the consumer.

(2) FRAUD ALERT; ACTIVE DUTY ALERT.—The terms "fraud alert" and "active duty alert" mean a statement in the file of a consumer that—

(A) notifies all prospective users of a consumer report relating to the consumer that the consumer may be a victim of fraud, including identity theft, or is an active duty military consumer, as applicable; and

(B) is presented in a manner that facilitates a clear and conspicuous view of the statement described in subparagraph (A) by any person requesting such consumer report.

(3) IDENTITY THEFT.—The term "identity theft" means a fraud committed using the identifying information of another person, subject to such further definition as the Bureau may prescribe, by regulation.

(4) IDENTITY THEFT REPORT.—The term "identity theft report" has the meaning given that term by rule of the Bureau, and means, at a minimum, a report—

(A) that alleges an identity theft;

(B) that is a copy of an official, valid report filed by a consumer with an appropriate Federal, State, or local law enforcement agency, including the United States Postal Inspection Service, or such other government agency deemed appropriate by the Bureau; and

(C) the filing of which subjects the person filing the report to criminal penalties relating to the filing of false information if, in fact, the information in the report is false.

(5) NEW CREDIT PLAN.—The term "new credit plan" means a new account under an open end credit plan (as defined in section 1602(i)1 of this title) or a new credit transaction not under an open end credit plan.

(r) CREDIT AND DEBIT RELATED TERMS—

(1) CARD ISSUER.—The term "card issuer" means—

(A) a credit card issuer, in the case of a credit card; and

(B) a debit card issuer, in the case of a debit card.

(2) CREDIT CARD.—The term "credit card" has the same meaning as in section 1602 of this title.

(3) DEBIT CARD.—The term "debit card" means any card issued by a financial institution to a consumer for use in initiating an electronic fund transfer from the account of the consumer at such financial institution, for the purpose of transferring money between accounts or obtaining money, property, labor, or services.

(4) ACCOUNT AND ELECTRONIC FUND TRANSFER.—The terms "account" and "electronic fund transfer" have the same meanings as in section 1693a of this title.

(5) CREDIT AND CREDITOR.—The terms "credit" and "creditor" have the same meanings as in section 1691a of this title.

(s) FEDERAL BANKING AGENCY.—The term "Federal banking agency" has the same meaning as in section 1813 of title 12.

(t) FINANCIAL INSTITUTION.—The term "financial institution" means a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person that, directly or indirectly, holds a transaction account (as defined in section 461(b) of title 12) belonging to a consumer.

(u) RESELLER.—The term "reseller" means a consumer reporting agency that—

(1) assembles and merges information contained in the database of another consumer reporting agency or multiple consumer reporting agencies concerning any consumer for purposes of furnishing such information to any third party, to the extent of such activities; and

(2) does not maintain a database of the assembled or merged information from which new consumer reports are produced.

(v) COMMISSION.—The term "Commission" means the Bureau.[46]

(w) The term "Bureau" means the Bureau of Consumer Financial Protection.

[46] So in original.

(x) NATIONWIDE SPECIALTY CONSUMER REPORTING AGENCY.—The term "nationwide specialty consumer reporting agency" means a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis relating to—

(1) medical records or payments;

(2) residential or tenant history;

(3) check writing history;

(4) employment history; or

(5) insurance claims.

(y) EXCLUSION OF CERTAIN COMMUNICATIONS FOR EMPLOYEE INVESTIGATIONS.—

(1) COMMUNICATIONS DESCRIBED IN THIS SUBSECTION.—A communication is described in this subsection if—

(A) but for subsection (d)(2)(D), the communication would be a consumer report;

(B) the communication is made to an employer in connection with an investigation of—

(i) suspected misconduct relating to employment; or

(ii) compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer;

(C) the communication is not made for the purpose of investigating a consumer's credit worthiness, credit standing, or credit capacity; and

(D) the communication is not provided to any person except—

(i) to the employer or an agent of the employer;

(ii) to any Federal or State officer, agency, or department, or any officer, agency, or department of a unit of general local government;

(iii) to any self-regulatory organization with regulatory authority over the activities of the employer or employee;

(iv) as otherwise required by law; or

(v) pursuant to section 1681f of this title.

(2) SUBSEQUENT DISCLOSURE.—After taking any adverse action based in whole or in part on a communication described in paragraph (1), the employer shall disclose to the consumer a summary containing the nature and substance of the communication upon which the adverse action is based, except that the sources of information acquired solely for use in preparing what would be but for subsection (d)(2)(D) an investigative consumer report need not be disclosed.

(3) SELF-REGULATORY ORGANIZATION DEFINED.—For purposes of this subsection, the term "self-regulatory organization" includes any self-regulatory organization (as defined in section 78c(a)(26) of this title), any entity established under title I of the Sarbanes-Oxley Act of 2002 [15 U.S.C. 7211 et seq.], any board of trade designated by the Commodity Futures Trading Commission, and any futures association registered with such Commission.

(z) VETERAN.—The term "veteran" has the meaning given the term in section 101 of title 38.

(aa) VETERAN'S MEDICAL DEBT.—The term "veteran's medical debt"—

(1) means a medical collection debt of a veteran owed to a non-Department of Veterans Affairs health care provider that was submitted to the Department for payment for health care authorized by the Department of Veterans Affairs; and

(2) includes medical collection debt that the Department of Veterans Affairs has wrongfully charged a veteran.

§1681b. Permissible purposes of consumer reports

(a) In general

Subject to subsection (c), any consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order, a subpoena issued in connection with proceedings before a Federal grand jury, or a subpoena issued in accordance with section 5318 of title 31 or section 3486 of title 18.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe—

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or

(F) otherwise has a legitimate business need for the information—

(i) in connection with a business transaction that is initiated by the consumer; or

(ii) to review an account to determine whether the consumer continues to meet the terms of the account.

(G) executive departments and agencies in connection with the issuance of government-sponsored individually-billed travel charge cards.

(4) In response to a request by the head of a State or local child support enforcement agency (or a State or local government official authorized by the head of such an agency), if the person making the request certifies to the consumer reporting agency that—

(A) the consumer report is needed for the purpose of establishing an individual's capacity to make child support payments, determining the appropriate level of such payments, or enforcing a child support order, award, agreement, or judgment;

(B) the parentage of the consumer for the child to which the obligation relates has been established or acknowledged by the consumer in accordance with State laws under which the obligation arises (if required by those laws); and

(C) the consumer report will be kept confidential, will be used solely for a purpose described in subparagraph (A), and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.

(5) To an agency administering a State plan under section 654 of title 42 for use to set an initial or modified child support award.

(6) To the Federal Deposit Insurance Corporation or the National Credit Union Administration as part of its preparation for its appointment or as part of its exercise of powers, as conservator, receiver, or liquidating agent for an insured depository institution or insured credit union under the Federal Deposit Insurance Act [12 U.S.C. 1811 et seq.] or the Federal Credit Union Act [12 U.S.C. 1751 et seq.], or other applicable Federal or State law, or in connection with the resolution or liquidation of a failed or failing insured depository institution or insured credit union, as applicable.

(b) Conditions for furnishing and using consumer reports for employment purposes

(1) Certification from user

A consumer reporting agency may furnish a consumer report for employment purposes only if—

(A) the person who obtains such report from the agency certifies to the agency that—

(i) the person has complied with paragraph (2) with respect to the consumer report, and the person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable; and

(ii) information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation; and

(B) the consumer reporting agency provides with the report, or has previously provided, a summary of the consumer's rights under this subchapter, as prescribed by the Bureau under section 1681g(c)(3)[47] of this title.

(2) Disclosure to consumer

(A) In general

Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless—

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

(ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

(B) Application by mail, telephone, computer, or other similar means

If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, at any time before a consumer report is procured or caused to be procured in connection with that application—

(i) the person who procures the consumer report on the consumer for employment purposes shall provide to the consumer, by oral, written, or electronic means, notice that a consumer report may be obtained for employment purposes, and a summary of the consumer's rights under section 1681m(a)(3)[48] of this title; and

(ii) the consumer shall have consented, orally, in writing, or electronically to the procurement of the report by that person.

(C) Scope

Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if—

(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49, or a position subject to safety regulation by a State transportation agency; and

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

(3) Conditions on use for adverse actions

(A) In general

Except as provided in subparagraph (B), in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates—

(i) a copy of the report; and

(ii) a description in writing of the rights of the consumer under this subchapter, as prescribed by the Bureau under section 1681g(c)(3)[49] of this title.

(B) Application by mail, telephone, computer, or other similar means

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[47] Section 1681g(c) of this title, referred to in subsec. (b)(1)(B), (3)(A)(ii), (B)(ii), was amended generally by Pub. L. 108–159, title II, §211(c), Dec. 4, 2003, 117 Stat. 1970, and, as so amended, no longer contains a par. (3).

[48] Section 1681m(a)(3) of this title, referred to in subsec. (b)(2)(B)(i), was redesignated section 1681m(a)(4) of this title by Pub. L. 111–203, title X, §1100F(1)(A), July 21, 2010, 124 Stat. 2112.

[49] Section 1681g(c) of this title, referred to in subsec. (b)(1)(B), (3)(A)(ii), (B)(ii), was amended generally by Pub. L. 108–159, title II, §211(c), Dec. 4, 2003, 117 Stat. 1970, and, as so amended, no longer contains a par. (3).

(i) If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, and if a person who has procured a consumer report on the consumer for employment purposes takes adverse action on the employment application based in whole or in part on the report, then the person must provide to the consumer to whom the report relates, in lieu of the notices required under subparagraph (A) of this section and under section 1681m(a) of this title, within 3 business days of taking such action, an oral, written or electronic notification—

(I) that adverse action has been taken based in whole or in part on a consumer report received from a consumer reporting agency;

(II) of the name, address and telephone number of the consumer reporting agency that furnished the consumer report (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis);

(III) that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide to the consumer the specific reasons why the adverse action was taken; and

(IV) that the consumer may, upon providing proper identification, request a free copy of a report and may dispute with the consumer reporting agency the accuracy or completeness of any information in a report.

(ii) If, under clause (B)(i)(IV), the consumer requests a copy of a consumer report from the person who procured the report, then, within 3 business days of receiving the consumer's request, together with proper identification, the person must send or provide to the consumer a copy of a report and a copy of the consumer's rights as prescribed by the Bureau under section 1681g(c)(3)[50] of this title.

(C) Scope

Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if—

(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49, or a position subject to safety regulation by a State transportation agency; and

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

(4) Exception for national security investigations

(A) In general

In the case of an agency or department of the United States Government which seeks to obtain and use a consumer report for employment purposes, paragraph (3) shall not apply to any adverse action by such agency or department which is based in part on such consumer report, if the head of such agency or department makes a written finding that—

(i) the consumer report is relevant to a national security investigation of such agency or department;

(ii) the investigation is within the jurisdiction of such agency or department;

(iii) there is reason to believe that compliance with paragraph (3) will—

(I) endanger the life or physical safety of any person;

(II) result in flight from prosecution;

(III) result in the destruction of, or tampering with, evidence relevant to the investigation;

(IV) result in the intimidation of a potential witness relevant to the investigation;

(V) result in the compromise of classified information; or

(VI) otherwise seriously jeopardize or unduly delay the investigation or another official proceeding.

(B) Notification of consumer upon conclusion of investigation

Upon the conclusion of a national security investigation described in subparagraph (A), or upon the determination that the exception under subparagraph (A) is no longer required for the reasons set forth in

[50] [Footnote appears without text in statute published online by the Government Publishing Office]

such subparagraph, the official exercising the authority in such subparagraph shall provide to the consumer who is the subject of the consumer report with regard to which such finding was made—

(i) a copy of such consumer report with any classified information redacted as necessary;

(ii) notice of any adverse action which is based, in part, on the consumer report; and

(iii) the identification with reasonable specificity of the nature of the investigation for which the consumer report was sought.

(C) Delegation by head of agency or department

For purposes of subparagraphs (A) and (B), the head of any agency or department of the United States Government may delegate his or her authorities under this paragraph to an official of such agency or department who has personnel security responsibilities and is a member of the Senior Executive Service or equivalent civilian or military rank.

(D) Definitions

For purposes of this paragraph, the following definitions shall apply:

(i) Classified information

The term "classified information" means information that is protected from unauthorized disclosure under Executive Order No. 12958 or successor orders.

(ii) National security investigation

The term "national security investigation" means any official inquiry by an agency or department of the United States Government to determine the eligibility of a consumer to receive access or continued access to classified information or to determine whether classified information has been lost or compromised.

(c) Furnishing reports in connection with credit or insurance transactions that are not initiated by consumer

(1) In general

A consumer reporting agency may furnish a consumer report relating to any consumer pursuant to subparagraph (A) or (C) of subsection (a)(3) in connection with any credit or insurance transaction that is not initiated by the consumer only if—

(A) the consumer authorizes the agency to provide such report to such person; or

(B)

(i) the transaction consists of a firm offer of credit or insurance;

(ii) the consumer reporting agency has complied with subsection (e);

(iii) there is not in effect an election by the consumer, made in accordance with subsection (e), to have the consumer's name and address excluded from lists of names provided by the agency pursuant to this paragraph; and

(iv) the consumer report does not contain a date of birth that shows that the consumer has not attained the age of 21, or, if the date of birth on the consumer report shows that the consumer has not attained the age of 21, such consumer consents to the consumer reporting agency to such furnishing.

(2) Limits on information received under paragraph (1)(B)

A person may receive pursuant to paragraph (1)(B) only—

(A) the name and address of a consumer;

(B) an identifier that is not unique to the consumer and that is used by the person solely for the purpose of verifying the identity of the consumer; and

(C) other information pertaining to a consumer that does not identify the relationship or experience of the consumer with respect to a particular creditor or other entity.

(3) Information regarding inquiries

Except as provided in section 1681g(a)(5) of this title, a consumer reporting agency shall not furnish to any person a record of inquiries in connection with a credit or insurance transaction that is not initiated by a consumer.

(d) [Reserved]

(e) Election of consumer to be excluded from lists

(1) In general

A consumer may elect to have the consumer's name and address excluded from any list provided by a consumer reporting agency under subsection (c)(1)(B) in connection with a credit or insurance transaction that is not initiated by the consumer, by notifying the agency in accordance with paragraph (2) that the consumer does not consent to any use of a consumer report relating to the consumer in connection with any credit or insurance transaction that is not initiated by the consumer.

(2) Manner of notification

A consumer shall notify a consumer reporting agency under paragraph (1)—

(A) through the notification system maintained by the agency under paragraph (5); or

(B) by submitting to the agency a signed notice of election form issued by the agency for purposes of this subparagraph.

(3) Response of agency after notification through system

Upon receipt of notification of the election of a consumer under paragraph (1) through the notification system maintained by the agency under paragraph (5), a consumer reporting agency shall—

(A) inform the consumer that the election is effective only for the 5-year period following the election if the consumer does not submit to the agency a signed notice of election form issued by the agency for purposes of paragraph (2)(B); and (

B) provide to the consumer a notice of election form, if requested by the consumer, not later than 5 business days after receipt of the notification of the election through the system established under paragraph (5), in the case of a request made at the time the consumer provides notification through the system.

(4) Effectiveness of election

An election of a consumer under paragraph (1)—

(A) shall be effective with respect to a consumer reporting agency beginning 5 business days after the date on which the consumer notifies the agency in accordance with paragraph (2);

(B) shall be effective with respect to a consumer reporting agency—

(i) subject to subparagraph (C), during the 5-year period beginning 5 business days after the date on which the consumer notifies the agency of the election, in the case of an election for which a consumer notifies the agency only in accordance with paragraph (2)(A); or

(ii) until the consumer notifies the agency under subparagraph (C), in the case of an election for which a consumer notifies the agency in accordance with paragraph (2)(B);

(C) shall not be effective after the date on which the consumer notifies the agency, through the notification system established by the agency under paragraph (5), that the election is no longer effective; and

(D) shall be effective with respect to each affiliate of the agency.

(5) Notification system

(A) In general

Each consumer reporting agency that, under subsection (c)(1)(B), furnishes a consumer report in connection with a credit or insurance transaction that is not initiated by a consumer, shall—

(i) establish and maintain a notification system, including a toll-free telephone number, which permits any consumer whose consumer report is maintained by the agency to notify the agency, with appropriate identification, of the consumer's election to have the consumer's name and address excluded from any such list of names and addresses provided by the agency for such a transaction; and

(ii) publish by not later than 365 days after September 30, 1996, and not less than annually thereafter, in a publication of general circulation in the area served by the agency—

(I) a notification that information in consumer files maintained by the agency may be used in connection with such transactions; and

(II) the address and toll-free telephone number for consumers to use to notify the agency of the consumer's election under clause (i).

(B) Establishment and maintenance as compliance

Establishment and maintenance of a notification system (including a toll-free telephone number) and publication by a consumer reporting agency on the agency's own behalf and on behalf of any of its affiliates in accordance with this paragraph is deemed to be compliance with this paragraph by each of those affiliates.

(6) Notification system by agencies that operate nationwide

Each consumer reporting agency that compiles and maintains files on consumers on a nationwide basis shall establish and maintain a notification system for purposes of paragraph (5) jointly with other such consumer reporting agencies.

(f) Certain use or obtaining of information prohibited

A person shall not use or obtain a consumer report for any purpose unless—

(1) the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; and

(2) the purpose is certified in accordance with section 1681e of this title by a prospective user of the report through a general or specific certification.

(g) Protection of medical information

(1) Limitation on consumer reporting agencies

A consumer reporting agency shall not furnish for employment purposes, or in connection with a credit or insurance transaction, a consumer report that contains medical information (other than medical contact information treated in the manner required under section 1681c(a)(6) of this title) about a consumer, unless—

(A) if furnished in connection with an insurance transaction, the consumer affirmatively consents to the furnishing of the report;

(B) if furnished for employment purposes or in connection with a credit transaction—

(i) the information to be furnished is relevant to process or effect the employment or credit transaction; and

(ii) the consumer provides specific written consent for the furnishing of the report that describes in clear and conspicuous language the use for which the information will be furnished; or

(C) the information to be furnished pertains solely to transactions, accounts, or balances relating to debts arising from the receipt of medical services, products, or devises, where such information, other than account status or amounts, is restricted or reported using codes that do not identify, or do not provide information sufficient to infer, the specific provider or the nature of such services, products, or devices, as provided in section 1681c(a)(6) of this title.

(2) Limitation on creditors

Except as permitted pursuant to paragraph (3)(C) or regulations prescribed under paragraph (5)(A), a creditor shall not obtain or use medical information (other than medical information treated in the manner required under section 1681c(a)(6) of this title) pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit.

(3) Actions authorized by Federal law, insurance activities and regulatory determinations

Section 1681a(d)(3) of this title shall not be construed so as to treat information or any communication of information as a consumer report if the information or communication is disclosed—

(A) in connection with the business of insurance or annuities, including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners (as in effect on January 1, 2003);

(B) for any purpose permitted without authorization under the Standards for Individually Identifiable Health Information promulgated by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996, or referred to under section 1179 of such Act,[51] or described in section 6802(e) of this title; or

[51] [Footnote appears without text in statute published online by the Government Publishing Office]

(C) as otherwise determined to be necessary and appropriate, by regulation or order, by the Bureau or the applicable State insurance authority (with respect to any person engaged in providing insurance or annuities).

(4) Limitation on redisclosure of medical information

Any person that receives medical information pursuant to paragraph (1) or (3) shall not disclose such information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

(5) Regulations and effective date for paragraph (2)

(A)[52] Regulations required

The Bureau may, after notice and opportunity for comment, prescribe regulations that permit transactions under paragraph (2) that are determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (and which shall include permitting actions necessary for administrative verification purposes), consistent with the intent of paragraph (2) to restrict the use of medical information for inappropriate purposes.

(6) Coordination with other laws

No provision of this subsection shall be construed as altering, affecting, or superseding the applicability of any other provision of Federal law relating to medical confidentiality.

§1681c. Requirements relating to information contained in consumer reports

(a) Information excluded from consumer reports

Except as authorized under subsection (b), no consumer reporting agency may make any consumer report containing any of the following items of information:

(1) Cases under title 11 or under the Bankruptcy Act that, from the date of entry of the order for relief or the date of adjudication, as the case may be, antedate the report by more than 10 years.

(2) Civil suits, civil judgments, and records of arrest that, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period.

(3) Paid tax liens which, from date of payment, antedate the report by more than seven years.

(4) Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years.

(5) Any other adverse item of information, other than records of convictions of crimes which antedates the report by more than seven years.

(6) The name, address, and telephone number of any medical information furnisher that has notified the agency of its status, unless—

(A) such name, address, and telephone number are restricted or reported using codes that do not identify, or provide information sufficient to infer, the specific provider or the nature of such services, products, or devices to a person other than the consumer; or

(B) the report is being provided to an insurance company for a purpose relating to engaging in the business of insurance other than property and casualty insurance.

(7) With respect to a consumer reporting agency described in section 1681a(p) of this title, any information related to a veteran's medical debt if the date on which the hospital care, medical services, or extended care services was rendered relating to the debt antedates the report by less than 1 year if the consumer reporting agency has actual knowledge that the information is related to a veteran's medical debt and the consumer reporting agency is in compliance with its obligation under section 302(c)(5) of the Economic Growth, Regulatory Relief, and Consumer Protection Act.

(8) With respect to a consumer reporting agency described in section 1681a(p) of this title, any information related to a fully paid or settled veteran's medical debt that had been characterized as delinquent, charged off, or in collection if the consumer reporting agency has actual knowledge that the information is related to a veteran's medical debt and the consumer reporting agency is in compliance with its obligation under section 302(c)(5) of the Economic Growth, Regulatory Relief, and Consumer Protection Act.

[52] So in original. No subpar. (B) has been enacted.

(b) Exempted cases

The provisions of paragraphs (1) through (5) of subsection (a) are not applicable in the case of any consumer credit report to be used in connection with—

(1) a credit transaction involving, or which may reasonably be expected to involve, a principal amount of $150,000 or more;

(2) the underwriting of life insurance involving, or which may reasonably be expected to involve, a face amount of $150,000 or more; or

(3) the employment of any individual at an annual salary which equals, or which may reasonably be expected to equal $75,000, or more.

(c) Running of reporting period

(1) In general

The 7-year period referred to in paragraphs (4) and (6) of subsection

(a) shall begin, with respect to any delinquent account that is placed for collection (internally or by referral to a third party, whichever is earlier), charged to profit and loss, or subjected to any similar action, upon the expiration of the 180-day period beginning on the date of the commencement of the delinquency which immediately preceded the collection activity, charge to profit and loss, or similar action.

(2) Effective date

Paragraph (1) shall apply only to items of information added to the file of a consumer on or after the date that is 455 days after September 30, 1996.

(d) Information required to be disclosed

(1) Title 11 information

Any consumer reporting agency that furnishes a consumer report that contains information regarding any case involving the consumer that arises under title 11 shall include in the report an identification of the chapter of such title 11 under which such case arises if provided by the source of the information. If any case arising or filed under title 11 is withdrawn by the consumer before a final judgment, the consumer reporting agency shall include in the report that such case or filing was withdrawn upon receipt of documentation certifying such withdrawal.

(2) Key factor in credit score information

Any consumer reporting agency that furnishes a consumer report that contains any credit score or any other risk score or predictor on any consumer shall include in the report a clear and conspicuous statement that a key factor (as defined in section 1681g(f)(2)(B) of this title) that adversely affected such score or predictor was the number of enquiries, if such a predictor was in fact a key factor that adversely affected such score. This paragraph shall not apply to a check services company, acting as such, which issues authorizations for the purpose of approving or processing negotiable instruments, electronic fund transfers, or similar methods of payments, but only to the extent that such company is engaged in such activities.

(e) Indication of closure of account by consumer

If a consumer reporting agency is notified pursuant to section 1681s–2(a)(4) of this title that a credit account of a consumer was voluntarily closed by the consumer, the agency shall indicate that fact in any consumer report that includes information related to the account.

(f) Indication of dispute by consumer

If a consumer reporting agency is notified pursuant to section 1681s–2(a)(3) of this title that information regarding a consumer who[53] was furnished to the agency is disputed by the consumer, the agency shall indicate that fact in each consumer report that includes the disputed information.

(g) Truncation of credit card and debit card numbers

(1) In general

[53] So in original. Probably should be "which".

Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.

(2) Limitation

This subsection shall apply only to receipts that are electronically printed, and shall not apply to transactions in which the sole means of recording a credit card or debit card account number is by handwriting or by an imprint or copy of the card.

(3) Effective date

This subsection shall become effective—

(A) 3 years after December 4, 2003, with respect to any cash register or other machine or device that electronically prints receipts for credit card or debit card transactions that is in use before January 1, 2005; and

(B) 1 year after December 4, 2003, with respect to any cash register or other machine or device that electronically prints receipts for credit card or debit card transactions that is first put into use on or after January 1, 2005.

(h) Notice of discrepancy in address

(1) In general

If a person has requested a consumer report relating to a consumer from a consumer reporting agency described in section 1681a(p) of this title, the request includes an address for the consumer that substantially differs from the addresses in the file of the consumer, and the agency provides a consumer report in response to the request, the consumer reporting agency shall notify the requester of the existence of the discrepancy.

(2) Regulations

(A) Regulations required

The Bureau shall,,[54] in consultation with the Federal banking agencies, the National Credit Union Administration, and the Federal Trade Commission,,[55] prescribe regulations providing guidance regarding reasonable policies and procedures that a user of a consumer report should employ when such user has received a notice of discrepancy under paragraph (1).

(B) Policies and procedures to be included

The regulations prescribed under subparagraph (A) shall describe reasonable policies and procedures for use by a user of a consumer report—

(i) to form a reasonable belief that the user knows the identity of the person to whom the consumer report pertains; and

(ii) if the user establishes a continuing relationship with the consumer, and the user regularly and in the ordinary course of business furnishes information to the consumer reporting agency from which the notice of discrepancy pertaining to the consumer was obtained, to reconcile the address of the consumer with the consumer reporting agency by furnishing such address to such consumer reporting agency as part of information regularly furnished by the user for the period in which the relationship is established.

§1681c–1. Identity theft prevention; fraud alerts and active duty alerts

(a) One-call fraud alerts

(1) Initial alerts

Upon the direct request of a consumer, or an individual acting on behalf of or as a personal representative of a consumer, who asserts in good faith a suspicion that the consumer has been or is about to become a victim of fraud or related crime, including identity theft, a consumer reporting agency described in section 1681a(p) of this title that maintains a file on the consumer and has received appropriate proof of the identity of the requester shall—

[54] So in original.

[55] So in original.

(A) include a fraud alert in the file of that consumer, and also provide that alert along with any credit score generated in using that file, for a period of not less than 1 year, beginning on the date of such request, unless the consumer or such representative requests that such fraud alert be removed before the end of such period, and the agency has received appropriate proof of the identity of the requester for such purpose; and

(B) refer the information regarding the fraud alert under this paragraph to each of the other consumer reporting agencies described in section 1681a(p) of this title, in accordance with procedures developed under section 1681s(f) of this title.

(2) Access to free reports

In any case in which a consumer reporting agency includes a fraud alert in the file of a consumer pursuant to this subsection, the consumer reporting agency shall—

(A) disclose to the consumer that the consumer may request a free copy of the file of the consumer pursuant to section 1681j(d) of this title; and

(B) provide to the consumer all disclosures required to be made under section 1681g of this title, without charge to the consumer, not later than 3 business days after any request described in subparagraph (A).

(b) Extended alerts

(1) In general

Upon the direct request of a consumer, or an individual acting on behalf of or as a personal representative of a consumer, who submits an identity theft report to a consumer reporting agency described in section 1681a(p) of this title that maintains a file on the consumer, if the agency has received appropriate proof of the identity of the requester, the agency shall—

(A) include a fraud alert in the file of that consumer, and also provide that alert along with any credit score generated in using that file, during the 7-year period beginning on the date of such request, unless the consumer or such representative requests that such fraud alert be removed before the end of such period and the agency has received appropriate proof of the identity of the requester for such purpose; \

(B) during the 5-year period beginning on the date of such request, exclude the consumer from any list of consumers prepared by the consumer reporting agency and provided to any third party to offer credit or insurance to the consumer as part of a transaction that was not initiated by the consumer, unless the consumer or such representative requests that such exclusion be rescinded before the end of such period; and

(C) refer the information regarding the extended fraud alert under this paragraph to each of the other consumer reporting agencies described in section 1681a(p) of this title, in accordance with procedures developed under section 1681s(f) of this title.

(2) Access to free reports

In any case in which a consumer reporting agency includes a fraud alert in the file of a consumer pursuant to this subsection, the consumer reporting agency shall—

(A) disclose to the consumer that the consumer may request 2 free copies of the file of the consumer pursuant to section 1681j(d) of this title during the 12-month period beginning on the date on which the fraud alert was included in the file; and

(B) provide to the consumer all disclosures required to be made under section 1681g of this title, without charge to the consumer, not later than 3 business days after any request described in subparagraph (A).

(c) Active duty alerts

Upon the direct request of an active duty military consumer, or an individual acting on behalf of or as a personal representative of an active duty military consumer, a consumer reporting agency described in section 1681a(p) of this title that maintains a file on the active duty military consumer and has received appropriate proof of the identity of the requester shall—

(1) include an active duty alert in the file of that active duty military consumer, and also provide that alert along with any credit score generated in using that file, during a period of not less than 12 months, or such longer period as the Bureau shall determine, by regulation, beginning on the date of the request, unless the active duty military consumer or such representative requests that such fraud alert be removed before the end of such period, and the agency has received appropriate proof of the identity of the requester for such purpose;

(2) during the 2-year period beginning on the date of such request, exclude the active duty military consumer from any list of consumers prepared by the consumer reporting agency and provided to any third party to offer credit or insurance to the consumer as part of a transaction that was not initiated by the consumer, unless the consumer requests that such exclusion be rescinded before the end of such period; and

(3) refer the information regarding the active duty alert to each of the other consumer reporting agencies described in section 1681a(p) of this title, in accordance with procedures developed under section 1681s(f) of this title.

(d) Procedures

Each consumer reporting agency described in section 1681a(p) of this title shall establish policies and procedures to comply with this section, including procedures that inform consumers of the availability of initial, extended, and active duty alerts and procedures that allow consumers and active duty military consumers to request initial, extended, or active duty alerts (as applicable) in a simple and easy manner, including by telephone.

(e) Referrals of alerts

Each consumer reporting agency described in section 1681a(p) of this title that receives a referral of a fraud alert or active duty alert from another consumer reporting agency pursuant to this section shall, as though the agency received the request from the consumer directly, follow the procedures required under—

(1) paragraphs (1)(A) and (2) of subsection (a), in the case of a referral under subsection (a)(1)(B);

(2) paragraphs (1)(A), (1)(B), and (2) of subsection (b), in the case of a referral under subsection (b)(1)(C); and

(3) paragraphs (1) and (2) of subsection (c), in the case of a referral under subsection (c)(3).

(f) Duty of reseller to reconvey alert

A reseller shall include in its report any fraud alert or active duty alert placed in the file of a consumer pursuant to this section by another consumer reporting agency.

(g) Duty of other consumer reporting agencies to provide contact information

If a consumer contacts any consumer reporting agency that is not described in section 1681a(p) of this title to communicate a suspicion that the consumer has been or is about to become a victim of fraud or related crime, including identity theft, the agency shall provide information to the consumer on how to contact the Bureau and the consumer reporting agencies described in section 1681a(p) of this title to obtain more detailed information and request alerts under this section.

(h) Limitations on use of information for credit extensions

(1) Requirements for initial and active duty alerts

(A) Notification

Each initial fraud alert and active duty alert under this section shall include information that notifies all prospective users of a consumer report on the consumer to which the alert relates that the consumer does not authorize the establishment of any new credit plan or extension of credit, other than under an open-end credit plan (as defined in section 1602(i)[56] of this title), in the name of the consumer, or issuance of an additional card on an existing credit account requested by a consumer, or any increase in credit limit on an existing credit account requested by a consumer, except in accordance with subparagraph (B).

(B) Limitation on users

(i) In general

No prospective user of a consumer report that includes an initial fraud alert or an active duty alert in accordance with this section may establish a new credit plan or extension of credit, other than under an open-end credit plan (as defined in section 1602(i)[57] of this title), in the name of the consumer, or issue an additional card on an existing credit account requested by a consumer, or grant any increase in credit limit on an existing credit account requested by a consumer, unless the user utilizes reasonable

[56] Section 1602(i) of this title, referred to in subsec. (h), was redesignated section 1602(j) of this title by Pub. L. 111–203, title X, §1100A(1)(A), July 21, 2010, 124 Stat. 2107.

[57] Section 1602(i) of this title, referred to in subsec. (h), was redesignated section 1602(j) of this title by Pub. L. 111–203, title X, §1100A(1)(A), July 21, 2010, 124 Stat. 2107.

policies and procedures to form a reasonable belief that the user knows the identity of the person making the request.

(ii) Verification

If a consumer requesting the alert has specified a telephone number to be used for identity verification purposes, before authorizing any new credit plan or extension described in clause (i) in the name of such consumer, a user of such consumer report shall contact the consumer using that telephone number or take reasonable steps to verify the consumer's identity and confirm that the application for a new credit plan is not the result of identity theft.

(2) Requirements for extended alerts

(A) Notification

Each extended alert under this section shall include information that provides all prospective users of a consumer report relating to a consumer with—

(i) notification that the consumer does not authorize the establishment of any new credit plan or extension of credit described in clause (i), other than under an open-end credit plan (as defined in section 1602(i)[58] of this title), in the name of the consumer, or issuance of an additional card on an existing credit account requested by a consumer, or any increase in credit limit on an existing credit account requested by a consumer, except in accordance with subparagraph (B); and

(ii) a telephone number or other reasonable contact method designated by the consumer.

(B) Limitation on users

No prospective user of a consumer report or of a credit score generated using the information in the file of a consumer that includes an extended fraud alert in accordance with this section may establish a new credit plan or extension of credit, other than under an open-end credit plan (as defined in section 1602(i)[59] of this title), in the name of the consumer, or issue an additional card on an existing credit account requested by a consumer, or any increase in credit limit on an existing credit account requested by a consumer, unless the user contacts the consumer in person or using the contact method described in subparagraph (A)(ii) to confirm that the application for a new credit plan or increase in credit limit, or request for an additional card is not the result of identity theft.

(i) National security freeze

(1) Definitions

For purposes of this subsection:

(A) The term "consumer reporting agency" means a consumer reporting agency described in section 1681a(p) of this title.

(B) The term "proper identification" has the meaning of such term as used under section 1681h of this title.

(C) The term "security freeze" means a restriction that prohibits a consumer reporting agency from disclosing the contents of a consumer report that is subject to such security freeze to any person requesting the consumer report.

(2) Placement of security freeze

(A) In general

Upon receiving a direct request from a consumer that a consumer reporting agency place a security freeze, and upon receiving proper identification from the consumer, the consumer reporting agency shall, free of charge, place the security freeze not later than—

(i) in the case of a request that is by tollfree telephone or secure electronic means, 1 business day after receiving the request directly from the consumer; or

(ii) in the case of a request that is by mail, 3 business days after receiving the request directly from the consumer.

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[58] Section 1602(i) of this title, referred to in subsec. (h), was redesignated section 1602(j) of this title by Pub. L. 111–203, title X, §1100A(1)(A), July 21, 2010, 124 Stat. 2107.

[59] Section 1602(i) of this title, referred to in subsec. (h), was redesignated section 1602(j) of this title by Pub. L. 111–203, title X, §1100A(1)(A), July 21, 2010, 124 Stat. 2107.

(B) Confirmation and additional information

Not later than 5 business days after placing a security freeze under subparagraph (A), a consumer reporting agency shall—

(i) send confirmation of the placement to the consumer; and

(ii) inform the consumer of—

(I) the process by which the consumer may remove the security freeze, including a mechanism to authenticate the consumer; and

(II) the consumer's right described in section 1681m(d)(1)(D) of this title.

(C) Notice to third parties

A consumer reporting agency may advise a third party that a security freeze has been placed with respect to a consumer under subparagraph (A).

(3) Removal of security freeze

(A) In general

A consumer reporting agency shall remove a security freeze placed on the consumer report of a consumer only in the following cases:

(i) Upon the direct request of the consumer.

(ii) The security freeze was placed due to a material misrepresentation of fact by the consumer.

(B) Notice if removal not by request

If a consumer reporting agency removes a security freeze under subparagraph (A)(ii), the consumer reporting agency shall notify the consumer in writing prior to removing the security freeze.

(C) Removal of security freeze by consumer request

Except as provided in subparagraph (A)(ii), a security freeze shall remain in place until the consumer directly requests that the security freeze be removed. Upon receiving a direct request from a consumer that a consumer reporting agency remove a security freeze, and upon receiving proper identification from the consumer, the consumer reporting agency shall, free of charge, remove the security freeze not later than—

(i) in the case of a request that is by tollfree telephone or secure electronic means, 1 hour after receiving the request for removal; or

(ii) in the case of a request that is by mail, 3 business days after receiving the request for removal.

(D) Third-party requests

If a third party requests access to a consumer report of a consumer with respect to which a security freeze is in effect, where such request is in connection with an application for credit, and the consumer does not allow such consumer report to be accessed, the third party may treat the application as incomplete.

(E) Temporary removal of security freeze

Upon receiving a direct request from a consumer under subparagraph (A)(i), if the consumer requests a temporary removal of a security freeze, the consumer reporting agency shall, in accordance with subparagraph (C), remove the security freeze for the period of time specified by the consumer.

(4) Exceptions

A security freeze shall not apply to the making of a consumer report for use of the following:

(A) A person or entity, or a subsidiary, affiliate, or agent of that person or entity, or an assignee of a financial obligation owed by the consumer to that person or entity, or a prospective assignee of a financial obligation owed by the consumer to that person or entity in conjunction with the proposed purchase of the financial obligation, with which the consumer has or had prior to assignment an account or contract including a demand deposit account, or to whom the consumer issued a negotiable instrument, for the purposes of reviewing the account or collecting the financial obligation owed for the account, contract, or negotiable instrument. For purposes of this subparagraph, "reviewing the account" includes activities related to account maintenance, monitoring, credit line increases, and account upgrades and enhancements.

(B) Any Federal, State, or local agency, law enforcement agency, trial court, or private collection agency acting pursuant to a court order, warrant, or subpoena.

(C) A child support agency acting pursuant to part D of title IV of the Social Security Act (42 U.S.C. 651 et seq.).

(D) A Federal agency or a State or its agents or assigns acting to investigate fraud or acting to investigate or collect delinquent taxes or unpaid court orders or to fulfill any of its other statutory responsibilities, provided such responsibilities are consistent with a permissible purpose under section 1681b of this title.

(E) By a person using credit information for the purposes described under section 1681b(c) of this title.

(F) Any person or entity administering a credit file monitoring subscription or similar service to which the consumer has subscribed.

(G) Any person or entity for the purpose of providing a consumer with a copy of the consumer's consumer report or credit score, upon the request of the consumer.

(H) Any person using the information in connection with the underwriting of insurance.

(I) Any person using the information for employment, tenant, or background screening purposes.

(J) Any person using the information for assessing, verifying, or authenticating a consumer's identity for purposes other than the granting of credit, or for investigating or preventing actual or potential fraud.

(5) Notice of rights

At any time a consumer is required to receive a summary of rights required under section 1681g of this title, the following notice shall be included:

"CONSUMERS HAVE THE RIGHT TO OBTAIN A SECURITY FREEZE

"You have a right to place a 'security freeze' on your credit report, which will prohibit a consumer reporting agency from releasing information in your credit report without your express authorization. The security freeze is designed to prevent credit, loans, and services from being approved in your name without your consent. However, you should be aware that using a security freeze to take control over who gets access to the personal and financial information in your credit report may delay, interfere with, or prohibit the timely approval of any subsequent request or application you make regarding a new loan, credit, mortgage, or any other account involving the extension of credit.

"As an alternative to a security freeze, you have the right to place an initial or extended fraud alert on your credit file at no cost. An initial fraud alert is a 1-year alert that is placed on a consumer's credit file. Upon seeing a fraud alert display on a consumer's credit file, a business is required to take steps to verify the consumer's identity before extending new credit. If you are a victim of identity theft, you are entitled to an extended fraud alert, which is a fraud alert lasting 7 years.

"A security freeze does not apply to a person or entity, or its affiliates, or collection agencies acting on behalf of the person or entity, with which you have an existing account that requests information in your credit report for the purposes of reviewing or collecting the account. Reviewing the account includes activities related to account maintenance, monitoring, credit line increases, and account upgrades and enhancements.".

(6) Webpage

(A) Consumer reporting agencies

A consumer reporting agency shall establish a webpage that—

(i) allows a consumer to request a security freeze;

(ii) allows a consumer to request an initial fraud alert;

(iii) allows a consumer to request an extended fraud alert;

(iv) allows a consumer to request an active duty fraud alert;

(v) allows a consumer to opt-out of the use of information in a consumer report to send the consumer a solicitation of credit or insurance, in accordance with section 1681m(d) of this title; and

(vi) shall not be the only mechanism by which a consumer may request a security freeze.

(B) FTC

The Federal Trade Commission shall establish a single webpage that includes a link to each webpage established under subparagraph (A) within the Federal Trade Commission's website www.Identitytheft.gov, or a successor website.

(j) National protection for files and credit records of protected consumers

(1) Definitions

As used in this subsection:

(A) The term "consumer reporting agency" means a consumer reporting agency described in section 1681a(p) of this title.

(B) The term "protected consumer" means an individual who is—

(i) under the age of 16 years at the time a request for the placement of a security freeze is made; or

(ii) an incapacitated person or a protected person for whom a guardian or conservator has been appointed.

(C) The term "protected consumer's representative" means a person who provides to a consumer reporting agency sufficient proof of authority to act on behalf of a protected consumer.

(D) The term "record" means a compilation of information that—

(i) identifies a protected consumer;

(ii) is created by a consumer reporting agency solely for the purpose of complying with this subsection; and

(iii) may not be created or used to consider the protected consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.

(E) The term "security freeze" means a restriction that prohibits a consumer reporting agency from disclosing the contents of a consumer report that is the subject of such security freeze or, in the case of a protected consumer for whom the consumer reporting agency does not have a file, a record that is subject to such security freeze to any person requesting the consumer report for the purpose of opening a new account involving the extension of credit.

(F) The term "sufficient proof of authority" means documentation that shows a protected consumer's representative has authority to act on behalf of a protected consumer and includes—

(i) an order issued by a court of law;

(ii) a lawfully executed and valid power of attorney;

(iii) a document issued by a Federal, State, or local government agency in the United States showing proof of parentage, including a birth certificate; or

(iv) with respect to a protected consumer who has been placed in a foster care setting, a written communication from a county welfare department or its agent or designee, or a county probation department or its agent or designee, certifying that the protected consumer is in a foster care setting under its jurisdiction.

(G) The term "sufficient proof of identification" means information or documentation that identifies a protected consumer and a protected consumer's representative and includes—

(i) a social security number or a copy of a social security card issued by the Social Security Administration;

(ii) a certified or official copy of a birth certificate issued by the entity authorized to issue the birth certificate; or

(iii) a copy of a driver's license, an identification card issued by the motor vehicle administration, or any other government issued identification.

(2) Placement of security freeze for a protected consumer

(A) In general

Upon receiving a direct request from a protected consumer's representative that a consumer reporting agency place a security freeze, and upon receiving sufficient proof of identification and sufficient proof of authority, the consumer reporting agency shall, free of charge, place the security freeze not later than—

(i) in the case of a request that is by tollfree telephone or secure electronic means, 1 business day after receiving the request directly from the protected consumer's representative; or

(ii) in the case of a request that is by mail, 3 business days after receiving the request directly from the protected consumer's representative.

(B) Confirmation and additional information

Not later than 5 business days after placing a security freeze under subparagraph (A), a consumer reporting agency shall—

(i) send confirmation of the placement to the protected consumer's representative; and

(ii) inform the protected consumer's representative of the process by which the protected consumer may remove the security freeze, including a mechanism to authenticate the protected consumer's representative.

(C) Creation of file

If a consumer reporting agency does not have a file pertaining to a protected consumer when the consumer reporting agency receives a direct request under subparagraph (A), the consumer reporting agency shall create a record for the protected consumer.

(3) Prohibition on release of record or file of protected consumer

After a security freeze has been placed under paragraph (2)(A), and unless the security freeze is removed in accordance with this subsection, a consumer reporting agency may not release the protected consumer's consumer report, any information derived from the protected consumer's consumer report, or any record created for the protected consumer.

(4) Removal of a protected consumer security freeze

(A) In general

A consumer reporting agency shall remove a security freeze placed on the consumer report of a protected consumer only in the following cases:

(i) Upon the direct request of the protected consumer's representative.

(ii) Upon the direct request of the protected consumer, if the protected consumer is not under the age of 16 years at the time of the request.

(iii) The security freeze was placed due to a material misrepresentation of fact by the protected consumer's representative.

(B) Notice if removal not by request

If a consumer reporting agency removes a security freeze under subparagraph (A)(iii), the consumer reporting agency shall notify the protected consumer's representative in writing prior to removing the security freeze.

(C) Removal of freeze by request

Except as provided in subparagraph (A)(iii), a security freeze shall remain in place until a protected consumer's representative or protected consumer described in subparagraph (A)(ii) directly requests that the security freeze be removed. Upon receiving a direct request from the protected consumer's representative or protected consumer described in subparagraph (A)(ii) that a consumer reporting agency remove a security freeze, and upon receiving sufficient proof of identification and sufficient proof of authority, the consumer reporting agency shall, free of charge, remove the security freeze not later than—

(i) in the case of a request that is by toll free telephone or secure electronic means, 1 hour after receiving the request for removal; or

(ii) in the case of a request that is by mail, 3 business days after receiving the request for removal.

(D) Temporary removal of security freeze

Upon receiving a direct request from a protected consumer or a protected consumer's representative under subparagraph (A)(i), if the protected consumer or protected consumer's representative requests a temporary removal of a security freeze, the consumer reporting agency shall, in accordance with subparagraph (C), remove the security freeze for the period of time specified by the protected consumer or protected consumer's representative.

(k) Credit monitoring

(1) Definitions

In this subsection:

(A) The term "active duty military consumer" includes a member of the National Guard.

(B) The term "National Guard" has the meaning given the term in section 101(c) of title 10.

(2) Credit monitoring

A consumer reporting agency described in section 1681a(p) of this title shall provide a free electronic credit monitoring service that, at a minimum, notifies a consumer of material additions or modifications to the file of

the consumer at the consumer reporting agency to any consumer who provides to the consumer reporting agency—

(A) appropriate proof that the consumer is an active duty military consumer; and

(B) contact information of the consumer.

(3) Rulemaking

Not later than 1 year after May 24, 2018, the Federal Trade Commission shall promulgate regulations regarding the requirements of this subsection, which shall at a minimum include—

(A) a definition of an electronic credit monitoring service and material additions or modifications to the file of a consumer; and

(B) what constitutes appropriate proof.

(4) Applicability

(A) Sections 168 ln and 1681*o* of this title shall not apply to any violation of this subsection.

(B) This subsection shall be enforced exclusively under section 1681s of this title by the Federal agencies and Federal and State officials identified in that section.

§1681c–2. Block of information resulting from identity theft

(a) Block

Except as otherwise provided in this section, a consumer reporting agency shall block the reporting of any information in the file of a consumer that the consumer identifies as information that resulted from an alleged identity theft, not later than 4 business days after the date of receipt by such agency of—

(1) appropriate proof of the identity of the consumer;

(2) a copy of an identity theft report;

(3) the identification of such information by the consumer; and

(4) a statement by the consumer that the information is not information relating to any transaction by the consumer.

(b) Notification

A consumer reporting agency shall promptly notify the furnisher of information identified by the consumer under subsection (a)—

(1) that the information may be a result of identity theft;

(2) that an identity theft report has been filed;

(3) that a block has been requested under this section; and

(4) of the effective dates of the block.

(c) Authority to decline or rescind

(1) In general

A consumer reporting agency may decline to block, or may rescind any block, of information relating to a consumer under this section, if the consumer reporting agency reasonably determines that—

(A) the information was blocked in error or a block was requested by the consumer in error;

(B) the information was blocked, or a block was requested by the consumer, on the basis of a material misrepresentation of fact by the consumer relevant to the request to block; or

(C) the consumer obtained possession of goods, services, or money as a result of the blocked transaction or transactions.

(2) Notification to consumer

If a block of information is declined or rescinded under this subsection, the affected consumer shall be notified promptly, in the same manner as consumers are notified of the reinsertion of information under section 1681i(a)(5)(B) of this title.

(3) Significance of block

For purposes of this subsection, if a consumer reporting agency rescinds a block, the presence of information in the file of a consumer prior to the blocking of such information is not evidence of whether the consumer knew

or should have known that the consumer obtained possession of any goods, services, or money as a result of the block.

(d) Exception for resellers

(1) No reseller file

This section shall not apply to a consumer reporting agency, if the consumer reporting agency—

(A) is a reseller;

(B) is not, at the time of the request of the consumer under subsection (a), otherwise furnishing or reselling a consumer report concerning the information identified by the consumer; and

(C) informs the consumer, by any means, that the consumer may report the identity theft to the Bureau to obtain consumer information regarding identity theft.

(2) Reseller with file

The sole obligation of the consumer reporting agency under this section, with regard to any request of a consumer under this section, shall be to block the consumer report maintained by the consumer reporting agency from any subsequent use, if—

(A) the consumer, in accordance with the provisions of subsection (a), identifies, to a consumer reporting agency, information in the file of the consumer that resulted from identity theft; and

(B) the consumer reporting agency is a reseller of the identified information.

(3) Notice

In carrying out its obligation under paragraph (2), the reseller shall promptly provide a notice to the consumer of the decision to block the file. Such notice shall contain the name, address, and telephone number of each consumer reporting agency from which the consumer information was obtained for resale.

(e) Exception for verification companies

The provisions of this section do not apply to a check services company, acting as such, which issues authorizations for the purpose of approving or processing negotiable instruments, electronic fund transfers, or similar methods of payments, except that, beginning 4 business days after receipt of information described in paragraphs (1) through (3) of subsection (a), a check services company shall not report to a national consumer reporting agency described in section 1681a(p) of this title, any information identified in the subject identity theft report as resulting from identity theft.

(f) Access to blocked information by law enforcement agencies

No provision of this section shall be construed as requiring a consumer reporting agency to prevent a Federal, State, or local law enforcement agency from accessing blocked information in a consumer file to which the agency could otherwise obtain access under this subchapter.

§1681c–3. Adverse information in cases of trafficking

(a) Definitions

In this section:

(1) Trafficking documentation

The term "trafficking documentation" means—

(A) documentation of—

(i) a determination that a consumer is a victim of trafficking made by a Federal, State, or Tribal governmental entity; or

(ii) by a court of competent jurisdiction; and

(B) documentation that identifies items of adverse information that should not be furnished by a consumer reporting agency because the items resulted from a severe form of trafficking in persons or sex trafficking of which the consumer is a victim.

(2) Trafficking Victims Protection Act of 2000 definitions

The terms "severe forms of trafficking in persons" and "sex trafficking" have the meanings given, respectively, in section 103 of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7102).

(3) Victim of trafficking

The term "victim of trafficking" means a person who is a victim of a severe form of trafficking in persons or sex trafficking.

(b) Adverse information

A consumer reporting agency may not furnish a consumer report containing any adverse item of information about a consumer that resulted from a severe form of trafficking in persons or sex trafficking if the consumer has provided trafficking documentation to the consumer reporting agency.

(c) Rulemaking

(1) In general

Not later than 180 days after December 27, 2021, the Director shall issue rules to implement subsection (a).

(2) Contents

The rules issued pursuant to paragraph (1) shall establish a method by which consumers shall submit trafficking documentation to consumer reporting agencies.

§1681d. Disclosure of investigative consumer reports

(a) Disclosure of fact of preparation

A person may not procure or cause to be prepared an investigative consumer report on any consumer unless—

(1) it is clearly and accurately disclosed to the consumer that an investigative consumer report including information as to his character, general reputation, personal characteristics, and mode of living, whichever are applicable, may be made, and such disclosure (A) is made in a writing mailed, or otherwise delivered, to the consumer, not later than three days after the date on which the report was first requested, and (B) includes a statement informing the consumer of his right to request the additional disclosures provided for under subsection (b) of this section and the written summary of the rights of the consumer prepared pursuant to section 1681g(c) of this title; and

(2) the person certifies or has certified to the consumer reporting agency that—

(A) the person has made the disclosures to the consumer required by paragraph (1); and

(B) the person will comply with subsection (b).

(b) Disclosure on request of nature and scope of investigation

Any person who procures or causes to be prepared an investigative consumer report on any consumer shall, upon written request made by the consumer within a reasonable period of time after the receipt by him of the disclosure required by subsection (a)(1), make a complete and accurate disclosure of the nature and scope of the investigation requested. This disclosure shall be made in a writing mailed, or otherwise delivered, to the consumer not later than five days after the date on which the request for such disclosure was received from the consumer or such report was first requested, whichever is the later.

(c) Limitation on liability upon showing of reasonable procedures for compliance with provisions

No person may be held liable for any violation of subsection (a) or (b) of this section if he shows by a preponderance of the evidence that at the time of the violation he maintained reasonable procedures to assure compliance with subsection (a) or (b).

(d) Prohibitions

(1) Certification

A consumer reporting agency shall not prepare or furnish an investigative consumer report unless the agency has received a certification under subsection (a)(2) from the person who requested the report.

(2) Inquiries

A consumer reporting agency shall not make an inquiry for the purpose of preparing an investigative consumer report on a consumer for employment purposes if the making of the inquiry by an employer or prospective employer of the consumer would violate any applicable Federal or State equal employment opportunity law or regulation.

(3) Certain public record information

Except as otherwise provided in section 1681k of this title, a consumer reporting agency shall not furnish an investigative consumer report that includes information that is a matter of public record and that relates to an

arrest, indictment, conviction, civil judicial action, tax lien, or outstanding judgment, unless the agency has verified the accuracy of the information during the 30-day period ending on the date on which the report is furnished.

(4) Certain adverse information

A consumer reporting agency shall not prepare or furnish an investigative consumer report on a consumer that contains information that is adverse to the interest of the consumer and that is obtained through a personal interview with a neighbor, friend, or associate of the consumer or with another person with whom the consumer is acquainted or who has knowledge of such item of information, unless—

(A) the agency has followed reasonable procedures to obtain confirmation of the information, from an additional source that has independent and direct knowledge of the information; or

(B) the person interviewed is the best possible source of the information.

§1681e. Compliance procedures

(a) Identity and purposes of credit users

Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title.

(b) Accuracy of report

Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

(c) Disclosure of consumer reports by users allowed

A consumer reporting agency may not prohibit a user of a consumer report furnished by the agency on a consumer from disclosing the contents of the report to the consumer, if adverse action against the consumer has been taken by the user based in whole or in part on the report.

(d) Notice to users and furnishers of information

(1) Notice requirement

A consumer reporting agency shall provide to any person—

(A) who regularly and in the ordinary course of business furnishes information to the agency with respect to any consumer; or

(B) to whom a consumer report is provided by the agency; a notice of such person's responsibilities under this subchapter.

(2) Content of notice

The Bureau shall prescribe the content of notices under paragraph (1), and a consumer reporting agency shall be in compliance with this subsection if it provides a notice under paragraph (1) that is substantially similar to the Bureau prescription under this paragraph.

(e) Procurement of consumer report for resale

(1) Disclosure

A person may not procure a consumer report for purposes of reselling the report (or any information in the report) unless the person discloses to the consumer reporting agency that originally furnishes the report—

(A) the identity of the end-user of the report (or information); and

(B) each permissible purpose under section 1681b of this title for which the report is furnished to the end-user of the report (or information).

(2) Responsibilities of procurers for resale

A person who procures a consumer report for purposes of reselling the report (or any information in the report) shall—

(A) establish and comply with reasonable procedures designed to ensure that the report (or information) is resold by the person only for a purpose for which the report may be furnished under section 1681b of this title, including by requiring that each person to which the report (or information) is resold and that resells or provides the report (or information) to any other person—

(i) identifies each end user of the resold report (or information);

(ii) certifies each purpose for which the report (or information) will be used; and

(iii) certifies that the report (or information) will be used for no other purpose; and

(B) before reselling the report, make reasonable efforts to verify the identifications and certifications made under subparagraph (A).

(3) Resale of consumer report to a Federal agency or department

Notwithstanding paragraph (1) or (2), a person who procures a consumer report for purposes of reselling the report (or any information in the report) shall not disclose the identity of the end-user of the report under paragraph (1) or (2) if—

(A) the end user is an agency or department of the United States Government which procures the report from the person for purposes of determining the eligibility of the consumer concerned to receive access or continued access to classified information (as defined in section 1681b(b)(4)(E)(i)[60] of this title); and

(B) the agency or department certifies in writing to the person reselling the report that nondisclosure is necessary to protect classified information or the safety of persons employed by or contracting with, or undergoing investigation for work or contracting with the agency or department.

§1681f. Disclosures to governmental agencies

Notwithstanding the provisions of section 1681b of this title, a consumer reporting agency may furnish identifying information respecting any consumer, limited to his name, address, former addresses, places of employment, or former places of employment, to a governmental agency.

§1681g. Disclosures to consumers

(a) Information on file; sources; report recipients

Every consumer reporting agency shall, upon request, and subject to section 1681h(a)(1) of this title, clearly and accurately disclose to the consumer:

(1) All information in the consumer's file at the time of the request, except that—

(A) if the consumer to whom the file relates requests that the first 5 digits of the social security number (or similar identification number) of the consumer not be included in the disclosure and the consumer reporting agency has received appropriate proof of the identity of the requester, the consumer reporting agency shall so truncate such number in such disclosure; and

(B) nothing in this paragraph shall be construed to require a consumer reporting agency to disclose to a consumer any information concerning credit scores or any other risk scores or predictors relating to the consumer.

(2) The sources of the information; except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed: Provided, That in the event an action is brought under this subchapter, such sources shall be available to the plaintiff under appropriate discovery procedures in the court in which the action is brought.

(3)

(A) Identification of each person (including each end-user identified under section 1681e(e)(1) of this title) that procured a consumer report—

[60] Section 1681b(b)(4) of this title, referred to in subsec. (e)(3)(A), was subsequently amended, and section 1681b(b)(4)(E) no longer defines the term "classified information". However, such term is defined elsewhere in that section.

(i) for employment purposes, during the 2-year period preceding the date on which the request is made; or

(ii) for any other purpose, during the 1-year period preceding the date on which the request is made.

(B) An identification of a person under subparagraph (A) shall include—

(i) the name of the person or, if applicable, the trade name (written in full) under which such person conducts business; and

(ii) upon request of the consumer, the address and telephone number of the person.

(C) Subparagraph (A) does not apply if—

(i) the end user is an agency or department of the United States Government that procures the report from the person for purposes of determining the eligibility of the consumer to whom the report relates to receive access or continued access to classified information (as defined in section 1681b(b)(4)(E)(i)[61] of this title); and

(ii) the head of the agency or department makes a written finding as prescribed under section 1681b(b)(4)(A) of this title.

(4) The dates, original payees, and amounts of any checks upon which is based any adverse characterization of the consumer, included in the file at the time of the disclosure.

(5) A record of all inquiries received by the agency during the 1-year period preceding the request that identified the consumer in connection with a credit or insurance transaction that was not initiated by the consumer.

(6) If the consumer requests the credit file and not the credit score, a statement that the consumer may request and obtain a credit score.

(b) Exempt information

The requirements of subsection (a) respecting the disclosure of sources of information and the recipients of consumer reports do not apply to information received or consumer reports furnished prior to the effective date of this subchapter except to the extent that the matter involved is contained in the files of the consumer reporting agency on that date.

(c) Summary of rights to obtain and dispute information in consumer reports and to obtain credit scores

(1) Commission[62] summary of rights required

(A) In general

The Commission[63] shall prepare a model summary of the rights of consumers under this subchapter.

(B) Content of summary

The summary of rights prepared under subparagraph (A) shall include a description of—

(i) the right of a consumer to obtain a copy of a consumer report under subsection (a) from each consumer reporting agency;

(ii) the frequency and circumstances under which a consumer is entitled to receive a consumer report without charge under section 1681j of this title;

(iii) the right of a consumer to dispute information in the file of the consumer under section 1681i of this title;

(iv) the right of a consumer to obtain a credit score from a consumer reporting agency, and a description of how to obtain a credit score;

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[61] Section 1681b(b)(4) of this title, referred to in subsec. (a)(3)(C)(i), was subsequently amended, and section 1681b(b)(4)(E) no longer defines the term "classified information". However, such term is defined elsewhere in that section.

[62] So in original. Probably should be "Bureau".

[63] So in original. Probably should be "Bureau".

(v) the method by which a consumer can contact, and obtain a consumer report from, a consumer reporting agency without charge, as provided in the regulations of the Bureau prescribed under section 211(c)[64] of the Fair and Accurate Credit Transactions Act of 2003; and

(vi) the method by which a consumer can contact, and obtain a consumer report from, a consumer reporting agency described in section 1681a(w)[65] of this title, as provided in the regulations of the Bureau prescribed under section 1681j(a)(1)(C) of this title.

(C) Availability of summary of rights

The Commission[66] shall—

(i) actively publicize the availability of the summary of rights prepared under this paragraph;

(ii) conspicuously post on its Internet website the availability of such summary of rights; and

(iii) promptly make such summary of rights available to consumers, on request.

(2) Summary of rights required to be included with agency disclosures

A consumer reporting agency shall provide to a consumer, with each written disclosure by the agency to the consumer under this section—

(A) the summary of rights prepared by the Bureau under paragraph (1);

(B) in the case of a consumer reporting agency described in section 1681a(p) of this title, a toll-free telephone number established by the agency, at which personnel are accessible to consumers during normal business hours;

(C) a list of all Federal agencies responsible for enforcing any provision of this subchapter, and the address and any appropriate phone number of each such agency, in a form that will assist the consumer in selecting the appropriate agency;

(D) a statement that the consumer may have additional rights under State law, and that the consumer may wish to contact a State or local consumer protection agency or a State attorney general (or the equivalent thereof) to learn of those rights; and

(E) a statement that a consumer reporting agency is not required to remove accurate derogatory information from the file of a consumer, unless the information is outdated under section 1681c of this title or cannot be verified.

(d) Summary of rights of identity theft victims

(1) In general

The Commission,[67] in consultation with the Federal banking agencies and the National Credit Union Administration, shall prepare a model summary of the rights of consumers under this subchapter with respect to the procedures for remedying the effects of fraud or identity theft involving credit, an electronic fund transfer, or an account or transaction at or with a financial institution or other creditor.

(2) Summary of rights and contact information

Beginning 60 days after the date on which the model summary of rights is prescribed in final form by the Bureau pursuant to paragraph (1), if any consumer contacts a consumer reporting agency and expresses a belief that the consumer is a victim of fraud or identity theft involving credit, an electronic fund transfer, or an account or transaction at or with a financial institution or other creditor, the consumer reporting agency shall, in addition to any other action that the agency may take, provide the consumer with a summary of rights that contains all of the information required by the Bureau under paragraph (1), and information on how to contact the Bureau to obtain more detailed information.

(e) Information available to victims

(1) In general

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[64] [Footnote appears without text in statute published online by the Government Publishing Office]

[65] [Footnote appears without text in statute published online by the Government Publishing Office]

[66] So in original. Probably should be "Bureau".

[67] So in original. Probably should be "Bureau".

For the purpose of documenting fraudulent transactions resulting from identity theft, not later than 30 days after the date of receipt of a request from a victim in accordance with paragraph (3), and subject to verification of the identity of the victim and the claim of identity theft in accordance with paragraph (2), a business entity that has provided credit to, provided for consideration products, goods, or services to, accepted payment from, or otherwise entered into a commercial transaction for consideration with, a person who has allegedly made unauthorized use of the means of identification of the victim, shall provide a copy of application and business transaction records in the control of the business entity, whether maintained by the business entity or by another person on behalf of the business entity, evidencing any transaction alleged to be a result of identity theft to—

(A) the victim;

(B) any Federal, State, or local government law enforcement agency or officer specified by the victim in such a request; or

(C) any law enforcement agency investigating the identity theft and authorized by the victim to take receipt of records provided under this subsection.

(2) Verification of identity and claim

Before a business entity provides any information under paragraph (1), unless the business entity, at its discretion, otherwise has a high degree of confidence that it knows the identity of the victim making a request under paragraph (1), the victim shall provide to the business entity—

(A) as proof of positive identification of the victim, at the election of the business entity—

(i) the presentation of a government issued identification card;

(ii) personally identifying information of the same type as was provided to the business entity by the unauthorized person; or

(iii) personally identifying information that the business entity typically requests from new applicants or for new transactions, at the time of the victim's request for information, including any documentation described in clauses (i) and (ii); and

(B) as proof of a claim of identity theft, at the election of the business entity—

(i) a copy of a police report evidencing the claim of the victim of identity theft; and

(ii) a properly completed—

(I) copy of a standardized affidavit of identity theft developed and made available by the Bureau; or

(II) an[68] affidavit of fact that is acceptable to the business entity for that purpose.

(3) Procedures

The request of a victim under paragraph (1) shall—

(A) be in writing;

(B) be mailed to an address specified by the business entity, if any; and

(C) if asked by the business entity, include relevant information about any transaction alleged to be a result of identity theft to facilitate compliance with this section including—

(i) if known by the victim (or if readily obtainable by the victim), the date of the application or transaction; and

(ii) if known by the victim (or if readily obtainable by the victim), any other identifying information such as an account or transaction number.

(4) No charge to victim

Information required to be provided under paragraph (1) shall be so provided without charge.

(5) Authority to decline to provide information

A business entity may decline to provide information under paragraph (1) if, in the exercise of good faith, the business entity determines that—

(A) this subsection does not require disclosure of the information;

[68] So in original. The word "an" probably should not appear.

(B) after reviewing the information provided pursuant to paragraph (2), the business entity does not have a high degree of confidence in knowing the true identity of the individual requesting the information;

(C) the request for the information is based on a misrepresentation of fact by the individual requesting the information relevant to the request for information; or

(D) the information requested is Internet navigational data or similar information about a person's visit to a website or online service.

(6) Limitation on liability

Except as provided in section 1681s of this title, sections 1681n and 1681*o* of this title do not apply to any violation of this subsection.

(7) Limitation on civil liability

No business entity may be held civilly liable under any provision of Federal, State, or other law for disclosure, made in good faith pursuant to this subsection.

(8) No new recordkeeping obligation

Nothing in this subsection creates an obligation on the part of a business entity to obtain, retain, or maintain information or records that are not otherwise required to be obtained, retained, or maintained in the ordinary course of its business or under other applicable law.

(9) Rule of construction

(A) In general

No provision of subtitle A of title V of Public Law 106–102 [15 U.S.C. 6801 et seq.], prohibiting the disclosure of financial information by a business entity to third parties shall be used to deny disclosure of information to the victim under this subsection.

(B) Limitation

Except as provided in subparagraph (A), nothing in this subsection permits a business entity to disclose information, including information to law enforcement under subparagraphs (B) and (C) of paragraph (1), that the business entity is otherwise prohibited from disclosing under any other applicable provision of Federal or State law.

(10) Affirmative defense

In any civil action brought to enforce this subsection, it is an affirmative defense (which the defendant must establish by a preponderance of the evidence) for a business entity to file an affidavit or answer stating that—

(A) the business entity has made a reasonably diligent search of its available business records; and

(B) the records requested under this subsection do not exist or are not reasonably available.

(11) Definition of victim

For purposes of this subsection, the term "victim" means a consumer whose means of identification or financial information has been used or transferred (or has been alleged to have been used or transferred) without the authority of that consumer, with the intent to commit, or to aid or abet, an identity theft or a similar crime.

(12) Effective date

This subsection shall become effective 180 days after December 4, 2003.

(13) Effectiveness study

Not later than 18 months after December 4, 2003, the Comptroller General of the United States shall submit a report to Congress assessing the effectiveness of this provision.

(f) Disclosure of credit scores

(1) In general

Upon the request of a consumer for a credit score, a consumer reporting agency shall supply to the consumer a statement indicating that the information and credit scoring model may be different than the credit score that may be used by the lender, and a notice which shall include—

(A) the current credit score of the consumer or the most recent credit score of the consumer that was previously calculated by the credit reporting agency for a purpose related to the extension of credit;

(B) the range of possible credit scores under the model used;

(C) all of the key factors that adversely affected the credit score of the consumer in the model used, the total number of which shall not exceed 4, subject to paragraph (9);

(D) the date on which the credit score was created; and

(E) the name of the person or entity that provided the credit score or credit file upon which the credit score was created.

(2) Definitions

For purposes of this subsection, the following definitions shall apply:

(A) Credit score

The term "credit score"—

(i) means a numerical value or a categorization derived from a statistical tool or modeling system used by a person who makes or arranges a loan to predict the likelihood of certain credit behaviors, including default (and the numerical value or the categorization derived from such analysis may also be referred to as a "risk predictor" or "risk score"); and

(ii) does not include—

(I) any mortgage score or rating of an automated underwriting system that considers one or more factors in addition to credit information, including the loan to value ratio, the amount of down payment, or the financial assets of a consumer; or

(II) any other elements of the underwriting process or underwriting decision.

(B) Key factors

The term "key factors" means all relevant elements or reasons adversely affecting the credit score for the particular individual, listed in the order of their importance based on their effect on the credit score.

(3) Timeframe and manner of disclosure

The information required by this subsection shall be provided in the same timeframe and manner as the information described in subsection (a).

(4) Applicability to certain uses

This subsection shall not be construed so as to compel a consumer reporting agency to develop or disclose a score if the agency does not—

(A) distribute scores that are used in connection with residential real property loans; or

(B) develop scores that assist credit providers in understanding the general credit behavior of a consumer and predicting the future credit behavior of the consumer.

(5) Applicability to credit scores developed by another person

(A) In general

This subsection shall not be construed to require a consumer reporting agency that distributes credit scores developed by another person or entity to provide a further explanation of them, or to process a dispute arising pursuant to section 1681i of this title, except that the consumer reporting agency shall provide the consumer with the name and address and website for contacting the person or entity who developed the score or developed the methodology of the score.

(B) Exception

This paragraph shall not apply to a consumer reporting agency that develops or modifies scores that are developed by another person or entity.

(6) Maintenance of credit scores not required

This subsection shall not be construed to require a consumer reporting agency to maintain credit scores in its files.

(7) Compliance in certain cases

In complying with this subsection, a consumer reporting agency shall—

(A) supply the consumer with a credit score that is derived from a credit scoring model that is widely distributed to users by that consumer reporting agency in connection with residential real property loans or with a credit score that assists the consumer in understanding the credit scoring assessment of the credit behavior of the consumer and predictions about the future credit behavior of the consumer; and

(B) a statement indicating that the information and credit scoring model may be different than that used by the lender.

(8) Fair and reasonable fee

A consumer reporting agency may charge a fair and reasonable fee, as determined by the Bureau, for providing the information required under this subsection.

(9) Use of enquiries as a key factor

If a key factor that adversely affects the credit score of a consumer consists of the number of enquiries made with respect to a consumer report, that factor shall be included in the disclosure pursuant to paragraph (1)(C) without regard to the numerical limitation in such paragraph.

(g) Disclosure of credit scores by certain mortgage lenders

(1) In general

Any person who makes or arranges loans and who uses a consumer credit score, as defined in subsection (f), in connection with an application initiated or sought by a consumer for a closed end loan or the establishment of an open end loan for a consumer purpose that is secured by 1 to 4 units of residential real property (hereafter in this subsection referred to as the "lender") shall provide the following to the consumer as soon as reasonably practicable:

(A) Information required under subsection (f)

(i) In general

A copy of the information identified in subsection (f) that was obtained from a consumer reporting agency or was developed and used by the user of the information.

(ii) Notice under subparagraph (D)

In addition to the information provided to it by a third party that provided the credit score or scores, a lender is only required to provide the notice contained in subparagraph (D).

(B) Disclosures in case of automated underwriting system

(i) In general

If a person that is subject to this subsection uses an automated underwriting system to underwrite a loan, that person may satisfy the obligation to provide a credit score by disclosing a credit score and associated key factors supplied by a consumer reporting agency.

(ii) Numerical credit score

However, if a numerical credit score is generated by an automated underwriting system used by an enterprise, and that score is disclosed to the person, the score shall be disclosed to the consumer consistent with subparagraph (C).

(iii) Enterprise defined

For purposes of this subparagraph, the term "enterprise" has the same meaning as in paragraph (6) of section 4502 of title 12.

(C) Disclosures of credit scores not obtained from a consumer reporting agency

A person that is subject to the provisions of this subsection and that uses a credit score, other than a credit score provided by a consumer reporting agency, may satisfy the obligation to provide a credit score by disclosing a credit score and associated key factors supplied by a consumer reporting agency.

(D) Notice to home loan applicants

A copy of the following notice, which shall include the name, address, and telephone number of each consumer reporting agency providing a credit score that was used:

"NOTICE TO THE HOME LOAN APPLICANT

"In connection with your application for a home loan, the lender must disclose to you the score that a consumer reporting agency distributed to users and the lender used in connection with your home loan, and the key factors affecting your credit scores.

"The credit score is a computer generated summary calculated at the time of the request and based on information that a consumer reporting agency or lender has on file. The scores are based on data about your credit history and payment patterns. Credit scores are important because they are used to assist the lender in

determining whether you will obtain a loan. They may also be used to determine what interest rate you may be offered on the mortgage. Credit scores can change over time, depending on your conduct, how your credit history and payment patterns change, and how credit scoring technologies change.

"Because the score is based on information in your credit history, it is very important that you review the credit-related information that is being furnished to make sure it is accurate. Credit records may vary from one company to another.

"If you have questions about your credit score or the credit information that is furnished to you, contact the consumer reporting agency at the address and telephone number provided with this notice, or contact the lender, if the lender developed or generated the credit score. The consumer reporting agency plays no part in the decision to take any action on the loan application and is unable to provide you with specific reasons for the decision on a loan application.

"If you have questions concerning the terms of the loan, contact the lender.".

(E) Actions not required under this subsection

This subsection shall not require any person to—

(i) explain the information provided pursuant to subsection (f);

(ii) disclose any information other than a credit score or key factors, as defined in subsection (f);

(iii) disclose any credit score or related information obtained by the user after a loan has closed;

(iv) provide more than 1 disclosure per loan transaction; or

(v) provide the disclosure required by this subsection when another person has made the disclosure to the consumer for that loan transaction.

(F) No obligation for content

(i) In general

The obligation of any person pursuant to this subsection shall be limited solely to providing a copy of the information that was received from the consumer reporting agency.

**(ii) Limit on liability **

No person has liability under this subsection for the content of that information or for the omission of any information within the report provided by the consumer reporting agency.

(G) Person defined as excluding enterprise

As used in this subsection, the term "person" does not include an enterprise (as defined in paragraph (6) of section 4502 of title 12).

(2) Prohibition on disclosure clauses null and void

(A) In general

Any provision in a contract that prohibits the disclosure of a credit score by a person who makes or arranges loans or a consumer reporting agency is void.

(B) No liability for disclosure under this subsection

A lender shall not have liability under any contractual provision for disclosure of a credit score pursuant to this subsection.

§1681h. Conditions and form of disclosure to consumers

(a) In general

(1) Proper identification

A consumer reporting agency shall require, as a condition of making the disclosures required under section 1681g of this title, that the consumer furnish proper identification.

(2) Disclosure in writing

Except as provided in subsection (b), the disclosures required to be made under section 1681g of this title shall be provided under that section in writing.

(b) Other forms of disclosure

(1) In general

If authorized by a consumer, a consumer reporting agency may make the disclosures required under[69] 1681g of this title—

(A) other than in writing; and

(B) in such form as may be—

(i) specified by the consumer in accordance with paragraph (2); and

(ii) available from the agency.

(2) Form

A consumer may specify pursuant to paragraph (1) that disclosures under section 1681g of this title shall be made—

(A) in person, upon the appearance of the consumer at the place of business of the consumer reporting agency where disclosures are regularly provided, during normal business hours, and on reasonable notice;

(B) by telephone, if the consumer has made a written request for disclosure by telephone;

(C) by electronic means, if available from the agency; or

(D) by any other reasonable means that is available from the agency.

(c) Trained personnel

Any consumer reporting agency shall provide trained personnel to explain to the consumer any information furnished to him pursuant to section 1681g of this title.

(d) Persons accompanying consumer

The consumer shall be permitted to be accompanied by one other person of his choosing, who shall furnish reasonable identification. A consumer reporting agency may require the consumer to furnish a written statement granting permission to the consumer reporting agency to discuss the consumer's file in such person's presence.

(e) Limitation of liability

Except as provided in sections 1681n and 1681*o* of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report [70] except as to false information furnished with malice or willful intent to injure such consumer.

§1681i. Procedure in case of disputed accuracy

(a) Reinvestigations of disputed information

(1) Reinvestigation required

(A) In general

Subject to subsection (f) and except as provided in subsection (g), if the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly, or indirectly through a reseller, of such dispute, the agency shall, free of charge, conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate and record the current status of the disputed information, or delete the item from the file in accordance with paragraph (5), before the end of the 30-day period beginning on the date on which the agency receives the notice of the dispute from the consumer or reseller.

(B) Extension of period to reinvestigate

Except as provided in subparagraph (C), the 30-day period described in subparagraph (A) may be extended for not more than 15 additional days if the consumer reporting agency receives information from the consumer during that 30-day period that is relevant to the reinvestigation.

(C) Limitations on extension of period to reinvestigate

[69] So in original. Probably should be followed by "section".

[70] So in original. Probably should be followed by a comma.

Subparagraph (B) shall not apply to any reinvestigation in which, during the 30-day period described in subparagraph (A), the information that is the subject of the reinvestigation is found to be inaccurate or incomplete or the consumer reporting agency determines that the information cannot be verified.

(2) Prompt notice of dispute to furnisher of information

(A) In general

Before the expiration of the 5-business-day period beginning on the date on which a consumer reporting agency receives notice of a dispute from any consumer or a reseller in accordance with paragraph (1), the agency shall provide notification of the dispute to any person who provided any item of information in dispute, at the address and in the manner established with the person. The notice shall include all relevant information regarding the dispute that the agency has received from the consumer or reseller.

(B) Provision of other information

The consumer reporting agency shall promptly provide to the person who provided the information in dispute all relevant information regarding the dispute that is received by the agency from the consumer or the reseller after the period referred to in subparagraph (A) and before the end of the period referred to in paragraph (1)(A).

(3) Determination that dispute is frivolous or irrelevant

(A) In general

Notwithstanding paragraph (1), a consumer reporting agency may terminate a reinvestigation of information disputed by a consumer under that paragraph if the agency reasonably determines that the dispute by the consumer is frivolous or irrelevant, including by reason of a failure by a consumer to provide sufficient information to investigate the disputed information.

(B) Notice of determination

Upon making any determination in accordance with subparagraph (A) that a dispute is frivolous or irrelevant, a consumer reporting agency shall notify the consumer of such determination not later than 5 business days after making such determination, by mail or, if authorized by the consumer for that purpose, by any other means available to the agency.

(C) Contents of notice

A notice under subparagraph (B) shall include—

(i) the reasons for the determination under subparagraph (A); and

(ii) identification of any information required to investigate the disputed information, which may consist of a standardized form describing the general nature of such information.

(4) Consideration of consumer information

In conducting any reinvestigation under paragraph (1) with respect to disputed information in the file of any consumer, the consumer reporting agency shall review and consider all relevant information submitted by the consumer in the period described in paragraph (1)(A) with respect to such disputed information.

(5) Treatment of inaccurate or unverifiable information

(A) In general

If, after any reinvestigation under paragraph (1) of any information disputed by a consumer, an item of the information is found to be inaccurate or incomplete or cannot be verified, the consumer reporting agency shall—

(i) promptly delete that item of information from the file of the consumer, or modify that item of information, as appropriate, based on the results of the reinvestigation; and

(ii) promptly notify the furnisher of that information that the information has been modified or deleted from the file of the consumer.

(B) Requirements relating to reinsertion of previously deleted material

(i) Certification of accuracy of information

If any information is deleted from a consumer's file pursuant to subparagraph (A), the information may not be reinserted in the file by the consumer reporting agency unless the person who furnishes the information certifies that the information is complete and accurate.

(ii) Notice to consumer

If any information that has been deleted from a consumer's file pursuant to subparagraph (A) is reinserted in the file, the consumer reporting agency shall notify the consumer of the reinsertion in writing not later than 5 business days after the reinsertion or, if authorized by the consumer for that purpose, by any other means available to the agency.

(iii) Additional information

As part of, or in addition to, the notice under clause (ii), a consumer reporting agency shall provide to a consumer in writing not later than 5 business days after the date of the reinsertion—

(I) a statement that the disputed information has been reinserted;

(II) the business name and address of any furnisher of information contacted and the telephone number of such furnisher, if reasonably available, or of any furnisher of information that contacted the consumer reporting agency, in connection with the reinsertion of such information; and

(III) a notice that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the disputed information.

(C) Procedures to prevent reappearance

A consumer reporting agency shall maintain reasonable procedures designed to prevent the reappearance in a consumer's file, and in consumer reports on the consumer, of information that is deleted pursuant to this paragraph (other than information that is reinserted in accordance with subparagraph (B)(i)).

(D) Automated reinvestigation system

Any consumer reporting agency that compiles and maintains files on consumers on a nationwide basis shall implement an automated system through which furnishers of information to that consumer reporting agency may report the results of a reinvestigation that finds incomplete or inaccurate information in a consumer's file to other such consumer reporting agencies.

(6) Notice of results of reinvestigation

(A) In general

A consumer reporting agency shall provide written notice to a consumer of the results of a reinvestigation under this subsection not later than 5 business days after the completion of the reinvestigation, by mail or, if authorized by the consumer for that purpose, by other means available to the agency.

(B) Contents

As part of, or in addition to, the notice under subparagraph (A), a consumer reporting agency shall provide to a consumer in writing before the expiration of the 5-day period referred to in subparagraph (A)—

(i) a statement that the reinvestigation is completed;

(ii) a consumer report that is based upon the consumer's file as that file is revised as a result of the reinvestigation;

(iii) a notice that, if requested by the consumer, a description of the procedure used to determine the accuracy and completeness of the information shall be provided to the consumer by the agency, including the business name and address of any furnisher of information contacted in connection with such information and the telephone number of such furnisher, if reasonably available;

(iv) a notice that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the information; and

(v) a notice that the consumer has the right to request under subsection (d) that the consumer reporting agency furnish notifications under that subsection.

(7) Description of reinvestigation procedure

A consumer reporting agency shall provide to a consumer a description referred to in paragraph (6)(B)(iii) by not later than 15 days after receiving a request from the consumer for that description.

(8) Expedited dispute resolution

If a dispute regarding an item of information in a consumer's file at a consumer reporting agency is resolved in accordance with paragraph (5)(A) by the deletion of the disputed information by not later than 3 business days after the date on which the agency receives notice of the dispute from the consumer in accordance with paragraph (1)(A), then the agency shall not be required to comply with paragraphs (2), (6), and (7) with respect to that dispute if the agency—

(A) provides prompt notice of the deletion to the consumer by telephone;

(B) includes in that notice, or in a written notice that accompanies a confirmation and consumer report provided in accordance with subparagraph (C), a statement of the consumer's right to request under subsection (d) that the agency furnish notifications under that subsection; and

(C) provides written confirmation of the deletion and a copy of a consumer report on the consumer that is based on the consumer's file after the deletion, not later than 5 business days after making the deletion.

(b) Statement of dispute

If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute. The consumer reporting agency may limit such statements to not more than one hundred words if it provides the consumer with assistance in writing a clear summary of the dispute.

(c) Notification of consumer dispute in subsequent consumer reports

Whenever a statement of a dispute is filed, unless there is reasonable grounds to believe that it is frivolous or irrelevant, the consumer reporting agency shall, in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof.

(d) Notification of deletion of disputed information

Following any deletion of information which is found to be inaccurate or whose accuracy can no longer be verified or any notation as to disputed information, the consumer reporting agency shall, at the request of the consumer, furnish notification that the item has been deleted or the statement, codification or summary pursuant to subsection (b) or (c) to any person specifically designated by the consumer who has within two years prior thereto received a consumer report for employment purposes, or within six months prior thereto received a consumer report for any other purpose, which contained the deleted or disputed information.

(e) Treatment of complaints and report to Congress

(1) In general

The Commission[71] shall—

(A) compile all complaints that it receives that a file of a consumer that is maintained by a consumer reporting agency described in section 1681a(p) of this title contains incomplete or inaccurate information, with respect to which, the consumer appears to have disputed the completeness or accuracy with the consumer reporting agency or otherwise utilized the procedures provided by subsection (a); and

(B) transmit each such complaint to each consumer reporting agency involved.

(2) Exclusion

Complaints received or obtained by the Bureau pursuant to its investigative authority under the Consumer Financial Protection Act of 2010 shall not be subject to paragraph (1).

(3) Agency responsibilities

Each consumer reporting agency described in section 1681a(p) of this title that receives a complaint transmitted by the Bureau pursuant to paragraph (1) shall—

(A) review each such complaint to determine whether all legal obligations imposed on the consumer reporting agency under this subchapter (including any obligation imposed by an applicable court or administrative order) have been met with respect to the subject matter of the complaint;

(B) provide reports on a regular basis to the Bureau regarding the determinations of and actions taken by the consumer reporting agency, if any, in connection with its review of such complaints; and

(C) maintain, for a reasonable time period, records regarding the disposition of each such complaint that is sufficient to demonstrate compliance with this subsection.

(4) Rulemaking authority

The Commission[72] may prescribe regulations, as appropriate to implement this subsection.

(5) Annual report

[71] So in original. Probably should be "Bureau".

[72] So in original. Probably should be "Bureau".

The Commission[73] shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives an annual report regarding information gathered by the Bureau under this subsection.

(f) Reinvestigation requirement applicable to resellers

(1) Exemption from general reinvestigation requirement

Except as provided in paragraph (2), a reseller shall be exempt from the requirements of this section.

(2) Action required upon receiving notice of a dispute

If a reseller receives a notice from a consumer of a dispute concerning the completeness or accuracy of any item of information contained in a consumer report on such consumer produced by the reseller, the reseller shall, within 5 business days of receiving the notice, and free of charge—

(A) determine whether the item of information is incomplete or inaccurate as a result of an act or omission of the reseller; and

(B) if—

(i) the reseller determines that the item of information is incomplete or inaccurate as a result of an act or omission of the reseller, not later than 20 days after receiving the notice, correct the information in the consumer report or delete it; or

(ii) if the reseller determines that the item of information is not incomplete or inaccurate as a result of an act or omission of the reseller, convey the notice of the dispute, together with all relevant information provided by the consumer, to each consumer reporting agency that provided the reseller with the information that is the subject of the dispute, using an address or a notification mechanism specified by the consumer reporting agency for such notices.

(3) Responsibility of consumer reporting agency to notify consumer through reseller

Upon the completion of a reinvestigation under this section of a dispute concerning the completeness or accuracy of any information in the file of a consumer by a consumer reporting agency that received notice of the dispute from a reseller under paragraph (2)—

(A) the notice by the consumer reporting agency under paragraph (6), (7), or (8) of subsection (a) shall be provided to the reseller in lieu of the consumer; and

(B) the reseller shall immediately reconvey such notice to the consumer, including any notice of a deletion by telephone in the manner required under paragraph (8)(A).

(4) Reseller reinvestigations

No provision of this subsection shall be construed as prohibiting a reseller from conducting a reinvestigation of a consumer dispute directly.

(g) Dispute process for veteran's medical debt

(1) In general

With respect to a veteran's medical debt, the veteran may submit a notice described in paragraph (2), proof of liability of the Department of Veterans Affairs for payment of that debt, or documentation that the Department of Veterans Affairs is in the process of making payment for authorized hospital care, medical services, or extended care services rendered to a consumer reporting agency or a reseller to dispute the inclusion of that debt on a consumer report of the veteran.

(2) Notification to veteran

The Department of Veterans Affairs shall submit to a veteran a notice that the Department of Veterans Affairs has assumed liability for part or all of a veteran's medical debt.

(3) Deletion of information from file

If a consumer reporting agency receives notice, proof of liability, or documentation under paragraph (1), the consumer reporting agency shall delete all information relating to the veteran's medical debt from the file of the veteran and notify the furnisher and the veteran of that deletion.

[73] So in original. Probably should be "Bureau".

§1681j. Charges for certain disclosures

(a) Free annual disclosure

(1) Nationwide consumer reporting agencies

(A) In general

All consumer reporting agencies described in subsections (p) and (w)[74] of section 1681a of this title shall make all disclosures pursuant to section 1681g of this title once during any 12-month period upon request of the consumer and without charge to the consumer.

(B) Centralized source

Subparagraph (A) shall apply with respect to a consumer reporting agency described in section 1681a(p) of this title only if the request from the consumer is made using the centralized source established for such purpose in accordance with section 211(c)[75] of the Fair and Accurate Credit Transactions Act of 2003.

(C) Nationwide specialty consumer reporting agency

(i) In general

The Commission[76] shall prescribe regulations applicable to each consumer reporting agency described in section 1681a(w)[77] of this title to require the establishment of a streamlined process for consumers to request consumer reports under subparagraph (A), which shall include, at a minimum, the establishment by each such agency of a toll-free telephone number for such requests.

(ii) Considerations

In prescribing regulations under clause (i), the Bureau shall consider—

(I) the significant demands that may be placed on consumer reporting agencies in providing such consumer reports;

(II) appropriate means to ensure that consumer reporting agencies can satisfactorily meet those demands, including the efficacy of a system of staggering the availability to consumers of such consumer reports; and

(III) the ease by which consumers should be able to contact consumer reporting agencies with respect to access to such consumer reports.

(iii) Date of issuance

The Commission[78] shall issue the regulations required by this subparagraph in final form not later than 6 months after December 4, 2003.

(iv) Consideration of ability to comply

The regulations of the Bureau under this subparagraph shall establish an effective date by which each nationwide specialty consumer reporting agency (as defined in section 1681a(w)[79] of this title) shall be required to comply with subsection (a), which effective date—

(I) shall be established after consideration of the ability of each nationwide specialty consumer reporting agency to comply with subsection (a); and

(II) shall be not later than 6 months after the date on which such regulations are issued in final form (or such additional period not to exceed 3 months, as the Bureau determines appropriate).

(2) Timing

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[74] Section 1681a(w) of this title, referred to in subsec. (a)(1)(A), (C)(i), (iv), was redesignated section 1681a(x) Page 1560 TITLE 15—COMMERCE AND TRADE §1681j of this title by Pub. L. 111–203, title X, §1088(a)(1), July 21, 2010, 124 Stat. 2086.

[75] [Footnote appears without text in statute published online by the Government Publishing Office]

[76] So in original. Probably should be "Bureau".

[77] [Footnote appears without text in statute published online by the Government Publishing Office]

[78] So in original. Probably should be "Bureau".

[79] [Footnote appears without text in statute published online by the Government Publishing Office]

A consumer reporting agency shall provide a consumer report under paragraph (1) not later than 15 days after the date on which the request is received under paragraph (1).

(3) Reinvestigations

Notwithstanding the time periods specified in section 1681i(a)(1) of this title, a reinvestigation under that section by a consumer reporting agency upon a request of a consumer that is made after receiving a consumer report under this subsection shall be completed not later than 45 days after the date on which the request is received.

(4) Exception for first 12 months of operation

This subsection shall not apply to a consumer reporting agency that has not been furnishing consumer reports to third parties on a continuing basis during the 12-month period preceding a request under paragraph (1), with respect to consumers residing nationwide.

(b) Free disclosure after adverse notice to consumer

Each consumer reporting agency that maintains a file on a consumer shall make all disclosures pursuant to section 1681g of this title without charge to the consumer if, not later than 60 days after receipt by such consumer of a notification pursuant to section 1681m of this title, or of a notification from a debt collection agency affiliated with that consumer reporting agency stating that the consumer's credit rating may be or has been adversely affected, the consumer makes a request under section 1681g of this title.

(c) Free disclosure under certain other circumstances

Upon the request of the consumer, a consumer reporting agency shall make all disclosures pursuant to section 1681g of this title once during any 12-month period without charge to that consumer if the consumer certifies in writing that the consumer—

(1) is unemployed and intends to apply for employment in the 60-day period beginning on the date on which the certification is made;

(2) is a recipient of public welfare assistance; or

(3) has reason to believe that the file on the consumer at the agency contains inaccurate information due to fraud.

(d) Free disclosures in connection with fraud alerts

Upon the request of a consumer, a consumer reporting agency described in section 1681a(p) of this title shall make all disclosures pursuant to section 1681g of this title without charge to the consumer, as provided in subsections (a)(2) and (b)(2) of section 1681c–1 of this title, as applicable.

(e) Other charges prohibited

A consumer reporting agency shall not impose any charge on a consumer for providing any notification required by this subchapter or making any disclosure required by this subchapter, except as authorized by subsection (f).

(f) Reasonable charges allowed for certain disclosures

(1) In general

In the case of a request from a consumer other than a request that is covered by any of subsections (a) through (d), a consumer reporting agency may impose a reasonable charge on a consumer—

(A) for making a disclosure to the consumer pursuant to section 1681g of this title, which charge—

(i) shall not exceed $8; and

(ii) shall be indicated to the consumer before making the disclosure; and

(B) for furnishing, pursuant to section 1681i(d) of this title, following a reinvestigation under section 1681i(a) of this title, a statement, codification, or summary to a person designated by the consumer under that section after the 30-day period beginning on the date of notification of the consumer under paragraph (6) or (8) of section 1681i(a) of this title with respect to the reinvestigation, which charge—

(i) shall not exceed the charge that the agency would impose on each designated recipient for a consumer report; and

(ii) shall be indicated to the consumer before furnishing such information.

(2) Modification of amount

The Bureau shall increase the amount referred to in paragraph (1)(A)(i) on January 1 of each year, based proportionally on changes in the Consumer Price Index, with fractional changes rounded to the nearest fifty cents.

(g) Prevention of deceptive marketing of credit reports

(1) In general

Subject to rulemaking pursuant to section 205(b) of the Credit CARD Act of 2009, any advertisement for a free credit report in any medium shall prominently disclose in such advertisement that free credit reports are available under Federal law at: "AnnualCreditReport.com" (or such other source as may be authorized under Federal law).

(2) Television and radio advertisement

In the case of an advertisement broadcast by television, the disclosures required under paragraph (1) shall be included in the audio and visual part of such advertisement. In the case of an advertisement broadcast by televison[80] or radio, the disclosure required under paragraph (1) shall consist only of the following: "This is not the free credit report provided for by Federal law".

§1681k. Public record information for employment purposes

(a) In general

A consumer reporting agency which furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment shall—

(1) at the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported; or

(2) maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date. For purposes of this paragraph, items of public record relating to arrests, indictments, convictions, suits, tax liens, and outstanding judgments shall be considered up to date if the current public record status of the item at the time of the report is reported.

(b) Exemption for national security investigations

Subsection (a) does not apply in the case of an agency or department of the United States Government that seeks to obtain and use a consumer report for employment purposes, if the head of the agency or department makes a written finding as prescribed under section 1681b(b)(4)(A) of this title.

§1681l. Restrictions on investigative consumer reports

Whenever a consumer reporting agency prepares an investigative consumer report, no adverse information in the consumer report (other than information which is a matter of public record) may be included in a subsequent consumer report unless such adverse information has been verified in the process of making such subsequent consumer report, or the adverse information was received within the three-month period preceding the date the subsequent report is furnished.

§1681m. Requirements on users of consumer reports

(a) Duties of users taking adverse actions on basis of information contained in consumer reports

If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall—

(1) provide oral, written, or electronic notice of the adverse action to the consumer;

(2) provide to the consumer written or electronic disclosure—

(A) of a numerical credit score as defined in section 1681g(f)(2)(A) of this title used by such person in taking any adverse action based in whole or in part on any information in a consumer report; and

[80] So in original. Probably should be "television".

(B) of the information set forth in subparagraphs (B) through (E) of section 1681g(f)(1) of this title;

(3) provide to the consumer orally, in writing, or electronically—

(A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and

(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(4) provide to the consumer an oral, written, or electronic notice of the consumer's right—

(A) to obtain, under section 1681j of this title, a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (3), which notice shall include an indication of the 60day period under that section for obtaining such a copy; and

(B) to dispute, under section 1681i of this title, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

(b) Adverse action based on information obtained from third parties other than consumer reporting agencies

(1) In general

Whenever credit for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, the user of such information shall, within a reasonable period of time, upon the consumer's written request for the reasons for such adverse action received within sixty days after learning of such adverse action, disclose the nature of the information to the consumer. The user of such information shall clearly and accurately disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer.

(2) Duties of person taking certain actions based on information provided by affiliate

(A) Duties, generally

If a person takes an action described in subparagraph (B) with respect to a consumer, based in whole or in part on information described in subparagraph (C), the person shall—

(i) notify the consumer of the action, including a statement that the consumer may obtain the information in accordance with clause (ii); and

(ii) upon a written request from the consumer received within 60 days after transmittal of the notice required by clause (i), disclose to the consumer the nature of the information upon which the action is based by not later than 30 days after receipt of the request.

(B) Action described

An action referred to in subparagraph (A) is an adverse action described in section 1681a(k)(1)(A) of this title, taken in connection with a transaction initiated by the consumer, or any adverse action described in clause (i) or (ii) of section 1681a(k)(1)(B) of this title.

(C) Information described

Information referred to in subparagraph (A)—

(i) except as provided in clause (ii), is information that—

(I) is furnished to the person taking the action by a person related by common ownership or affiliated by common corporate control to the person taking the action; and

(II) bears on the credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living of the consumer; and

(ii) does not include—

(I) information solely as to transactions or experiences between the consumer and the person furnishing the information; or

(II) information in a consumer report.

(c) Reasonable procedures to assure compliance

No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of this section.

(d) Duties of users making written credit or insurance solicitations on basis of information contained in consumer files

(1) In general

Any person who uses a consumer report on any consumer in connection with any credit or insurance transaction that is not initiated by the consumer, that is provided to that person under section 1681b(c)(1)(B) of this title, shall provide with each written solicitation made to the consumer regarding the transaction a clear and conspicuous statement that—

(A) information contained in the consumer's consumer report was used in connection with the transaction;

(B) the consumer received the offer of credit or insurance because the consumer satisfied the criteria for credit worthiness or insurability under which the consumer was selected for the offer;

(C) if applicable, the credit or insurance may not be extended if, after the consumer responds to the offer, the consumer does not meet the criteria used to select the consumer for the offer or any applicable criteria bearing on credit worthiness or insurability or does not furnish any required collateral;

(D) the consumer has a right to prohibit information contained in the consumer's file with any consumer reporting agency from being used in connection with any credit or insurance transaction that is not initiated by the consumer; and

(E) the consumer may exercise the right referred to in subparagraph (D) by notifying a notification system established under section 1681b(e) of this title.

(2) Disclosure of address and telephone number; format

A statement under paragraph (1) shall—

(A) include the address and toll-free telephone number of the appropriate notification system established under section 1681b(e) of this title; and

(B) be presented in such format and in such type size and manner as to be simple and easy to understand, as established by the Bureau, by rule, in consultation with the Federal Trade Commission, the Federal banking agencies, and the National Credit Union Administration.

(3) Maintaining criteria on file

A person who makes an offer of credit or insurance to a consumer under a credit or insurance transaction described in paragraph (1) shall maintain on file the criteria used to select the consumer to receive the offer, all criteria bearing on credit worthiness or insurability, as applicable, that are the basis for determining whether or not to extend credit or insurance pursuant to the offer, and any requirement for the furnishing of collateral as a condition of the extension of credit or insurance, until the expiration of the 3-year period beginning on the date on which the offer is made to the consumer.

(4) Authority of Federal agencies regarding unfair or deceptive acts or practices not affected

This section is not intended to affect the authority of any Federal or State agency to enforce a prohibition against unfair or deceptive acts or practices, including the making of false or misleading statements in connection with a credit or insurance transaction that is not initiated by the consumer.

(e) Red flag guidelines and regulations required

(1) Guidelines

The Federal banking agencies, the National Credit Union Administration, the Federal Trade Commission, the Commodity Futures Trading Commission, and the Securities and Exchange Commission shall jointly, with respect to the entities that are subject to their respective enforcement authority under section 1681s of this title—

(A) establish and maintain guidelines for use by each financial institution and each creditor regarding identity theft with respect to account holders at, or customers of, such entities, and update such guidelines as often as necessary;

(B) prescribe regulations requiring each financial institution and each creditor to establish reasonable policies and procedures for implementing the guidelines established pursuant to subparagraph (A), to

identify possible risks to account holders or customers or to the safety and soundness of the institution or customers; and

(C) prescribe regulations applicable to card issuers to ensure that, if a card issuer receives notification of a change of address for an existing account, and within a short period of time (during at least the first 30 days after such notification is received) receives a request for an additional or replacement card for the same account, the card issuer may not issue the additional or replacement card, unless the card issuer, in accordance with reasonable policies and procedures—

(i) notifies the cardholder of the request at the former address of the cardholder and provides to the cardholder a means of promptly reporting incorrect address changes;

(ii) notifies the cardholder of the request by such other means of communication as the cardholder and the card issuer previously agreed to; or

(iii) uses other means of assessing the validity of the change of address, in accordance with reasonable policies and procedures established by the card issuer in accordance with the regulations prescribed under subparagraph (B).

(2) Criteria

(A) In general

In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall identify patterns, practices, and specific forms of activity that indicate the possible existence of identity theft.

(B) Inactive accounts

In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall consider including reasonable guidelines providing that when a transaction occurs with respect to a credit or deposit account that has been inactive for more than 2 years, the creditor or financial institution shall follow reasonable policies and procedures that provide for notice to be given to a consumer in a manner reasonably designed to reduce the likelihood of identity theft with respect to such account.

(3) Consistency with verification requirements

Guidelines established pursuant to paragraph (1) shall not be inconsistent with the policies and procedures required under section 5318(l) of title 31.

(4) Definitions

As used in this subsection, the term "creditor"—

(A) means a creditor, as defined in section 1691a of this title, that regularly and in the ordinary course of business—

(i) obtains or uses consumer reports, directly or indirectly, in connection with a credit transaction;

(ii) furnishes information to consumer reporting agencies, as described in section 1681s–2 of this title, in connection with a credit transaction; or

(iii) advances funds to or on behalf of a person, based on an obligation of the person to repay the funds or repayable from specific property pledged by or on behalf of the person;

(B) does not include a creditor described in subparagraph (A)(iii) that advances funds on behalf of a person for expenses incidental to a service provided by the creditor to that person; and

(C) includes any other type of creditor, as defined in that section 1691a of this title, as the agency described in paragraph (1) having authority over that creditor may determine appropriate by rule promulgated by that agency, based on a determination that such creditor offers or maintains accounts that are subject to a reasonably foreseeable risk of identity theft.

(f) Prohibition on sale or transfer of debt caused by identity theft

(1) In general

No person shall sell, transfer for consideration, or place for collection a debt that such person has been notified under section 1681c–2 of this title has resulted from identity theft.

(2) Applicability

The prohibitions of this subsection shall apply to all persons collecting a debt described in paragraph (1) after the date of a notification under paragraph (1).

(3) Rule of construction

Nothing in this subsection shall be construed to prohibit—

(A) the repurchase of a debt in any case in which the assignee of the debt requires such repurchase because the debt has resulted from identity theft;

(B) the securitization of a debt or the pledging of a portfolio of debt as collateral in connection with a borrowing; or

(C) the transfer of debt as a result of a merger, acquisition, purchase and assumption transaction, or transfer of substantially all of the assets of an entity.

(g) Debt collector communications concerning identity theft

If a person acting as a debt collector (as that term is defined in subchapter V) on behalf of a third party that is a creditor or other user of a consumer report is notified that any information relating to a debt that the person is attempting to collect may be fraudulent or may be the result of identity theft, that person shall—

(1) notify the third party that the information may be fraudulent or may be the result of identity theft; and

(2) upon request of the consumer to whom the debt purportedly relates, provide to the consumer all information to which the consumer would otherwise be entitled if the consumer were not a victim of identity theft, but wished to dispute the debt under provisions of law applicable to that person.

(h) Duties of users in certain credit transactions

(1) In general

Subject to rules prescribed as provided in paragraph (6), if any person uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person, based in whole or in part on a consumer report, the person shall provide an oral, written, or electronic notice to the consumer in the form and manner required by regulations prescribed in accordance with this subsection.

(2) Timing

The notice required under paragraph (1) may be provided at the time of an application for, or a grant, extension, or other provision of, credit or the time of communication of an approval of an application for, or grant, extension, or other provision of, credit, except as provided in the regulations prescribed under paragraph (6).

(3) Exceptions

No notice shall be required from a person under this subsection if— (A) the consumer applied for specific material terms and was granted those terms, unless those terms were initially specified by the person after the transaction was initiated by the consumer and after the person obtained a consumer report; or (B) the person has provided or will provide a notice to the consumer under subsection (a) in connection with the transaction.

(4) Other notice not sufficient

A person that is required to provide a notice under subsection (a) cannot meet that requirement by providing a notice under this subsection.

(5) Content and delivery of notice

A notice under this subsection shall, at a minimum—

(A) include a statement informing the consumer that the terms offered to the consumer are set based on information from a consumer report;

(B) identify the consumer reporting agency furnishing the report;

(C) include a statement informing the consumer that the consumer may obtain a copy of a consumer report from that consumer reporting agency without charge;

(D) include the contact information specified by that consumer reporting agency for obtaining such consumer reports (including a toll-free telephone number established by the agency in the case of a consumer reporting agency described in section 1681a(p) of this title); and

(E) include a statement informing the consumer of—

(i) a numerical credit score as defined in section 1681g(f)(2)(A) of this title, used by such person in making the credit decision described in paragraph (1) based in whole or in part on any information in a consumer report; and

(ii) the information set forth in subparagraphs (B) through (E) of section 1681g(f)(1) of this title.

(6) Rulemaking

(A) Rules required

The Bureau shall prescribe rules to carry out this subsection.

(B) Content

Rules required by subparagraph (A) shall address, but are not limited to—

(i) the form, content, time, and manner of delivery of any notice under this subsection;

(ii) clarification of the meaning of terms used in this subsection, including what credit terms are material, and when credit terms are materially less favorable;

(iii) exceptions to the notice requirement under this subsection for classes of persons or transactions regarding which the agencies determine that notice would not significantly benefit consumers;

(iv) a model notice that may be used to comply with this subsection; and

(v) the timing of the notice required under paragraph (1), including the circumstances under which the notice must be provided after the terms offered to the consumer were set based on information from a consumer report.

(7) Compliance

A person shall not be liable for failure to perform the duties required by this section if, at the time of the failure, the person maintained reasonable policies and procedures to comply with this section.

(8) Enforcement

(A) No civil actions

Sections 1681n and 1681*o* of this title shall not apply to any failure by any person to comply with this section.

(B) Administrative enforcement

This section shall be enforced exclusively under section 1681s of this title by the Federal agencies and officials identified in that section.

§1681n. Civil liability for willful noncompliance

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1)

(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

(d) Clarification of willful noncompliance

For the purposes of this section, any person who printed an expiration date on any receipt provided to a consumer cardholder at a point of sale or transaction between December 4, 2004, and June 3, 2008, but otherwise complied with the requirements of section 1681c(g) of this title for such receipt shall not be in willful noncompliance with section 1681c(g) of this title by reason of printing such expiration date on the receipt.

§1681*o*. Civil liability for negligent noncompliance

(a) In general
Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Attorney's fees
On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

§1681p. Jurisdiction of courts; limitation of actions
An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction, not later than the earlier of—

(1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or

(2) 5 years after the date on which the violation that is the basis for such liability occurs.

§1681q. Obtaining information under false pretenses
Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined under title 18, imprisoned for not more than 2 years, or both.

§1681r. Unauthorized disclosures by officers or employees
Any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information shall be fined under title 18, imprisoned for not more than 2 years, or both.

§1681s. Administrative enforcement

(a) Enforcement by Federal Trade Commission

(1) In general
The Federal Trade Commission shall be authorized to enforce compliance with the requirements imposed by this subchapter under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), with respect to consumer reporting agencies and all other persons subject thereto, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to some other Government agency under any of subparagraphs (A) through (G) of subsection (b)(1), and subject to subtitle B of the Consumer Financial Protection Act of 2010 [12 U.S.C. 5511 et seq.], subsection (b).[81] For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under this subchapter shall constitute an unfair or deceptive act or practice in commerce, in violation of section 5(a) of the Federal Trade Commission Act (15 U.S.C. 45(a)), and shall be subject to enforcement by the Federal Trade Commission under section 5(b) of that Act [15 U.S.C. 45(b)] with respect to any consumer reporting agency or person that is subject to enforcement by the Federal Trade Commission pursuant to this subsection, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act. The Federal Trade Commission shall

[81] So in original.

have such procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under this subchapter and to require the filing of reports, the production of documents, and the appearance of witnesses, as though the applicable terms and conditions of the Federal Trade Commission Act were part of this subchapter. Any person violating any of the provisions of this subchapter shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act as though the applicable terms and provisions of such Act are part of this subchapter.

(2) Penalties

(A) Knowing violations

Except as otherwise provided by subtitle B of the Consumer Financial Protection Act of 2010, in the event of a knowing violation, which constitutes a pattern or practice of violations of this subchapter, the Federal Trade Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person that violates this subchapter. In such action, such person shall be liable for a civil penalty of not more than $2,500 per violation.

(B) Determining penalty amount

In determining the amount of a civil penalty under subparagraph (A), the court shall take into account the degree of culpability, any history of such prior conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(C) Limitation

Notwithstanding paragraph (2), a court may not impose any civil penalty on a person for a violation of section 1681s–2(a)(1) of this title, unless the person has been enjoined from committing the violation, or ordered not to commit the violation, in an action or proceeding brought by or on behalf of the Federal Trade Commission, and has violated the injunction or order, and the court may not impose any civil penalty for any violation occurring before the date of the violation of the injunction or order.

(b) Enforcement by other agencies

(1) In general

Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance with the requirements imposed under this subchapter with respect to consumer reporting agencies, persons who use consumer reports from such agencies, persons who furnish information to such agencies, and users of information that are subject to section 1681m(d) of this title shall be enforced under—

(A) section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), by the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), with respect to—

(i) any national bank or State savings association, and any Federal branch or Federal agency of a foreign bank;

(ii) any member bank of the Federal Reserve System (other than a national bank), a branch or agency of a foreign bank (other than a Federal branch, Federal agency, or insured State branch of a foreign bank), a commercial lending company owned or controlled by a foreign bank, and any organization operating under section 25 or 25A of the Federal Reserve Act [12 U.S.C. 601 et seq., 611 et seq.]; and

(iii) any bank or Federal savings association insured by the Federal Deposit Insurance Corporation (other than a member of the Federal Reserve System) and any insured State branch of a foreign bank;

(B) the Federal Credit Union Act (12 U.S.C. 1751 et seq.), by the Administrator of the National Credit Union Administration with respect to any Federal credit union;

(C) subtitle IV of title 49, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;

(D) part A of subtitle VII of title 49, by the Secretary of Transportation, with respect to any air carrier or foreign air carrier subject to that part;

(E) the Packers and Stockyards Act, 1921 (7 U.S.C. 181 et seq.) (except as provided in section 406 of that Act [7 U.S.C. 226, 227]), by the Secretary of Agriculture, with respect to any activities subject to that Act;

(F) the Commodity Exchange Act [7 U.S.C. 1 et seq.], with respect to a person subject to the jurisdiction of the Commodity Futures Trading Commission;

(G) the Federal securities laws, and any other laws that are subject to the jurisdiction of the Securities and Exchange Commission, with respect to a person that is subject to the jurisdiction of the Securities and Exchange Commission; and

(H) subtitle E of the Consumer Financial Protection Act of 2010 [12 U.S.C. 5561 et seq.], by the Bureau, with respect to any person subject to this subchapter.

(2) Incorporated definitions

The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) have the same meanings as in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(c) State action for violations

(1) Authority of States

In addition to such other remedies as are provided under State law, if the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this subchapter, the State—

(A) may bring an action to enjoin such violation in any appropriate United States district court or in any other court of competent jurisdiction;

(B) subject to paragraph (5), may bring an action on behalf of the residents of the State to recover—

(i) damages for which the person is liable to such residents under sections 1681n and 1681o of this title as a result of the violation;

(ii) in the case of a violation described in any of paragraphs (1) through (3) of section 1681s–2(c) of this title, damages for which the person would, but for section 1681s–2(c) of this title, be liable to such residents as a result of the violation; or

(iii) damages of not more than $1,000 for each willful or negligent violation; and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorney fees as determined by the court.

(2) Rights of Federal regulators

The State shall serve prior written notice of any action under paragraph (1) upon the Bureau and the Federal Trade Commission or the appropriate Federal regulator determined under subsection (b) and provide the Bureau and the Federal Trade Commission or appropriate Federal regulator with a copy of its complaint, except in any case in which such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Bureau and the Federal Trade Commission or appropriate Federal regulator shall have the right—

(A) to intervene in the action;

(B) upon so intervening, to be heard on all matters arising therein;

(C) to remove the action to the appropriate United States district court; and

(D) to file petitions for appeal.

(3) Investigatory powers

For purposes of bringing any action under this subsection, nothing in this subsection shall prevent the chief law enforcement officer, or an official or agency designated by a State, from exercising the powers conferred on the chief law enforcement officer or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(4) Limitation on State action while Federal action pending

If the Bureau, the Federal Trade Commission, or the appropriate Federal regulator has instituted a civil action or an administrative action under section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818] for a violation of this subchapter, no State may, during the pendency of such action, bring an action under this section against any defendant named in the complaint of the Bureau, the Federal Trade Commission, or the appropriate Federal regulator for any violation of this subchapter that is alleged in that complaint.

(5) Limitations on State actions for certain violations

(A) Violation of injunction required

A State may not bring an action against a person under paragraph (1)(B) for a violation described in any of paragraphs (1) through (3) of section 1681s–2(c) of this title, unless—

(i) the person has been enjoined from committing the violation, in an action brought by the State under paragraph (1)(A); and

(ii) the person has violated the injunction.

(B) Limitation on damages recoverable

In an action against a person under paragraph (1)(B) for a violation described in any of paragraphs (1) through (3) of section 1681s–2(c) of this title, a State may not recover any damages incurred before the date of the violation of an injunction on which the action is based.

(d) Enforcement under other authority

For the purpose of the exercise by any agency referred to in subsection (b) of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b), each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this subchapter any other authority conferred on it by law.

(e) Regulatory authority

(1) In general

The Bureau shall prescribe such regulations as are necessary to carry out the purposes of this subchapter, except with respect to sections 1681m(e) and 1681w of this title. The Bureau may prescribe regulations as may be necessary or appropriate to administer and carry out the purposes and objectives of this subchapter, and to prevent evasions thereof or to facilitate compliance therewith. Except as provided in section 1029(a) of the Consumer Financial Protection Act of 2010 [12 U.S.C. 5519(a)], the regulations prescribed by the Bureau under this subchapter shall apply to any person that is subject to this subchapter, notwithstanding the enforcement authorities granted to other agencies under this section.

(2) Deference

Notwithstanding any power granted to any Federal agency under this subchapter, the deference that a court affords to a Federal agency with respect to a determination made by such agency relating to the meaning or interpretation of any provision of this subchapter that is subject to the jurisdiction of such agency shall be applied as if that agency were the only agency authorized to apply, enforce, interpret, or administer the provisions of this subchapter[82] The regulations prescribed by the Bureau under this subchapter shall apply to any person that is subject to this subchapter, notwithstanding the enforcement authorities granted to other agencies under this section.

(f) Coordination of consumer complaint investigations

(1) In general

Each consumer reporting agency described in section 1681a(p) of this title shall develop and maintain procedures for the referral to each other such agency of any consumer complaint received by the agency alleging identity theft, or requesting a fraud alert under section 1681c–1 of this title or a block under section 1681c–2 of this title.

(2) Model form and procedure for reporting identity theft

The Commission,[83] in consultation with the Federal Trade Commission, the Federal banking agencies, and the National Credit Union Administration, shall develop a model form and model procedures to be used by consumers who are victims of identity theft for contacting and informing creditors and consumer reporting agencies of the fraud.

(3) Annual summary reports

Each consumer reporting agency described in section 1681a(p) of this title shall submit an annual summary report to the Bureau on consumer complaints received by the agency on identity theft or fraud alerts.

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[82] So in original. Probably should be followed by a period.

[83] So in original. Probably should be "Bureau,".

(g) Bureau regulation of coding of trade names

If the Bureau determines that a person described in paragraph (9) of section 1681s–2(a) of this title has not met the requirements of such paragraph, the Bureau shall take action to ensure the person's compliance with such paragraph, which may include issuing model guidance or prescribing reasonable policies and procedures, as necessary to ensure that such person complies with such paragraph.

§1681s–1. Information on overdue child support obligations

Notwithstanding any other provision of this subchapter, a consumer reporting agency shall include in any consumer report furnished by the agency in accordance with section 1681b of this title, any information on the failure of the consumer to pay overdue support which—

(1) is provided—

(A) to the consumer reporting agency by a State or local child support enforcement agency; or

(B) to the consumer reporting agency and verified by any local, State, or Federal Government agency; and

(2) antedates the report by 7 years or less.

§1681s–2. Responsibilities of furnishers of information to consumer reporting agencies

(a) Duty of furnishers of information to provide accurate information

(1) Prohibition

(A) Reporting information with actual knowledge of errors

A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate.

(B) Reporting information after notice and confirmation of errors

A person shall not furnish information relating to a consumer to any consumer reporting agency if—

(i) the person has been notified by the consumer, at the address specified by the person for such notices, that specific information is inaccurate; and

(ii) the information is, in fact, inaccurate.

(C) No address requirement

A person who clearly and conspicuously specifies to the consumer an address for notices referred to in subparagraph (B) shall not be subject to subparagraph (A); however, nothing in subparagraph (B) shall require a person to specify such an address.

(D) Definition

For purposes of subparagraph (A), the term "reasonable cause to believe that the information is inaccurate" means having specific knowledge, other than solely allegations by the consumer, that would cause a reasonable person to have substantial doubts about the accuracy of the information.

(E) Rehabilitation of private education loans

(i) In general

Notwithstanding any other provision of this section, a consumer may request a financial institution to remove from a consumer report a reported default regarding a private education loan, and such information shall not be considered inaccurate, if—

(I) the financial institution chooses to offer a loan rehabilitation program which includes, without limitation, a requirement of the consumer to make consecutive on-time monthly payments in a number that demonstrates, in the assessment of the financial institution offering the loan rehabilitation program, a renewed ability and willingness to repay the loan; and

(II) the requirements of the loan rehabilitation program described in subclause (I) are successfully met.

(ii) Banking agencies

(I) In general

If a financial institution is supervised by a Federal banking agency, the financial institution shall seek written approval concerning the terms and conditions of the loan rehabilitation program described in clause (i) from the appropriate Federal banking agency.

(II) Feedback

An appropriate Federal banking agency shall provide feedback to a financial institution within 120 days of a request for approval under subclause (I).

(iii) Limitation

(I) In general

A consumer may obtain the benefits available under this subsection with respect to rehabilitating a loan only 1 time per loan.

(II) Rule of construction

Nothing in this subparagraph may be construed to require a financial institution to offer a loan rehabilitation program or to remove any reported default from a consumer report as a consideration of a loan rehabilitation program, except as described in clause (i).

(iv) Definitions

For purposes of this subparagraph—

(I) the term "appropriate Federal banking agency" has the meaning given the term in section 1813 of title 12; and

(II) the term "private education loan" has the meaning given the term in section 1650(a) of this title.

(F) Reporting information during COVID–19 pandemic

(i) Definitions In this subsection:

(I) Accommodation

The term "accommodation" includes an agreement to defer 1 or more payments, make a partial payment, forbear any delinquent amounts, modify a loan or contract, or any other assistance or relief granted to a consumer who is affected by the coronavirus disease 2019 (COVID–19) pandemic during the covered period.

(II) Covered period

The term "covered period" means the period beginning on January 31, 2020 and ending on the later of—

(aa) 120 days after March 27, 2020; or

(bb) 120 days after the date on which the national emergency concerning the novel coronavirus disease (COVID–19) outbreak declared by the President on March 13, 2020 under the National Emergencies Act (50 U.S.C. 1601 et seq.) terminates.

(ii) Reporting

Except as provided in clause (iii), if a furnisher makes an accommodation with respect to 1 or more payments on a credit obligation or account of a consumer, and the consumer makes the payments or is not required to make 1 or more payments pursuant to the accommodation, the furnisher shall—

(I) report the credit obligation or account as current; or

(II) if the credit obligation or account was delinquent before the accommodation—

(aa) maintain the delinquent status during the period in which the accommodation is in effect; and

(bb) if the consumer brings the credit obligation or account current during the period described in item (aa), report the credit obligation or account as current.

(iii) Exception

Clause (ii) shall not apply with respect to a credit obligation or account of a consumer that has been charged-off.

(2) Duty to correct and update information

A person who—

(A) regularly and in the ordinary course of business furnishes information to one or more consumer reporting agencies about the person's transactions or experiences with any consumer; and

(B) has furnished to a consumer reporting agency information that the person determines is not complete or accurate, shall promptly notify the consumer reporting agency of that determination and provide to the agency any corrections to that information, or any additional information, that is necessary to make the information provided by the person to the agency complete and accurate, and shall not thereafter furnish to the agency any of the information that remains not complete or accurate.

(3) Duty to provide notice of dispute

If the completeness or accuracy of any information furnished by any person to any consumer reporting agency is disputed to such person by a consumer, the person may not furnish the information to any consumer reporting agency without notice that such information is disputed by the consumer.

(4) Duty to provide notice of closed accounts

A person who regularly and in the ordinary course of business furnishes information to a consumer reporting agency regarding a consumer who has a credit account with that person shall notify the agency of the voluntary closure of the account by the consumer, in information regularly furnished for the period in which the account is closed.

(5) Duty to provide notice of delinquency of accounts

(A) In general

A person who furnishes information to a consumer reporting agency regarding a delinquent account being placed for collection, charged to profit or loss, or subjected to any similar action shall, not later than 90 days after furnishing the information, notify the agency of the date of delinquency on the account, which shall be the month and year of the commencement of the delinquency on the account that immediately preceded the action.

(B) Rule of construction

For purposes of this paragraph only, and provided that the consumer does not dispute the information, a person that furnishes information on a delinquent account that is placed for collection, charged for profit or loss, or subjected to any similar action, complies with this paragraph, if—

(i) the person reports the same date of delinquency as that provided by the creditor to which the account was owed at the time at which the commencement of the delinquency occurred, if the creditor previously reported that date of delinquency to a consumer reporting agency;

(ii) the creditor did not previously report the date of delinquency to a consumer reporting agency, and the person establishes and follows reasonable procedures to obtain the date of delinquency from the creditor or another reliable source and reports that date to a consumer reporting agency as the date of delinquency; or

(iii) the creditor did not previously report the date of delinquency to a consumer reporting agency and the date of delinquency cannot be reasonably obtained as provided in clause (ii), the person establishes and follows reasonable procedures to ensure the date reported as the date of delinquency precedes the date on which the account is placed for collection, charged to profit or loss, or subjected to any similar action, and reports such date to the credit reporting agency.

(6) Duties of furnishers upon notice of identity theft-related information

(A) Reasonable procedures

A person that furnishes information to any consumer reporting agency shall have in place reasonable procedures to respond to any notification that it receives from a consumer reporting agency under section 1681c–2 of this title relating to information resulting from identity theft, to prevent that person from refurnishing such blocked information.

(B) Information alleged to result from identity theft

If a consumer submits an identity theft report to a person who furnishes information to a consumer reporting agency at the address specified by that person for receiving such reports stating that information maintained by such person that purports to relate to the consumer resulted from identity theft, the person may not furnish such information that purports to relate to the consumer to any consumer reporting agency, unless the person subsequently knows or is informed by the consumer that the information is correct.

(7) Negative information

(A) Notice to consumer required

(i) In general

If any financial institution that extends credit and regularly and in the ordinary course of business furnishes information to a consumer reporting agency described in section 1681a(p) of this title furnishes negative information to such an agency regarding credit extended to a customer, the financial institution shall provide a notice of such furnishing of negative information, in writing, to the customer.

(ii) Notice effective for subsequent submissions

After providing such notice, the financial institution may submit additional negative information to a consumer reporting agency described in section 1681a(p) of this title with respect to the same transaction, extension of credit, account, or customer without providing additional notice to the customer.

(B) Time of notice

(i) In general

The notice required under subparagraph (A) shall be provided to the customer prior to, or no later than 30 days after, furnishing the negative information to a consumer reporting agency described in section 1681a(p) of this title.

(ii) Coordination with new account disclosures

If the notice is provided to the customer prior to furnishing the negative information to a consumer reporting agency, the notice may not be included in the initial disclosures provided under section 1637(a) of this title.

(C) Coordination with other disclosures

The notice required under subparagraph (A)—

(i) may be included on or with any notice of default, any billing statement, or any other materials provided to the customer; and

(ii) must be clear and conspicuous.

(D) Model disclosure

(i) Duty of Bureau

The Bureau shall prescribe a brief model disclosure that a financial institution may use to comply with subparagraph (A), which shall not exceed 30 words.

(ii) Use of model not required

No provision of this paragraph may be construed to require a financial institution to use any such model form prescribed by the Bureau.

(iii) Compliance using model

A financial institution shall be deemed to be in compliance with subparagraph (A) if the financial institution uses any model form prescribed by the Bureau under this subparagraph, or the financial institution uses any such model form and rearranges its format.

(E) Use of notice without submitting negative information

No provision of this paragraph shall be construed as requiring a financial institution that has provided a customer with a notice described in subparagraph (A) to furnish negative information about the customer to a consumer reporting agency.

(F) Safe harbor

A financial institution shall not be liable for failure to perform the duties required by this paragraph if, at the time of the failure, the financial institution maintained reasonable policies and procedures to comply with this paragraph or the financial institution reasonably believed that the institution is prohibited, by law, from contacting the consumer.

(G) Definitions

For purposes of this paragraph, the following definitions shall apply:

(i) Negative information

The term "negative information" means information concerning a customer's delinquencies, late payments, insolvency, or any form of default.

(ii) Customer; financial institution

The terms "customer" and "financial institution" have the same meanings as in section 6809 of this title.

(8) Ability of consumer to dispute information directly with furnisher

(A) In general

The Bureau, in consultation with the Federal Trade Commission, the Federal banking agencies, and the National Credit Union Administration, shall prescribe regulations that shall identify the circumstances under which a furnisher shall be required to reinvestigate a dispute concerning the accuracy of information contained in a consumer report on the consumer, based on a direct request of a consumer.

(B) Considerations

In prescribing regulations under subparagraph (A), the agencies shall weigh—

(i) the benefits to consumers with the costs on furnishers and the credit reporting system;

(ii) the impact on the overall accuracy and integrity of consumer reports of any such requirements;

(iii) whether direct contact by the consumer with the furnisher would likely result in the most expeditious resolution of any such dispute; and

(iv) the potential impact on the credit reporting process if credit repair organizations, as defined in section 1679a(3) of this title, including entities that would be a credit repair organization, but for section 1679a(3)(B)(i) of this title, are able to circumvent the prohibition in subparagraph (G).

(C) Applicability

Subparagraphs (D) through (G) shall apply in any circumstance identified under the regulations promulgated under subparagraph (A).

(D) Submitting a notice of dispute

A consumer who seeks to dispute the accuracy of information shall provide a dispute notice directly to such person at the address specified by the person for such notices that—

(i) identifies the specific information that is being disputed;

(ii) explains the basis for the dispute; and

(iii) includes all supporting documentation required by the furnisher to substantiate the basis of the dispute.

(E) Duty of person after receiving notice of dispute

After receiving a notice of dispute from a consumer pursuant to subparagraph (D), the person that provided the information in dispute to a consumer reporting agency shall—

(i) conduct an investigation with respect to the disputed information;

(ii) review all relevant information provided by the consumer with the notice;

(iii) complete such person's investigation of the dispute and report the results of the investigation to the consumer before the expiration of the period under section 1681i(a)(1) of this title within which a consumer reporting agency would be required to complete its action if the consumer had elected to dispute the information under that section; and

(iv) if the investigation finds that the information reported was inaccurate, promptly notify each consumer reporting agency to which the person furnished the inaccurate information of that determination and provide to the agency any correction to that information that is necessary to make the information provided by the person accurate.

(F) Frivolous or irrelevant dispute

(i) In general

This paragraph shall not apply if the person receiving a notice of a dispute from a consumer reasonably determines that the dispute is frivolous or irrelevant, including—

(I) by reason of the failure of a consumer to provide sufficient information to investigate the disputed information; or

(II) the submission by a consumer of a dispute that is substantially the same as a dispute previously submitted by or for the consumer, either directly to the person or through a consumer reporting agency under subsection (b), with respect to which the person has already performed the person's duties under this paragraph or subsection (b), as applicable.

(ii) Notice of determination

Upon making any determination under clause (i) that a dispute is frivolous or irrelevant, the person shall notify the consumer of such determination not later than 5 business days after making such determination, by mail or, if authorized by the consumer for that purpose, by any other means available to the person.

(iii) Contents of notice

A notice under clause (ii) shall include—

(I) the reasons for the determination under clause (i); and

(II) identification of any information required to investigate the disputed information, which may consist of a standardized form describing the general nature of such information.

(G) Exclusion of credit repair organizations

This paragraph shall not apply if the notice of the dispute is submitted by, is prepared on behalf of the consumer by, or is submitted on a form supplied to the consumer by, a credit repair organization, as defined in section 1679a(3) of this title, or an entity that would be a credit repair organization, but for section 1679a(3)(B)(i) of this title.

(9) Duty to provide notice of status as medical information furnisher

A person whose primary business is providing medical services, products, or devices, or the person's agent or assignee, who furnishes information to a consumer reporting agency on a consumer shall be considered a medical information furnisher for purposes of this subchapter, and shall notify the agency of such status.

(b) Duties of furnishers of information upon notice of dispute

(1) In general

After receiving notice pursuant to section 1681i(a)(2) of this title of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency, the person shall—

(A) conduct an investigation with respect to the disputed information;

(B) review all relevant information provided by the consumer reporting agency pursuant to section 1681i(a)(2) of this title;

(C) report the results of the investigation to the consumer reporting agency;

(D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis; and

(E) if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any reinvestigation under paragraph (1), for purposes of reporting to a consumer reporting agency only, as appropriate, based on the results of the reinvestigation promptly—

(i) modify that item of information;

(ii) delete that item of information; or

(iii) permanently block the reporting of that item of information.

(2) Deadline

A person shall complete all investigations, reviews, and reports required under paragraph (1) regarding information provided by the person to a consumer reporting agency, before the expiration of the period under section 1681i(a)(1) of this title within which the consumer reporting agency is required to complete actions required by that section regarding that information.

(c) Limitation on liability

Except as provided in section 1681s(c)(1)(B) of this title, sections 1681n and 1681*o* of this title do not apply to any violation of—

(1) subsection (a) of this section, including any regulations issued thereunder;

(2) subsection (e) of this section, except that nothing in this paragraph shall limit, expand, or otherwise affect liability under section 1681n or 1681*o* of this title, as applicable, for violations of subsection (b) of this section; or

(3) subsection (e) of section 1681m of this title.

(d) Limitation on enforcement

The provisions of law described in paragraphs (1) through (3) of subsection (c) (other than with respect to the exception described in paragraph (2) of subsection (c)) shall be enforced exclusively as provided under section 1681s of this title by the Federal agencies and officials and the State officials identified in section 1681s of this title.

(e) Accuracy guidelines and regulations required

(1) Guidelines

The Bureau shall, with respect to persons or entities that are subject to the enforcement authority of the Bureau under section 1681s of this title—

(A) establish and maintain guidelines for use by each person that furnishes information to a consumer reporting agency regarding the accuracy and integrity of the information relating to consumers that such entities furnish to consumer reporting agencies, and update such guidelines as often as necessary; and

(B) prescribe regulations requiring each person that furnishes information to a consumer reporting agency to establish reasonable policies and procedures for implementing the guidelines established pursuant to subparagraph (A).

(2) Criteria

In developing the guidelines required by paragraph (1)(A), the Bureau shall—

(A) identify patterns, practices, and specific forms of activity that can compromise the accuracy and integrity of information furnished to consumer reporting agencies;

(B) review the methods (including technological means) used to furnish information relating to consumers to consumer reporting agencies;

(C) determine whether persons that furnish information to consumer reporting agencies maintain and enforce policies to ensure the accuracy and integrity of information furnished to consumer reporting agencies; and

(D) examine the policies and processes that persons that furnish information to consumer reporting agencies employ to conduct reinvestigations and correct inaccurate information relating to consumers that has been furnished to consumer reporting agencies.

§1681s–3. Affiliate sharing

(a) Special rule for solicitation for purposes of marketing

(1) Notice

Any person that receives from another person related to it by common ownership or affiliated by corporate control a communication of information that would be a consumer report, but for clauses (i), (ii), and (iii) of section 1681a(d)(2)(A) of this title, may not use the information to make a solicitation for marketing purposes to a consumer about its products or services, unless—

(A) it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons for purposes of making such solicitations to the consumer; and

(B) the consumer is provided an opportunity and a simple method to prohibit the making of such solicitations to the consumer by such person.

(2) Consumer choice

(A) In general

The notice required under paragraph (1) shall allow the consumer the opportunity to prohibit all solicitations referred to in such paragraph, and may allow the consumer to choose from different options when electing to prohibit the sending of such solicitations, including options regarding the types of entities and information covered, and which methods of delivering solicitations the consumer elects to prohibit.

(B) Format

Notwithstanding subparagraph (A), the notice required under paragraph (1) shall be clear, conspicuous, and concise, and any method provided under paragraph (1)(B) shall be simple. The regulations prescribed to implement this section shall provide specific guidance regarding how to comply with such standards.

(3) Duration

(A) In general

The election of a consumer pursuant to paragraph (1)(B) to prohibit the making of solicitations shall be effective for at least 5 years, beginning on the date on which the person receives the election of the consumer, unless the consumer requests that such election be revoked.

(B) Notice upon expiration of effective period

At such time as the election of a consumer pursuant to paragraph (1)(B) is no longer effective, a person may not use information that the person receives in the manner described in paragraph (1) to make any solicitation for marketing purposes to the consumer, unless the consumer receives a notice and an opportunity, using a simple method, to extend the opt-out for another period of at least 5 years, pursuant to the procedures described in paragraph (1).

(4) Scope

This section shall not apply to a person—

(A) using information to make a solicitation for marketing purposes to a consumer with whom the person has a pre-existing business relationship;

(B) using information to facilitate communications to an individual for whose benefit the person provides employee benefit or other services pursuant to a contract with an employer related to and arising out of the current employment relationship or status of the individual as a participant or beneficiary of an employee benefit plan;

(C) using information to perform services on behalf of another person related by common ownership or affiliated by corporate control, except that this subparagraph shall not be construed as permitting a person to send solicitations on behalf of another person, if such other person would not be permitted to send the solicitation on its own behalf as a result of the election of the consumer to prohibit solicitations under paragraph (1)(B);

(D) using information in response to a communication initiated by the consumer;

(E) using information in response to solicitations authorized or requested by the consumer; or

(F) if compliance with this section by that person would prevent compliance by that person with any provision of State insurance laws pertaining to unfair discrimination in any State in which the person is lawfully doing business.

(5) No retroactivity

This subsection shall not prohibit the use of information to send a solicitation to a consumer if such information was received prior to the date on which persons are required to comply with regulations implementing this subsection.

(b) Notice for other purposes permissible

A notice or other disclosure under this section may be coordinated and consolidated with any other notice required to be issued under any other provision of law by a person that is subject to this section, and a notice or other disclosure that is equivalent to the notice required by subsection (a), and that is provided by a person described in subsection (a) to a consumer together with disclosures required by any other provision of law, shall satisfy the requirements of subsection (a).

(c) User requirements

Requirements with respect to the use by a person of information received from another person related to it by common ownership or affiliated by corporate control, such as the requirements of this section, constitute requirements with respect to the exchange of information among persons affiliated by common ownership or common corporate control, within the meaning of section 1681t(b)(2) of this title.

(d) Definitions

For purposes of this section, the following definitions shall apply:

(1) Pre-existing business relationship

The term "pre-existing business relationship" means a relationship between a person, or a person's licensed agent, and a consumer, based on—

(A) a financial contract between a person and a consumer which is in force;

(B) the purchase, rental, or lease by the consumer of that person's goods or services, or a financial transaction (including holding an active account or a policy in force or having another continuing

relationship) between the consumer and that person during the 18-month period immediately preceding the date on which the consumer is sent a solicitation covered by this section;

(C) an inquiry or application by the consumer regarding a product or service offered by that person, during the 3-month period immediately preceding the date on which the consumer is sent a solicitation covered by this section; or

(D) any other pre-existing customer relationship defined in the regulations implementing this section.

(2) Solicitation

The term "solicitation" means the marketing of a product or service initiated by a person to a particular consumer that is based on an exchange of information described in subsection (a), and is intended to encourage the consumer to purchase such product or service, but does not include communications that are directed at the general public or determined not to be a solicitation by the regulations prescribed under this section.

§1681t. Relation to State laws

(a) In general

Except as provided in subsections (b) and (c), this subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

(b) General exceptions

No requirement or prohibition may be imposed under the laws of any State—

(1) with respect to any subject matter regulated under—

(A) subsection (c) or (e) of section 1681b of this title, relating to the prescreening of consumer reports;

(B) section 1681i of this title, relating to the time by which a consumer reporting agency must take any action, including the provision of notification to a consumer or other person, in any procedure related to the disputed accuracy of information in a consumer's file, except that this subparagraph shall not apply to any State law in effect on September 30, 1996;

(C) subsections (a) and (b) of section 1681m of this title, relating to the duties of a person who takes any adverse action with respect to a consumer;

(D) section 1681m(d) of this title, relating to the duties of persons who use a consumer report of a consumer in connection with any credit or insurance transaction that is not initiated by the consumer and that consists of a firm offer of credit or insurance;

(E) section 1681c of this title, relating to information contained in consumer reports, except that this subparagraph shall not apply to any State law in effect on September 30, 1996;

(F) section 1681s–2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply—

(i) with respect to section 54A(a) of chapter 93 of the Massachusetts Annotated Laws (as in effect on September 30, 1996); or

(ii) with respect to section 1785.25(a) of the California Civil Code (as in effect on September 30, 1996);

(G) section 1681g(e) of this title, relating to information available to victims under section 1681g(e) of this title;

(H) section 1681s–3 of this title, relating to the exchange and use of information to make a solicitation for marketing purposes;

(I) section 1681m(h) of this title, relating to the duties of users of consumer reports to provide notice with respect to terms in certain credit transactions;

(J) subsections (i) and (j) of section 1681c–1 of this title relating to security freezes; or

(K) subsection (k) of section 1681c–1 of this title, relating to credit monitoring for active duty military consumers, as defined in that subsection;

(2) with respect to the exchange of information among persons affiliated by common ownership or common corporate control, except that this paragraph shall not apply with respect to subsection (a) or (c)(1) of section 2480e of title 9, Vermont Statutes Annotated (as in effect on September 30, 1996);

(3) with respect to the disclosures required to be made under subsection (c), (d), (e), or (g) of section 1681g of this title, or subsection (f) of section 1681g of this title relating to the disclosure of credit scores for credit granting purposes, except that this paragraph—

(A) shall not apply with respect to sections 1785.10, 1785.16, and 1785.20.2 of the California Civil Code (as in effect on December 4, 2003) and section 1785.15 through section 1785.15.2 of such Code (as in effect on such date);

(B) shall not apply with respect to sections 5–3–106(2) and 212–14.3–104.3 of the Colorado Revised Statutes (as in effect on December 4, 2003); and

(C) shall not be construed as limiting, annulling, affecting, or superseding any provision of the laws of any State regulating the use in an insurance activity, or regulating disclosures concerning such use, of a credit-based insurance score of a consumer by any person engaged in the business of insurance;

(4) with respect to the frequency of any disclosure under section 1681j(a) of this title, except that this paragraph shall not apply—

(A) with respect to section 12–14.3–105(1)(d) of the Colorado Revised Statutes (as in effect on December 4, 2003);

(B) with respect to section 10–1–393(29)(C) of the Georgia Code (as in effect on December 4, 2003);

(C) with respect to section 1316.2 of title 10 of the Maine Revised Statutes (as in effect on December 4, 2003);

(D) with respect to sections 14–1209(a)(1) and 14–1209(b)(1)(i) of the Commercial Law Article of the Code of Maryland (as in effect on December 4, 2003);

(E) with respect to section 59(d) and section 59(e) of chapter 93 of the General Laws of Massachusetts (as in effect on December 4, 2003);

(F) with respect to section 56:11–37.10(a)(1) of the New Jersey Revised Statutes (as in effect on December 4, 2003); or

(G) with respect to section 2480c(a)(1) of title 9 of the Vermont Statutes Annotated (as in effect on December 4, 2003); or

(5) with respect to the conduct required by the specific provisions of—

(A) section 1681c(g) of this title;

(B) section 1681c–1 of this title;

(C) section 1681c–2 of this title;

(D) section 1681g(a)(1)(A) of this title;

(E) section 1681j(a) of this title;

(F) subsections (e), (f), and (g) of section 1681m of this title;

(G) section 1681s(f) of this title;

(H) section 1681s–2(a)(6) of this title; or

(I) section 1681w of this title.

(c) "Firm offer of credit or insurance" defined

Notwithstanding any definition of the term "firm offer of credit or insurance" (or any equivalent term) under the laws of any State, the definition of that term contained in section 1681a(l) of this title shall be construed to apply in the enforcement and interpretation of the laws of any State governing consumer reports.

(d) Limitations

Subsections (b) and (c) do not affect any settlement, agreement, or consent judgment between any State Attorney General and any consumer reporting agency in effect on September 30, 1996.

§1681u. Disclosures to FBI for counterintelligence purposes

(a) Identity of financial institutions

Notwithstanding section 1681b of this title or any other provision of this subchapter, a consumer reporting agency shall furnish to the Federal Bureau of Investigation the names and addresses of all financial institutions (as that term is defined in section 3401 of title 12) at which a consumer maintains or has maintained an account, to the extent that information is in the files of the agency, when presented with a written request for that information that includes a term that specifically identifies a consumer or account to be used as the basis for the production of that information, signed by the Director of the Federal Bureau of Investigation, or the Director's designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office designated by the Director, which certifies compliance with this section. The Director or the Director's designee may make such a certification only if the Director or the Director's designee has determined in writing, that such information is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

(b) Identifying information

Notwithstanding the provisions of section 1681b of this title or any other provision of this subchapter, a consumer reporting agency shall furnish identifying information respecting a consumer, limited to name, address, former addresses, places of employment, or former places of employment, to the Federal Bureau of Investigation when presented with a written request that includes a term that specifically identifies a consumer or account to be used as the basis for the production of that information, signed by the Director or the Director's designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office designated by the Director, which certifies compliance with this subsection. The Director or the Director's designee may make such a certification only if the Director or the Director's designee has determined in writing that such information is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

(c) Court order for disclosure of consumer reports

Notwithstanding section 1681b of this title or any other provision of this subchapter, if requested in writing by the Director of the Federal Bureau of Investigation, or a designee of the Director in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, a court may issue an order ex parte, which shall include a term that specifically identifies a consumer or account to be used as the basis for the production of the information, directing a consumer reporting agency to furnish a consumer report to the Federal Bureau of Investigation, upon a showing in camera that the consumer report is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States. The terms of an order issued under this subsection shall not disclose that the order is issued for purposes of a counterintelligence investigation.

(d) Prohibition of certain disclosure

(1) Prohibition

(A) In general

If a certification is issued under subparagraph (B) and notice of the right to judicial review under subsection (e) is provided, no consumer reporting agency that receives a request under subsection (a) or (b) or an order under subsection (c), or officer, employee, or agent thereof, shall disclose or specify in any consumer report, that the Federal Bureau of Investigation has sought or obtained access to information or records under subsection (a), (b), or (c).

(B) Certification

The requirements of subparagraph (A) shall apply if the Director of the Federal Bureau of Investigation, or a designee of the Director whose rank shall be no lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office, certifies that the absence of a prohibition of disclosure under this subsection may result in—

(i) a danger to the national security of the United States;

(ii) interference with a criminal, counterterrorism, or counterintelligence investigation;

(iii) interference with diplomatic relations; or

(iv) danger to the life or physical safety of any person.

(2) Exception

(A) In general

A consumer reporting agency that receives a request under subsection (a) or (b) or an order under subsection (c), or officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to—

(i) those persons to whom disclosure is necessary in order to comply with the request;

(ii) an attorney in order to obtain legal advice or assistance regarding the request; or

(iii) other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director.

(B) Application

A person to whom disclosure is made under subparagraph (A) shall be subject to the nondisclosure requirements applicable to a person to whom a request under subsection (a) or (b) or an order under subsection (c) is issued in the same manner as the person to whom the request is issued.

(C) Notice

Any recipient that discloses to a person described in subparagraph (A) information otherwise subject to a nondisclosure requirement shall inform the person of the applicable nondisclosure requirement.

(D) Identification of disclosure recipients

At the request of the Director of the Federal Bureau of Investigation or the designee of the Director, any person making or intending to make a disclosure under clause (i) or (iii) of subparagraph (A) shall identify to the Director or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request.

(e) Judicial review

(1) In general

A request under subsection (a) or (b) or an order under subsection (c) or a non-disclosure requirement imposed in connection with such request under subsection (d) shall be subject to judicial review under section 3511 of title 18.

(2) Notice

A request under subsection (a) or (b) or an order under subsection (c) shall include notice of the availability of judicial review described in paragraph (1).

(f) Payment of fees

The Federal Bureau of Investigation shall, subject to the availability of appropriations, pay to the consumer reporting agency assembling or providing report or information in accordance with procedures established under this section a fee for reimbursement for such costs as are reasonably necessary and which have been directly incurred in searching, reproducing, or transporting books, papers, records, or other data required or requested to be produced under this section.

(g) Limit on dissemination

The Federal Bureau of Investigation may not disseminate information obtained pursuant to this section outside of the Federal Bureau of Investigation, except to other Federal agencies as may be necessary for the approval or conduct of a foreign counterintelligence investigation, or, where the information concerns a person subject to the Uniform Code of Military Justice, to appropriate investigative authorities within the military department concerned as may be necessary for the conduct of a joint foreign counterintelligence investigation.

(h) Rules of construction

Nothing in this section shall be construed to prohibit information from being furnished by the Federal Bureau of Investigation pursuant to a subpoena or court order, in connection with a judicial or administrative proceeding to enforce the provisions of this subchapter. Nothing in this section shall be construed to authorize or permit the withholding of information from the Congress.

(i) Reports to Congress

(1) On a semiannual basis, the Attorney General shall fully inform the Permanent Select Committee on Intelligence and the Committee on Banking, Finance and Urban Affairs of the House of Representatives, and the Select Committee on Intelligence and the Committee on Banking, Housing, and Urban Affairs of the Senate concerning all requests made pursuant to subsections (a), (b), and (c).

(2) In the case of the semiannual reports required to be submitted under paragraph (1) to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate, the submittal dates for such reports shall be as provided in section 3106 of title 50.

(j) Damages

Any agency or department of the United States obtaining or disclosing any consumer reports, records, or information contained therein in violation of this section is liable to the consumer to whom such consumer reports, records, or information relate in an amount equal to the sum of—

(1) $100, without regard to the volume of consumer reports, records, or information involved;

(2) any actual damages sustained by the consumer as a result of the disclosure;

(3) if the violation is found to have been willful or intentional, such punitive damages as a court may allow; and

(4) in the case of any successful action to enforce liability under this subsection, the costs of the action, together with reasonable attorney fees, as determined by the court.

(k) Disciplinary actions for violations

If a court determines that any agency or department of the United States has violated any provision of this section and the court finds that the circumstances surrounding the violation raise questions of whether or not an officer or employee of the agency or department acted willfully or intentionally with respect to the violation, the agency or department shall promptly initiate a proceeding to determine whether or not disciplinary action is warranted against the officer or employee who was responsible for the violation.

(l) Good-faith exception

Notwithstanding any other provision of this subchapter, any consumer reporting agency or agent or employee thereof making disclosure of consumer reports or identifying information pursuant to this subsection in good-faith reliance upon a certification of the Federal Bureau of Investigation pursuant to provisions of this section shall not be liable to any person for such disclosure under this subchapter, the constitution of any State, or any law or regulation of any State or any political subdivision of any State.

(m) Limitation of remedies

Notwithstanding any other provision of this subchapter, the remedies and sanctions set forth in this section shall be the only judicial remedies and sanctions for violation of this section.

(n) Injunctive relief

In addition to any other remedy contained in this section, injunctive relief shall be available to require compliance with the procedures of this section. In the event of any successful action under this subsection, costs together with reasonable attorney fees, as determined by the court, may be recovered.

§1681v. Disclosures to governmental agencies for counterterrorism purposes

(a) Disclosure

Notwithstanding section 1681b of this title or any other provision of this subchapter, a consumer reporting agency shall furnish a consumer report of a consumer and all other information in a consumer's file to a government agency authorized to conduct investigations of, or intelligence or counterintelligence activities or analysis related to, international terrorism when presented with a written certification by such government agency that such information is necessary for the agency's conduct or such investigation, activity or analysis and that includes a term that specifically identifies a consumer or account to be used as the basis for the production of such information.

(b) Form of certification

The certification described in subsection (a) shall be signed by a supervisory official designated by the head of a Federal agency or an officer of a Federal agency whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate.

(c) Prohibition of certain disclosure

(1) Prohibition

(A) In general

If a certification is issued under subparagraph (B) and notice of the right to judicial review under subsection (d) is provided, no consumer reporting agency that receives a request under subsection (a), or officer, employee, or agent thereof, shall disclose or specify in any consumer report, that a government agency described in subsection (a) has sought or obtained access to information or records under subsection (a).

(B) Certification

The requirements of subparagraph (A) shall apply if the head of the government agency described in subsection (a), or a designee, certifies that the absence of a prohibition of disclosure under this subsection may result in—

(i) a danger to the national security of the United States;

(ii) interference with a criminal, counterterrorism, or counterintelligence investigation;

(iii) interference with diplomatic relations; or

(iv) danger to the life or physical safety of any person.

(2) Exception

(A) In general

A consumer reporting agency that receives a request under subsection (a), or officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to—

(i) those persons to whom disclosure is necessary in order to comply with the request;

(ii) an attorney in order to obtain legal advice or assistance regarding the request; or

(iii) other persons as permitted by the head of the government agency described in subsection (a) or a designee.

(B) Application

A person to whom disclosure is made under subparagraph (A) shall be subject to the nondisclosure requirements applicable to a person to whom a request under subsection (a) is issued in the same manner as the person to whom the request is issued.

(C) Notice

Any recipient that discloses to a person described in subparagraph (A) information otherwise subject to a nondisclosure requirement shall inform the person of the applicable nondisclosure requirement.

(D) Identification of disclosure recipients

At the request of the head of the government agency described in subsection (a) or a designee, any person making or intending to make a disclosure under clause (i) or (iii) of subparagraph (A) shall identify to the head or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request.

(d) Judicial review

(1) In general

A request under subsection (a) or a non-disclosure requirement imposed in connection with such request under subsection (c) shall be subject to judicial review under section 3511 of title 18.

(2) Notice

A request under subsection (a) shall include notice of the availability of judicial review described in paragraph (1).

(e) Rule of construction

Nothing in section 1681u of this title shall be construed to limit the authority of the Director of the Federal Bureau of Investigation under this section.

(f) Safe harbor

Notwithstanding any other provision of this subchapter, any consumer reporting agency or agent or employee thereof making disclosure of consumer reports or other information pursuant to this section in good-faith reliance upon a certification of a government agency pursuant to the provisions of this section shall not be liable to any person for such disclosure under this subchapter, the constitution of any State, or any law or regulation of any State or any political subdivision of any State.

(g) Reports to Congress

(1) On a semi-annual basis, the Attorney General shall fully inform the Committee on the Judiciary, the Committee on Financial Services, and the Permanent Select Committee on Intelligence of the House of Representatives and the Committee on the Judiciary, the Committee on Banking, Housing, and Urban Affairs, and the Select Committee on Intelligence of the Senate concerning all requests made pursuant to subsection (a).

(2) In the case of the semiannual reports required to be submitted under paragraph (1) to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate, the submittal dates for such reports shall be as provided in section 3106 of title 50.

§1681w. Disposal of records

(a) Regulations

(1) In general

The Federal Trade Commission, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Federal banking agencies, and the National Credit Union Administration, with respect to the entities that are subject to their respective enforcement authority under section 1681s of this title, and in coordination as described in paragraph (2), shall issue final regulations requiring any person that maintains or otherwise possesses consumer information, or any compilation of consumer information, derived from consumer reports for a business purpose to properly dispose of any such information or compilation.

(2) Coordination

Each agency required to prescribe regulations under paragraph (1) shall—

(A) consult and coordinate with each other such agency so that, to the extent possible, the regulations prescribed by each such agency are consistent and comparable with the regulations by each such other agency; and

(B) ensure that such regulations are consistent with the requirements and regulations issued pursuant to Public Law 106–102 and other provisions of Federal law.

(3) Exemption authority

In issuing regulations under this section, the agencies identified in paragraph (1) may exempt any person or class of persons from application of those regulations, as such agency deems appropriate to carry out the purpose of this section.

(b) Rule of construction

Nothing in this section shall be construed—

(1) to require a person to maintain or destroy any record pertaining to a consumer that is not imposed under other law; or

(2) to alter or affect any requirement imposed under any other provision of law to maintain or destroy such a record.

§1681x. Corporate and technological circumvention prohibited

The Commission shall prescribe regulations, to become effective not later than 90 days after December 4, 2003, to prevent a consumer reporting agency from circumventing or evading treatment as a consumer reporting agency described in section 1681a(p) of this title for purposes of this subchapter, including—

(1) by means of a corporate reorganization or restructuring, including a merger, acquisition, dissolution, divestiture, or asset sale of a consumer reporting agency; or

(2) by maintaining or merging public record and credit account information in a manner that is substantially equivalent to that described in paragraphs (1) and (2) of section 1681a(p) of this title, in the manner described in section 1681a(p) of this title.

Appendix B—Excerpt from Regulation V, 12 CFR 1022[84]

§ 1022.30 Obtaining or using medical information in connection with a determination of eligibility for credit.

(a) ***Scope.*** This section applies to any person that participates as a creditor in a transaction, except for a person excluded from coverage of this part by section 1029 of the Consumer Financial Protection Act of 2010, title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 137.

(b) ***General prohibition on obtaining or using medical information*** **—**

(1) ***In general.*** A creditor may not obtain or use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit, except as provided in this section.

(2) ***Definitions.***

(i) ***Credit*** has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(ii) ***Creditor*** has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(iii) ***Eligibility, or continued eligibility, for credit*** means the consumer's qualification or fitness to receive, or continue to receive, credit, including the terms on which credit is offered. The term does not include:

(A) Any determination of the consumer's qualification or fitness for employment, insurance (other than a credit insurance product), or other non-credit products or services;

(B) Authorizing, processing, or documenting a payment or transaction on behalf of the consumer in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit; or

(C) Maintaining or servicing the consumer's account in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit.

(c) ***Rule of construction for obtaining and using unsolicited medical information*** **—**

(1) ***In general.*** A creditor does not obtain medical information in violation of the prohibition if it receives medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit without specifically requesting medical information.

(2) ***Use of unsolicited medical information.*** A creditor that receives unsolicited medical information in the manner described in paragraph (c)(1) of this section may use that information in connection with any determination of the consumer's eligibility, or continued eligibility, for credit to the extent the creditor can rely on at least one of the exceptions in § 1022.30(d) or (e).

(3) ***Examples.*** A creditor does not obtain medical information in violation of the prohibition if, for example:

(i) In response to a general question regarding a consumer's debts or expenses, the creditor receives information that the consumer owes a debt to a hospital.

(ii) In a conversation with the creditor's loan officer, the consumer informs the creditor that the consumer has a particular medical condition.

(iii) In connection with a consumer's application for an extension of credit, the creditor requests a consumer report from a consumer reporting agency and receives medical information in the consumer report furnished by the agency even though the creditor did not specifically request medical information from the consumer reporting agency.

(d) ***Financial information exception for obtaining and using medical information*** **—**

(1) ***In general.*** A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit so long as:

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[84] This appendix sets forth the text of Regulation V, § 1022.30 as it appears in the electronic version of the Code of Federal Regulations, as published online at https://www.ecfr.gov/current/title-12/chapter-X/part-1022#1022.30. Although the CFPB has made every effort to transcribe the regulation accurately, this appendix is intended only as a convenience for the small entity representatives and not as a substitute for the text in the Code of Federal Regulations.

(i) The information is the type of information routinely used in making credit eligibility determinations, such as information relating to debts, expenses, income, benefits, assets, collateral, or the purpose of the loan, including the use of proceeds;

(ii) The creditor uses the medical information in a manner and to an extent that is no less favorable than it would use comparable information that is not medical information in a credit transaction; and

(iii) The creditor does not take the consumer's physical, mental, or behavioral health, condition or history, type of treatment, or prognosis into account as part of any such determination.

(2) ***Examples*** —

(i) ***Examples of the types of information routinely used in making credit eligibility determinations.*** Paragraph (d)(1)(i) of this section permits a creditor, for example, to obtain and use information about:

(A) The dollar amount, repayment terms, repayment history, and similar information regarding medical debts to calculate, measure, or verify the repayment ability of the consumer, the use of proceeds, or the terms for granting credit;

(B) The value, condition, and lien status of a medical device that may serve as collateral to secure a loan;

(C) The dollar amount and continued eligibility for disability income, workers' compensation income, or other benefits related to health or a medical condition that is relied on as a source of repayment; or

(D) The identity of creditors to whom outstanding medical debts are owed in connection with an application for credit, including but not limited to, a transaction involving the consolidation of medical debts.

(ii) ***Examples of uses of medical information consistent with the exception.***

(A) A consumer includes on an application for credit information about two $20,000 debts. One debt is to a hospital; the other debt is to a retailer. The creditor contacts the hospital and the retailer to verify the amount and payment status of the debts. The creditor learns that both debts are more than 90 days past due. Any two debts of this size that are more than 90 days past due would disqualify the consumer under the creditor's established underwriting criteria. The creditor denies the application on the basis that the consumer has a poor repayment history on outstanding debts. The creditor has used medical information in a manner and to an extent no less favorable than it would use comparable non-medical information.

(B) A consumer indicates on an application for a $200,000 mortgage loan that she receives $15,000 in long-term disability income each year from her former employer and has no other income. Annual income of $15,000, regardless of source, would not be sufficient to support the requested amount of credit. The creditor denies the application on the basis that the projected debt-to-income ratio of the consumer does not meet the creditor's underwriting criteria. The creditor has used medical information in a manner and to an extent that is no less favorable than it would use comparable non-medical information.

(C) A consumer includes on an application for a $10,000 home equity loan that he has a $50,000 debt to a medical facility that specializes in treating a potentially terminal disease. The creditor contacts the medical facility to verify the debt and obtain the repayment history and current status of the loan. The creditor learns that the debt is current. The applicant meets the income and other requirements of the creditor's underwriting guidelines. The creditor grants the application. The creditor has used medical information in accordance with the exception.

(iii) ***Examples of uses of medical information inconsistent with the exception.***

(A) A consumer applies for $25,000 of credit and includes on the application information about a $50,000 debt to a hospital. The creditor contacts the hospital to verify the amount and payment status of the debt, and learns that the debt is current and that the consumer has no delinquencies in her repayment history. If the existing debt were instead owed to a retail department store, the creditor would approve the application and extend credit based on the amount and repayment history of the outstanding debt. The creditor, however, denies the application because the consumer is indebted to a hospital. The creditor has used medical information, here the identity of the medical creditor, in a manner and to an extent that is less favorable than it would use comparable non-medical information.

(B) A consumer meets with a loan officer of a creditor to apply for a mortgage loan. While filling out the loan application, the consumer informs the loan officer orally that she has a potentially terminal

disease. The consumer meets the creditor's established requirements for the requested mortgage loan. The loan officer recommends to the credit committee that the consumer be denied credit because the consumer has that disease. The credit committee follows the loan officer's recommendation and denies the application because the consumer has a potentially terminal disease. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis as part of a determination of eligibility or continued eligibility for credit.

(C) A consumer who has an apparent medical condition, such as a consumer who uses a wheelchair or an oxygen tank, meets with a loan officer to apply for a home equity loan. The consumer meets the creditor's established requirements for the requested home equity loan and the creditor typically does not require consumers to obtain a debt cancellation contract, debt suspension agreement, or credit insurance product in connection with such loans. However, based on the consumer's apparent medical condition, the loan officer recommends to the credit committee that credit be extended to the consumer only if the consumer obtains a debt cancellation contract, debt suspension agreement, or credit insurance product from a nonaffiliated third party. The credit committee agrees with the loan officer's recommendation. The loan officer informs the consumer that the consumer must obtain a debt cancellation contract, debt suspension agreement, or credit insurance product from a nonaffiliated third party to qualify for the loan. The consumer obtains one of these products and the creditor approves the loan. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis in setting conditions on the consumer's eligibility for credit.

(e) ***Specific exceptions for obtaining and using medical information —***

(1) ***In general.*** A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit:

(i) To determine whether the use of a power of attorney or legal representative that is triggered by a medical condition or event is necessary and appropriate or whether the consumer has the legal capacity to contract when a person seeks to exercise a power of attorney or act as legal representative for a consumer based on an asserted medical condition or event;

(ii) To comply with applicable requirements of local, state, or Federal laws;

(iii) To determine, at the consumer's request, whether the consumer qualifies for a legally permissible special credit program or credit-related assistance program that is:

(A) Designed to meet the special needs of consumers with medical conditions; and

(B) Established and administered pursuant to a written plan that:

(*1*) Identifies the class of persons that the program is designed to benefit; and

(*2*) Sets forth the procedures and standards for extending credit or providing other credit-related assistance under the program;

(iv) To the extent necessary for purposes of fraud prevention or detection;

(v) In the case of credit for the purpose of financing medical products or services, to determine and verify the medical purpose of a loan and the use of proceeds;

(vi) Consistent with safe and sound practices, if the consumer or the consumer's legal representative specifically requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit, to accommodate the consumer's particular circumstances, and such request is documented by the creditor;

(vii) Consistent with safe and sound practices, to determine whether the provisions of a forbearance practice or program that is triggered by a medical condition or event apply to a consumer;

(viii) To determine the consumer's eligibility for, the triggering of, or the reactivation of a debt cancellation contract or debt suspension agreement if a medical condition or event is a triggering event for the provision of benefits under the contract or agreement; or

(ix) To determine the consumer's eligibility for, the triggering of, or the reactivation of a credit insurance product if a medical condition or event is a triggering event for the provision of benefits under the product.

(2) ***Example of determining eligibility for a special credit program or credit assistance program.*** A not-for-profit organization establishes a credit assistance program pursuant to a written plan that is designed to assist

disabled veterans in purchasing homes by subsidizing the down payment for the home purchase mortgage loans of qualifying veterans. The organization works through mortgage lenders and requires mortgage lenders to obtain medical information about the disability of any consumer that seeks to qualify for the program, use that information to verify the consumer's eligibility for the program, and forward that information to the organization. A consumer who is a veteran applies to a creditor for a home purchase mortgage loan. The creditor informs the consumer about the credit assistance program for disabled veterans and the consumer seeks to qualify for the program. Assuming that the program complies with all applicable law, including applicable fair lending laws, the creditor may obtain and use medical information about the medical condition and disability, if any, of the consumer to determine whether the consumer qualifies for the credit assistance program.

(3) ***Examples of verifying the medical purpose of the loan or the use of proceeds.***

(i) If a consumer applies for $10,000 of credit for the purpose of financing vision correction surgery, the creditor may verify with the surgeon that the procedure will be performed. If the surgeon reports that surgery will not be performed on the consumer, the creditor may use that medical information to deny the consumer's application for credit, because the loan would not be used for the stated purpose.

(ii) If a consumer applies for $10,000 of credit for the purpose of financing cosmetic surgery, the creditor may confirm the cost of the procedure with the surgeon. If the surgeon reports that the cost of the procedure is $5,000, the creditor may use that medical information to offer the consumer only $5,000 of credit.

(iii) A creditor has an established medical loan program for financing particular elective surgical procedures. The creditor receives a loan application from a consumer requesting $10,000 of credit under the established loan program for an elective surgical procedure. The consumer indicates on the application that the purpose of the loan is to finance an elective surgical procedure not eligible for funding under the guidelines of the established loan program. The creditor may deny the consumer's application because the purpose of the loan is not for a particular procedure funded by the established loan program.

(4) ***Examples of obtaining and using medical information at the request of the consumer.***

(i) If a consumer applies for a loan and specifically requests that the creditor consider the consumer's medical disability at the relevant time as an explanation for adverse payment history information in his credit report, the creditor may consider such medical information in evaluating the consumer's willingness and ability to repay the requested loan to accommodate the consumer's particular circumstances, consistent with safe and sound practices. The creditor may also decline to consider such medical information to accommodate the consumer, but may evaluate the consumer's application in accordance with its otherwise applicable underwriting criteria. The creditor may not deny the consumer's application or otherwise treat the consumer less favorably because the consumer specifically requested a medical accommodation, if the creditor would have extended the credit or treated the consumer more favorably under the creditor's otherwise applicable underwriting criteria.

(ii) If a consumer applies for a loan by telephone and explains that his income has been and will continue to be interrupted on account of a medical condition and that he expects to repay the loan by liquidating assets, the creditor may, but is not required to, evaluate the application using the sale of assets as the primary source of repayment, consistent with safe and sound practices, provided that the creditor documents the consumer's request by recording the oral conversation or making a notation of the request in the consumer's file.

(iii) If a consumer applies for a loan and the application form provides a space where the consumer may provide any other information or special circumstances, whether medical or non-medical, that the consumer would like the creditor to consider in evaluating the consumer's application, the creditor may use medical information provided by the consumer in that space on that application to accommodate the consumer's application for credit, consistent with safe and sound practices, or may disregard that information.

(iv) If a consumer specifically requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit and provides the creditor with medical information for that purpose, and the creditor determines that it needs additional information regarding the consumer's circumstances, the creditor may request, obtain, and use additional medical information about the consumer as necessary to verify the information provided by the consumer or to determine whether to make an accommodation for the consumer. The consumer may decline to provide additional information, withdraw the request for an accommodation, and have the application considered under the creditor's otherwise applicable underwriting criteria.

(v) If a consumer completes and signs a credit application that is not for medical purpose credit and the application contains boilerplate language that routinely requests medical information from the consumer or that indicates that by applying for credit the consumer authorizes or consents to the creditor obtaining and using medical information in connection with a determination of the consumer's eligibility, or continued eligibility, for credit, the consumer has not specifically requested that the creditor obtain and use medical information to accommodate the consumer's particular circumstances.

(5) ***Example of a forbearance practice or program.*** After an appropriate safety and soundness review, a creditor institutes a program that allows consumers who are or will be hospitalized to defer payments as needed for up to three months, without penalty, if the credit account has been open for more than one year and has not previously been in default, and the consumer provides confirming documentation at an appropriate time. A consumer is hospitalized and does not pay her bill for a particular month. This consumer has had a credit account with the creditor for more than one year and has not previously been in default. The creditor attempts to contact the consumer and speaks with the consumer's adult child, who is not the consumer's legal representative. The adult child informs the creditor that the consumer is hospitalized and is unable to pay the bill at that time. The creditor defers payments for up to three months, without penalty, for the hospitalized consumer and sends the consumer a letter confirming this practice and the date on which the next payment will be due. The creditor has obtained and used medical information to determine whether the provisions of a medically-triggered forbearance practice or program apply to a consumer.

APPENDIX D: DISCUSSION GUIDE FOR SMALL ENTITY REPRESENTATIVES

See attached.

Discussion Guide: Consumer Reporting Rule SBREFA Outline

About this document: The CFPB is currently considering a rulemaking to address a number of consumer reporting topics under the Fair Credit Reporting Act (FCRA). In accordance with the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), the CFPB is planning a Small Business Review Panel to consult with representatives of small entities that likely would be subject to the rule, if it were adopted. The CFPB has issued an Outline of Proposals and Alternatives Under Consideration (Outline) to summarize for those representatives the proposals the CFPB is considering and to seek feedback on those proposals. This document supports the Outline by providing a high-level overview of the proposals the CFPB is considering and noting their location in the Outline.

Consumer Report and Consumer Reporting Agency Definitions

Topic	Summary of proposal(s) under consideration	Location in SBREFA Outline
Data brokers	Among other things, would: 1) provide that data brokers that sell certain types of consumer data (e.g., data typically used for credit, employment, and certain other eligibility determinations) are selling consumer reports; and 2) provide that consumer information provided to a user who uses it for a permissible purpose is a "consumer report" regardless of whether the data broker knew or should have known the user would use it for that purpose or intended the user to use it for that purpose. Assuming the other elements of the definition of "consumer reporting agency" were satisfied, such data brokers would be consumer reporting agencies.	7-9
"Assembling or Evaluating"	Would provide more bright-line definition for the terms "assembling" and "evaluating" in the definition of "consumer	9-10

Topic	Summary of proposal(s) under consideration	Location in SBREFA Outline
	reporting agency," specifically as those terms pertain to entities that facilitate electronic data access between parties.	
Credit header data	Would clarify the extent to which credit header data—*i.e.*, consumer-identifying data, such as a consumer's current and former addresses and Social Security number, that are maintained by consumer reporting agencies—is a consumer report.	10
Targeted marketing and aggregated data	Would clarify that certain activities that consumer reporting agencies undertake to help third-party users market to consumers violate the FCRA prohibition on furnishing consumer reports to third parties without a permissible purpose. Additionally, would clarify when aggregated or anonymized consumer report information constitutes or does not constitute a consumer report.	11-12

Permissible purposes

Topic	Summary of proposal(s) under consideration	Location in SBREFA Outline
Written instructions of the consumer	Would address what is needed for a consumer report to be furnished by a consumer reporting agency in accordance with the "written instructions of the consumer" permissible purpose.	12-13
Legitimate business need	Would clarify that the "legitimate business need" permissible purpose requires either 1) that the consumer has initiated a transaction for personal, family, or household purposes and the consumer report is used only for the purpose of determining the consumer's eligibility for the business transaction, or 2) that there is an account review for which the use of a consumer report is actually needed to decide if the consumer continues to meet the terms of the account.	13-14

Topic	Summary of proposal(s) under consideration	Location in SBREFA Outline
Data security and data breaches	Would clarify a consumer reporting agency's obligation to protect consumer reports from data breaches or unauthorized access by third parties.	14

Disputes

Topic	Summary of proposal(s) under consideration	Location in SBREFA Outline
Legal	Would codify that there is no distinction in the FCRA between "legal" and "factual" disputes, such that consumer reporting agencies and furnishers have obligations to conduct reasonable investigations of both types of disputes.	14-16
Systemic	Would address what consumer reporting agencies and furnishers must do to investigate and address systemic errors that come to their attention via disputes. In addition, may provide a specific process consumers could use to submit disputes relating to systemic issues affecting multiple consumers.	16-17

Medical Debt

Topic	Summary of proposal(s) under consideration	Location in SBREFA Outline
Creditors	Would prohibit creditors from obtaining or using medical debt collection information to make determinations about consumers' eligibility (or continued eligibility) for credit.	14-17
Consumer Reporting Agencies	Would prohibit consumer reporting agencies from including medical debt collection tradelines on consumer reports furnished to creditors for purposes of making credit eligibility determinations.	17-18

Additional resources

Find more information about the proposals under consideration and sign up for updates about the Bureau's rulemaking at www.consumerfinance.gov/rules-policy/small-business-review-panels/small-business-review-panel-for-consumer-reporting-rulemaking/.

APPENDIX E: PANEL OUTREACH MEETINGS PRESENTATION MATERIALS

See attached.

Consumer Reporting Rule SBREFA Panel Meetings

CFPB | October 18 & 19, 2023

Consumer Financial Protection Bureau

Privacy Act Statement (5 U.S.C. 552a(e)(3))

The information you provide the Consumer Financial Protection Bureau (CFPB) through your participation as a small entity representative (SER) on a Small Business Regulatory Enforcement Fairness Act (SBREFA) Panel is used to support SBREFA rulemaking activities.

Your written feedback will be tied to your personally identifiable information (PII) that you submit such as your name, organization, and business contact information and will be shared with the public in a published report. With your consent, the CFPB will also capture audio and video recordings of your responses as you participate during the pre-panel and panel sessions for transcription purposes. Recorded session feedback will be aggregated and included in a published report but will not be linked to your PII.

Information collected will be treated in accordance with the System of Records Notice (SORN), CFPB.017 - Small Business Review Panels and Cost of Credit Consultations. Although CFPB does not anticipate further disclosing the information provided, it may be disclosed as indicated in the Routine Uses described in the SORN.

This collection of information is authorized by Public Law 111-203, title X, sections 1011 and 1012, codified at 12 U.S.C. 5491 and 5492. Public Law 96-354, as amended by Public Law 104-121 and Public Law 111-203, codified at 5 U.S.C. 601 et seq.

Participation on the SBREFA panel is voluntary. However, if you do not consent to the recordings, you will not be able to participate in the session.

SBREFA Meeting Logistics

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- Use your computer for audio with a headset to reduce background noise. Or have WebEx call your phone.
- If you prefer to connect to audio only:

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US Toll Call
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Access code
27 69 034 9142
Passcode
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Click on "Layout" located to the left of the Participants view to change your view.

Speakers

If you are a presenter or panelist and are not speaking, **please mute and turn off your camera.**

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For Webex generated Closed Captioning, click the CC button at the lower left corner of the Webex window.

Technical Issues

- If you experience audio problems, click the "Audio & Video" button in the top toolbar.
- If you are having technical difficulties, please send a Chat to the "Host" or email Isabel Bailey at Isabel.Bailey@cfpb.gov.

Ask a question

- During the session, if you would like to ask a question, please raise your hand. The raised hand function can be found on the right-hand side of your screen. Your question will be answered in the order in which your hand was raised. Please **turn off your raised hand** once your question has been answered.
- If you prefer to ask your question in the **Chat**, it can be found on the lower right-hand side of the screen. Please address your question to "All Panelists".

Day 1 Welcome

Dan Sokolov

Deputy Associate Director
Research, Monitoring, and Regulations Division
Consumer Financial Protection Bureau

Stephanie Fekete

Director of Interagency Affairs
Office of Advocacy
U.S. Small Business Administration

Will Bestani

Senior Policy Analyst
Office of Information and Regulatory Affairs
Office of Management and Budget

Day 1 Agenda

Time (Eastern)	Session
1:00 – 1:30 PM	Day 1 Welcome and Recap of Disputes Discussion
1:30 – 2:20 PM	Segment 1: Definitions of Consumer Reporting and Consumer Reporting Agency
2:20 – 2:30 PM	Break
2:30 – 4:00 PM	Segment 1 (Cont.): Definitions of Consumer Reporting and Consumer Reporting Agency
4:00 – 4:10 PM	Break
4:10 – 4:55 PM	Segment 2: Medical Debt
4:55 – 5:00 PM	Day 1 Closing Remarks

Segment 1

Definitions of Consumer Report and Consumer Reporting Agency

- Data brokers
- Defining “assembling or evaluating”
- “Credit header” data
- Targeted marketing and aggregated data

Proposals Under Consideration – Data Brokers

Relevant FCRA Section:

- Section 603(d) and (f)
  - Defines the terms "consumer report" and "consumer reporting agency."

Proposals Under Consideration:

- The CFPB is considering proposals to address the application of the FCRA to data brokers, including to codify current law. These include proposals to provide that:
  - Data brokers that sell certain types of consumer data (*e.g.*, data typically used for credit and employment eligibility determinations) are selling consumer reports, regardless of the purpose for which the data was actually used or collected, or the expectations of that data broker.
  - Consumer information provided to a user who uses it for a permissible purpose is a "consumer report" regardless of whether the data broker knew or should have known the user would use it for that purpose or intended the user to use it for that purpose.

Discussion Questions – Data Brokers

General Questions

Q1. How, if at all, will the proposals under consideration require your firm to change its operations, products, or services?

Q2. What do you anticipate will be the initial and ongoing costs to your firm, if any, of complying with the proposals under consideration?

Q3. What aspect or aspects of complying with the proposals under consideration would be the most challenging?

Q4. What alternative approaches, if any, should the CFPB consider in lieu of the proposals under consideration?

Proposal-Specific Questions

Q8. If the CFPB proposes the approaches described above, what types of entities would fall within the definition of "consumer reporting agency"? Are there certain types of entities that should not fall within the definition of "consumer reporting agency"?

Q9. If consumer data communicated to a third party and used by the third party for credit decisions, employment purposes, insurance decisions, or other permissible purposes were a consumer report regardless of the data broker's knowledge or intent concerning the third party's use of the data, what costs would entities selling such data incur to monitor or control how their customers use purchased data?

Discussion Questions – Data Brokers

Proposal-Specific Questions

Q10. If the CFPB proposes the approach described above with respect to data brokers that sell certain types of data, would it be sufficient to provide a standard for (or guidelines about) what types of data are "typically" used for an FCRA-covered purpose or should the CFPB provide a list of such data types? What standard, guidelines, or data types should the CFPB consider for each FCRA-covered purpose?

Q11. Are there other ways in which the CFPB should be thinking about how and when data broker data should be considered a consumer report furnished by a CRA?

Q12. If any of the proposals under consideration that would make a data broker subject to the FCRA as a CRA were finalized, do you anticipate that your firm or your customers will seek to obtain consumer consent before providing consumer reports to third parties? If so, what challenges do you foresee with obtaining consumer consent?

Q13. What costs do you believe the proposals under consideration would be likely to impose on the entities from which your firm obtains consumer data (known as "furnishers" under the FCRA) and on the entities to which your firm provides consumer data (known as "users" under the FCRA)? Are there additional burdens or unintended consequences to such entities the CFPB should consider? What steps could the CFPB take to reduce or lessen those potential impacts?

Day 1 Mid-Session Break # 1

Proposal Under Consideration – Defining "Assembling or Evaluating"

Relevant FCRA Section:

- Section 603(f)
  - Defines the term "consumer reporting agency."

Proposal Under Consideration:

- The CFPB is considering a proposal to provide a more bright-line definition for when the activities of companies that facilitate electronic data access between parties, such as intermediaries or vendors, constitute "assembling" or "evaluating" as those terms are used in the FCRA's definition of consumer reporting agency. These include proposals to:
  - Address when such companies' activities constitute "assembling or evaluating."
  - Provide that, if such companies are "assembling or evaluating" and otherwise meet the definition of "consumer reporting agency," they would be consumer reporting agencies under FCRA section 603(f).

Discussion Questions – Defining "Assembling or Evaluating"

General Questions

Q1. How, if at all, will the proposal under consideration require your firm to change its operations, products, or services?

Q2. What do you anticipate will be the initial and ongoing costs to your firm, if any, of complying with the proposal under consideration?

Q3. What aspect or aspects of complying with the proposal under consideration would be the most challenging?

Q4. What alternative approaches, if any, should the CFPB consider in lieu of the proposal under consideration?

Proposal-Specific Questions

Q14. What are the types of intermediaries, vendors, and other entities that transmit consumer data electronically between data sources and users? For any such company, describe the types of information the company obtains, from which data sources, who determines the sources of information to use, and how the information is transmitted, used, interpreted, or modified by the company.

Q15. Are there any circumstances under which the activities of an intermediary, vendor, or other entity that transmits consumer data electronically does not create a risk of harm to a consumer?

Proposals Under Consideration – "Credit Header" Data

Relevant FCRA Section:

- Section 603(d)
  - Defines the term "consumer report."

Proposal Under Consideration:

- The CFPB is considering a proposal to clarify the extent to which credit header data constitutes a consumer report.
  - "Credit header" data are certain consumer-identifying data maintained by CRAs. Credit header data has historically been considered to include, for example, an individual's name (and any other names previously used), current and former addresses, Social Security number, and phone numbers.
  - The proposal under consideration would likely reduce, perhaps significantly, CRAs' ability to sell or otherwise disclose credit header data from their consumer reporting databases without a permissible purpose.

General Discussion Questions – "Credit Header" Data

Q1. How, if at all, will the proposal under consideration require your firm to change its operations, products, or services?

Q2. What do you anticipate will be the initial and ongoing costs to your firm, if any, of complying with the proposal under consideration?

Q3. What aspect or aspects of complying with the proposal under consideration would be the most challenging?

Q4. What alternative approaches, if any, should the CFPB consider in lieu of the proposal under consideration?

Proposal-Specific Discussion Questions – "Credit Header" Data

Q16. What types of information do firms typically consider to be credit header data? What types of credit header data are typically sold or purchased and for what purpose(s)? How is data collected for those purposes and how is it stored?

Q17. Under what circumstances do firms typically consider the sale or purchase of credit header data not to be a consumer report, and why? What costs would be incurred if such sales or purchases of credit header data were to be considered a consumer report?

Q18. If the CFPB proposes a rule clarifying when credit header data is a consumer report, are there certain categories of credit header data you believe should be included or excluded as a consumer report? If so, under what circumstances?

Proposals Under Consideration – Targeted Marketing and Aggregated Data

Relevant FCRA Sections:

- Section 603(d)
  - Defines the term "consumer report."
- Section 603(f)
  - Defines the term "consumer reporting agency."

Proposals Under Consideration:

- The CFPB is considering proposals to clarify:
  - Whether and when aggregated or anonymized consumer report information constitutes or does not constitute a consumer report; and
  - That certain activities CRAs undertake to help third-party users market to consumers violate the FCRA's general prohibition against furnishing consumer reports for marketing or advertising purposes.

General Discussion Questions – Targeted Marketing and Aggregated Data

Q1. How, if at all, will the proposals under consideration require your firm to change its operations, products, or services?

Q2. What do you anticipate will be the initial and ongoing costs to your firm, if any, of complying with the proposals under consideration?

Q3. What aspect or aspects of complying with the proposals under consideration would be the most challenging?

Q4. What alternative approaches, if any, should the CFPB consider in lieu of the proposals under consideration?

Proposal-Specific Discussion Questions – Targeted Marketing and Aggregated Data

Q19. What is your understanding of how CRAs or service providers perform marketing or advertising services on behalf of third-party users? What services are performed (*e.g.*, identification of target audiences, delivery of marketing or advertising materials to consumers)? What data are relied on to perform these services, and do firms typically consider such data to be protected by the FCRA? Why or why not?

Q20. What is your understanding of how firms share consumer report information in marketing or advertising platforms? What capabilities do these platforms offer to third-party users for targeting marketing or advertising campaigns? What steps do firms typically take to prevent consumer report information from being used for impermissible purposes under the FCRA?

Q21. What is your knowledge about products that include aggregated data drawn from consumer reporting databases? For what purposes do firms typically use or offer the products? What type of information is aggregated? How is the aggregation done? At what level are the data aggregated?

Q22. Do firms typically consider aggregated data products they use or offer to be consumer reports? Why or why not?

Q23. Is there a level of aggregation of consumer report information at which consumer privacy would not be implicated? Are there instances you are aware of where aggregated information that is drawn from a consumer reporting database is later linked back by a third party to specific consumers, for example when a consumer responds to an advertisement?

Day 1 Mid-Session Break # 2

Segment 2

Medical Debt Collection Information

Proposals Under Consideration – Medical Debt Collection Information

Relevant FCRA and Regulation V Sections:

- FCRA Section 604(g)(2)
  - Restricts creditors' ability to obtain or use medical information in credit decisions
- Regulation V, 12 CFR § 1022.30(d)
  - Identifies exceptions to the restrictions in FCRA section 604(g)(2)

Proposals Under Consideration:

- The CFPB is considering proposals to:
  - Revise Regulation V, 1022.30(d) such that creditors would be prohibited from obtaining or using medical debt collection information about a consumer to make determinations about the consumer's credit eligibility or continued credit eligibility.
  - Prohibit CRAs from including medical debt collection tradelines on consumer reports furnished to creditors for purpose of making credit eligibility determinations.

General Discussion Questions – Medical Debt Collection Information

Q1. How, if at all, will the proposals under consideration require your firm to change its operations, products, or services?

Q2. What do you anticipate will be the initial and ongoing costs to your firm, if any, of complying with the proposals under consideration?

Q3. What aspect or aspects of complying with the proposals under consideration would be the most challenging?

Q4. What alternative approaches, if any, should the CFPB consider in lieu of the proposals under consideration?

Proposal-Specific Discussion Questions – Medical Debt Collection Information

Q35. Under the proposals under consideration, would you anticipate that medical debt collectors would stop furnishing medical debt collection information to CRAs and use alternative debt collection methods? If so, which ones?

Q36. To what extent do creditors currently use medical debt collection information when making credit eligibility determinations, including to comply with other laws or requirements? Do creditors use medical debt collection information for other purposes in connection with a credit transaction?

Q37. From what sources do creditors obtain consumers' medical debt collection information, other than consumer reports?

Q38. What are the pros and cons to an alternative approach of mandating a delay in the furnishing and reporting of medical debt for a particular period of time, and not reporting or furnishing medical debt below a particular dollar amount?

Q39. What are the pros and cons of an alternative approach of requiring CRAs and furnishers, upon receiving a dispute, to conduct an independent investigation to certify that a disputed medical debt is accurate and not subject to pending insurance disputes?

Day 1 Closing Remarks

Day 2 Welcome

Privacy Act Statement (5 U.S.C. 552a(e)(3))

The information you provide the Consumer Financial Protection Bureau (CFPB) through your participation as a small entity representative (SER) on a Small Business Regulatory Enforcement Fairness Act (SBREFA) Panel is used to support SBREFA rulemaking activities.

Your written feedback will be tied to your personally identifiable information (PII) that you submit such as your name, organization, and business contact information and will be shared with the public in a published report. With your consent, the CFPB will also capture audio and video recordings of your responses as you participate during the pre-panel and panel sessions for transcription purposes. Recorded session feedback will be aggregated and included in a published report but will not be linked to your PII.

Information collected will be treated in accordance with the System of Records Notice (SORN), CFPB.017 - Small Business Review Panels and Cost of Credit Consultations. Although CFPB does not anticipate further disclosing the information provided, it may be disclosed as indicated in the Routine Uses described in the SORN.

This collection of information is authorized by Public Law 111-203, title X, sections 1011 and 1012, codified at 12 U.S.C. 5491 and 5492. Public Law 96-354, as amended by Public Law 104-121 and Public Law 111-203, codified at 5 U.S.C. 601 et seq.

Participation on the SBREFA panel is voluntary. However, if you do not consent to the recordings, you will not be able to participate in the session.

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- If you are having technical difficulties, please send a Chat to the "Host" or email Isabel Bailey at Isabel.Bailey@cfpb.gov.

Ask a question

- During the session, if you would like to ask a question, please raise your hand. The raised hand function can be found on the right-hand side of your screen. Your question will be answered in the order in which your hand was raised. Please **turn off your raised hand** once your question has been answered.
- If you prefer to ask your question in the **Chat**, it can be found on the lower right-hand side of the screen. Please address your question to "All Panelists".

Day 2 Agenda

Time (Eastern)	Session
1:00 – 1:05 PM	Day 2 Welcome
1:05 – 1:30 PM	Segment 2 Cont.: Medical Debt
1:30 – 2:30 PM	Segment 3: Permissible Purposes
2:30 – 2:40 PM	Break
2:40 – 3:10 PM	Segment 3 Cont.: Permissible Purposes
3:10 – 3:30 PM	Segment 4: Implementation Period
3:30 – 3:40 PM	Break
3:40 – 4:30 PM	Segment 5: Potential Impacts on Small Entities
4:30 – 5:00 PM	Day 2 Closing Remarks

Proposal-Specific Discussion Questions – Medical Debt Collection Information

Q35. Under the proposals under consideration, would you anticipate that medical debt collectors would stop furnishing medical debt collection information to CRAs and use alternative debt collection methods? If so, which ones?

Q36. To what extent do creditors currently use medical debt collection information when making credit eligibility determinations, including to comply with other laws or requirements? Do creditors use medical debt collection information for other purposes in connection with a credit transaction?

Q37. From what sources do creditors obtain consumers' medical debt collection information, other than consumer reports?

Q38. What are the pros and cons to an alternative approach of mandating a delay in the furnishing and reporting of medical debt for a particular period of time, and not reporting or furnishing medical debt below a particular dollar amount?

Q39. What are the pros and cons of an alternative approach of requiring CRAs and furnishers, upon receiving a dispute, to conduct an independent investigation to certify that a disputed medical debt is accurate and not subject to pending insurance disputes?

Segment 3

Permissible Purposes

- Written instructions of the consumer
- Legitimate business need
- Data security and data breaches

Proposals Under Consideration – Written Instructions of the Consumer

Relevant FCRA Sections:

- Section 604
  - Provides the enumerated permitted purposes for which a CRA may furnish consumer reports.
- Section 604(a)(2)
  - States that a CRA may furnish a consumer report if the report is provided "[i]n accordance with the written instructions of the consumer to whom it relates."

Proposals Under Consideration:

- The CFPB is considering proposals to address what is needed for a consumer report to be furnished by a CRA in accordance with the "written instructions of the consumer" permissible purpose under the FCRA, including:
  - The steps companies must take to obtain a consumer's written instructions;
  - Who can collect written instructions;
  - Limits on the scope of authorization to ensure the consumer has authorized all uses of the consumer's data (including limits on the number of purposes or entities that can be covered by a single instruction); and
  - Methods for revoking any ongoing authorization.

General Discussion Questions – Written Instructions of the Consumer

Q1. How, if at all, will the proposals under consideration require your firm to change its operations, products, or services?

Q2. What do you anticipate will be the initial and ongoing costs to your firm, if any, of complying with the proposals under consideration?

Q3. What aspect or aspects of complying with the proposals under consideration would be the most challenging?

Q4. What alternative approaches, if any, should the CFPB consider in lieu of the proposals under consideration?

Proposal-Specific Discussion Questions – Written Instructions of the Consumer

Q24. Describe the consumer authorizations or certifications of written instruction typically relied upon to furnish or obtain consumer reports pursuant to this permissible purpose. How specific are these authorizations, and if your firm relies on the certification of a user, does the user disclose the language of the consumer's authorization? How can a consumer revoke or modify their authorization? What are the products or services offered to consumers for which your firm relies on the written instructions of the consumer to obtain a consumer report?

Q25. What should the CFPB take into consideration when evaluating proposals to ensure that consumers understand the scope and import of their authorization to furnish or obtain their consumer report?

Q26. If your firm requires consumer authorization to furnish or obtain consumer reports, what methods (*e.g.*, electronic signature, check box, wet-ink signature, etc.) does your firm use to document the consumer's instructions or authorization? What feedback has your firm received from consumers regarding the convenience or challenges caused by such methods, if any?

Proposal Under Consideration – Legitimate Business Need

Relevant FCRA Sections:

- Section 604
  - Provides the enumerated permitted purposes for which a CRA may furnish consumer reports.
- Section 604(a)(3)(F)
  - States that a CRA may furnish a consumer report to a person if it has reason to believe that the person "otherwise has a legitimate business need for the information—(i) in connection with a business transaction that is initiated by the consumer; or (ii) to review an account to determine whether the consumer continues to meet the terms of the account."

Proposal Under Consideration:

- The CFPB is considering a proposal to specify that a CRA may furnish a consumer report under the "legitimate business need" permissible purpose in the FCRA only if:
  - A transaction was initiated by the consumer for personal, family, or household purposes and the consumer report will be used only for the purpose of determining the consumer's eligibility for the business transaction; or
  - There is an account review for which the use of a consumer report is actually needed to make a decision about whether the consumer continues to meet the terms of the account.

Discussion Questions – Legitimate Business Need

General Questions

Q1. How, if at all, will the proposal under consideration require your firm to change its operations, products, or services?

Q2. What do you anticipate will be the initial and ongoing costs to your firm, if any, of complying with the proposal under consideration?

Q3. What aspect or aspects of complying with the proposal under consideration would be the most challenging?

Q4. What alternative approaches, if any, should the CFPB consider in lieu of the proposal under consideration?

Proposal-Specific Questions

Q27. Under what circumstances do firms currently use the legitimate business need permissible purpose in connection with consumer-initiated business transactions and account reviews?

Q28. Would the proposal under consideration limit your firm's ability to get consumer reports? If so, how? Would it be feasible for your firm instead to rely on the written instruction permissible purpose or some other permissible purpose?

Day 2 Mid-Session Break # 1

Proposal Under Consideration – Data Security and Data Breaches

Relevant FCRA Sections:

- Section 604
  - Provides the enumerated permitted purposes for which a CRA may furnish consumer reports.
- Section 607(a)
  - Requires CRAs to maintain reasonable procedures designed to limit the furnishing of consumer reports to the permissible purposes listed in FCRA section 604.

Proposal Under Consideration:

- The CFPB is considering a proposal to address a CRA's obligation under the FCRA to protect consumer reports from a data breach or unauthorized access.
  - The CFPB is considering, for example, providing that failure to protect against unauthorized access to consumer reports by third parties may violate FCRA sections 604 or 607(a).

Discussion Questions – Data Security and Data Breaches

General Questions

Q1. How, if at all, will the proposal under consideration require your firm to change its operations, products, or services?

Q2. What do you anticipate will be the initial and ongoing costs to your firm, if any, of complying with the proposal under consideration?

Q3. What aspect or aspects of complying with the proposal under consideration would be the most challenging?

Q4. What alternative approaches, if any, should the CFPB consider in lieu of the proposal under consideration?

Proposal-Specific Question

Q29. What data security improvements, and associated costs, would CRAs incur if they were liable under the FCRA for all data breaches?

Segment 4

Implementation Period

Discussion Questions – Implementation Period

Q40. Please provide input on an appropriate implementation period for complying with a rule finalizing the proposals under consideration. Are there any aspects of the CFPB's proposals under consideration that could be particularly time consuming or costly to implement? Are any of these challenges particular to small entities? Are there any factors outside a covered entity's control that would affect its ability to prepare for compliance?

Day 2 Mid-Session Break # 2

Segment 5

Potential Impacts on Small Entities

Potential Impacts on Small Entities

Relevant RFA Sections

- Section 603(b)
  - Requires agencies to include in proposed rules certain descriptions and analyses regarding the initial projected costs of the proposed rule on small entities.
- Section 603(c)
  - Requires agencies to describe as part of the initial cost analysis any significant alternatives to the proposed rule which accomplish the objectives of applicable statutes and also minimize any significant economic impact of the proposed rule on small entities.
- Section 603(d)(1)
  - Requires, as part of the initial cost analysis for proposed rules, agencies to consider and describe the following:
    - any projected increase in the cost of credit for small entities;
    - any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and minimize any increase in the cost of credit for small entities; and
    - advice and recommendations of SERs related to any projected increased in the cost of credit for small entities and any significant alternatives to minimize such cost increases, as well as SERs' advice and recommendations regarding the analyses required by RFA section 603(b).

Discussion Questions – Potential Impacts on Small Entities

Q5. Other than compliance costs, what costs, burdens, or unintended consequences should the CFPB consider with respect to the proposals under consideration? Please quantify if possible. What alternatives, if any, would mitigate such costs, burdens, or unintended consequences?

Q43. For each of the proposals under consideration above, do you expect that your firm would restrict or eliminate any product or service offerings to comply with the rule? If so, how would the proposals impact those products or services?

Q44. For each of the proposals under consideration above, please provide information, data, and/or estimates of impacts to your firm's business operations and revenue, including to both current operations and revenues and to future operations and revenues that could potentially be lost.

Q45. What other, additional impacts do you think might occur that have not been covered above?

Q6. Are there any statutes or regulations with which your firm must comply that may duplicate, overlap, or conflict with the proposals under consideration? What challenges or costs would your firm anticipate in complying with any such statutes or regulations and the CFPB's proposals under consideration?

Discussion Questions – Potential Impacts on Small Entities

Q7. What factors disproportionately affecting small entities should the CFPB be aware of when evaluating the proposals under consideration? Would the proposals under consideration provide unique benefits to small entities?

Q46. What benefits do you expect small entities may experience from any of the proposals under consideration listed above?

Q41. Please provide feedback on the CFPB's understanding of the small entities that could be affected by the proposals under consideration.

Q42. For the proposals under consideration that are relevant to their businesses, small entity representatives are encouraged to provide specific estimates, information, and data on the projected one-time and ongoing costs of compliance if the proposals were adopted. Information and data on current FCRA compliance costs (baseline costs) will be valuable as well.

Q47. Would the proposals under consideration affect the cost and availability of credit to small entities?

Day 2 Closing Remarks

Submitting Written Feedback

SERs are encouraged to submit written feedback about each of the proposals under consideration and, in particular, about the costs and impacts of each proposal. Your feedback will help inform the written SBREFA panel report and the overall rulemaking.

Due Date: November 6, 2023

Submit To: CFPB_consumerreporting_rulemaking@cfpb.gov

Reminders for SER written feedback:

- Your feedback will be appended to the SBREFA panel report, which will be made part of the public rulemaking docket.
- If you are considering submitting proprietary or confidential business information, please contact us in advance to discuss whether and how that information should be provided.
- Written feedback will be shared with SBA OA and OIRA.

Thank you!