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Via Electronic Delivery to
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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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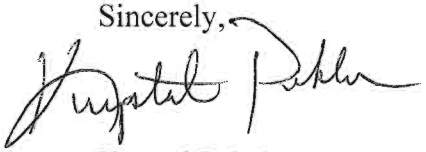
[43] *See* 15 U.S.C. § 1681i(a)(1)(A) (". . . if the completeness or accuracy of any item of information contained in a *consumer's file* at a consumer reporting agency is disputed *by the consumer* and the consumer notifies the agency directly. . .") (emphasis added).

[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,



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