November 6, 2023

The Honorable Rohit Chopra
Director
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

Dear Director Chopra:

The American Financial Services Association (AFSA[1]) writes regarding the Consumer Financial Protection Bureau's (CFPB) rulemaking to address several consumer reporting topics under the Fair Credit Reporting Act (FCRA). AFSA shares the CFPB's mission to protect consumers from data misuse. However, we have significant concerns with the viability of a number of the proposals in the outline, which would increase costs for small businesses, expose consumers to fraudulent activity, and increase consumer harm.

At the outset, AFSA states that several of the changes proposed in the CFPB's "Small Business Advisory Review Panel for Consumer Reporting Rulemaking Outline of Proposals"[2] (the Outline) can be read as contradictory to the plain language of the statute, caselaw, and existing interpretations from the government agencies responsible for ensuring consumer protection under the FCRA. Most notably, the FCRA itself[3] clearly outlines how and when any consumer reporting agency may furnish a consumer report. Additionally, the CFPB and the Federal Trade Commission (FTC) have published a document titled "A Summary of Your Rights Under the Fair Credit Reporting Act," which is intended to provide consumers with an understanding of their "major rights under the FCRA." [4] Finally, the Federal Reserve publishes a "Consumer Compliance Handbook" [5] which contains examination objectives, procedures, and other instructions for planning and conducting consumer compliance examinations. The Outline suggests certain changes are under consideration that will upend these long-held interpretations in a manner that could hurt responsible Americans looking for loans.

Our comment follows the order of the Outline in Section 3, "Proposals and Alternatives Under Consideration."

[1] Founded in 1916, the American Financial Services Association (AFSA) is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.
[2] Small Business Advisory Review Panel for Consumer Reporting Rulemaking Outline of Proposals, Consumer Financial Protection Bureau, September 15, 2023, available at https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-rule-sbrefa_outline-of-proposals.pdf.
[3] Fair Credit Reporting Act, 15 U.S.C § 1681.
[4] A Summary of Your Rights Under the Fair Credit Reporting Act, available at https://files.consumerfinance.gov/f/201504_cfpb_summary_your-rights-under-fcra.pdf.
[5] Consumer Compliance Handbook: Division of Consumer and Community Affairs, 2017, available at https://www.federalreserve.gov/boarddocs/supmanual/cch/200711/cch200711.pdf.

A. Definitions of consumer report and consumer reporting agency

1. Data brokers

AFSA has no comment on this section.

2. Defining "assembling or evaluating"

AFSA has no comment on this section.

3. "Credit Header" data

The CFPB is considering proposals to significantly reduce the ability to use credit header data. By the plain language of the statute, credit header data is not consumer report information.[6] It does not bear on any of the specified consumer characteristics identified in FCRA.[7]

The purpose of use of consumer data is also determinative whether information qualifies as a consumer report. Like other information discussed in this comment, demographic and identifying information is not considered consumer report information unless it is used for eligibility determinations.

Subjecting credit header data to treatment as a credit report will have unintended consequences. For example, with technological advances and increasingly sophisticated financial scams, financial institutions have a responsibility to their consumers and market participants to prevent, detect and mitigate fraud by using transaction, account validation, and consumer authentication tools and services. Credit header data is often central to tools used by financial institutions and other businesses to verify identities and prevent identity theft and fraud. Preventing fraud and identity theft is strongly pro-consumer, as persons whose identities are stolen can suffer harm to their credit. Businesses are suffering severe harm from fraud and identity theft. A regulation which would complicate and restrict one of the most important fraud fighting tools out there – using credit header data as the basis for identify verification – would be a huge step back.

Verifying that a consumer is the one making a purchase is often a fast-acting process and, when credit header data is so used, it has been determined not to be consumer report information.[8] Subjecting this information to the FCRA would require delivery of adverse action notices to potential fraudsters; require permissible purpose, which may introduce friction to the consumer experience where written instructions are needed; and increase liability for potential consumer disputes. This is likely to significantly increase compliance time and costs, while also allowing more potential fraud to occur and slowing application processing. AFSA encourages the CFPB to consider how financial institutions use credit header data to protect consumers when engaging in the FCRA rulemaking and exclude it from being classified as a consumer report.

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[6] 15 U.S.C. § 1681a(d).

[7] *Id*.

[8] *Bickley v. Dish Network, LLC*, No. 3:10-CV-00678-H, 2012 WL 5397754, at *3–4 (W.D. Ky. Nov. 2, 2012), *aff'd*, 751 F.3d 724 (6th Cir. 2014) ("According to the statute, a consumer report bears 'on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." 15 U.S.C. § 1681a(d)(1). The 'Declined No Hit' response indicates that the consumer reporting agencies did not have a confident match between the name and the SSN provided. Because the 'Declined No Hit' response bears in no way on the individual's creditworthiness or financial character, and Plaintiff provides no evidence to the contrary, the Court must conclude that this response does not constitute a consumer report under the FCRA.")

3. Targeted marking and aggregated data

AFSA has no comments on this section.

B. Permissible purposes

1. Written instructions of the consumer

The statute, the consumer education document, and the compliance handbook unanimously state that written instructions of the consumer to whom the data relates, absent other permissible purposes or the firm offer of credit exception, is required to furnish consumer report information. Currently, there is no specific guidance in place on what written instructions must look like beyond that they must be clear, specific, and affirmatively authorize the user to obtain a consumer report rather than a mere acknowledgement that a consumer's credit may be accessed. Accordingly, member companies have developed certain FCRA policies to ensure that, when needed, proper written instructions are obtained and consumer report data is used in accordance with the consumer's instructions. Changes to the required steps to obtain authorization, who can collect written instructions, and limits on the scope of authorization will be an additional compliance burden on small businesses who already have well-functioning compliance programs in place.

Consumers who provide written instructions for these services enjoy the benefit of free credit monitoring and identity protection. Adding additional requirements for the collection, duration, and method of providing written instructions could become overly burdensome or restrictive, causing consumers to no longer enroll in these services. Moreover these types of services may no longer be offered free of charge to consumers. A reduced availability of these products would place consumers at risk for lack of monitoring their credit and identity. Further, these types of products may only be offered by CRAs and large institutions thus putting the control of consumer data solely in the hands of a few.

2. Legitimate business need

AFSA has no comment on this section.

3. Data security and data breaches

The Outline states that the CFPB is considering expanding the FCRA to include that failure to protect against unauthorized access to consumer reports by third parties may violate the FCRA. The Outline contemplates that unauthorized access would be tantamount to "furnish[ing]" a consumer report without a permissible purpose. Interpreting "furnish" in such a fashion would run contrary to the codified definition of furnisher, which implies an *intention* to disseminate.[9] Unauthorized access of consumer report information by a fraudster is not the equivalent of a consumer reporting agency or a lender purposely disseminating consumer report information to unauthorized parties. Doing so would unnecessarily confuse the term and run contrary to the purpose of original intentions of the FCRA.

[9] Regulation V, 12 C.F.R. § 1022.41(c).

Additionally, data security is extremely important to both companies and consumers, and there are already laws in place to ensure that consumer data is protected. The Gramm-Leach-Bliley Act (GLBA) requires financial institutions – companies that offer consumers financial products or services like loans, financial or investment advice, or insurance – to safeguard sensitive data. The GLBA sets forth specific criteria relating to the safeguards that certain nonbank financial institutions must implement as a part of their information security programs. Member companies' compliance programs have been built and updated in accordance with GLBA standards. At best, any proposal contemplated by the CFPB is duplicative, at worst it would create inconsistent obligations on entities that will only increase confusion within the marketplace. Data security is a top priority for financial institutions, and data breaches carry substantial monetary and reputational exposure. Introducing new standards will increase compliance costs by overlapping with existing protections that adhere to the FTC's well-established and stringent requirements, and penalizing financial institutions whose data is stolen for impermissibly furnishing a consumer report would introduce no direct benefit to consumers.

C. *Disputes*

1. Disputes involving legal matters

The Outline claims that the FCRA does not distinguish between legal and factual disputes and requires investigation into unresolved legal disputes. This interpretation is unsupported within the FCRA. In fact, the plain reading of the statute contradicts the CFPB's interpretation of the FCRA in its statement of policy. [10] The statute requires credit reporting agencies (CRAs) to guard against, and credit furnishers to reasonably investigate, factual inaccuracies, not to resolve legal issues that would require a judicial ruling to resolve the dispute. The CFPB's position that allows legal challenges through FCRA investigations, if followed, would allow collateral attacks on issues that only can only be resolved by final judicial rulings. That legal disputes should be subject to FCRA investigation requirements is not only inconsistent with the court's authority over legal disputes, but is also contrary to the statutory text, Congressional intent, and well-established court precedent. Moving forward with such rulemaking creates the significant risk that CFPB's rulemaking will be found to be arbitrary and capricious and is also likely to increase market confusion.

- FCRA Text: An examination of sections 1681i(a) and 1681e(b) of the FCRA shows that a plaintiff must sufficiently allege that the credit report contains factually, not legally, inaccurate information. Moreover, the surrounding statutory language repeatedly speaks in terms that apply most naturally to factual disputes. For example, Section 1681e(b) requires CRAs to develop procedures to maintain "maximum possible accuracy." That descriptor makes sense in the context of factual accuracy, but not in the context of legal validity. Factual accuracy can be objectively measured; a fact is either true and accurate or it is not. And the phrase "maximum possible accuracy" shows that Congress wanted CRAs to make their reports mirror as closely as possible the true facts about consumers' debts.

  Section 1681s-2(b)(1) requires furnishers to investigate information whose "completeness or accuracy" is disputed, and to modify or delete any "item of information" "found to be *inaccurate or incomplete*" [emphasis added]. The key textual question is what it means for an "item of information" in a consumer's file to be "inaccurate or incomplete." Asking whether credit information conforms exactly to fact or truth, or has no errors, or contains all necessary parts, applies most naturally to matters of fact.

[10] Consumer Fin. Prot. Bureau, *Circular 2022-07, Reasonable investigation of consumer reporting disputes*, at 3 (Nov. 2022), available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_reasonable-investigation-of-consumer-reporting-disputes_circular-2022-07.pdf.

Additionally, the statute only allows for 30 days to resolve a dispute. Legal disputes involve an analysis of relevant facts that may not be possible based upon the information contained in the dispute or supporting material. And even if the relevant material is made available, such 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, other courts may disagree. Further complicating this analysis is the potential difficulty in establishing the relevant jurisdiction and laws for a given tradeline to conduct a proper legal analysis. FCRA's requirement that disputes be resolved in 30 days supports that the Act intended that a lender is required to resolve alleged factual inaccuracies and not resolve disputed legal questions. The proper venue to resolve disputed legal questions is a court or arbitration, as appropriate.

- Congressional Intent: The FCRA's legislative history further confirms Congress's focus on factual inaccuracy, not legal disputes. The original Fair Credit Reporting Act of 1970 was introduced in the Senate by a bipartisan group of Senators to "protect consumers against arbitrary, erroneous, and malicious credit information."[11] It was meant to target confusion over individuals with similar names; biased information; personality driven opinions or malicious gossip; computer errors; and incomplete information.[12]

- Court Precedent: This issue has been considered, and ruled upon, by multiple courts. The majority of courts of appeals to consider the question—the First, Seventh, Ninth, Tenth, and Eleventh Circuits—have held that FCRA investigation obligations extend only to investigate disputes of factual information, as consumer reporting agencies and/or furnishers are neither qualified nor obligated to resolve legal issues.[13]

2. Disputes involving systematic issues

The Outline proposes that a furnisher notify *any* consumer affected by a systemic issue realized during an investigation into a dispute by another consumer. This is contrary to the requirements imposed under the FCRA for reporting investigation results. For indirect disputes, a furnisher must report the results of its investigation of the "disputed information." The "disputed information" is information that has been disputed by one consumer. For direct disputes, a furnisher must report the results to "the consumer" disputing the information (and correct the reporting if necessary). The FCRA does not contemplate that dispute investigations or results would be performed in as broad of a fashion as the Outline proposes and risks the transmission of data that the consumer did not otherwise authorize. This is also already addressed by state notice requirements.

Ultimately, the FCRA already solves for systemic problems and harms caused by systemic issues by prohibiting a furnisher from reporting information to a CRA that it knows or has reasonable cause to believe is inaccurate. Further, the FCRA requires reasonable policies and procedures "with regard to the confidentiality, accuracy,

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[11] 115 Congressional Record 2410 (1969).
[12] *Id*. at 2411, 2412, and 2414.
[13] *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 (finding no obligation by a CRA to investigate the merits of a consumer's claim that she was not legally obligated on a debt to a medical provider who failed to properly bill her insurer for the service because "credit reporting agencies are not tribunal . . . Because CRAs are ill equipped to adjudicate contract disputes, courts have been loath to allow consumers to mount collateral attacks on the legal validity of their debts in the guise of FCRA reinvestigation claims.") citing *Saunders v. Branch Banking & Trust Co. of Va.*, 526 F.3d 142, 150 (4th Cir.2008); *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).

relevancy, and proper utilization of such information."[14] Should a furnisher realize a systemic issue during a routine dispute investigation, the FCRA already requires it to undertake efforts to correct that issue and update any furnishing inaccuracies. Notifying consumers of any issue that has likely already been fixed would do nothing other than cause them needless anxiety and concern over an issue that the FCRA already requires a furnisher to correct, and, further, would incentivize widespread and unnecessary litigation against lenders. The outline states that the purpose is to "facilitate consumers' ability to receive collective relief from CRAs and furnishers that do not appropriately address systemic issues."[15] This intent to increase class action litigation would cause furnishers to withhold information as the legal risks are too high.[16] This ultimately will increase the cost of credit and/or reduce the amount of credit available for consumer uses.

D. Medical debt collection information

AFSA is concerned with the nebulous way that the CFPB refers to medical debt in this section, as well as unintended consumer harm that the Outline does not seem to consider. The Outline does not specify that the CFPB is considering excluding only false or spurious medical debt but rather states that creditors would be "prohibited from obtaining or using medical debt collection information to make determinations about consumers' credit eligibility (or continued credit eligibility)"[17] alongside eliminating such tradelines from consumer reports.

Excluding all debt with even a tangential relation to mental or physical treatment notwithstanding the electiveness of such treatment (*e.g.*, plastic surgery or prescription sunglasses) or banning accurately reported and legally enforceable debt from being considered during an ability-to-repay analysis could result in consumers taking on more valid and legally enforceable debt than the consumer would be able to repay, leading to outcomes that are inconsistent with the CFPB's rational in support of its Ability-to-Repay/Qualified Mortgage Rule.[18]

This type of lending would lead to significant consumer harm and does not adhere to the practices of AFSA members. For example, in the case of traditional installment loans (TILs), lenders conduct an ability to repay a loan using a monthly net-income/expense calculation to ensure that proposed monthly payments can be met through monthly cash-flow. This is a healthy use of credit. If enforceable medical debt is scrubbed from the analysis, a cycle-of-debt situation could occur, where delinquent borrowers have no choice but to refinance the loan in the hope that they will be able to repay it further down the line. It will also likely cause lenders to implement tighter lending policies, which would result in a reduction of credit availability. AFSA believes the CFPB's proposed actions are too broad and would upend a responsible lending system.

Beyond concerns with consumer harm, this section contradicts the stated rationale behind other CFPB recent actions. The CFPB itself has previously commented on how broad it believes the ability-to-repay analysis should be.

In the enforcement action that the CFPB has filed against an auto lender, the CFPB accused the lender of not being thorough enough in its ability-to-repay analysis, claiming that not analyzing all payments was "abusive."[19] In the filed complaint, the CFPB states the following: "[The lender] does not consider—or even require dealers

[14] 15 U.S.C. § 1681(b).
[15] "Small Business Advisory Review Panel for Consumer Reporting Rulemaking Outline of Proposals," pg. 16 and 17.
[16] *Data Furnishers Should Watch CFPB Plans For Class Actions*, Alan D. Wingfield David N. Anthony Stefanie H. Jackman Christopher J. Capurso, October 17, 2023. https://www.law360.com/articles/1728394.
[17] *Id. at* pg. 18
[18] 78 FR 6408.
[19] *Consumer Financial Protection Bureau v. Credit Acceptance Corporation* (1:23-cv-00038) District Court, S.D. New York

to ask about—the borrower's recurring debt obligations, rent or mortgage payment, or any of the other necessary expenses an individual incurs each month, including the cost of food, healthcare, or childcare." [20]

As noted in a Congressional letter sent to the CFPB, highlighting the unintended consequences of this legislation, a requirement to consider weekly food and childcare expenses when considering whether to extend credit does not exist.[21] Despite that, the CFPB deemed the lender not considering the recurring cost of healthcare, among other debt obligations, abusive. In the complaint, the CFPB specifically states that in the sample loan the lender "did not ask for clarification about Ms. B's dependents or her costs for housing, food, **medical care**, or childcare [emphasis added]."[22]

Now, in the Outline, the CFPB is attempting to force financial institutions to engage in that very "abusive" action by ignoring recurring medical debt obligations. This either negates previous CFPB enforcement action or institutes a rule which would allow the CFPB to categorize every lender as "abusive", putting the rulemaking at risk for being arbitrary and capricious. It is unclear how these competing priorities can be reconciled.

If the CFPB is trying to combat questionable or spurious medical debt, the proposal under consideration is too broad. The CFPB has not provided a clear definition of what medical debt consists of under this new Outline. For example, if a credit card or traditional installment lending is used for a medical procedure or device, would lenders be required to ask what the consumer has used their credit or loan for?

While there may be issues with the healthcare system, the CFPB should not try to address them through the FCRA. It is clearly not the appropriate vehicle for changing the healthcare system.

Ultimately, removing medical debt from consideration in credit decisions will result in consumer harm by allowing consumers to take on more valid and legally enforceable debt than they would have or should have. It would also result in shrinking credit availability. Moreover, the CFPB would likely be inviting lawsuits challenging such broad actions.

E. Implementation period

For the reasons stated above, AFSA urges the CFPB to reconsider several of its proposals under consideration in the Outline, as they will cause harm to consumers, increase compliance costs for companies and consumers alike, be inconsistent with CFPB positions and other relevant caselaw, reduce credit availability, and may contradict the plain language of existing statute.

Should the CFPB advance the Outline's broadest and most expansive application of the FCRA in the rulemaking, AFSA contends this would be a significant undertaking, both in terms of time and cost, for companies to comply with and adapt to novel requirements in a well-established complex and nuanced data ecosystem vital to the U.S. economy. Not only would companies have to reconfigure, test, and validate their current compliance programs, which have been established to protect consumers and their data, but there would need to be additional interactions with third-party vendors, which companies use to prevent fraud and protect consumers from identity theft. This could lead to a disruption or slowing of important services to consumers. Therefore, an extended implementation period should be considered.

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[20] *Id.*, pg. 8.
[21] Rep. Michael Lawler, Rep. Andy Barr, Rep. Andrew Garbarino, and Rep. Bill Huizenga, March 21, 2023. https://afsaonline.org/wp-content/uploads/2023/03/3.21.23-Letter-to-CFPB-re-CAC-lawsuit.pdf
[22] *Consumer Financial Protection Bureau v. Credit Acceptance Corporation* (1:23-cv-00038) District Court, S.D. New York

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The CFPB should reconsider its proposals under consideration to align with the plain language of the FCRA. As shown above, AFSA and its members urge the CFPB to avoid unwittingly introducing more fraud, costs, and consumer harm, not to mention significant legal uncertainty, into the marketplace by expanding the FCRA beyond scope of the statute. The increase in compliance costs, which would have to be passed on to consumers, the delay and disruption in fraud prevention causing consumer harm, the misrepresentation of disputes, and the unintended potential that consumers may borrow beyond their means will only result in American consumers and small businesses being hurt. Additionally, this will likely act as a disincentive for lenders to furnish data as a whole, which ultimately could result in furnishers not providing any information to the consumer reporting agencies, which would in turn, harm the consumers.

AFSA is happy to meet with the CFPB before the rulemaking process progresses further. Please contact me at 202-776-7300 or cwinslow@afsamail.org with any questions.

Sincerely,

Celia Winslow
Senior Vice President
American Financial Services Association