November 6, 2023

Via Electronic Mail

Comment Intake
Consumer Financial Protection CFPB
1700 G Street, NW
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CFPB_consumerreporting_rulemaking@cfpb.gov

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

To Whom it May Concern:

The Bank Policy Institute,[1] The Clearing House (TCH),[2] and the Consumer Bankers Association (CBA),[3] appreciate the opportunity to comment on the Consumer Financial Protection Bureau's (the CFPB) Small Business Regulatory Enforcement Fairness Act (SBREFA) outline concerning consumer reporting (hereinafter "SBREFA outline").[4]

The SBREFA outline represents the first proposed discretionary amendments to Regulation V,[5]

[1] The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's bank-originated small business loans, and are an engine for financial innovation and economic growth.

[2] The Clearing House Association, L.L.C., the country's oldest banking trade association, is a nonpartisan organization that provides informed advocacy and thought leadership on critical payments-related issues. Its sister company, The Clearing House Payments Company L.L.C., owns and operates core payments system infrastructure in the U.S., clearing and settling more than $2 trillion each day.

[3] CBA is the only national trade association focused exclusively on retail banking. Established in 1919, the association is a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly $3 trillion in consumer loans, and provide $270 billion in small business loans.

[4] Consumer Financial Protection CFPB (CFPB), *Small Business Advisory Review Panel for Consumer Reporting Rulemaking – Outline of Proposals and Alternatives under Consideration* (Sept. 15, 2023, released publicly Sept. 21, 2023), available at https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-rule-sbrefa_outline-of-proposals.pdf.

[5] Amendments to Regulation V were made in 2022 to implement new section 605C of the Fair Credit Reporting Act (FCRA), added by the National Defense Authorization Act for Fiscal Year 2022 (2022 NDAA), Pub. L. 117-81, section 6102, 135 Stat. 2383-84 (2021) (to be codified at 15 U.S.C. 1681c-3), https://www.congress.gov/117/plaws/publ81/PLAW117publ81.pdf.

which implements the Fair Credit Reporting Act (FCRA), since authority was transferred to the CFPB in 2010.[6] The SBREFA outline cites several reasons the CFPB is engaging in this rulemaking, including concerns about consumer privacy in the "collection, assembly, evaluation, dissemination, and use of vast quantities of often highly sensitive personal and financial data."[7] We share the CFPB's goal of protecting consumer privacy, and we understand the CFPB is concerned about the ways in which consumers' data is used outside of the banking context. However, we want to make the CFPB aware that several of the proposals under consideration may have unintended consequences, particularly for banks and bank customers.

The CFPB also discusses the role of advances in technology since the FCRA's enactment in 1970. The CFPB states that "…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"[8] and refers to these entities as "data brokers," "data aggregators," or "platforms."[9] The CFPB then goes on to state that it interprets the current data ecosystem as one that "the FCRA was designed to regulate"[10] However, it is hard to imagine how the congressional intent behind the FCRA would map to the current data ecosystem, and it would be more appropriate for Congress to determine whether to expand the statutory definitions in the FCRA than the CFPB.

Global Feedback

Before providing feedback on specific aspects of the SBREFA outline, we wish to provide global feedback on the SBREFA process and the potential effects of the regulatory changes the outline contemplates. We are predominantly concerned about potential unintended consequences of the proposal that may harm consumers, such as, for example, through the increased cost of bank products, decreased credit accessibility, and making identity verification and fraud prevention more difficult. Our general concerns are as follows:

Vagueness of the SBREFA outline and short deadline for comments

The SBREFA outline considers proposals that, if enacted, would constitute sweeping changes to key aspects of the FCRA, such as those proposed to the definitions of "consumer report" and "consumer reporting agency,"[11] that are inconsistent with longstanding regulatory guidance, relevant caselaw, and the plain language of the FCRA. In addition, these proposed definitional

[6] Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Public Law 111–203, section 1088, 124 Stat. 1376, 2086 (2010).
[7] CFPB, *Small Business Advisory Review Panel for Consumer Reporting Rulemaking – Outline of Proposals and Alternatives under Consideration* p. 1 (Sept. 15, 2023, released publicly Sept. 21, 2023), available at https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-rule-sbrefa_outline-of-proposals.pdf, (hereinafter "SBREFA outline").
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *See id.* at 6-12.

changes lack necessary clarity and include undefined terms and terms with indeterminate scope, such as "data broker,"[12] "credit header data,"[13] and the various uses of the terms "medical debt collections tradeline information,"[14] "medical debt information,"[15] and "medical debt collection information."[16] Further, the SBREFA outline does not provide sufficient specificity about the scope of the changes contemplated and the types of products or entities affected. For example, it is not clear how the proposal "would likely reduce, perhaps significantly, consumer reporting agencies' ability to sell or otherwise disclose credit header data,"[17] or the circumstances under which "aggregated or anonymized consumer report information constitutes or does not constitute a consumer report,"[18] and under what circumstances a consumer dispute could be considered to "indicate[] that there is a systemic issue."[19]

Despite the potentially sweeping nature of the proposals under consideration, as a group of stakeholders indicated in a letter dated October 6, 2023,[20] the SBREFA timeline of roughly 45 days is insufficient to provide meaningful feedback on the CFPB's proposals. The SBREFA outline includes multiple requests for data and proposed regulatory changes that interact with bank obligations pursuant to other statutes and regulations. Additionally, the SBREFA outline was released shortly before a related rulemaking proposal: the "Required Rulemaking on Personal Financial Data Rights" to implement the Dodd-Frank Act's Section 1033 (hereinafter "Section 1033 NPRM" or "Section 1033 proposal") that also implicates the FCRA.[21] Given these circumstances, there is insufficient time for institutions to provide detailed cost data and assess the potential impact of the contemplated regulatory changes, especially in light of the SBREFA outline's breadth, vagueness, and lack of specificity about key proposals.

Accordingly, we respectfully recommend that prior to the issuance of any credit reporting NPRM, the CFPB issue an Advanced Notice of Proposed Rulemaking that contains more concrete and specific proposals and provides sufficient time to gather information and thoughtfully consider the full impacts of possible changes to the existing regulation. This will ensure stakeholders are able to provide robust and necessary feedback to the CFPB and reduce the chances of unintended consequences that may negatively impact consumers.

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[12] *See id.* at 7-8.
[13] *See id.* at 10.
[14] *See id.* at 17.
[15] *Id.* at 3, 18, 20.
[16] *See id.* at 17.
[17] *Id.* at 10.
[18] *Id.* at 11.
[19] *Id.* at 17
[20] *See* Letter from 13 trade associations to the CFPB, *Re: Request for a Comment Extension on the Small Business Advisory Review Panel for Consumer Reporting Rulemaking Outline of Proposals and Alternatives Under Consideration* (Oct. 6, 2023), available at https://www.consumerbankers.com/sites/default/files/FCRA%20SBREFA%20Outline%20Comment%20Extension%20Request_FINAL.pdf.
[21] *See* CFPB Notice of Proposed Rulemaking, *Required Rulemaking on Personal Financial Data Rights*, Docket No. CFPB-2023-0052 (posted to CFPB website Oct. 19, 2023), available at https://files.consumerfinance.gov/f/documents/cfpb-1033-nprm-fr-notice_2023-10.pdf (hereinafter "1033 NPRM").

Aggregate impact of SBREFA proposals under consideration on critically important bank activities

Many of the proposals under consideration in the SBREFA outline appear to be motivated by a desire to address the rise of new types of businesses that sell certain consumer data but claim not to be covered by existing rules. By contrast, banks already have an extensive legal and regulatory schema governing how they may use and transfer data, providing consumer protections and mandating the privacy and security of consumer information.[22] If the CFPB is attempting to target those unregulated entities and not upset the well-established existing framework, the CFPB should expressly exempt banks from any proposed definition of "data brokers" consistent with its authority under CFPA section 1022(b)(3)(1) and under considerations set forth in section 1022(b)(2).

Moreover, it is of critical importance that the CFPB craft any consumer reporting regulations in a way that does not interfere with banks' use of information from outside sources for purposes that benefit consumers. This includes critical uses such as identity resolution, fraud prevention, account validation, statutorily required anti-money laundering activities, and other essential bank functions (hereinafter "critically important bank activities").[23] These activities are integral to the safe and sound functioning of banks and thus they are already closely regulated by the federal and state banking agencies. Adding additional regulatory restrictions to these activities, especially without the input or approval of those agencies, could increase fraud and money laundering and otherwise upset the functioning of the banking system.

The SBREFA outline includes proposals under consideration that simultaneously treat consumer-identifying information as a consumer report, broaden the meaning of "assembling or evaluating" consumer data,[24] and significantly expand the definition of "consumer reporting agency" to include third-party "data brokers."[25] When conducting critically important bank activities, banks rely on third-party vendors and service providers to maintain or consult databases of consumer-identifying information. It appears that the SBREFA outline would treat these third-party vendors as "data brokers" and the vendors' aggregation of consumer-identifying information as a "consumer report," and thus, information necessary for critically important bank activities would now be subject to the FCRA, potentially without a permissible purpose.[26]

As discussed in more detail below, under the "Credit Header Data" section, the CFPB should structure any regulations governing data brokers in a way that clearly does not hinder or burden banks using consumer-identifying information for critically important bank activities.

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[22] *See* ABA letter to CFPB, *Re: Request for Information Regarding Data Brokers and Other Business Practices Involving the Collection and Sale of Consumer Information (RFI)* (June 13, 2023).
[23] *See e.g.,* Bank Secrecy Act, 12 U.S.C. § 1829b, 12 U.S.C. §§ 1951-1960, 31 U.S.C. §§ 5311-5314, §§ 5316-5336. the Federal Financial Institutions Examination Council's Consumer Identification Program 31 C.F.R. § 1020.220(a).
[24] *See generally*, SBREFA outline at 8-10.
[25] *See generally id.* at 7-9.
[26] *See id.* at 13-14.

Interaction with the CFPB's 1033 Proposed Rule

The CFPB's SBREFA outline proposes certain regulatory changes that would compound banks' burdens from the Section 1033 NPRM,[27] under which, at a consumer's direction, a financial institution would be required to provide certain consumer information to authorized third parties.[28] The Section 1033 NPRM indicates that, in certain circumstances, this data sharing may be subject to the FCRA, and third parties operating in this ecosystem, including data aggregators, may be consumer reporting agencies.[29] Since the proposals in the SBREFA outline would significantly expand the definition of "consumer reporting agency,[30] banks may routinely be forced to "furnish" consumer information to consumer reporting agencies, and, as a result, face significant additional compliance burdens and liabilities under the FCRA. Depending on the specifics of a final rule, banks could potentially face dual and competing compliance obligations under both the FCRA and the Section 1033 rulemaking.

In addition to urging the CFPB to undertake a thoughtful and systematic approach to this credit reporting rulemaking and the Section 1033 rulemaking, we urge the CFPB to clearly establish that sharing data at a consumer's direction pursuant to Section 1033 is not "furnishing" information under the FCRA., perhaps by amending Regulation V to exclude entities engaging in consumer-authorized data sharing from the definition of furnisher.[31] Any such sharing and usage inherently aligns with a consumer's informed consent and express directive.

Specific Feedback

In addition to global feedback, we want to offer the following feedback on specific sections of the SBREFA outline:

Definitions of consumer report and consumer reporting agency

In the SBREFA outline, the CFPB proposes sweeping changes to the statutory definitions of "consumer reporting agency" and "consumer report." [32]

First, it proposes expanding the FCRA definition of "consumer reporting agency"[33] to include "data brokers" [34] that sell "certain types"[35] of consumer data as consumer reporting agencies under the FCRA. The outline does not provide a sufficient definition of "data broker" or the types of data included to enable us to meaningfully respond to that proposed definition.

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[27] *See* 1033 NPRM.
[28] *See generally id.*, Subpart B—Obligation to Make Covered Data Available.
[29] *Id.* at 23, 155, 188, 259.
[30] See generally, SBREFA outline at 6-12.
[31] 12 C.F.R. § 1022.41(c)
[32] *See* SBREFA outline at 6-12.
[33] *See id* at 6-12.
[34] *Id* at 7-8.
[35] *Id* at 7-9.

Next, the CFPB proposes changing the definition of "consumer report" to include any information used for a permissible purpose, "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."[36] Additionally, the CFPB proposes that a data broker that collects consumer information for permissible purposes may not sell it for non-permissible purposes.[37] And, it proposes that 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.[38] The SBREFA outline also indicates that the CFPB may propose a more bright-line definition for the terms "assembling" and "evaluating" in the definition of a consumer reporting agency, specifically as those terms pertain to entities that facilitate electronic data access between parties.[39]

Further, the SBREFA outline proposes re-defining "consumer reporting agency" to include any entity that provides consumer data to a third-party who uses the data for a permissible purpose, even if the entity has no knowledge of this usage or intent to provide a consumer report for this purpose.[40] This proposal is incompatible with the text of the FCRA. The FCRA defines a "consumer reporting agency" as an entity that "*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."[41] This ensures that consumer reporting agencies are on notice that they are consumer reporting agencies under the FCRA and can fulfil the FCRA's requirement to notify users and furnishers that they are also subject to the FCRA.

Under the proposals considered in the SBREFA outline, a "data broker" could become a consumer reporting agency without knowing it, even if the parties agree that the user will not use the information for FCRA purposes, such as determining eligibility for credit or employment. As a result, the entity could be liable for FCRA noncompliance despite being unaware that it is considered a consumer reporting agency. Even if an entity is made aware of misuse by a recipient, it is not reasonably possible for an entity that has not previously been considered a consumer reporting agency to be able to achieve full compliance with its FCRA obligations immediately. In addition to carving out banks from the definition of "data broker," any FCRA rulemaking, consistent with the statute, should not transform entities, such as financial institutions, into consumer reporting agencies where the institution does not intend to share information with the purpose of furnishing a consumer report.

[36] *Id* at 7.
[37] *See id* at 8.
[38] *See id* at 8.
[39] *See id* at 9-10.
[40] *See id* at 8.
[41] FCRA, 15 U.S.C. § 1681a(f) (emphasis added).

Moreover, the FCRA's statutory text defines a "consumer report" as the communication of information by a consumer reporting agency that is "used, 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" certain enumerated permissible purposes, such as credit, insurance, or employment.[42] The statute defines a "consumer reporting agency" as a person that assembles or evaluates consumer information "for the *purpose* of furnishing consumer reports to third parties."[43] "Purpose" is integral to both definitions and to the scope of the FCRA.

The CFPB also proposes to redefine the terms "assembling" and "evaluating" in the definition of a consumer reporting agency in a way that would capture merely transmitting consumer information between entities via an intermediary.[44] However, merely summarizing or reiterating data about a consumer, even in a different format, without adding any insight or additional information, should not be considered "assembling" or "evaluating" because the entity is not gathering, collecting, or bringing together consumer information, nor is it appraising, assessing, determining or making a judgment about the consumer. Rather, conveying information without retaining it has not been interpreted as consumer reporting agency activity.[45]

Further, as discussed earlier in this letter, the CFPB should clarify how its FCRA SBREFA outline proposals under consideration intersect with its Section 1033 rulemaking. The CFPB should ensure that mandatory participation in the consumer-permissioned data sharing ecosystem does not automatically make a bank a "data broker," or force a bank to become a "furnisher" when a data provider complies with a consumer authorization instruction that their data be shared under the 1033 framework. This approach would fundamentally undermine the voluntary furnishing regime that underpins the FCRA.

"Credit header" data

Under the SBREFA outline, the CFPB is considering a proposal to "clarify the extent to which credit header data constitutes a consumer report," which 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."[46]

As discussed above, the CFPB should ensure that any future FCRA rulemaking does not cause unintended consequences for critically important and consumer-protective bank activities, which require banks to use consumer-identifying information. Financial institutions obtain consumer-identifying information from a variety of sources to help them detect and prevent fraud, identity theft, money laundering, and other criminal activities. Banks are already required to have data

[42] FCRA, 15 U.S.C. § 1681a(d)(1) (emphasis added).
[43] FCRA, 15 U.S.C. § 1681a(f) (emphasis added).
[44] SBREFA outline at 8.
[45] *See* Federal Trade Commission, *40 Years of Experience with the Fair Credit Reporting Act, An FTC Staff Report with Summary of Interpretations* p. 29 (July 2011).
[46] SBREFA outline at 10.

governance programs in place. In addition, many payment systems require that originators use a commercially reasonable fraudulent transaction detection method. Originators often use account validation services to fulfill this requirement. We encourage the CFPB to be mindful that any changes to the rules implementing the FCRA should not disrupt the use and availability of account validation services and other fraud prevention services. Creating prohibitions and other impediments on the use of all data sourced from different types of data brokers and other third parties could inadvertently impact the flow of data needed for critically important bank activities, negatively impact market efficiency, and result in significant harm to banks and consumers.

Consumer Identity Verification

Treasury's Financial Crimes Enforcement Network (FinCEN) has promulgated regulations governing banks pursuant to the Bank Secrecy Act,[47] including Consumer Identification Program requirements.[48] Banks are required to obtain identifying information about customers and establish risk-based procedures for verifying a customers' identity. These laws, regulations, and procedures protect the financial system from money laundering and other criminal activities and protect consumers from identity theft and fraud. To verify consumers' identities, banks use tools including information provided by third party vendors that specialize in providing consumer identification information, which includes a consumer's first and last name, address, date of birth, and tax identification number (typically a social security number). When banks use consumer-identifying information for identity verification purposes, this information is currently protected and regulated under the Gramm-Leach-Bliley Act ("GLBA") and Regulation P. If this information were considered a consumer report, it would be subject to FCRA provisions including accuracy standards, permissible purpose restrictions, as well as the adverse action notice and dispute provisions.

Subjecting these routine – and mandatory – consumer identity verification practices to the FCRA would not only risk diminishing banks' ability to comply with Bank Secrecy Act requirements, but also substantially increase a bank's compliance obligations, and potentially create consumer confusion (for example, if a bank cannot confirm an individual's identity, would it be appropriate to send an adverse action notice to an individual whose identity cannot be verified, in addition to denying the individual account?). Additionally, these requirements could interfere with a bank's ability to efficiently onboard new customers and open accounts. This increase in compliance burden and costs could substantially increase burdens to small banks and increase the price of credit or the cost for consumers to open an account.

Fraud Prevention

For years banks have been on the front lines fighting fraud. Banks continue to fight increasingly prevalent and sophisticated financial scams, including those across peer-to-peer (P2P) payment platforms. This includes preventing, detecting, and mitigating fraud by monitoring accounts and

[47] 12 U.S.C. § 1829b, 12 U.S.C. §§ 1951-1960, 31 U.S.C. §§ 5311-5314, §§ 5316-5336.
[48] 31 C.F.R. § 1020.220(a).

using transaction and consumer authentication tools. Financial institutions also play an important part in preventing money laundering, the financing of terrorism, and crime. Additionally, when a consumer report includes an initial fraud alert or an active-duty alert, the FCRA requires banks to verify the identity of the customer before opening an account.[49] The ability to confirm consumer-identifying information, including information that may be considered "credit header data," is critical to carrying out those responsibilities — and required by law.

Moreover, banks rely on third parties to verify that customers with an existing account are who they claim to be, and to confirm applicants are not impersonating someone or creating a synthetic identity to commit fraud. This helps to reduce the number of bad actors who scam consumers into sending them money. Banks also use and analyze information (including device identifiers and geolocation) to prevent malign actors from taking over legitimate customer accounts. The CFPB's own Regulation P does not allow consumers to opt-out of sharing their information for fraud prevention purposes.[50] Additionally, banks are required to adopt risk-based approaches to Bank Secrecy Act compliance and apply effective Bank Secrecy Act controls. Banks use information to comply with customer identification and beneficial ownership requirements. This not only benefits consumers and saves them from financial pain and inconvenience, it also helps to preserve the safety and soundness of the financial system. The CFPB should recognize the constructive nature of these use cases and take steps to preserve and encourage them, avoiding conflicting or additional requirements beyond the existing framework for this type of beneficial data sharing activity.

Subjecting information used to investigate fraudulent activity to the FCRA could create compliance challenges and hurdles where time is of the essence to stop the fraudulent activity and protect consumers (for example, a receiving bank's investigation into a potential P2P payment fraud or scam). FCRA could create additional compliance burdens for banks when investigating fraud through increased liability for potential consumer disputes, the requirement to issue adverse action notices which must indicate how "credit header data" was used (which may tip off fraudsters to bank prevention practices), and timing delays inherent in having to proactively identify a "permissible purpose" prior to accessing the data. Fraudsters could also dispute credit header data as a means to circumvent fraud prevention.

Question 18 from the SBREFA outline requested comment on whether certain categories of credit header data should be "excluded as a consumer report."[51] Given the enormity of consumer protective practices banks use this information for, we urge the CFPB to exclude the use of credit header data by banks for identity verification and fraud prevention from coverage under FCRA as a "consumer report."

Targeted marketing and aggregated data

[49] Under 15 U.S.C. § 1681c-1, users of consumer reports may not extend credit, issue an additional card on a credit card account, or increase a credit limit without verifying the identity of the person making the request.
[50] 12 C.F.R. 1016.15(a)(2)(ii).
[51] SBREFA outline at 11.

The SBREFA outline highlights that "the FCRA…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."[52] The outline specifies that 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."[53]

It appears that the CFPB is also considering a proposal to clarify whether and when "aggregated" or "anonymized" consumer report information constitutes or does not constitute a consumer report. The CFPB should avoid conflating the terms "aggregated" and "anonymized" in the rulemaking. Regulation P excludes "Information that does not identify a consumer, such as aggregate information or blind data that does not contain personal identifiers such as account numbers, names, or addresses" from the definition of "Personally Identifiable Financial Information."[54] Confusing these data minimization tools could inadvertently limit important business practices, some of which may benefit consumers. Additionally, we would like to remind the CFPB that the term "consumer" is defined in the statute as an individual[55] and that a report that contains de-identified information aggregated across multiple consumers cannot, under the statutory definition, be a "consumer report" as it is not about an individual.[56]

In general, the CFPB should consider the consumer benefits of using de-identified and aggregated consumer information, which does not compromise consumer privacy, such as:

- Research that helps policymakers, businesses, consumers and non-profit leaders understand the financial health of US consumers and businesses.
- Credit and fraud risk model development to identify and mitigate these risks before they impact consumers or small businesses.
- Identifying underserved populations to better meet the needs of all consumers and businesses.
- Innovating to improve services to benefit small businesses and consumers.

Prohibiting these uses of adequately de-identified and aggregated data without a permissible purpose under the FCRA would inhibit the innovations and consumer benefits described above.

The SBREFA outline provides no clarity regarding what level of de-identification or aggregation is sufficient to ensure that information is not considered a "consumer report." De-identification and aggregation of data falls along a spectrum, and consumers may be best served by focusing on what level of de-identification and aggregation is most appropriate for balancing these positive benefits against risk to consumers through malicious or unintended re-identification. It also does not clarify whether data defined as a "consumer report" under the CFPB's rule will

[52] *Id.* at 11.
[53] *Id.* at 11.
[54] 12 C.F.R. § 1016.3(q)(ii)(2)(B)
[55] 15 U.S.C. 1681a(c).
[56] *See* 15 U.S.C. 1681a(d).

continue to be a consumer report throughout its lifecycle, without respect to the degree of de-identification it may undergo. We recommend the CFPB refine its proposal to ensure that data that was previously included in a consumer report but is no longer connected to a known consumer is not considered a consumer report, consistent with the text of the statute.

Permissible purposes

The SBREFA outline contains proposals to change two of the FCRA's permissible purposes: 1) the "written instructions of the consumer" and 2) "legitimate business need."

Written instructions of the consumer

The SBREFA outline proposes to change the requirements for asserting a FCRA permissible purpose by obtaining the "written instructions of the consumer." The outline proposes to specify new steps users must take to obtain a consumer's written instructions, limit the scope of an authorization to ensure the consumer has authorized the data use(s), and provide a consumer with a process for revoking their authorization.[57] The outline does not provide specifics or examples of the types of new requirements it is contemplating.

Banks have been complying with the FCRA, including the permissible purpose of "written instructions of the consumer" for more than 40 years. With this background, our member banks are concerned that additional requirements around the collection, duration, and method of providing written instructions are likely to become overly burdensome or restrictive. This may result in banks being unable to offer certain services that require the "written instructions of the consumer" as a permissible purpose free of charge, such as credit and identity monitoring. As a result, fewer consumers may sign up for these services, and therefore would potentially be at greater risk of becoming victims of identity theft while also having less visibility into their credit information, tradelines and credit scores.

Legitimate business need

The SBREFA outline contains proposals that would narrow the "legitimate business need" permissible purpose by requiring the bank to show an "actual need" to use a consumer report to determine whether the consumer continues to meet the terms of the account.[58]

Our member banks currently use the "legitimate business need" permissible purpose to conduct critically important bank activities that safeguard deposit accounts (such as fraud monitoring), as discussed above. The outline is not clear about what would constitute "actual need." Banks are concerned that overly stringent requirements would hamper their ability to monitor debit accounts to prevent fraud, creating consumer harm by introducing delays while notices of errors or disputes are investigated and resolved.

[57] *See generally* SBREFA outline at 12-13.
[58] *See generally id.* at 13-14.

Disputes

Disputes involving legal matters

The SBREFA outline proposes to codify previous legal arguments posited by the CFPB that there is no distinction in the FCRA between "legal" and "factual" disputes, and therefore consumer reporting agencies and furnishers must conduct reasonable investigations of both types of disputes. We are concerned the description and examples in the outline indicate this would require furnishers to investigate and address unsettled legal arguments or claims (such as a dispute a consumer is not responsible for a debt incurred by an employee with access and authority to act on their behalf), which likely require a judicial ruling to resolve fully. Further, dispute specialists do not have the expertise to resolve unsettled legal questions and banks are concerned that dispositioning legal claims may result in the unauthorized practice of law or otherwise disincentivize furnishing and increase costs through the use of outside counsel. In fact, banks generally may not even be aware that it could be considered a FCRA dispute when, for example, a consumer going through divorce proceedings claims not to be financially responsible for their mortgage because they believe their ex-spouse should be wholly responsible. Additionally, the FCRA only allows for 30 days to resolve a dispute,[59] and resolving disputed questions of law can take months or years for courts to disposition definitively.

Disputes involving systemic issues

The SBREFA outline indicates the CFPB is considering proposals to require furnishers and consumer reporting agencies to take certain steps to investigate and address disputes involving systemic issues. Specifically, the outline discusses a proposal to require furnishers and consumer reporting agencies to determine whether there is a systemic issue as part of their dispute investigation process, and to correct any inaccurate reporting on behalf of all affected consumers.[60] The outline also indicates that the CFPB may establish a specific process consumers could use to submit disputes they believe to arise from systemic issues affecting multiple consumers.[61]

It is unclear from the proposals under consideration what "systemic" means, including how many consumers need to be affected for a dispute to be considered "systemic." It is also unclear whether the CFPB would mandate some additional systemic review of every dispute a furnisher receives, regardless of whether it suggests there may be a systemic issue. In general, a furnisher would be expected to identify any systemic issues that may be present when conducting a normal dispute investigation, and it would unduly burden banks to require them to conduct a system-wide review in connection with each complaint or hold them liable for identifying systemic issues that are not discoverable from such an investigation.

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[59] 15 U.S.C. § 1681i(a)(1)(A), 1681s-2(a)(8)(E)(iii).
[60] *See* SBREFA outline at 16-17.
[61] *See id.* at 16-17.

We understand that this proposal may be related to previous CFPB enforcement actions where businesses did not correct systemic issues and address disputes involving systemic issues. Once a furnisher knows or has reason to know information is inaccurate or incomplete, it already has a duty to update or correct that information. Data furnishers or CRAs, not individual consumers, are in the best position to identify and resolve potentially systemic errors, and existing law requires them to update and correct reporting inaccuracies after discovery. Consumers are also likely to be confused by receiving an additional notification of a "systemic issue," especially if they did not initiate a dispute. In addition, requiring smaller furnishers to provide notice would be burdensome and costly, and may discourage them from participating in the FCRA ecosystem.

Individual consumers are not well-positioned to identify systemic errors or identify when an error on their credit report may be caused by a systemic issue. As a result, a process for consumers to submit disputes they believe result from systemic errors is less likely to be used by consumers than abused by Credit Repair Organizations (CROs). We understand that the CFPB is already aware of the onslaught of form and duplicative disputes sent to consumer reporting agencies and furnishers by CROs, drowning out individualized disputes and potentially impeding furnishers' ability to identify actual issues impacting the accuracy and integrity of the information they send to consumer reporting agencies. Adding systemic error disputes to obligations set forth in the FCRA would create an avenue for further abuse by these CROs, without benefiting consumers or improving accuracy of credit reporting.

Medical debt collection information

The SBREFA outline includes a proposal to prohibit lenders from obtaining or using medical debt collection information to make determinations about consumers' credit eligibility (or continued credit eligibility).[62] The SBREFA outline also includes a proposal to prohibit consumer reporting agencies from including medical debt collection tradelines on consumer reports furnished to creditors for purposes of making credit eligibility determinations.[63] We have two categories of concerns with these proposals: policy concerns and operational concerns.

Policy concerns

In its press release announcing the SBREFA outline,[64] and other public statements by CFPB officials,[65] the CFPB made it clear that its proposals to suppress medical debt information is

[62] *See* SBREFA outline at 17-19.
[63] *See id.* at 17-19.
[64] CFPB Press Release, CFPB Kicks Off Rulemaking to Remove Medical Bills from Credit Reports (Sept. 21, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-kicks-off-rulemaking-to-remove-medical-bills-from-credit-reports/.
[65] Seth Frotman, General Counsel and Senior Advisor to the CFPB Director, *Prepared Remarks at New Jersey Citizen Action Education Fund's 14th Annual Financial Justice Summit* (Oct. 4, 2023), available at

intended to target high health care costs and practices of providers, hospitals, and insurance companies that they believe harm consumers. The CFPB's fundamental criticisms of the cost of care and the practices of providers, hospitals, and insurance companies can only be addressed by those entities themselves or by Congress and other policymakers with authority over those entities. However, The CFPB lacks authority over the healthcare industry's pricing regime and the CFPB's proposal to address concerns about the high cost of medical care by regulating financial services is misplaced. Prohibiting lenders from obtaining or using accurate information about medical debt in credit decisions would not solve underlying concerns about medical billing and insurance coverage. In fact, it could create additional risks for consumers, banks, and the financial system; especially considering the CFPB's research on the predictive value of medical debt on credit performance is from 2014, which suggested only that this medical debt information has less predictive value than other credit information, not that it lacks predictive value entirely.[66]

The credit reporting system is a voluntary, industry-led initiative that provides a global model for offering credit that is predictive of a consumer's ability to repay – a goal that the CFPB's early work focused on. The CFPB could hamper banks' capacity to perform ability-to-repay analyses (as discussed in the Operational concerns section below), which the CFPB has found to be critically important for preventing consumer harm and consumer well-being, as well as disrupt the entire system of risk-based credit decisions. By attempting to remove certain credit attributes from the credit reporting system because the CFPB deems them "less predictive" without conducting a robust analysis of what types, dollar amounts, and other characteristics of the consumer information are less predictive, and the degree to which they are less predictive than other consumer information, the CFPB would create a real risk that banks would be unable to meet their consumer protection obligations or safety and soundness requirements.

Operational concerns

The SBREFA outline is unclear about what data the CFPB would consider "medical debt" for the purposes of each proposal, where that information originates from, and, importantly, whether it includes a bank's own transaction or experience (T&E) data. The FCRA's definition of "medical information" is broad and could include an individual's payment history for medical treatments, medicine, medical equipment, etc. It is not apparent what, if any, of this information the CFPB would choose to prohibit banks from using.

If the CFPB prohibits creditors from using information about general-purpose credit that consumers have used to pay for medical products and services, banks may be unable to determine when a consumer uses a general-purpose credit card or HELOC to pay for medical expenses. Moreover, prohibiting banks from considering medical information in underwriting

https://www.consumerfinance.gov/about-us/newsroom/new-jersey-citizen-action-education-funds-14th-annual-financial-justice-summit/.

[66] *See generally* CFPB, *Medical Debt Burden in the United States* (Feb, 2022), available at https://files.consumerfinance.gov/f/documents/cfpb_medical-debt-burden-in-the-united-states_report_2022-03.pdf.

could force banks to provide an applicant a second line of credit when the applicant previously defaulted on a line of credit they used in part for medical products or services.

If the CFPB goes further and prohibits creditors from using their own T&E data that may contain medical debt collection information to underwrite current or former card holders, it could cause major operational and costly implementation challenges. This could reduce both credit availability and "relationship banking" (as a bank's own T&E data underpins the entire relationship banking model), which the CFPB has indicated are areas of particular concern to the agency. If a bank cannot use their own T&E data without a costly and time-consuming process to identify and remove any information that may be related to medical products and services, it may be cost-prohibitive to use T&E data for underwriting.

Conclusion

We thank the CFPB for the opportunity to comment on the SBREFA outline. While we share the CFPB's concern regarding unregulated entities buying and selling consumer data outside the legal and regulatory system, for the reasons above, we urge the CFPB to thoughtfully consider any rulemaking that impacts the consumer protective ways in which banks use data in crafting future regulatory proposals, including the overlapping impacts of the Section 1033 rulemaking.

Please do not hesitate to reach out if you have any questions regarding this letter, or if you would like to discuss further with our member banks.

Respectfully submitted,

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