November 3, 2023

Via email: CFPB_consumerreporting_rulemaking@cfpb.gov

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

Re: Written Comment on Proposals regarding Consumer Reporting Rulemaking

Dear Sir or Madam:

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

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

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

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

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

Proposal re: Data Brokers.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROPOSAL RE: ASSEMBLING & EVALUATING.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROPOSAL RE: CREDIT HEADER DATA.

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

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

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

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

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

PROPOSAL RE: DATA SECURITY & DATA BREACHES.

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

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

[11] Incidentally, InfoMart already makes this representation under the GLBA when purchasing credit header data.

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This proposal would overlap and conflict with the FTC Act, which prohibits unfair and deceptive practices and acts. In its enforcement of the Act and its regulation of data security practices, the Federal Trade Commission has already established a reasonableness standard that is to be commensurate with the size and resources of the entity and the nature of the data at issue.

This proposal would appear to impose a quintuple jeopardy of sorts. The CRA will face liability or regulatory penalties from (1) state attorneys generals for violating state data breach statutes, (2) private consumers under common law causes of action, (3) the Federal Trade Commission under the FTC Act, (4) the FTC under the FCRA, and (5) private consumers under the FCRA. Given that federal and state governments as well as large, sophisticated, well-funded corporations are routinely victims of data theft (i.e., data breaches), it is reasonable to conclude that, despite thoughtful, intentional, reasonable, and industry standard data security measures, every organization that works with consumer data will inevitably be the victim of data theft at some point. Declaring that that small entity CRA has also violated § 1681b(a) would be unnecessarily punitive.

Not all consumer reports are the same. Some consumer reports in the employment screening context contain no negative information. That is, InfoMart is able to verify employment, verify the candidate's graduation from an educational institution, and confirm there is no criminal history information. Other reports may contain potentially adverse information, but the information is freely available to the public already. And yet, the Bureau's proposal would subject small entities like InfoMart to FCRA liability if this benign and/or public information is stolen from InfoMart.[12] Candidly, this does not seem fair or equitable. Under state data breach laws, no breach would have occurred, but under the Bureau's proposal, a violation of the FCRA occurred.

It appears the Bureau's proposal would impose strict liability on a CRA for violating §§ 604 and 607(a) for each consumer report that is stolen by a thief. This would vest consumers with the right of private recovery under §§ 616 and 617. Any such class action would be ruinous to InfoMart, as the measure of damages under the FCRA is far greater than what is currently imposed by state data breach statutes. In our industry, both professional liability and cyber insurance carriers have been dropping out of the market, cancelling coverage even for insureds with little to no claims history. If the Bureau were to impose FCRA strict liability on CRAs for data breaches, InfoMart anticipates it will be unable to secure either

[12] As do most, if not all, CRAs in the employment screening sector, InfoMart truncates or masks sensitive information, such as the candidate's Social Security number, so that it is not visible on the consumer report.

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professional liability or cyber coverage. Professional liability carriers which normally provide coverage for an alleged violation of the FCRA would absolutely and undoubtedly refuse to provide coverage to a CRA if a data breach now also means a violation of the FCRA. Likewise, cyber carriers would certainly refuse to provide coverage for FCRA damages that would be asserted or assessed against a CRA for a data breach. If InfoMart has neither professional liability nor cyber coverage, the owner would be faced with the tough decision of whether to continue her business or sell to a large, self-insured competitor.

Lastly, even if the Bureau issued a rule along the lines proposed, we do not believe consumers would be better protected. In the employment screening sector, employers need to keep hiring records for a period of time in order to comply with other federal laws. InfoMart would not simply delete its consumer reports without notifying the employer, who – in our experience – would then request the reports be transferred to the employer. In other words, *the data will not be deleted*. It will simply be transferred from one custodian to another. Like CRAs and the Bureau itself, employers are also victims of data theft.

PROPOSAL RE: WRITTEN INSTRUCTIONS.

Proposal B.1. *To address what is needed for a consumer report to be furnished by a consumer reporting agency in accordance with the consumer's written instructions under FCRA section 604(a)(2). This proposal will include:*

(1) The steps companies must take to obtain the consumer's written instructions;
(2) Who can collect written instructions;
(3) Limits on the scope of the authorization to ensure the consumer has authorized all uses of the consumer's data (including limits on the number of purposes or entities that can be covered by a single instruction); and
(4) *Methods for revoking any ongoing authorization.*

Comment. InfoMart observes that the Bureau appears to use the terms "written instructions" and "authorization" interchangeably in this proposal. For those in the employment screening sector, when we hear the word "authorization," we think of its use under § 1681b(b)(2)(A)(ii). We assume the Bureau is not intending by its proposal to address both the employment permissible purpose and the written instructions of the consumer permissible purpose. We would therefore encourage the Bureau to dispense with using the term "authorization" in this context.

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In the event the Bureau intends to prescribe regulations regarding the § 1681b(b)(2)(A)(ii) written authorization, InfoMart would caution that requiring every CRA to be listed on the authorization is impossible, since the consumer must provide the authorization before the consumer report is ordered and InfoMart will not know which upstream data providers it will need to use to compile the report until after the report is ordered.

PROPOSAL RE: DISPUTES.

Proposal C.1. Legal Disputes. *To codify the Bureau's interpretation that FCRA does not distinguish between factual and legal disputes.*

Comment. InfoMart reinvestigates the accuracy and completeness of all items of information disputed by consumers, and it does not "pre-screen" these disputes by classifying them as "legal" or "factual." From time to time, however, a consumer may articulate a misapprehension of the significance of her criminal history record during the dispute process. For example, in some states, a pardon does not discharge or vacate a conviction. The consumer may think the pardon means the conviction should not appear on her background check report. The FCRA, of course, does not prohibit reporting a conviction that remains a conviction under state law. In this sense, there is a "legal" component to the dispute. But we nonetheless conduct a reinvestigation - and engage in dialogue with the consumer. In a related vein, some consumers think they should not have been convicted. They claim they did not engage in the underlying act made the basis of the conviction or that their criminal defense attorney told them the "matter was taken care of and the case dismissed." Any rule issued by the Bureau should not inadvertently vest the consumers with the right to collaterally attack the validity or significance of a conviction by and through a § 1681i reinvestigation process. The proper venue for such an attack is in the courts.

Proposal C.2. Systemic Disputes. *To address what a consumer reporting agency and a furnisher must do, pursuant to their obligations under FCRA sections 611 and 623, upon receiving a dispute from a consumer that indicates that there is a systemic issue that could be affecting the completeness or accuracy of consumer reports involving multiple consumers, and:*

(1) to require furnishers and consumer reporting agencies to determine as part of their investigation of such disputes whether there is a systemic issue and to correct any inaccurate reporting on behalf of all affected consumers;

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(2) to specify how the results of any such investigation should be communicated, including, for example, whether notice should be provided to consumers who may be affected by systemic issues identified in a dispute that was submitted by another consumer; and

(3) to provide a rubric or template that consumers could use to submit disputes relating to systemic issues affecting multiple consumers.

Comment. We believe this proposal is inapplicable to employment screening CRAs like InfoMart, and we would encourage the Bureau to expressly exempt CRAs from this proposal when they are furnishing consumer reports for employment purposes. Unlike other types of CRAs, InfoMart does not maintain a consumer file of information from which it repeatedly extracts information, compiles a report, and furnishes it to the end user; rather, employment screening CRAs compile a brand-new consumer report each time one is ordered. The contents of these unique, individualized reports are dictated by the scope of the background check requested by the employer. As such, InfoMart does not encounter causes that systemically result in inaccurate or incomplete consumer reports.

In further contrast to other types of CRAs, the majority of consumers receive a copy of their consumer report at the same time it is furnished to the employer. It is a feature that is built into our employment screening platforms. Additionally, when adverse public record information is at issue, we transmit a 613a notice to the consumer. And if the error is not caught by the consumer under any of the preceding steps, then the consumer will catch the error when the employer provides the statutorily mandated pre-adverse action notice with a copy of the report. In short, if there is an inaccuracy in our report, the consumer typically catches it quickly, files a dispute, and we promptly reinvestigate. If there was an inaccuracy, we correct it. Requiring small entity CRAs like InfoMart to further attempt to classify the dispute as the product of a cause that is resulting in systemic errors would serve no purpose for the consumer.

ACCESS TO CREDIT

To date, it has been the experience of small entities in this industry that securing a line of credit is challenging given the litigation, compliance, and regulatory environments. We anticipate that banks and other lenders will be even more reticent to extend credit to small entities in the new environment created by these proposals.

IMPLEMENTATION PERIOD.

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As many of the proposals proffered by the Bureau would have an existential impact on small employment screening entities like InfoMart, articulating an implementation period would serve no purpose other than to demarcate the date by which small entities will want to sell their business to the publicly traded and largest privately-held CRAs. If the Bureau intends to proceed with destroying the existing employment screening marketplace, InfoMart would request a three-year implementation period to enable it to determine whether it will transition out of the marketplace.

CONCLUDING REMARKS.

We can see no other way around this fact – the Bureau's Proposals would eviscerate, eliminate, and erase the small business market in the employment screening industry. According to various estimates, the small business segment of the employment screening industry comprises anywhere from 1 to 1.5 billion dollars. By any measure, this is a "significant economic impact."[13] Just as importantly, insofar as the employment screening sector is concerned, the proposals would not offer any additional benefits or protections to consumers. Applicants for employment and employees already enjoy robust due process protections, ranging from written disclosures, written authorizations, 613a notices, pre-adverse action notice, adverse action notice, dispute rights, and file disclosure rights.

Classifying public record researchers and other data providers upstream of the employment screening CRA as consumer reporting agencies would not enhance consumer protections, but it would cause consumer confusion, increase the proliferation of consumer personal information, and substantially harm small entities.

Converting SaaS's and PaaS's upstream and downstream of the employment screening CRA into consumer reporting agencies would not enhance consumer protections, but it would cause consumer confusion, increase the proliferation of consumer personal information, and substantially harm small entities like InfoMart.

Eliminating an employment screening CRA's access to credit header data would not enhance consumer protections, but it would harm the accuracy and completeness of consumer reports and it would substantially harm small entities like InfoMart.

[13] See, 5 U.S.C. § 603(c).

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Declaring that the FCRA's permissible purpose requirement has been violated if an employment screening CRA is the victim of data theft would not enhance consumer protections, but it would substantially harm small entities like InfoMart. Indeed, to avoid the catastrophic fall-out of a data breach, CRAs will shift the hosting of these consumer reports to employers.

In short, when there is a CRA at the tail end of the data stream, and it is the CRA that is providing the consumer report to the end user, the proposals would serve no benefit to consumers, they would actually increase harm to consumers, and they would most certainly disrupt and damage the employment screening small business marketplace. A clear and robust exemption for the employment screening sector needs to be included in any promulgated rules.

Respectfully submitted,

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