

October 30, 2023

By Email (CFPB_consumerreporting_rulemaking@cfpb.gov)

The Honorable Rohit Chopra
Director, Consumer Financial Protection Bureau
1700 G. St., NW
Washington, D.C. 20552

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

Dear Director Chopra and Bureau Staff,

Please accept this comment on the Consumer Financial Protection Bureau's outline (the "Proposal") for its Small Business Advisory Review Panel for Consumer Reporting Rulemaking. This comment is submitted on behalf of a party interested in the proper scope of the Fair Credit Reporting Act and how the Proposal would affect small businesses. Part I responds to Questions 4, 8, and 11. Part II responds to Questions 5, 7, 19, and 45.

The Fair Credit Reporting Act regulates "consumer reports" and "consumer reporting agencies." Historically, consumer reports have been understood to comprise consumer information communicated for credit, insurance, or employment purposes. Consumer-reporting agencies, in turn, are entities that provide such reports to others. The Proposal has now offered a novel interpretation of FCRA that appears to drastically expand the Act's scope. First, the Proposal would define "consumer report" to include *any* communication of consumer data, regardless of its intended use. Second, the Proposal would define "consumer reporting agency" to include entities that merely use consumer information on behalf of third parties. This proposed reading is not supported by the plain text of the Act, and adopting this reading would harm small businesses and consumers.

I. The Proposal offers an interpretation of FCRA that contradicts the statute's plain language, context, and purpose.

For decades, courts and parties have understood FCRA as an important but narrow statute intended to protect consumers from abusive tactics by credit agencies. The Bureau's Proposal suggests a novel interpretation of "consumer report" and "consumer reporting agency" that would, if adopted, stretch the Act to reach a new set of

actors: data brokers, Internet platforms, and advertisers. But this interpretation is not supported by the statute’s text or purpose. The Bureau should thus reconsider its suggested interpretation.

A. “Consumer Report”

FCRA defines “consumer report” as any

communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for—(A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other purpose authorized under section 1681b of this title.¹

The Proposal reads this definition to include any communication that contains “certain types of consumer data” “typically used for credit and employment determinations”—“regardless of the purpose for which the data was actually used or collected.”² Under the proposed definition, in other words, the sender’s intent in collecting the consumer data appears to be irrelevant, as is the recipient’s plan for or actual use of the data. So long as the data *could be used* to determine creditworthiness, its communication would cause it to become a consumer report.

FCRA’s plain text does not support this reading. The Act defines “consumer report” as the communication of information “used or expected to be used or collected in whole or in part *for the purpose of* serving as a factor in establishing the consumer’s eligibility for” credit, insurance, or employment.³ As commonly understood, “purpose” is the “object or end to be attained.”⁴ To count as a consumer report, then, the consumer data must have been collected with the intent of assessing a consumer’s creditworthiness or actually used or expected to be used for that purpose. The Proposal’s reading would seemingly eliminate this requirement altogether, effectively rewriting the definition of “consumer report” to include any

communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living **of the type** which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for—(A) credit or insurance to be used primarily for personal,

¹ 15 U.S.C. § 1681a(d)(1).

² Proposal at 8.

³ 15 U.S.C. § 1681a(d)(1) (emphasis added).

⁴ Def. 1(a), *Merriam-Webster Dictionary*.

family, or household purposes; (B) employment purposes; or (C) any other purpose authorized under section 1681b of this title.

But as the Supreme Court has repeatedly stressed, “an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.”⁵ And FCRA’s text is clear: consumer data is not “covered by the Act solely because it [is] the type of information generally found in consumer reports.”⁶

The FTC has also recognized this plain-text reading of the Act. The FTC was responsible for rulemaking under FCRA for several decades, until the creation of the CFPB, and it shares enforcement of the Act with the CFPB. The FTC’s longstanding interpretation of the term “consumer report” rejects the reading offered by the Proposal, recognizing that the Act requires the intent to use the consumer data for credit, insurance, or employment:

There are two basic elements of the definition. First, the information in the report must have a “bearing on” one or more specified consumer characteristics (e.g., credit standing). Second, the report must be “used or expected to be used ... for the purpose of ... establishing the consumer’s eligibility” for credit, employment, insurance, or other permissible purposes allowed by the FCRA. Both elements of the definition must be satisfied in order for a report to be a consumer report; thus, *information that is not “used or expected to be used” to determine eligibility for a permissible purpose is not a consumer report, even if the information bears on one of the seven specified consumer characteristics.*⁷

Given this plain language, it is not surprising that courts have read FCRA to impose an intent requirement for information to be considered a “consumer report.” In one case, cardholders sued their credit-card company under FCRA for selling or renting to merchants the information it had collected about the cardholders’ spending habits.⁸ The court dismissed the suit, explaining that “[t]o be a ‘consumer report’ a report must be used, expected to be used, or collected for one of the purposes enumerated in the statute.”⁹ In other words, “[a] consumer report is ... defined not only by the nature of its contents, but also by its intended use.”¹⁰ Thus, the court reasoned, “[a] report will not be

⁵ *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014).

⁶ *Arcidiacono v. Am. Express Co.*, No. 92-cv-3428, 1993 WL 94327, at *3 (D.N.J. Mar. 29, 1993).

⁷ FTC, *40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations* 20 (July 2011) (emphasis added); accord FTC, *Big Data: A Tool for Inclusion or Exclusion?* 16 (Jan. 2016) (to be a consumer report, “the communication must be prepared or provided to others *to make an eligibility determination* about a particular consumer”) (emphasis added).

⁸ 1993 WL 94327, at *1.

⁹ *Id.* at *3.

¹⁰ *Id.* (internal quotation marks omitted).

covered by the Act solely because it contains the type of information generally found in consumer reports.”¹¹ “Nowhere in the complaint” had the cardholders alleged that their information had been “used, expected to be used, or collected in connection with any offer of credit, insurance, [or] employment.”¹² Instead, the cardholders had asserted that the credit-card company had “bought and sold th[eir] personal information, not to offer credit, but to market products and services.”¹³ But marketing was not one of the purposes covered by FCRA.¹⁴ And consumer information “not prepared or used for one of [FCRA’s] enumerated purposes was not a consumer report” under the Act.¹⁵ So the credit-card company did not violate FCRA by selling the cardholders’ data to advertisers.¹⁶

In another case, a disgruntled employee sued his former employer after the employer terminated him and then pulled his public records from an online database.¹⁷ The records showed “his bankruptcy filings, judgments and liens, employment, criminal offenses, traffic citations, residences, driver’s license, home ownership and value, business and personal associations, and education.”¹⁸ The employee argued that these records counted as a consumer report because they tracked “the seven categories of information used to determine whether a document is a consumer report ...— credit worthiness, standing, capacity, character, general reputation, personal characteristics, and mode of living.”¹⁹ The court disagreed, explaining that the plain text of the Act required that the records be *intended* to assess creditworthiness.²⁰ Because the employee had cited no evidence suggesting that the database intended the records to be used for a purpose covered by FCRA, the records did not constitute a consumer report, and the employee failed to state a claim.²¹ The U.S. Courts of Appeals for the Second, Seventh, and Ninth Circuits have similarly held that an entity is not a consumer-reporting agency where it does not compile and provide consumer information with the intent that it be used to assess credit, insurance, or employment.²²

Not only does the Proposal find no support in FCRA’s plain text, but also it fails to honor FCRA’s context and purpose. Congress enacted FCRA in 1970 against a

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* (internal quotation marks omitted).

¹⁴ *Id.*; see 15 U.S.C. § 1681(a) (delineating “permissible purposes” under FCRA).

¹⁵ *Arcidiacono*, 1993 WL 94327, at *3.

¹⁶ *Id.*

¹⁷ *Thacker v. GPS Insight, LLC*, No. 18-cv-63, 2019 WL 3816720, at *1, 6 (D. Ariz. Aug. 14, 2019).

¹⁸ *Id.* at *9.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² See *Kidd v. Thomson Reuters Corp.*, 925 F.3d 99, 104–05 (2d Cir. 2019); *Tierney v. Advoc. Health & Hosps. Corp.*, 797 F.3d 449, 452–53 (7th Cir. 2015); *Zabriskie v. Fed. Nat’l Mortg. Ass’n*, 940 F.3d 1022, 1027 (9th Cir. 2019).

backdrop of abusive practices by credit agencies.²³ “Inaccurate credit reports [had] directly impair[ed] the efficiency of the banking system, and unfair credit reporting methods [had] undermine[d] the public confidence which is essential to the continued functioning of the banking system.”²⁴ To stop these abuses, Congress set rigorous restrictions on consumer-reporting agencies and consumer reports, demanding that they “utilize accurate, relevant, and current information in a confidential and responsible manner.”²⁵ FCRA thus delineates the circumstances in which “any consumer reporting agency may furnish a consumer report.”²⁶ The Act also limits the information that can be included in a consumer report, and it requires that consumer-reporting agencies investigate and correct any inaccuracies.²⁷ Noncompliance comes with serious consequences, from actual, statutory, and punitive damages to attorney’s fees.²⁸

Congress imposed these limits and compliance costs on a limited and important set of actors in the consumer-reporting space, not every provider of consumer data. The average consumer report might show a consumer’s Social Security number, employment history, credit cards, mortgages, auto loans, student loans, and payment history. When these reports are used to make financially significant decisions in an individual’s life, an inaccurate report could result in an individual being denied a home mortgage or a new job. Other uses of a consumer’s information do not pose the same serious consequences. Social-media platforms, for instance, might collect and share information about a consumer’s interests or shopping habits. Even inaccurate information provided to an advertiser—that a consumer has a pet, for example—likely has no true negative ramifications for the consumer. There is no compelling reason to subject such information to FCRA’s stringent limits when it is not being used in relation to credit, employment, or insurance.

Reflecting its focus on limiting abusive credit practices, FCRA offers a limited set of permissible purposes for accessing or sharing a consumer report, all of which involve seeking credit, insurance, or employment. But consumer data has long been legally used and shared for other purposes. Banks use consumer data to detect fraud.²⁹ Law-enforcement officials use data to hunt down suspects.³⁰ Local governments use consumer data to understand citizens’ needs and to provide better public services. Some cities, for instance, have used data from Uber about driving habits to help ease traffic

²³ See *Dalton v. Cap. Associated Indus.*, 257 F.3d 409, 414 (4th Cir. 2001).

²⁴ 15 U.S.C. § 1681(a)(1).

²⁵ *Hovater v. Equifax, Inc.*, 823 F.2d 413, 417 (11th Cir. 1987).

²⁶ 15 U.S.C. § 1681b(a).

²⁷ 15 U.S.C. §§ 1681c(a), 1681i.

²⁸ 15 U.S.C. §§ 1681n, 1681o.

²⁹ See Penny Crosman, *Five Ways Banks Use Data Science*, *American Banker* (Aug. 23, 2023), <https://bit.ly/477YNMY>.

³⁰ See Greg Ridgeway, *Policing in the Era of Big Data*, 1 *Annual Rev. of Criminology* 401, 408–09 (2018).

congestion.³¹ Insurance companies use data to evaluate claims for benefits.³² Political organizations use data to conduct polls and report on public opinion.³³ Businesses use data to target marketing and advertising to potential customers,³⁴ and to improve customer experiences and guide the development of new products and services. For example, an electric-car company might track sales data to appropriately site charging stations across the country. These and many other longstanding and important uses of consumer data are not mentioned in the Act because such uses are not included within its scope, as courts and data users have long understood. FCRA sets out a strict and comprehensive scheme for ensuring “fair and accurate credit reporting.”³⁵ It does not purport to regulate all uses of consumer data.

The interpretation suggested by the Proposal would risk just that, transforming FCRA into a comprehensive privacy regime. But the Act should not and need not be distorted to serve this purpose. For one, existing federal privacy laws already provide important protections for consumers. The Gramm-Leach-Bliley Act prohibits entities that offer financial services, regardless of whether the company is a traditional financial-services company, from disclosing private information to outside parties without giving consumers notice and an opportunity to opt out of disclosure.³⁶ The Driver’s Privacy Protection Act curbs the circumstances in which private parties can access information about drivers.³⁷ The Health Insurance Portability and Accountability Act, as implemented by the Department of Health and Human Services, forbids disclosures of patient information except as requested by the patient or as needed to provide medical care.³⁸

Complementing these federal protections, many states have also passed general privacy laws. The California Consumer Privacy Act, for example, requires that businesses collecting consumer data (a) inform consumers what data is being collected and whether it will be sold or shared, (b) delete that data upon request by the consumer, (c) correct any inaccuracies in the data, and (d) let consumers opt out of the sharing or sale of their data.³⁹ Other states have passed similar laws.⁴⁰

³¹ See Douglas MacMillan, *Uber Offers Trip Data to Cities, Starting with Boston*, Wall St. J. (Jan. 13, 2015), <https://on.wsj.com/3QbyfUg>.

³² See *Hovater*, 823 F.2d at 414, 418.

³³ See David Nickerson & Todd Rogers, *Political Campaigns and Big Data*, 28 J. of Econ. Perspectives 51, 53 (2014).

³⁴ See *Arcidiacono*, 1993 WL 94327, at *1.

³⁵ 15 U.S.C. § 1681(a)(1).

³⁶ See 15 U.S.C. § 6802.

³⁷ See 18 U.S.C. § 2721.

³⁸ See 45 C.F.R. § 164.502.

³⁹ Cal. Civ. Code §§ 1798.100, 105, 106, 120 (2018).

⁴⁰ See, e.g., Colo. Code §§ 6-1-1301 (2022); Conn. Code §§ 42-515–525 (2022); Del. Code §§ 6-1201C (2022); Ind. Code §§ 24-15-1-1 (2022); Iowa Code §§ 715D.1 (2023); Mont. Code §§ 30-30-NEW-003 (2022); S.B. 619, 82d Leg. (Ore. 2023); Tenn. Code § 39-13-

To the extent that the Bureau considers these laws insufficient to protect consumers, it should leave to Congress the task of creating a new, comprehensive privacy law. For decades, data brokers, businesses, and consumer groups have vigorously debated the benefits and drawbacks of privacy regulation.⁴¹ Numerous federal privacy bills have been proposed in recent years—twelve this session alone, including one ban on targeted advertising—yet not one has passed.⁴² In the face of this legislative deliberation, the Proposal now suggests for the first time a reading of FCRA that would resolve the ongoing debate by strictly limiting the dissemination of all consumer data. Courts would be right to view such a novel interpretation of great import with suspicion.⁴³

B. “Consumer Reporting Agency”

FCRA defines a “consumer reporting agency” as “any person which ... 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.”⁴⁴ Traditional credit agencies furnish consumer reports by delivering them to requesting parties, like a bank or employer. But in targeted advertising, online platforms can use consumer data to deliver ads on behalf of an advertiser without ever providing the data to the advertiser. As one platform explains, “[w]hen a business creates an audience for ad targeting, they can’t view the people in that audience, nor can they download the audience to see who’s in it. They also can’t get any personal information from an audience, such as names, locations, email addresses, and so forth.”⁴⁵ The Proposal suggests that these platforms should nevertheless count as “consumer reporting agencies” because they “furnish” consumer data when they merely use that data “on behalf of a third party” without “directly providing” that information to that third party.⁴⁶

This novel interpretation cannot be squared with FCRA’s plain text. To count as a “consumer reporting agency,” the entity must have assembled consumer data “for the purpose of *furnishing* consumer reports” to the requesting party.⁴⁷ As commonly understood, “furnish” means “provide,” “supply,” or “give”—in other words, to

612 (2021); H.B. 4, 88th Leg. (Tex. 2023); Utah Code § 13-16-101 (2023); Va. Code §§ 59.1-575 (2022).

⁴¹ See, e.g., Orly Lobel, *The Problem with Too Much Data Privacy*, Time (Oct. 27, 2022), <https://bit.ly/40aL5qi>.

⁴² See Müge Fazlioglu, *US Federal Privacy Legislation Tracker, Introduced in the 118th Congress (2023-2024)*, IAPP 3–6 (Sept. 2023).

⁴³ See *Biden v. Nebraska*, 143 S. Ct. 2355, 2372–75 (2023).

⁴⁴ 15 U.S.C. § 1681a(f).

⁴⁵ See, e.g., Snapchat, *Targeted Advertising – The Full Guide* (2022), <https://bit.ly/46LBCZc>.

⁴⁶ Proposal at 11.

⁴⁷ 15 U.S.C. § 1681a(f).

physically transfer.⁴⁸ Recognizing this, the FTC has explained that a consumer report is furnished where a creditor “transmits,” “provid[es],” “communicate[s],” “suppl[ies],” “conveys,” “disclos[es],” or “shar[es]” the report with another.⁴⁹ To count as a consumer-reporting agency, then, the entity must have collected consumer information with the intent of providing it directly to a third party—not, as the Proposal suggests, merely using that information *on behalf of* a third party.

Taken together, the Proposal’s new interpretations of “consumer report” and “consumer reporting agency” risk subjecting almost any collection and use of consumer data to FCRA’s strict requirements. In this new regime, every furnisher of consumer data could count as a consumer-reporting agency, subject to statutory and punitive damages for noncompliance, and consumer information could *only* ever be permissibly used to assess creditworthiness, issue insurance, or offer employment. This expansion of FCRA would upend current data practices and contradict established precedent holding that consumer information does not run afoul of FCRA unless it is intended to be used for offering credit, employment, or insurance.⁵⁰ This comment thus respectfully requests that the Bureau reconsider these interpretations.

II. The Proposal, if adopted, would harm small businesses and consumers.

In addition to being legally untenable, the Proposal’s new interpretation would hurt both small businesses and consumers. FCRA prohibits consumer-reporting agencies from furnishing consumer reports except for certain purposes identified in the statute.⁵¹ Because marketing is not a permitted purpose, the Proposal’s new interpretation of FCRA would seriously limit a platform or business’s ability to use a consumer’s data to personalize ads for that customer.

In targeted advertising, platforms like Facebook, Google, Instagram, Snapchat, X (formerly Twitter), Yahoo, and YouTube use consumer data to offer personalized ads to consumers on behalf of advertisers. This data might be provided by the advertiser or a data broker, or it may have been collected by the platform itself. Using the available data, the platform aims the ad at those customers most likely to be interested in the product or service.

In an age of e-commerce, small businesses rely on targeted advertising to connect with new and existing customers in their neighborhood and around the world. Local pizzerias might target potential patrons on Yelp. Pet sitters might seek new furry clients on Facebook. Makeup brands might attract beauty aficionados on Instagram. Sports memorabilia might find eager fans on X. Targeted advertising permits these small businesses to reach customers quickly and affordably.

⁴⁸ Defs. 1–2, *Merriam-Webster Dictionary*.

⁴⁹ See *Summary of Interpretations* at 30–31.

⁵⁰ See, e.g., *Kidd*, 925 F.3d at 104–05.

⁵¹ See 15 U.S.C. § 1681b(a).

Envision an artist with a virtual storefront on Etsy who hopes to attract more customers. She considers placing an ad in an art magazine, but the ad is expensive, and its cost is fixed, no matter how many people see it. The artist decides instead to use targeted advertising on digital platforms. She places advertisements for her art within minutes, from the comfort of her studio.⁵² For just a few dollars a day, she starts reaching customers, and she adjusts her spending each day as needed.⁵³ Best of all, she is only charged when a customer clicks on her ad or likes her tweet.⁵⁴ Using this tool, the artist draws in new and returning customers, growing her small business.⁵⁵

Not only is targeted advertising easier than traditional advertising, but it is also more efficient for small businesses.⁵⁶ Small-business owners estimate that their businesses have grown almost 40% in the past two years due to digital advertising.⁵⁷ Many small businesses sell niche products on Internet storefronts that ship around the world. Traditional advertising might help those businesses reach a broad audience, but most viewers will not be interested in the business's niche product. Targeted advertising avoids this mismatch by showing ads to only those consumers likely to be interested in purchasing that product.⁵⁸ Thanks to this precision, nearly 80% of small businesses say that digital ads contribute more to their sales than do traditional ads.⁵⁹

Reflecting these benefits, many small businesses have built their entire customer base with targeted advertising. Indeed, in a recent survey of 1,400 small businesses, 93% of business leaders said that targeted advertising was “useful,” 76% said that targeting was “valuable and important,” and 34% said that targeting was “absolutely critical” to their business.⁶⁰

Consumers, too, benefit from targeted marketing. Personalized ads help consumers meet specific needs. Finding goods and services takes time and energy, and by predicting a consumer's needs, personalized advertising saves consumers those

⁵² See, e.g., YouTube, *Set Up a Video Campaign*, <https://bit.ly/46K9ohy>; X, *Advertise on Twitter*, <https://bit.ly/3SglHh5>.

⁵³ See, e.g., Google, *What's Online Marketing?*, <https://bit.ly/46J45Pl>.

⁵⁴ See, e.g., Yahoo, *Yahoo Native Ad Basics*, <https://bit.ly/3FuNv9Y>; X, *X Ads Campaigns 101*, <https://bit.ly/3QHGBol>.

⁵⁵ See Etsy, *Case Study: Fine Tuning Your Etsy Ads Strategy*, (Aug. 16, 2022), <https://etsy.me/3FD1JW4>.

⁵⁶ See Tobias Kircher & Jens Foerderer, *Ban Targeted Advertising? An Empirical Investigation of the Consequences for App Development*, *Mgmt. Sci. Articles in Advance* 1, 5 (2023).

⁵⁷ See Connected Com. Council, *Maximum Impact: How Digital Ads Level the Playing Field for U.S. Small Businesses* 6 (2023).

⁵⁸ See Yan Lau, *A Brief Primer on the Economics of Targeted Advertising*, FTC 5–6 (Jan. 2020); Kircher at 5.

⁵⁹ See *Maximum Impact* at 6.

⁶⁰ Connected Com. Council, *Importance of Targeted Digital Ads to EU Small Businesses Now and During 2022* (2023).

search costs.⁶¹ For example, a dog owner too busy to find a pet sitter for an upcoming trip might receive a targeted ad from a local dog walker. Or a parent, having searched online for recipes for a gluten-free birthday cake, may see a targeted ad for a local bakery that specializes in such cakes. Targeted ads also expose consumers to new “wants” related to their current interests. A sports fan, for instance, who recently purchased a new jersey might receive a targeted ad for new tailgating equipment to use on game day. Or an avid reader of psychological thrillers may discover a new favorite author through a personalized ad.⁶² Not limited to goods and services, personalized ads can also help consumers connect with their communities, leading them to local places of worship or matching them with non-profits that need volunteers.

Targeted ads also give consumers more choices in the products that they purchase. Over 94% of consumers shop at small businesses, and many consumers prefer to support small and local businesses rather than big-box stores.⁶³ Before the rise of online shopping, consumers were often limited to large stores and the mass-appeal products in them. Now, with the proliferation of small businesses on platforms like Etsy, Shopify, and eBay, consumers can find millions of niche products. (And if the exact product a consumer is looking for does not exist, he can likely hire a small business to create it).⁶⁴ Targeted advertising exposes consumers to these small businesses, introducing them to entrepreneurs down the street and across the country.

For these reasons, many consumers prefer to receive targeted ads.⁶⁵ In fact, 76% of consumers expect personalized experiences, including custom product recommendations,⁶⁶ and 44% of consumers are willing to provide companies with their personal information to receive more relevant ads.⁶⁷ Consumers sometimes feel bombarded with marketing, seeing ads everywhere they go: on TV, in the newspaper, on the subway, on billboards. But with targeted advertising, businesses can send fewer ads to fewer people, reducing this information overload. No wonder then that 75% of consumers prefer receiving fewer ads that are targeted to their particular interests.⁶⁸

Restricting targeted advertising, as the Proposal suggests, would ignore these benefits to small businesses and consumers. It would also disrupt the thriving e-

⁶¹ See Lau at 11–12.

⁶² See Jyoti Madhusoodanan, *Now It's Personal: How Knowing an Ad Is Targeted Changes Its Impact*, Yale Insights (May 17, 2021), <https://bit.ly/3SfTsPr>.

⁶³ See ICSC's *Small Business Consumer Survey Reveals the Ongoing Importance of Small Businesses in the Lives of Consumers and Communities in the U.S.*, Business Wire (May 2, 2022), <https://bwnews.pr/3rZ2KF3>.

⁶⁴ See Chris Anderson, *The Long Tail*, Wired (Oct. 1, 2004), <https://bit.ly/45ICcW9>.

⁶⁵ See Holly Pauzer, *71% of Consumers Prefer Personalized Ads*, Adlucent (2016), <https://bit.ly/3tQqerK>.

⁶⁶ See Patrick Grieve, *Personalized Customer Service: What It Is and How to Provide It*, ZenDesk (Feb. 6, 2023), <https://bit.ly/3QfUJUG>.

⁶⁷ See Pauzer.

⁶⁸ *Id.*

commerce ecosystem. In the U.S., online shopping accounts for over \$1.1 trillion in sales each year, with over 16% of all purchases taking place online.⁶⁹ Targeted advertising is ubiquitous in this online marketplace, with advertisers both big and small relying on it. A restriction on targeted advertising would lead to fewer sales, lower revenue, and fewer jobs.

Small businesses would bear the brunt of this harm, as they are the most frequent users of targeted advertising.⁷⁰ These businesses, currently so reliant on targeted advertising, would have to fundamentally restructure their marketing strategies. Some may start using generalized digital ads, sent to a random selection of a platform's users. Others may turn to traditional advertising, paying high prices to advertise to a broad audience. No matter the new strategy, many would struggle to attract new customers, and some may have to shutter their doors.

This decline in small businesses would hurt competition. Competition is essential to a successful economy and to protecting consumers. To that end, one of the Bureau's stated purposes is to "ensure that ... markets for consumer financial products and services are ... competitive."⁷¹ And "[s]mall businesses are an essential part of the American economy."⁷² Targeted ads enable these small businesses to compete with larger companies. Small businesses, by focusing on only those customers likely to be interested in their products, can find new customers at comparable rates to those reached by big businesses through traditional advertising. The consumers receiving these targeted ads can choose to buy from a small business rather than a big-box store. To win these customers back, big-box stores will lower prices, stock better products, and offer more personalized services and loyalty programs, restarting the competitive cycle.⁷³ Restricting targeted advertising would remove this core competitive tool for small businesses.

Eliminating targeted advertising is also likely to disproportionately hurt certain categories of small businesses and consumers. For example, Black and Hispanic business owners, on average, consider digital advertising to be more important than do other business owners.⁷⁴ And because many Millennial and Gen Z consumers do not use

⁶⁹ See Anna Baluch, *38 E-Commerce Statistics of 2023*, Forbes (Feb. 8, 2023), <https://bit.ly/3FD7ZNY>.

⁷⁰ See, e.g., Salim Chouaki et al., *Exploring the Online Micro-Targeting Practices of Small, Medium, and Large Businesses*, 6 Proceedings of the ACM on Human-Comp. Interaction, No. 378, p. 3 (2022).

⁷¹ 12 U.S.C. § 5511(a).

⁷² *Investing In America Means Investing in America's Small Businesses*, White House (May 1, 2023), <https://bit.ly/3s9xByB>.

⁷³ See Lau at 6, 11–12.

⁷⁴ See Connected Com. Council, *Digital Tools Continue to Unlock Opportunities for U.S. Small Businesses* 4 (2023).

traditional media, like cable television or newspapers,⁷⁵ businesses may struggle to identify and reach these consumers in the absence of targeted advertising.

* * * *

Each consumer is estimated to create over 1.7 megabytes of data a day.⁷⁶ In a world of big data, the Proposal offers an interpretation of FCRA that would stretch the Act to cover an unprecedented number of actors and an unprecedented amount of information. This comment requests that the Bureau reconsider its new interpretation and instead adhere to the plain text of the Act, leaving it to Congress to establish a comprehensive regime for consumer data if it sees fit to do so.

Respectfully,

Jeffrey P. Ehrlich

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⁷⁵ See Deep Patel, *Gen Z Hates TV, and What That Means for Traditional Advertising*, Forbes (May 30, 2017), <https://bit.ly/46YeYN6>.

⁷⁶ See Richard Stengel, *Data Drives the World. You Need to Understand It*, Time (Oct. 20, 2021), <https://bit.ly/3Saxrlf>.