

October 30, 2023

VIA EMAIL

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Re: Docket No. CFPB-2023-0020, Feedback re
SBREFA Outline

To Whom it May Concern:

Our firm represents a coalition of companies (i.e., Spokeo, PeopleFinders, BeenVerified, Truthfinder, Instant Checkmate, and Intelius) that provide people search products and services, primarily to consumers. On June 8, 2023, we submitted written comments in response to the Request for Information Regarding Data Brokers (RFI), Docket No. CFPB-2023-0020,¹ and write now to provide feedback on the September 15, 2023 Outline of Proposals and Alternatives Under Consideration (Outline) for the Small Business Advisory Review (Panel). Certain of our members attempted to participate in the Panel, but were informed they do not qualify, and we therefore appreciate this opportunity to provide additional stakeholder feedback.

These comments can be considered broadly responsive to the Outline in general and also directly responsive to questions 2, 4, 5, 7, 8, 10, 13, and 18.

I. Our clients.

Our clients operate internet search engines that allow subscribers to search for and obtain certain publicly-available information about people—products and services often referred to as “people search.” Our clients obtain data from public sources, such as phone books and directories, social media websites (provided made public), media outlets, real property records, court records, consumer indices, and vital statistics. The data our clients sell includes information like names, present and past addresses, and publicly disclosed telephone numbers and email addresses. In essence, our clients synthesize into a single search hundreds of public searches that users otherwise would have to conduct individually.

The Outline (p. 1) describes the customers of a ‘consumer reporting agency’ (CRA) as, “typically[,] ... creditors, insurers, landlords, employers, and others making eligibility ... decisions.” These are not our clients’ customers or their motivations. Rather, our clients’

¹ Our initial comments addressed the importance of safeguarding constitutionally protected free speech information, comments we do not here repeat.

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customers are predominantly *other consumers*—people looking to connect with family and friends; to track down long-lost or unmet relatives; to vet parents driving carpools or offering sleepovers; to learn more about dating prospects and people met online; and to investigate potential scams and spam. On average, our clients’ websites receive around 37.8 million unique visits per month,² more than the number of people estimated to have watched the 2023 state the union address (27.3 million), the *Game of Thrones* finale (19.3), and the most recent Monday Night Football game (18.6 million). Millions of consumers rely on our clients’ services for low-cost access to public records, to better understand their communities, to maintain important relationships, and to stay safe in their neighborhoods and interactions.

To confirm these uses, and to ensure the data is not misused, our clients’ websites include numerous disclaimers and instructions that their products are not to be used for Fair Credit Reporting Act (FCRA) purposes. Likewise, our clients’ terms of use—which consumers must accept before subscribing—and other customer agreements require customers to refrain from FCRA uses. These instructions are not buried in boilerplate, but are spelled out in plain, consumer-friendly language presented before consumers finalize a purchase. (*See Example Disclosures and Consents* enclosed herewith as Appendix A.)

Moreover, our clients conduct rigorous monitoring of customer uses and promptly deactivate the account of any customer found to have breached the user terms, including the prohibition on FCRA uses. Even so, the number of customers found to have misused client products for FCRA purposes thus far has proved to be statistically insignificant.

Put another way, the assumptions underlying the Outline, particularly the definition of CRAs and consumer reports, do not apply to our clients or their customers, as further explained below.

II. Our comments.

A. Definition of ‘Consumer Reporting Agency’

According to the Outline (p. 7), the CFPB is considering a proposal that “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*” (emphasis added). This proposal conflates the statutory definitions of ‘consumer reporting agency’ and ‘consumer report,’ and in so doing, would violate the statute and lead to unworkable results.

While a consumer report is defined in part by its use or expected use—namely, “serving as a factor in establishing the consumer’s eligibility for” credit, insurance, employment, or housing—a CRA is defined by its regular practice and purpose. 15 U.S.C. § 1681a(d)(1). A CRA must “*regularly engage*” 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*

² Based on data obtained from <https://www.similarweb.com/> on visits between October 26-29, 2023.

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reports to third parties....” *Id.* § 1681a(f) (emphasis added). The purpose or intent of an entity is paramount in determining whether the entity qualifies as a CRA under FCRA.

As numerous courts consistently have held, a CRA “is an entity that intends the information it furnishes to constitute a ‘consumer report.’” *Kidd v. Thomson Reuters Corp.*, 925 F.3d 99, 104-05 (2d Cir. 2019); *see also Zabriskie v. Fed. Nat’l Mortg. Ass’n*, 940 F.3d 1022, 1027 (9th Cir. 2019) (“FCRA applies to an entity ... with the intent to provide a consumer report to third parties”); *see also Tierney v. Advocate Health & Hosps. Corp.*, 797 F.3d 449, 452 (7th Cir. 2015) (same); *see, e.g., Kidd v. Thomson Reuters Corp.*, 299 F. Supp. 3d 400, 407 (S.D.N.Y. 2017) (FCRA did not apply where “there [was] no evidence ... that, in making [online] platform available to its subscribers, [the defendant] assembled information on consumers with the subjective intention of supplying ‘consumer reports’”).

Not only would the proposal disregarding an entity’s intent contravene the plain and direct language of the statute, it would be unworkable in practice, both for businesses and regulators. The proposal would place the CRA determination entirely in the hands of end users. Specifically, an end user who uses a product for a permissible purpose would thereby convert the provider to a CRA, no matter the provider’s purpose or business model and even if regulators agreed the provider was not engaged in the regular practice of furnishing consumer reports. The uncertainty would make it impossible for businesses to build compliant programs, since an end user’s actions—however unreasonable, unforeseen, or unauthorized—would always trump and thwart a business’s designs. Plainly, such a result would be unworkable, and we strongly urge the Bureau to rescind the proposal.

At the very least, the proposal should make allowance or an exception for instances in which users covenant not to use/misuse data for FCRA purposes, such as in a written contract or terms of use. Such a proviso would allow businesses to create compliance programs with some degree of certainty and provide businesses with remedies, at law and in contract, to halt and redress misuses of their products.

B. Definition of ‘Consumer Report’

A second, but related, proposal under consideration “would provide that a data broker that sells *certain types* of consumer data would be a consumer reporting agency.” (Outline p. 8.) Whereas under the first proposal, CRA status would depend entirely on an end user’s actions, under this second proposal, the definition of ‘consumer report’ would hinge entirely on the nature of the information provided. “Under such a proposal, ... a data broker’s sale of data regarding a consumer’s *payment history, income, and criminal records, for example, 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*, because that type of data is typically used for credit and employment determinations (both permissible purposes).” (*Id.* p. 8 (emphasis added).) Similarly, the Bureau is considering a proposal that would limit the sale of ‘credit header data’ “without a permissible purpose.” (*Id.* p. 10.) Under these proposals, certain information such as criminal histories, income information, and credit header data would become consumer reports, *per se*.

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There are multiple problems with these proposals. Like the first proposal, they contravene the plain language of FCRA, this time the definition of consumer report. As a threshold matter, a consumer report is a “communication of ... information *by a consumer reporting agency.*” 15 U.S.C. § 1681a(d)(1) (emphasis added). Definitionally, an entity that does not qualify as a CRA cannot furnish a consumer report. Moreover, a consumer report must contain information “*which is used or expected to be used ... for the purpose of serving as a factor in establishing the consumer’s eligibility* for” credit, insurance, employment, or other authorized purposes. *Id.* (emphasis added). Once again, purpose is paramount, alongside use. There simply is no authorization in the statute to treat information as a consumer report, where that information is not used for purposes of determining eligibility for credit or other enumerated subjects.

To say that certain data “is *typically* used for credit and employment determinations” (Outline p. 8 (emphasis added)) is neither sufficient justification, nor is it accurate. Of course, ‘typically’ does not mean ‘always,’ so the Outline acknowledges that the proposal is overbroad—a critical failure from a First Amendment perspective, at least vis-à-vis public data. Publicly available information, including the information found in phone directories as well as criminal histories, is noncommercial speech subject to the fullest First Amendment protection and the strictest legal scrutiny. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011) (strict scrutiny “is implicated when information ... is subjected to ‘restraints on the way in which the information might be used’ or disseminated”); *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 954-56 (9th Cir. 2012) (presenting public information in directories such as phone books is noncommercial speech even though offered for sale). An obviously overbroad restriction of public data cannot withstand First Amendment scrutiny.

Moreover, it simply is not accurate to say that publicly available income history and criminal records are “typically” used for FCRA purposes. Our clients’ customers prove the point. As summarized in our initial comment letter, our clients’ products are widely used and highly valued by a multitude of private individuals and public entities. Among other use cases, consumers use our clients’ services, including but not only criminal and income history, to locate lost friends and relatives; to look up potential dates; to find out more about a child’s carpool driver; to reunite adoptees and birth parents; to verify the identity of persons met online; to identify who is behind unwanted calls or texts; to investigate potential neighbors and neighborhoods; to plan family reunions; to root out scams; and much more.

This leads to a final, but vital, consideration in evaluating the above proposals, particularly from a small-business and consumer-protection perspective. The proposals have the potential to greatly impact—either by significantly increasing the price or *eliminating altogether*—affordable products that are highly beneficial to consumers. True CRAs necessarily must incur substantial expense to ensure their data is as accurate as possible, and as such, they charge a commensurate price for their consumer reports. CRAs provide reports bought specifically for credit-related purposes, which can have a significant impact on the individual reported upon. Ensuring the accuracy of those reports, and consumers’ rights with respect to those reports, is consistent with the Congressional findings and statement of purpose under FCRA (*see* 15 U.S.C. § 1681), which emphasize the need to ensure “fair and accurate reporting” that ensures “that [CRAs] exercise

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their grave responsibilities with fairness, impartiality, and a respect for the consumer’s right to privacy.” As the Outline notes (p. 7), privacy, “confidentiality and accuracy” are primary concerns under FCRA.

Our clients, by contrast, serve individual consumers, whose means are limited by comparison to companies buying consumer reports. While our clients did not qualify as “small” for purposes of the Panel, they nonetheless are small compared to traditional CRAs. They compile public information that everyday consumers then can access economically, to support use cases that are highly valuable to them and that do not wade anywhere near the FCRA permissible purposes (see, *infra*, and our separate June 8, 2023 letter). Accuracy is of course an important goal, but access and affordability are equally important, not only to our clients and their customers, but under the First Amendment. The “[Supreme] Court’s decisions involving corporations in the business of communication,” like our clients, “are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.” *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). The “right to receive information and ideas ... is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution.” *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982).

While the goals of FCRA and the current rulemaking are laudable, each ultimately aims to benefit and protect consumers. The proposals under consideration, however, will impact two categories of consumers: those who are the subjects of consumer reports and those in the market for lawfully-obtained, constitutionally-protected, publicly-available information for reasons unrelated to FCRA. Underserved and vulnerable individuals in particular will be impacted, as they rely on products like our clients’ to make informed decisions and otherwise lack access to, and permissible motivation to receive, FCRA products. In this way, the proposals risk handing control over public records to the very financial institutions FCRA was enacted to regulate. If the resulting rulemaking defines particular types of information (criminal history, credit header, etc.) as ‘consumer reports’ and particular entities (data brokers) as CRAs, irrespective of intent, and CRAs can only provide such information for FCRA-permissible purposes, then an entire industry of people search products may disappear from the market—or at least become so expensive as to have done so, at least for ordinary consumers. Put simply, consumers looking to look up a date or neighbor for non-FCRA-purposes would simply be out of luck.

In evaluating the above proposals, we respectfully request that the Bureau consider the impact on all consumers and on businesses that deal exclusively in constitutionally protected, publicly available information, whose products, when affordable, have been and hopefully will remain highly valuable and important to millions of U.S. consumers.

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Thank you again for opportunity to provide feedback on the Outline and for considering these comments.

Yours sincerely,

A handwritten signature in cursive script, appearing to read "P. J. Recht". The signature is written in dark ink on a light background.

Philip Recht

Partner

Appendix A

Example Consumer Disclosures and Consents

What you can't do with our criminal or traffic records

To view ANY criminal and/or traffic records, if any such records are available, you must affirm that your use is permitted.

As a reminder, you are expressly prohibited from using BeenVerified for any of the following

- ⊗ **Employment screening** when evaluating a person for employment, reassignment, promotion or retention.
- ⊗ **Tenant screening** including (but not limited to) leasing a residential or commercial space
- ⊗ **Credit or insurance** to assess the risk of existing credit obligations of an individual OR determining eligibility for issuing credit or insurance
- ⊗ **Hiring of household workers** including (but not limited to) nannies and domestic workers
- ⊗ **Educational qualifications** including (but not limited to) a person's qualifications for an educational program or scholarship
- ⊗ **Business transactions initiated by an individual customer** to review a personal customer account to determine whether the person continues to meet the terms of such account
- ⊗ **Any other reason prohibited by the [Fair Credit Reporting Act](#)**

I acknowledge, agree, understand, and represent that, by clicking "Affirm My Use Is Permitted" below, I am affirming that I am NOT using, and under no circumstances will use, any information obtained from BeenVerified in a manner that is subject to the [Fair Credit Reporting Act](#), or for any other purpose prohibited by the [Terms of Service](#).

Affirm my use is permitted

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Background Check Public Records Search Reverse Address Lookup

Public Records Notice

This site contains REAL public records data including criminal records, background reports, photos, court documents, address information, phone numbers, civil judgments, properties owned, social media profiles, and much more.

Intelius does not provide consumer reports and is not a consumer reporting agency under the Fair Credit Reporting Act. We provide information (criminal record, address, phone number, property, civil judgment, and more) that can be used to satisfy your curiosity, protect your family, and find the truth about people in your life. To use our site you must certify below that you agree to our [Privacy Policy](#) and [Terms of Use](#) and will NOT use our site or the information we provide:

- (1) to make decisions about or in connection with hiring, promoting, reassigning, or continuing to employ any person, including current or potential volunteers and household employees such as childcare workers, contractors, or home health aides;
- (2) to make decisions about or in connection with renting or selling a house, apartment, or other residential property to any person;
- (3) to make decisions about or in connection with lending money or extending credit to any person;
- (4) in connection with the underwriting of insurance;
- (5) for any purpose related to any eligibility determination about a person;

or

- (6) for any other purposes that would require FCRA compliance.

I AGREE