November 6, 2023

Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552
Via email: CFPB_consumerreporting_rulemaking@cfpb.gov

Re: PBSA Comments on Consumer Reporting Proposals Under Consideration

Dear Sir or Madam:

I am writing on behalf of the Professional Background Screening Association (PBSA) in response to your request for feedback on the proposed rules under consideration that were recently discussed as part of the Small Business Review Panel for Consumer Reporting Rulemaking. PBSA is an international trade association of over 800 member organizations, the majority of whom provide employment, tenant, and volunteer background screening and related services to virtually every industry around the globe. The consumer reports prepared by PBSA's background screening members are used by employers, property managers, government entities, and volunteer organizations every day to ensure that communities are safe for all who work, reside, or visit there. Among other goals, PBSA members seek to promote the accurate and timely reporting of a variety of consumer-related information for the purpose of empowering employment, housing, volunteering, and other opportunities to individuals. In the United States, consistent with those purposes, PBSA's members obtain consumer information from thousands of different courts and other sources across the country and, in compliance with federal and state laws, produce millions of consumer reports per month.

III Proposals and Alternatives Under Consideration (Questions 1-7)

As a general matter, PBSA believes the proposals under consideration, if adopted as presented, would create tremendous harm to the screening profession that has developed in adherence to the Fair Credit Reporting Act for over 50 years. This harm would result in the elimination of many small businesses, will reduce competition, and harm consumers with increased costs and delays while also creating significant risks to privacy.

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In particular, the proposals to expand the definition of a consumer reporting agency (CRA) to encompass various providers of data and services and to minimize or eliminate the use of credit header data would likely result in the elimination of a substantial majority of our members who are small businesses. As noted by one of the small entity representatives to the Small Business Review Panel, "that market would get wiped out. It would cease to exist. Small CRAs and small data providers would close up shop or would sell to the big companies. If this proposal on data brokers, on assembling and evaluating, and on credit header data is as broad as it appears…" This impact would be acutely felt by local courthouse public record researchers who are almost exclusively small businesses that would be unable to manage or afford the new compliance obligations. Additionally, we anticipate that existing consumer reporting agencies (CRAs) would face significantly increased costs or be forced to merge with intermediaries to access data from public sources.

Additionally, as many small businesses, who have operated under the FCRA's long-standing regulatory structure, close or sell to larger players who can absorb the staggering costs associated with the proposals under consideration, a consolidation would take place in the screening profession that would reduce competition and harm consumers who would ultimately bear higher costs as well as the delays in screening that these proposals all but ensure. In tight labor and housing markets, consumers subject to these delays will lose the opportunity for jobs and housing as other qualified applicants are chosen by employers or property owners.

To the extent the proposals call for the elimination or reduction in the availability and use of credit header data, such a proposal would have serious consequences for public safety as it would severely impair the ability to conduct a full investigation of every relevant jurisdiction for court records.

In today's market, it is often a single CRA in the employment and tenant screening process that is responsible for interfacing with the consumers, furnishers, data sources, and end-users throughout the screening process and, from the consumers' perspective, represents a single point of contact to address any questions or disputes that may arise. To the extent the Bureau intends to extend the obligations of CRAs to entities not currently defined as a CRA, it is likely to lead to consumer confusion as a result of the dispersed and duplicative responsibilities that would be extended to multiple companies involved in the process.

In addition to the protections afforded by the FCRA, various state consumer reporting statutes and state data privacy laws should be carefully considered, as conflicts arising with any pre-established state standard would lead to an array of further complexity. Specifically, state data broker registration laws may have definitions that conflict with this proposal, and the CFPB should consider state-specific requirements such as California's *Investigative Consumer Reporting Agency Act* disclosure requirements, as those that do not align with this proposal may have an impact on compliance.

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Further, it is important to note that much of the information contained in a consumer report compiled for employment and tenant purposes is public information which is Constitutionally protected. We have serious concerns about the potential impact of the potential proposals in this regard.

Lastly, while we provide feedback below to a number of specific questions posed by the Bureau, in some cases the ambiguous nature of the description of the proposals under consideration makes it difficult to provide more specific feedback or cost analysis as was noted by a number of the participants during the panel discussions.

A. Definition of consumer report and consumer reporting agency

1. Data Brokers

Q8. If the CFPB proposes the approaches described above, what types of entities would fall within the definition of "consumer reporting agency"? Are there certain types of entities that should not fall within the definition of "consumer reporting agency"?

The proposals set forth by the Bureau clearly focus on including "data brokers" as consumer reporting agencies but fail to define what constitutes a "data broker" or what practices the Bureau is seeking to address by a change of this nature. We would make the distinction that companies serving as intermediaries (such as courthouse public record researchers), public record providers, and database companies for background and tenant screening purposes have long been recognized by regulators and the courts as distinct from CRAs. These entities provide information to consumer reporting agencies, which in turn are ultimately responsible for employing reasonable procedures to assure maximum possible accuracy. Imposing similar obligations on these upstream providers would result in less information available to the CRAs and will in turn have negative impacts on competition noted above. Moreover, the nature of these upstream providers' role in the screening process does not warrant any change in that approach by the Bureau and certainly not to the degree that it would be destructive to so many small businesses and lead to consumer confusion and other consumer harms such as higher costs and delays.

Q9. If consumer data communicated to a third party and used by the third party for credit decisions, employment purposes, insurance decisions, or other permissible purposes were a consumer report regardless of the data broker's knowledge or intent concerning the third party's use of the data, what costs would entities selling such data incur to monitor or control how their customers use purchased data?

We would underscore the point above about the protections that exist today in the context of background screening through the role played by the CRA in that process, which ensures that data is only provided for a permissible purpose under the FCRA, is accurate to the maximum extent

possible, and provides consumers with a process to dispute any perceived inaccuracies.

To the degree that the Bureau would propose to define courthouse public record researchers, intermediaries, public record providers, and database companies providing data to CRAs as CRAs themselves, this would impose expensive, time-consuming, and ultimately redundant and unnecessary requirements in the context of background screening. Accordingly, we would encourage the Bureau to exempt background screening from this proposal.

Q10. If the CFPB proposes the approach described above with respect to data brokers that sell certain types of data, would it be sufficient to provide a standard for (or guidelines about) what types of data are "typically" used for an FCRA-covered purpose or should the CFPB provide a list of such data types? What standard, guidelines, or data types should the CFPB consider for each FCRA-covered purpose?

We believe that such an approach is unnecessary, for the reasons stated above. However, if the CFPB proceeds with this approach, the CFPB should consider providing clear standards with an exhaustive list to ensure clarity and avoid ambiguity. However, much of the data that is used in background screening reports is public record information, which serves a broader purpose outside of background screening and the restriction of which raises significant First Amendment concerns.

Q11. Are there other ways in which the CFPB should be thinking about how and when data broker data should be considered a consumer report furnished by a consumer reporting agency?

In the absence of a proposed definition of "data broker" or "data broker data" it is difficult to provide a response. We would note, however, the potential consequences of expanding that definition to companies who provide data to CRAs providing a consumer report for employment and tenant screening purposes. For example, which entities would be responsible for sending Section 613(a) notices when the information is used for employment purposes? The courthouse public record researchers (often multiple) used by the CRA? The company providing pointer data that informs the jurisdictions in which to conduct a search? Also, would the end-user employer now have the responsibility of identifying all of these entities (perhaps a dozen or so in number) on a Section 615(a) pre-adverse action notice? Rather than embedding this under a single CRA that actually has a relationship with the end-user and consumer, these obligations may now be diffuse, and the proposal creates a risk of tremendous consumer confusion.

Additionally, as the compliance obligation expands to other entities involved in the background screening process who have traditionally been defined and regulated as suppliers, it would undermine privacy hygiene as greater amounts of information would be shared among companies meeting new compliance obligations. For example, if a courthouse public record researcher is responsible for assuring that every record provided back to the CRA matches the applicant, then

the researcher will demand that the CRA share all of the identifying information that the CRA has about the applicant. That degree of sharing information with courthouse public record researchers is unnecessary in today's environment (because the CRA does the work of comparing identifiers) and is highly adverse to best practices on data minimization. But it would be the outcome that the CFPB mandates by extending CRA treatment up the data-supply chain.

Q12. If any of the proposals under consideration that would make a data broker subject to the FCRA as a consumer reporting agency were finalized, do you anticipate that your firm or your customers will seek to obtain consumer consent before providing consumer reports to third parties? If so, what challenges do you foresee with obtaining consumer consent?

In the employment screening context, the FCRA requires that consumers provide written authorization for an employer to obtain, and a CRA to provide, a consumer report. However, requiring consent up the entire data stream to companies such as courthouse public record researchers could lead to consumer confusion at best and, in reality, requires an impossibility. At the time the consent is obtained from the consumer, a CRA does not know which jurisdictions a consumer has relation to and therefore does not know which upstream data providers it will be engaging to search for records and would therefore not know which data provider a consumer should provide consent to. Accordingly, the Bureau should refrain from expanding the definition of CRAs in the background screening context.

Q13. What costs do you believe the proposal under consideration would be likely to impose on the entities from which your firm obtains consumer data (known as "furnishers" under the FCRA) and on the entities to which your firm provides consumer data (known as "users" under the FCRA)? Are there additional burdens or unintended consequences to such entities the CFPB should consider? What steps could the CFPB take to reduce or lessen those potential impacts?

We have significant concerns about the framework and the potential damage to our supply chains. As noted in the general comments at the outset, the proposal would lead to the elimination of many if not most of the small businesses in the screening profession. End users and consumers would face increased costs and delays as a result. As noted above, we believe the upstream entities that supply data for background screening should be exempted from the proposals expanded definition of consumer reporting agencies.

2. Defining "assembling or evaluating"

Q14. What are the types of intermediaries, vendors, and other entities that transmit consumer data electronically between data sources and users? For any such company, describe the types of information the company obtains, from which data sources, who determines the sources of information to use, and how the information is transmitted, used, interpreted, or modified by the company.

In the context of employment and tenant screening, a CRA will engage with a range of data providers who gather data which the CRA will then assemble and evaluate. For instance, a CRA will obtain credit header data for the purposes of determining the addresses and names for which to conduct local research of public records. Such research is conducted by other vendors who employ a variety of methods to conduct the public records research and merely transmit the information obtained to the CRA. In some cases, a CRA may contact prior employers to confirm work history and educational institutions to confirm academic credentials. Further, a CRA may rely on state and local governments to confirm professional certification of prospective employees. Each of these providers is merely serving as a pipeline to transmit data. The functional assembling and evaluating of this information is performed by the CRA – not the providers. As noted elsewhere, classifying these providers as CRAs will cause enormous harms to small businesses and consumers alike.

Similarly, in both the employment and tenant screening contexts, employers and property managers leverage software platforms that enable them to manage their application flows. These platforms may deliver consumer report information, often in a workflow or format that enables the end user to view and make decisions on the consumer report. These platforms, however, do not "assemble or evaluate" this information into a consumer report, but are simply tools to manage the flow of data.

From the small business perspective, treating software platforms as consumer reporting agencies would cut off an important avenue for competition, as many platforms enable smaller CRAs to compete with larger players in the market.

Q15. Are there any circumstances under which the activities of an intermediary, vendor, or other entity that transmits consumer data electronically does not create a risk of harm to a consumer?

This question presumes that the normal use of an intermediary, vendor, or other entity that transmits consumer data electronically creates a risk of harm to a consumer, which is an unsupported premise. In fact, CRAs that work with intermediaries, vendors, or other entities vet these entities to ensure that consumer data is handled securely and properly. Further, when a CRA is at the end of the data stream and is the entity furnishing the consumer report for an eligibility decision, no risk or harm is created for the consumer and moreover, the consumer is afforded a number of significant protections.

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3. "Credit header" data

Q16. What types of information do firms typically consider to be credit header data? What types of credit header data are typically sold or purchased and for what purpose(s)? How is data collected for those purposes and how is it stored?

Credit header data is used in many contexts, including identity verification, fraud prevention and for identifying the states and localities in which a consumer has resided, which in turn is used as an investigative tool to determine where to search and what names to search when conducting a background check. Credit header data is obtained under a purpose permitted by the Gramm-Leach-Bliley Act, and to the extent that any such information is stored, properly secured.

Q17. Under what circumstances do firms typically consider the sale or purchase of credit header data not to be a consumer report, and why? What costs would be incurred if such sales or purchases of credit header data were to be considered a consumer report?

The sale or purchase of credit header data is not considered to be a consumer report when the credit header data is used by a CRA for internal investigative purposes consistent with the Gramm Leach Bliley Act. Were the Bureau to define the sale or purchase of credit header data to be a consumer report, it would practically eliminate the ability of a CRA to conduct a complete investigation in all relevant jurisdictions other than those self-disclosed by the consumer with significant attending consequences to public safety. Conversely, the use of credit header data will frequently allow a CRA to eliminate a "false positive" and thus the use of this information improves the accuracy of consumer reports from both a "false negative" and "false positive" perspective. Similarly, with the advent of online rental applications, credit header data plays an important role in identity verification products that help reduce renter fraud.

Q18. If the CFPB proposes a rule clarifying when credit header data is a consumer report, are there certain categories of credit header data you believe should be included or excluded as a consumer report? If so, under what circumstances?

Credit header data should be excluded as a consumer report when used for a purpose that is consistent with the Gramm-Leach-Bliley Act, such as when used for research and identity verification in employment and tenant screening.

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B. Permissible purposes

1. **Written instruction of the consumer**

Q24. Describe the consumer authorizations or certifications of written instruction typically relied upon to furnish or obtain consumer reports pursuant to this permissible purpose. How specific are these authorizations, and if your firm relies on the certification of a user, does the user disclose the language of the consumer's authorization? How can a consumer revoke or modify their authorization? What are the products or services offered to consumers for which your firm relies on the written instructions of the consumer to obtain a consumer report?

CRAs that conduct employment screening processes already secure instructions through authorizations obtained by their employer clients. Where screening relies on written instructions of the consumer, rather than an employment-purposes disclosure and authorization, a CRA may review, provide, or host the form of instructions.

Although the employment permissible purpose involves a different written authorization requirement, PBSA requests that the CFPB consider developing and promulgating model language for employment-related disclosures and authorizations. We suggest that the CFPB provide clarity to consumers and small businesses alike by providing sample authorizations and disclosures that satisfy the statute.

Q25. What should the CFPB take into consideration when evaluating proposals to ensure that consumers understand the scope and import of their authorization to furnish or obtain their consumer report?

As noted above, the CFPB should consider providing sample forms that provide businesses with plain-language examples of how best to comply with the FCRA, such as through model language for employment-related disclosures. This would be especially beneficial for small CRAs and end users that lack legal departments and would decrease consumer confusion by providing a consistent notice.

Q26. If your firm requires consumer authorization to furnish or obtain consumer reports, what methods (e.g., electronic signature, check box, wet-ink signature, etc.) does your firm use to document the consumer's instructions or authorization? What feedback has your firm received from consumers regarding the convenience or challenges caused by such methods, if any?

The PBSA has seen a rapid influx of e-signatures across companies, due to the convenience and security that they provide for consumers. Electronically signed forms are often retained along with an audit log, IP address, and/or date and time stamp. Some companies also use check boxes

and wet-ink, and we find that consumers and employers prefer to have flexibility in their options for both electronic and paper authorizations.

2. **Legitimate Business Need**

Q27. Under what circumstances do firms currently use the legitimate business need permissible purpose in connection with consumer-initiated business transactions and account reviews?

With respect to PBSA members, the "legitimate business need" permissible purpose is used in the tenant screening context. The FTC has recognized the use of this permissible purpose in the context of renting an apartment, for example.

Q28. Would the proposal under consideration limit your firm's ability to get consumer reports? If so, how? Would it be feasible for your firm instead to rely on the written instruction permissible purpose or some other permissible purpose?

The proposal under consideration to limit the use of consumer purpose transactions (a concept that does not appear in this section of the FCRA) may require landlords and property managers to determine whether an apartment lease is corporate or residential, even though the risk and data being assessed may be the same. This inconsistency will lead to consumer confusion.

3. **Data Security and data breaches**

Q29. What data security improvements, and associated costs, would consumer reporting agencies incur if they were liable under the FCRA for all data breaches?

Imposing strict liability on CRAs under Section 604 or Section 607(a) of the FCRA would require a contorted interpretation of the statute. It simply defies logic to assert that a CRA "furnishes" anything – much less a consumer report - when a criminal steals data. In that same vein, a CRA cannot violate the permissible purpose requirement under Section 604 as it has not "furnished" a consumer report to the criminal who stole the data.

Certainly, like all companies, a CRA may be negligent for not having sufficiently robust protections in place for which ample remedies exist under current federal and state law, but a strict liability regime as proposed – that does not take into account the size and resources of the business -- would be draconian and inconsistent with every major privacy statute. Many of the small entity CRA representatives detailed the devastating effects such a requirement would have on their businesses during the panel discussion.

Such a proposal would also raise questions regarding double jeopardy under which the small business entity is liable for the data breach under state data breach laws and would now be strictly

liable under this proposed interpretation of the FCRA. As was discussed in the panel, the costs of obtaining cyber-related insurance is expensive and increasingly is simply becoming unavailable. Imposing strict liability would exacerbate these problems exponentially. It does not serve consumers to impose liability so severe that there will be no insurance to pay it. As the CFPB is itself aware, cyber-criminals are ever evolving in their efforts to successfully compromise even the most robust protections. Even the US government is itself not immune from cyberattacks and data breaches. To suggest that a business employing reasonable security measures be held strictly liable when victimized by cyber criminals perversely shifts liability from perpetrator to victim and would likely further incentivize ransomware attacks.

C. Disputes

1. Disputes involving legal matters

Q30. Do you have knowledge about the practice of distinguishing between disputes classified as relating to legal issues and those classified as relating to factual issues, and if so, how do those that engage in this practice distinguish these types of disputes? Do they process or handle the disputes differently, and if so, what are the differences?

Our industry processes disputes without distinguishing between legal and factual disputes. We would have concerns if the proposed rule would force our members to become an arbiter of legal questions in place of a court of law, especially with respect to the significance and meaning of a criminal history record.

Q31. What portion of your firm's annual disputes relate to legal issues, and what policies and procedures are in place related to disputes your firm classifies as relating to legal issues?

Our industry processes disputes without distinguishing between legal and factual disputes.

2. Disputes involving systemic issues

Q32. How might the CFPB define "systemic" issues for purposes of the proposals it is considering? What may be the cause(s) for a furnisher or consumer reporting agency to have erroneous reporting for multiple consumers of the same type (e.g., issues with common processes, policies and procedures, infrastructure limitations, training)? How does your firm become aware of systemic issues that cause consumer reporting errors?

We would note at the outset that such a proposal is unwarranted in the context of background screening. First, courts have determined that accuracy rates of background checks exceed

99.6%.[1] We would further note that CRAs are bound to conduct investigations when a dispute is made and, given the uncapped statutory liability imposed under the FCRA, have ample motivation to address systemic issues – however defined. The CFPB and FTC have established, through enforcement actions, that CRAs should be examining disputes for systemic issues and conducting appropriate root cause analyses. This proposal is unnecessary, as the FCRA provides ample existing protections.

Q33. If furnishers or consumer reporting agencies (or both) investigate and address systemic issues that may be causing consumer reporting errors affecting multiple consumers, based upon a single consumer's notice of dispute, what kind of notice should go to other potentially similarly situated consumers affected by the systemic issue? At what point(s) of the process? What should that notice(s) say?

No form of notice should go to anyone other than those who raise a dispute. First, it may not be possible to define "potentially similarly situated consumers" on the basis of a single dispute. As was discussed in the panel, the range of fact patterns that could emerge would be difficult to

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[1] Cases include:

(a) Smith v. LexisNexis Screening Solutions, 15-2329 & 15-2330 (6th Cir., Sept. 13, 2016)

At the time of Smith's criminal history check, Lexis ran and sold roughly 10 million criminal background reports a year. Lexis tracks the overall dispute rate for its criminal background reports. Lexis's data shows that 99.8% of its reports are never disputed, which means that the dispute rate is only .2%.

(b) Williams v. First Advantage, No. 1:13cv222-MW/GRJ (N.D. Fl., March 2, 2017)

First Advantage prepared 3,554,163 background reports between 2010 and 2013 containing public-record information on a nationwide basis. Of those approximately 3.5 million reports, 17,431 were disputed, 14,346 resulted in a revised background report, and 13,392 of those revised reports were based on disputes where the consumer complained that a public record in his or her report belonged to another individual. That amounts to a .38% inaccuracy rate nationwide.

(c) Black v. General Info. Sols. LLC, 1:15 CV 1731 (N.D. Ohio, Feb. 26, 2018),

From 2013 to 2016, GIS's dispute rate ranged from 0.159% (2015) to 0.216% (2016), with an average of 0.175%. The 2015 error rate for the external vendor, contracted by GIS to perform Mr. Black's investigation was 0.022%.

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determine any systemic nature involved, and it is unclear how a consumer would be able to identify that their individual dispute stemmed from a systemic issue. Further, for any consumers potentially impacted in the past, employment and tenant screening CRAs likely may not have current contact information for prior applicants, raising concerns about the transmission of consumer report information based on historical addresses.

We would also underscore the beneficial function served by the pre-adverse action notice in the employment context that provides to the consumer the information at issue. As such, the consumer already has knowledge and had the opportunity to dispute any inaccuracy, and thus any additional notice is likely to create consumer confusion and/or notice fatigue.

Q34. What kind of information would be helpful for a consumer to include in a dispute notice to your firm to determine whether an error may be caused by a systemic issue?

Currently, no restrictions limit the information which a consumer can provide when making a dispute. Any mechanism – such as a rubric or otherwise – is likely to lead to the expectation that only certain types of information can be included. As noted above, the FCRA requires a full investigation of any dispute and creates a liability structure that incentivizes a CRA or furnishers to provide accurate data and consumer reports.

As discussed during the panel, consumers frequently have a misinformed expectation about the dispute process, and we would echo the suggestion that the Bureau conduct consumer education about the benefits and limitations that apply during the dispute process.

PBSA appreciates the opportunity to provide feedback to the Bureau as it considers issues related to consumer reporting and given the unique aspects of the background screening profession, we thank you for the invitation to participate in the Small Business Review Panel as well as to provide these comments. For all the reservations stated above, we urge the CFPB to strongly reconsider the approach that appears to be under consideration and given the complexities of the issues at hand, that any additional regulatory action be preceded by opportunities to comment on more clearly defined proposals such as an advanced notice of proposed rulemaking.

Sincerely,

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Executive Director

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