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Via Electronic Delivery to
2024-NPRM-CONSUMER-REPORTING@cfpb.gov

Comment Intake—Protecting Americans from Harmful Data Broker Practices (Regulation V)
c/o Legal Division Docket Manager, Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552.

RE: Protecting Americans from Harmful Data Broker Practices (Regulation V)

To Whom It May Concern:

The Consumer Data Industry Association (CDIA)[1] submits this comment letter in response to the Protecting Americans from Harmful Data Broker Practices (Regulation V) ("NPRM" or "Proposed Rule") issued by the Consumer Financial Protection Bureau ("CFPB" or "Bureau") that was published in the Federal Register on December 13, 2024.[2]

The Proposed Rule is contrary to law and should be withdrawn. As a general matter, the Proposed Rule would redefine a number of terms and provisions in the Fair Credit Reporting Act ("FCRA") in ways that are contrary to the clear statutory text and longstanding judicial interpretation. It is not the CFPB's place to rewrite the law to address what it believes are problems with the data broker industry; that responsibility lies with Congress.

But even without its many legal defects, the Proposed Rule still should not be finalized because it is arbitrary and capricious. The Proposed Rule is not the result of reasoned decision-making; there is no data or analysis identifying the relevant markets, the prevalence of the issues the Bureau seeks to address with the Proposed Rule, or the impact that the Proposed Rule would have on markets that it regulates. Indeed, the Bureau acknowledges in nearly two dozen instances that it "does not have data" or sufficient information to substantiate its policy conclusions or assess the proposal's potential impact on consumers and the financial services industry. And even though the Bureau is allowed to publish a notice of proposed rulemaking without such data, and seek it as part of the rulemaking process, what analysis the Bureau did

[1] CDIA is the voice of the consumer reporting industry, representing consumer reporting agencies (CRAs), including the nationwide credit bureaus, regional and specialized credit bureaus, background check and residential screening companies, and others. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals and to help businesses, governments, and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity all over the world, helping ensure fair and safe transactions for consumers, facilitating competition, and expanding consumers' access to financial and other products suited to their unique needs.

[2] 89 Fed. Reg. 101402 (Dec. 13, 2024).

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conduct is deficient. As discussed in greater detail below, if finalized the Proposed Rule would create substantial policy problems with which the Bureau has not meaningfully grappled.

Even without these defects, the Bureau should know that the Proposed Rule is bad policy. Most critically, the Proposed Rule would substantially interfere with law enforcement and antifraud activities that rely on the "credit header data" ecosystem that has built up over decades based on the consistent interpretation of FCRA that credit header data is not subject to FCRA requirements. But there are other negative consequences that would result if the rule is finalized, including the fact that it might sweep into its ambit any number of services that Congress never contemplated as consumer reporting agencies, such as court researchers, loan origination platforms, and government database providers.

CDIA shares many of the concerns about the data broker industry that are expressed in the Proposed Rule. But these concerns, no matter how legitimate, do not grant the Bureau a license to override clear statutory text. In any event, the Bureau does not need to go so far as to promulgate a new rule. If it believes that certain data brokers are providing information knowing that the information will be used for a FCRA-covered purpose, the CFPB can bring an enforcement action against those data brokers to the extent that they fail to comply with the requirements of FCRA. No new rules are needed.

1. The CFPB Lacks Authority to Promulgate the Proposed Rule.

As discussed in much greater detail below, the Proposed Rule seeks to substantially rewrite and expand the coverage of FCRA by purporting to redefine terms and provisions of the statute that the Bureau claims are ambiguous. But this the Bureau cannot do; the Supreme Court has been clear that an agency's ability to craft new legal requirements out of whole cloth is severely limited, and exists only in circumstances not present here.

a. *The CFPB Cannot Use Regulations to Alter the Meaning of Statutory Terms.*

Congress enacted FCRA in 1970.[3] While the law has been amended from time to time,[4] many of the terms and provisions that the Bureau seeks to redefine in the Proposed Rule have been in place for decades, and reviewed by courts countless times. The reviewing courts have identified the best meaning of these terms and provisions. The Bureau has no authority to advance its policy goals by defining terms in a way other than their best meaning. Statutes "have a single, best meaning," and agencies may not try to define statutes in any other way to achieve their policy objectives, no matter how laudatory.[5] Nor can the Bureau claim that it is simply

[3] Pub. L. 91-508, 84 Stat. 1114.

[4] *See*, *e.g.*, Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108-159, 117 Stat. 1952.

[5] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024). The CFPB appears to be still laboring under the assumption that it, rather than the judiciary, has the authority to define terms in the statute. In the Proposed Rule the Bureau complains that "applications of the law have often undermined one of the statute's core commitments: protecting consumer privacy." 89 Fed. Reg. at 101408. But just because the text of the statute is less

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giving meaning to ambiguous statutory terms; that too is the exclusive job of the courts. The statute has only one "best reading," and "if it is not best, it is not permissible."[6]

The best reading of a statute is determined using "traditional tools of statutory construction," which exist "to resolve statutory ambiguities."[7] In drafting the Proposed Rule, the Bureau did not deploy these traditional tools to discern the best meaning of the statute. Nor did it look to see how courts had previously used those tools to interpret the provisions at issue. Indeed, in many instances the Bureau admitted that prior judicial interpretations were contrary to its preferred reading, but proceeded to its preferred reading in the Proposed Rule anyway.[8] Nearly all of the Proposed Rule is an outcome-driven exercise in re-writing the statute to bring data brokers and the sale of consumer data within the ambit of FCRA. But it is a "core administrative-law principle" that "an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."[9] Since nearly all of the Proposed Rule falls into that category, it should be withdrawn in its entirety and not pursued further due to lack of statutory authority.

b. The Proposed Rule Violates the Major Questions Doctrine.

The Proposed Rule also runs afoul of the "major questions doctrine." Under the major questions doctrine, an agency cannot promulgate a regulation with "economic or political significance" unless there is "clear congressional authorization" to do so.[10] This is necessary because of "both separation of powers principles and a practical understanding of legislative intent."[11]

The Proposed Rule has substantial economic significance. The Bureau recognizes that if the Proposed Rule were to become final, "a substantial number of additional data brokers operating today likely will qualify as consumer reporting agencies selling consumer reports under the FCRA, resulting in . . . a substantial reduction in the volume of consumer information being bought and sold for non-permissible purposes."[12] Indeed, the Proposed Rule itself identifies tens of thousands of entities "that may be subject to the proposed rule if finalized."[13] Imposing substantial compliance costs on these entities, and curtailing or eliminating much of their activity—as well as the activity that data brokers facilitate—would have a major impact on

protective of consumer privacy than the Bureau wishes it to be, and courts have faithfully interpreted the text, does not mean that courts have "undermined" anything about the law.

[6] *Loper Bright*, 603 U.S. at 400.

[7] *Id*.

[8] *See*, *e.g.*, 89 Fed. Reg. at 101408 (noting that, contrary to the Proposed Rule, courts consider a consumer report to be the communication, not the information contained in the communication, and focus on the use made of the communication by its direct recipient, not use made by some other person in the future).

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

[10] *W. Virginia v. EPA,* 597 U.S. 697, 723, 721 (2022).

[11] *Id*. at 723.

[12] 89 Fed. Reg. at 101414.

[13] *Id*. at 101450–54.

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the economy. By one account, in 2021 the data broker industry was valued at $319 billion.[14] This is without even considering the substantial economic impact the proposed rule would have as a result of reducing fraud prevention and making various processes less efficient and more burdensome for consumers.[15] And, contra the major questions doctrine, there is no clear Congressional authorization to promulgate any of the Proposed Rule, and disrupt the entirety of the data broker industry as well as much of the antifraud activity on which banks and other financial institutions rely.

In support of the Proposed Rule, the Bureau relies on its general authority to promulgate rules to "carry out the purposes of" FCRA and the Consumer Financial Protection Act.[16] But these broad, vague statutory provisions are not the type of specific instructions from Congress that the major questions doctrine requires. For example, it is less specific than Congress's authorization to the CDC to enact regulations "necessary to prevent the . . . spread of communicable diseases" that the Supreme Court described as a "wafer-thin reed on which to rest" the power to impose an eviction moratorium.[17]

In fact, when Congress wants a regulatory agency to promulgate detailed regulations to implement FCRA, it says so clearly. In any number of instances Congress expressly instructed the Federal Trade Commission ("FTC") or the CFPB to promulgate regulations to implement one or more FCRA provisions. For example, Congress directed the Bureau, in consultation with other agencies, to "prescribe regulations that shall identify the circumstances under which a furnisher shall be required to reinvestigate a dispute concerning the accuracy of information contained in a consumer report on the consumer, based on a direct request of a consumer."[18] The fact that there is no similar express instruction to re-write FCRA to cover data brokers and related transactions further confirms that the CFPB lacks the clear Congressional authorization to promulgate the Proposed Rule.

The Bureau purporting to find authority to regulate all consumer data in a statute that is over fifty years old and has never been thought of as authorizing anything like the Proposed Rule also suggests that it runs afoul of the major questions doctrine. As Justice Gorsuch has noted, "an agency's attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign that it is acting without clear congressional authority."[19] In the Proposed Rule, the CFPB is trying to leverage a statute designed for specific purposes related to the credit-reporting industry to achieve far broader policy goals surrounding data privacy—in part in reaction to technological developments. But FCRA's rulemaking

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[14] Devan Burris, "How grocery stores are becoming data brokers," CNBC (Dec. 10, 2023), available at: https://www.cnbc.com/2023/12/10/how-grocery-stores-are-becoming-data-brokers.html.

[15] *See* Section 4, *infra*.

[16] 89 Fed. Reg. at 101407.

[17] *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 765, (2021).

[18] *See*, *e.g.*, 15 U.S.C. § 1681s-2(a)(8).

[19] *EPA*, 597 U.S. at 747 (Gorsuch, J., concurring).

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provisions and definitions do not authorize regulation in pursuit of those distinct and contestable policy aims.

2. The Substantive Provisions of the Proposed Rule Are Contrary to Law.

a. The Proposed Rule ignores established FCRA definitions.

The fundamental weakness with the Proposed Rule—indeed, its fatal flaw—is that it misapprehends the plain meaning and structure of FCRA. FCRA does *not* generally regulate data related to a consumer.[20] Rather, FCRA regulates consumer reports and consumer reporting agencies.[21] A consumer report is 1) a communication that 2) contains information bearing on at least one statutorily defined characteristic of a consumer, 3) which is used or expected to be used in whole or in part to serve as a factor in a credit decision, insurance decision, for employment purposes, or for a purpose defined by statute.[22]

Importantly, consumer reports are only provided by consumer reporting agencies.[23] A consumer reporting agency is an entity that 1) for a fee, 2) "regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers," 3) "*for the purpose of* furnishing consumer reports to third parties."[24] The fact that a consumer reporting agency is only an entity that assembles or evaluates relevant data "*for the purpose of* furnishing consumer reports" means that only entities that *want* to be consumer reporting agencies are consumer reporting agencies. As one court bluntly stated, a consumer reporting agency "is an entity that *intends* the information it furnishes to constitute a 'consumer report.'"[25] If an entity does not intend to provide third parties with a consumer report—that is, if it does not intend to communicate information that third parties will use for a statutorily defined purpose—then the entity is not a consumer reporting agency, and communications from that entity are not consumer reports. That is because "the duties imposed on consumer reporting agencies by [FCRA] are such that it is unlikely that Congress intended them to apply to persons or entities remote from the one making the relevant credit or employment decision."[26] As discussed in greater detail below, the Proposed Rule would define "consumer report" so broadly

[20] *See*, *e.g.*, *Henry v. Forbes*, 433 F. Supp. 5, 10 (D. Minn. 1976) ("Contrary to plaintiff's hopeful allegations, the Act clearly does not provide a remedy for all illicit or abusive use of information about consumers.").

[21] 15 U.S.C. § 1681, *et seq*.

[22] *Id*. at § 1681a(d).

[23] *Id*.

[24] *Id*. at § 1681a(f) (emphasis added).

[25] *Kidd v. Thomson Reuters Corp.*, 925 F.3d 99, 104 (2d Cir. 2019) (emphasis added); *see also Zabriskie v. Fed. Nat'l Mortg. Ass'n*, 940 F.3d 1022, 1027 (9th Cir. 2019) ("By its plain meaning, therefore, FCRA applies to an entity that assembles or evaluates consumer information *with the intent* to provide a consumer report to third parties." (emphasis added)).

[26] *Mix v. JPMorgan Chase Bank, NA*, No. CV-15-01102-PHX-JJT, 2016 WL 5850362, at *5 (D. Ariz. Oct. 6, 2016) (*quoting D'Angelo v. Wilmington Med. Ctr., Inc.*, 515 F. Supp. 1250, 1253 (D. Del. 1981)).

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that it would effectively nullify this requirement that the entity intend to provide consumer reports.[27]

The Bureau believes that FCRA must apply to all entities that provide information of the type typically included in consumer reports, and that to do otherwise would "incentivize willful ignorance and undermine the purpose of the statute."[28] Even if the Bureau had the authority to redefine terms in the statute (it does not), its concern about willful ignorance is misplaced; whether an entity is a CRA turns on more than just the entity's professed intention. Its purpose for providing the communication at issue "can, of course, be established in all the ways intent can be found in our law, including explicit attestation, concrete evidence, or, in some circumstances, inference from the foreseeable and logical consequences of a course of conduct."[29]

The Bureau's position also is inconsistent with other parts of FCRA. For example, FCRA Section 607(a) obligates a consumer reporting agency to, among other things, require that prospective users of the information certify the purpose for which the information is sought, *and certify that the information will be used for no other purpose*.[30] FCRA imposes the same obligation on entities who resell consumer reports.[31] Requiring CRAs to obtain certification from users that they will only use consumer reports for a permissible purpose and no other reinforces the idea that an entity must *intend* to be a CRA and provide a consumer report.

As discussed in greater detail below, each of the provisions of the Proposed Rule ignores these key limitations on FCRA's scope. Under the Proposed Rule, a consumer report is any data used for one of the statutorily defined permissible purposes, even if the data was not provided by a consumer reporting agency—i.e. it was not provided by an entity intending to provide a consumer report. Under the Proposed Rule, data that is the type that is typically used for a FCRA-defined permissible purpose is a consumer report (and therefore cannot be used for anything other than a FCRA purpose) regardless of whether it is actually used for that purpose, and "regardless of whether the person communicating the information collected it or expected it to be used for that purpose."[32] In short, the Proposed Rule would take a carefully crafted, narrowly tailored statutory framework that governs consumer reports that are provided by consumer reporting agencies, and turn it into a general purpose privacy protection statute that applies to the transfer of virtually any consumer data at any time for any purpose. But this is

[27] The fact that Congress created a specific statutory requirement that an entity intend to provide a consumer report undermines the Bureau's attempt to define the concept of consumer report more broadly. *See*, *e.g.*, *Greenlaw v. United States*, 554 U.S. 237, 251 (2008) (courts "resist attributing to Congress an intention to render a statute . . . internally inconsistent").

[28] 89 Fed. Reg. at 101409.

[29] *Kidd*, 925 F.3d 99, 105 (2d Cir. 2019).

[30] 15 U.S.C. § 1681e(a). Similarly, the FCRA ensures that those entities who are receiving consumer reports know what their responsibilities under the FCRA are; a CRA must provide notice of those responsibilities to any person to which it provides a consumer report. 15 U.S.C. § 1681e(d).

[31] *Id*. at § 1681e(e)(2).

[32] 89 Fed Reg at 101409.

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beyond the Bureau's authority. It is black letter law that an agency cannot rewrite a statute by regulation. "Where the statutory text does not support [the agency's] proposed alterations, [the agency] cannot step into Congress's shoes and rewrite its words."[33] FCRA does not authorize the Proposed Rule the same way that a law that governs blue cars would not be justification for regulation of all things blue on the one hand, and all cars (or, perhaps more apt, all things with wheels) on the other.

This defect in the Proposed Rule is shown in any number of ways. But perhaps it is shown most clearly by the Bureau's discussion of why, even with the changes enacted by the Proposed Rule, it would not consider "government agencies or government-run databases that provide information to the public, such as the Federal Public Access to Court Electronic Records (PACER) website" subject to the requirements of FCRA.[34] The plain text of the new regulations suggests that PACER *should* be subject to FCRA. PACER assembles and retains a substantial amount of information on consumers (including financial information), charges a fee to provide users with that information, and that information can be used—and in fact is used—to make a credit or employment decision. If, for example, an individual who has previously filed for bankruptcy applies for a loan, the potential creditor might download from PACER the individual's bankruptcy filings, which include information such as the applicant's income and assets as well as his outstanding debts, and use that information to inform the credit decision. This should cause the PACER data to be considered a consumer report under the terms of the Proposed Rule because it was information about a person's credit worthiness and was actually used in making a credit decision, even though PACER is not a consumer reporting agency and does not assemble the information for that purpose. In fact, under the Proposed Rule the information actually would be *per se* a consumer report because PACER "should expect" information about the consumer's credit history to be used in FCRA-covered transactions.

Despite all this, the Bureau asserts that PACER and other government databases are not subject to FCRA because certain FCRA obligations—such as those mandating disclosure of the contents of a consumer's file—would be incompatible with their operation and "lead to absurd results." CDIA agrees. But we agree not because government run databases have some privileged place in the law, or because subjecting government-run databases to the requirements of the Proposed Rule would "lead to absurd results" (the Proposed Rule leads to absurd results for non-governmental entities as well). Rather, the Proposed Rule does not apply to PACER and other government-run databases for the simple fact that the operators of those databases do not intend to provide consumer reports. Their operations are established and organized wholly separate from the issues related to consumer reporting, and the fact that third-parties may use for FCRA purposes information retrieved from those databases is wholly incidental to their operation. That is all that is relevant for FCRA purposes, and the Proposed Rule cannot change that. Indeed, the Bureau's need to create *ad hoc* exceptions to the natural application of the

[33] *VanDerStok v. Garland*, 86 F.4th 179, 195 (5th Cir. 2023), *cert. granted*, 144 S. Ct. 1390 (2024).
[34] 89 Fed. Reg. at 101425.

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Proposed Rule further shows that the proposed interpretations of FCRA are not consistent with the statutory text.[35]

b. *A consumer report is the communication, not the information contained in the communication*.

In determining the coverage of FCRA, the Proposed Rule concerns itself with the information contained in the communication that could be a consumer report, rather than the communication itself.[36] This position is incorrect for at least two reasons. *First*, as the Bureau admits, "[c]ourts have tended to focus their analysis on the specific communication."[37]

Second, courts likely reach this conclusion because the Bureau's proposed reading is grammatically incorrect. The Bureau argues FCRA regulates information and not communications because a consumer report is something that "is used or expected to be used or collected in whole or in part," and consumer reporting agencies "collect information, not communications."[38] Rather than being the most grammatical reading of the statute as the Bureau claims,[39] this reading is not grammatical at all. The statute defines a consumer report as a "communication of information . . . *which* is used or expected to be used or collected." The use of the word "which" suggests that the subsequent words are detached from the preceding phrase, and therefore modify the subject of the sentence "communication." Had Congress wanted to further describe the information that is in the communication—i.e. further limited the universe of "information" that makes up a consumer report—it would have used the word "that."[40] The Bureau itself appears to recognize the importance of this distinction; in the regulatory text that purports to restate the statutory definition of "consumer report," it replaces "which" with "that."[41]

But the Proposed Rule's definition of "consumer report" is problematic in other ways as well. If the Bureau's reading is correct, the entity that uses or is expected to use information—i.e. the recipient—is different than the entity that "collected" information. There is nothing in the text of the statutory definition to suggest that the relevant actor switches mid-sentence.[42]

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[35] *See, e.g.*, *Jones v. Hendrix*, 599 U.S. 465, 480 (2023) (explaining that "[t]he illogical results of applying" an interpretation weigh "strongly against the conclusion that Congress intended these results").

[36] *See*, *e.g.*, 89 Fed. Reg. at 101410 ("Proposed § 1022.4(c) clarifies that . . . the relevant inquiry is whether the *information* in a communication is expected to be used" (emphasis in original)).

[37] *Id*. at 101408.

[38] *Id*. at 101410.

[39] *Id*. at 101408.

[40] *See* William Strunk Jr. & E.B. White, *The Elements of Style* 1, 53 (2d ed.1972) ("*That* is the defining, or restrictive, pronoun, *which* the nondefining, or nonrestrictive.").

[41] 89 Fed. Reg. at 101458 (proposed 12 C.F.R. 1022.4(a)). The Bureau also makes the change when reciting the statutory text as part of its discussion of the Proposed Rule. *Id*. at 101407.

[42] Indeed, the Bureau's reading may actually presume that the relevant acts—use and collection—apply to different things. At one point, a single sentence in the Proposed Rule discusses whether "the communication was . .

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The more natural reading would be to understand that the definition is concerned with only the recipient of the communication, which either uses it, or collects it to be used by others, for one of the FCRA-specified purposes. This reading makes the most sense since FCRA, in the very same section that defines consumer report, also defines a "reseller" as an entity that "*assembles and merges* information contained in the database of another consumer reporting agency or multiple consumer reporting agencies."[43] What's more, Congress separately defined the term "file" to mean the information gathered by a CRA on a particular consumer; a consumer report must be something different than just the information a CRA has collected about a consumer.[44] Therefore, the most natural reading of the definition of consumer report is that it governs communications from consumer reporting agencies to entities that either use the information, or gather communications for use by others. As the Bureau notes, this is the exact conclusion that various courts have reached, and, as with most of the other aspects of the Proposed Rule, the Bureau is not free to conclude otherwise in order to achieve its policy goals.

c. The Bureau's expansive readings of the phrases "is used" and "is expected to be used" are incorrect.

Under the Proposed Rule, any communication that contains *any* of the information that is *ever* used for a FCRA-defined purpose would be considered a consumer report.[45] This includes "use by persons other than the direct recipient of a communication."[46] As noted above, this is in tension with the FCRA requirement that an entity must intend to provide a consumer report, since the use would be downstream of the actual communication by the CRA to its customer. Perhaps recognizing this issue, the Bureau asserts that this reading is necessary because "a person could potentially avoid FCRA coverage even if the person had actual knowledge that the entity to which it communicated the information was selling the information to a downstream recipient who planned to use it for a purpose described in proposed § 1022.4(a)(2)."[47] But FCRA already covers this situation without the Proposed Rule. If an entity has actual knowledge that a recipient of one of its reports would sell the information to a third-party to use for a FCRA-covered purpose, a reviewing court could find that the entity intended to provide a consumer report to that third-party for a FCRA-covered purpose, since the intent to provide a consumer report can be established using "inference from the foreseeable and logical consequences of a

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. actually used" and whether "the information in the communication was . . . collected." *Id*. at 101413. Having the noun that is modified by this list of terms change mid-sentence makes even less sense.

[43] 15 U.S.C. § 1681a(u).

[44] *Id*. at § 1681a(g). Relatedly, if the Bureau's reading is correct, it would have been much easier for Congress to simply say that a consumer report is a "communication of information in a consumer's file that is used or excepted to be used" for a defined purpose. The fact that Congress defined consumer report as a "communication of information . . . which is used or expected to be used or collected" without reference to the consumer's file suggests that the collection is done by someone other than the CRA.

[45] 89 Fed. Reg. at 101408–10; 89 Fed. Reg. at 101458 (proposed 12 C.F.R. § 1022.4(b)).

[46] *Id*. at 101408.

[47] *Id*. at 101409.

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course of conduct."[48] Actual knowledge of downstream use for a FCRA-covered purpose would plainly support such an inference.

The Bureau's proposed redefinition of "is used" is also in tension with other parts of the statute. As discussed above, a CRA must obtain from its customer a certification that it will use the requested consumer report for the indicated permissible purpose and no other.[49] But if a communication of information can be transformed into a consumer report—and the entity providing the information transformed into a CRA—based on some downstream third-party's use of the information for a FCRA-defined purpose, the entity providing the communication has no opportunity or ability to obtain the required certification. The Proposed Rule cannot work with the statutory scheme designed by Congress.

According to the Proposed Rule, *any use*, as opposed to just use by the direct recipient of the communication, must fall within FCRA because otherwise "the recipient's use or expected use for a nonpermissible purpose would not violate the statute because . . . the communication would not be a consumer report."[50] Rather than being a bug, this is exactly how FCRA is supposed to work. As noted above, FCRA regulates consumer reports and consumer reporting agencies, not all data related to consumers. There are entities that collect the same data that appear in a consumer report, but do not collect it for use in FCRA defined purposes. For the most part, FCRA does not cover that activity, and the CFPB is powerless to make the law do otherwise.

The Proposed Rule does not hide the fact that this part is designed to apply to entities other than those that intend to provide consumer reports.[51] The CFPB notes that it is proposing this definition "to incentiviz[e] entities that sell consumer information to monitor the uses to which such information is put."[52] But FCRA already does this; as the *Kidd* court observed, whether an entity intends to provide consumer reports can be inferred "from the foreseeable and logical consequences of a course of conduct."[53] The law does not allow entities to collect and disseminate consumer information without regard for its use so long as the entity disclaims an intent to provide consumer reports. Instead, the law will infer that intent if the "foreseeable and logical consequences" of the entity's behavior is that the communications it makes will be used for a FCRA-defined purpose. This is why so many entities that collect and communicate consumer information that *could* constitute a consumer report take any number of steps to ensure

[48] *Kidd*, 925 F.3d at 105.
[49] 15 U.S.C. § 1681e(a).
[50] *Id*. at 101408.
[51] 89 Fed. Reg. at 101409 ("As a practical matter, this would mean that a person that sells information that is used for a purpose described in proposed § 1022.4(a)(2) would become a consumer reporting agency, regardless of whether the person knows or believes that the communication of that information is legally considered a consumer report").
[52] *Id*. at 101408.
[53] *Kidd*, 925 F.3d at 105.

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that their contractual counterparties do not actually use the information for a FCRA-covered purpose, including the defendant in *Kidd* itself.[54]

The Proposed Rule's attempt to redefine the phrase "is expected to be used" also has issues. At first, the Bureau would give that phrase an uncontroversial meaning of the subjective expectation of the entity making the communication that is a consumer report, including expectations it should reasonably anticipate, if the other elements are satisfied.[55] This once again is also consistent with the fact that an entity's intent to provide consumer reports can be derived in part from the foreseeable and logical consequences of its conduct.[56]

But the Proposed Rule would go further than that, making it *per se* unreasonable to not anticipate that certain categories of data would be used in a FCRA-covered transaction by any individual at any point in the future.[57] Specifically, under the Proposed Rule any communication of a consumer's credit history, credit score, debt payments, and income or financial tier would be considered a consumer report, regardless of whether the entity making the communication intended the communication to be a consumer report, regardless of whether there were contractual prohibitions on the recipient of the communication using it for a FCRA-defined purpose, and regardless of whether the communication is actually used (or collected) for a FCRA-defined purpose.[58] The Bureau claims that this is consistent with the statute "because those information types are typically used to underwrite loans."[59] But such a *per se* rule has no basis in the statute. A "typical" use is not necessarily the only use, which makes a *per se* rule improper.

Even if the Bureau could declare that specific data fields *per se* constituted a consumer report, the Proposed Rule is still legally defective. If the Bureau had the authority to declare certain types of communications *per se* consumer reports (it does not), the relevant question would not be whether those data fields "are typically used to underwrite loans," but whether those items are so inextricably entwined with underwriting loans (or another FCRA-defined purpose) that it would be categorically unreasonable to not anticipate the information would be used for that purpose. And the Proposed Rule does not even try to show that, likely because it cannot. For example, a consumer's "income or financial tier" would be highly relevant to identifying potential subscribers to a magazine whose target audience is high net worth

[54] *Id*. at 102 (detailing steps defendant took to ensure its customers were not using data for FCRA-covered purpose, including requiring "subscribers to reaffirm their commitment to using [the product] for a non-FCRA purpose" every two years).

[55] 89 Fed. Reg. at 101410; id. at 101458 (proposed 12 C.F.R. § 1022.4(c)(1)).

[56] *Kidd*, 925 F.3d at 105.

[57] 89 Fed. Reg. at 101411–15. For all the reasons already discussed, the Bureau's attempt to turn a communication into a consumer report based on a downstream recipient's use of the information from the communication is contrary to FCRA text.

[58] *Id*. at 101458 (proposed 12 C.F.R. § 1022.4(c)(2)).

[59] *Id*. at 101411.

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individuals with the resources to buy high end furnishings and luxury cars. FCRA does not regulate this activity, even though the Bureau wishes that it did.[60]

The Bureau's definition is also illogical because any number of items beyond those identified by the Proposed Rule are "typically used to underwrite loans." The Proposed Rule contains no real discussion of why some data points but not others were singled out for special treatment. It likely did not engage in such an analysis because doing so would show that using the Bureau's new "typically used to underwrite loans" test would turn nearly every communication about a consumer into a consumer report.

The Bureau attempts to further justify this portion of the Proposed Rule with a lengthy discussion of the purported harms posed by the data broker industry.[61] Without commenting on the accuracy of those purported harms, the Bureau cannot address them by trying to jam the square peg of data broker activity into the round hole of FCRA. The Bureau recognizes that courts have held that FCRA does not apply to data brokers who "took steps to monitor and prohibit the sale of data for FCRA uses,"[62] likely referring to *Kidd* and similar cases.[63] That should end the matter; the Bureau may not by regulatory fiat contradict these holdings limiting FCRA's scope.

d. *The Bureau's attempt to expand FCRA provisions to credit header data is contrary to law.* [64]

The Proposed Rule would also expand FCRA to cover personal identifiers, often referred to as "credit header data." Once again, the Bureau impermissibly seeks to expand the meaning of terms in FCRA well beyond what the plain text allows. In the Proposed Rule the Bureau admits that the FTC and caselaw generally treat credit header data as outside the scope of FCRA.[65]

Despite this, the Proposed Rule would define a communication that only includes credit header data as a consumer report because, according to the Bureau, credit header data bears on

[60] The Bureau's arbitrary line drawing here is also evidence of the arbitrary and capricious nature of the Proposed Rule. But since the Proposed Rule only purports to be giving the statutory text its best reading, such logical inconsistencies suggest that it is a legal defect, and not just a practical one. *Cf. Greenlaw* (courts "resist attributing to Congress an intention to render a statute . . . internally inconsistent").

[61] *Id*. at 101412–13.

[62] *Id*. at 101413.

[63] Tellingly, at no point does the Proposed Rule cite *Kidd* or related cases.

[64] As discussed further below, even without these legal defects, bringing credit header data within the scope of FCRA would be bad policy, as it would hamstring vital law enforcement and fraud prevention tools. *See* Section 4, *infra*.

[65] *See*, *e.g.*, 89 Fed. Reg. at 101415 ("The FTC stated that a report limited to identifying information does not constitute a consumer report if it does not bear on any of the seven factors specified in the definition and is not used to determine eligibility."); *see also id*. ("Courts considering communications of personal identifiers by consumer reporting agencies have generally concluded that such communications are not consumer reports, largely on the ground that the information does not bear on the factors specified in the definition.").

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the "personal characteristics" of the consumer, and "may bear on the consumer's mode of living" or "provide information about the consumer's educational or employment associations."[66] The Bureau also argues that credit header data qualifies as a consumer report for FCRA purposes based on two faulty rationales already discussed. *First*, the Bureau argues that credit header data meets the definition of consumer report because it is "information" that is used for a FCRA-defined purpose. And *second*, the Bureau argues that that credit header data from consumer reporting agency was "collected in whole or in part" for a FCRA-defined purpose. But, as noted above, this misreads the text of the statute; a consumer report is defined as the communication, not as the information in the communication. And, the relevant "collect[ion]" is of the communication by the recipient of the communication, not the consumer reporting agency.

As the Bureau admits, Federal courts have consistently found that identifying information is not the type of information that is communicated in a consumer report. For example, in *Parker v. Equifax Information Services, LLC*, the court considered whether the Equifax product "eIDcompare" that was used solely to verify the identity of a consumer was a "consumer report" under FCRA.[67] The Plaintiffs alleged that the eIDcompare product constituted a consumer report because it received from its subscribers data packets that included fields for a consumer's name, phone number, Social Security number, date of birth, driver's license, current address, and time spent at that address.[68] But, the court explained that "[t]he accumulation of biographical information from Equifax's products *does not constitute a consumer report* because the information does not bear on Parker's credit worthiness."[69] Further, "[t]he data at issue here reflects biographical information generally recognized as header data and, thus, *is not a consumer report*."[70] The Sixth Circuit made a similar pronouncement in *Bickley v. Dish Network, LLC*, stating that "header information" is not a consumer report.[71] Numerous of other federal courts have stated the same.[72]

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[66] *Id*. at 101416. The Bureau also argues that "the mere fact that a particular consumer reporting agency or type of consumer reporting agency has personal identifiers for a consumer can itself bear on one or more of the factors specified in the definition of consumer report," by, for example, suggesting that the consumer has a credit file with a consumer reporting agency in the first place. 89 Fed. Reg. at 101416.

[67] No. 2:15-CV-14365, 2017 WL 4003437 (E.D. Mich. Sept. 12, 2017).

[68] *Id.* at *2.

[69] *Id.* at *3 (emphasis added).

[70] *Id.* (emphasis added).

[71] 751 F.3d 724, 729 (6th Cir. 2014).

[72] *See, e.g.*, *Trans Union Corp. v. FTC,* 81 F.3d 228, 229, 231–32 (D.C. Cir. 1996) (rejecting the view that "any scrap of information transmitted to credit grantors as part of a credit report must necessarily have been collected" for one of the three purposes listed in the definition of "consumer report"); *Individual Reference Servs. Group v. FTC*, 145 F. Supp. 2d 6, 17 (D.D.C. 2001) (name, address, Social Security Number, and phone number do not bear on required factors); *In re Equifax Inc., Consumer Data Security Breach Litigation*, 362 F. Supp. 3d 1295, 1313 (N.D. Ga. 2019) (holding that "header information" is not a "consumer report" because it does not bear on an individual's creditworthiness); *Dotzler v. Perot*, 914 F. Supp. 328, 330 (E.D. Mo. 1996) (name, current and former addresses, and Social Security Number do not bear on factors); *Weiss v. Equifax, Inc.*, No. 20-cv-1460, 2020 WL 3840981 (E.D.N.Y. July 8, 2020) (holding that personally identifiable information stolen during a data breach is not a "consumer report" within the meaning of the FCRA); *Williams-Steele v. Trans Union*, No. 12 Civ. 0310 (GBD)

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Congress and Federal agencies similarly have long recognized the credit header information is not a consumer report. The FTC's long-standing and unambiguous interpretation of FCRA is that identifying information (*i.e.*, credit header information) does not constitute a consumer report.[73] Further, the FTC has formally adopted a reading of FCRA that identity verification products (which rely upon such credit header information) are not "consumer reports" under FCRA.[74] The FTC recognized that other Federal laws, not FCRA, govern credit header information. The FTC also excluded from the 2009 Furnisher Rule any direct disputes related to the consumer's identifying information, "such as name(s), date of birth, Social Security number, telephone number(s), or addresses(es)."[75] This exclusion reinforces the position that such information is not regulated by FCRA.

Congress has also recognized that identity verification and fraud prevention products built using credit header information are not regulated under FCRA. The Dodd-Frank Act gave the CFPB jurisdiction over consumer financial products or services, including credit reporting, but carved out from the definition of "financial products or services" those used for identity authentication or fraud or identity theft detection, prevention, or investigation, signaling that identity verification products are not covered by FCRA.[76] In fact, the CFPB itself has recognized the unique nature of credit header information, stating that the "header of a credit file contains the identifying information of the consumer with whom the credit file is associated including an

(JCF), 2014 WL 1407670, at *4 (S.D.N.Y. Apr. 11, 2014) ("Neither a missing area code nor an allegedly inaccurate alternate address bear on any of the factors listed in 15 U.S.C. § 1681a(d)(1), or is likely to be used in determining eligibility for any credit-related purpose . . . ."); *Ali v. Vikar Mgmt., Ltd.*, 994 F. Supp. 492, 497 (S.D.N.Y. 1998) (address information does not bear on factors); *Smith v. Waverly Partners, LLC*, No. 3:10-CV-28, 2011 WL 3564427, at *1 (W.D.N.C. Aug. 12, 2011) (holding that "[the defendant] did not communicate any information bearing on Plaintiff's 'credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living'…Instead, it merely provided name, Social Security Number, prior addresses, date of birth, and driver's license information. Such minimal information does not bear on any of the seven enumerated factors in § 1681a(d), and is thus not a consumer report.").

[73] *In the Matter of Trans Union Corp.*, FTC Docket No. 9255 at 30 (Feb. 10, 2000) (name, SSN, and phone number of the consumer are not subject to the FCRA because they "[do] not . . . bear on creditworthiness, credit capacity, credit standing, character, general reputation, personal characteristics, or mode of living, unless such terms are given an impermissibly broad meaning").

[74] *See* July 29, 2008 letter to Marc Rotenberg, p. 1, n.1 (distinguishing a prior settlement on the basis that it merely involved an identification verification product, not a consumer report), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2008/08/080801reedrotenbergletter.pdf.

[75] *See* 12 C.F.R. § 1022.43(b)(1)(i); *see also* "Consumer Reports: What Information Furnishers Need to Know," FTC Business Guidance (June 2013) *available at* https://www.ftc.gov/system/files/documents/plain-language/pdf-0118_consumer-reports-what-information-furnishers-need-to-know_2018.pdf.

[76] 12 U.S.C.A. § 5481(15)(B)(i). *See also Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Consumers* (March 2012), at 67, *available at* https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.

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individual's name (and any other names previously used), current and former addresses, Social Security number (SSN), date of birth, and phone numbers."[77]

Simply put, credit header data is not a consumer report under FCRA, so the Bureau lacks legal authority to regulate it.

e. *The Bureau's proposed treatment of de-identified data has no legal basis*.

The Proposed Rule also would expand FCRA to cover data that has been anonymized or aggregated. The Proposed Rule includes three different provisions that the Bureau might adopt to regulate aggregated and anonymized data. Each of these has legal defects.

To begin with, aggregated data is not used to establish a consumer's eligibility for credit or any other FCRA permissible purpose.[78] This is because aggregated data do not "bear[] on" a particular consumer or any identifiable consumer.[79] For example, in *Tailford v. Experian Information Solutions, Inc*.,[80] the plaintiffs argued that aggregated consumer file data constituted a consumer report because the data was used to identify consumers for invitations to apply for credit.[81] Quoting the district court from which the case was appealed, Experian countered that "merely using 'information to identify a pool of potential credit applicants is not the same as using information to determine credit eligibility.'" The Ninth Circuit agreed, concluding that Experian's use of aggregated data for targeted marketing purposes "is not using that information to establish a consumer's eligibility for credit" or any other FCRA purpose and therefore does not meet FCRA's definition of a "consumer report."[82]

This reasoning is in keeping with historical FTC guidance,[83] as well as government practice, which routinely uses aggregated consumer data for non-FCRA purposes. For example, the Federal Reserve and the FTC have both conducted studies that relied on credit score information aggregated at the ZIP code level. Further, the CFPB routinely uses aggregated credit report information for its research purposes, such as in its study on credit invisibility.

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[77] "Key Dimensions and Processes in the U.S. Credit Reporting System," CFPB Report, p. 8 (December 2012), *available at* https://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf.

[78] It is also unclear whether and how any of the proposed regulatory provisions would relate to aggregated data. The discussion of the provisions in the Proposed Rule refers to "information that has been aggregated or otherwise purportedly deidentified," but each of the proposed provisions refers only to "de-identification of information."

[79] *See* 15 U.S.C. § 1681a(d)(1); *McCready v. eBay, Inc*., 453 F.3d 882 (7th Cir. 2006) (holding that a consumer under the FCRA must at a minimum "be an identifiable person").

[80] 26 F.4th 1092 (9th Cir. 2022).

[81] *See id.* at 1103.

[82] *Id*.

[83] FTC Staff, "40 Years of Experience with the Fair Credit Reporting Act" ("Forty Year Report") (Jul. 2011) at 20 ("Information that does not identify a specific consumer does not constitute a consumer report even if the communication is used in part to determine eligibility," specifically citing use of aggregate data).

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Since FCRA does not cover aggregated data, any regulation purporting to interpret FCRA cannot reach that far. This is likely why the alternate provisions in the Proposed Rule refer only to "de-identification of information."

In attempting regulate data that has been anonymized, the Bureau is concerned about modern technology and expanded data availability that makes it easier to identify individual consumers in a de-identified data set.[84] But its proposed remedies go further than FCRA allows. As noted above, to be considered a consumer report under FCRA a communication must both "bear[] on" certain characteristics of a consumer *and* "serv[e] as a factor in establishing" a consumer's eligibility for credit, employment or insurance, or be used for another FCRA-defined purpose.[85] Because this definition is focused on individual consumers, both in characteristics and use, FTC staff has taken the position that information may constitute a consumer report even if it does not identify the consumer by name only if it could "otherwise *reasonably* be linked to the consumer."[86] Each of the alternatives in the Proposed Rule would go much further than this.

- Alternative 1 would completely ignore de-identification.[87] But, if data is aggregated or the consumer's identity is masked or otherwise deidentified and not linked or linkable to the consumer, the data could not meet the definition of consumer report in FCRA, given that FCRA is focused on communications about a specific consumer used for a FCRA-defined purpose involving the specific consumer.

- Alternative 3 would look to factors that are nowhere found in FCRA's text, such as whether "information is used to inform a business decision about a particular consumer" and whether a recipient of the data actually "identifies the consumer."[88] This alternative contains many of the same weaknesses that infect other provisions of the Proposed Rule. For example, under Alternative 3, whether something is a consumer report would turn on some unknown third-party's use of the communication rather than the intention of the provider of the communication. Additionally, Alternative 3 would extend FCRA coverage to uses other than those that are defined by FCRA. None of these options are available to the CFPB.

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[84] 89 Fed. Reg. at 101420–21.

[85] 15 U.S.C. § 1681a(d).

[86] Forty Year Report at 21 (emphasis added). The FTC has in other instances suggested that even if data did not identify a specific consumer, it might constitute a consumer report if it is "crafted for eligibility purposes with reference to a particular consumer or set of particular consumers." Federal Trade Commission, "Big Data A Tool for Inclusion or Exclusion?" (Jan. 2016) at 16–17, n. 85. But there the FTC contemplated that the aggregated data was specifically constructed with a "particular consumer or set of particular consumers" in mind for purposes of making an eligibility determination. This is in stark contrast to the Proposed Rule that contemplates deeming as a consumer report *any* communication that contains de-identified consumer information.

[87] 89 Fed. Reg. 101458 (proposed 12 C.F.R. § 1022.4(3) – Alternative 1).

[88] *Id*. (proposed 12 C.F.R. § 1022.4(3) – Alternative 3).

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- Alternative 2 would deem a communication containing de-identified consumer data a consumer report "if the information is still linked or linkable to a consumer."[89] But even here the Proposed Rule exceeds FCRA's bounds. As noted above, FTC staff concluded that de-identified consumer data may be considered a consumer report if it can "otherwise *reasonably* be linked to the consumer."[90] Alternative 2 omits the reference to reasonable linkage, and requires only theoretical linkage. But this once again attempts to read out of the relevant definitions an entity's intent to provide a consumer report. Only the "foreseeable and logical consequences" of an entity's actions determine whether it intends to provide consumer reports. It is not necessarily foreseeable (or reasonably foreseeable) that some recipient at some point in the future will use complex algorithms to re-identify data that has been de-identified (especially if, for example, the recipient of the de-identified data is contractually obligated to not re-identify it). But even if Alternative 2 were amended to incorporate the concept of reasonability, it still should not be promulgated for the simple reason that it is unnecessary; a recipient of anonymized data from a consumer reporting agency that subsequently links that data to a consumer would obtain a consumer report under false pretenses in violation of FCRA and be subject to fines and imprisonment.[91]

Ultimately, none of the proposed alternatives relating to de-identified data are consistent with the text and prior interpretations of FCRA. Because of this, the Bureau lacks the authority to promulgate any of them as proposed.

f. The Bureau's proposed definition of "assembling or evaluating" is contrary to law.

In addition to expanding the definition of "consumer report" beyond what FCRA allows, the Proposed Rule would also expand the definition of "consumer reporting agency" beyond the statutory text and judicial precedent. As noted above, the Proposed Rule completely ignores the requirement that an entity must intend to provide consumer reports, and therefore intend to be a consumer reporting agency.

The Proposed Rule is faulty in other ways. This includes proposing to define very broadly the phrase "assembling or evaluating" in the definition of consumer reporting agency. If the Proposed Rule is finalized, entities that undertake such anodyne activities as "retain[ing]," "mak[ing] a judgment regarding," or "altering" information about a consumer would be considered consumer reporting agencies if the other elements of the definition are also met.[92] The Proposed Rule provides examples of what it means to "assembl[e] or evaluat[e]"

[89] *Id*. (proposed 12 C.F.R. § 1022.4(3) - Alternative 2).
[90] 40 Year Report at 83–84 (emphasis added).
[91] 15 U.S.C. § 16811 ("Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined under title 18, imprisoned for not more than 2 years, or both.").
[92] 89 Fed. Reg. at 101459 (proposed 12 C.F.R. § 1022.5(b)).

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information in this context, including "grouping or categorizing" bank account data based on transaction type, standardizing data "such as by modifying the year date fields to all reflect four, rather than two, digits to ensure consistency," and simply "retain[ing] information about consumers."[93]

The Bureau claims that the Proposed Rule is consistent with the dictionary definitions of the relevant terms. Not so. Nothing in the dictionary definitions of assemble or evaluate would cover standardizing data. Nor does mere retention or mechanical grouping of data constitute assembling or evaluating it. Assembling and evaluating "involves more than receipt and retransmission of information," and generally involves "re-organiz[ing] or filter[ing]" data in some meaningful way to distinguish it from a "mere[] . . . conduit of information."[94] The FTC staff reached the same conclusion when they observed that "[a]n entity that performs only mechanical tasks in connection with transmitting consumer information is not a [consumer reporting agency] because it does not assemble or evaluate information."[95] Indeed, the Proposed Rule's attempt to define the terms to include collecting or gathering, without more, is contrary to past judicial opinions that noted "[o]btaining and forwarding information does not make an entity a CRA."[96] Requiring some level of intentional aggregation or substantive evaluation of the data beyond mere receipt or standardization makes sense given that "the duties imposed on consumer reporting agencies by [FCRA] are such that it is unlikely that Congress intended them to apply to persons or entities remote from the one making the relevant credit or employment decision."[97] The Proposed Rule ignores this common-sense limitation on FCRA's scope.

g. Furnishing a consumer report does not mean "facilitating access" to data contained in a consumer report.

The Proposed Rule would expand the definition of what it means to "furnish" a consumer report to include "instances where a consumer reporting agency does not technically transfer a consumer report but facilitates a person's use of any information in the consumer report for that person's financial gain."[98] But this has no basis in the statutory text, and CDIA is not aware of any judicial decision supporting the Proposed Rule's definition. As an initial matter, under FCRA a CRA does not furnish "information," but a "consumer report."[99] A consumer report, in turn, is defined as a "communication."[100] To assert that furnishing a consumer report for

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[93] *Id*.

[94] *Carlton v. Choicepoint, Inc.*, No. CIV.08-5779(RBK/KMW), 2009 WL 4127546, at *4 (D.N.J. Nov. 23, 2009).

[95] 40 Year Report at 29.

[96] *Ori v. Fifth Third Bank*, 603 F. Supp. 2d 1171, 1175 (D. Wis. 2009).

[97] *Mix v. JPMorgan Chase Bank, NA*, No. CV-15-01102-PHX-JJT, 2016 WL 5850362, at *5 (D. Ariz. Oct. 6, 2016) (*quoting D'Angelo v. Wilmington Med. Ctr., Inc.*, 515 F. Supp. 1250, 1253 (D. Del. 1981)).

[98] 89 Fed. Reg. at 101427; *see also id*. at 1014529 (proposed 12 C.F.R. § 1022.10(b)).

[99] 15 U.S.C. § 1681b(a).

[100] *Id*. at § 1681a(d); *see also* Section 2.b, *supra*.

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purposes of FCRA as something other than a CRA communicating information to a third-party (i.e. an end user) is completely divorced from the words of the statute.

The Bureau's attempt to bring the concept of "financial gain" into the definition of furnishing a consumer report is even further removed from the statute. Any number of permissible purposes have nothing to do with financial transactions at all, such as in connection with eligibility for a license or related to establishing capacity for child support payments.[101] Nothing in the statutory text suggests that whether a CRA furnishes a consumer report turns only on whether it is for the recipient's financial gain.

h. There is no statutory basis for the Bureau's proposed limitations on the written instructions of a consumer.

The Proposed Rule also would place substantial restrictions on the ability of CRAs to furnish a consumer report on the written instructions of the consumer. None of the proposed restrictions on this permissible purpose relate to the words of the statute, which expressly authorizes a consumer reporting agency to furnish a consumer report "in accordance with the written instructions of the consumer to whom it relates."[102] The Proposed Rule would create from scratch limitations on this statutory authorization. Nothing in the statute authorizes this; Congress left the definition of written instructions intentionally broad, perhaps in part to facilitate transactions at the consumer's request. The CFPB may possess some limited authority to ensure that the consumer reporting agency indeed acts "[i]n accordance with" the consumer's instructions". But nothing in FCRA empowers the CFPB to regulate the *substance* of a consumer's authorization. To the contrary, the statutory text empowers the *consumer* to issue his own "instructions."

The Proposed Rule ignores this, and thereby exceeds the CFPB's statutory authority, in at least two respects. *First*, the Proposed Rule limits permissible "written instructions" to a single "product," "service," or "use," even though consumers can (and often do) authorize the furnishing of consumer reports for multiple purposes in a single disclosure, including for credit-monitoring services. Moreover, the Proposed Rule singles out valuable services such as targeted advertising and cross-selling as presumptively incapable of consumer consent. The CFPB does not hide its paternalism on this point, discussing how, in its view, consumers are generally "not informed about the consent they are purportedly providing."[103] And it apparently plans to police "written instructions" for compliance with "the consumer's reasonable expectations."[104] But again, nothing in FCRA limits the scope of a consumer's *bona fide* "written instructions" based on the CFPB's assessment of what is "reasonable."

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[101] *Id*. at § 1681b(a).
[102] *Id*. at §1681b(a)(2).
[103] 89 Fed. Reg. at 101430.
[104] *Id*. at 101431.

Second, FCRA provides no justification for the Proposed Rule's one-year duration limit on a consumer's ability to consent to the furnishing of a consumer report or reports. Rather than working to ensure that consumers' consent is valid, or that consumer reporting agencies operate within the boundaries of consumers' instructions, this requirement automatically terminates even *valid* consumer authorizations that consumer reporting agencies are *respecting*. In effect, the Proposed Rule would prohibit consumers from consenting to more than 365 days of reporting (defined by the Proposed Rule as any use of a broad swath of even de-identified data). And again, the CFPB is explicit that it has struck this "balance[]" based on its own view of consumers' general "expectations," despite recognizing that it will "frustrate[]" and "burden[]" consumers.[105] That is unlawful: FCRA nowhere empowers the CFPB to restrict consumer authority in this way. And as explained below, adopting this requirement would indeed frustrate use cases that customers value in today's market.

The proposed limitations on the written instruction permissible purpose are also contrary to existing FTC guidance, which has recognized that a consumer's written instructions are operative so long as consent is clear,[106] going so far as to approve of a written statement that "I authorize you to procure a consumer report on me."[107] The Bureau proposes to add time restrictions and disclosure requirements found neither in the text of the statute nor any other competent legal authority of which CDIA is aware.

In *Insurance Marketing Coalition, Ltd. v. Federal Communications Commission*,[108] the Eleventh Circuit Court of Appeals recently set aside a Federal Communications Commission rule that suffered from many of the same defects of the Proposed Rule. In that case, the statute that generally prohibited robocalls allowed them to be made based on "prior express consent." There, as in the Proposed Rule, the FCC purported to prohibit any express consent from applying to multiple entities.[109] In a similar manner as the Proposed Rule, the FCC purported to require that the consented to robocalls "be logically and topically associated with the interaction that prompted the consent."[110] There, as here, the FCC justified the proposed regulations by

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[105] *Id*.

[106] Forty Years Report at 43.

[107] *Id*.

[108] 127 F.4th 303 (11th Cir. 2025) (hereinafter "*IMC*").

[109] *Compare id*. at 310 (under proposed FCC regulation "a called party cannot give 'prior express consent' to receive telemarketing or advertising robocalls from multiple parties unless the called party consents to receive calls from each individual caller separately") *with* 89 Fed. Reg. 101431 ("The proposed provisions are also designed to prevent evasion of the written instructions permissible purpose by ensuring that each product or service (or use, if not in connection with a product or service) is authorized by one, separate written instruction") *and id*. at 101459–60 (proposed 12 C.F.R. § 1022.11).

[110] *Compare IMC*, 127 F.4th at 310 ("The second restriction on what it means to give 'prior express consent' states that consented-to telemarketing or advertising robocalls 'must be logically and topically associated with the interaction that prompted the consent.'") *with* 89 Fed. Reg. at 101431 ("The CFPB is proposing several conditions intended to ensure that . . . once consent is obtained, the user of the report procures, uses, retains, or shares the report with a third party only as reasonably necessary to provide the product or service requested by the consumer, or the specific use.") *and id*. at 101459–60 (proposed 12 C.F.R. § 1022.11).

referencing a generic grant of authority to promulgate regulations to implement the statute.[111] The court in *Insurance Marketing* held that both of these restrictions "conflict with the ordinary statutory meaning of 'prior express consent,'" which, for purposes of that statute, incorporated common law principles of consent.[112]

The same is true here; the Bureau's proposed limitations on the written instructions permissible purpose conflict with the ordinary definition of the statute. The statutory term is broad and requires only that the consumer 1) instruct the entity to procure a report about him, and 2) that those instructions be in writing. Nothing in the statutory text suggests that instructions must be limited to one year, or one party, or one transaction, just like nothing in the statutory text at issue in *Insurance Marketing* limited the prior express consent to one party or one transaction. Because of this defect, the Proposed Rule should not be finalized.

As with so much else in the Proposed Rule, the proposal governing a consumer's written instructions is nothing more than the CFPB attempting to impose its policy preferences in the statute where they do not exist. It lacks the authority to do this.

3. The Proposed Rule Is Arbitrary and Capricious.

The Proposed Rule is not reasoned decision-making. The Administrative Procedure Act prohibits agencies from making fundamentally unreasoned decisions, failing to consider relevant evidence, or inappropriately weighing the available evidence. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). As noted at many points above, the Proposed Rule is shot through with unreasonable conclusions and arbitrary line drawing. The Proposed Rule would *per se* treat certain data points that are "typically" used as part of the credit underwriting process as consumer reports, but not others. The Proposed Rule would exempt government run databases from its requirements even though there is no express exception in the statute, and the databases would otherwise fall squarely within the coverage of the Proposed Rule.

But there are a number of other issues as well. For example, the Proposed Rule repeatedly cites a desire to fight "price discrimination" as a policy justification.[113] But price discrimination is generally legal, and regulated by other federal statutes including the Robinson-Patman Act. The Bureau makes no attempt to explain why it must pass the Proposed Rule to regulate conduct that is generally legal and already regulated by a separate statute. Further, the Proposed Rule recognizes that consumers' willingness to pay for data privacy is, in fact,

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[111] *Compare ICM*, 127 F.4th at 311 (FCC defends regulation by reference to statutory provision that "allows the FCC to 'prescribe regulations to implement' the TCPA") *with* 89 Fed. Reg. at 101429 (proposed "written instruction" portion of Proposed Rule consistent with statutory authorization to promulgate regulations "'necessary or appropriate to administer and carry out the purposes and objectives of the FCRA" (quoting 15 U.S.C. § 1681s(e)(1)).

[112] *ICM*, 127 F.4th at 311, 313.

[113] *See*, *e.g.*, 89 Fed. Reg. at 101436–37.

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extremely low.[114] But the agency dismisses that fact in favor of speculation—bereft of any actual evidence—that "consumers might *intrinsically* value privacy in the sense of being generally uneasy about their data being shared."[115]

The Proposed Rule also contains any number of unsupported assertions and assumptions. Its (unlawful) changes to the definition of consumer report are motivated in part by a concern about an entity having actual knowledge that data it communicates to third-parties is eventually used for a FCRA covered purpose, but it does not identify a single instance where this has actually happened. Nor does the Proposed Rule identify an instance where aggregated or de-identified data was re-identified and used for a FCRA-covered purpose. The cost-benefit analysis has similar issues. For example, the Bureau speculates that risk mitigation services rely on inaccurate data from data brokers, and subjecting these data brokers to FCRA's accuracy requirements would improve the accuracy of the information and the accuracy of the service.[116] But the Bureau does not identify any risk mitigation service that would benefit from this change, why such a risk mitigation service cannot impose its own data accuracy requirements on the brokers from which is gets data, or what the impact of the added costs of subjecting data brokers to FCRA would be on the risk mitigation service provider. It just assumes that promulgated the Proposed Rule would be an unalloyed good.

Nor does the Proposed Rule explain why existing authorities cannot address the perceived issues with data brokers. For years, the FTC has consistently applied the definition of "consumer reporting agency" and used its enforcement authority under FCRA to take action against companies operating within FCRA's ambit. Recent examples abound. In 2020, the FTC took action against CRA AppFolio relating to consumer information sourced from a third-party data vendor, which the FTC acknowledged was not a CRA where it disclaimed any guarantee relating to accuracy and required AppFolio to verify the information.[117] In 2021, the agency issued warning letters to several mobile app developers that compiled public record information to create background and criminal record reports, cautioning that companies who provide information to, say, employers regarding employees' criminal histories, are providing "consumer reports" because the data involves the individual's character, reputation, or personal characteristics, and such companies must therefore comply with FCRA.[118]

That same year, the FTC settled allegations against Spokeo, Inc., a company that collected personal information about individuals from hundreds of online and offline data sources and merged the data to create detailed personal profiles of consumers, which was then

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[114] *See*, *e.g.*, *id*. at 101437.
[115] *Id*. at 101436.
[116] *Id*. at 101437.
[117] *Fed. Trade Comm'n v. AppFolio, Inc*., *available at* https://www.ftc.gov/legal-library/browse/cases-proceedings/1923016-appfolio-inc.
[118] Fed. Trade Comm'n, *Press Release: FTC Warns Marketers That Mobile Apps May Violate Fair Credit Reporting Act* (Feb. 7, 2012), https://www.ftc.gov/news-events/news/press-releases/2012/02/ftc-warns-marketers-mobile-apps-may-violate-fair-credit-reporting-act.

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marketed on a subscription basis to job recruiters and others as an employment screening tool. The FTC determined that that collection of information constituted a consumer report and that Spokeo was a CRA subject to FCRA.[119] The FTC also settled with two other data brokers who allegedly sold "consumer reports," compiled using public record information, to employers and landlords without taking reasonable steps to make sure that they were accurate as required by FCRA.[120] The FTC has enforced FCRA against entities only where it alleges the entity is a CRA, and it has done so consistently. FCRA enforcement history demonstrates no uncertainty around the scope and applicability of FCRA.

CDIA believes that there are any number of data brokers operating today that likely are knowingly providing data to entities that use the data for a FCRA-defined purpose while not following any of the FCRA requirements. But the Bureau can bring enforcement actions against those entities without wholesale (and unlawful) changes to FCRA.

4. The Proposed Rule Is Bad Policy.

Even without the numerous, fatal legal defects in the Proposed Rule, the Bureau still should not finalize it because it is bad policy.

Most importantly, if finalized, the Proposed Rule would substantially disrupt law enforcement and antifraud efforts. The Proposed Rule would make it harder—if not impossible—to provide fraud detection and prevention products. The only possible approach under FCRA would be to obtain the consumer's written instructions, which would not only be difficult to obtain when fraud detection products are leveraged, but attempting to do so may undermine the thing the data companies are trying to prevent. Additionally, imposing maximum possible accuracy procedure standards to data used in fraud detection and prevention products is not the appropriate standard for effective fraud prevention, where one needs to consider a broader swath of data to look for indicia of fraud.

Credit header data is *not* data used for marketing; instead, its uses are essential to the public interest.[121] For example, "Social Security numbers . . . play a critical role in identifying and locating missing family members, owners of lost or stolen property, heirs, pension beneficiaries, organ and tissue donors, suspects, witnesses in criminal and civil matters, tax

[119] *United States v. Spokeo, Inc.*, No. 2:12-cv-5001 (C.D. Cal. June 12, 2012), https://www.ftc.gov/legal-library/browse/cases-proceedings/1023163-spokeo-inc.

[120] Fed. Trade Comm'n, *Press Release: Two Data Brokers Settle FTC Charges That They Sold Consumer Data Without Complying With Protections Required Under the Fair Credit Reporting Act* (Apr. 9, 2014), https://www.ftc.gov/news-events/news/press-releases/2014/04/two-data-brokers-settle-ftc-charges-they-sold-consumer-data-without-complying-protections-required.

[121] The privacy and security of credit header data is regulated by various provisions of the Gramm-Leach-Bliley Act. *See*, *e.g.*, 15 U.S.C. § 6802.

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evaders, and parents and ex-spouses with delinquent child or spousal support obligations."[122] Other beneficial uses of credit header data that fall outside of the FCRA-defined permissible purpose list include:

- investigating violent crimes without the delay and inefficiency of waiting for a warrant or court order;
- locating missing and exploited children and to investigate human trafficking;[123]
- helping to locate parents who have evaded child support enforcement;[124]
- helping to proactively identify and locate victims of natural disasters;
- verifying the applications of low-income consumers needing access to vital government benefits, like the Supplemental Nutrition Assistance Program ("SNAP") benefits[125] and healthcare coverage;
- expediting the reunification of lost assets with rightful beneficiaries;[126]
- reducing the risk of identity theft as it is used by financial institutions to comply with Know Your Customer guidelines;

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[122] *See generally*, *Hearing on Enhancing Social Security Number Privacy: Before the Subcomm. on Social Security of the House Ways and Means Comm. Subcom. on Social Security*, June 15, 2004 (107th Cong.) (statement of Prof. Fred H. Cate, Indiana University School of Law).

[123] In November 2020, a missing 15-year-old girl in Austin, Texas "was one of nearly 200 children who've been safely recovered through the [National Center for Missing & Exploited Children's] ADAM Program." The Automated Delivery of Alerts on Missing Program was built by the NCMEC's "long-time partner" and CDIA member, LexisNexis Risk Solutions. NCMEC Blog, Revolutionizing the Search For Missing Kids, Nov. 20, 2020. For many kidnappings, investigations often begin with a list of suspects that match a vehicle or are registered sex offenders within the vicinity. Credit header data allows investigations to quickly identify suspects that have a relationship with the kidnapped child and are in the area.

[124] Association for Children for Enforcement of Support reports that public record information provided through commercial vendors helped locate over 75 percent of the "deadbeat parents" they sought. *Information Privacy Act, Hearings before the Comm. on Banking and Financial Services, House of Representatives, 105th Cong., 2nd Sess. (July, 28, 1998) (statement of Robert Glass).*

[125] To determine eligibility for benefits and to weed out fraud in SNAP, applicants go through a certification process, which includes a check of both public and non-public information from private companies. Errors and fraud in SNAP "can add up quickly and create a serious payment accuracy problem for state." The "data matching and certification process may also provide information useful in detecting recipient application fraud." Randy Alison Aussenberg, *Errors and Fraud in the Supplemental Nutrition Assistance Program (SNAP)*, Cong. Research Service, Sept. 28, 2018, at 17-18, 23, and 29.

[126] The presence of an SSN increases the chance of locating a pension beneficiary from less than 8 percent to more than 85 percent. *Hearing on Protecting Privacy and Preventing Misuse of Social Security Numbers before the Subcomm. On Social Security of the House Comm. on Ways and Means*, May 22, 2001 (statement of Paula LeRoy, President, Pension Benefit Information).

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- use by sellers to prevent online purchase fraud and reduce the risk of consumer victimization or to ensure age-restricted content is not available to minors; and

- use by law enforcement to investigate crimes and to locate victims, witnesses, and fugitives.

In another of many examples, CDIA members offer fraud prevention and detection services to prevent fraud on businesses, consumers, and third parties. Fraud prevention and detection services may provide information on known fraudsters and fraud strategies and identify potential fraud risks based on comparing applicant-supplied data with data available from third-party sources. But fraudsters are always looking for new avenues to infiltrate systems and data, perpetuate identity theft, and create synthetic identities. Restricting the sharing of credit header data to only those permissible purposes under FCRA would eliminate the ability of fraud prevention companies and users of those services to detect and defend against fraud patterns, including synthetic identity fraud. For example, detecting fraud patterns requires the analysis of a network of information across multiple identities and sources of information. Limiting the analysis to only the credit header information in a particular consumer's file inherently limits the ability to detect potential patterns and associations indicative of fraud, such as multiple identities connected to the same address.

Similarly, many fraud products that leverage credit header information look for patterns in newly supplied application information in a way that is not consistent with the accuracy requirement under FCRA, but which products operate to protect consumers from identity theft. For example, these fraud products can identify where multiple persons are using the same Social Security number, where the same mobile telephone number is showing up associated with multiple, otherwise unrelated consumers, etc. If FCRA accuracy requirement were applied to these products, the products could only use information that has been verified to belong to the consumer—which would destroy the ability of the product to flag potential fraud.[127] FCRA's adverse action notification requirements also could educate and empower bad actors while creating more obstacles and confusion for legitimate victims of fraud.

Fraud detection and prevention services not only directly protect consumers and businesses, but by protecting consumers and businesses, also promote competition and help keep costs lower. Small businesses with fewer resources that rely on these services are disproportionately at risk for fraud, so ensuring the availability of fraud detection and prevention products supports small businesses and startups, furthering competition. Further, small businesses have fewer resources to build internal fraud detection and prevention tools, so they rely on third-party providers. Thus, restricting access to credit header information necessary to help businesses prevent identity theft and fraud would disproportionately impact smaller market

[127] One CDIA member estimates that the predictive value of current fraud modeling tools declines by 32% when using only FCRA-compliant data.

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participants. In addition, decreasing the ability to detect fraud will lead to greater credit and fraud losses, with these increased risks and associated costs passed to consumers and small businesses.

Subjecting credit header data to the requirements of FCRA would have downstream effects that harm consumers. For example, if credit header information is considered a consumer report, it may be subject to state security freeze laws, which in turn means that the credit header information will not be available for basic consumer authentication absent a consumer lifting the freeze. Therefore, businesses would be forced to require consumers to lift their security freeze each time the business needs to authenticate the consumer. This could serve as a deterrent to consumers to place a security freeze in the first place, exposing them to increased chances of experiencing fraud.

Additionally, if credit header information is considered consumer report information, businesses will be forced to use alternative, outdated and less comprehensive, sources of data, such as public records, to verify the identity of their customers. Public records may include real estate transaction records, criminal records, tax liabilities, civil liens, sex offender registries, bankruptcies, and other forms of information made publicly available usually by a state or local agency. Not every consumer has a public record. As a result, a business could see a significant decrease in the number of consumers that the business is able to validate, which in turn could lead to consumers seeing a significant increase in the amount and type of personally identifiable information that they must prove on their own (*e.g.,* presentation of driver's license, current utility bill, Social Security card) to enter into any number of transactions.

Furthermore, given the higher rate of fraud in certain vulnerable populations, the removal of credit header information from available means of identity verification and other uses not covered by FCRA likely will affect the underserved, the elderly, and younger consumers including students, military members, and consumers of lower-socioeconomic statuses. One CDIA member conducted a study to evaluate the impact that eliminating credit header data from the account opening process would have on consumers. According to that study, identity can only be confirmed without credit header data for 86% of consumers, versus 99% when using credit header data. Worse, the potential customers who would be most impacted by the change are younger consumers (especially those aged 18 to 21), as well as applicants who are African American, Asian/Pacific Islander, and Hispanic.

This effect would be exacerbated for consumers who do not have alternate forms of identification, such as a driver's license or state-issued identification document. According to the Department of Justice, "at least one-third of identity theft victims live in lower-income households."[128] According to the FTC, "about a third (385,590) of reports [in the calendar year 2022] that included age information came from people 60 and older, and their reported losses

[128] Greene, Sara S., *Stealing (Identity) From the Poor*, *Minnesota Law Review* https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=4343&context=mlr#:~:text=Results%20from%20the%202016%20Department,a%20problem%20for%20several%20years. (2021) [internal citation removed].

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totaled more than $1.6 billion. Because the vast majority of frauds are not reported, these numbers include only a fraction of older adults harmed by fraud."[129] The FTC has also suggested that "servicemembers are experiencing highly disproportionate instances of theft from their financial accounts compared to the general population."[130]

But antifraud measures are not the only areas that will be negatively impacted by the Proposed Rule. Finalizing the Proposed Rule would also result in substantial disruption in other ways. Shipping carriers rely on credit header data to ensure that packages go to the correct address. Auto insurance claims investigations rely on credit header data to fight fraud, as well as process claims quickly by efficiently locating parties and witnesses. Neither of these activities are a "permissible purpose" under FCRA, so both would be impacted negatively by restricting credit header information.

There also are a number of entities that provide important services in the consumer reporting ecosystem that have long been viewed not to be consumer reporting agencies and that may be impacted by any attempt by the CFPB to rewrite the statutory definitions. For example, many lenders utilize software through which they obtain and assess data from a variety of sources: the consumer (through an application); consumer reporting agencies; and other third parties (such as employers). The proposed definition of "assemble or evaluate" could turn companies that use these programs into consumer reporting agencies. Similarly, entities that obtain data from one source to retransmit it (without more) may fall within the definition of a consumer reporting agency.

Subjecting a loan origination system, for example, to FCRA could force the technology provider to drastically change their business model, as requirements like maximum possible accuracy standards would be imposed. Subjecting tech providers to accuracy standards could mean that the technology provider, and not the data source, nor the user, would be responsible for the accuracy of the data. It would also raise questions about whether a loan origination system may take adverse action against a consumer, if it knows—for example—what a credit grantor or investor's debt-to-income minimums are and calculates the applicant's ratios.

The Proposed Rule would have other harmful effects as well. For example, the "written instructions" provisions would likely prevent consumers from accessing products or services that they value. More generally, these provisions will introduce friction to the consumer's relationship with service providers. For example, the one-year limit on consent to use consumers' data will disrupt credit-monitoring services on which consumers rely. At a minimum it would require these consumers to re-execute consent every year, imposing costs on consumers in terms of time and annoyance. Worse would be an unintentional failure to renew consent,

[129] *See* FTC, *Protecting Older Consumers 2022-2023*, https://www.ftc.gov/system/files/ftc_gov/pdf/p144400olderadultsreportoct2023.pdf, p. 25 (Oct. 18, 2023).

[130] FTC, *Consumer Data Spotlight: Identity Theft Causing Outsized Harm to Our Troops*, https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2020/05/identity-theft-causing-outsized-harm-our-troops (May 21, 2020).

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which could have negative effects on the consumer's financial health. Consumers wishing to sign up for multiple products would need to execute multiple consents, even as part of the same overall transaction. None of this does anything to help consumers.

The Proposed Rule would also interfere with important research by limiting the use of aggregated and anonymized consumer data. Anonymized credit data is used by score developers and modelers to gain insight and train models. Financial institutions use anonymized credit data sets to evaluate their internal underwriting criteria, to research and develop products, to identify trends in consumer use of credit for product development and modification, to assess portfolios, and even to design prescreen campaigns (where identifiable data is subsequently shared pursuant to a permissible purpose).[131] In addition to facilitating research and testing environments, aggregated and de-identified data can be used to develop lending and other business strategies that ultimately benefit consumers. Subjecting such products to FCRA would harm consumers by stifling innovation and frustrating consumer choice. The Proposed Rule does not account for the valuable consumer benefits associated with these commercial use cases.[132] Instead, as before, it merely gestures at speculative and ill-defined consumer benefits.[133] Once again, that is both bad policy and a sure sign of unreasoned agency decision making.

5. The Implementation Period Should Be One Year.

If, despite the myriad issues documented above, the Bureau chooses to finalize the Proposed Rule, a one-year implementation period would be essential. Any number of changes would need to be made to the operations of CDIA members, including for some members implementing a full-scale FCRA compliance system where none existed before, renegotiating contracts to account for the new legal requirements, and similar steps. The added time is critical

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[131] Further, we note that in its 2014 report on data brokers, the FTC observed that marketing lists often identify consumers who share credit characteristics, but that fact alone did not turn such information into credit reports when used for non-FCRA marketing:

> Marketing lists identify consumers who share particular characteristics (e.g., all persons living with at least two children, all persons who are both women and own a specific car brand, people interested in diabetes, and households with smokers in them). The client identifies the attributes that it would like to find in a consumer audience, and the data broker provides a list of consumers with those attributes. A client, for example, can request a list of consumers who are "Underbanked" or "Financially Challenged" in order to send them an advertisement for a subprime loan or other services.

FTC Data Broker Report at p. 28. The FTC went on to note that "[e]ven though these categories may implicate creditworthiness, the use of data about a consumer's financial status in order to send the consumer targeted advertisements is generally not covered by FCRA, unless the advertisements are for certain pre-approved offers of credit [i.e., an FCRA purpose]." Id. at p. 25 at n. 58.

[132] *See* 89 Fed. Reg. at 101441–42 (discussing other potential consumer costs).

[133] *See id*. at 101440 (assuming that, because "clarifying that consumer information that has been de-identified, whether through aggregation or other means, may constitute a consumer report … could limit the sharing and sale of consumers' data," that provision is beneficial to consumers).

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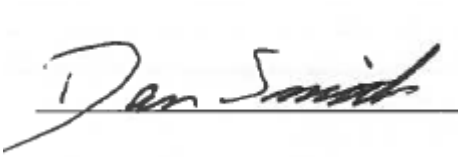
to ensure the transition is smooth and does not result in unintended negative consequences for consumers.

* * *

We appreciate the opportunity to comment on the CFPB's NPRM. As set forth above, the Proposed Rule has a number of fatal defects, both legal and factual. Although we recognize that this proposed rulemaking arises from concerns about the proliferation of data brokers and the broader data ecosystem that operates outside the requirements of FCRA, a rule under FCRA is not the appropriate vehicle to address those concerns.

We urge the CFPB not to adopt the Proposed Rule.

Sincerely,



Dan Smith
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