*Submitted via electronic mail*
October 30, 2023

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

**Re: FTA Comment on the CFPB's Outline of Proposals and Alternatives Under Consideration Related to the Consumer Reporting Rulemaking**

The Financial Technology Association ("FTA") appreciates the opportunity to comment on the Consumer Financial Protection Bureau's ("Bureau" or "CFPB") outline of proposals and alternatives under consideration (the "Outline")[1] related to its consumer reporting rulemaking, for the purposes of the panel recently convened under the Small Business Regulatory Enforcement Fairness Act ("SBREFA").

FTA champions the transformative role of financial technology for American consumers, businesses, and the economy. Representing industry leaders, FTA elevates fintechs' power to increase competition and drive financial innovation through responsible products and services. As our members' voice in Washington, FTA advocates for the modernization of regulation to support greater access to financial services.

A core pillar of FTA's effort to advance consumer-centric financial services development in the U.S. is ensuring modern regulatory frameworks that recognize and foster the benefits of financial technology-driven innovation and accommodate new models within the regulatory perimeter. FTA's members include furnishers and users of consumer report information that will be affected by any potential rulemaking under the Fair Credit Reporting Act ("FCRA"). As a result, we appreciate this opportunity to highlight some of the ways that the proposals discussed in the Outline could drastically impact and impede how financial services providers operate and serve American consumers and small businesses, including by restricting access and curbing further consumer-centric innovation.

[1] Consumer Financial Protection Bureau, Small Business Advisory Review Panel for Consumer Reporting Rulemaking: Outline of Proposals and Alternatives Under Consideration (Sept. 15, 2023) [hereinafter "Outline"].

## I. Aggregated or Anonymized Data Should Not Constitute a Consumer Report and is Currently Used for Pro-Consumer Purposes

In the Outline, the Bureau states that it is considering proposals to clarify whether "aggregated" or "anonymized" consumer data constitutes a consumer report.[2] The Federal Trade Commission's ("FTC") 40 Years Report – longstanding guidance relied upon by both industry and the courts – makes it clear that 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.[3] Financial service providers use aggregated or anonymized consumer data to build more accurate credit underwriting models that foster a more inclusive credit ecosystem – a stated goal of the Bureau.[4] Further, it is common for providers to securely share anonymized data amongst themselves or consumer reporting agencies ("CRAs") for modeling, prescreening, product development, or portfolio evaluation purposes. If CRAs or other providers begin withholding such anonymized data, the quality of product offerings and underwriting models, already a concern of the Bureau and other regulators, may suffer and negatively impact access to products for consumers, especially those who have limited access to credit already. By unnecessarily targeting aggregated or anonymized data, the Bureau will undo years of progress in creating a more inclusive credit ecosystem and risk leaving consumers with less access to credit.

## II. Credit Header Data is Critical to Fraud Prevention Tools Used Throughout the Industry and Bears No Resemblance to the Definition of a Consumer Report Under the FCRA

The Bureau proposes to clarify the extent to which "credit header data" constitutes a consumer report.[5] In fact, the Bureau notes that the proposal it has under consideration would "likely reduce, perhaps significantly," a CRA's ability to sell or otherwise disclose credit header data without a permissible purpose.[6]

As the Bureau alludes to in the Outline, credit header data is a critical component in products specializing in identity verification processes that are used to detect and prevent identity theft and fraud or for purposes explicitly required by law, such as customer due diligence requirements

[2] Outline at 11.
[3] Federal Trade Commission, 40 Years of Experience with the Fair Credit Reporting Act at 20 (July 2011).
[4] *See, e.g.*, Consumer Financial Protection Bureau, *The Bureau is taking action to build a more inclusive financial system* (July 28, 2020), *available at* https://www.consumerfinance.gov/about-us/blog/bureau-taking-action-build-more-inclusive-financial-system/.
[5] Outline at 10.
[6] *Id.*

("CDD") under U.S. anti-money laundering ("AML") laws.[7] The Bureau voices concern about the sale of credit header data for commercial purposes, naming examples of use cases that would be deemed impermissible if treated as consumer reporting. However, the Bureau appears to be unaware of the collateral damage this potential change would produce within the financial ecosystem and the broader economy. Credit header data is a critical component of identity verification products, which are relied upon to detect and prevent identity theft and fraud in both financial and non-financial contexts.

If the Bureau determines that credit header data constitutes a consumer report, that determination not only has no basis under the FCRA, it will also meaningfully impede efforts to combat fraud and abuse. For example, fraud models are tuned based on this data to identify potential fraudulent actors. When these services are used, they return scores based on usage, velocity, and other factors that may indicate that the applicant is a fraudster. If this data were to be covered under the FCRA, coupled with customer dispute rights, it would have a detrimental impact on fraud models. These models are built to be dynamic over time and evolve as risks change, leveraging "credit header" data. In addition, the enhanced dispute mechanisms would give fraudsters the ability to "cleanse" data they have purchased for continued re-use. As a practical matter, there is no alternative source of data to turn to for the purpose of a reliable identity match.

The FCRA specifically states that a "consumer report" must bear on one of the seven enumerated characteristics.[8] Credit header data, consisting of identifying information such as names, addresses, social security number, and phone numbers,[9] does not bear on any of those seven characteristics – it is merely identifying information. Designating such information as a consumer report also creates situations where a user denying a consumer credit based on an identity verification failure would need to send adverse action notices under the FCRA. As discussed above, these notices may very well end up being sent to persons committing identity theft or other forms of fraud, giving them a playbook for how to better perfect their scams and opening up consumers to additional fraud risk. This is an untenable situation that will serve to benefit fraudsters and scammers, including by potentially rendering fraud models less effective, and cause further harm to consumers impacted by these schemes.

[7] *Id*. ("The CFPB is aware that some consumer reporting agencies sell credit header data for purposes not authorized under the FCRA, such as marketing or certain law enforcement purposes.")
[8] FCRA 603(d)(1) (*codified at* 15 U.S.C. § 1681a).
[9] Outline at 10.

## III. The CFPB Should Not Expand Dispute Rights Beyond the FCRA's Statutory Parameters

In the Outline, the CFPB states that it is considering proposals that would allow consumers to log systemic disputes with furnishers on behalf of similarly situated consumers and to seek "collective relief" from furnishers.[10] However, the Bureau does not define how many consumers must be affected for an issue to rise to a "systemic" level. The FCRA already requires furnishers to furnish accurately and to respond to disputes by individual consumers within a specified period of time.[11] This proposal for systemic investigation and relief appears to only serve the aim of providing consumers – and their attorneys – with a mechanism for class action relief for direct disputes. At the same time, there will be no practical way for a furnisher to ascertain whether an alleged "systemic" dispute is actually systemic, absent a significant investigation into the credit reporting of other persons who did not submit disputes. The existing dispute process under the FCRA is already the subject of large-scale abuse by credit repair organizations, who lodge huge volumes of form-letter, meritless disputes in an effort to overwhelm furnishers' ability to provide a timely response to disputes. Requiring a "systemic" investigation into every dispute will only put more power into the hands of these unscrupulous actors[12] and make it more difficult for furnishers to find and correct meritorious disputes.

The FCRA does not provide this kind of remedy. Rulemaking should not, either.

## IV. Existing Judicial Interpretations Provide Guidance as to Entities that Meet the FCRA's Definitions

FTA notes that while Regulation V has not been materially updated since rulemaking authority was transferred to the CFPB under Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), the courts have continued to interpret the FCRA as to how it applies to modern financial services. The SBREFA Outline suggests that while the Bureau gathers the evidence and information required to provide the basis upon which to amend Regulation V, the CFPB will also likely seek to clarify and codify existing law, which includes binding court decisions. This is critical to the success of more recent fintech entrants into the credit scoring space who are innovating for the benefit of consumers and fighting to increase transparency and competition with long-standing CRAs.

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[10] Outline at 16.

[11] *See, e.g.*, FCRA § 623(a)(1)(A), (b) (*codified at* 15 U.S.C. § 1681s-2(a)(1)(A)), (b)).

[12] This category could include fraudsters who have invested in stolen data, which can be "cleansed" and reused again following successful dispute campaigns.

These newer market participants did not exist when Regulation V was promulgated but have built their compliance programs relying upon decades of jurisprudence interpreting the FCRA. For example, under existing law sellers of software services do not "assemble and evaluate" consumer information or reports for purposes of FCRA liability.[13] This long-standing interpretation was recently reaffirmed by a District of Utah decision, *Gundersen v. Equifax Info. Servs* ("*Gundersen*"), that clarified that companies which provide credit scoring software tools are not subject to FCRA civil liability because, among other reasons, licensing of proprietary algorithms does not amount to "assembling and evaluating" consumer credit information.[14] *Gundersen* also reaffirmed the critical distinction, discussed above, that use of anonymized or de-identified consumer information for purposes of credit score modeling also failed to fall under FCRA liability as such information did not relate to any specific consumer.[15] These long-standing and bedrock principles help increase competition in the rapidly-evolving market for new credit scoring methods and software development. The Bureau should codify these principles in order to preserve the progress towards a level playing field for consumers who are ill-served by the market dominance of the established CRAs and their respective roles in credit scoring.

## V. Consumer-Permissioned Data Sharing Should Not be Considered "Assembling or Evaluating" Under the FCRA and Relevant Disclaimer Provisions Should Be Retained

Consumer-permissioned sharing is a critical component of the U.S. economy and allows fintech companies to offer consumers tailored and improved services. It is also an important tool for the unbanked and underbanked as it increases access to credit through identity verification, increases data sources, such as rental, utility, or tax payment history, and can facilitate no-fee salary advances. Finally, this technology also helps safeguard the financial system, including through enhanced fraud mitigation tools facilitated by robust identity verification capabilities.

We support the CFPB's work to formalize these rights in regulation under Section 1033 of the Dodd-Frank Act and look forward to engaging with the Bureau on its recently released notice of proposed rulemaking under this section. However, as raised in our recently submitted letter where

[13] *See* supra n. 3.
[14] *Gundersen v. Equifax Info. Servs*., LLC, 2023 WL 4677067, __ F. Supp. 3d __, at **2-3 (D. Utah Jul. 21, 2023). *See also, e.g. Weidman v. Federal Home Loan Mortgage Corp.*, 338 F. Supp. 2d 571 (E.D. Pa. 2004) (finding that Freddie Mac's provision of Loan Prospector software to lenders satisfied "joint user" exception to FCRA liability as software used information provided by credit bureaus and lenders to render credit underwriting recommendations to lenders); cf. CFPB, "What is the difference between a credit report and a credit score?", (last revised Sep. 1, 2020) (explaining that credit scores are calculated based on information in a consumer report and that scores "can differ depending on which credit reporting agency provided the information" used for scoring by the creditor) *available at* https://www.consumerfinance.gov/ask-cfpb/what-is-the-difference-between-a-credit-report-and-a-credit-score-en-2069.
[15] Gundersen at **4-5

we joined with other trades to request that the Bureau extend the comment deadline for its Outline, we have not had sufficient time to properly consider how these proposals interact with the CFPB's 1033 proposal, so the below represents conspicuous areas of concern.

The Bureau's outline suggests that consumer-permissioned sharing could be captured under the FCRA's "assembling or evaluating" prong. It states, "[d]ata brokers that facilitate consumer-authorized data sharing by accessing consumer information held by data providers and communicating it to third party data recipients are typically engaged in activities that constitute "assembling or evaluating" consumer information under existing precedent; thus, where they otherwise satisfy the definition of "consumer reporting agency," they are subject to the FCRA."[16]

As the CFPB clarifies the terms "assembling" and "evaluating," it should preserve the mere passing of consumer information between entities via an intermediary as outside the scope of a consumer reporting agency. Merely summarizing, or reiterating data about a consumer, even in a different format but without adding any insight or additional information, should not be considered "assembling" or "evaluating," particularly when it is customer-authorized. Inappropriately capturing mere transmission activity would have significant impacts for the industry and impose substantial operational costs on covered firms, particularly those who only pass information on. Instead, we believe that the definition of "assembling" should be tailored to achieve the FCRA's purpose of ensuring data accuracy in the context of credit reporting. In other words, data aggregators that merely transmit data should be excluded because they are not in a position to verify or correct the data. In addition, data inferences that do not require "assembly" should be excluded from the FCRA, given that it does not reflect on the accuracy of the underlying data. Finally, retaining such data should not be considered "assembly" where the retained data is not transmitted together.

The CFPB's outline also signals that consumer information provided to users will be considered a "consumer report" regardless of whether the data aggregator knew or should have known the user would use it for an FCRA-covered purpose. In particular, it suggests that disclaimers about limitations on data uses will no longer be sufficient to avoid FCRA liability. According to the FCRA's definition of a "consumer reporting agency," an entity must be regularly engaging in the practice of assembling or evaluating consumer information for the "purpose of furnishing consumer reports" to third parties.

Eliminating a data aggregators' ability to disclose that the data provided should not be used for FCRA purposes will result in unnecessary compliance costs, since the potential CRA would need to implement FCRA processes just in case the data is used for a FCRA purpose, which they have

[16] Outline at 10.

no control over. In the alternative, a data aggregator would need to implement robust controls and monitoring to ensure that the data isn't used for a FCRA purpose, which is also burdensome. To mitigate these unnecessary consequences, we recommend that the CFPB remove this proposal in any formal rulemaking.

## VI. The CFPB Should Ensure Consistency with Overlapping Rules and Rulemakings and Narrow the Definition of Data Broker in Any Future Rulemaking

Government agencies have long recognized a separation between data brokers and other types of entities and have adopted narrower definitions of data broker than are set forth in the CFPB's Outline. For example, in California, "data broker" refers to a business that knowingly collects and sells to third parties the personal information of a consumer with whom the business does not have a direct relationship.[17] In Vermont, a "data broker" is a business, or unit or units of a business, separately or together, that knowingly collects and sells or licenses to third parties the brokered personal information of a consumer with whom the business does not have a direct relationship.[18] In both cases, these definitions of data broker are narrower than what is set forth in the Outline. As the Bureau continues its rulemaking effort, we request that it seek to harmonize its approach with established standards to assist entities with implementation.

Lack of cohesion and consistency across and between relevant rules dealing with the treatment and use of data could result in confusion, uncertainty, duplication and gaps. This is particularly true when applied to the Bureau's Section 1033 rulemaking. While we continue to study the nuances of the interplay of both the Section 1033 and FCRA rulemakings on consumer-permissioned data, further alignment between these rulemakings will provide covered entities with greater certainty on the potential impacts of both rules and allow them to more precisely provide feedback to the Bureau on those impacts, which is important given the different rulemaking stages of these proposals.

With the above in mind, we would encourage the CFPB to align its approach to defining data broker with the statute's remit and various legal precedents by defining it as an entity that sells,

[17] *See* Cal. Civ. Code § 1798.99.80. "Data broker" does not include any of the following: (1) A consumer reporting agency to the extent that it is covered by the federal Fair Credit Reporting Act (15 U.S.C. Sec. 1681 et seq.); (2) A financial institution to the extent that it is covered by the Gramm-Leach-Bliley Act (Public Law 106- 102) and implementing regulations; and (3) An entity to the extent that it is covered by the Insurance Information and Privacy Protection Act (Article 6.6 (commencing with Section 791) of Chapter 1 of Part 2 of Division 1 of the Insurance Code).

[18] *See* 9 V.S.A. § 2430. The definition expressly excludes entities that engage in developing or maintaining third-party e-commerce or application platforms or providing publicly available information related to a consumer's business or profession. It also excludes any one-time or occasional sale of assets of a business as part of a transfer of control of those assets that is not part of the ordinary conduct of the business; or a sale or license of data that is merely incidental to the business.

resells, or licenses data only and is covered within the scope of the FCRA's focus on the furnishing of accurate and reliable credit information. We also would recommend a clear exemption for consumer-permissioned data as such activities were not contemplated by the FCRA and such entities would be directly covered by any final Section 1033 rule.

Such an approach would make the application of the definition more workable and predictable for covered entities and ensure that no conflicts arise with already established legal precedents, while more closely adhering to the statute's remit. Ultimately, the focus of the FCRA and its implementation is on consumer report users and the credit reporting agencies who generate those reports; we encourage the CFPB to focus on those aspects in any future rulemaking.

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FTA appreciates this opportunity to comment on the Outline and the Bureau's proposals regarding a potential FCRA rulemaking. The proposals contained within the Outline would affect a very broad spectrum of financial technology companies. If we can provide additional information on the issues raised herein, please contact the undersigned at penny@ftassociation.org.

Sincerely,

Penny Lee
President and Chief Executive Officer
Financial Technology Association