U.S. Chamber of Commerce

1615 H Street, NW
Washington, DC 20062-2000
uschamber.com

March 5, 2025

Comment Intake—Protecting Americans from Harmful Data Broker Practices (Regulation V)
Docket No. CFPB-2024-0044
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 U.S. Chamber of Commerce ("Chamber") appreciates the opportunity to submit comments to the Consumer Financial Protection Bureau ("CFPB") regarding its Proposed Rule on Protecting Americans from Harmful Data Broker Practices (Regulation V) (the "Proposed Rule").[1]

As enumerated below, we believe that the CFPB should withdraw the Proposed Rule for the following reasons:

- The Proposed Rule would harm consumers and other stakeholders.
- The Proposed Rule would exceed the CFPB's legal authority.
- The CFPB should work with its regulatory partners to achieve its goals in this field through the enforcement of existing laws and regulations.

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The Proposed Rule would significantly and irrevocably alter the use of data in the marketplace and the financial markets. It would cause harm to consumers and other stakeholders by heavily restricting or eliminating efforts to provide key services to consumers, including fraud prevention and detection and identity theft programs. The Proposed Rule would also significantly increase compliance costs, especially for entities that would be deemed a Credit Reporting Agency ("CRA") for the first time under the Proposed Rule. In addition to its harmful impacts, the Proposed Rule

[1] *See* CFPB, *Proposed Rule; Protecting Americans from Harmful Data Broker Practices (Regulation V)*, 89 Fed. Reg. 101402 (Dec. 13, 2024), https://www.federalregister.gov/documents/2024/12/13/2024-28690/protecting-americans-from-harmful-data-broker-practices-regulation-v (hereinafter "*Proposed Rule*").

exceeds the CFPB's statutory mandate under the Fair Credit Reporting Act ("FCRA") by ignoring the text of the statute and running afoul of First Amendment protections. And while the FCRA certainly incorporates privacy protections for consumer reporting data, the FCRA is not a broad privacy law in the way the CFPB attempts to use it in the Proposed Rule. For these reasons, the CFPB should withdraw the Proposed Rule.

Consumer data plays a critical role in the modern economy. Financial institutions and other companies use consumer data in fraud prevention efforts. Companies use consumer data to verify the identities of consumers seeking to make transactions in the marketplace, to provide consumers more tailored products, and to reduce risk for consumers and the market. Law enforcement uses consumer data for purposes that include locating missing children and arresting suspected criminals. Data brokers, including those offering products and services *not* regulated by the Fair Credit Reporting Act ("FCRA"), play an important role in providing the products and services. In doing so, data brokers help consumers receive better-tailored and lower-priced products and services across a wide range of contexts—all while subject to a range of different regulatory schemes.

The CFPB now would impose its own vision of how the data economy should operate, disregarding both market forces and the policy judgments reflected in governing law. To do so, it would unmoor the FCRA from its intended purpose and transform it into a general-purpose privacy statute by, among other actions:

- Greatly expanding the circumstances in which types of activities conducted by a data broker and third-party use of information provided by a data broker will subject that data broker to the FCRA;
- Substantially expanding the types of information to be treated as a "consumer report" subject to the FCRA; and
- Imposing unworkable requirements upon certain customer disclosures and consents.

These and other significant changes contemplated by the Proposed Rule would significantly disrupt the data broker marketplace and harm consumers. Unintended consequences of the Proposed Rule would include increased fraud, limitations on lawful uses of data by law enforcement, a less seamless transaction experience, and higher costs for consumers. Further, the Proposed Rule would have a chilling effect on the willingness of creditors to extend credit, resulting in reduced competition and a reduction in credit access. These impacts are incompatible with the purpose of the CFPB to "ensur[e] that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[2]

[2] 12 U.S.C. § 5511(a).

Moreover, the Proposed Rule would overstep the CFPB's rulemaking authority under the FCRA. The CFPB may prescribe rules "as may be necessary or appropriate to enable the [CFPB] to administer and carry out the purposes and objectives of" the FCRA.[3] However, this authority does not allow the CFPB to override the statutory text of the FCRA or otherwise act contrary to Congress's intent.[4] Because the Proposed Rule ignores the purpose of the FCRA and contradicts its plain text, it would not be upheld if challenged in court.[5]

I. The Proposed Rule would harm consumers and other stakeholders.

Consumers derive enormous benefits from data-driven services. Data that are not considered "consumer reports" under the FCRA, including certain credit header data, are used in numerous ways to protect consumers, improve their access to the financial system, and to deliver them cutting-edge products across sectors. The communication and use of such data, when done in accordance with existing law and regulation, is critical to the ability of companies to develop fraud, risk, and identity tools to protect consumers and businesses. Without the exchange of data as permitted under the FCRA, Regulation V, the Gramm-Leach-Bliley Act ("GLBA"), and other laws, companies would not be able to provide these important services in a cost-effective way. Ignoring these benefits, as well as substantial concerns raised during the rulemaking process, the Proposed Rule would make it significantly harder, if not impossible, to offer products and services that rely on data that is not considered a "consumer report" under the FCRA and Regulation V. As a result, the Proposed Rule would result in significant negative consequences and harm consumers.

a. The Proposed Rule would negatively impact tools used to prevent, detect, and prosecute financial and non-financial crime.

Consumer data plays a significant role in preventing, detecting, and preventing both financial and non-financial crimes. Among other uses, consumer data is used as a part of identity verification, the detection and prevention of fraud, compliance with Know Your Customer ("KYC") requirements, and supporting the efforts of law enforcement to prevent crime and locate missing persons.

Expanding the definition of "consumer report" in Regulation V to include all credit header data, credit history data, credit score data, debt payment data, income and financial tier data, and potentially de-identified data, as in the Proposed Rule, could prevent financial institutions from using the data for the essential anti-fraud

[3] *Id.* §§ 5512(b)(1), 5481(12), 5481(14).
[4] 5 U.S.C. § 706(2)(B).
[5] *See, e.g.*, *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 629-30 (2012).

purposes for which it is used today. Credit header data, for example, plays an important role in preventing fraud by helping companies determine whether certain data have been associated with previous fraudulent applications, bankruptcies, or reported identity theft. The protections afforded by existing identity theft and fraud prevention and detection tools would be weakened if all credit header data were required to be treated as a consumer report. Significantly, the CFPB suggests that companies could achieve these theft and fraud prevention goals by collecting data from alternate sources, but fraud prevention and detection are not permissible purposes under the FCRA. As a result, the Proposed Rule would significantly weaken existing fraud prevention and detection tools. Further, alternate sources of data simply do not have the same accuracy, comprehensiveness, or timeliness as credit header data. To the extent businesses and financial institutions need to utilize data from alternative sources that may not be as accurate, the Proposed Rule could also frustrate the consumer experience and result in increased fraud.

Members of Congress have previously highlighted the potential negative impacts of treating all credit header data as consumer reports. In a letter to CFPB Director Rohit Chopra in response to the outline required under the Small Business Regulatory Enforcement Fairness Act ("SBREFA") in advance of the Proposed Rule, six Representatives expressed concern with the impacts of extending the FCRA to apply to credit header data.[6] Specifically, the representatives stated that "[w]ithout a dynamic trusted source of information – such as credit header data – . . . due diligence programs would be less reliable, and many would need to be rebuilt from the ground up."[7] The letter also identified challenges that would especially impact small lenders that serve rural and underserved communities and generally lack the data and resources of larger institutions.

Consumer data, particularly the types of data like credit header data that would become "consumer reports" under the Proposed Rule, also play an important role in broader law enforcement uses. Examples include the data tool that helped law enforcement to stop a mass shooting in San Bernardino in real time, preventing further loss of life,[8] as well as the use of consumer data by the National Center for Missing and Exploited Children to help resolve over 1,300 missing child cases in 2022 alone.[9] The CFPB cites preventing crime and national security threats as major

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[6] Brad Sherman et. al, Letter to The Honorable Rohit Chopra (July 30, 2024).
[7] *Id.*
[8] *See* Doug Sanders, *San Bernardino police officers honored by Thomson Reuters for response to Dec. 2 terrorist attack*, San Bernardino Sun, Mar. 2, 2016, at https://www.sbsun.com/2016/03/02/san-bernardino-police-officers-honored-by-thomson-reuters-for-response-to-dec-2-terrorist-attack/.
[9] *See* Jeb Hensarling & Brian Johnson, *Why does the CFPB want to undermine a key tool of law enforcement?*, American Banker, Nov. 27, 2023, at https://www.americanbanker.com/opinion/why-does-the-cfpb-want-to-undermine-a-key-tool-of-law-enforcement.

purposes for the rule, yet the Proposed Rule would prevent or substantially restrict such uses of data to prevent and detect crime.

b. The CFPB's proposals on de-identified data will impair underwriting.

Treating de-identified data as "consumer reports" subject to the FCRA, as the CFPB proposes, would also harm consumers. Financial service providers often rely on de-identified data to use and validate models, including models that predict a consumer's ability to repay credit. With access to de-identified data either prevented or substantially restricted, financial service providers may no longer be able to utilize certain models, or such models may become significantly less accurate. Lacking the insights received from these models, financial service providers in turn may not be able to assess risk as accurately. As a result, some financial service providers may not be able to extend credit safely and soundly to consumers, especially those who do not have a traditional positive credit history. As a practical matter, reasonably cautious parties will be forced to treat de-identified data as consumer reports, largely depriving them of the ability to make important use of such data. These impacts are likely to reduce credit access for unbanked and underbanked consumers, again contrary to the CFPB's purpose and stated goals.

c. The Proposed Rule would eliminate valuable products and services from the marketplace.

The Proposed Rule would impose significant costs and compliance burdens on a broad range of entities, including entities that are already considered CRAs, entities that would become CRAs under the Proposed Rule, and other businesses that rely on consumer data. The Proposed Rule would significantly restrict the use of credit header data; data on credit history, credit score, debt payments, or income or financial tier; and potentially deidentified data for uses such as fraud protection, identity theft, law enforcement, advertising, credit model valuation, and more. The costs and restrictions that would be imposed by the Proposed Rule are likely to drive some companies out of business and would reduce the products and services offered in the marketplace. Many products and services that benefit consumers rely on data that is not considered "consumer reports" under the FCRA and Regulation V.

Pulling this data within the scope of the FCRA would subject the entities that provide it to significant new compliance costs and risks. For example:

- The Proposed Rule would massively increase compliance costs for data brokers that would become CRAs under the Proposed Rule. It would be an enormous—and possibly insurmountable—challenge for these entities to put in place the operational or compliance systems necessary

to comply with the FCRA, including its strict requirements related to furnishing consumer reports upon request and handling disputes.

- Entities that furnish consumer data would experience significant compliance costs to try to ensure that direct recipients and downstream users of data do not use the data in a way that would make the data a "consumer report."
- Companies that interact with entities that are newly deemed CRAs—or that may be deemed CRAs—would experience significant compliance costs to determine whether the recipient of their information is, or is not, now subject to the FCRA. Unless the CFPB routinely updates its current list of CRAs to be comprehensive and exhaustive,[10] industry stakeholders will be subject to intolerable uncertainty as they transact with other entities that might be CRAs under the Proposed Rule's broad definitions.
- The new written instruction requirements would also impose significant incremental costs on all CRAs and users of consumer reports. In particular, CRAs and users of consumer reports would need to reformat their FCRA disclosures and obtain a new consent from a consumer each year to obtain consumer reports in conjunction with long-term products and services, such as credit monitoring.
- The requirement that written instructions are valid for only one year would cause consumer harm because consumers will be at risk of losing access to certain products that they understood they could indefinitely access, such as credit monitoring.
- Further, the requirement to specify the CRA where the consumer report will be obtained will restrict the flexibility of users of consumer reports to freely shop for consumer reports. The user would be bound to use the CRA identified in the consumer consent or obtain new consents from every single consumer that uses ongoing services such as credit monitoring. Some of these services are currently offered to consumers free of charge, and service providers may stop offering such services or impose a price for them because of the resources required to obtain new consents for every consumer. The result would reduce competition within the marketplace and drive up prices for consumers and businesses.

These increased compliance requirements would force many entities to invest in costly compliance programs or exit the market. This, in turn, would reduce the availability of relevant data and increase its price. A broad range of industry stakeholders, as well as the law enforcement customers they serve, would feel the

[10] CFPB, List of Consumer Reporting Companies (Feb. 7, 2025), https://www.consumerfinance.gov/consumer-tools/credit-reports-and-scores/consumer-reporting-companies/,

brunt of these negative consequences. Smaller financial institutions and other small businesses in particular may feel the impact to the extent that they can no longer affordably access key data. In this way, the Proposed Rule also may make it harder for smaller institutions to compete against larger institutions.

Consumers again would bear the brunt of these changes. Consumers currently enjoy a seamless functionality because of safe data-sharing among stakeholders in the consumer data ecosystem. Under the Proposed Rule, it will be more difficult and time consuming for a consumer acting lawfully to open a bank account, send a payment, receive a loan, or use a credit monitoring service. The CFPB's suggested alternatives for obtaining certain data through alternate data sources or under exceptions in the FCRA ignore the realities of how current data tools, their operators, and their user's function. Obtaining consumer data through other methods would be impossible in some instances, or so time-consuming and difficult that current data tools could not function in the same way they can today. Consumers would feel the impact of the loss of these essential products and services, including through increased instances of fraud, inaccurate and/or delayed identity verification, and increased cost of financial products and services.

d. The Proposed Rule will harm smaller financial institutions and small businesses.

The Proposed Rule fails to seriously address many concerns identified during the review required under the Small Business Regulatory Enforcement Fairness Act ("SBREFA"). The SBREFA required the CFPB to collect the advice and recommendations of small entity representatives concerning how the proposal might increase the cost of credit for small entities and if alternatives exist that might accomplish the stated objectives of applicable statutes while minimizing any such costs and burdens. The CFPB failed to consider alternatives here. Instead, the CFPB continued on its predetermined course, without serious consideration of the comments received on the costs and negative impacts.

For example, small entities explained during the SBREFA process that the outlined rule would have a significant economic impact on a substantial number of small entities, including compliance costs so high that they might be forced to cease operations entirely.[11] The CFPB fails to cite any alternatives it considered to address these concerns. Instead, the Proposed Rule merely states that the CFPB does not have data to quantify these costs and requests comment. The CFPB ignored the comments submitted by small entities and others on such costs and chose not to make any adjustments or offer any alternatives in the Proposed Rule. Nor did the

[11] *Proposed Rule* at 101,438.

CFPB conduct any independent research on these potential costs, despite learning of them during the SBREFA process.

The CFPB's Section 1022(b) analysis also fails to meet the statutory requirements. For one, even though the CFPB acknowledges in its Section 1022(b) analysis the numerous compliance, administrative, and litigation costs that would occur due to the Proposed Rule, the CFPB refuses to attempt to quantify them. The analysis thus fails to meaningfully consider the true costs and impacts of the Proposed Rule, much less whether those costs are outweighed by the purported benefits. These impacts were not unknown to the CFPB, which in addition to the Small Business Review Panel, received thousands of comments in response to a Request for Information and the SBREFA outline it published. Yet, the CFPB went forward with its Proposed Rule without sufficiently researching the potential costs of the Proposed Rule or considering alternatives that could mitigate costs.

The Section 1022(b) analysis also ignores the requirement to consider the impact of proposed rules on financial institutions with total assets of $10 billion or less and the impact on consumers in rural areas. The CFPB states that, as to financial institutions with total assets of $10 billion or less, it does not expect the Proposed Rule will have significantly different impacts from the impacts to other financial institutions. Similarly, the CFPB states that it expects that the impact to consumers in rural areas will be the same on average as to consumers that do not live in rural areas. Yet, the CFPB received comments from representatives and in response to the SBREFA outline, pointing out that small lenders, including many that serve rural and underserved communities, could face significant challenges in detecting fraud and meeting regulatory requirements without access to reliable credit header information.[12] Even if these lenders would be able to obtain credit header data pursuant to a permissible purpose under the Proposed Rule (which is not necessarily the case), they will be less able to withstand price increases and data availability issues that will arise from the compliance costs and overall impacts to the exchange of data under the Proposed Rule. The representatives specifically requested the CFPB recognize these challenges and the legal obligations of small lenders to comply with identity theft, fraud, and KYC requirements when finalizing a rule. The CFPB failed to even acknowledge these particular concerns for small lenders and rural communities.

II. The Proposed Rule would exceed the CFPB's legal authority.

The Proposed Rule ignores the purpose of the FCRA, as established by Congress, as well as specific limitations within the statute's text. It also violates the First Amendment. As a result, the Proposed Rule would be challenged successfully in court if finalized in its proposed form, leading to unnecessary cost and regulatory

[12] Brad Sherman et. al, *Letter to The Honorable Rohit Chopra* (July 30, 2024).

uncertainty.[13] The CFPB consequently must not advance the Proposed Rule in its current form.

a. The Proposed Rule would rewrite the FCRA, ignoring Congressional intent.

Congress enacted the FCRA to apply specific rules to a particular set of entities and use cases focused on credit reporting. The statutory purpose of the FCRA is focused on credit reporting and the mechanism for investigating and evaluating the creditworthiness, credit standing, credit capacity, character, and general reputation of consumers.[14] In the FCRA, Congress identified its purpose as "requir[ing] that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer."[15] Congress did not intend the FCRA to apply broadly to all consumer information, nor to apply to all data brokers and aggregators who may touch certain consumer information. The Proposed Rule would impermissibly expand the scope of the FCRA, contrary to Congress's intent.

Through the Proposed Rule, the CFPB would impermissibly expand the definition of "consumer reporting agency" to apply to persons Congress never intended to subject to the FCRA. Specifically, the Proposed Rule defines "assembling and evaluating" in the context of the definition of a "consumer reporting agency" to mean collecting, bringing together, gathering, or retaining; appraising, assessing, making a judgment regarding, determining or fixing the value of, verifying, or validating; or contributing to or altering the content of such information. This definition could be used to assert any entity merely having possession of consumer data is a CRA if there is an associated financial benefit to the entity, including data aggregators and data warehouses. And the CFPB asserts that an entity would "assemble or evaluate" information if it uses "algorithms" to display information, even though at least one court has concluded that a company does not assemble or evaluate information when it uses an algorithm to present information to a user in a specific order.[16] Not only does this expansion contradict the letter of the FCRA, but it also poses significant practical concerns. These entities simply do not function in a way that works with the FCRA's requirements. And the FCRA was not designed to apply to such entities.

It is also unclear whether the Proposed Rule could apply to financial service providers when enacted alongside the CFPB's final rule on Personal Financial Data

[13] 5 U.S.C. § 706(2)(B). *See also*, *Loper Bright Enterprises v. Raimondo,* 603 U.S. 369 (2024).
[14] 15 U.S.C. § 1681(a).
[15] *Id.* § 1681(b).
[16] *Sandofsky v. Google LLC*, 2021 WL 2941128, at *3 (D. Mass. 2021).

Rights.[17] Under that rule, financial service providers will be required to make consumer data available upon request—specifically, information about transactions, costs, charges, and uses—to third parties in accordance with a consumer request for that data. Under the Proposed Rule, information about a consumer's credit history and debt payments would be considered a consumer report. The CFPB leaves unclear whether a financial services provider complying with the Personal Financial Data Rights rule could become a CRA under the Proposed Rule. Expanding the FCRA to apply so broadly that financial service providers acting in the normal course of their business would become CRAs was certainly not the intent of Congress in enacting the FCRA.

The Proposed Rule also mischaracterizes the FCRA as a far-reaching data privacy law. To be sure, the FCRA has a data privacy component, but it is narrowly focused on consumer reporting that impacts a consumer's eligibility for credit, insurance, employment, and other permissible purposes under the FCRA. The CFPB has not been vested with general authority by Congress to broadly regulate privacy. Establishing broadly applicable privacy requirements is a major question reserved for Congress. The CFPB should not attempt to apply such a specifically targeted statute beyond its bounds, both because it lacks legal authority to do so and because poor policy outcomes are sure to follow any attempt to impose the highly tailored FCRA framework as a rule of more general application.

The data broker industry is highly regulated, subject to the authority of multiple federal and state regulators. The CFPB plays an important, but limited, role in the regulation of certain segments of the data broker industry given its responsibility to implement the FCRA and the CFPA. However, the CFPB's authority under the FCRA and the CFPA does not reach every company that sells any consumer data for any purpose. Indeed, Congress has declined to expand the CFPB's authority in this manner despite having numerous opportunities to do so. The CFPB should respect this congressional intent.

b. The Proposed Rule would ignore clear textual limitations Congress imposed in the FCRA.

The CFPB's departure from the purpose of the FCRA is reflected in the Proposed Rule's conflict with key provisions of the FCRA. For example, instead of following the statutory elements of the interrelated definitions of "consumer report" and "consumer reporting agency," the CFPB selectively interprets certain words and phrases used in these definitions, without giving meaning or effect to other statutory language. This cherry-picking of the statutory language results in a Proposed Rule

[17] This rule is currently being challenged in federal court. See *BPI v. CFPB*, Complaint, 5:24-cv-00304-DCR (E.D. Ky. Oct. 23, 2024).

that is arbitrary and capricious and contrary to established judicial interpretations of the FCRA. While the CFPB has general rulemaking authority to prescribe rules "as may be necessary or appropriate to enable the [CFPB] to administer and carry out the purposes and objectives of" the FCRA,[18] that authority does not extend to rewriting the FCRA.[19] The Proposed Rule consequently would exceed the CFPB's authority to promulgate regulations implementing the FCRA.

1. The Proposed Rule would rewrite the statutory definition of "consumer report."

A "consumer report" is defined in the FCRA as "communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living (the "enumerated factors") which is used or expected to be used or collected in whole or in part for" a permissible purpose—i.e., "the purpose of serving as a factor in establishing the consumer's eligibility for—(A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other purpose authorized under section 1681b."[20]

The Proposed Rule disregards the limitation in the definition of "consumer report" that the communication of the information must be collected, used, or expected to be used for a permissible purpose. The Proposed Rule instead mandates that four categories of information (credit history, credit score, debt payments, or income or financial tier) are *always* consumer reports, regardless of the actual purpose for which the information was collected, used, or expected to be used. The CFPB may not ignore the limitations in the statutory definition of "consumer report" in this manner.

The CFPB similarly ignores limitations imposed by the FCRA by mandating that credit header data collected by a CRA in whole or in part for the purpose of preparing a consumer report is a consumer report, regardless of whether the information is used or expected to be used for FCRA permissible purposes and whether the data bears on any of the enumerated factors. In doing so, the Proposed Rule contradicts decades of guidance from the Federal Trade Commission ("FTC"), which implemented Regulation V prior to the creation of the CFPB, and prior court decisions. Notably, the FTC guidance provides: "When viewed against the FCRA's statutory purpose of protecting the privacy of personal credit information, we find that the 'bearing on' limitation, set forth in Section 603(d) excludes from the FCRA's definition of consumer report certain predominantly identifying information including: name, mother's maiden name,

[18] *Id.* §§ 5512(b)(1), 5481(12), 5481(14).
[19] 5 U.S.C. § 706(2)(B).
[20] 15 U.S.C. § 1681a(d)(1).

generational designator, telephone number, and social security number."[21] Courts have agreed with this guidance for decades.[22] The definition of "consumer report" put forward by the Proposed Rule clearly contradicts the FCRA. However, even if the definition of "consumer report" in the FCRA was ambiguous, the CFPB's interpretation in the Proposed Rule is not the best reading of the statute, particularly when compared to interpretations in court decisions and FTC guidance. As a result, the CFPB's interpretation will not be afforded deference. Rather, courts would likely concur with prior court decisions and FTC guidance on the definition and overturn the Proposed Rule.[23]

The three alternatives proposed with respect to de-identified data also would rewrite how "consumer reports" are treated by the FCRA. As one option, the CFPB proposes to treat all de-identified consumer report data as a consumer report if it was collected for the purpose of preparing a consumer report. This proposal to treat de-identified consumer report data as a consumer report contradicts the FCRA's requirement that a consumer report must relate to a specific consumer. The CFPB does not have authority to excise statutory elements to expand the scope of the

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[21] *In re Trans Union Corp.,* FTC Docket No. 9255 (Feb. 10, 2000), at https://www.ftc.gov/sites/default/files/documents/cases/2000/03/transunionopinionofthecommission.pdf. *See also* Fed. Trade Comm'n, *40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations* (July 2011), at https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf ("The demographic and identifying information (e.g., name, address) generally is not considered 'consumer report' information under the FCRA, unless it is used for eligibility determinations. See *In re Trans Union Corp.*, 2000 FTC LEXIS 23 (2000), *aff'd sub nom. Trans Union Corp. v. FTC*, 245 F.3d 809, *reh. denied*, 267 F.3d 1138 (D.C. Cir. 2001), *cert. denied*, 122 S. Ct. 2386 (2002); *FTC v. TRW, Inc.*, Civil No. 3-91-CV2661-H (N.D. Tex. 1993) (consent decree); *Dotzler v. Perot*, 914 F. Supp. 328 (E.D. Mo. 1996)."); 16 C.F.R. Part 600, App., § 603(4)(F) (FTC Commentary to Regulation V) ("A report limited solely to the consumer's name and address alone, with no connotations as to credit worthiness or other characteristics, does not constitute a 'consumer report,' if it does not bear on any of the seven factors.").

[22] *See, e.g.*, *Individual Reference Servs. Grp., Inc. v. F.T.C.*, 145 F. Supp. 2d 6, 17 (D.D.C. 2001), *aff'd sub nom. Trans Union LLC v. F.T.C.*, 295 F.3d 42 (D.C. Cir. 2002) ("The FCRA does not regulate the dissemination of information that is not contained in a 'consumer report.' In 2000, the FTC stated that the 'credit header' data at issue in this litigation—the name, address, social security number, and phone number of the consumer—was not subject to the FCRA because it 'does 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.'"); *Bickley v. Dish Network, LLC*, 751 F.3d 724, 729 (6th Cir. 2014) (holding that header information is not a consumer report); *Gray v. Experian Info. Sols. Inc.*, No. 8:23-CV-981-WFJ-AEP, 2023 WL 6895993, at *3-4 (M.D. Fla. Oct. 19, 2023) ("Courts, generally, have held that personal identifying information such as a consumer's name and social security number does not itself constitute a credit report but only 'header information.'"); *Ali v. Vikar Mgmt. Ltd.*, 994 F. Supp. 492, 497, 499 (S.D.N.Y. 1998) ("Address information on a consumer, for example, is not a consumer report because it is not information that bears on any of the characteristics described in 15 U.S.C. § 1681a(d)(1).").

23 *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

regulation far beyond what Congress intended to regulate with the FCRA. And again, the Proposed Rule contradicts established FTC guidance that de-identified data is not a consumer report if it is not reasonably linkable to the consumer.[24]

The CFPB also proposes to treat consumer reporting agencies as "furnish[ing]" a consumer report even when an agency does not communicate any consumer data to a third party. This proposal ignores the requirement that a "consumer report" must involve a "communication" of information by a consumer reporting agency. It also ignores the ordinary meaning of "furnish": to "supply" or "provide" something.[25] When an entity "facilitates a person's use of the consumer report for that person's financial gain" but does not actually transfer information, the entity has not supplied or provided the consumer report at all—and therefore has not furnished it, contrary to the Proposed Rule.

2. The Proposed Rule would rewrite the statutory definition of "consumer reporting agency."

A "consumer reporting agency" is defined in the FCRA as a person who "*regularly* engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers *for the purpose* of furnishing consumer reports to third parties."[26] The Proposed Rule ignores the qualifiers that a CRA must regularly engage in such activities for the purpose of furnishing consumer reports. Rather, the CFPB proposes to treat data brokers as CRAs based on a single misuse of data by a single recipient for an FCRA permissible purpose, regardless of whether the data broker intended or even knew that the information would be used for such a purpose.

The CFPB's approach contradicts settled case law. Courts have considered the statutory definition of "consumer reporting agency" and confirmed that, per the ordinary meaning of the statutory text, "[a] 'consumer reporting agency' is an entity that *intends* the information it furnishes to constitute a 'consumer report.'"[27] The Ninth Circuit has specifically held that the fact lenders use a proprietary software in eligibility determinations does not make the data in the software a consumer report or the software provider a CRA under the plain text of the FCRA.[28] The court confirmed

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[24] Fed. Trade Comm'n, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* iv (Mar. 2012), at https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.
[25] *Furnish*, Black's Law Dictionary (6th ed. 1990).
[26] 15 U.S.C. § 1681a(f).
[27] *Kidd v. Thomson Reuters Corp.*, 925 F.3d 99, 104 (2nd Cir. 2019) (emphasis added).
[28] *Zabriskie v. Federal Nat'l Mortg. Assn.*, 940 F.3d 1022, 1027-28 (9th Cir. 2019).

that an entity that assembles or evaluates consumer information is only a CRA if it did so with the intention of furnishing consumer reports to third parties.[29]

c. The Proposed Rule would violate the First Amendment.

The Proposed Rule would violate First Amendment protections that apply to free speech. As explained in the Software Information Industry Association's comment letter responding to the CFPB's earlier Request for Information, data brokers undertake a range of activities that are protected by the First Amendment.[30] Notably, the Supreme Court has explained that "the creation and dissemination of information is speech for First Amendment purposes."[31] For that reason, states have recognized that information in the public domain is protected speech under the First Amendment when enacting privacy laws.

The CFPB similarly may not impose statutory restrictions upon the collection and dissemination of information that is in the public domain. The Proposed Rule would take this impermissible step, however, by making credit header data a "consumer report" subject to certain restrictions under the FCRA. Similarly, the Proposed Rule would provide that credit history, credit score, debt payments, or income or financial tier are always consumer reports when communicated by CRAs. These provisions would apply regardless of whether the information is in the public domain or from where the CRA obtained the information. As currently drafted, the CFPB's Proposed Rule consequently would run afoul of the First Amendment.

III. The CFPB should work with its regulatory partners to achieve its goals in this field through the enforcement of existing laws and regulations.

To justify the Proposed Rule, the CFPB has claimed that data brokers and information about consumers are largely unregulated. This characterization is misleading. Data brokers are already subject to numerous legal requirements. While business models and relevant legal frameworks differ across the data broker industry, laws governing data brokers include the FCRA, the FTC Act, the CFPA, and the GLBA at the federal level, as well as privacy and other statutes in the individual states. Credit header data, for example, are already subject to clear regulation under the GLBA and Regulation P. Separately, there are national security legal requirements that govern transfers of data outside the U.S.

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[29] *Id.*

[30] SIIA, *SIIA Urges CFPB to Protect Data Brokers and First Amendment Rights* (July 14, 2023), at https://www.siia.net/siia-urges-cfpb-to-protect-data-brokers-and-first-amendment-rights/.

[31] *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011).

Similarly, existing guidance on de-identified data is reasonably implemented to prevent violations of consumer privacy. This guidance provides that de-identified data is not a consumer report if it is not reasonably linkable to the consumer.[32] The guidance further provides data is not reasonably linkable if a company "(1) takes reasonable measures to ensure that the data is de-identified; (2) publicly commits not to try to reidentify the data; and (3) contractually prohibits downstream recipients from trying to re-identify the data."[33] These are workable standards that appropriately balance the interests between consumer privacy and the beneficial uses of de-identified data.

The CFPB should work with its regulatory partners to enforce existing law if it believes that data brokers are illegally using consumer reports for impermissible purposes. While it is true that the CFPB does not alone have authority over all data brokers, that limitation does not justify the CFPB amending Regulation V in ways that would fundamentally and irrevocably change the markets and how data are used and exchanged. Rather than finalize a rule that would have numerous negative consequences, the CFPB should withdraw the Proposed Rule and work with its regulatory partners to use existing laws, regulations, and guidance to enforce the law against bad actors.

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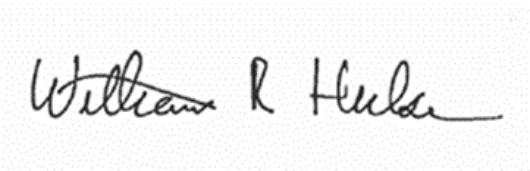
We thank you for your consideration of these comments and would be happy to discuss these issues further.

Sincerely,



Bill Hulse
Senior Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce

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[32] Fed. Trade Comm'n, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* iv (Mar. 2012), at https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.
[33] *Id.*