U.S. Chamber of Commerce

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November 3, 2023

Comment Intake Request
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Small Business Advisory Review Panel for Consumer Reporting Rulemaking – Outline of Proposals and Alternative Under Consideration

To Whom It May Concern:

The Center for Capital Markets Competitiveness ("CCMC") at the U.S. Chamber of Commerce ("the Chamber") appreciates the opportunity to submit comments to the Consumer Financial Protection Bureau ("CFPB") regarding its Outline of Proposals and Alternative Under Consideration for a "Consumer Reporting Rulemaking" under the Fair Credit Reporting Act (FCRA) (the "Outline"). Our comments reflect the significant implications of the Outline for our membership, including the small businesses we represent.

The Outline suggests the CFPB intends to pursue an expansive rulemaking that could fundamentally change how data is used for financial and non-financial purposes. Such an expansive rulemaking could have significant, and potentially severe, implications for how businesses use data to meet the needs of consumers.

We encourage the agency to give more attention to the concerns of small businesses. The CFPB correctly acknowledges that the rule may have a significant economic impact on a substantial number of small entities but devotes insignificant discussion to identifying options for limiting the burden imposed on small entities, including indirect economic impacts. The Outline recognizes three categories of "small entities" that could be impacted by the proposals in the Outline: (1) Entities that meet (or would meet, if the proposals were adopted) the definition of consumer reporting agency in FCRA section 603(f), (2) Entities that furnish information to consumer reporting agencies, and (3) Creditors that use medical debt collection information in making credit eligibility determinations.[1] The Small Business Regulatory Enforcement Fairness Act ("SBREFA") requires the CFPB to collect the advice and recommendations of small entity representatives ("SERs") concerning how the proposals under consideration 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 Outline does not consider the impact on small entities that rely on information included in consumer reports. According to a survey of small businesses in 2022, 86 percent

[1] The SBREFA did not ask about other key impacts of the rule on small businesses, such as the impact on medical providers of changes to medical debt reporting.

believed technology helped them survive during the challenges of the pandemic.[2] After the pandemic, small businesses face a new set of challenges like worker shortage and inflation, and increasingly rely on new tools like artificial intelligence ("AI"). Nevertheless, calls for regulations of AI, privacy, and technology platforms could profoundly reduce on small businesses' ability to reap the benefits of digital tools and innovations that help them operate and compete. If the consumer reporting system is saddled with new costs and limitations, including by expanding it to scope in "data brokers," small businesses may suffer:

- 75 percent of small businesses say tech platforms helped them compete with larger firms.
- 23 percent of small businesses are using AI and another 39 percent plan to use it.
- 74 percent said limiting use of data would harm operations.[3]

The U.S. Chamber will begin by discussing a few process-related concerns before turning to reactions to the proposed changes to consumer reporting practices.

I. Process

The CFPB was correct in its decision to employ the SBREFA before proposing a rule, but the deadline to comment on the outline was unnecessarily brief which may impact the type of specific feedback required to consider the interests of impacted parties.[4] Federal law provides that, prior to issuing a proposed rule that could have a significant economic impact on a substantial number of small entities, the CFPB must consult with small entities that are likely to be subject to the regulation.[5] The CFPB only 30 days to comment on a vague outline that proposes to substantially shift the boundaries of the FCRA.[6]

a. No Proposed Reasonable Alternatives

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[2] US Chamber of Commerce Technology Engagement Center, "Empowering Small Business: The Impact of Technology on U.S. Small Business" (September 2023), https://americaninnovators.com/wp-content/uploads/2023/09/Empowering-Small-Business-The-Impact-of-Technology-on-U.S.-Small-Business.pdf

[3] Ibid.

[4] Request for a Comment Extension on the Small Business Advisory Review Panel for Consumer Reporting Rulemaking Outline of Proposals and Alternatives Under Consideration . (2023, October 6). Retrieved from https://www.centerforcapitalmarkets.com/wp-content/uploads/2023/10/FCRA-SBREFA-Outline-Comment-Extension-Request_FINAL.pdf

[5] See Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104-121, tit.II, 110 Stat. 857 (1996) (codified at 5 U.S.C. 609) (amended by Dodd-Frank Act section 1100G); the Regulatory Flexibility Act, 5 U.S.C. 601 et seq

[6] See letter "Request for a Comment Extension on the Small Business Advisory Review Panel…" (October 6, 2023) , available at https://www.centerforcapitalmarkets.com/wp-content/uploads/2023/10/FCRA-SBREFA-Outline-Comment-Extension-Request_FINAL.pdf?# "The comment period for the Small Business Advisory Review Panel for the Personal Financial Data Rights rulemaking under the Dodd-Frank Act Section 103315 was 90 days (released October 27, 2022, comments due January 25, 2023), the comment period for the Small Business Advisory Review Panel for the Automated Valuation Model (AVM) rulemaking16 was 79 days (released February 23, 2023, comments due May 13, 2023), and the comment period for the Small Business Advisory Review Panel for the Small Business Lending Data Collection rulemaking under the Dodd-Frank Act Section 107117 was 90 days (released September 15, 2020, comments due December 14, 2020)."

The Outline offers no meaningful alternatives for comment despite acknowledging that the SBREFA process is intended to consider options to mitigate negative consequences for small entities. The Outline also fails to identify obvious costs associated with proposed rule changes. Instead, the Outline poses numerous questions to small entities about the proposal and requests input on how definitions capture additional companies in its scope, the costs associated with the proposal, and how it could affect business models. These are certainly important questions the CFPB should be considering, but the Outline falls short in its claim to be offering alternatives. This requires small entities participating in the SBREFA process, and other commenters such as the Chamber, to hypothesize what the CFPB is considering as proposals, much less alternatives. This compromises the utility of the SBREFA process in this rulemaking.

b. Impact of the Personal Financial Data Rights Rule on the Definition of Consumer Reports and Furnishers

On October 19, 2023, the CFPB issued a proposed rule citing its under authority under Section 1033 of the Dodd-Frank Act ("Section 1033 proposal").[7] The Section 1033 proposal would "require depository and non-depository entities to make available to consumers and authorized third parties certain data relating to consumers' transactions and accounts; establish obligations for third parties accessing a consumer's data, including important privacy protections for that data; provide basic standards for data access; and promote fair, open, and inclusive industry standards." We are still in the process of analyzing the Section 1033 proposal , but as currently proposed, it suggests that a financial institution would be required, upon the request of a consumer, to share information with a third-party. Based on the Outline for the FCRA rulemaking, the Section 1033 proposal could make almost any financial institution a "data broker" when it provides "consumer information provided to a user [an "authorized third-party"] who uses it for a permissible purpose…regardless of whether the data provider knew or should have known that the user would use it for that purpose" and therefore a CRA, even if the financial institution does not intend to engage in covered activities, frustrating the optional reporting regime central to the FCRA.

The CFPB should finalize its Section 1033 proposal Dodd-Frank Act ("Personal Financial Data Rights") before issuing a notice of proposed rulemaking based on the Outline given its overlapping application. It is extremely difficult to comment on the Outline without knowledge of how the Section 1033 proposal will be finalized. The Section 1033 proposal would require a financial institution to share a customer's information with a third-party if requested by that customer. As we wrote in our response to the CFPB's data broker Request for Information: sharing this information could cause entities subject to the Section 1033 proposal's data sharing requirements to unwillingly be scoped into the definition of "data broker,"[8] and therefore a "consumer reporting agency." If consumer information is considered

[7] CFPB Proposes Rule to Jumpstart Competition and Accelerate Shift to Open Banking. Consumer Financial Protection Bureau. (2023, October 19). https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-jumpstart-competition-and-accelerate-shift-to-open-banking/

[8] Request for a Comment Extension on the Small Business Advisory Review Panel for Consumer Reporting Rulemaking Outline of Proposals and Alternatives Under Consideration (2023, October 6). Retrieved from https://www.centerforcapitalmarkets.com/wp-content/uploads/2023/10/FCRA-SBREFA-Outline-Comment-Extension-Request_FINAL.pdf?

a consumer report once shared pursuant to a Section 1033 request, a financial institution provider the data could also be implicated as a furnisher despite the lack of intent. It is not clear under what conditions sharing of data under the Section 1033 proposal may overlap with potentially expanded requirements under an FCRA rulemaking. In order to make the most informed and thoughtful comments on the Outline we need to have a final Section 1033 rule. Concurrent, overlapping rulemakings on a compressed timeline poses a significant risk that the final rules could be deemed arbitrary and capricious and that consumers will be caught in the middle without an informed, thoughtful and careful approach to how their data is treated.

c. Enhanced transparency through ANPR

Finally, we would respectfully request the CFPB issue an Advanced Notice of Proposed Rulemaking (ANPR) before proceeding to a proposed rule based on this Outline. This is a wide ranging and complex topic and ANPRs are common and warranted in these situations. Any FCRA rulemaking is likely to have broad consequences across the economy and it would be a mistake to implement anything without the most deliberate and careful process. In recent years, the CFPB issued an ANPR before moving to propose a proposed rule on credit card late fees, and before issuing the Section 1033 prposal.

The SBREFA process provides an important opportunity to receive input from small entities about how a rule might increase the cost of credit or if the stated objectives can be completed with alternative means. This Outline, however, offers few alternatives, and does not commit the CFPB to what is contemplated in the Outline for provisions that do not apply to small entities. Therefore, an opportunity to comment on the Outline is inherently limited if the CFPB chooses to propose a rule that addresses other issues.

Further, an ANPR would provide necessary information on whether and how obligations under the Section 1033 proposal apply in the consumer reporting ecosystem.

II. Response to the SBREFA Outline

a. Scope of Rulemaking and Limitations of CFPB's Authority Under the FCRA

The Outline and public statements about the rulemaking appear to mischaracterize the scope and purposes of the FCRA. The purpose of the FCRA is "to require 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, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information."[9]

The Outline characterizes the FCRA as a far-reaching data privacy law and states "[o]ne of the FCRA's principal goals is to protect consumer privacy," however, the CFPB has not been vested with general authority by Congress to broadly regulate privacy. This is a major question reserved for Congress.[10] The Outline points to the Congressional findings and

[9] 15 U.S. Code § 1681 - Congressional findings and statement of purpose
[10] West Virginia v. Environmental Protection Agency, 142 S. Ct. 2587, 2609 (2002)

statement of purpose of the FCRA that notes, in the context of accuracy and fairness of consumer reporting, that *"There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's privacy."*[11] But this finding does not support the CFPB's attempt to exercise broad rulemaking authority over privacy policy and data use, and does not appear to appreciate the upstream or downstream consumer impacts of redefining "consumer reporting agency" or "consumer report.".

b. Data Brokers

In its application of the FCRA to data brokers, the Bureau should adhere to the statutory elements in the definitions of consumer report and consumer reporting agency. The CFPB recognizes that its authority regarding data is limited to companies that are subject to the FCRA,[12] which generally includes consumer reporting agencies, businesses that furnish information for inclusion in consumer reports ("furnishers"), and users of consumer reporting information. The collection, use, and disclosure of data by data brokers that is not being used for decisioning has traditionally been outside the agency's purview, and rightly so, as decisioning purposes are the touchstone of the FCRA. However, the Outline suggests that the agency is nevertheless attempting to extend its reach to such disclosures. The Outline uses a new term – "data broker" – that if used as broadly as proposed would significantly expand what constitutes a "consumer report" and "consumer reporting agency" but fails to rely on, much less reference, applicable authority under the FCRA. The term "data broker" does not appear anywhere in the FCRA despite it appearing 57 times in the Outline.

While it may be the case that "some data brokers are consumer reporting agencies under current law," the Outline offers no definition of data broker before jumping to proposals it is considering "to address the application of the FCRA to data brokers" and expanding the scope of which entities are covered well beyond current law. In our response to the CFPB's Request for Information on Data Brokers and Other Business Practices Involving the Collection and Sale of Consumer Information we strongly recommended that the CFPB "be more clear about what it means by 'data broker' in any further regulatory action it takes relating to the data broker market . . . the CFPB should carefully adhere to its statutory authority in clarifying the term 'data broker.'"[13] Any regulation of "data brokers" by the CFPB must remain grounded in the FCRA, and if the CFPB believes the FCRA should be updated this would require an act of Congress.

The CFPB proposes to treat data brokers as a consumer reporting agency based on the type of data shared regardless of use and regardless of the other potential legal requirements to share that data. This proposal to treat a data broker as a CRA without regard to the purpose for which the data is collected, used, or expected to be used, is outside the

[11] 15 U.S. Code § 1681 - Congressional findings and statement of purpose

[13] Hulse, B. (2023, July 12). Request for Information, Consumer Financial Protection Bureau; Data Brokers and Other Business Practices Involving the Collection and Sale of Consumer Information (88 Fed. Reg. 16,951-16,954, March 21, 2023) . Center for Capital Markets Competitiveness. US Chamber of Commerce. Retrieved from https://www.centerforcapitalmarkets.com/wp-content/uploads/2023/07/U.S.-Chamber-Comments_RFI_DataCollection_-Final.pdf

scope of the CFPB's statutory authority and contrary to public policy. The CFPB does not have the legal authority to re-write the statute and read the "purpose" out of the statutory definitions of "consumer report" and "consumer reporting agency."[14] Yet that is precisely what the CFPB proposes to do by deeming the sale of certain data by data brokers to be consumer reports "regardless of the purpose for which the data was actually used or collected," or expected to be used.

This proposal ignores the statutory definition of a "consumer report" which is the communication of information that has a bearing on one of the seven enumerated characteristics[15] and requires that information be used for a permissible purpose. Further, the proposal ignores legitimate reasons that information associated with eligibility determinations (such as payment history, income, and criminal records) may be shared outside the context of the FCRA.

The proposal would also unjustifiably hold a data broker strictly liable as a CRA, for activities unknown and/or potentially unworkable, regardless of the controls that the data broker put in place to prevent users from using information for an FCRA-permissible purpose. The increased cost of compliance of this approach increases the risk some data brokers would exit the market, reducing competition, and possibly eliminating information sharing that may be helpful to consumers and small business.

Finally, the proposals to expand the definitions of "consumer report" and "CRA" in the Outline could significantly disrupt the "pipelines" of the financial system. Generally, consumers enjoy a seamless functionality as a result of safe data-sharing among financial players in the consumer data ecosystem. An expansion of FCRA coverage could have unintended consequences that are disruptive to consumers seeking to obtain credit, open a deposit account, obtain a lease, rent a car at rates that align with the risks of issue credit, or any number of other activities that occur seamlessly today. In addition, the proposed changes could negatively impact consumer protections such as identity verification, anti-money laundering controls and fraud detection. Careful consideration of the impact any changes may have on consumers and the economy, intentionally or unintentionally, is required before revising the FCRA regulations.

c. Credit Header Data

The Outline proposes to treat "credit header" data as a "consumer report." Setting aside direct caselaw contrary to the proposal under consideration,[16] treating this information

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[14] 15 U.S.C. 1681a(d). "consumer report" is defined as the communication of information by a CRA that is "used, expected to be used, or collected in whole or in part for the *purpose* [emphasis added] of serving as a factor in establishing the consumer's eligibility for" certain enumerated permissible purposes, such as credit, insurance, or employment.
A "consumer reporting agency" is defined as a person that assembles or evaluates consumer information "for the *purpose* [emphasis added] of furnishing consumer reports to third parties."

[15] 15 U.S. Code § 1681a(d)(1)

[16] *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). ("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

as a consumer report would subject it to the panoply of requirements under the FCRA (e.g., accuracy requirements, restrictions on permissible purposes, dispute resolution requirements, and adverse action notices).

The Outline fails to identify *any* harms in existing market practices for credit header data and does not make note of the benefits to consumers under existing market practices. The Outline attempts to rationalize the proposal with an explanation for why "credit header" data should be treated as a "consumer report" given it is "more frequently used for eligibility determinations" and that it "may bear on a consumer's personal characteristics," but it does not explain why such a change is necessary or advisable, and runs contrary to existing caselaw. Credit header data is already subject to clear regulation under the Gramm-Leach-Bliley Act and Regulation P. Additionally, the Outline fails to provide any examples of how credit header data is used in eligibility determinations or why it must be deemed covered by the FCRA. Moreover, it is likely to create a chilling effect on the ability of businesses to obtain data that is critical to their ability to develop fraud, risk and identity tools to protect consumers and businesses.

Credit header data is used in numerous ways to protect consumers and improve their access to the financial system. Credit header data plays an important role in helping financial institutions prevent fraud. For example, some CRAs report on credit header data to help both financial institutions and businesses determine whether that data has been associated with previous fraudulent applications, bankruptcies, or reported identity theft. These protections would be weakened if credit header data were required to be treated as a consumer report. Businesses and financial institutions that rely on credit header data for identity verification purposes would need to institute new compliance programs that are not just more costly, but also could frustrate the consumer experience and could increase the incidents of fraud.

The treatment of credit header data described in the Outline would prohibit financial institutions from using it for the essential anti-fraud purposes for which it is used today. For example, financial institutions are required to comply with the Bank Secrecy Act's "Know Your Customer" requirements to protect consumers against identity theft and fraudulent activity such as opening an account in their name. It will be more difficult and time consuming for a consumer acting lawfully to open a bank account, send a payment, or receive a loan if it becomes more complicated or costly for a financial institution to confirm the consumer's identity.

d. Targeted marketing and aggregated data

The proposal also appears to fundamentally redefine what a consumer report is in an attempt to undermine targeted advertising. The Outline proposes capturing the use of consumer data to help with targeted advertising as a consumer report, even if CRAs do not

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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.' (Trans Union Index, Ex. F, In the Matter of Trans Union Corp., Docket No. 9255, Feb. 10, 2000, at 30.); 15 U.S.C. § 1681a(d)(1).")

provide the information directly to clients, providing only the marketing to the consumers themselves. And the Outline suggests redefining "consumer report" as it relates to aggregated or anonymized data. Declaring that aggregated and household level data should be considered a consumer report again ignores the plain meaning of the statute. Specifically, the FCRA defines "consumer" as "an individual," not household, or broader geographic levels.[17] If the CFPB believes the definition of "consumer" as used in the FCRA needs to be changed, this would require an act of Congress. Both proposals could upend marketing for products and services. Advertising is beneficial to consumers; it leads to more competitive markets, with lower prices and more product improvements. The CFPB provides zero explanation for how such a change would enhance consumer privacy (data is not transferred and aggregated or anonymized data is privacy protected), nor does it provide any justification for the significant increase in costs associated with providing pro-consumer marketing benefits, not does it cite the appropriate authority to do so.

e. Disputed Information in Consumer Reports

The Outline cites consumer complaint data on "Incorrect information on your report" and "Problem with a credit reporting company's investigation into an existing problem" to justify potential regulatory changes for disputes. But these consumer complaints do not tell the full story. These complaints may speak to accurate information that a consumer simply finds to be unfavorable. CRAs continuously strive to achieve maximum possible accuracy in the information included on consumer reports, and the CFPB should identify means for making this easier, not more difficult.

Consumers should be entitled to file legitimate disputes, but the system has increasingly become overwhelmed by illegitimate claims that are primarily advanced by a cottage industry of credit repair organizations. Credit repair organizations typically bombard credit bureaus with dispute letters in the hope of getting negative marks deleted, according to Andrew Pizor, a senior attorney at the National Consumer Law Center.[18] The CFPB's consumer complaint system does not distinguish whether disputes about consumer reports, as described above, are filed by third parties such as credit repair organizations or directly by consumers. The Chamber has previously recommended the CFPB label complaints filed by credit repair organizations to provide more transparency for the origins of this data and offers important context.

The Outline notes that "[c]onsumer complaints to the CFPB reflect how costly, ineffective, and time-consuming the consumer reporting dispute process can be for consumers," but fails to mention the cost this process imposes on CRAs and furnishers. The Outline cannot reasonably offer alternatives for limiting burdens on "small entities" given it fails to recognize the immense burden the dispute process imposes on the consumer reporting ecosystem.

f. Factual vs Legal Disputes

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[17] 15 U.S.C. § 1681a(c).

[18] Carrns, A. (2023, September 15). Beware Companies Selling Credit 'Repair' Services. https://www.nytimes.com/2023/09/15/your-money/credit-score-repair.html

The Outline indicates the CFPB is considering a proposal to codify its opinion on whether "legal" disputes are covered under the FCRA. The Outline argues that the FCRA "does not distinguish between legal and factual disputes" and therefore does not exempt legal disputes from its requirements that consumer reporting agencies and furnishers must reasonably investigate disputes. This is an incorrect interpretation of the FCRA that has already been rejected by the majority of federal courts that have addressed the issue, would be entirely impractical to implement and duplicates existing avenues to resolve legal disputes in a way that increases costs to consumers. Legal disputes should be resolved by the appropriate court of jurisdiction or through mutually agreed to arbitration, if applicable.

The FCRA requires CRAs to guard against factual inaccuracies, not to resolve legal disputes that would require judicial disposition. The text, structure, history, and purposes of the FCRA all demonstrate that the statute requires CRAs to maintain reasonable procedures to assure factual accuracy, not to resolve legal disputes. Accuracy ordinarily involves whether information reflects correct and full facts—not whether the consumer has some legal defense to the debt. And, the First, Seventh, Ninth, Tenth, and Eleventh Circuits have held that a reporting agency's obligations extend only to "factually inaccurate information, as consumer reporting agencies are neither qualified nor obligated to resolve legal issues."[19] Even courts that have declined to adopt a bright-line distinction between law and fact have held that the FCRA is limited to questions that are "objectively and readily verifiable."[20] The Outline fails to acknowledge any such limitation; it would seemingly extend to any legal question, no matter how complicated—from "state foreclosure law interpretation disputes" to "contractual liability disputes."

The Outline's proposal to impose different obligations for legal disputes would create new compliance costs for both CRAs and furnishers. CRAs and furnishers would be required to have "reasonable procedures" to ensure the accuracy of consumers' credit files, including a process for resolving complex legal questions about whether the information in the file adheres to applicable law. For example, *DeAndrade* raised the question whether mortgage documents with an allegedly forged signature were nevertheless valid under the doctrine of ratification, 523 F.3d at 63, while *Denan* involved the enforceability of choice-of-law provisions and questions of tribal sovereign immunity, 959 F.3d at 295. The personnel responsible for reviewing and responding to disputed information in consumer reports are not trained to make legal judgments. To comply with this new mandate, CRAs and furnishers may find it necessary to significantly expand their in-house legal teams to ensure that legal disputes in credit reports are all reviewed by qualified lawyers. And the lawyers reviewing those reports would need to be trained in a host of disparate subject areas, so that they could spot and analyze legal issues on a wide range of issues. CRAs should not be forced to become arbiters of consumer contractual disputes or other legal issues.

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[19] *Denan v. Trans Union LLC*, 959 F.3d 290, 296-97 (7th Cir. 2020); *see also Losch v. Nationstar Mortgage LLC,* 995 F.3d 937, 946 (11th Cir. 2021); *Wright v. Experian Info. Sols., Inc.*, 805 F.3d 1232, 1242 (10th Cir. 2015); *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 891 (9th Cir. 2010); *DeAndrade v. Trans Union LLC*, 523 F.3d 61, 68 (1st Cir. 2008).

[20] *Sessa v. Trans Union, LLC*, 74 F.4th 38, 43 (2d Cir. 2023).

Additionally, the statute only allows for 30 days to resolve a dispute. Legal issues cannot be addressed in such a short timeframe; indeed, resolving disputed questions of law can take months or years for courts to disposition definitively. The FCRA's requirement that disputes be resolved in 30 days supports that the Act intended that a lender is required to resolve alleged factual inaccuracies under the Act and not resolve disputed legal questions. Requiring furnishers to resolve potentially complex legal questions in order to satisfy their statutory obligation to conduct a reasonable investigation will reduce the likelihood investigations are completed within 30 days, necessarily increasing the frequency of tradeline deletions to avoid violating the FCRA.

g. Systemic Disputes

According to the Outline, the CFPB is considering proposals concerning disputes that relate to systemic issues affecting the completeness or accuracy of data furnished to CRAs and included in consumer reports. Specifically, the CFPB is considering proposals that would address how furnishers and CRAs must investigate and address such systemic issues. The CFPB is also considering whether to provide consumers with a specific process through which they could notify a CRA or furnisher of possible systemic consumer reporting issues that affect other similarly situated consumers.

The Outline fails to define, much less describe in detail, what may constitute a "systemic dispute" or how they can be identified by furnishers or CRAs. Is this based on a total volume? A certain percentage? Qualitative characteristics? Consumers will be even less likely to recognize or appropriately categorize what is a "systemic dispute."

The proposal could cause furnishers to stop or limit providing information under the FCRA given the expanded risk of litigation that could result. Further, the establishment of reasonable policies and procedures, as already required by the FCRA, requires that relevant information be considered in ensuring accuracy of the data and updating of information discovering inaccuracies. According to the Outline, the purpose of the proposal is to "facilitate consumers' ability to receive collective relief from CRAs and furnishers that do not appropriately address systemic issues." This appears intended to expand the FCRA's private right of action to furnishers. It is unclear how furnishing accuracy will be enhanced by companies expending significant resources fighting nuisance private litigation suits. Private rights of action are typically an ineffective means of protecting consumers; rather, they enrich private parties, chill productive commercial activity, and cripple businesses.[21] For example:

- Private rights of action undermine appropriate agency enforcement and allow plaintiffs' lawyers to set policy nationwide, rather than allowing regulations to shape and balance policy protections.
- They can also lead to a series of inconsistent and dramatically varied, district-by-district court rulings.

[21] US Chamber of Commerce Institute for Legal Reform, "Ill-Suited Private Rights of Action and Privacy Claims" (July 2019), https://instituteforlegalreform.com/wp-content/uploads/2020/10/Ill-Suited_-_Private_RIghts_of_Action_and_Privacy_Claims_Report.pdf

- Private rights of action are routinely abused by plaintiffs' attorneys, leading to grossly expensive litigation and staggeringly high settlements that disproportionally benefit plaintiffs' lawyers.
- They also hinder innovation and consumer choice by threatening companies with frivolous, excessive, and expensive litigation.

There is a mountain of evidence to show that plaintiffs receive little when they win class action lawsuits, considering the judgment is divided among many and much goes to the lawyer. According to a 2015 CFPB study, the average class action award to consumers is only $32, while plaintiffs' lawyers take home nearly $1 million on average.[22] According to a report from the US Chamber of Commerce Institute for Legal Reform,Unfair Inefficient, Unpredictable: Class Action Flaws and the Road to Reform: one study of class action settlements from 2019-2020 found that "more than half of [class] settlement[s] on average went to attorneys or others who were not class members."[23]

Notably, furnishing of any consumer report information under the FCRA is entirely voluntary> Increasing the burdens and risks of furnishing could significantly reduce the information available in consumer reports, thus creating new challenges for businesses and consumers alike. Class action litigation is so expensive that many furnishers will likely opt to settle and delete information, regardless of its accuracy, rather than litigate even a frivolous or unfounded FCRA class action. Businesses, especially small businesses, could have less access to information. As a result, consumers could encounter fewer product options and/or higher prices.

III. Credit Repair Organization Oversight

The Outline conspicuously excludes any mention of credit repair organizations. Consumer reporting agencies and furnishers have continually expressed frustration about unscrupulous actions of credit repair organizations that both hurt consumers and undermine the integrity of the consumer reporting system. Credit repair organizations have been found to exploit consumers and have a troubled record of inundating furnishers and consumer reporting agencies with unsubstantiated disputes and duplicative claims about the accuracy of information in credit reports.

The Federal Trade Commission and Consumer Financial Protection Bureau have warned consumers about the risk of credit repair organizations and have taken action to prevent unlawful practices. The FTC warns consumers: "Maybe you've heard about credit repair companies and are wondering if they can help? Be careful: many are scams. Here's what you need to know about fixing your credit."[24] In August 2023, the CFPB entered into a

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[22] Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a), available at https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf

[23] Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform. US Chamber of Commerce Institute for Legal Reform. (2022, August). https://instituteforlegalreform.com/wp-content/uploads/2022/08/ILR-Class-Action-Flaws-FINAL.pdf

[24] Fixing Your Credit FAQs. Federal Trade Commission. (2021, June). https://consumer.ftc.gov/articles/fixing-your-credit-faqs

proposed settlement with a "credit repair conglomerate" that includes a $2.7 billion judgment against the companies.[25]

Instead of bringing more oversight to credit repair organizations, which would limit frivolous disputes and provide more bandwidth to improve accuracy in consumer reports, the Outline includes various proposals that create additional opportunities for them to undermine the integrity of the consumer reporting system and the accuracy of information included in consumer reports.

IV. Medical Debt Reporting & Risk-Based Pricing in Credit Underwriting

The CFPB is considering two proposals related to medical debt collection information. The Outline proposes to (1) revise Section 1022.30(d) of Regulation V, to modify the exemption such that creditors are prohibited from obtaining or using medical debt collection information to make determinations about consumers' credit eligibility (or continued credit eligibility); and, (2) prohibit CRAs from including medical debt collection tradelines on consumer reports furnished to creditors for purposes of making credit eligibility determinations.

The issues raised by the Outline undermine the principles of risk-based pricing by making relevant and factual data inaccessible, and therefore undermine both consumer protection and safety and soundness. The Chamber released a report in 2021 finding that recent calls for removing risked-based pricing in favor of a uniform pricing system will hurt, not help, underserved communities, the credit invisible, and consumers with subprime credit.[26]

The Outline states that, "The CFPB has long-standing concerns about the usefulness of medical debt collections tradeline information in predicting a consumer's creditworthiness" and points to research about the predictive value of this information. It would be inappropriate, and likely unlawful, for the CFPB to promulgate regulations based on what information it believes is "predictive." The FCRA focused on the accuracy of information, not whether that information is "predictive," a determination best left to market participants to evaluate and compete with appropriate financial products and services. If the CFPB were to adopt this approach, it would put itself into a position as a moral arbiter about what is "good" or "bad" debt – this is far outside the scope of whether the debt was legally issued.

The CFPB says the quiet part out loud in a recent speech by the agency's General Counsel and appears to reach a rulemaking conclusion without first eliciting or consider relevant comments from stakeholders: the agency simply does not like medical debt.[27] The

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[25] *CFPB Reaches Multibillion Dollar Settlement with Credit Repair Conglomerate*. Consumer Financial Protection Bureau. (2023b, August 28). https://www.consumerfinance.gov/about-us/newsroom/cfpb-reaches-multibillion-dollar settlement-with-credit-repair-conglomerate/

[26] Pham, N. D., & Donovan, M. (2021, Spring). The Economics of Risk-Based Pricing for Historically Underserved Consumers in the United States. The U.S. Chamber of Commerce. https://www.centerforcapitalmarkets.com/wp-content/uploads/2021/04/CCMC_RBP_v11-2.pdf

[27] Frotman, S. (2023, August 4). Prepared Remarks of Seth Frotman, General Counsel and Senior Advisor to the Director, at New Jersey Citizen Action Education Fund's 14th Annual Financial Justice Summit. Consumer Financial

CFPB is part of a "whole of government" approach to addressing issues it has identified regarding the cost of medical care, medical billing, and the total amount of outstanding medical debt in the U.S. These very well may be valid policy questions, but the CFPB proposals to use the FCRA to address the downstream effects of systemic questions about medical care stand to do more harm than good within the market it regulates. Medical debt impacts credit calculations and to the extent policymakers believe there are issues about the amount or fairness of debt, it should be addressed at the point of origin within the medical care system by the appropriate authorities, not the CFPB.

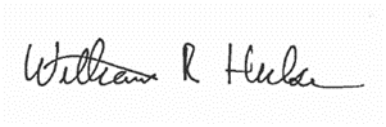
The Outline proposes to blind credit providers to unpaid medical debt by eliminating it from consumer reports.[28] This may have the perceived "benefit" of making credit more accessible, but only because creditors will be at higher risk of inadvertently making loans under terms that borrowers are unable to repay. Scoring models used by creditors may weight medical debt differently than other consumer debt, but entirely blinding a lender to outstanding debt risks consumer protection by compromising lenders' assessment of ability to repay, resulting in consumers taking on debt they cannot afford.[29]

V. Conclusion

We thank you for your consideration of these comments and would be happy to discuss these issues further. We look forward to reviewing the forthcoming report from the SBREFA panel and the solutions it identifies for minimizing regulatory burden.

Sincerely,

Bill Hulse



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

Protection Bureau. https://www.consumerfinance.gov/about-us/newsroom/new-jersey-citizen-action-education-funds-14th-annual-financial-justice-summit/

[28] "Medical debt" in this context is understood to mean medical collections tradelines.

[29] 12 CFR § 1026.43 - Minimum standards for transactions secured by a dwelling. . For example, the CFPB's own Qualified Mortgage rule recognizes a debt-to-income ratio exceeding 43 percent is more likely to default.