SIIA Comments on the Small Business Advisory Review Panel for Consumer Reporting Rulemaking's Outline of Proposals and Alternatives Under Consideration

Dear Director Chopra:

On behalf of the Software & Information Industry Association (SIIA), we appreciate the opportunity to provide feedback on proposals offered by the Small Business Review Panel for Consumer Reporting Rulemaking (the Panel).[1] As reflected below, our comments focus on appropriately scoping the term data broker within the purpose and the authorization of the Fair Credit Reporting Act (FCRA).

SIIA is the principal trade association for those in the business of information. SIIA represents over 380 companies in academic publishing, education technology, financial information, software, platforms used by millions worldwide, and data analytics and information services. Our mission is to protect the three prongs of a healthy information environment essential to that business: creation, dissemination, and productive use.

We urge the CFPB to exercise caution in its approach to data brokers. The Outline defines a data broker, broadly, as "an umbrella term used to describe firms that collect, aggregate, sell, resell, license, or otherwise share personal information about consumers with other parties."[2] Though the Outline states that these functions constitute "activities that the FCRA was designed to regulate,"[3] that is not consistent with the FCRA or implementing regulations. Indeed, the proposed rule's broad definition of data brokers and even broader proposed categories of "consumer reporting agencies" and "consumer reports" would wrap in an unprecedented number of entities whose activities are not consumer reporting based on any common understanding of the term.

As detailed further in this submission, we believe this type of expansion of the scope of the FCRA to functions that are societally beneficial, essential to the functioning of the internet, and have nothing to do with credit reporting or consumer reports will have significant harmful consequences for the U.S. economy.

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

[1] Consumer Financial Protection Bureau, Small Business Advisory Review Panel for Consumer Reporting Rulemaking, *Outline of Proposals and Alternatives Under Consideration* (September 15, 2023) ("Outline") (https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-rule-sbrefa_outline-of-proposals.pdf).
[2] Outline at 7, note 19.
[3] Outline at 3.

As proposed, defining any consumer information that is used for a permissible purpose to be a consumer report would risk wrapping in almost any entity that sells or shares information that *could* be used for such a purpose. That is not the law: reports used or intended to be used for commercial purposes do not qualify as permissible purposes under the FCRA.[4]

This is because the proposal specifies that "consumer information provided to a user who uses it for a permissible purpose is a 'consumer report' regardless of whether the data broker knew or should have known the user would use it for that purpose, or intended the user to use it for that purpose."[5] The statute, in contrast, states that "consumer reports" must be used or expected to be used" for the purposes the FCRA specifies.[6]

The Outline's expansive definition of "data brokers" finds no footing in the language of the statute and the history of its judicial construction. Its overbroad definition sweeps to include many publishers that routinely sell information to third parties that, while they could potentially be used for a permissible purpose, are intended for completely different purposes than those contemplated by the FCRA. As written, the definition sweeps in (among other things) social media platforms, professional directories, databases of newspaper articles and other public domain material.

In addition, many "data brokers" will gather and disseminate publicly available or commercially available data for societally beneficial ends such as fraud prevention or to aid law enforcement, or for commercial purposes such as business-to-business intelligence. The compilation of data for these purposes falls outside the scope of the FCRA's definition of consumer reports. Moreover, the entities that sell such data are not consumer reporting agencies under any common understanding of the term. Yet this definition would govern these entities as such under the FCRA, were this data to ever be used for a permissible purpose downstream and outside of a broker's control, despite its provenance and intent.

As just one example, the breadth of this definition could easily cover transactions as attenuated from consumer reporting as those between data brokers and online advertisers that are using digital platforms to reach consumers. Brokers and digital platforms frequently furnish these advertisers with data designed to aid in reaching those likely to be interested in the product being advertised – including data that could feasibly bear on creditworthiness and employment. If this information were ever used for a permissible purpose under the FCRA, this definition would cover the data broker, and arguably the digital platform, as a consumer reporting agency, even though it is being used to place relevant ads rather than make active determinations about employment or credit.

Q9: If consumer data communicated to a third party and used by the third party for credit decisions, employment purposes, insurance decisions, or other permissible purposes were a consumer report regardless of the data broker's knowledge or intent

[4] *See Ippolito v. WNS, Inc.*, 864 F.2d 440 (1988).
[5] Outline at 7.
[6] 15 USC 1681 (d)(1).

concerning the third party's use of the data, what costs would entities selling such data incur to monitor or control how their customers use purchased data?

That kind of stricture on the dissemination of information would violate the First Amendment and would have dramatic ramifications for the entire information economy. It would not only chill protected political speech, but also interfere with productive business activity, chilling business transactions and creating enormous compliance costs that will render critical data-driven services increasingly or even impossibly costly. Data brokers concerned about the need to implement a new regime to comply with the requirements of the FCRA will almost certainly avoid transferring this potentially useful data instead of risking that a third party uses the furnished data for a permissible purpose. Because the standard proposed is effectively strict liability for the data broker regardless of their intent, knowledge, or even constructive knowledge, existing relationships between entities or current uses of data is unlikely to avoid chilling transfers. After all, there is no guarantee the data will be used the same way in the future, and intent does not enable a data broker to escape potential designation as a reporting agency.

In addition, were this rule implemented, even contractual obligations that flow down with this data–which themselves significantly increase compliance costs and potential oversight challenges–would be insufficient to protect brokers from the potential for coverage under the FCRA. The proposed rule grants no immunity for data brokers who implement contractual or even oversight controls over the use of the information if a third party uses it for a permissible purpose, including in breach of this contract. Thus, a data broker would remain wholly exposed to the behavior and data use of the recipient. It is impossible to imagine that such a severe standard would not dramatically reduce information transfers out of well-intentioned compliance concerns alone.

Q5: Other than compliance costs, what costs, burdens, or unintended consequences should the CFPB consider with respect to the proposal under consideration? Please quantify if possible. What alternatives, if any, would mitigate such costs, burdens, or unintended consequences?

Broadening the definition of consumer reports to include credit header data would limit the usefulness of that data to deliver a variety of routine services that consumers take for granted, most notably healthcare. The use of accurate, current data for identity authentication and address verification permeates the sector, and restricting its use would negatively impact a wide range of applications including aid to underserved populations.

For example, regulating credit header data as consumer reports would restrict the use of this information for verifying patients' identities. This would limit access to care, and paradoxically even restrict patients' ability to access their own health data – disproportionately affecting underserved populations. It would also reduce the ability of providers to effectively identify barriers to care or to carry out engagement initiatives with these populations.

Furthermore, restricting the use of credit header data would simply reduce access to useful information for all patients. This includes matching efforts that link disparate information to create holistic patient records, in turn restricting care coordination and increasing medical costs. It could even reduce the effectiveness of government efforts to monitor health risks, such as emergency prevention and contact tracing practices used in to curb the impact of infectious diseases, enable notification of outbreaks, and disseminate information on best practices.

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Thank you for considering our views. We look forward to continued engagement with the Bureau and would be happy to discuss any of these issues further with you.

Respectfully submitted,

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