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Consumer Financial Protection Bureau
1700 G Street NW
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Re: Request for Information Regarding Data Brokers and Other Business Practices
Involving the Collection and Sale of Consumer Information, Docket No. CFPB–2023-
0020

The National Consumer Law Center (on behalf of its low-income clients) submits these comments on the Consumer Financial Protection Bureau’s Request for Information Regarding Data Brokers and Other Practices.¹ We are excited that this RFI is the first step in the CFPB’s much anticipated and much needed process of issuing regulations under the Fair Credit Reporting Act (FCRA). We urge the CFPB to address the issues posed by data brokers by adopting a rule that broadly interprets the terms “consumer report” and “consumer reporting agency” under the FCRA, as Congress intended.

¹ The Request for Information is posted at <https://www.consumerfinance.gov/rules-policy/notice-opportunities-comment/open-notices/request-for-information-regarding-data-brokers-and-other-business-practices-involving-the-collection-and-sale-of-consumer-information/>, and published at 88 Fed. Reg. 16,951 (March 21, 2023). These comments were written by NCLC attorneys Chi Chi Wu, Sarah Bolling Mancini, Margot Saunders, Kyra Taylor, and law student intern Annika Reno. Carolyn Carter of NCLC provided editorial oversight.

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Executive Summary

The data broker industry is a \$240 billion industry that is growing, opaque, intrusive, and potentially harmful to consumers, yet largely unregulated. The Fair Credit Reporting Act (FCRA) presents a meaningful avenue to address this regulatory gap for many companies in this industry, if the CFPB issues a rule that defines the scope of the Act as broadly as Congress originally intended.

The terms “consumer report” and “consumer reporting agency” are defined expansively in the FCRA, and cover many types of information sold by data brokers when used for one of the purposes enumerated in the Act, such as credit, employment, insurance, or a consumer-initiated business transaction. However, court decisions have unduly constricted the scope of the FCRA with judicially created barriers not found in the plain language of the Act. The CFPB can restore via rulemaking the original scope of these definitions that have been narrowed by judicial fiat.

Restoring the original broad scope of “consumer report” and “consumer reporting agency” (“CRA”) is especially critical because some of the most problematic data brokers are actually the Big Three credit bureaus, a.k.a. the nationwide CRAs: Equifax, Experian, and TransUnion. The three companies have a number of products that they claim are outside the scope of the FCRA, even though in the case of at least Experian, the information is derived from its main credit reporting database. All three nationwide CRAs offer products supposedly not FCRA-regulated that include financial information, such as consumers’ assets and investments. Other problematic data brokers include LexisNexis and Acxiom.

To address the problematic practices of data brokers, the CFPB should interpret the definition of “consumer report” and “consumer reporting agency” to include circumstances when data bears on one of the seven factors in the definition and: (1) the data broker knows or has reason to believe that its clients are using data for FCRA-covered purposes; (2) the data was originally collected for the purpose of providing a consumer report -- *e.g.*, the main credit reporting files at the nationwide CRAs – but then used for non-FCRA purposes; (3) even if the data is organized or disseminated based on an entity other than individual consumers, including household, real property, IP address, census block, or zip code; or (4) the data is used for any of the covered purposes under the FCRA, including consumer-initiated business transactions. These measures will help avoid evasions of the FCRA, and ensure that the sensitive personal information of consumers is regulated by the privacy and accuracy provisions of the Act. FCRA coverage will go a long way to placing meaningful controls and transparency on the practices of data brokers.

Finally, we recommend three additional measures to regulate the practices of data brokers. First, we reiterate our request from our January 2022 letter for the CFPB clarify that “credit header” information does constitute a consumer report under the FCRA if it is derived from consumer reporting information. Second, the CFPB should re-define what constitutes a “firm offer of credit” for prescreening purposes to require that the creditor make a meaningful offer of actual credit. Third, if a data broker is truly not selling consumer report information under the FCRA, the CFPB should regulate certain egregious practices to the extent that the Bureau can under its UDAAP authority and should recommend that the FTC adopt similar prohibitions.

More details regarding these recommendations can be found in Section F of these comments.

A. The Data Broker Market is Vast and Harms Consumers

1. Technology accelerated the size and intrusiveness of the data broker industry

(Responses to RFI Questions 1 and 2)

The market for the sale of consumer data has exploded in the past few decades. Companies collect and sell information related to consumers' location, age, buying habits, the fact that they have applied for credit recently, the fact that they have not refinanced their home mortgage in a certain number of years. Data gets sold and resold without any meaningful consent from the consumer.

The data industry has existed for decades, if not centuries, but current technology allows companies to collect, store, and interconnect data in ways that were not possible before. Today, the “dossier” industry is bigger than ever.² In 2021 the market for data brokers was valued at \$240.3 billion. It is expected to reach \$462.4 billion by the end of 2031.³

The industry is intentionally opaque,⁴ but we do know a number of ways in which data brokers collect data. They obtain information from public records, publicly available information, and non-public consumer information that consumers provide to companies from which they obtain products or services.⁵ Some companies gather data on individuals directly from firms they own,⁶ while others “purchase, license, or otherwise acquire data second-hand from companies that directly collect this information from their users.”⁷ They may also “buy or acquire printed information, such as telephone directories or local government records, and either scan these documents into an electronic format or have data entry professionals manually create an

² Data brokerage is generally defined as, “the practice of buying, aggregating, selling, licensing, and otherwise sharing individuals’ data.” See Justin Sherman, *Data Brokers and Sensitive Data on U.S. Individuals: Threats to American Civil Rights, National Security, and Democracy*, Duke Sanford Cyber Policy Program (Aug. 2021) [hereinafter “*Sherman, Data Brokers and Sensitive Data*”].

³ Press Release, *Data Brokers Market Estimated to Reach US\$ 462.4 billion by 2031*, TMR Report, GlobeNewswire (Aug. 1, 2022), <https://www.globenewswire.com/news-release/2022/08/01/2489563/0/en/Data-Brokers-Market-Estimated-to-Rreach-US-462-4-billion-by-2031-TMR-Report.html>.

⁴ “Many data brokers admit that their work is a black box because of the ‘veil of secrecy surrounding the origins of the information, how it is analyzed, and who buys it.’” See Chih-Liang Yeh, *Pursuing consumer empowerment in the age of big data: A comprehensive regulatory framework for data brokers*, Telecommunications Policy 42, no. 4 (Dec. 2017), at 288 (quoting Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money And Information* (2015), MA: Harvard Univ. Press, at 33) (hereinafter “Yeh, *Pursuing consumer empowerment*”).

⁵ National Consumer Law Center, *Fair Credit Reporting* § 2.7.5 (10th ed. 2022), updated at www.nclc.org/library.

⁶ Sarah Lamdan, *Data Cartels: The Companies That Control and Monopolize Our Information* (2003), Stanford University Press, at 3, 7 (describing Thomson Reuters and Reed Elsevier LexisNexis (RELX) as “conglomerates, multi-industry behemoths that control swaths of resources” and “capitalize on the troves of materials that they get through taking over competitors”).

⁷ Sherman, *Data Brokers and Sensitive Data*, at 2.

electronic record.”⁸ Some firms collect publicly available web-based data through web crawlers (programs that capture content across the internet and transmit it back to the firm’s servers). They likewise crawl government records to develop profiles on individuals.⁹

Data brokers sell all manner of information about individuals, going far beyond the actual or “raw” data (e.g., an individual’s name, address, age, ethnicity, occupation and income).¹⁰ Data brokers combine scores of datasets to create a “mosaic” of “where we go, who we know, and what we do each day.”¹¹ Data brokers offer potential buyers pre-packaged databases of information organized around certain consumer preferences or predictive behaviors.¹² “By tailoring their services for different purposes, data brokers sell products to various types of customers,” such as advertising and marketing, credit and insurance, identity verification and fraud detection, health care, education, government agencies, law enforcement, and customer services.¹³

2. The data broker industry continues to perpetuate widespread consumer harm in the face of inadequate regulation.

(Response to RFI Questions 13)

The activities of data brokers ultimately harm consumers in a number of ways. Consumers are besieged with unwanted written solicitations and phone calls. This harassing behavior is not only annoying, but interferes with consumers’ ability to be reached by contacts they actually want to hear from. Section D discusses how lead generators selling information for telemarketing has contributed to the scourge of unwanted and excessive robo-calls plaguing consumers.

The data sold or shared by data brokers provides the fuel for targeted marketing and direct solicitations that can lead to consumers falling victim to scams. Data collected by companies leads to privacy breaches and identity theft. Data collected by companies may be inaccurate, leading to lost employment opportunities, loss of government benefits, or reputational injury. For example, Section C.4 describes how inaccurate information by the data broker LexisNexis led to vulnerable consumers being denied or suspended from Supplemental Security Income benefits, and even being inaccurately charged for overpayments.

The lack of transparency from data brokers is its own form of harm. Data brokers collect and sell consumer data without their consent, so that “most people are unaware of [data brokers]

⁸ Federal Trade Commission, *Data Brokers: A Call for Transparency and Accountability* (2014), at 17, <https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf> [hereinafter “FTC, *Data Brokers*”].

⁹ See, e.g., Whitepages, <https://about.whitepages.com/>; PeopleSearch, <https://peoplesearch.com/>.

¹⁰ FTC, *Data Brokers*, at 19 (“For example, a data broker might infer that an individual with a boating license has an interest in boating, that a consumer has a technology interest based on the purchase of a Wired magazine subscription, that a consumer has an interest in shoes because she visited Zappos.com, or that a consumer who has bought two Ford cars has loyalty to that brand.”)

¹¹ David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, Yale Law Journal 115, no. 3 (December 2005), 628-79.

¹² Sherman, *Data Brokers and Sensitive Data*, at 2; FTC, *Data Brokers*, at 19.

¹³ Yeh, *Pursuing consumer empowerment*, at 285.

existence and their substantial impact on daily transactions.”¹⁴ This opaqueness compounds the other problems posed by data brokers, such as inaccurate information. A consumer has no ability to correct errors in information if they are not even aware of its existence.

Given the sensitive information collected and sold by data brokers and the risks of harm to consumers from the improper disclosure of accurate information as well as the propagation of inaccurate information, appropriate regulation of the industry is extremely important. No one law governs all of the various uses of the information collected by these companies. Data brokers are covered by a mélange of state and federal statutes, such as the Gramm Leach Bliley Act, the Health Insurance Portability and Accountability Act, the California Consumer Privacy Act and similar state laws, and most importantly for our purposes, the Fair Credit Reporting Act.

Of these laws, the FCRA has the most robust protections in that it is national in scope, has a private remedy, and has significant privacy and accuracy protections. That is why it is so critical that the CFPB should adopt regulations to clarify that the broad scope of the FCRA covers many data brokers and the information that they peddle as “consumer reports” and “consumer reporting agencies.”

3. The data broker industry poses special harms to servicemembers (*Response to RFI Questions 9*)

While data brokers pose a risk for all Americans, servicemembers and their families are particularly vulnerable. As research by the Data Brokerage Project at Duke University has noted “[d]ata brokers gather, package, and advertise highly sensitive data on current and former members of the U.S. military, which poses privacy and safety risks to servicemembers.¹⁵ One example cited by the Data Brokerage Project was a mass-fraud scheme targeting World War II veterans, which was uncovered by the New York Times in 2007.¹⁶ One of the victims was a 92-year-old Army veteran whose name a list broker put in a dataset and sold to telemarketing criminals. The Data Brokerage Project noted:

Many other data brokers advertise data points on hundreds of thousands of current and former U.S. military personnel—as well as their families and the presence of children in the home. Foreign governments could acquire this data to profile, track, and target military personnel and their families and otherwise undermine U.S. national security. The Chinese government’s 2015 hack of the Office of Personnel Management was one of the most damaging data breaches the federal government has suffered—yet there is no need for the Chinese government or any other foreign intelligence agency to even hack many

¹⁴ *Id.* at 283.

¹⁵ Who is Selling Your Data: A Critical Examination of the Role of Data Brokers in the Digital Economy: Hearing Before the Subcomm. on Oversight and Investigations of the H. Fin. Serv. Comm., 118th Congr. (2023) (testimony of Justin Sherman, Senior Fellow, Data Brokerage Project at Duke University). https://d1dth6e84htgma.cloudfront.net/Sherman_Testimony_4_19_23_b40d947a8e.pdf?updated_at=2023-04-17T17:40:42.415Z.

¹⁶ *Id.*

U.S. databases when so much data can be legally purchased from U.S. data brokers, which appear to do very little customer vetting.¹⁷

Selling lists of servicemembers and their families opens them up to exploitation, because they are historically more likely to be targeted by unscrupulous and predatory businesses or outright scammers.¹⁸ By providing bad actors with data that may make it easier to exploit servicemembers' vulnerabilities, data brokers make that targeting more likely to be successful. If this data is sufficient for spying, it is certainly sufficient to make it easier to scam military communities as well.

B. The CFPB should make it clear that many data brokers are covered by the FCRA

(Response to RFI Question 22)

1. The FCRA's statutory purpose and history supports broad coverage

Regulating data brokers under the FCRA is not only appropriate, but necessary to administer and carry out the purposes and objectives of the Act, and to prevent evasions by companies that should be consider consumer reporting agencies (CRAs). Privacy and confidentiality issues were among the chief concerns that led Senator William Proxmire to introduce the first version of the FCRA. At the time, some CRAs would sell information to virtually anyone.¹⁹ Information was used in ways inconsistent with the purpose for which it was collected. When Senator Proxmire first introduced S. 823, the bill which ultimately became the Fair Credit Reporting Act, he stressed the importance of assuring confidentiality:

The fact that credit reporting agencies maintain files on millions of Americans, including their employment, income, bill paying record, marital status, habits, character and morals is not in and of itself so disturbing. What is disturbing is that this practice will continue, and will have to continue, if we continue to have an insurance system and a consumer credit system of the kind we have. What is disturbing is the lack of any public standards to ensure that the information is kept confidential and used only for its intended purpose. The growing accessibility of this information through computer- and data-transmission techniques makes the problem of confidentiality even more important.²⁰

As discussed in Section B.2, the statute passed by Congress in 1970 contained a very broad definition of a "consumer report" as regulated by the Act's provisions. This broad definition reflects the enacting Congress's concern about the ever-expanding "information network" and

¹⁷ *Id.*

¹⁸ Jennifer Sauer, AARP Research, Veterans Battle Surprise Attacks from Fraud and Scams, Nov. 9, 2021, <https://www.aarp.org/pri/topics/work-finances-retirement/fraud-consumer-protection/fraud-scams-military-veterans/>;

¹⁹ National Consumer Law Center, *Fair Credit Reporting* § 1.4 (10th ed. 2022), updated at www.nclc.org/library.

²⁰ 115 Cong. Rec. 2413 (1969). See also 114 Cong. Rec. 24,903 (1968) (remarks of Sen. Proxmire).

unchecked “dossier industry,”²¹ which was disseminating information about individuals’ financial status, criminal history, and general reputation without “public regulation or supervision.”²² With these concerns in mind, Congress passed the FCRA in order “to enable consumers to protect themselves against [such] arbitrary, erroneous, and malicious” information.²³

The need for FCRA coverage of data brokers is even more urgent today. The data industry, already well developed when the FCRA became law in 1970, has exploded in the decades since. Technology available now allows companies to collect, store, and interconnect data in ways that were not possible before.

When the data a company sells is a consumer report covered by the FCRA, significant protections of the statute apply. These protections are based on basic principles of fair information practices and thus well suited for regulating data brokers:

- *The right to have information be accurate:* the FCRA requires “reasonable procedures for maximum possible accuracy” from consumer reporting agencies. § 1681e(b)
- *The right to correct errors:* consumers have the right to dispute inaccurate information and get it corrected. §§ 1681i(a), 1681s-2(a)(8), 1681s-2(b)
- *The right to access information about ourselves:* the FCRA gives consumers the right to disclosure of information about themselves in the files of a CRA. § 1681g
- *The right to know when information is used against us:* consumers receive an “adverse action” notices when information in the form of a consumer report is used to deny them credit, employment, insurance, rental housing, or many other financial essentials. § 1681m(a)
- *Privacy protections to prevent inappropriate dissemination and use:* only users with a “permissible purpose” can access consumer reports. § 1681b

These protections are critical to prevent privacy and inaccuracy violations that significantly harm consumers.

Another reason to adopt clear rules about FCRA coverage of data brokers is that data products that are truly not covered by the FCRA are subject to state law claims without any threat from the FCRA’s limited preemption and qualified immunity provisions.²⁴ A number of states have enacted reasonable limits on data brokers, for example through statutes like the California Consumer Privacy Act and the Vermont Data Broker Law.²⁵ Clarity regarding which products

²¹ Robert M. McNamara Jr., *The Fair Credit Reporting Act: A Legislative Overview*, 22 J. Pub. L. 78, 80 (1973) (quoting Nader, *The Dossier Invades the Home*, Saturday Rev., April 17, 1971, at 18–21).

²² 115 Cong. Rec. 2410 (1969).

²³ *Id.*

²⁴ Chi Chi Wu, *Data Gatherers Evading the FCRA May Find Themselves Still in Hot Water*, National Consumer Law Center, (June 14, 2019), available at <https://library.nclc.org/data-gatherers-evading-fcra-may-find-themselves-still-hot-water>.

²⁵ Cal. Civ. Code § 1798.100 *et seq*; 9 Vt. Stat. Ann. § 2430.

are consumer reports and which are not is also important because some state privacy laws exempt CRAs, such the California Consumer Privacy Act.²⁶

2. The plain language of the FCRA covers many data brokers

The FCRA covers data brokers when they meet the definition of a consumer reporting agency and the product they are selling meets the statutory definition of a consumer report.

A consumer reporting agency (CRA) is defined by the Act as:

[A]ny person which, for monetary fees, dues, or on a cooperative nonprofit basis, 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, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.
15 U.S.C. § 1681a(f)

Thus, a company is a CRA covered by the statute if it engages in the practice of assembling or evaluating information for the purpose of furnishing consumer reports. A consumer report, in turn, is defined as:

[A]ny written, oral, or other 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 which is used or expected to be used or collected in whole or in part for 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 of this title.
15 U.S.C. § 1681a(d)(1).

The first part of the definition of consumer report, whether the information in question bears on one of the seven factors, is usually not in question. Most consumer data collected and sold will have some bearing on at least “personal characteristics,” “general reputation,” or “mode of living.” Information such as age, familial status, income level, real property ownership, investments and assets, for example, would bear on the individual’s personal characteristics or mode of living, and some of them bear on their credit capacity and credit worthiness.

The second part of the definition of consumer report, how the data is “used or expected to be used or collected,” is where there has been much debate and litigation, and which creates the need for CFPB to issue firm rules. A data product is a consumer report, and the provider will be a CRA, if the data is either (1) used, (2) expected to be used, or (3) collected “in whole or in part” for the purpose of serving as a factor in establishing the consumer’s eligibility for credit,

²⁶ Cal. Civ. Code § 1798.145(d)(1).

insurance, employment, or some other permissible purpose listed in Section 1681b. Those other permissible purposes include sale:

(3) To a person which it [the CRA] has reason to believe—

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or

(F) otherwise has a legitimate business need for the information--

(i) in connection with a business transaction that is initiated by the consumer; or

(ii) to review an account to determine whether the consumer continues to meet the terms of the account.

(G) executive departments and agencies in connection with the issuance of government-sponsored individually-billed travel charge cards.

15 U.S.C. § 1681b(a).

These permissible purposes are quite broad, and in turn the definition of a consumer report should be equally broad. Unfortunately, as discussed in Section B.3, some courts have unduly narrowed the definition of consumer report to reports furnished only for the first four purposes (i.e., eligibility for credit, employment, insurance underwriting, or a government license or benefit).

If information is either used or expected to be used or collected for one of the covered purposes listed in § 1681b(a), then the FCRA should apply and the CRA may *only* sell the information for a permissible purpose. The “expected to be used” and “collected” language in § 1681a(d)(1) is critical. Information that is regularly collected and used for CRA-covered purposes, such as the main credit reporting files at the nationwide CRAs, cannot and should not be used for purposes other than those permitted by § 1681b (or the limited purposes in § 1681f and 1681v). Yet as discussed in Section C, it appears that the nationwide CRAs are doing exactly that.

Federal agencies have previously recognized that the FCRA applies to data brokers that sell data for purposes covered by the FCRA and have cited them for failing to comply with the Act. In 2013, the Federal Trade Commission (FTC) issued letters to ten companies engaged in the sale of consumer data, warning that their practices could be in violation of the FCRA.²⁷ The FTC

²⁷ Press Release, *FTC Warns Data Broker Operations of Possible Privacy Violations* (May 7, 2013), www.ftc.gov/news-events/press-releases/2013/05/ftc-warns-data-broker-operations-possible-privacy-violations.

identified these ten companies after a test shopping investigation in which FTC staff members posed as individuals or companies seeking information, and found that these companies were willing to sell consumer information without complying with the FCRA.²⁸ In addition, the FTC has brought enforcement actions under the FCRA against data brokers that used inadequate security measures, leading to data breaches and identity theft. Among these was an enforcement action against ChoicePoint,²⁹ the company whose later purchase by LexisNexis brought with it the Accurint suite of products.³⁰

3. Court Decisions Unduly Restrict the FCRA's Scope

Despite the FCRA's very broad definitions of "consumer report" and "consumer reporting agency," a number of courts, including several federal Courts of Appeals, have shown a reluctance to respect the FCRA's plain language and its expansive coverage. These decisions have not only unduly limited the scope of the FCRA, they have given data brokers the license to avoid coverage of the Act using various dodges. Most importantly, some of the data brokers engaged in these dodges are already CRAs with respect to other products they sell, including the Big Three nationwide CRAs, as discussed in Section C.

a. *Kidd v. Thomson Reuters* and *Zabriskie v. Fannie Mae*

A pair of federal Circuit Court decisions have unduly restricted the scope of the FCRA by requiring that a company have a specific intent to provide a consumer report in order to be covered by the FCRA. The problem is that often data brokers attempt to skirt coverage of the Act by putting a disclaimer on their website stating that the product is not a consumer report and "may not be used in whole or in part as a factor in determining eligibility for credit, insurance, employment or another purpose in connection with which a consumer report may be used under the FCRA."³¹ Companies then argue that they lack a specific intent by pointing to disclaimers and contractual provisions, while turning a blind eye to misuses of data for FCRA covered purposes. Requiring a specific intent also contradicts and makes meaningless the rule that information is a consumer report if it is used or *expected to be used or collected* for an FCRA covered purposes.

In *Kidd v. Thomson Reuters*, the Second Circuit addressed the question of whether Thomson Reuters acted as a consumer reporting agency in furnishing its online research platform CLEAR. The plaintiff, Lindsey Kidd, was denied a job after a background check using CLEAR falsely

²⁸ National Consumer Law Center, *Fair Credit Reporting* § 2.7.5 (10th ed. 2022), updated at www.nclc.org/library.

²⁹ Stipulated Final Judgment, *U.S. v. ChoicePoint, Inc.*, No. 1 06-CV-0198 (N.D. Ga. Jan. 30, 2006), www.ftc.gov/sites/default/files/documents/cases/2006/01/stipfinaljudgement.pdf.

³⁰ Press Release, LexisNexis Transformation Accelerates with Integration of ChoicePoint, Oct. 15, 2008, <https://www.lexisnexis.com/community/pressroom/b/news/posts/lexisnexis-transformation-accelerates-with-integration-of-choicepoint>.

³¹ See, e.g., Accurint for Government website, <https://risk.lexisnexis.com/products/accurint-for-government> (last visited June 2, 2023).

showed that she was convicted of theft.³² Employment purposes are covered by the FCRA. Thomson Reuters stated in its marketing materials that CLEAR “may not be promoted or used for FCRA-regulated purposes,” and potential subscribers are required to certify that they do not plan to use the platform for any FCRA-covered purpose.³³ The Second Circuit concluded that Thomson Reuters did not have the specific intent to furnish a consumer report in the CLEAR platform, and therefore the company was not a CRA.³⁴ This “specific intent” language has been relied upon by other courts, including Ninth Circuit in *Zabriskie v. Fannie Mae*.

One often overlooked aspect of *Kidd v. Thomson Reuters* is the company did more than rely on disclaimers and certifications. It presented evidence that Ms. Kidd’s case was one of only 46 known instances of misuse of the CLEAR platform out of 144 million searches conducted between 2012 and 2016.³⁵ Users of the platform were required to certify a non-FCRA covered purpose each time they used it. When Thomson Reuters suspects that a user may be violating the use restrictions, it conducts an investigation and bans the user from accessing the portal until they sign a contract promising to use CLEAR only in ways allowed by Thomson Reuters.³⁶ The company presented evidence that it had in fact terminated the accounts of subscribers responsible for ten improper searches.³⁷ The Second Circuit warned that the “totality of a defendant’s actions” must be the determining factor in whether a company intends to furnish a consumer report, and it is not possible to escape regulation by the FCRA “merely by disclaiming an intent to furnish consumer reports.”³⁸

In contrast to the Second Circuit’s more nuanced decision, and failing to consider whether there was similar evidence of preventive measures, the *Kidd v Thomson Reuters* decision was followed by *Zabriskie v. Fannie Mae*.³⁹ In this case, the Ninth Circuit rejected a claim that reports issued by Fannie Mae’s Desktop Underwriter software were consumer reports, holding that Fannie Mae’s subjective intent was not to provide a consumer report – *i.e.*, a report that Fannie Mae intended to be used to determine credit eligibility – but rather intended to provide software that told a lender whether Fannie Mae would likely purchase the loan.⁴⁰ The Circuit Court seemed unswayed by the fact that in reality many lenders will use the Desktop Underwriter report to determine whether to extend a loan at all.⁴¹

The *Zabriskie* opinion calls into question how courts will measure the specific intent of a company when that company knows that its subscribers are using data for purposes covered by

³² *Kidd v. Thomson Reuters Corp.*, 925 F. 3d 99 (2d Cir. 2019).

³³ *Id.* at 102.

³⁴ *Id.* at 108-109.

³⁵ *Id.* at 102.

³⁶ *Id.* at 108.

³⁷ *Id.* at 102.

³⁸ *Id.* at 107.

³⁹ 940 F.3d 1022 (9th Cir. 2019).

⁴⁰ *Id.* at 1028.

⁴¹ *Id.*

the FCRA. One unique aspect to the case is that the court did not seem to want to hamper Fannie Mae's role in providing liquidity to the mortgage market.⁴²

Unfortunately, the decisions in *Kidd v Thomson Reuters* and *Zabriskie v. Fannie Mae* provide fertile ground for the tactic of using disclaimers and contractual provisions, and may be encouraging companies to attempt to evade FCRA coverage. One contributing factor is the emphasis on the requirement for a specific intent while ignoring the aspects of *Kidd* where Thomson Reuters provided evidence of the substantial steps that it took to prevent misuse of CLEAR. For example, LexisNexis uses disclaimers frequently, and as discussed in Section C.4, is a highly problematic company. Not only does LexisNexis *not* take steps to prevent users from using the data for FCRA-covered purposes, the company actively sells reports for FCRA-covered purposes such as government benefits eligibility determinations and collection activity.

Thus, we urge the CFPB to incorporate in its rulemaking the overlooked analysis in *Kidd*, where FCRA coverage depends on the use or *expected use* of a product based on evidence of the third-party user's conduct and the data broker's meaningful, active attempts to prevent FCRA-covered uses. When a company's business is selling data and that data is *expected to be used* for FCRA-covered purposes in that the company has actual knowledge or has reason to believe that its clients are using data for such purposes, including the fact that the company is not implementing controls to prevent such FCRA-covered uses, the FCRA should apply. We urge the CFPB to adopt a rule establishing this principle.

b. *Tailford v. Experian*

*Tailford v Experian*⁴³ involved Experian's ConsumerView product, which is sold for marketing purposes and discussed in Section C.1 below. The plaintiffs alleged that ConsumerView was a consumer report, and that Experian had failed to provide disclosures about the product under the FCRA's file disclosure requirements at § 1681g.

The Ninth Circuit held that ConsumerView was not a consumer report based on an argument that is frequently used by data brokers seeking to avoid FCRA coverage – that information is being disseminated about an entity other than a “consumer” or natural person, i.e., that a report pertains to a household, IP address, piece of real property, zip code, or census block, and thus is not covered under the FCRA.⁴⁴ This is particularly disturbing in the case of ConsumerView, because as the court even noted, *some of the data was allegedly derived from the main credit reporting files of Experian*.

First, Plaintiffs contend that because the ConsumerView database sources some of its data from the File One credit database and because File One data was collected for credit

⁴² *Id.* at 1025 (explaining that Congress created Fannie Mae in 1938 to “provided liquidity and stability” to the secondary mortgage market) and *id.* at 1030 (pointing out that interpreting the FCRA to apply to Fannie Mae would “contradict Congress’s design for Fannie Mae to operate only in the secondary mortgage market, to deal directly with lenders, and not to deal with borrowers themselves”).

⁴³ 26 F.4th 1092 (9th Cir. 2022).

⁴⁴ *Id.* at 1103.

purposes, that data should be considered part of a consumer's file that might be used in a consumer report. The problem with this argument is that despite the sourcing of some of the data from the File One database, the data maintained in the ConsumerView database is aggregate data, organized by zip-code and not individualized to any consumer. Such aggregate data is not information that ever has been or might arguably be included in an individual consumer report. The aggregate information contained in Experian's ConsumerView database is thus not part of a consumer's "file" and is therefore not subject to disclosure under § 1681g(a)(1) of the FCRA."⁴⁵

The problem is that while the information might be organized by zip code, it is then delivered to customers to use for the purpose of targeting individual consumers for marketing. In fact, Experian states in its marketing of ConsumerView that "[w]e also attach a unique, permanent identifier to each consumer record, which helps maintain contact with consumers wherever they move."⁴⁶

Unfortunately, the Ninth Circuit is not alone in allowing a company to dodge the FCRA by claiming that information does not pertain to a "consumer." In *Fuges v. Southwest Fin. Serv., Ltd.*, the Third Circuit, without deciding the matter, found that it was objectively reasonable for a company that prepared reports on the current owners of properties to interpret the reports as outside the FCRA because they pertain to the property and not to a consumer.⁴⁷

The CFPB must put an end to these dodges. As the FTC has stated,⁴⁸ any report that is disseminated based on an entity other than a consumer is still a consumer report if it can be reasonably linked with individual consumers. An FCRA rule should restate and codify this FTC interpretation, as well as specifically state that any information that is in the main credit reporting files of the nationwide CRAs cannot be used for a non-FCRA purpose involving a specific individual consumer, even if the information is initially aggregated or organized on a basis other than individual consumers. As the court in *Skiles v. Tesla* case (discussed more in the next section) noted:

While it is true that the FCRA defines a "consumer" as an individual and not a business or group of people, . . . , a consumer report need only "bear on" an individual's creditworthiness or reputation. The household data as pleaded here—which is allegedly

⁴⁵ *Id.*

⁴⁶ Experian, ConsumerView, at 7 (Feb. 2018), <https://www.experian.com/assets/dataselect/brochures/consumerview.pdf> [hereinafter "Experian ConsumerView brochure"].

⁴⁷ 707 F.3d 241 (3d Cir. 2012) (rejecting claim for willful noncompliance).

⁴⁸ FTC, 40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations, § 603(d)(1) items 5A, July 2011, <https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf> [hereinafter "FTC Staff Summary"] ("information may constitute a consumer report even if it does not identify the consumer by name if it could otherwise reasonably be linked to the consumer"). Many of the provisions of the FTC Summary were formerly in the FTC Staff Commentary. Appendix to 16 C.F.R. Part 600—Commentary on the Fair Credit Reporting Act (rescinded).

prepared for individuals and based upon information from those individuals, ...— satisfies this standard.⁴⁹

In *Tailford*, the Ninth Circuit provided a second reason that ConsumerView data was not a consumer report, *i.e.*, that the use of ConsumerView is not a covered purpose. The court stated “The marketing of ConsumerView data to identify ‘target candidates for invitations to apply for credit,’ is not using that information to establish a consumer’s eligibility for credit, employment or any other purpose authorized under §1681b.”⁵⁰ Like its decision in *Zabriskie v. Fannie Mae*, this is another example of a court ignoring the language in § 1681a(d) that information is a consumer report if it is “*expected to be used*” or “*collected*” for a covered purpose. The File One data used by ConsumerView was certainly collected for the purpose of credit eligibility determinations.

Using the *Tailford* court’s reasoning, a nationwide CRA is now free to take information from its main credit reporting files and sell it for non-FCRA purposes such as marketing or law enforcement and argue that since the information was now being used for a non-covered purpose (or there was no specific intent to produce a covered consumer report), the Act no longer applies. Consumers lose the benefit of the FCRA’s procedural and substantive protections, including notice requirements, accuracy protections, dispute rights, privacy protections, and more.

A number of other courts⁵¹ and the FTC have rejected the illogical reasoning upon which the *Tailford* decision is based.⁵² The CFPB should codify these other decisions and the FTC’s interpretation.

c. *Skiles v Tesla*

As discussed in Section B.2, the definition of a “consumer report” depends in part on what constitutes a “permissible purpose” under § 1681b(a). These permissible purposes are quite broad, especially the one for a “legitimate business need for the information- (i) in connection with a business transaction that is initiated by the consumer” § 1681b(a)(3)(F). Thus, the definition of a consumer report should be equally broad. However, some courts have written out this aspect of the definition of a consumer report by judicial fiat, despite the plain language of the statute.

⁴⁹ *Skiles v. Tesla, Inc.*, 440 F. Supp. 3d 1012, 1015 (N.D. Cal. 2020). Unfortunately, as discussed in the next section, the court in *Skiles* ultimately held that the Mosaic score was not a consumer report by reading out part of the definition in § 1681a(d).

⁵⁰ *Tailford v. Experian Info. Sols., Inc.*, 26 F.4th 1092, 1103 (9th Cir. 2022)

⁵¹ *See, e.g.*, *Comeaux v. Brown & Williamson Tobacco Co.*, 915 F.2d 1264 (9th Cir. 1990); *St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881 (5th Cir. 1989); *Ippolito v. WNS, Inc.*, 864 F.2d 440 (7th Cir. 1988); *Heath v. Credit Bur. of Sheridan, Inc.*, 618 F.2d 693 (10th Cir. 1980); *Hansen v. Morgan*, 582 F.2d 1214 (9th Cir. 1978); *Heagerty v. Equifax Info. Services L.L.C.*, 447 F. Supp. 3d 1328, 1345–1346 (N.D. Ga. 2020). *See generally*, National Consumer Law Center, *Fair Credit Reporting* § 2.3.5 (10th ed. 2022), updated at www.nclc.org/library.

⁵² FTC Staff Summary, § 603(d)(1) item 7C.

In *Skiles v Tesla*,⁵³ the plaintiff alleged Experian sold Tesla a “Mosaic” score, which is a marketing product that allegedly includes the individual's age, income, and creditworthiness information, in particular “Summarized Credit Statistics” presumably derived from Experian’s File One database.⁵⁴ The plaintiff argued that the Mosaic score was a consumer report based on the “business transaction initiated by the consumer” provision of § 1681b(a)(3)(F)(i) as the FCRA-covered purpose. The court rejected this argument and in doing so, significantly narrowed the scope of what constitutes a “consumer report.” The court held that “to plead that the Mosaic score is a ‘consumer report’ ..., Skiles must allege that it was used or expected to be used in connection with one of the “specifically enumerated transactions” in Section 1681a(d) or Section 1681b(3)(A)-(E), “i.e., credit, insurance eligibility, employment, or licensing.”⁵⁵

The *Skiles* court’s decision eliminates a critical provision of the FCRA’s definition of “consumer report,” and is contrary to prior FTC interpretations.⁵⁶ It is extremely alarming because several type of specialty consumer reports are likely based on the “consumer-initiated business transaction” provision, including:

- tenant screening
- deposit account screening, ie, ChexSystems & Early Warning Services
- check transaction reports, e.g., Telecheck
- utility payment data, e.g., National Telecom & Utilities Exchange

If the “consumer-initiated business transaction” permissible purpose does not inform the definition of consumer report, it would imply that all of these types of reports are not regulated by the Act, which would be a terrible result. We urge the CFPB to restate the prior FTC interpretation and make clear that the consumer-initiated business transaction permissible purpose provision is a covered purpose that renders information a consumer report under the FCRA.

C. Well-Known Data Broker Companies Attempt to Evade the FCRA

(Responses to RFI Questions 1, 2, 3, 5, and 10)

A number of companies have attempted to evade the coverage of the FCRA despite selling consumer information that should fit within the definition of a consumer report. This section describes firm-specific practices by a select handful of top U.S. data brokers. Some of the most egregious data brokers in this regard are the “Big Three” credit bureaus or nationwide CRAs (Equifax, Experian, and TransUnion), which sell consumer data as marketing, risk mitigation, and other non-FCRA uses.

⁵³ 440 F. Supp. 3d 1012 (N.D. Cal. 2020).

⁵⁴ Based on additional information about the Mosaic scores from a later decision dismissing the second amended complaint in the case. *Skiles v. Tesla, Inc.*, 472 F. Supp. 3d 566, 569 (N.D. Cal. 2020).

⁵⁵ 440 F. Supp. 3d at 1016 (citing the pre-1996 Reform Act case *Mone v. Dranow*, 945 F.2d 306, 308 (9th Cir. 1991).

⁵⁶ FTC Staff Summary § 603(d)(1) item 8D (tenant screening report is a consumer report “because it is used for a business transaction that the consumer has initiated for ‘personal, family or household purpose.’”)

Each of the Big Three are not only selling data products that they claim are not FCRA covered, but they are expanding such offerings through rapid acquisition of other data firms. They have all bought a panoply of data firms in recent years, as discussed in the individual discussions of each company. In fact, Equifax openly touted in its SEC filings that “We rely, in part, on acquisitions, joint ventures and other alliances to grow our business and expand our geographic reach.”⁵⁷ TransUnion states “As the demand for data and analytics solutions grows across industries and geographies, we will continue to expand the scope of our underlying data”⁵⁸ and that it will “continue to look for opportunities to gain access to new datasets.”⁵⁹

1. Experian

Experian sells several products that it does not treat as consumer reports. These include several troubling products: ConsumerView, which is used for marketing, Ascend Marketing, and Experian Health.

ConsumerView, which was the subject of the *Tailford v. Experian* decision discussed in Section B.3.c, is described as:

the largest and most comprehensive resource for traditional and digital marketing campaigns... With thousands of attributes on more than 300 million consumers and 126 million households, ConsumerView data provides a deeper understanding of your customers, resulting in more actionable insights across channel.”⁶⁰

In its marketing brochure, Experian states that ConsumerView includes “Aggregated credit information” and “Financial data segments” including the “ConsumerViewSM Profitability Score, which ranks households most likely to pay their debts.”⁶¹ Given the information Experian has access to in its main credit reporting files, it seems extremely likely that the “aggregated credit information” and information used to create a “Profitability Score” comes from that database, known as File One. Indeed, Experian’s ConsumerView brochure states that its “financial indicators [include] card usage and creditworthiness.”⁶²

The complaint in the *Tailford* lawsuit contains additional disturbing allegations about ConsumerView. It indeed alleges that the information contained in ConsumerView is derived in part from Experian’s File One database.⁶³ The complaint notes that ConsumerView contains both “traditional” data like inquiries, trade lines, public records, and dates of reported employment,

⁵⁷ Equifax, *Annual Report Pursuant to Section 13 Or 15(D) of the Securities Exchange Act of 1934 for the Fiscal Year Ended December 31, 2022*, at 18 [hereinafter “Equifax 2022 10-K”].

⁵⁸ TransUnion, *Annual Report Pursuant to Section 13 Or 15(D) of the Securities Exchange Act of 1934 for the Fiscal Year Ended December 31, 2022*, at 9 [hereinafter “TransUnion 2022 10-K”].

⁵⁹ *Id.* at 13.

⁶⁰ Experian ConsumerView brochure at 3.

⁶¹ *Id.* at 5.

⁶² *Id.*

⁶³ Complaint, *Tailford et al v. Experian Information Solutions, Inc.*, No. 8:19-cv-02191 (Nov. 12, 2019), at 12.

and also “non-traditional” data like household income, purchase history, and “even whether an individual is a ‘dog’ or a ‘cat’ person.”⁶⁴ It alleges that Experian actively omits from its file disclosures to consumers required under § 1681g certain “traditional” and “non-traditional” data in its consumer files. It also alleges failure to disclose all of the inquiries made to Experian and where various sets of information were sold.⁶⁵

Experian’s marketing products are not limited to ConsumerView or the Mosaic score. Experian has also created Ascend Marketing, which it describes in its Annual Report:

Using Experian’s advanced pinning technology [Ascend Marketing] combines the freshest credit data available with new datasets, such as property assessor, deed and mortgage data from third parties, as well as customer data. It then helps marketers segment that information so they can better understand their customers and find those who might benefit from a credit offer.⁶⁶

The term “offer” suggests that Experian might be justifying the use of File One credit information in Ascend Marketing as a form of prescreening under § 1681b(c). Unfortunately, court decisions have expanded the scope of prescreening and what constitutes a “firm offer of credit” to a point that is close to pure marketing.⁶⁷ Defining the scope of the FCRA to clarify that data brokers are covered will be only partially effective if the CFPB also does not limit prescreening to when a creditor is truly prepared to make a meaningful offer of credit.

Experian Health’s products include Patient Financial Clearance, which it claims “determines which patients are likely to pay and connects those who potentially qualify for financial assistance with the right programs.”⁶⁸ Experian also markets a Healthcare Payment Risk Score, which supposedly predicts a patient’s “propensity to pay.”⁶⁹ Both of these products appear to rely on financial information, and Experian boasts users can “[l]everage Experian’s comprehensive data and analytics capabilities to calculate the patient’s optimal payment plan amount based on the patient’s unique financial situation.”⁷⁰

Experian also offers a debt collection product called Collections Optimization Manager, which it claims “helps hospitals and health systems assess a patient’s unique financial situation and tailor collections strategies to meet their needs”⁷¹ and “monitors patient accounts for changes in their ability to pay and provides collections staff with targeted, timely updates enhancing recovery

⁶⁴ *Id.* at 8.

⁶⁵ *Id.*

⁶⁶ Experian Annual Report 2022 - Year ended 31 March 2022, at 39, June 2022, www.experianplc.com/media/4480/experian_ar2022_web.pdf.

⁶⁷ National Consumer Law Center, *Fair Credit Reporting* §7.3.3.3 (10th ed. 2022), updated at www.nclc.org/library.

⁶⁸ Experian Health, Patient Financial Clearance, 2020,

<https://www.experian.com/content/dam/marketing/na/healthcare/brochures/patient-financial-clearance.pdf>

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Experian Health, Case study: Targeted collections efforts yield outstanding results,

<https://www.experian.com/content/dam/marketing/na/healthcare/case-studies/case-study-sanford-collections-optimization-manager.pdf> (viewed June 10, 2023).

time and improving staff productivity.”⁷² These statements raise the issue – where is Experian obtaining data to assess “patient’s unique financial situation” and how is the company able to “monitor patient accounts” regarding ability to pay? Is this data from the File One credit reporting files?

Furthermore, Experian boasts that its Collections Optimization Manager can “reveal those patients who likely are eligible for charity services, those who might prefer to pay in full at a discount, or those who might benefit from structured instalment payments.”⁷³ Is Experian’s product making the decision for nonprofit hospitals as to presumptive eligibility or exclusion from financial assistance programs? While the IRS regulations regarding financial assistance allow for presumptive eligibility based on third-party information,⁷⁴ presumptive denials are not permitted.⁷⁵

In addition to all of the above products, Experian sells names of pregnant women and newborns that are “updated weekly.”⁷⁶

In terms of acquisitions, Experian has purchased the following companies in recent years:

- Emptech
- Tax Credit Co.
- Corporate Cost Control (CCC)
- CIC Plus
- Gabi
- Tapad⁷⁷

2. Equifax

Equifax’s marketing efforts appear to revolve around its IXI Network and IXI Data, which it describes as:

⁷² Experian Health, To stay afloat financially, get smarter collections data, <https://www.experian.com/content/dam/marketing/na/healthcare/case-studies/case-study-altru-health-system.pdf>(viewed June 10, 2023).

⁷³ *Id.*

⁷⁴ 26 C.F.R. § 1.501(r)-6(c)(2).

⁷⁵ 79 Fed. Reg. 78,954, 78,992 (Dec. 31, 2014)(Supplementary Information for 26 C.F.R. § 1.501(r)-6(c)(2); “The final regulations do not treat as reasonable efforts a presumptive determination that an individual is not FAP-eligible”).

⁷⁶ See Lois Beckett, *Everything We Know About What Data Brokers Know About You*, ProPublica, June 13, 2014, <https://www.propublica.org/article/everything-we-know-about-what-data-brokers-know-about-you>).

⁷⁷ Experian Annual Report 2022 - Year ended 31 March 2022, at 10-11; Press Release, Experian Announces New Employer Services Business and Real-time Income and Employment Verification Solution, May 24, 2021, <https://www.businesswire.com/news/home/20210524005138/en/Experian-Announces-New-Employer-Services-Business-and-Real-time-Income-and-Employment-Verification-Solution> (Emptech, Tax Credit Co., Corporate Cost Control (CCC))

our exclusive network of more than 95 leading financial institutions, [from which] we directly measure about \$27.5 trillion in anonymous U.S. consumer assets and investments, representing about 45 percent of all U.S. consumer invested assets. We utilize our patented process to collect and classify anonymous consumer asset data and then combine it with additional proprietary measures of income, discretionary spending, and credit to provide a more complete picture of households’ financial and economic positions. ...⁷⁸

According to Equifax:⁷⁹

- Member-firms submit anonymous asset and sales data at least 2 times per year:
- Position, account classification, geographic (ZIP+4), distribution channel
 - We standardize, aggregate and classify this Direct-measured data

IXI Network	Includes leading financial services firms: <ul style="list-style-type: none"> • Retail banks • Full service and discount brokers • Mutual fund groups • Insurance firms • Credit unions
Data submission and standardization	Member-firms submit anonymous asset and sales data at least 2 times per year: <ul style="list-style-type: none"> • Position, account classification, geographic (ZIP+4), distribution channel • We standardize, aggregate and classify this Direct-measured data
Direct-measured financial assets database: ~\$27.5 trillion	Direct-measured financial assets databases: <ul style="list-style-type: none"> • About \$27.5 trillion in consumer liquid assets (about 45% of all assets) • About \$4.5 trillion in small business assets
Project to entire market: ~\$61 trillion	We project the Direct-measured database to represent the total liquid financial assets held by all U.S. households — about \$61 trillion <ul style="list-style-type: none"> • Asset estimates available at HH level
Additional data added to better represent HH Wallet	We add additional data to enhance base products: <ul style="list-style-type: none"> • Total income estimates • Discretionary spending estimates • Measures of aggregated credit usage • Demographics, attitudes, behaviors

⁷⁸ Equifax, Foundation of IXI data solutions, 2022, https://assets.equifax.com/assets/ixi/foundationOfIXIData_ps.pdf.

⁷⁹ *Id.*

Equifax includes a disclaimer stating that “IXI products can only be used in non-FCRA efforts.”⁸⁰

The IXI Network products include:

Member only

WealthComplete Premier
Investyles
MarketMix Premier
Small Business Assets

Available for purchase (presumably by anyone)

Income360
Ability to Pay Index
CreditStyles Pro
CreditMix
Affluence Index
Spending Power
Economic Cohorts
Segmentation Analysis (3Ps)⁸¹

Some of these products are described as follows:

- Credit Styles Pro: “includes Detailed Credit Variables, Risk Scores, Intent Indicators, and Aggregated FICO® Scores. These measures, scores, and variables can be used alone or combined for advanced analytics.... Because they are not subject to FCRA regulations and household scores and variables are aggregated to the ZIP+4 level, CreditStyles Pro components can be used throughout the customer lifecycle to enhance prospecting, targeting, and account management.”⁸²
Despite being aggregated and anonymous, Credit Styles Pro also claims it “Better represents households’ credit usage by de-duplicating individuals on joint and shared accounts.”⁸³ Thus it appears that the aggregated data is subsequently linked to individuals or households.
- Affluence Index: “can more accurately predict capacity to spend, save, or invest because it incorporates proprietary, anonymous wealth information derived from multiple sources,

⁸⁰ Confluent Strategies, IXI: What it is and how it will help you win customers, <https://confluentstrategies.com/resources/ixi-what-it-is-and-how-it-will-help-you-win-customers/> (viewed June 10, 2023).

⁸¹ *Id.*

⁸² Equifax, CreditStyles Pro, 2019, <https://assets.equifax.com/marketing/US/assets/CreditStyles-Pro-pps.pdf>.

⁸³ *Id.*

including summary factors produced from our proprietary database of consumer investable assets.”⁸⁴

- WealthComplete “provides a complete picture of wealth for U.S. households. It is based on our proprietary, anonymous, direct-measured financial assets database and is projected to represent the total financial liquid assets held by all U.S. households, approximately \$17 trillion. WealthComplete can be used for customer segmentation, share of wallet opportunity analysis, and asset allocation analysis.”⁸⁵
- Economic Cohorts: “a household-level segmentation product that clusters consumer groups based on estimated income, spending and aggregated credit, as well as well as demographics, housing and urbanicity characteristics”⁸⁶
- Income360 provides a continuous household-based dollar estimate of income uncapped up to \$2.0M”⁸⁷

There is also a product called Financial Spectrum, which utilizes IXI Network data:

- Financial Spectrum offers asset-based customer segmentation to financial services marketers, reducing compliance risk by leveraging actual, direct-measured financial data and no protected-class demographic variables like age or marital status ... The new offering provides unique consumer insights that only Equifax can provide from the IXI Network, including: asset composition, average assets, and liabilities, and propensity to buy specific financial products and services”⁸⁸

This chart illustrates some of the market segmentation that Equifax offers:

⁸⁴ Equifax, Affluence Index, 2021,

https://assets.equifax.com/marketing/US/assets/affluence_index_ps.pdf

⁸⁵ Equifax, Determining the Opportunity and Creating Client Treatment Groups, 2017,

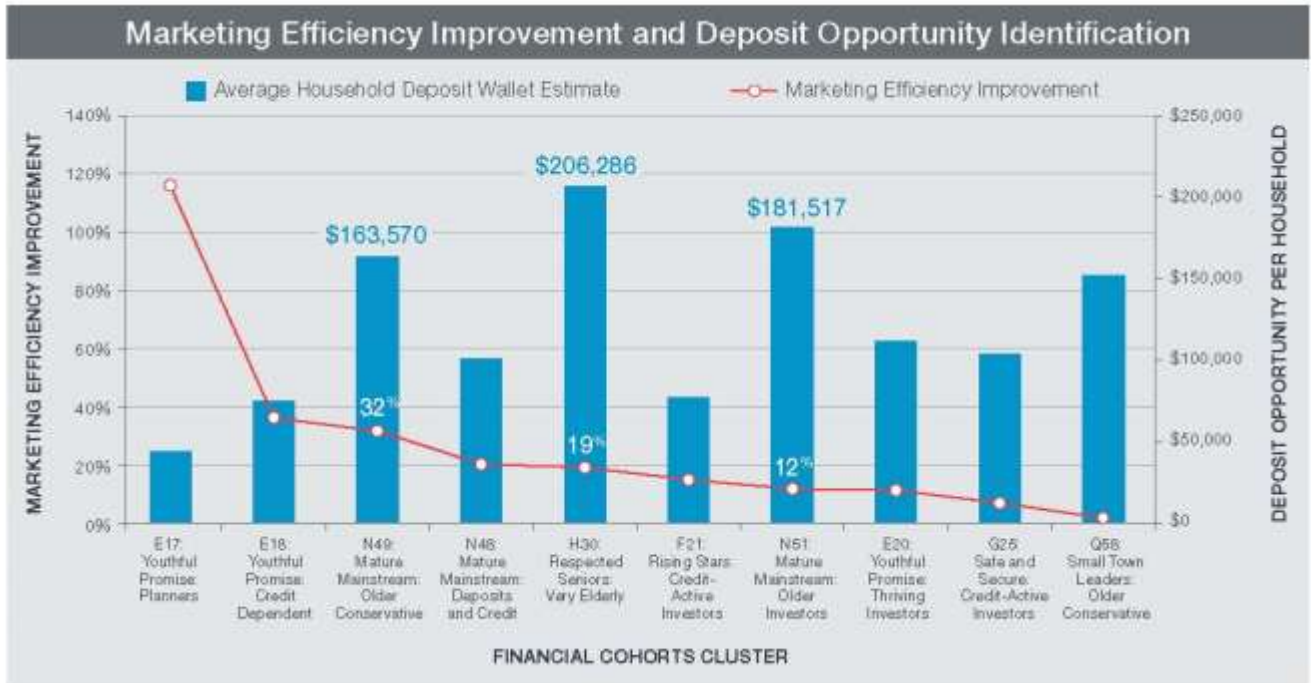
https://assets.equifax.com/marketing/US/assets/determine-opportunity-with-wealth-complete_cs.pdf; *see also* Equifax, WealthComplete Premier, 2022, <https://assets.equifax.com/assets/usis/wealth-complete-premier-product-sheet.pdf>

⁸⁶ Equifax, Marketing Solutions for Retail, 2017,

https://assets.equifax.com/marketing/US/assets/marketing_solutions_for_retail.pdf,

⁸⁷ *Id.*

⁸⁸ Press Release, Neustar and Equifax Launch Financial Spectrum to Provide Financial Services Audience Data and Segmentation to Increase Brand Reach and Customer Acquisition, June 30, 2021, www.businesswire.com/news/home/20210630005310/en/Neustar-and-Equifax-Launch-Financial-Spectrum%E2%84%A2-to-Provide-Financial-Services-Audience-Data-and-Segmentation-to-Increase-Brand-Reach-and-Customer-Acquisition



From: Equifax, Growing Bank Deposits with Targeted Prospecting, 2023, <https://assets.equifax.com/marketing/US/assets/growing-bank-deposits-with-targeted-prospecting-case-study-2023.pdf>.

The data in the IXI Network appears to be very type of data that would be covered under the FCRA – financial data, particularly asset data. If any of the customers of the above products use it for an FCRA-covered purpose, including making a firm offer of credit, it would be a consumer report. But it appears that Equifax claims that the IXI Network data is not an FCRA-covered product, in part, based on the anonymization of the data. Like Experian’s ConsumerView, IXI Network data appears to be stored anonymously but then become re-associated with consumers, which does mean it “bears on” an individual’s creditworthiness or reputation.

In addition to the IXI Network, Equifax appears to sell its core credit reporting data for certain marketing purposes, namely cross-selling existing customers. In its SEC filings, Equifax states that its Online Information Solutions data, which is the main credit reporting files, “is used by our clients for cross-selling additional products to existing customers...”⁸⁹

Equifax also maintains at least 75,000 individual data elements for its marketing products, “including information as specific as whether a consumer purchased a particular soft drink or shampoo product in the last six months, uses laxatives or yeast infection products; OB/GYN doctor visits within the last 12 months, miles traveled in the last 4 weeks, and the number of whiskey drinks consumed in the past 30 days.”⁹⁰

⁸⁹ Equifax 2022 10-K at 6.

⁹⁰ See Staff of S. Comm. on Commerce, Science, and Transportation, 113th Cong., *Report on the Data Broker Industry: Collection, Use, and Sale of Consumer Data for Marketing Purposes*, at 14.

In terms of acquisitions, Experian has purchased the following companies in recent years:

Mdigator
Efficient Hire
LawLogix
Data-Crédito (Dominican Republic)
Kount
Appriss Insights
Teletrack⁹¹

Equifax stated that its 2022 purchases were “totaling \$450 million that will contribute approximately \$90 million in annualized revenue.”⁹²

3. TransUnion

TransUnion describes itself as “the largest provider of scale in the United States to possess both nationwide consumer credit data and comprehensive, diverse public records data, which allows us to better predict behaviors, assess risk and address a broader set of business issues for our customers.”⁹³ It states that the company “own[s] several proprietary datasets such as consumer credit information, driver violation history, phone activity, digital device identifiers, business data and rental payment history....”⁹⁴

One of these proprietary datasets is TransUnion’s TLOxp platform, now known as TruLookup, which is promoted for use to:

- “ •**Investigate and Alert** - Investigate and obtain information about individuals and businesses to mitigate any potential risk associated with them
- “•**Locate and Recover** - Information and insight you can leverage to locate and recover dollars, property and assets
- “•**Identity Enrichment** - Enriches identity data to ensure the accuracy, recency and comprehensiveness of consumer information.”⁹⁵

In its SEC filings, TransUnion claims that TLOxp “leverages proprietary data linking and matching capabilities across thousands of data sources to identify and provide insights on relationships among specific people, assets, locations, and businesses. This allows us to offer enhanced due diligence, investigation, risk management, threat assessment, identity authentication, and fraud prevention and detection solutions. ... In 2022, we began offering TLOxp to credit unions through Temenos, a financial services platform provider.”⁹⁶ Other use

⁹¹ Equifax 2022 10-K at 40.

⁹² *Id.* at 11.

⁹³ TransUnion 2022 10-K, at 5.

⁹⁴ *Id.*

⁹⁵ Press Release, TransUnion Announces Rebrand of its Business Solutions with Focus on Providing a Tru Picture of Consumers, Feb. 21, 2023, <https://www.tlo.com/blog/transunion-announces-rebrand-of-its-business-solutions>,

⁹⁶ TransUnion 2022 10-K, at 6.

cases for TLOxp include “government, law enforcement, insurance, and healthcare.”⁹⁷ Thus, it appears that TLOxp is offered for at least two FCRA-covered purposes, insurance and collections, and that it is used by financial institutions. In addition, fraud prevention is likely an FCRA-covered purpose to the extent that it is conducted with respect to a financial product, e.g., identity verification for a credit product or Know Your Customer screening for opening a deposit account.

Users can also order TransUnion credit reports via TLOxp. On the webpage offering this service, TLOxp includes the following fine print disclaimer: “TRADS [TransUnion Risk and Alternative Data Solutions, which sells TLOxp⁹⁸] is not a consumer reporting agency and does not assemble, compile, or maintain report information. TRADS may, on behalf of and at the discretion of Subscriber, request Consumer Reports, including but not limited to credit reports, from TU by transmitting Subscriber’s subscriber code, permissible purpose certification and subject consumer identifying information. TRADS, via TLOxp®, is solely a conduit for the delivery of the TransUnion Consumer Reports as a convenience to the Subscriber.”⁹⁹ It appears that TRADS/TLOxp is a reseller at a minimum, yet is disclaiming FCRA obligations.

TLOxp also offers Employment Solutions, which it explicitly markets for collections, stating: “Strengthen your skip tracing efforts and enhance recoveries with up-to-date employment data.”¹⁰⁰ It also offers several other product lines, including TruAudience (marketing), TruValidate (fraud prevention), TruVision (risk management solutions), TuIQ (analytics), TruEmpower (consumer engagement), and TruContact (communications).

TruValidate “provides an enhanced suite of identity management, authentication, and fraud analytics solutions that protect businesses from fraud, increase acquisition rates and consumer loyalty, and optimize business operations.”¹⁰¹

In 2021, TransUnion acquired Neustar, an “identity resolution company with leading solutions in Marketing, Fraud and Communications.”¹⁰² This added to TransUnion’s portfolio “digital identifier datasets, most notably phone activity data, as well as improved capabilities to link and match certain of our datasets.”¹⁰³ In addition, TransUnion states in SEC filings that it has a

⁹⁷ *Id.*

⁹⁸ *See* TransUnion Risk & Alternative Data Sols., Inc. v. Challa, 676 F. App’x 822, 823 (11th Cir. 2017)(“TRADS is a ‘data fusion’ company, offering products that aggregate fragmented information about people, businesses, and assets. Its core product, TLOxp, enables TRADS’s clients—typically government, law enforcement, licensed investigators, and corporate fraud divisions—to obtain a cohesive set of data on identified entities.”)

⁹⁹ TransUnion/TLOxp, TransUnion Credit Reports, <https://www.tlo.com/tu-credit-reports> (viewed June 10, 2023).

¹⁰⁰ TransUnion/TLOxp, TLOxp Employment Solutions, <https://www.tlo.com/employment-solutions> (viewed June 10, 2023).

¹⁰¹ TransUnion 2022 10-K, at 6.

¹⁰² Press Release, TransUnion Accelerates Growth of Identity-Based Solutions with Agreement to Acquire Neustar for \$3.1 Billion, Sept. 13, 2021, <https://newsroom.transunion.com/transunion-accelerates-growth-of-identity-based-solutions--with-agreement-to-acquire-neustar-for-31-billion/>.

¹⁰³ TransUnion 2022 10-K, at 3.

partnership with “Neuro-ID for Behavioral Analytics, which will be offered as part of a Digital Insights Solutions package that includes Device Risk and Neustar’s Digital Identity Risk,...”¹⁰⁴

TransUnion has partnered with Carfax,¹⁰⁵ a “vehicle history data provider to launch a vehicle history score that helps insurance carriers further segment risk based on the attributes of a specific automobile.”¹⁰⁶ It is unclear whether TransUnion treats this product as covered by the FCRA, but if it does not, we would assume TransUnion would argue that it is because the report is about a vehicle and not an individual consumer.¹⁰⁷

TransUnion’s marketing materials indicate that, like Experian, it may be using data in its main credit reporting files for non-FCRA covered purposes, such as marketing. In its SEC filings, the company states:

- “In Marketing, we recognized that we already had the foundational datasets we needed to compete in audience segmentation and identity resolution, made strategic bolt-on acquisitions, and acquired Neustar to broaden our customer base and deepen our solution capabilities.”¹⁰⁸

- “We provide services to our customers through real-time, online delivery for services such as credit reports and predictive scores, in batch form for services that help our customers proactively acquire new customers, cross-sell to existing customers and help them monitor and manage risk...”¹⁰⁹

- “From our heritage in the credit risk space, we have expanded into adjacent solution areas that can leverage our datasets and competencies, most notably fraud and marketing.”¹¹⁰

TransUnion offers a product called Credit Vision that it appears to consider FCRA-covered. This includes CreditVision Propensity scores, which, according to TransUnion, provide:

an enhanced ability to identify specific credit trends, helping to increase the odds of acquisition by specifically targeting active consumers. By studying consumer behavior, institutions can act more quickly and with confidence that offers will be timely and well received.¹¹¹

¹⁰⁴ *Id.* at 6.

¹⁰⁵ TransUnion, Vehicle History Score, <https://www.transunion.com/product/vehicle-history-score> (viewed June 10, 2023).

¹⁰⁶ TransUnion 2022 10-K, at 8.

¹⁰⁷ See National Consumer Law Center, Automobile Fraud § 2.3.2 (7th ed. 2022), updated at www.nclc.org/library (describing Carfax reports)..

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 15.

¹¹⁰ *Id.* at 10.

¹¹¹ TransUnion, CreditVision, at 10 (2021), https://www.transunion.com/content/dam/transunion/global/business/documents/GTM_CreditVision_Magnitude_Algorithm_Brochure_FINAL.pdf.

Again, the term “offer” suggests that TransUnion likely justifies the use of Credit Vision scores for marketing as a form of prescreening under § 1681b(c). This provides further support for our recommendation that CFPB should re-define what constitutes a “firm offer of credit” for to require that the creditor make a meaningful offer of actual credit.

Finally, in terms of acquisitions, TransUnion has acquired the following companies in recent years:

Neustar
Sontiq
Verisk Financial Services
TruOptik
Signal
TruSignal
iovation¹¹²

4. LexisNexis and Accurant

LexisNexis is one of the largest and most ubiquitous data brokers in the U.S. The company advertises data on 270 million transactions around the globe every hour. Among its “vast array of standard and non-traditional sources, LexisNexis offers its customers access to 1.5 billion bankruptcy records, 77 million business contact records, 330 million unique cell phone numbers, 11.3 billion unique name and address combinations, 6.6 billion motor vehicle registrations, and 6.5 billion personal property records.”¹¹³ Additionally, it markets its ability to “identify relatives, associates and neighbors who may show up in photos or be mentioned in social media postings with a search of hundreds of networks and millions of sites on the open web.”¹¹⁴

LexisNexis sells a suite of products containing consumer information to a range of different users. It acknowledges that some of its products, such as LexisNexis Risk Solutions, are consumer reports.¹¹⁵ But LexisNexis also has a history of denying that some of its products are consumer reports.

One of LexisNexis’ data products, “Accurant,” aggregates and organizes over 37 billion public and proprietary records, which, according to LexisNexis, makes it the largest database of linked public and proprietary information.¹¹⁶ Its features include up-to-date phone numbers, addresses,

¹¹² TransUnion 2022 10-K, at 11-12.

¹¹³ LexisNexis, “Search Public Records,” <https://www.lexisnexis.com/en-us/products/public-records/powerful-public-records-search.page> (last accessed April 19, 2023).

¹¹⁴ *Id.*

¹¹⁵ CFPB, List of List of Consumer Reporting Companies, at 37, 2023, https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-companies-list_2023.pdf.

¹¹⁶ LexisNexis, “Crime and Criminal Investigations Solutions,” <https://risk.lexisnexis.com/law-enforcement-and-public-safety/crime-and-criminal-investigations>; *see also* “LexID: Advanced analytics for better identity management,” <https://risk.lexisnexis.com/our-technology/lexid> (last accessed April 19, 2023).

vehicle information, property records, social networking information, license plate reader information, business records, criminal records, bankruptcies, and case management, comparison, and mapping tools.

LexisNexis sells Accurint for different uses, some of which are FCRA-covered and others which are not. For instance, Accurint for Collections was at one point treated as an FCRA-covered product due to a legal settlement,¹¹⁷ which seems appropriate given that debt collection is a covered purpose under the FCRA.¹¹⁸ Accurint is also used by many law enforcement agencies, which is generally not a permissible purpose under the FCRA. The sale of Accurint for both covered and non-covered purposes is problematic because, as discussed in Section B.3, once information is collected or expected to be used, even in part, for a covered purpose, it constitutes a consumer report and cannot be sold subsequently for a non-covered purpose.

Federal, state and local agencies are major users of LexisNexis data. “Accurint for Government” is used by more than 3,000 government agencies across the country.¹¹⁹ LexisNexis says the product “verifies such essential personal information as name, address and Social Security Number or Federal Identification number, and confirms the identities of businesses and their authorized agents. It also allows [users] to verify the identities and validate professional licenses, DEA licensing, legal standing and criminal records.”¹²⁰

LexisNexis touts that its Accurint for Law Enforcement can “expedite the identification of people and their assets, addresses, relatives and business associates by providing instant access to a comprehensive database of public records that would ordinarily take days to collect.”¹²¹ Unfortunately, this information is also subject to abuse by individual law enforcement personnel.¹²²

On the federal level, LexisNexis has provided extensive data and operational capacity to Immigration and Customs Enforcement (ICE) via Accurint.¹²³ LexisNexis’s ongoing contract with ICE as of May 2021 has a potential award value of \$27 million. ICE uses Accurint to locate

¹¹⁷ *Berry v. LexisNexis Risk & Information Analytics Group, Inc.*, 2014 WL 4403524 (E.D. Va. Sept. 5, 2014) (order confirming class settlement).

¹¹⁸ 15 U.S.C. § 1681b(a)(3)(A) (permissible purpose exists “involving . . . collection of an account of [] the consume”). See generally, National Consumer Law Center, *Fair Credit Reporting* § 7.2.3.4 (10th ed. 2022), updated at www.nclc.org/library.

¹¹⁹ LexisNexis, “Accurint for Government,” <https://risk.lexisnexis.com/products/accurint-for-government> (last accessed April 19, 2023).

¹²⁰ *Id.*

¹²¹ LexisNexis Risk Solutions, Accurint for Law Enforcement, <https://risk.lexisnexis.com/products/accurint-for-law-enforcement> (viewed May 12, 2023).

¹²² Krista Johnson, Ex-Kentucky officer used police tech to hack women's Snapchats, steal nude photos, documents show, *Louisville Courier Journal*, Oct. 13, 2022, www.usatoday.com/story/news/nation/2022/10/13/louisville-police-officer-snapchat-hack-nudes/10488052002/ (police officer “was able to obtain information about potential victims by abusing his powers and using the powerful data-combining software, Accurint.”)

¹²³ Just Futures Law & Mijente, *The Data Broker to Deportation Pipeline: How Thomson Reuters and LexisNexis Share Utility & Commercial Data with ICE* (June 2021), <https://www.flipsnack.com/justfutures/commercial-and-utility-data-report/full-view.html>.

individuals for detention and deportation. By contracting with data brokers like LexisNexis, ICE and other law enforcement agencies circumvent the law, “erode civil rights and civil liberties and conduct mass surveillance to fuel raids and deportations.”¹²⁴

In fiscal year 2018, the Social Security Administration (SSA) began using Accurint for Government on a widespread basis to determine whether recipients of needs-based government assistance had unreported “non-home real property” that could disqualify them from the receipt of such benefits. Soon after the advent of SSA’s use of this Accurint product, advocates representing recipients of Supplemental Security Income (SSI) benefits reported significant problems with clients being falsely accused of owning real property. People who relied on SSI for survival received letters from SSA suspending their benefits or assessing an overpayment based on supposedly owning real property that put them over the resource limit. Too often, the data relied upon was inaccurate. Vulnerable SSI recipients, who are by definition either disabled or elderly and extremely low income, were forced to prove a negative —that they did not own the real property — to the satisfaction of the employees in their local SSA office. And even worse, many lost their benefits or faced an offset for alleged overpayment during that appeal process, depending on the timing of their appeals.

The matching standards used in creating an Accurint for Government report are shockingly lax. A first and last name match is sufficient to include a piece of real property in the report. LexisNexis does not require a match for the person’s middle initial, Social Security Number, or date of birth.¹²⁵ The CFPB has noted that “name only” matching or matching with insufficient identifiers does not constitute a reasonable procedure for maximum possible accuracy.¹²⁶ In the case of SSA’s use of Accurint, this failure had resulted in low-income people being cut off from minimal subsistence-level benefits due to erroneous real property matches. People of color and immigrants were disproportionately impacted, as name-only matching results in even more inaccurate matches among these populations.¹²⁷

Under the FCRA, one permissible purpose for use of a consumer report – and thus a covered purpose that will make information a consumer report – is use “in connection with a

¹²⁴ Letter from Just Futures Law, Mijente, the Electronic Privacy Information Center, the Center on Privacy & Technology at Georgetown Law et. al, to Department of Homeland Security Secretary Alejandro Mayorkas (Feb. 23, 2023) (“Permanently Cancel ICE Contract with Data Broker LexisNexis Ahead of February 28th Contract Renewal Date”), <https://www.documentcloud.org/documents/23688425-letter-from-80-groups-to-dhs-cancel-lexisnexis-contract>.

¹²⁵ See Sarah Mancini, Kate Lang, and Chi Chi Wu, NCLC and Justice in Aging, *Mismatched and Mistaken* (Apr. 4, 2021), <https://www.nclc.org/resources/mismatched-and-mistaken-how-the-use-of-an-inaccurate-private-database-results-in-ssi-recipients-unjustly-losing-benefits/>.

¹²⁶ Fair Credit Reporting; Name-Only Matching Procedures, 86 Fed. Reg. 62468, 62469, 62471 (Nov. 10, 2021), www.federalregister.gov/documents/2021/11/10/2021-24471/fair-credit-reporting-name-only-matching-procedures

¹²⁷ “Clustering” of common surnames is more common among ethnic minorities than among non-Hispanic white populations. Data from the 2010 Census showed that the Hispanic population had a high degree of name clustering among the measured groups, with just 26 surnames accounting for a quarter of the population and 16.3 percent of people reporting one of the top 10 names See Joshua Comenetz, U. S. Census Bureau, *Frequently Occurring Surnames in the 2010 Census*, 7 (2016). A similar pattern of name clustering was detected among other ethnic minorities, including Asian and Black Americans. *Id.*

determination of the consumer’s eligibility for a license or other benefit granted by a governmental instrumentality...” § 1681b(a)(3)(D). Despite this covered purpose. SSA and LexisNexis have argued that Accurint is not a consumer report based on statements in the SSA procedural manual that the Accurint search must be used not to “deny or suspend benefits,” but merely to “establish a lead.”¹²⁸ However, this argument can be challenged in several ways.

First, even if the Accurint report is being used only to “establish a lead,” it strains credulity to argue that it is not being used “*in connection with* a determination of the consumers’ eligibility” for a government benefit. The meaning of “in connection with” and “eligibility” have not been explored with respect to the government benefits purpose. In the context of eligibility for credit, the FTC clarified that a fraud database should be considered a consumer report under the FCRA even if lenders using the data would not be permitted to deny applicants based on information from the database, but would use it merely as a “checkpoint.”¹²⁹ This is analogous to SSA saying that the Accurint report is being used to “establish a lead.”

Second, “eligibility” should be broadly construed. As the court carefully explained in *Adams v LexisNexis*, another case against LexisNexis, the term should encompass a determination of whether an individual is “qualified to participate” or “worthy to be selected,” including being “eligible” for collection based on being the person who owes particular debts included in a report.¹³⁰ The court concluded that a report sold for the purpose of identifying debts owed by a particular person was a consumer report because it was “used or expected to be used or collected,” in whole or in part, for the purpose of “serving as a factor” in establishing a consumer’s “eligibility” for collection of a consumer credit account.¹³¹ Similarly, the information contained in the Accurint report is “used or expected to be used” as a factor in establishing eligibility (or ineligibility) for asset-based SSI benefits.

Moreover, despite the language in the SSA procedural manual stating that the Accurint search should be used only to establish a lead, there were numerous examples of SSA employees terminating SSI benefits based solely on the results of Accurint real property information.¹³² In a 2021 report, NCLC documented a number of instances from around the country in which SSA employees failed to conduct any independent verification after the Accurint database reported a match between an individual and a piece of real property.¹³³

¹²⁸ Social Security Administration Program Operations Manual System (POMS), SI 01140.105(F) (2016).

¹²⁹ Grimes, FTC Informal Staff Opinion Letter (Mar. 3, 1993).

¹³⁰ *Adams v. LexisNexis Risk Information & Analytics Group, Inc.*, 2010 WL 1931135 (D.N.J. May 12, 2010).

¹³¹ *Id.* See also *Hoke v. Retail Credit Corp.*, 521 F.2d 1079 (4th Cir. 1975) (wrestling with the interplay between § 1681a and § 1681b and concluding that a report being used in connection with a determination of eligibility for a medical license was a “consumer report” under the FCRA even though the governmental agency was not required by law to consider an applicant’s financial responsibility or status).

¹³² See Sarah Mancini, Kate Lang, and Chi Chi Wu, NCLC and Justice in Aging, *Mismatched and Mistaken* (Apr. 4, 2021), <https://www.nclc.org/resources/mismatched-and-mistaken-how-the-use-of-an-inaccurate-private-database-results-in-ssi-recipients-unjustly-losing-benefits/>.

¹³³ *Id.*

After NCLC’s report illuminated problems with Accurint reports being used by SSA to conclusively determine eligibility for a government benefit, SSA updated its procedural manual to require specific verification steps when a piece of real property is identified in the Accurint report.¹³⁴ These changes provide some level of protection against improper adverse decisions based on inaccurate data from an Accurint report. However, Accurint is still being used by roughly 3,000 government entities, many of whom are likely using it for FCRA-covered purposes.

LexisNexis has faced multiple lawsuits alleging that various Accurint products are consumer reports and that the company flagrantly failed to comply with the FCRA. In *Adams v. LexisNexis*, the district court denied Lexis’s motion for judgment on the pleadings, holding that despite the company’s protestations, material facts remained in dispute with respect to whether the Accurint report qualified as a consumer report.¹³⁵ In *Berry v. LexisNexis*, the plaintiffs alleged that LexisNexis was acting as if Accurint was not a consumer report while knowing that many or even most of its customers would use the product for purposes covered by the FCRA.¹³⁶ In that case, the parties reached a class settlement in 2013 that required LexisNexis to treat certain uses of Accurint as a consumer report through June 30, 2020.¹³⁷ Unfortunately, one of the most recent court decisions involving LexisNexis held that the company was not a CRA based on the questionable theory that the public records provided by that company (in this case bankruptcy filings) were not “about a consumer” because they were “raw” public records.¹³⁸

5. Acxiom

Acxiom is considered to be “the biggest and most prominent firm collecting, consolidating, and analyzing consumer information from public and private sources.”¹³⁹ In 2014, it claimed to have over 3000 data segments for nearly every U.S. consumer.¹⁴⁰ Acxiom boasts it has data coverage

¹³⁴ SSA, POMS at SI 01140.100(F) (updated June 13, 2022), <https://secure.ssa.gov/apps10/poms.nsf/lrx/0501140100>.

¹³⁵ 2010 WL 1931135, at *9 (D.N.J. May 12, 2010).

¹³⁶ *Berry v. LexisNexis Risk & Information Analytics Group, Inc.*, 2014 WL 4403524 (E.D. Va. Sept. 5, 2014) (order confirming class settlement).

¹³⁷ *Berry*, 2014 WL 4403524, at *15. In its order approving the settlement, the district court inaccurately summarized an FTC opinion letter as having stated that Accurint for Collections reports did not fall within the FCRA and did not involve credit reports. In fact, the FTC opinion letter does not state that the FTC voted that the product was not a consumer report. Rather the letter explains that the FTC brought the case under its FTC Act authority and not under the FCRA, and therefore FCRA sanctions were not appropriate. Official FTC Opinion Letter to Commenter Rotenberg, In the Matter of Reed Elsevier Inc., File No. 052-3094, Docket No. C-4226 (Fed. Trade Comm’n July 29, 2008).

¹³⁸ *Clifford v. LexisNexis Risk Data Mgmt. LLC*, 2023 WL 2478864, *4 (D. Ariz. Mar. 13, 2023). The court did base its opinion, in part, on the fact that it was Equifax, not LexisNexis, that engaged in matching the public record to the plaintiff’s file. Thus, even under the reasoning of this case, where LexisNexis conducts the matching, such as when it delivers information to SSA, it should be considered a CRA.

¹³⁹ Yeh, *Pursuing consumer empowerment*, at 288.

¹⁴⁰ FTC, *Data Brokers*, at 8.

“over 62 countries and growing, as well as the ability to reach over 2.5 billion consumers.”¹⁴¹ The company tags each person with a 13-digit code and then further assigns them to 70 “clusters based on traits such as age, income, race, place of residence (e.g., urban vs. suburban), and shopping habits.”¹⁴² Marketing materials for the Acxiom database product, “Infobase,” advertise data attributes on:

- individual demographics (age, gender, ethnicity, education, occupation);
- household characteristics (household size, number/ages of children);
- *financial data (income ranges, net worth, economic stability)*;
- life events (marriage/divorce, birth of children, moves);
- interests (sports, leisure activities, family, pets, entertainment);
- buying activities (products bought, method of payment);
- behavior (community involvement, causes, gaming);
- major purchases (automotive, home purchase), and;
- geospatial insights (geocoding of latitude/longitude, Census data aggregated at Block, Tract, DMA, ZIP+4).¹⁴³

Acxiom also advertises access to 225 million landline and wireless telephone numbers in the U.S. and Canada and over 965 million U.S.-based consumer records, which it says can be “used both for prospecting and customer loyalty or up-sell applications.”¹⁴⁴ Clients of Acxiom “can identify email addresses of customers or prospects, or they can find the name and postal address for the consumer from only an email address.”¹⁴⁵ ProPublica reported in 2014 that Acxiom also sells certain health data, like whether an individual has an “online search propensity for a certain ailment or prescription.”¹⁴⁶ As Forbes reported in 2017, “[t]he company has been criticized in particular for reports that people have found it difficult to prevent Acxiom from using their data, or to remove their data from Acxiom’s systems.”¹⁴⁷

The data that Acxiom sells appears to bear on several of the seven factors in the definition of “consumer report.” If this data is used for any of the purposes covered under the FCRA, Acxiom and its products should be governed by the Act’s protections. Such coverage would benefit consumers by subjecting this otherwise opaque yet expansive data set to the FCRA’s transparency, privacy, and accuracy controls.

6. TSI Utility Disconnection Scores

¹⁴¹ Acxiom, *Global Data Navigator*, https://www.acxiom.com/wp-content/uploads/2018/03/Fact_Sheet_Global_Data_Navigator.pdf (viewed May 14, 2023).

¹⁴² Yeh, *Pursuing consumer empowerment*, at 288.

¹⁴³ Acxiom, *Infobase*, <https://www.acxiom.com/wp-content/uploads/2020/07/ac-2490-19-fs-acxiom-infobase.pdf> (emphasis added) (last accessed April 19, 2023).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Beckett, *Everything We Know About What Data Brokers Know About You*.

¹⁴⁷ Bernard Marr, *Where Can You Buy Big Data? Here Are The Biggest Consumer Data Brokers?*, Forbes, September 7, 2017, <https://www.forbes.com/sites/bernardmarr/2017/09/07/where-can-you-buy-big-data-here-are-the-biggest-consumer-data-brokers/?sh=2f85a4166c27>.

Utility companies are now using third party data brokers as part of the collection process. For example, some utilities are using Total Solutions, Inc. (TSI), which utilizes an algorithm to create a risk-ranking for the utilities' residential customers on a monthly basis.¹⁴⁸ One Illinois utility, Commonwealth Edison (ComEd), has been using TSI's risk rankings to establish the timing of certain collection activities, including disconnections, for customers with arrearages.¹⁴⁹

According to filings in a regulatory proceeding for ComEd, the company states:

First, all customers are automatically scored for their likelihood of payment. ComEd's vendor, Total Solution Inc. ("TSI"), uses its proprietary risk scoring software to score each ComEd's residential customer account two (2) days after their bill due date based on the calculated likelihood of on-time payment ("risk level"). TSI completes this automated scoring every month.

Second, those customers with past-due balances move through the Collection Matrix; the speed at which they proceed through the Collection Matrix is dependent on their individual risk score. A customer is placed in a risk segment based on their individual risk score. The risk segments range from '1' (most likely to make an on-time payment) to '8' (least likely to make an on-time payment). **Those customers in the highest risk segments, who also have past due balances at or exceeding the collection threshold, are moved through the Collection Matrix faster than customers in lower risk segments.** ...¹⁵⁰

(Emphasis added.)

ComEd also explained that the "attributes" that TSI considers in its risk scoring model:

1. Collection arrangements within the last 6 months (new customers) or 12 & 3 months (existing customers)
2. Number of times eligible to cut off within the last 6 months (new customers) or 12 months (existing customers)
3. Number of collection activities in the last 6 months (new customers) or 12 months (existing customers)
4. Total arrears in the past 6 months (new customers) or 12 months (existing customers)
5. Times past due within the last 6 months (new customers) or 12 & 4 months (existing customers)
6. Months since account turned on
7. Months since last payment TSI implements a scorecard in order to calculate risk scores for each customer.

Beyond this, there is little information on how TSI establishes an individual customer's score given its claim of "proprietary" status. Thus, there is no information as to how each of the above factors is weighted, or how the calculated scores are segmented into the eight risk rankings

¹⁴⁸ See Total Solution Inc., Welcome to Total Solution Inc., <http://www.totalsolutioninc.com/>.

¹⁴⁹ Initial Post-Hearing Brief of Community Organizing and Family Issue, In re Commonwealth Edison - Petition for the Establishment of Performance Metrics Under Section 16-108.18(e) of the Public Utilities Act, Docket No. 22-0067 (Ill. Commerce Comm. July 28, 2022).

¹⁵⁰ *Id.*

that ComEd uses when determining how fast a customer moves through the disconnection process.

The data that is fed through TSI's algorithm is imported from ComEd's Customer Information Management System. TSI then translates that data into a risk score, then a risk segmentation from 1 (most likely to pay) to 8 (least likely to pay). This risk segmentation is TSI's deliverable to ComEd.¹⁵¹

Utility service is a permissible purpose under the FCRA and thus should constitute a covered purpose for the definition of a "consumer report." In fact, there is a CRA that is specific to utility and telecom services, the National Consumer Telecom and Utilities Exchange. While some of the data inputted into TSI's algorithm would not be a consumer report because it is the utility's own first-hand experience information, § 1681a(d)(2)(A)(i), there is also third party data involved, especially for newer customers. Taking the data and using it to generate new data (risk rankings) could be considered third party information and thus a consumer report.

D. Data brokers significantly contribute to the proliferation of illegal and unwanted robocalls

(Responses to RFI Questions 2b, 12, 13, and 16)

As everyone who has a telephone knows, unwanted robocalls continue to bombard telephones in the United States. Indeed, despite increased attention to the problem, the number of scam and telemarketing calls per month increased dramatically between 2017 and late 2022, exceeding 4 billion calls a month by the end of 2022.¹⁵²

Data brokers are responsible for facilitating most of these illegal calls. Different types of data brokers collect, sort, sell and trade the specific, detailed information about individual consumers that fuels both fraudulent robocalls and the invasive and generally illegal telemarketing calls that plague America's telephones. Some data brokers provide consumers' private information to scam artists that allow the scammers to pretend that they are trusted providers of services (such as health insurance providers,¹⁵³ the IRS,¹⁵⁴ or the SSA¹⁵⁵). Other data brokers—known as lead generators—gather information that consumers unwittingly provide about themselves on websites as they are shopping online for products or services. The lead generators turn around

¹⁵¹ *Id.* at 19-20, citing ComEd Response to COFI Data Request 2.07(d).

¹⁵² PR Newswire, Robocalls Top 50.3 Billion in 2022, Matching 2021 Call Volumes Despite Enforcement Efforts (Jan. 5, 2023), <https://www.prnewswire.com/news-releases/robocalls-top-50-3-billion-in-2022--matching-2021-call-volumes-despite-enforcement-efforts-301714297.html>.

¹⁵³

<https://media.youmail.com/mcs/glb/audio/s3diZGlyX3QwNmRpcjpodWlxNzc0MDg1OjE1NjM5MzA3MDMwODNHvosRZb.gen.wav>

¹⁵⁴ <https://www.youtube.com/watch?v=ANm4uBimRXA>

¹⁵⁵

<https://media.youmail.com/mcs/glb/audio/s6diZGlyXzd2bWRpcjp0b21jYXQ2MTUyOjE2MjE1MzYwMTU5MDhK000nRQ.gen.wav>

and provide that information to thousands of different telemarketers who use that information to evade compliance requirements for telemarketing calls.

In 2022, the losses reported to the FTC due to scam calls exceeded \$325 million,¹⁵⁶ but losses reported to the FTC are only the tip of the iceberg. One private company estimates the losses from scam calls at over \$65 billion (plus over \$20 billion in losses from scam text messages) last year.¹⁵⁷ The illegal telemarketing calls are also invasive, undermine the value of our telephone system, and pose a risk to many subscribers who often miss important calls because the onslaught of spam causes them to be wary of answering their phone.¹⁵⁸

Regulations issued by the Federal Communications Commission¹⁵⁹ (FCC) and the FTC¹⁶⁰ provide strict rules governing how telemarketers can legally place telemarketing calls using a prerecorded voice to residential and wireless lines, and any calls (whether prerecorded or live) to lines registered on the nation's Do-Not-Call Registry.¹⁶¹ Both agencies' rules specify that before these telemarketing calls can be made, the recipient must have signed a written agreement providing consent to receive those telemarketing calls relating to a specific seller of goods or services.¹⁶² Despite these requirements, lead generators and others routinely sell consumers' consent agreements to other sellers and telemarketers, leading to proliferation of calls from multiple callers from a single consent agreement.¹⁶³

¹⁵⁶ FTC Consumer Sentinel Network, Fraud Reports by Contact Method, [Reports & Amount Lost by Contact Method](https://public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/FraudFacts) (last visited Apr. 25, 2023) (Losses & Contact Method tab, with quarters 1 through 4 checked for 2018), available at <https://public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/FraudFacts>.

¹⁵⁷ Robokiller phone scam report, 2022 insights & analysis, <https://www.robokiller.com/robokiller-2022-phone-scam-report>.

¹⁵⁸ Illegal calls have become so pervasive that 70% of Americans do not answer calls from numbers they do not recognize. This increases costs for health care providers, small and large businesses, and their call recipients, who miss or incur delays in receiving time-critical communications for fear of answering a robocaller. These unwanted calls are also a prime reason that many landline subscribers are dropping their landline subscriptions. See Octavio Blanco, Consumer Reports, *Mad About Robocalls?* (Apr. 2, 2019), available at <https://www.consumerreports.org/robocalls/mad-about-robocalls/>; Tim Harper, Consumer Reports, *Why Robocalls Are Even Worse Than You Thought* (May 15, 2019), available at <https://www.consumerreports.org/robocalls/why-robocalls-are-even-worse-than-you-thought/>. See generally Nicole Egan, *Rage Against the Machine: Reducing Robocall Abuse to Protect At-Risk Consumers*, 17 U. Mass. L. Rev. 211 (2022).

¹⁵⁹ 47 C.F.R. § 64.1200(f)(9).

¹⁶⁰ 16 C.F.R. § 310.4(b)(v).

¹⁶¹ 47 C.F.R. § 64.1200(c)(2)(ii) and 16 C.F.R. § 310.4(b)(3)(B)(i), respectively.

¹⁶² Federal Trade Comm'n, Business Guidance, Complying with the Telemarketing Sales Rule, available at <https://www.ftc.gov/business-guidance/resources/complying-telemarketing-sales-rule#prerecordedmessages>.

¹⁶³ See e.g., *In re Targeting and Eliminating Unlawful Text Messages Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Comments of National Consumer Law Center *et al.*, CG Docket Nos. 21-402, 02-278 (May 8, 2023), available at <https://www.fcc.gov/ecfs/document/1050859496645/1>, Reply Comments of National Consumer Law Center, *et al.*, available at <https://www.fcc.gov/ecfs/search/search-filings/filing/10606186902940>;

Lead generators, a common feature on the internet, refer potential customers to vendors.¹⁶⁴ They fit the CFPB’s definition of data brokers as entities that “collect information from public and private sources for purposes including marketing and advertising, building proprietary algorithms . . .”¹⁶⁵ The “leads”—the potential customers—are sold directly to sellers of products or services (such as lenders or insurance companies) or to lead aggregators who then sell the leads to the sellers.¹⁶⁶ As courts and the FTC have noted, it is not always apparent from a particular website that it is operated by a lead generator rather than an actual lender or seller of other products or services,¹⁶⁷ and misrepresentations on lead generators’ sites are not uncommon.¹⁶⁸ Many lead generators sell leads to lenders, others to insurance companies, car dealers, providers of security software, and many other products and services. Some lead generators’ sites make representations about compliance with state laws.¹⁶⁹ These assertions may be actionable misrepresentations.¹⁷⁰

Lead generators typically collect completed applications from site visitors, provide varying levels of data analysis, and sell applications to the highest bidders through automated auctions. Some lead generators are lenders themselves who make referrals when they do not lend in a consumer’s jurisdiction or when the borrower does not fit the lender’s requirements. Others are merely advertisers. Consumers who visit a lead generator’s site are typically invited to enter their contact information (and often personal details including name, phone number, social security number, address, email address and telephone number) into a form on the site. The site operator then sells the consumer’s information to interested lenders. A 2011 survey found that leads are sometimes sold for over \$100;¹⁷¹ more recent online data indicates that leads can be sold for as much as \$600 each.¹⁷²

¹⁶⁴ See Fed. Trade Comm’n, Follow the Lead Workshop—Staff Perspective (Sept. 2016), *available at* www.ftc.gov (overview of lead generation industry).

¹⁶⁵ 88 Fed. Reg. at 16953.

¹⁶⁶ *Id.* at 2 (“A lead is someone who has indicated—directly or indirectly—interest in buying a product.”).

¹⁶⁷ See CFPB v. D & D Mktg., 2016 WL 8849698 (C.D. Cal. Nov. 17, 2016).

¹⁶⁸ *Id.*; Federal Trade Comm’n, Follow the Lead Workshop—Staff Perspective 5 (Sept. 2016), *available at* www.ftc.gov. See, e.g., Consumer Fin. Prot. Bureau v. RD Legal Funding, L.L.C., 332 F. Supp. 3d 729, 782–783 (S.D.N.Y. 2018); MacDonald v. CashCall, Inc., 2017 WL 1536427, at *12 (D.N.J. Apr. 28, 2017), *aff’d on other grounds*, 883 F.3d 220 (3d Cir. 2018) (affirming denial of arbitration motion); Consumer Fin. Prot. Bureau v. CashCall, Inc., 2016 WL 4820635, at *10 (C.D. Cal. Aug. 31, 2016).

¹⁶⁹ *Id.*; Fed. Trade Comm’n, [Follow the Lead Workshop—Staff Perspective](http://www.ftc.gov) 5 (Sept. 2016), *available at* www.ftc.gov.

¹⁷⁰ Consumer Fin. Prot. Bureau v. RD Legal Funding, L.L.C., 332 F. Supp. 3d 729, 782–783 (S.D.N.Y. 2018); MacDonald v. CashCall, Inc., 2017 WL 1536427, at *12 (D.N.J. Apr. 28, 2017), *aff’d on other issues*, 883 F.3d 220 (3d Cir. 2018) (affirming denial of arbitration motion); Consumer Fin. Prot. Bureau v. CashCall, Inc., 2016 WL 4820635, at *10 (C.D. Cal. Aug. 31, 2016).

¹⁷¹ Consumer Federation of America, [Survey of Online Payday Loan Websites](http://consumerfed.org) 7 (Aug. 2011), *available at* <http://consumerfed.org>.

¹⁷² See Leads Hook, Blog post, *How to Make Money Selling Leads in 2023 (& How Much to Charge)* (Jan. 23, 2023), *available at* <https://www.leadshook.com>.

Multiple commenters in a pending FCC proceeding¹⁷³ have explained how the resale of consumer data by lead generators significantly contributes to the problem of illegal calls.¹⁷⁴ One commenter--R.E.A.C.H.—which describes itself as an organization filing on behalf its “direct-to-consumer marketing, lead generation and performance marketing members,” admitted in its comments that lead generators are responsible for a “meaningful percentage” of entirely fabricated agreements that provide consent for the telemarketing calls.¹⁷⁵ R.E.A.C.H.’s comments provide particularly helpful information about how the lead generator industry works to facilitate telemarketing robocalls. Its comments explain that “once the consumer has submitted the consent form the company seeks to profit by reselling the “lead” multiple—perhaps hundreds—of times over a limitless period of time. Since express written consent does not expire, the website is free to sell the consent forever.”¹⁷⁶

Each party that owns the consent, including the original lead generator and every subsequent purchaser of the consent, “is free to sell it again.”¹⁷⁷ The result of all these sales: “Each time the website operator—or an intermediary “aggregator” . . . sells the consumer’s data a new set of phone calls will be made to the consumer.”¹⁷⁸ Additional comments in the FCC proceeding support the point that the practice of lead generators sharing consents is a major contributing factor in the proliferation of unwanted telemarketing calls.¹⁷⁹

¹⁷³ *In re* Targeting and Eliminating Unlawful Text Messages Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order and Further Notice of Proposed Rulemaking, CG Docket Nos. 21-402, 02-278 (Rel. Mar. 17, 2023), *available at* <https://www.fcc.gov/document/fcc-adopts-its-first-rules-focused-scam-texting-0>. The Proposed Rule was published in the Federal Register at 88 Fed. Reg. 20,800 (Apr. 7, 2023) and is available at <https://www.govinfo.gov/content/pkg/FR-2023-04-07/pdf/2023-07069.pdf>.

¹⁷⁴ *See, e.g.*, Comments of Joe Shields, CG Docket Nos. 21-402, 02-278, at 4 (May 8, 2023), *available at* <https://www.fcc.gov/ecfs/document/10509289758317/1> (“[T]he ‘lead’ number is sold under the pretense of healthcare but intentionally sold to auto insurers, financial advisors, senior benefits companies, remodelers, banks, retailers, telecoms, auto warranty companies, travel companies and most importantly marketers for just about anything to name just a few.”); Comment of James Connors, CG Docket Nos. 21-402, 02-278, at 1 (Apr. 17, 2023), *available at* <https://www.fcc.gov/ecfs/document/10418203276092/1> (“[H]ere’s just three of the too numerous to count lead generation sources that create the day-in and day-out frustration to the hundreds of millions of law-abiding citizens that are bombarded daily without any concern for our privacy, while ignoring the fact that 246+ million of us have long since registered on the National Do Not Call Registry indicating we DO NOT WANT these calls!”); Comment of Richard Presley, CG Docket Nos. 21-402, 02-278, at 2 (Apr. 11, 2023), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/10411157882365> (“This is exactly why the [lead generation] industry has never followed the rules and nor will it ever police itself...”); Anonymous Comment, CG Docket Nos. 21-402, 02-278 (Feb. 27, 2023), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/10224111809296> (“It’s the aged data companies that are raking in 500% profit reselling the same consumer data 5 or more times to small businesses who don’t know any better about the TCPA to begin with.”).

¹⁷⁵ Comment of Responsible Enterprises Against Consumer Harassment, CG Dockets Nos. 21-402, 02-278, at 1 (May 9, 2023), *available at* <https://www.fcc.gov/ecfs/document/10509951114134/1>.

¹⁷⁶ *Id.* at 3 (emphasis added).

¹⁷⁷ *Id.* at 6 (emphasis added).

¹⁷⁸ *Id.* at 3 (emphasis added).

¹⁷⁹ Comment of Drips [“a conversational outreach platform that helps compliant businesses set appointments with consumers who have existing business relationships or provided express written

Telemarketers regularly claim that they have the consent required by the Telephone Consumer Protection Act (TCPA) for telemarketing calls based on completely unreliable information provided by data brokers and lead generators.¹⁸⁰ Indeed, the FCC and the Ohio Attorney General recently alleged that a robocaller that had transmitted millions of illegal telemarketing calls selling the ubiquitous auto warranty deliberately altered online consent forms *after learning* that it was being investigated, in an attempt to fabricate consumers’ consent to receive the calls.¹⁸¹

The recommendations in Section F below about when information constitutes a consumer report will have the benefit of governing the activities of lead generators when they sell information of the kind that would be used or expected to be used in decisions related to credit, insurance, employment, or other purposes covered by the FCRA. Strong rules preserving the original scope of the FCRA’s coverage will ensure that lead generators cannot be able to sell such information except for permissible purposes under the Act, which do not include marketing.

Outside of the FCRA’s coverage, the activities of lead generators as data brokers should be regulated by the CFPB to the extent that it can under its UDAAP authority, *i.e.*, to the extent it involves consumer financial products and services. The generation or sale of forged or unreliable leads to anyone—telemarketers, sellers, other lead generators—should be explicitly prohibited as deceptive under the CFPB’s UDAAP authority (and the CFPB should recommend that the FTC adopt similar prohibitions under Section 5 of the FTC Act). The resale—beyond the initial website on which the consumer provided consent—of consumer information should be prohibited, also because it is deceptive. The consumer could not know that by consenting to

consent to be contacted for specific purposes”], CG Dockets Nos. 21-402, 02-278 (May 8, 2023) (“The known fact that one click can sign up a consumer to thousands of businesses, related or not, is a dreadful problem. Aged leads are also problematic because, currently, consent never expires.”), available at <https://www.fcc.gov/ecfs/document/10509043191182/1>; Comment of National Association of Mutual Insurance, CG Dockets Nos. 21-402, 02-278 (May 8, 2023) (“Until lead buyers stop purchasing non-compliant leads there will be incentives that lead to bad practices”), available at <https://www.fcc.gov/ecfs/document/10508029328611/1>.

¹⁸⁰ See, e.g., *McCurley v. Royal Seas Cruises, Inc.*, 2022 WL 1012471, at *2, 3 (9th Cir. Apr. 5, 2022) (noting the many discrepancies in a lead generator’s records of purported consent; defendant’s claim re level of consent is “implausible at best”); *Mantha v. Quotewizard.com, L.L.C.*, 2021 WL 6061919, at *9 (D. Mass. Dec. 13, 2021) (Mag.) (granting partial summary judgment to plaintiff on issue of consent to receive calls despite being on nationwide do-not-call list; observing that lead generator apparently pirated another company’s website in order to generate or falsify the source of leads, one of which resulted in the call to plaintiff), adopted, 2022 WL 325722 (D. Mass. Feb. 3, 2022). See also *HI.Q, Inc. v. ZeetoGroup, L.L.C.*, 2022 WL 17345784 (S.D. Cal. Nov. 29, 2022) (Mag.) (describing background before granting regarding motion to compel; lead generator submitted three sworn statements, one saying that consent form identified caller and two saying it did not, and some of its “validation reports” were links that did not work).

¹⁸¹ See Complaint for Permanent Injunction, Damages, and Other Equitable Relief, *State of Ohio ex rel. Attorney General Dave Yost v. Jones*, No. 2:22-cv-2700, at ¶ 69 (S.D. Ohio July 7, 2022) (“For example, when a VoIP Provider of Sumco Panama had to respond to an ITG traceback request, Sumco Panama needed to ‘buy some time’ before responding in order to *add* ‘auto services’ language to the list of opt-in websites in the terms and conditions *after* many VSC robocalls were made based on the alleged ‘opt in’ from these websites.” (emphasis in original)). See also *id.* at ¶¶ 68-71.

receive calls from one seller, that they were also consenting to receiving calls from thousands of other sellers.

E. Credit header data

(Response to RFI Question 22)

“Credit header” information generally refers to identifiers such as a consumer’s name, current and former addresses, telephone number, and Social Security number (SSN). It can also include information such as current and prior employers, mother’s maiden name, and age/date of birth. CRAs currently treat credit header data as exempt from the FCRA.

In January 2022, NCLC and other consumer groups urged the CFPB to clarify that “credit header” information does constitute a consumer report under the FCRA if it is derived from consumer reporting information, and CRAs must ensure that the user has a permissible purpose under the Act before providing such data to the user.¹⁸² In February 2023, a coalition of immigrant rights, consumer rights, and privacy organizations made a similar request within a more comprehensive letter regarding data broker issues.¹⁸³ We reiterate that request in these comments and request that both the January 2022 and February 2023 letters be incorporated by reference.

As both letters noted, the exception for credit header data from FCRA coverage stems from a provision in the FTC’s 40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations (“FTC Staff Summary”),¹⁸⁴ formerly known as the FTC Staff Commentary to the FCRA.¹⁸⁵ As such, any exception was the result of sub-regulatory guidance and can be modified or eliminated by the same means, without the need to undergo the lengthier process of notice and comment rulemaking.

Viewed in the abstract, a simple list of names, addresses and telephone numbers might not seem to bear on the seven factors in § 1681a(d)(1). However, the fact that the information originates from a CRA not only can bear on one of the seven factors, but reveal sensitive information.

For example, a list of consumers from NCTUE indicates those consumers have obtained service from one of the member companies, *i.e.* the consumers have a mobile phone, cable, utility, or

¹⁸² NCLC, et al., Letter Urging CFPB Director Chopra to Eliminate “Credit Header” Exception, January 20, 2022, https://www.nclc.org/wp-content/uploads/2022/10/credit_headers_ICE_ltr.pdf.

¹⁸³ Coalition letter to CFPB Director Chopra Requesting Broad Consumer Financial Market Correction, Beginning with an Advisory Opinion Regarding Credit Header Data, February 8 2023, <https://epic.org/wp-content/uploads/2023/02/2023-02-08-Coalition-Letter-to-CFPB.pdf>.

¹⁸⁴ <https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrapreport.pdf>.

¹⁸⁵ Section 603(d)(1), para. 6.C.ii of the FTC Staff Summary states:

- ii. Lists of names and contact information. A report limited to identifying information such as a consumer’s name, address, former addresses, or phone numbers, does not constitute a “consumer report” if it does not bear on any of the seven factors and is not used to determine eligibility.

Internet service, which would be a “personal characteristic” or “mode of living.” If a list of consumers includes SSNs, those numbers by themselves are extremely sensitive as well as valuable. In addition, the fact that the consumer’s entry is missing an SSN or uses another identification number such as a matricula consular or Individual Taxpayer Identification Number can be revealing of the consumer’s immigration status, which is a personal characteristic. Even just a list of consumers from a nationwide CRA standing alone provides important information, in that it informs the user that each consumer has a file with those companies and is not “credit invisible.”

We urge is that CFPB make clear that credit header information is a consumer report, even if it is limited to names, addresses and other identifiers, *if the information originates from a consumer reporting agency*. Such an interpretation is supported by another section of the FTC Staff Summary that states: “If information from a consumer report is added to a report that is not otherwise a consumer report, that report becomes a consumer report.”¹⁸⁶

Coverage of credit header information under the FCRA is both fair and important, because CRAs have the ability to compile information about consumers that are not easily and generally obtained or available to other parties. This is especially true for sensitive identifiers such as a SSNs or driver’s license numbers. Such information also includes addresses and telephone numbers for consumers who do not wish to be located, including not only undocumented immigrants but debtors seeking refuge from harassing collectors, domestic violence survivors seeking to flee abusers, or consumers who simply do not wish to be contacted. These consumers, who might take great pains to avoid publicizing their home addresses or phone numbers, should not be forced to give up that privacy in order to obtain essential services such as cell phone, Internet, or utility service.

F. Recommendations

(Response to RFI Question 22)

The data broker industry is vast, growing, opaque, and intrusive. It can cause significant harm to consumers, which is hard to detect and fix because of lack of transparency. To combat these harms, the CFPB should adopt the following provisions in its potential rulemaking concerning the scope of the FCRA, i.e., the Bureau should interpret the definition of “consumer report” and “consumer reporting agency” so that:

(1) the determination of the “expected use” of data should be based on evidence of how purchasers/users have actually used the data in reality, and the data broker’s meaningful, active attempts to prevent FCRA-covered uses. If a data broker knows or has reason to believe that its clients are using data for FCRA-covered purposes, including the fact that the company is not implementing controls to prevent such FCRA-covered uses, then the information should be considered a “consumer report.”

¹⁸⁶ FTC Staff Summary § 603(d)(1), ¶ 4.

(2) once information that bears on one of the seven factors in § 1681a(d) is collected for the purpose of providing a consumer report, that information will always be considered a consumer report because it was “collected in whole or in part” and “expected to be used” for an FCRA-covered purpose. For example, any information that originates from the main credit reporting files of the nationwide CRAs cannot be used for a non-FCRA purpose involving individual consumers, even if the information is initially aggregated or organized on a basis other than individual consumers.

(3) any report that is organized or disseminated based on an entity other than a consumer shall still be considered a consumer report if it bears on one of the seven factors and can be reasonably associated with one or more individual consumers. This includes information organized or disseminated based on household, real property, IP address, census block, zip code, or raw public records data.

(4) consistent with prior FTC interpretations, the consumer-initiated business transaction permissible purpose provision under § 1681b(a)(3)(F)(i) is a covered purpose that renders information a consumer report under the FCRA.

We also urge that the CFPB clarify via guidance or advisory opinion that “credit header” information does constitute a consumer report under the FCRA if it is derived from consumer reporting information, and that CRAs must ensure that the user has a permissible purpose under the Act before providing such data to the user.

Finally, re-establishing the broad scope of what constitutes a “consumer report” and “consumer reporting agency” will only be partially effective to stem the problems caused by data brokers unless the CFPB also addresses the problems of prescreening. The CFPB should define what constitutes a “firm offer of credit” under § 1681e(c) to require that the creditor make a meaningful offer of actual credit, and not just a discount code or coupon.

Outside of the FCRA’s coverage, the activities of data brokers should be regulated by the CFPB to the extent that it can under its UDAAP authority, *i.e.*, to the extent it involves consumer financial products and services. Practices such as the sale of forged or unreliable leads to anyone should be explicitly prohibited as deceptive under the CFPB’s UDAAP authority, and the CFPB should recommend that the FTC adopt similar prohibitions under Section 5 of the FTC Act. Such prohibitions should also include the resale of information beyond the initial website on which the consumer provided consent.

* * *

Thank you for the opportunity to submit these comments. If you have questions about these comments, please contact Chi Chi Wu at cwu@nclc.org or 617-542-8010.

Respectfully submitted,

National Consumers Law Center
(on behalf of its low-income clients)