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

Re: Protecting Americans From Harmful Data Broker Practices (Regulation V), Docket No. CFPB–2024–0044/RIN 3170–AB27.

The National Consumer Law Center (on behalf of its low-income clients) (NCLC) is pleased to submit these comments in response to the Consumer Financial Protection Bureau (CFPB)'s Notice of Proposed Rulemaking regarding Protecting Americans From Harmful Data Broker Practices, issued December 13, 2024,[1] pursuant to the Fair Credit Reporting Act (FCRA) In general, we favor the proposed regulation and believe it is a well-supported, reasonable rule that primarily consists of clarifications based on existing law. In particular, we support the proposed rule because:

- it provides much needed protections under the FCRA to respond to the growing problem of data brokers, as documented in the administrative record;
- it makes clear that the FCRA's protections apply to credit header information, *i.e.* personal identifier information derived from a consumer report, because such information can be highly revealing and its abuse can be harmful to consumers;
- it will promote public safety and national security, while preventing fraud, by automatically covering the sale of credit, debt, and income information under the FCRA;
- it will prevent evasion by data brokers who claim they are merely "conduits," by codifying established definitions of when an entity "assembles" or "evaluates" information; and
- it provides strong guardrails when businesses obtain the consumer's written authorization to obtain a credit or other consumer report, by ensuring that the consent is active, knowing, and subject to strong protections.

In general, the proposed rule is composed of very reasonable interpretations of the FCRA that are well-founded, supported by the plain language of the Act or common-sense logic, and in many cases, codifying existing interpretations from the Federal Trade Commission (FTC) or the caselaw.

[1] The proposed rule is at 89 Fed. Reg. 101402 (Dec. 13, 2024). These comments were written by NCLC Senior Attorney Chi Chi Wu.

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A. The proposed rule is a sorely needed response to the growing problem of data brokers.

The CFPB has proposed a rule that is well supported by the administrative record. Numerous comments to the CFPB's Request for Information document the significant harms and abuses of privacy committed by data brokers. These include comments from:

- Approximately 7,000 individual consumers, the vast majority in support of stronger regulation for data brokers.
- NCLC, https://www.regulations.gov/comment/CFPB-2023-0020-3924, primarily focusing on the data brokering activities of companies that are already considered consumer reporting agencies (CRAs) in most contexts (*e.g.,* Equifax, Experian, TransUnion) where the CRAs claim that their sale of information is not covered by the FCRA.
- Electronic Privacy Information Center (EPIC), https://www.regulations.gov/comment/CFPB-2023-0020-3980, describing the data life cycle and business practices of data brokers, as well as the negative impacts of ubiquitous commercial data collection on consumers.
- Just Futures Law, MediaJustice, Mijente, the Surveillance Resistance Lab, and the UCLA Center on Race and Digital Justice, https://www.regulations.gov/comment/CFPB-2023-0020-3992, sharing the results of a community survey reflecting the lack of transparency, dearth of protections, and need for stronger regulation of data brokers. This comment also included testimonies from five leading advocates across the country about their experiences with data brokers.
- U.S. Public Interest Research Group (PIRG) and Center for Digital Democracy (CDD), https://www.regulations.gov/comment/CFPB-2023-0020-3412, describing the huge market for consumer financial data and how it is used to profile consumers.
- Consumer Reports, https://www.regulations.gov/comment/CFPB-2023-0020-3271, sharing the experiences of individual consumer members of Consumer Reports with data brokers, including incorrect data, inability to remove information from data broker files, difficulty blocking unsolicited calls and emails, and other harms caused by data brokers.
- Center for Democracy and Technology, https://www.regulations.gov/comment/CFPB-2023-0020-3981, describing data brokers' practices around sourcing and selling/sharing consumer data, including financial data, worker data, health-related data, and location data and why certain measures ostensibly intended to protect consumer privacy in connection with data brokers' practices fall short.
- Duke University Data Brokerage Research Project, https://www.regulations.gov/comment/CFPB-2023-0020-3962, sharing the results of their research on the data brokerage ecosystem.
- Center for Taxpayer Rights, https://www.regulations.gov/comment/CFPB-2023-0020-4028, describing the challenges and consequences that taxpayers face when they are sold a refund financial product and then their data is sold to financial institutions in connection with those products.
- Digital Defense Fund, The National Network of Abortion Funds, and Apiary for Practical Support, https://www.regulations.gov/comment/CFPB-2023-0020-3946, documenting the harms perpetuated by the data broker industry on abortion providers, abortion funds,

reproductive health care providers, abortion-seekers, pregnant people, and their loved ones.

A final rule that is the same or very similar to the proposed rule would be well-supported by this strong and extensive administrative record. In contrast, a final rule that is the opposite of, is contrary to the proposed rule, or would weaken consumer protections under the FCRA would be arbitrary and capricious, in that it would not be supported by the administrative record given the overwhelming evidence of the need for regulation.

B. The proposed rule strikes the right balance with respect to regulation of the sharing of personal identifier information derived from a consumer report, *i.e.* credit header information.

Proposed § 1022.4(d) would provide that a CRA's communication of a consumer's personal identifier, such as name, address, date of birth, or Social Security number, would constitute a consumer report if that information was collected in whole or in part for the purpose of preparing a consumer report. This provision would ensure that so-called "credit header" information would be covered as a consumer report under the FCRA. We support this proposed provision, which helps preserve consumer privacy and enables consumers to correct erroneous information that could have devastating consequences if unregulated.

Historically so-called "credit header" information was excluded from coverage as a consumer report by a provision in the FTC Official Staff Commentary.[2] The Staff Commentary was rescinded in 2011,[3] but unfortunately the credit header exception was included in the FTC 40 Years Report that replaced it,[4] and the exception survives in the caselaw.[5] We support the CFPB's proposal to remove the exception and once again bring credit headers under the protection of the FCRA.

Viewed in the abstract, a simple list of names, addresses and other identifiers might not seem to bear on the seven factors in § 1681a(d)(1). But as the CFPB explains in depth in the Supplementary Information for the proposed rule, the fact that 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 the CRA National Consumer Telecom and Utilities Exchange indicates that those consumers have obtained service from one of the member companies, *i.e.* the consumers have a mobile phone, cable, utility, or Internet service, which would be a "personal characteristic" or "mode of living."

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[2] FTC Official Staff Commentary indicated that a directory that listed such information is not a consumer report. Former 16 C.F.R. Part 600.1, Appendix at § 603(d) item 5.B.

[3] 76 Fed. Reg. 44,462 (July 26, 2011), rescinding 16 C.F.R. § 600.1 (stating authority and purpose of interpretation), § 600.2, and Appendix to Part 600—Commentary on the Fair Credit Reporting Act.

[4] FTC, 40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations ("FTC 40 Years Report"), § 603(d)(1) item 6C(ii) (2011), https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf.

[5] National Consumer Law Center, Fair Credit Reporting (10th ed. 2022), § 2.3.4.2, updated at www.nclc.org/library.

If a list of consumers includes Social Security numbers, those numbers by themselves are extremely sensitive as well as valuable. 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."

One of the arguments that the industry has made against eliminating the credit header exception is that such information is useful in fraud prevention. But the proposed rule does not prohibit the use of credit headers in fraud prevention; instead, it strikes a good balance between the goals of consumer privacy and the needs of businesses for identity verification. As the CFPB explains in the Supplementary Information, the proposed rule would allow the use of credit header data for fraud prevention or identity verification for uses such as opening a credit account or employment screening, which are permissible uses under the FCRA.[6]

Covering credit header information under the FCRA but allowing it to be used for fraud prevention and identity verification is superior to excluding it from coverage as a consumer report because it subjects this information to the Act's requirements for accuracy and dispute resolution. Excluding headers from FCRA-coverage results in the frustration of consumer rights and our ability to ensure such information is accurate. For example, in *Lass v ChexSystems*, the CRA erroneously reported that the consumer was deceased, which prevented him from opening a bank account. The CRA has argued that this information was credit header information not covered by the CRA; [7] if the CRA prevails, the consumer will have no remedy or ability to fix this egregious error under the FCRA. Such a result surely cannot be what Congress intended when it enacted the FCRA to ensure that the consumer reporting system is "fair and equitable to the consumer, with regard to the confidentiality [and] accuracy,…" 15 U.S.C. § 1681(b).

The CFPB requests comment on a potential exemption from § 1022.4(d) for credit header information furnished to local, Tribal, State, and Federal governments.[8] We would oppose any exception that allowed government actors to obtain personal identifier information from a CRA without a permissible purpose beyond what is permitted under § 1681f of the FCRA. In adopting § 1681f, Congress made a deliberate decision to allow government and law enforcement to access specific limited data elements without a permissible purpose, *i.e.* consumer's name, addresses (including former addresses) and employers (including former employers). Congress also made a specific decision not to include other elements in this provision, such as Social Security numbers, dates of birth, and phone numbers.

Congress had good reason to allow only limited data elements to be supplied to government officials without a permissible purpose. Allowing unfettered access by law enforcement to consumer reports could enable fishing expeditions and dragnet-type access to data for a wide swath of individuals without any sort of reasonable suspicion, raising Fourth Amendment and due process concerns. We urge the CFPB to respect Congress's decision in this matter and not to

[6] 89 Fed. Reg. at 101,419.
[7] Motion to Dismiss, Lass v. ChexSystems, Case No 24-cv-00741 (S.D. Cal. Oct. 15, 2024), available at https://drive.google.com/file/d/1eUjKv6ZgzdLvk3Yvnk1Ec6J8mM20xz8b/view?usp=sharing.
[8] 89 Fed. Reg. at 101,419.

allow additional categories of information to be shared to government officials without a permissible purpose.

C. The proposed rule will promote public safety and national security while preventing fraud by automatically treating the sale of credit, debt, and income information as a consumer report.

Proposed § 1022.4(c)(2) would make the sale of certain types of data automatically a consumer report based on the nature of the information. This proposed paragraph would provide that information would be "expected to be used" for an FCRA-covered purpose and thus is a consumer report if "[t]he information is about a consumer's: (i) Credit history; (ii) Credit score; (iii) Debt payments; or (iv) Income or financial tier."

We strongly support this proposal. Treating credit, debt, and income information about a consumer as automatically FCRA-regulated will promote public safety for a number of populations, including law enforcement, domestic violence survivors, and targets of stalking. Malicious actors often seek out financial information to target these populations, and such information could be used by such perpetrators to wreak significant harm. These types of sensitive financial information could also be used by scam artists and other financial predators to target certain groups such as seniors and servicemembers.

As the CPFB documents in the Supplementary Information, proposed subsection § 1022.4(c)(2) also promotes national security because data brokers may be supplying countries of concern with these types of sensitive financial information for members of the military, Federal contractors, journalists, and activists.[9] The information could be used to for coercion, blackmail, or espionage.

All of these categories of information are also natural and logical subjects for FCRA coverage. Credit reports and credit scores should by their inherent nature always be covered under the FCRA, no matter what they are being used for – and they should never be used for impermissible purposes such as marketing (except for FCRA-permitted prescreening), or to exploit or target vulnerable populations. The very reason that Congress passed the FCRA was to regulate credit reports. Debt payment information constitutes the bulk of information on a credit report, and thus covering it as a consumer report is also logical and self-evident. Finally, income and financial tier information is similar information that is key to credit decisioning and underwriting, as well as very sensitive information that consumers keep closely guarded. Again, this information by nature should be regulated under the FCRA.

Finally, we support proposed § 1022.4 (c)(2) because its bright line rule will be easy to apply and enforce. Clear rules of the road are essential in this area, which has suffered due to the convoluted and circular nature of the definition of "consumer report" and "consumer reporting agency." Making compliance simple benefits both consumers and industry.

[9] *Id.* at 101,411-12.

D. De-identified information should be considered a consumer report.

Proposed § 1022.4(e) would deal with deidentified information that would otherwise constitute a consumer report. The CFPB has laid out three alternatives to deal with deidentified information:

> 1. De-identification is not relevant to a determination of whether information meets the definition of consumer report;
> 2. De-identification is not relevant and information can be considered a consumer report if it is still linked or linkable to a consumer; or
> 3. De-identification is not relevant and information can be considered a consumer report if one of three criteria are met: (i) it is still linked or linkable to a consumer; (ii) it is used to inform a business decision about a consumer, such whether to target market to them; or (iii) a recipient is able to re-identify the consumer.

It is crucial for the CFPB to cover de-identified data as a consumer report. The administrative record, including NCLC's responses to the RFI and SBREFA, document numerous examples of data brokers, including the nationwide CRAs, selling allegedly de-identified data to users for the purposes of target marketing to consumers.

We urge the CFPB to adopt the first alternative, *i.e.* that de-identification is not relevant to whether information is a consumer report. This alternative creates a clear, bright line rule that is easy to apply and enforce. In the Supplementary Information for the proposed rule, the CFPB expressed concerns that this option might impair the ability to conduct research or marketing monitoring using de-identified data.[10] To respond to this concern, the CFPB could adopt this option with an exception for the monitoring activities of government agencies, and the research activities of government, academic, and nonprofit institutions.

If the CFPB does not choose the first option, it should at a minimum choose the third option. The third option at least regulates de-identified information when is used to target market to consumers or can be easily re-identified, such as information at the household or IP address level. The second option is inadequate because it allows target marketing to consumers so long as the de-identified information is not specifically linked to the consumer. It permits evasion of the FCRA if the data broker or user simply uses a broader proxy for the consumer, such as ZIP code level data, in order to target market individual consumers.

E. The proposed definitions of "assembling" or "evaluating" ensure that data brokers cannot evade regulation under the FCRA by claiming that they merely serve as a conduit.

Proposed § 1022.5(b) would define the terms "assembling or evaluating" for purposes of what constitutes a "consumer reporting agency" under § 1681(f) of the FCRA. We support this proposed rule, which would deter common evasions of FCRA coverage by data brokers.

Proposed § 1022.5(b)(1)(i) would define "assembling or evaluating" to include collecting, bringing together, gathering, or retaining information. Proposed § 1022.5(b)(1)(ii) would also

[10] *Id.* at 101,421.

include in "assembling or evaluating" activities such as appraising, assessing, making a judgment, valuing, verifying, or validating information. Proposed § 1022.5(b)(1)(iii) states that the terms include contributing to or altering the content of such information. Proposed § 1022.5(b)(2) sets forth a number of common examples of the above actions, such as grouping together bank account transactions, modifying information to fit a common format, or scoring or rank ordering information.

We support all three provisions in proposed § 1022.5(b)(1) and the examples of § 1022.5(b)(2). All of them are logical, reasonable, and natural interpretations of the terms "assembling" and "evaluating." They also comport with the FTC's interpretation in its 40 Years Report, which defines "assembling" as "gathering, collecting, or bringing together consumer information"[11] and defines "evaluating" as "appraising, assessing, determining or making a judgment on such information."[12] The FTC 40 Years Report also provides an example of these activities which is similar to the examples in proposed § 1022.5(b)(2).[13] The provisions in proposed § 1022.5(b)(2) are supported by the caselaw as well.[14]

Proposed § 1022.5(b) would prevent evasions of the FCRA by data brokers who sometimes disclaim coverage by arguing they do not assemble or evaluate information because they are merely "software providers" or a "conduit."[15] However, these data brokers sell information to users specifically for purposes such as tenant screening or mortgage servicing that are covered under the FCRA. As such, they should be covered as CRAs under the FCRA, so that consumers have important protections with respect to this information, such as accuracy requirements and

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[11] FTC 40 Years Report at § 603(f) item 3B.

[12] *Id.*

[13] *Id.* at § 603(f) item 3B(i) ("An entity whose record searchers collect publicly available information such as criminal records for employer screening of applicants, then forwards the information to its headquarters where a report is prepared consisting of that information, has conducted "assembling" activities sufficient to meet the definition of a CRA.").

[14] *See* Dias v. Blackstone Consulting, Inc., 2024 WL 2132627, at *5–6 (M.D. Fla. Apr. 30, 2024) (defendant failed to carry burden of showing no material facts in dispute regarding its status as a CRA where it consolidated background information from Tracers and/or other sources of information into a report for a client); McGrath v. Credit Lenders Serv. Agency, Inc., 2022 WL 580566, at *6–7 (E.D. Pa. Feb. 25, 2022) (entity that reviewed court's open judgment directory and municipal lean directory for match to plaintiffs'' name and address and sent that "judgment report" as part of larger report to bank assembled information and was CRA); Meeks v. US Bank, 2019 WL 670349, at *2 (E.D. Mo. Feb. 19, 2019) (rejecting argument that because First Advantage "merely provided" FBI's background check to defendant, report was not consumer report; report contained information that First Advantage collected from third party data sources); Lewis v. Ohio Prof. Elec. Network, L.L.C., 190 F. Supp. 2d 1049 (S.D. Ohio 2002) (defining "assemble" and "evaluate"). *Cf.* Morris v. Equifax Info. Serv., L.L.C., 457 F.3d 460, 470 n.16 (5th Cir. 2006)(taking note of the view that it Congress intended for the FCRA to cover a very broad range of 'assembling' or 'evaluating' activities, without deciding the issue).

[15] *See, e.g.,* Kholost v. U.S. Dep't of Hous. & Urban Dev., 2018 WL 3539814, at *4 (E.D.N.Y. July 23, 2018) (RealPage was "merely a conduit" between TransUnion and housing provider; mere receipt and retransmission of consumer report did not make RealPage CRA); Walker v. Fabrizio & Brook, P.C., 2017 WL 5010781 (E.D. Mich. Nov. 2, 2017) (conduit entity that formats and distributes legally required foreclosure notices using data received from lenders and servicers through electronic portal is not CRA).

the right to dispute errors. A consumer should not be left without recourse for errors in information used to deny them basic shelter or to foreclose upon their home.

F. Written authorization as a permissible purpose should require the active, knowing consent of the consumer and be subject to strong protections.

Proposed § 1022.11(b) would establish safeguards for when a CRA furnishes a consumer report pursuant to a consumer's written instructions. These safeguards include:

- a standalone consumer disclosure and consent form that sets forth the name of the CRA from which the report will be obtained, the user to whom the report will be provided; the specific product or service that the report will be used for; the limitations on the scope of such use; and how to revoke consent
- a limitation that the CRA can only furnish the consumer report in connection with the specific product or service that the consumer has requested, or the specific use that the consumer has identified.
- that the user may obtain, use, or retain the consumer report, or provide the report to a third party, only as reasonably necessary to provide the requested product or service or for the specific use that the consumer has identified;
- a limitation that the user can only obtain the consumer report within one year of the date when the consumer provided the consent; and
- either the CRA or user must provide a method for the consumer to revoke their consent, and cannot charge for a revocation.

All of these protections are common sense and reasonable safeguards to make sure that consumers have control over their personal information when they choose to share it, and that such sharing is knowing and deliberate. Many of these protections are similar to the protections that the CFPB instituted in its Personal Financial Data Rights rule pursuant to Section 1033 of the Dodd-Frank Act.[16] As with consumer permissioning of information under that regime, these safeguards ensure that a consumer's written authorization to share sensitive financial information is not abused or misused for purposes that the consumer did not intend for, contemplate, or desire.

G. The proposed rule is comprised of very reasonable interpretations of the FCRA that are well supported by prior FTC guidance, caselaw, or common-sense logic.

Overall, the proposed rule takes an entirely reasonable, common-sense approach in interpreting the scope of the FCRA. In addition to the reasons stated in the foregoing discussion for supporting the proposed rule, many of the other provisions of the proposed rule either restate the statute or reflect principles that are already established from FTC guidance or legal cases. Other provisions are the result of a logical, grammatically correct reading of the statutory language. Such provisions include:

[16] Codified at 12 C.F.R. Part 1033.

- § 1022.4(a), (f) and (g): These subsections simply restate in part the statutory language of § 1681a(d).

- § 1022.4(b): This subsection states that "Information in a communication is used for a purpose described in paragraph (a)(2) of this section [*i.e.* an FCRA-covered purpose] if a recipient of the information uses it for such purpose." That is an entirely logical and natural reading of the statute. It also comports with prior FTC guidance.[17] This subsection prevents evasions by ensuring that information is a consumer report when a downstream user uses it for an FCRA-covered purpose, even if the original recipient obtained it for another purposes. A contrary reading would allow users to easily evade the FCRA by using an intermediary to obtain consumer reports allegedly for a purpose not covered by the FCRA, but then using it for a covered purpose without the protections of the Act. This is a necessary provision to prevent evasion of FCRA coverage.

- § 1022.4(c)(1): This subsection states that "Information in a communication is expected to be used for a purpose described in paragraph (a)(2) of this section if (1) The person making the communication expects or should expect that a recipient of the information in the communication will use the information for such a purpose." That is an entirely reasonable and natural reading of the statute. It also comports with prior FTC guidance[18] and existing caselaw[19] that it is the expectations of the CRA that make information a consumer report. Such expectation should include both the CRA's subjective actual expectation as well as whether the CRA should have objectively expected that the information would be used for an FCRA-covered purpose.

- § 1022.4(f): This subsection simply restates in part the statutory language of § 1681a(d).

- § 1022.4 (g): This subsection simply restates in part the statutory language of § 1681a(d).

- § 1022.5(a): This subsection simply restates in part the statutory language of § 1681a(f).

- § 1022.10(b): This subsection provides that a CRA is considered to have furnished a consumer report if the CRA either provides the report to the user or facilitates that person's use of the report for financial gain, even if the CRA does not technically transfer the consumer report to the person. The latter provision is intended to cover the practice of when a CRA provides a list of consumers filtered using one or more criteria supplied by the user. This practice is essentially how prescreening works. However, prescreening requires the user to make a firm offer of credit and insurance or have another permissible purpose. 15 U.S.C. § 1681b(c). So this provision essentially clarifies that this same

[17] FTC 40 Years Report at § 603(d)(1) item 7C, stating "A report that is not otherwise a consumer report may become a consumer report when it is subsequently used by the recipient for a permissible purpose").
[18] *Id.* (noting that a report is <u>not</u> a consumer report if the entity supplying it "neither knows of, nor can reasonably anticipate" an FCRA-covered use). Thus, the key criteria for coverage is what the CRA can reasonably anticipate.
[19] National Consumer Law Center, Fair Credit Reporting (10th ed. 2022), § 2.3.5, updated at www.nclc.org/library.

practice is impermissible if there is no firm offer or other permissible purpose. This is a very reasonable and well-supported clarification.

- § 1022.12(a): This subsection simply restates the statutory language of § 1681b(a)(A) through (E) regarding permissible purposes for a CRA to furnish a consumer report.

- § 1022.12(b)(2): This subsection interprets the FCRA's permissible purpose in connection with business transactions initiated by the consumer. In particular, it makes clear that this particular permissible purpose covers rental housing applications, opening a bank or brokerage account, and screening consumers paying by personal check. These are longstanding permissible purposes under the FCRA,[20] and thus also inform the definition of a consumer report. They are the provisions that ensure FCRA coverage of specialty CRAs that play a huge role in determining whether consumers can access important necessities such as rental housing and bank accounts.

- § 1022.12(b)(3): This subsection makes clear that the permissible purpose for business transactions initiated by the consumer does not authorize furnishing of consumer reports for marketing. Such a clarification is supported by the plain language of the statutory provision – the requirement that the transaction be initiated by the consumer means that it cannot by definition cover marketing. And as the Supplementary Information notes, it is also supported by the legislative history and caselaw.[21]

For all the reasons stated above, we support the proposed rule.

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Thank you for the opportunity to submit these comments and for the strong proposals under consideration as set forth in the NPRM. 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)

[20] *See* FTC 40 Years Report §§ 603(d)(1) item 8D; 603(f) item 3D, 604(a)(3)(F) item 3. *See generally*, National Consumer Law Center, Fair Credit Reporting (10th ed. 2022), §§ 2.3.6.3.2 and 2.3.6.3.3, updated at www.nclc.org/library.
[21] 89 Fed. Reg. at 101,433.