

**Before the  
Bureau of Consumer Financial Protection  
Washington, DC 20580**

Request for Information Regarding Data            )    Comments from Public Knowledge  
Brokers and Other Business Practices            )  
Involving the Collection and Sale of Consumer    )  
Information    )  
  )  
Docket Number: CFPB-2023-05670

In 1970, Congress passed the Fair Credit Reporting Act (FCRA), an early data privacy law.<sup>1</sup> It aimed to regulate the emerging consumer reporting market, which involved the dissemination of extensive information about Americans, including financial status, public records, personal habits, and more. Congress uncovered abuses in the market, such as secrecy agreements and inaccurate reports.<sup>2</sup> FCRA was passed to ensure fairness, confidentiality, accuracy, relevancy and proper use of consumer information.<sup>3</sup>

On April 19<sup>th</sup>, 2023, the House Energy and Commerce Subcommittee on Oversight and Investigations held a hearing entitled “Who is Selling Your Data: A Critical Examination of the Role of Data Brokers in the Digital Economy.”<sup>4</sup> The hearing focused specifically on data brokers that act outside the scope of current privacy laws, including FCRA. The evidence provided showed once again a secretive market that American consumers have little insight into but has profound effects on Americans’ lives.

Under the FCRA a “consumer reporting agency” (CRA) is any person which, for monetary fees, “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.”<sup>5</sup> A “consumer report” is a communication of any information by a CRA 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” to establish a consumer's eligibility for credit, insurance, and employment, among others.<sup>6</sup> Per the FTC’s

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<sup>1</sup> 15 U.S.C. § 1681.

<sup>2</sup> 115 Cong. Rec. 2410 (1969).

<sup>3</sup> 15 U.S.C. § 1681i, s-2.

<sup>4</sup> Hearing Before the Subcomm. on Oversight and Investigations, 118 Cong.

<sup>5</sup> 15 U.S.C. § 1681a(f).

<sup>6</sup> 15 U.S.C. § 1681a(d).

report from 2011, these two definitions are mutually dependent — information must be furnished by a CRA to be a consumer report, and persons must regularly assemble or evaluate information for the purpose of furnishing consumer reports to be a CRA.<sup>7</sup> Data brokers exploit this mutually dependent definition to either argue that they do not qualify as a consumer reporting agency or do not provide consumer reports. They are also providing reports, that while outside the traditional scope of FCRA, nevertheless impact consumers financial well-being. The CFPB must use all its available authority to provide regulations, rules, and guidance to ensure that this behavior does not continue.

### **Data Brokers Routinely Claim They Are Not Consumer Reporting Entities**

Legislative history shows that Congress was mainly focused on the abuses and anti-consumer practices of the “Big Three” national CRAs — Equifax, Experian, and Transunion — when it first enacted the FCRA.<sup>8</sup> However, the exponential increase in both the amount of personal data available and the computing power to support its uses have since then allowed many more entrants to the industry. This has resulted not only in over fifty companies being classified as CRAs as of 2023, but also uncertainties as to which additional companies fall under the definition of a CRA and should be included to this growing list.<sup>9</sup> In this context, many data brokers have repeatedly been the subject of lawsuits by both consumers and the FTC for evading FCRA responsibilities. These data brokers aggregate data and allow users to obtain reports that could serve many principal functions of consumer reports — i.e., establishing eligibility for credit, insurance, employment, and others — while claiming they are not CRAs. Case law governing such data brokers remains uncertain and consumers are harmed as a result.

In *Kidd v. Thomson Reuters Corp.*, Lindsey Kidd was denied a job with the Georgia Department of Public Health when Thomson Reuter’s subscription-based online research platform named Consolidated Lead Evaluation and Reporting (CLEAR) falsely indicated she had criminal records.<sup>10</sup> Despite this information arguably having served the functions of a credit report, the Second Circuit ruled it was not subject to FCRA because Thomson

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<sup>7</sup> Fed. Trade Comm’n, 40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations (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>.

<sup>8</sup> *Id.*

<sup>9</sup> Consumer Financial Protection Bureau, List of Consumer Reporting Companies (2023), [https://files.consumerfinance.gov/f/documents/cfpb\\_consumer-reporting-companies-list\\_2023.pdf](https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-companies-list_2023.pdf); Pauline T. Kim & Erika Hanson, *People Analytics and the Regulation of Information under the Fair Credit Reporting Act*, 61 St. Louis Univ. L.J. 17, 26 (2016).

<sup>10</sup> *Kidd v. Thomson Reuters Corp.*, 925 F.3d 99, 101–103 (2d Cir. 2019).

Reuters did not intend to assemble this information to furnish a consumer report and therefore did not qualify as a CRA.<sup>11</sup> The court held that Thomson Reuters' lack of intent was clear in the numerous controls it had placed to ensure that CLEAR was not used for FCRA purposes, such as screening subscribers before granting access to CLEAR, training them on proper uses of the platform, and regularly requiring them to affirm their understanding of use restrictions.<sup>12</sup> However, even such extensive controls ultimately failed to completely eliminate harms from inaccurate data and the lack of means to correct them, and although Thomson Reuters was indeed aware that its CLEAR platform was being misused despite its efforts, it was absolved of FCRA responsibilities because it was not a CRA.<sup>13</sup> Such problems rising from FCRA's underinclusive definition of CRAs is aggravated by the fact that regardless of the data broker's specific intent, users themselves can easily access information from platforms such as CLEAR that provide searchable and customizable dashboards that are "powered by billions of data points."<sup>14</sup>

Harms from such under-inclusiveness are aggravated in cases involving smaller, lesser-known data brokers. Unlike in *Kidd* where information from CLEAR was clearly misused to affect employment and was recognized as such by Thomson Reuters, numerous data brokers operate in greyer areas with much weaker controls when equipping third party users with information. These data brokers typically claim to provide online access to vaguely-defined "background reports" or "reputation scores" that include employment history, criminal records, and lawsuits, among others.<sup>15</sup> And rather than claiming they are FCRA-compliant, they claim they are not CRAs at all — their websites almost always include terms of use reinforcing that they are not CRAs and that the information they provide may not be used for FCRA purposes such as determining eligibility for credit or employment.<sup>16</sup> Users are instead instructed to use this information to reduce the risk of associating with criminals, "learn more about people in their lives," or to simply satisfy their curiosity.<sup>17</sup>

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<sup>11</sup> *See id.* at 108.

<sup>12</sup> *Id.* at 101–102.

<sup>13</sup> *See id.* at 108.

<sup>14</sup> *Thomson Reuters CLEAR*, Thomson Reuters, <https://legal.thomsonreuters.com/en/products/clear-investigation-software> (last visited June 8, 2023).

<sup>15</sup> *Frequently Asked Questions*, MyLife, <https://www.mylife.com/help> (last visited June 8, 2023); *TruthFinder Background Check*, TruthFinder, <https://www.truthfinder.com/background-check> (last visited June 8, 2023); *Run a Criminal Records Check*, Intelius, <https://www.intelius.com/criminal-records> (last visited June 8, 2023).

<sup>16</sup> *User Agreement*, MyLife, <https://www.mylife.com/user-agreement> (last visited June 8, 2023); *Terms of Use & Conditions of Sale*, TruthFinder, <https://www.truthfinder.com/terms-of-use> (last visited June 8, 2023); *Terms of Use & Conditions of Sale*, Intelius, <https://www.intelius.com/terms-of-use> (last visited June 8, 2023).

<sup>17</sup> *About Us*, TruthFinder, <https://www.truthfinder.com/about> (last visited June 8, 2023).

One of such data brokers is MyLife. In *Finlay v. MyLife.com Inc.*, Brion Finlay sued MyLife for violations of FCRA upon searching his name on Google and finding incorrect and upsetting information about himself on a “MyLife profile.”<sup>18</sup> This online profile included bold letters claiming that Finlay had arrest or criminal records, as well as a reputation score that was claimed to assist in vetting “job applicants, service providers, business opportunities, and dating prospects.”<sup>19</sup> Finlay claimed that MyLife was a CRA because it — among other things — expected its profiles to be used for employment purposes and actively marketed to employers.<sup>20</sup>

Following a settlement with the FTC in 2021, MyLife was required to implement a monitoring program to avoid violating FCRA.<sup>21</sup> MyLife now does not make associations with employment and instead claims that, unlike credit scores, “people use your reputation to decide everything — whether they want to do business with you, be friends with you, live with you, date you and much more.”<sup>22</sup> However, despite these adjustments, it remains the case that MyLife continues to provide a variety of personal information such as court records, liens, and work history.<sup>23</sup> As such, at least a portion of FCRA compliance again falls on users who are granted access to MyLife profiles when they pay a fee and agree to a terms and conditions to not use the information for FCRA purposes. Numerous other data brokers providing such services can be found through a simple internet search — including Spokeo, which was the subject of a very similar settlement with the FTC — and unlike the subscribers in CLEAR, the users of these websites are not screened, trained, nor easily identifiable.<sup>24</sup> In addition to the obvious privacy harms from the reports collectively provided by these data brokers, consumers are also harmed by the fact that such data brokers are not obligated to follow FCRA’s various regulations requiring CRAs to ensure reasonable procedures for maximum accuracy, rights of consumers to inspect data about themselves, and due process to challenge false data, among others.

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<sup>18</sup> *Finlay v. MyLife.com Inc.*, 525 F. Supp. 3d 969, 974 (D. Minn. 2021).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 975.

<sup>21</sup> Press Release, Fed. Trade Comm’n, FTC, DOJ Obtain Ban on Negative Option Marketing and \$21 Million for Consumers Deceived by Background Report Provider MyLife (Dec. 16, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/12/ftc-doj-obtain-ban-negative-option-marketing-21-million-consumers-deceived-background-report>.

<sup>22</sup> MyLife, <https://www.mylife.com/> (last visited June 8, 2023).

<sup>23</sup> *Id.*

<sup>24</sup> Press Release, Fed. Trade Comm’n, Spokeo to Pay \$800,000 to Settle FTC Charges Company Allegedly Marketed Information to Employers and Recruiters in Violation of FCRA (June 12, 2012), <https://www.ftc.gov/news-events/news/press-releases/2012/06/spokeo-pay-800000-settle-ftc-charges-company-allegedly-marketed-information-employers-recruiters>.

## The Definition of Consumer Reports is Under-Inclusive

The increasing availability of data on all aspects of consumer behavior has resulted in the FTC rightly acknowledging that even non-traditional data such as social media data can be used to establish a consumer's eligibility for credit, insurance, employment, or other eligibility determinations.<sup>25</sup> However, in the broader context of ensuring fair access to economic opportunities, even data that do not bear on the various eligibility enumerated in FCRA nevertheless affect consumers' financial well-being. In other words, the principal purpose of credit reports as currently defined in FCRA does not fully capture the extent to which various information can be used to affect consumers, and the improper use of such information can pose a variety of potential harms to consumers.

One example of such harm can be found in data products that provide retail fraud solutions. In *Hayden v. Retail Equation*, the district court held that The Retail Equation's (TRE) "risk scores" did not fall within the statutory definition of a consumer report because it did not bear on the plaintiffs' eligibility for credit.<sup>26</sup> Plaintiffs alleged that TRE provided individualized risk scores to retailers such as Sephora, CVS, and Home Depot when customers attempted to return or exchange their purchases.<sup>27</sup> These risk scores were generated by TRE through statistical analysis of data collected by various retailers about each customers' unique purchasing history and "unique identification information contained within a consumer's driver's license, ID card, or passport, e.g., name, date of birth, race, sex, photo, street address, and zip code."<sup>28</sup> Plaintiffs further alleged that TRE violated FCRA by incorrectly identifying them as fraudsters, failing to disclose to consumers their own "risk scores," not providing an avenue for correcting or reinvestigating information, and collecting and processing the information without consent.<sup>29</sup> When third parties use information from data solutions such as TRE, a subset of consumers will always be deprived of the benefit of return policies that other consumers enjoy when purchasing everyday essentials such as apparel, medicine, and home goods. Although these purchases are minor when compared to financial repercussions of decisions about employment or mortgages, the fact that retailers can access TRE's information with a click of a button for every single return pose concern about the cumulative effects of such prevalent, collective use. Such

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<sup>25</sup> Tiffany George, *50 years of the FCRA*, Fed. Trade Comm'n: Business Blog (Oct. 27, 2020), <https://www.ftc.gov/business-guidance/blog/2020/10/50-years-fcra>.

<sup>26</sup> *Hayden v. Retail Equation, Inc.*, 2022 U.S. Dist. LEXIS 119792, at \*11 (C.D. Cal. May 4, 2022).

<sup>27</sup> *Id.* at \*3, \*6.

<sup>28</sup> *Id.* at \*5.

<sup>29</sup> *Id.* at \*9–10.

effects are magnified by the fact that such fraud solutions are not limited to retail, but also offered across industries such as e-commerce, insurance, and healthcare.<sup>30</sup>

Another example of a real-world harm is found in identity search products designed for actors — primarily government — that have profound effects on access to economic opportunities. For instance, LexisNexis Accurint for Government (Accurint) provides jail booking data offering “unrivaled coverage of over 85% of incarcerations in the U.S.,” and its suggested uses include evaluating applicants for professional licenses and enforcing child support orders, among others.<sup>31</sup> Another key use case of Accurint is in benefits disbursement. For example, since 2018, the Social Security Administration (SSA) has used Accurint when investigating whether Supplemental Security Income (SSI) recipients had unreported real estate that could disqualify them from receiving SSI.<sup>32</sup> Even though the data from Accurint had inaccuracies resulting in tangible economic loss of suspended benefits for many, the SSA — according to the National Consumer Law Center — seems to have relied on its procedural manual that Accurint searches must only be used to “establish a lead” and not to determine eligibility, thereby evading FCRA’s regulations.<sup>33</sup> As such, the effects of personal data on consumers’ well-being have long ago extended beyond those from credit or background checks, and abuses in the data brokers industry providing these data remain to be regulated by the appropriate authorities.

## Conclusion

The CFPB should use all available authority under both FCRA and its general unfair, deceptive, or abusive acts or practices authority to protect consumers from harms caused by data brokers. The industry has changed significantly, making new rules necessary. As it has become easier for data broker to gather information and market different consumer profiling tools, the harms everyday Americans are subjected to have increased. Consumer reports have expanded beyond determining if someone is credit-worthy, and now are used to determine if someone is

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<sup>30</sup> *CLEAR for Insurance Investigations*, Thomson Reuters, <https://legal.thomsonreuters.com/en/products/clear-investigation-software/clear-for-insurance-investigations> (last visited June 8, 2023); *CLEAR for Healthcare Fraud, Waste, and Abuse Investigations*, Thomson Reuters, <https://legal.thomsonreuters.com/en/products/clear-investigation-software/clear-for-healthcare-fraud-identification> (last visited June 8, 2023); *CLEAR for Retail Fraud*, Thomson Reuters, <https://legal.thomsonreuters.com/en/products/clear-investigation-software/retail-fraud> (last visited June 8, 2023).

<sup>31</sup> *Jail Booking Data for Accurint® for Government*, LexisNexis Risk Solutions, <https://risk.lexisnexis.com/-/media/files/government/brochure/jail-booking-data-br%20pdf.pdf> (last visited June 8, 2023).

<sup>32</sup> Sarah Mancini, et al., Nat’l Consumer L. Ctr., *Mismatched and Mistaken: How the Use of an Inaccurate Private Database Results in SSI Recipients Unjustly Losing Benefits* (Apr. 2021), <https://www.nclc.org/wp-content/uploads/2022/08/RptMismatchedFINAL041421-1.pdf>.

<sup>33</sup> *See id.*

worthy of government benefits or being able to return a purchase. Public Knowledge is pleased to see the CFPB take this important first step in reigning in these abusive business practices.