



United States House of Representatives
One Hundred Eighteenth Congress
Committee on Financial Services
2129 Rayburn House Office Building
Washington, DC 20515

December 13, 2023

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

RE: 12 CFR Parts 1001 and 1033, Notice of Proposed Rulemaking: Docket No. CFPB - 20230052

Dear Director Chopra:

I write regarding the Consumer Financial Protection Bureau (CFPB)'s notice of proposed rulemaking (NPRM), Docket No. 2023-0052, which implements Section 1033 of the Dodd Frank Wall Street Reform and Consumer Financial Protection Act of 2010. I appreciate the CFPB's work on the issue of data portability and open banking. Technological advances in our financial system have produced products and services that benefit consumers in numerous ways. Many of these products and services are predicated on accessing consumer data. Yet our statutes, regulations, and guidance have not kept pace with technology. The Gramm Leach Bliley Act (GLBA) has not been updated substantively in more than twenty years and Section 1033 was enacted more than a decade ago. It is time that Congress and the executive branch act to ensure our data privacy and security laws empower and protect consumers consistent with innovation.

Proposed Rule Makes Significant Strides

The NPRM issued by the CFPB on October 19, 2023, makes significant strides in updating our privacy regulations. For example, the proposed rule includes requirements that consumers be made aware of where their data is held and how it is used. It would require that authorized third parties take certain steps to safeguard consumer data and ensure consumers are able to terminate the collection and use of their data in a more expedited fashion.

Protecting Americans' financial privacy is a key pillar of both section 1033 and the House Financial Services Committee's (Committee) own work. Consumers should be empowered to know what data is being collected, where the data is stored, with whom the data is shared, and what rights those authorized third parties have with respect to consumers' data. The proposed rule appropriately requires that authorized third parties disclose to consumers information that will allow them to make these decisions with respect to their sensitive financial

data (including of revocation of authorization and termination of access), and how their data will be kept secure.¹

Additionally, the proposed rule provides that the collection and use of consumer data by authorized third parties is limited to one year, unless the consumer reauthorizes access to their data². This provision ensures the collection of consumer data does not continue even after a consumer no longer uses a certain product or service.

A guiding principle behind section 1033 is that consumers will benefit from increased control and portability of their data. This presumes consumer data is accurate. Inaccuracies in consumer data will inhibit its effectiveness in servicing consumers and the financial system. The proposed rule requires that consumer data is collected in a way that ensures its accuracy, including when the information is transmitted to additional parties (if applicable) by requiring data providers to establish policies designed to ensure that the data they provide to third parties matches the data held internally by data providers, and further requiring that authorized third parties establish policies designed to ensure that consumer data is accurately received.³

The proposed rule also appropriately ensures that consumer data will be protected from unauthorized use as it moves through the financial system. The intent of section 1033 is to enable consumers to have additional control over their data and where it is shared. However, this should not come at the expense of the security of consumer data, some of which is highly sensitive information. The proposed rule would require authorized third parties to be in compliance with the GLBA Safeguards Framework,⁴ as well as those additional third parties with whom an authorized third party is authorized to share at each point of transfer.⁵ These provisions are vital to ensure that when consumers decide to share their data, they can be sure their data will carry the same protections regardless of whom holds it.

Finally, the proposed rule would make it easier for consumers to revoke the ability of third parties to use their data at any time. The proposed rule goes one step further by requiring authorized third parties to notify additional parties if and when the consumer exercises such revocation; and prohibiting the authorized third party from continued collection, use, or retention of data when a consumer revokes authorization.⁶ This provision ensures that consumers have meaningful control over their data, and that initially authorizing third parties to access data does not result in indefinite possession and use of a consumer's data.

Recognized Exceptions to Consumer Control

Consumers must be empowered to make smarter decisions about the financial services and products they use. However, this control should be balanced with certain exceptions that

¹ § 1033.421(g), § 1033.411.

² § 1033.421(b).

³ § 1033.351(c)(1), § 1033.421(d).

⁴ § 1033.421(e).

⁵ § 1033.421(f).

⁶ § 1033.421(h).

protect proprietary information; protect the safety and soundness of our financial system; and allow law enforcement to investigate financial crimes.

The proposed rule recognizes the need to protect “confidential commercial information, including an algorithm used to derive credit scores or other risk scores or predictors” from disclosure.⁷ This type of proprietary information is integral to a financial institution developing credit models and is fundamental to the broader credit market. The disclosure of confidential commercial information would be harmful to the safety and soundness of the financial system and the goals of section 1033.

Separately, information held by a data provider for “the purpose of preventing fraud or money laundering, or detecting, or making any report regarding other unlawful or potentially unlawful conduct”⁸ should not be portable. Congress and regulators routinely make exceptions to protect law enforcement efforts. These efforts are critical to protecting our financial system from bad actors who want to exploit it for illicit purposes. Similarly, the Committee supports the exception for “information required to be kept confidential by any other provision of law.”⁹

Finally, the fourth exception included in the proposed rule, which exempts data that “cannot [be] retrieve[d] in the ordinary course of its business,” contains a requirement that a data provider “create a record of what covered data are not made available pursuant to an exception... and explain why the exception applies.”¹⁰ This requirement will ensure that consumer data is not withheld for anti-competitive reasons.

Concerns with the Proposed Rule

Notwithstanding the above, I have concerns that certain provisions of the rule would have negative, unintended consequences. The proposed rule unreasonably restricts secondary uses of consumer data, which will ultimately harm not just consumers, but the financial system more generally. We must ensure that our regulatory regimes do not create the perverse incentive of moving American innovation offshore.

For example, certain aspects of sections 1033.421(a) and (c) that would limit the collection, use, and retention of covered data to what is reasonably necessary to provide the consumer’s requested product or service look like a common-sense protection to ensure a consumer’s data is not misused. However, completely prohibiting the use of secondary data does not benefit consumers. It would prevent financial institutions and third-party service providers from improving on existing products or services (including the very product or service the consumer has requested); or building new products or services (including products and services that may be substantially similar to the product or service the consumer has requested). Not only does this risk harm to consumers who may benefit from these new and/or improved products and

⁷ Consumer Fin. Protection Bureau, Proposed Rule, Required Rulemaking on Personal Financial Data Rights, 64, (Oct. 19, 2023), available at https://files.consumerfinance.gov/f/documents/cfpb-1033-nprm-fr-notice_2023-10.pdf.

⁸ *Id.* at 64

⁹ *Id.* at 64

¹⁰ *Id.* at 65

services, it hinders innovation – the very innovation that allows the United States to be a global leader in the financial services industry.

There is no doubt section 1033 was designed to allow consumers to “to access their covered data for their own benefit,” and that consumers should be the “primary beneficiary of such access.”¹¹ However, as drafted, the proposed rule entirely removes the consumer from the decision to allow data for secondary purposes. This includes using the data in such a way to benefit the consumer.

The proposed rule specifies that the Small Business Regulatory Enforcement Fairness Act (SBREFA) panel specifically asked the CFPB to consider a more flexible approach. As you know, the purpose of the SBREFA panel is to ensure that small businesses have a chance to weigh in on rules “that would have a significant economic impact on a substantial number of small entities.”¹² The panel recommended that the CFPB consider options for collection and use of data that “do not unnecessarily restrict third parties’ ability to provide consumers with requested products or services.”¹³ This includes allowing consumers to opt in to allow their data to be used for such secondary purposes, including to improve upon and build new products. However, the CFPB has thus far declined to provide the opt in.

The CFPB justifies its posture by stating some of the permissioned data will include “sensitive financial data that might expose consumers to fraud or identity theft if it were exposed.”¹⁴ While this is true, the CFPB has included exceptions in the proposed rule (see *supra*) to mitigate this exact risk. Further, the CFPB also notes that the SBREFA panel specifically recommended that the CFPB consider options “that would permit uses of data (including de-identified or anonymized data, as discussed below) for product maintenance or improvement, if appropriate consumer protections can be put in place.”¹⁵ However, the CFPB has yet to include provisions that would allow third parties to use anonymized data for secondary purposes, including to support innovation which benefits consumers.

To that end, the CFPB should revisit the use of secondary data for such purposes, implementing either an opt in or opt out regime, as is included in other data protection laws, and the use of anonymized data for those purposes.

Permanence of Data Privacy Protections

As I conveyed to you at our recent Committee hearing on November 29, 2023, at which you testified, to ensure our data privacy policy is not subject to the whims of any given administration, I believe it’s critical that we make law—not just regulation. I hope we can work

¹¹ Consumer Fin. Protection Bureau, Proposed Rule, Required Rulemaking on Personal Financial Data Rights, 140, (Oct. 19, 2023), available at https://files.consumerfinance.gov/f/documents/cfpb-1033-nprm-fr-notice_2023-10.pdf.

¹² SBREFA, U.S. Small Business Administration Office of Advocacy, <https://advocacy.sba.gov/resources/reference-library/sbrefa/>.

¹³ Consumer Fin. Protection Bureau, Proposed Rule, Required Rulemaking on Personal Financial Data Rights, 139, (Oct. 19, 2023), available at https://files.consumerfinance.gov/f/documents/cfpb-1033-nprm-fr-notice_2023-10.pdf.

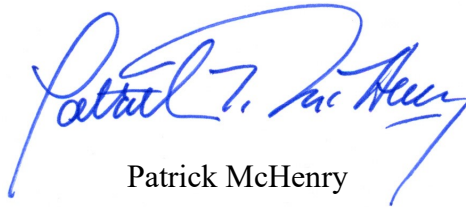
¹⁴ *Id.* at 140.

¹⁵ *Id.* at 155.

constructively on this issue moving forward so Americans' financial data privacy is protected for the long term.

I appreciate the CFPB's attention to these observations. If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, reading "Patrick T. McHenry". The signature is fluid and cursive, with a large initial "P" and a long, sweeping underline.

Patrick McHenry
Chairman

cc: The Honorable Maxine Waters, Ranking Member