

January 25, 2023

Re: CDT comments in response to the Consumer Financial Protection Bureau's Outline of Proposals and Alternatives under Consideration, in the *Small Business Advisory Review Panel for Required Rulemaking on Personal Financial Data Rights*

Dear Consumer Financial Protection Bureau:

The Center for Democracy & Technology (CDT) submits these comments in response to the Consumer Financial Protection Bureau's (CFPB) Outline of Proposals and Alternatives under Consideration, in the *Small Business Advisory Review Panel for Required Rulemaking on Personal Financial Data Rights* (the Outline).¹

Overall, CDT is supportive of the CFPB's efforts to increase competition among financial institutions by giving teeth to Section 1033 of the Dodd-Frank Act. Consumer-directed data sharing between providers has many pro-competitive benefits, including that being able to share historical and transactional data from one institution to another can empower a consumer to seek better rates, products, and services at another institution without having to start completely over. CDT generally explores the concept of "open banking" and financial data portability in a report from 2021 called *Open Banking: Building Trust*.²

A successful implementation of Section 1033 also could provide a model for data portability at a time when portability is rare, though often included as a consumer right in the context of privacy legislation.³ Outside the financial industry, the only significant implementation of data portability that CDT knows of is the Data Transfer Project (DTP), a collaboration between big technology companies to help facilitate the consumer-directed transfer of data between those companies. DTP is still in development and has been for many years. A successful portability model based on Section 1033 could inspire similar efforts, and inspire DTP to move forward.

However, the portability proposals contained in the Outline raise some privacy concerns that CFPB should address in any rulemaking.

¹ Outline of Proposals and Alternatives under Consideration, *Small Business Advisory Review Panel for Required Rulemaking on Personal Financial Data Rights*, Consumer Financial Protection Bureau (Oct. 27, 2022), https://files.consumerfinance.gov/f/documents/cfpb_data-rights-rulemaking-1033-SBREFA_outline_2022-10.pdf.

² Stan Adams & John B. Morris, Jr., *Open Banking: Building Trust*, Center for Democracy & Tech. (May 2021), <https://cdt.org/wp-content/uploads/2021/05/CDT-2021-05-25-Open-Banking-Building-Trust-FINAL.pdf>.

³ For example, see Section 203(a)(4) of the American Data Privacy and Protection Act, <https://www.congress.gov/bill/117th-congress/house-bill/8152/text> (granting individuals the right "to the extent technically feasible, export to the individual or directly to another entity the covered data of the individual that is processed by the covered entity" in human-readable and machine-readable format).

First, while portability is a win for competition and for consumers, the CFPB should also be cognizant that forced sharing of data between competitors is a benefit to the competitors themselves. Some of the largest banks and financial institutions stand to benefit significantly from having an influx of data about new customers that they can then use for any number of purposes. To help address this, the CFPB should not allow providers to mandate that incoming consumers share their historical data with them—rather, it should be up to the consumer to share that information. Consumers should also be allowed to choose which types of data they would like to share, allowing them to decide if they would like to share, for instance, historical data that is no longer relevant (like a prior email address), or data that is not needed for the services they are being provided. Also, the CFPB should maximize the competitive benefits and minimize the privacy harms of transferring excess, unnecessary data by ensuring that the data points providers are allowed to port are the data points that would best enable financial institutions to provide new and innovative products to new customers.

Relatedly, the regulations should place limits on collection, sharing, use, and retention by third parties that access or collect data about a consumer.⁴ Those requirements should be more strict than the proposed “reasonably necessary” standard because that standard is malleable. Because financial data is sensitive by any definition, the CFPB should adopt the stronger standard “strictly necessary” to provide the service, which will help limit privacy harms related to the sharing of financial data and mirrors language in the American Data Privacy and Protection Act.⁵

Second, the CFPB should not require providers to retain information about a consumer that it would not otherwise maintain. Section 1033 of the Dodd-Frank Act states that “nothing in this section shall be construed to impose any duty on a covered person to maintain or keep any information about a consumer.” However, in the Outline, it considers a proposal “under which a covered data provider would be required only to make available information going as far back in time as that covered data provider makes transaction history available directly to consumers...”⁶ To the extent that a provider would have deleted historical, non-transactional information before the time period covering transaction data has lapsed, this would amount to a requirement to retain data, contrary to the statute. Thus, the CFPB should consider a proposal that requires providers to provide access to data only that they would have otherwise retained under their policies.

Third, data that is made available to third parties should be accurate. Data about a person’s finances is increasingly being used to make important, life-altering offers and decisions about people.⁷ With the

⁴ Outline at 40-45.

⁵ Section 102(2), <https://www.congress.gov/bill/117th-congress/house-bill/8152/text>

⁶ Outline at 27.

⁷ See, e.g., Natalie Campisi, *From Inherent Racial Bias to Incorrect Data – The Problems with Current Credit Scoring Models*, Forbes (Feb. 26, 2021), <https://www.forbes.com/advisor/credit-cards/from-inherent-racial-bias-to-incorrect-data-the-problems-with-current-credit-scoring-models>; Lauren Kirchner & Matthew Goldstein, *Access Denied: Faulty Automated Background Checks Freeze Out Renters*, Markup (May 28, 2020), <https://themarkup.org/locked-out/2020/05/28/access-denied-faulty-automated-background-checks-freeze-out>

ability to port such data, it will be used to make even more decisions. Providers should take every precaution to ensure that the data they hold is accurate. And if a provider knows or should have known information is inaccurate, they should be liable for porting that data.⁸ If a provider is not sufficiently sure that particular data about a consumer is accurate, they should either seek out the correct information or simply delete that information.

Fourth, as CDT argued in 2021, screen scraping is a dubious practice that opens up privacy and security issues for consumers:

Sharing credentials increases the possibility of fraudulent account manipulation because anyone with access to a user's credentials can log in and manipulate the user's account as though they were the user. Because service providers must store these credentials (and must be able to use them in unencrypted form to log into the banks), credentials could be exposed as part of a data breach, thereby giving malicious actors full access to customer financial accounts. Moreover, if a customer decides to stop using an app, the only way to prevent future access by the app would be for the customer to change their login credentials with the bank.⁹

To the extent possible, the CFPB should encourage use of Application Programming Interfaces (APIs) for sharing data, which would help reduce the security- and privacy-related harms that screen scraping can cause. They would also allow for more fine-tuned access to certain types of data rather than full account access.¹⁰

CDT looks forward to continuing to engage with the CFPB on this issue.

/s/ Eric Null

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renters; Emmanuel Martinez & Lauren Kirchner, *The Secret Bias Hidden in Mortgage-Approval Algorithms*, Markup (Aug. 25, 2021), <https://themarkup.org/denied/2021/08/25/the-secret-bias-hidden-in-mortgage-approval-algorithms>.

⁸ Outline at 30.

⁹ *Open Banking*, *supra* note 2, at 3.

¹⁰ *Id.* at 4.