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December 22, 2023

FINANCIAL DATA RIGHTS
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: *Docket No. CFBP-2023-0052*
Required Rulemaking on Personal Financial Data Rights

Dear Director Chopra:

My name is Jack Solowey, and I am a policy analyst for financial technology at the Cato Institute's Center for Monetary and Financial Alternatives. I appreciate the opportunity to comment on the Required Rulemaking on Personal Financial Data Rights (Proposed Rule) of the Consumer Financial Protection Bureau (CFPB or the Bureau), which addresses financial data sharing obligations—or "open banking" provisions—under Section 1033 of the Dodd Frank Act.[1] The Cato Institute is a public policy research organization dedicated to the principles of individual liberty, limited government, free markets, and peace, and the Center for Monetary and Financial Alternatives focuses on identifying, studying, and promoting alternatives to centralized, bureaucratic, and discretionary financial regulatory systems. The opinions I express here are my own.

The Bureau must amend the Proposed Rule to realize its stated goals of promoting interoperability and competition within the financial services ecosystem.[2] Specifically, the Bureau must modify its approach to industry standard setting to remove regulatory obstacles,

[1] Required Rulemaking on Personal Financial Data Rights ("Proposed Rule"), Docket No. CFPB-2023-0052; RIN 3170-AA78, available at https://files.consumerfinance.gov/f/documents/cfpb-1033-nprm-fr-notice_2023-10.pdf.

[2] It must be noted in the regulatory record that notwithstanding occasional references in the Proposed Rule to "digital wallets"—which the Bureau has discussed in relation to cryptocurrencies in *separate* rulemaking (Docket No. CFPB-2023-0053, RIN 3170-AB17)—the Bureau has not directly or expressly addressed cryptocurrencies, decentralized finance (DeFi), virtual assets, or digital assets (collectively, "the crypto and DeFi ecosystem") in the Proposed Rule. Nor did the Bureau consider in any way, shape, or form the economic effects of the Proposed Rule on the crypto and DeFi ecosystem. Accordingly, any application of the Proposed Rule to the crypto and DeFi ecosystem would be entirely improper, including by running afoul of obligations under the Consumer Financial Protection Act itself (to consider the potential costs and benefits and impact of rulemaking) and likely the Administrative Procedure Act. 12 U.S.C. § 5512(b)(2) and 5 U.S.C. § 551 et seq.

not impose them anew; clarify and narrow overbroad definitions of terms that would unreasonably encompass ancillary activities; and resolve tensions between the terms of the proposed rule and the Bureau's conflicting interpretation thereof.

I. Industry Standards

a. Standardization Through Private Governance

A Brief History of Standardization. Under the Proposed Rule, the CFPB would tightly control organizations setting technical standards for the open-banking ecosystem, including the data formats and performance specifications of financial data providers, financial data recipients, and the technologies that connect them. The Bureau would exercise this control by micromanaging standard-setting bodies' internal governance processes and maintaining complete discretion to authorize these bodies' existence.

This approach proceeds on an implicit theory that private coordination will fail to adequately promote standardized data formats. This top-down control of the inner workings and external qualification of standard-setting bodies cannot be justified by reference to Section 1033 of the Dodd-Frank Act alone, because the Bureau's standard-setting framework departs from Congress's rulemaking instructions. As discussed further below, whereas Section 1033 simply required the Bureau to "prescribe standards applicable to covered persons to promote the development and use of standardized formats for information," the Bureau has arrogated to itself the power to serve as both gatekeeper and micromanager of industry standard-setting bodies themselves, a far cry from Congress's instruction.[3]

The Bureau's assumption that private coordination inevitably will fail to deliver standardization of relevant data formats and tools is misplaced. Modern standard-setting governance is often a matter of voluntary participation in private industry-led non-profits and non-governmental organizations. In addition, economic and technological history reveal numerous examples of private coordination ultimately achieving standardization in critical fields, including information technology and data transmission.

The premiere international standard-setting body, the International Organization for Standardization (ISO) is a voluntary non-governmental organization.[4] The U.S. delegate to the

[3] 12 U.S.C. § 5533(d).

[4] "Frequently Asked Questions," International Organization for Standards (accessed December 19, 2023), available at https://www.iso.org/footer-links/frequently-asked-questions-faqs/general-faqs.html. *See also* Cynthia J. Martincic, "A Brief History of ISO," IT Standards (February 20, 1997), available at https://www.sis.pitt.edu/mbsclass/standards/martincic/isohistr.htm.

ISO—the American National Standards Institute (ANSI)—is a private non-profit organization that "coordinates the U.S. voluntary standards and conformity assessment system."[5]

Important historical case studies undermine the assumption that achieving common standards is generally or wholly a matter of public regulatory intervention in the wake of market failures. One of the classic examples of convergence to standardization is that of the originally diverse and often incompatible railroad gauges in use in the 19th-Century United States. While the history of U.S. railroad gauges is multifaceted (involving some public and private factors), convergence to a standard gauge was largely a matter of private responses to incentives:

> "After the Civil War (1861-1865), several pressures coincided to induce private efforts towards standardization, including growing demand for interregional shipment, growing trade in time-sensitive perishable goods, competition (within routes), and consolidation (across routes)."[6]

In freight transportation today, the ubiquitous intermodal shipping container—itself a symbol of interoperability and modularity in the global economy—is based on an ISO standard.[7]

The history of critical information technologies contains similar examples. Adoption of the TCP/IP Internet protocol suite as the underlying standard for the global Internet was a result of gradually accreting industry choices.[8] Development of the Universal Serial Bus (USB) standard for connecting peripheral devices to personal computers was an industry-led project implemented through a non-profit vehicle.[9] And development and maintenance of Bluetooth technology standards for shortrange wireless connectivity is very much the same story.[10]

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[5] "Introduction," American National Standards Institute (accessed December 19, 2023), available at https://www.ansi.org/about/introduction.

[6] Daniel P. Gross, "Collusive Investments in Technological Compatibility: Lessons from U.S. Railroads in the Late 19th Century," Harvard Business School Strategy Unit Working Paper No. 17-044 (August 30, 2019): 5, available at https://www.hbs.edu/ris/Publication%20Files/Collusive%20Investments_a011d4c1-35bc-4b58-8d13-60c544ef4206.pdf.

[7] Barnaby Lewis, "Boxing clever—How standardization built a global economy," International Organization for Standards (September 11, 2017), available at https://www.iso.org/news/ref2215.html.

[8] *See* Andrew L. Russell, "OSI: The Internet that Wasn't," *IEEE Spectrum* (July 29, 2013), https://spectrum.ieee.org/osi-the-internet-that-wasnt.

[9] "Two decades of 'plug and play' How USB became the most successful interface in the history of computing," Intel (accessed December 19, 2023) available at https://www.intel.com/content/www/us/en/standards/usb-two-decades-of-plug-and-play-article.html.

[10] Robert Triggs & Calvin Wankhede, "A little history of Bluetooth," *Android Authority* (September 1, 2023), available at https://www.androidauthority.com/history-bluetooth-explained-846345/; and Governing Documents, Bluetooth (accessed December 19, 2023), available at https://www.bluetooth.com/about-us/governing-documents/.

Private Progress Toward Open Banking. The Bureau's own research recognizes that progress in interoperable open-banking technologies has been privately led. Not only did private industry provide screen scraping and credential-based application programming interfaces (APIs) as means of facilitating the transfer of consumer financial data, but it also has facilitated the advancement of credential-free APIs, the use of which the Bureau seeks to promote with the Proposed Rule.

According to the Bureau itself, "the use of credential-free APIs has grown from less than 1 percent in 2019 and 2020 to 9 percent in 2021 and 24 percent in 2022."[11] The Bureau further identifies that "[a]t the same time, the share of access attempts using screen scraping has declined from 80 percent in 2019 to 50 percent in 2022."[12]

Notably, the Bureau also recognizes the role of private market forces contributing to these trends separate and apart from government action:

> "Awareness of CFPA section 1033 may have contributed to these outcomes, though adoption is also influenced by data providers' desire to shift third party access away from screen scraping and towards more secure and efficient technologies, as well as the demand for third party access from data providers' customers."[13]

Indeed, private innovation responding to market incentives has for decades produced the data sharing methods (including screen scraping and APIs) enabling consumers to access their financial data and port it to different applications.[14]

b. Recognition of Standard-Setting Bodies in the Proposed Rule

The Bureau states that if finalized, the Proposed Rule will foster a financial data ecosystem that is "competitive by promoting standardization and not entrenching the roles of incumbent[s]."[15] However, the Proposed Rule risks entrenching incumbents by giving the Bureau discretionary power to block the emergence of new standard-setting bodies. The Bureau must not maintain

[11] Proposed Rule at 186.
[12] *Id.*
[13] *Id.* at 187.
[14] *See* Jack Solowey, "Regulatory Scrapes: Consumer Choice Can Avert Conflict Over Open Banking Rules," *Cato at Liberty* (blog), Cato Institute (February 3, 2023), available at https://www.cato.org/blog/regulatory-scrapes-consumer-choice-can-avert-conflict-over-open-banking-rules. *See also* Veronica Irwin, "How fintech got banks to come around on open banking," *Protocol* (October 17, 2022), available at https://www.protocol.com/fintech/open-banking-consensus. In addition, the crypto and DeFi ecosystem has pioneered from the ground up technology that natively achieves open-banking goals. Jack Solowey, "A Tale of Two Documents: How the Bitcoin White Paper Outperformed Dodd-Frank," *Cato at Liberty* (blog), Cato Institute (November 4, 2022), available at https://www.cato.org/blog/tale-two-documents-how-bitcoin-white-paper-outperformed-dodd-frank.
[15] Proposed Rule at 17.

sole discretionary authority to recognize or reject qualified private standard setters, or else the Proposed Rule will become a self-undermining obstacle to market entry, competition, and innovation.

Notably, the Proposed Rule does not establish a process by which standard-setting bodies may achieve CFPB recognition. Rather, the Bureau proposes highly specific requirements for standard-setting bodies' internal governance and "requests comment on the procedures it should use to recognize standard-setting bodies."[16]

The Bureau should not intervene in the governance of standard-setting bodies, a power not authorized by Congress in Section 1033. In addition, the Bureau must revamp its recognition framework to open, not tightly and arbitrarily restrict, the market for industry standard-setting bodies. Lastly, at a bare minimum, the Bureau's recognition procedures must be documented, publicly available, non-discretionary, and binding on the Bureau.

The Proposed Recognition Framework is Arbitrary and Anti-Competitive. Under the Proposed Rule, a covered entity can demonstrate compliance by conforming with a "qualified industry standard."[17] But "qualified" standards can only be issued by bodies that the CFPB has officially recognized within the last three years.[18] Counterintuitively, promulgating standards that achieve a reasonable degree of industry buy-in and a track record of furthering high-quality services in the open-banking ecosystem would not establish a standard-setting organization as a qualified body, only CFPB fiat would suffice.

The Proposed Rule adopts a heavy-handed approach to industry standard setting, regulating not only covered entities—financial data providers, third parties receiving financial data, and the providers of technologies connecting the two—as Congress instructed, but also standard-setting bodies themselves, which Congress did not provide for. Dodd-Frank Section 1033 only instructed the Bureau to "prescribe standards applicable to covered persons to promote the development and use of standardized formats for information, including through the use of machine readable files, to be made available to consumers."[19] But the Bureau has manufactured and claimed the power to gatekeep and micromanage industry standard-setting bodies specifically.

The Bureau's invocation of Consumer Financial Protection Act (CFPA) rulemaking authority does not justify its departure from Congress's instruction, as promulgating rules under the CFPA requires that such rules be "necessary or appropriate" to the "purposes and objectives of the

[16] *Id.* at 50.
[17] *Id.* at 280-83, 286, 288-90, and 293-94.
[18] *Id.* at 276-77 (proposing 12 C.F.R. § 1033.141(a)(7)).
[19] 12 U.S.C. § 5533(d).

Federal consumer financial laws."[20] The purposes and objectives of gatekeeping and micromanaging standard-setting bodies is nowhere to be found in the federal consumer financial law at issue, Dodd-Frank Section 1033.[21]

Not only does the Bureau's gatekeeping approach claim power not granted by Congress, but it also directly undermines the policy goal of open banking. Director Chopra has described this goal well as a competitive market that facilitates a decentralized and more seamlessly integrated environment for consumers to access and leverage their financial data.[22] In the Proposed Rule, the Bureau recognizes that the goal of a "competitive data access framework" is best served where "standard-setting bodies do not inappropriately use their position to benefit a single set of interests."[23]

To that end, the Bureau has outlined a set of commendable-sounding attributes for the internal governance of standard-setting bodies, according to which the Bureau would determine whether a body is "fair, open, and inclusive" and therefore deserving of official CFPB recognition.[24] However, the Bureau claims complete discretion in making such determinations, with the Proposed Rule only providing that after a standard-setting body requests recognition, the attributes the CFPB enumerates "will inform the CFPB's consideration of the request."[25] By the plain terms of the Proposed Rule, the CFPB would have the power to reject or simply ignore the applications of even those standard-setting bodies that satisfy all of the CFPB's stated criteria.

This absolute discretionary power would not even need to be abused, but simply followed to the letter, to lead to arbitrary approvals, rejections, and "pocket vetoes" of applications for recognition. During the approval process for the first CFPB recognized standard-setting body, as well as subsequent approval processes for new bodies, the Bureau would have the authority to pick winners and losers and limit the number of competing standards organizations. The prospect of arbitrary recognition of standard-setting bodies alone likely would have a chilling effect on the establishment of new bodies. Even if the natural equilibrium in the market for standard-setting bodies results in a very small number of such organizations (even as few as one or two), arbitrary limits on market entry would prevent the emergence of new bodies that could usher in innovative new standards and supplant bodies with outmoded practices or

[20] Proposed Rule at 46; and 12 U.S.C. § 5512(b)(1).
[21] 12 U.S.C. § 5533.
[22] Rohit Chopra, Director, "Director Chopra's Prepared Remarks at Money 20/20," Consumer Financial Protection Bureau (October 25, 2022), available at https://www.consumerfinance.gov/about-us/newsroom/director-chopra-prepared-remarks-at-money-20-20/.
[23] Proposed Rule at 48.
[24] *Id.* at 276-277 (proposing 12 C.F.R. § 1033.141(a)).
[25] *Id.* at 277 (proposing 12 C.F.R. § 1033.141(b)).

specifications. In addition, the lack of a credible prospect of competition would remove pressure on an existing body to continue to improve and innovate to avoid being supplanted.

A lack of competition not only would lead to less innovation from standard-setting bodies themselves but also would risk contributing to incumbency advantages for the covered entities to whom those bodies' standards apply. Where an established standard-setting body does not face competition, it would be vulnerable to pressure to serve only the interests of incumbent covered entities (e.g., financial data providers, third-party data recipients, and data aggregators) to the detriment of upstarts and overall competition in the open-banking ecosystem.

Even if the Bureau believes that the proposed "fair, open, and inclusive" criteria—including obligations related to open entry into a body, decision-making balance, internal due process, and transparency—would limit anti-competitive tendencies of incumbent standard-setting bodies and permit market entry by upstarts, achieving a fair, open, and inclusive market for open-banking products and services would be better served by credible competition among standard-setting bodies.

Principles for an Appropriate Recognition Framework and Process. To allow for competition and innovation among and within standard-setting bodies and covered entities alike, the Bureau should adopt an alternative recognition framework and process.

Instead of a gatekeeping role, the CFPB should permit standard-setting bodies to self-certify their ability to promulgate—as Congress stated—"standardized formats for information, including through the use of machine readable files, to be made available to consumers."[26] The burden of proof should be on the Bureau to demonstrate that a standard-setting body fails to deliver such formats.

To be clear, a Bureau determination of such a failure should be with reference to the bare requirement laid out by Congress (developing standardized formats for machine-readable consumer information), not the Bureau's own contrived "fair, open, and inclusive" criteria for the internal governance of standard-setting bodies, however commendable those attributes might sound. In an open market for standard-setting bodies that is not gatekept by an arbitrary Bureau process, the need to impose openness requirements on a standard-setting body's internal governance is greatly diminished, as relevant stakeholders dissatisfied with an incumbent body would have the recourse of "exit" by establishing competing bodies. With such recourse, these stakeholders would not need to rely on internal pleas to reform an existing body that is artificially protected by the Bureau's barrier to competition.

[26] 12 U.S.C. § 5533(d).

For the avoidance of doubt, the alternative framework proposed here would recognize self-certified standard-setting bodies as issuers of qualified industry standards for covered entities.

Moreover, where the CFPB determines that a body has failed to satisfy the original Congressional mandate, the body should be given a reasonable cure period to correct any deficiencies. Ideally, such a cure period should be no shorter than 90 days.

c. Alternative Standards

Under the proposed rule, developer interfaces must make covered data available in a standardized format.[27] This requirement would be satisfied where either the format (1) conforms to a qualified industry standard or (2) *in the absence of such a standard*, the interface uses a format that is widely used by similar data providers and is readily usable by third parties.[28] This provision reveals how the Bureau's formalistic approach to standardization defies common sense.

Under the Bureau's proposal, a data format that is both widely used by relevant data providers *and* readily usable by third parties *only* would be considered to achieve an appropriate level of standardization in the absence of standards issued by a Bureau-recognized body. Any set of standardization criteria that finds a format that is *both* in widespread use by data providers *and* readily usable by data recipients not to be sufficiently standardized as a general matter has lost the plot.

Accordingly, the Bureau ought to strike the "In the absence of a qualified industry standard" clause from the second option for satisfying developer interface data format requirements. As amended, the relevant provision would allow any interface that makes data available in a format that is widely used by similar data providers and readily usable by third parties to satisfy data standardization requirements.

II. Correcting Overbroad Definitions

The Proposed Rule contains critical defined terms that are overbroad. These must be narrowed to avoid covering activity that is not properly within the scope of Dodd-Frank Section 1033.

Data Aggregator. The Proposed Rule would define a data aggregator as "an entity that is retained by and provides services to the authorized third party to enable access to covered data."[29] On its face, this definition would appear to sweep in any service provider or

[27] Proposed Rule at 280 (proposing 12 C.F.R. § 1033.311(b)).
[28] *Id.*
[29] *Id.* at 275 (proposing 12 C.F.R. § 1033.131).

subcontractor that contributes in any way to a third party being able to access consumer data from a data provider. If so interpreted, this definition could extend to the providers of ancillary infrastructure—like code libraries and Software as a Service—that, while perhaps furthering the activity of a third party, do not have any direct customer- or customer-data-facing role.

Subjecting such service providers to the Proposed Rule would undermine the goals of a competitive and interoperable financial data ecosystem, as it would impose unnecessary compliance risk and costs on providers of critical software infrastructure, discouraging them from helping to develop the tools that would enable consumers to access their covered financial data and port it to new applications. The Bureau must significantly narrow the definition of data aggregator to avoid burdening service providers that have no direct relationship to customers or their data. One option would be to redefine the term as follows:

> *Data aggregator* means an entity that is retained by and provides services to the authorized third party **with the express purpose of** ~~to~~ enabl**ing** access to covered data **through the direct processing, retention, transmission, or other handling of covered data or its associated credentials, authorizations, permissions, or keys without which such data could not be accessed**.

Covered Data Processing. The Proposed Rule would update the CFPA's implementing regulations to specifically cover financial data processing (i.e., "[p]roviding financial data processing products or services by any technological means") under the definition of financial products or services subject to CFPB authority.[30] As the Bureau notes, the CFPA already defines financial products or services to include "providing payments or other financial data processing products or services to a consumer by any technological means."[31] Unfortunately, the Bureau has not clarified what the term "financial data processing" actually means in this rulemaking directly addressing that subject. Rather, the Bureau has used this rulemaking to cement ambiguity and an overbroad interpretation of that term.

The Bureau's description of financial data processing products or services and the non-exhaustive examples it provides in the Proposed Rule ("processing, storing, aggregating, or transmitting financial or banking data, alone or in connection with another product or service") is overbroad.[32] A plain reading of this description would appear to sweep in ancillary technologies that are not themselves financial in character, even if they happen to further the activity of product or service providers that are genuinely financial in nature. Put differently, there is nothing about such general-purpose technologies that present uniquely finance-related risks that ought to be addressed through finance-specific regulation.

[30] *Id.* at 177 and 270-71 (revising 12 C.F.R. § 1001.2).
[31] Proposed Rule at 177-78; and 12 U.S.C. § 5481(15)(A)(vii).
[32] *Id.* at 270-71 (revising 12 C.F.R. § 1001.2).

The core source of this overbreadth is the lack of an appropriately tailored definition of "financial data processing" itself. This term ought to be defined to narrowly pertain to activity that is expressly financial in character, not merely general-purpose data processing that happens to be employed in the "processing, storing, aggregating, or transmitting" of financial or banking data. Otherwise, the definition in the Proposed Rule, on its face, would subject general-use applications that touch financial data to CFPB authority over providers of financial services.[33]

This outcome would clash with multiple concepts in the CFPA, including the exclusions for electronic conduit services and certain data transmission service providers.[34] To avoid this outcome, the Bureau must clearly reflect these CFPA exclusions in its new description of covered financial data processing products or services.

In addition, the major act of legislation covering financial data in the U.S., the Gramm-Leach-Bliley Act (GLBA), applies specifically to financial institutions, which, in turn, are defined in reference to their primary business being financial in character.[35] The Bureau ought to import the finance-specific tailoring of defined covered entities under GLBA and its implementing regulations to the definition of "financial data processing" under the CFPA. For example, the Bureau could draw on the GLBA regulations' approach and define the provider of financial data processing products or services to mean—in relevant part—a provider "the business of which is engaging in an activity that is financial in nature" and *exclude* "entities that engage in financial activities but that are not significantly engaged in those financial activities."[36]

III. Policy Interests Are Best Served by Resolving Conflict Between Bureau Interpretation and Plain Meaning

According to the Bureau, "third parties can continue to use data that they generated in providing their products and services" for purposes including "the improvement of existing products, the development of new products, and risk management assessments."[37] This would

[33] The narrow exceptions provided—for those transmitting payment instructions to a non-financial merchant and those providing access to a host server for a website—do not cure this problem.
[34] 12 U.S.C. § 5481(11). In the CFPA, Congress carved out from the definition of a "service provider" the "unknowing[] or incidental[] transmitting or processing [of] financial data in a manner that such data is undifferentiated from other types of data of the same form as the person transmits or processes." 12 U.S.C. § 5481(26)(A)(ii). However, that statutory exception would not necessarily resolve the problem created by the Bureau's overbroad concept of "financial data processing," as the Bureau's proposal likely would result in financial data processors being treated as "covered persons," not "service providers" (a distinct concept) under the CFPA. Compare 12 U.S.C. §§ 5481(26) and (6).
[35] 16 C.F.R. § 313.3(k)(1).
[36] *Id.* and 16 C.F.R. § 313.3(k)(3).
[37] *Id.* at 215-216.

be appropriate, as it would allow businesses that have invested in tools that let consumers leverage their financial data to improve those tools, develop new technologies, and sustain their operations.

Nonetheless, the Bureau's position that a third party can use such data to improve and develop its products is in possible tension with the Proposed Rule's requirement that a third party "limit its collection, use, and retention of covered data to what is reasonably necessary to provide the consumer's requested product or service."[38] A significant part of this tension arises from the potential difficulty of distinguishing, in practice, between "covered data" and data generated by the third party in the course of providing its covered-data-related products and services. Moreover, it is not necessarily obvious from a plain reading of the Proposed Rule that third parties would be permitted to use the data they generate in the course of providing their covered-data-related products or services for additional purposes (e.g., improving their products and developing new ones).

To help resolve this tension and avoid creating unintended ambiguity, the Bureau should clarify the general limitation on the use of consumer data by third parties to comport with the Bureau's own interpretation. For example, the Bureau could expressly carve out data generated by a third party in the course of providing a product and service from the general limitation on the use of covered data and/or expressly enumerate uses that would not be covered by that limitation (e.g., improving products and services or developing new products and services).

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Thank you for the opportunity to comment on the CFPB's Required Rulemaking on Personal Financial Data Rights. I am happy to answer any questions or further engage on this topic.

Sincerely,

Jack Solowey
Financial Technology Policy Analyst
Center for Monetary and Financial Alternatives
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[38] Proposed Rule at 292 (proposing 12 C.F.R. § 1033.421(a)).