

July 15, 2023

*Via Electronic Submission*

Comment Intake  
Request for Information Regarding Data Brokers  
Consumer Financial Protection Bureau  
c/o Legal Division Docket Manager  
1700 G Street, NW  
Washington, DC 20552

**Re: Request for Information Regarding Data Brokers and Other Business Practices  
Involving the Collection and Sale of Consumer Information (Docket No. CFPB-2023-  
0020)**

Ladies and Gentlemen:

The Clearing House Association L.L.C. (“The Clearing House” or “TCH”)<sup>1</sup> appreciates the opportunity to provide comments to the Consumer Financial Protection Bureau (“CFPB” or “Bureau”) on its “Request for Information Regarding Data Brokers and Other Business Practices Involving the Collection and Sale of Consumer Information” (the “RFI”).<sup>2</sup>

The preamble to the RFI discusses the history and role of the Fair Credit Reporting Act (“FCRA”)<sup>3</sup> and refers to “data brokers” as companies with business models that collect and sell consumer data but who may purport not to be covered by the FCRA. The Spring 2023 Unified Agenda states that CFPB is looking to conduct pre-rulemaking activity under the FCRA in November 2023.<sup>4</sup> As the Bureau considers the impact of data broker activity on consumers and weighs whether to amend the regulations which implement the FCRA, TCH encourages the CFPB to carefully define the term “data broker” to exclude certain activities of financial institutions which may be required by Section 1033 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Section 1033”)<sup>5</sup> and various federal laws regarding the collection and retention of information about the financial products and services that they provide to consumers.<sup>6</sup>

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<sup>1</sup> The Clearing House Association, L.L.C., the country’s oldest banking trade association, is a nonpartisan organization that provides informed advocacy and thought leadership on critical payments-related issues. Its sister company, The Clearing House Payments Company L.L.C., owns and operates core payments system infrastructure in the U.S., clearing and settling more than \$2 trillion each day. See The Clearing House’s web page at [www.theclearinghouse.org](http://www.theclearinghouse.org).

<sup>2</sup> Bureau of Consumer Financial Protection, “Request for Information Regarding Data Brokers and Other Business Practices Involving the Collection and Sale of Consumer Information,” 88 Fed. Reg. 16951, (March 21, 2023).

<sup>3</sup> 15 U.S.C. § 1681 *et seq.*

<sup>4</sup> See Office of Information and Regulatory Affairs, Unified Agenda, Consumer Financial Protection Bureau, Spring 2023, (noting pending pre-rule activity under the Fair Credit Reporting Act for November 2023), *available at* <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=3170-AA54>.

<sup>5</sup> Pub. L. No. 111-203, § 1033, 124 Stat. 1376, 2008 (codified at 12 U.S.C. § 5533), *hereinafter* the “Dodd-Frank Act”.

<sup>6</sup> See for example, Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809, §§ 6821-6827, and Bank Secrecy Act, 31 U.S.C. § 5311, *et seq.*

TCH and its member banks fully support the right of consumers to safely and securely obtain information, upon their request, about their ownership or use of a financial product or service from the provider of that product or service, consistent with Section 1033. TCH and its members have engaged in significant work with other industry stakeholders to facilitate that right in conformance with the principles for consumer-authorized financial data sharing and aggregation that the Bureau released in October 2017.<sup>7</sup> We have been instrumental in the development of both Financial Data Exchange (“FDX”)<sup>8</sup> – a non-profit industry standards body which supports a royalty-free API technical standard for consumer permissioned data sharing – and Akoya<sup>9</sup> – a one-to-many, API-based, data access network for the exchange of consumer-permissioned financial data.

We recognize that the purpose of this RFI is to elicit feedback on a range of heterogeneous “new business models that sell consumer data”<sup>10</sup> which have emerged since the enactment of the FCRA and is therefore intentionally broad and inclusive in describing the firms about which it is soliciting information. However, we ask that the CFPB be mindful of both financial institutions’ existing and future statutory and regulatory obligations and the statutory limitations of the Fair Credit Reporting Act when crafting any future definition of “data brokers.”

## Discussion

Section “II. Overview” of the RFI states, “Data brokers is an umbrella term to describe firms that collect, aggregate, sell, resell, license, or otherwise share consumers’ personal information with other parties.”<sup>11</sup> We are concerned that this construction leaves open the possibility that any one of the alternative activities of collecting, aggregating, selling, reselling, licensing, or sharing is sufficient to describe a data broker. This formulation is repeated in questions 1, 5, and 15 of the RFI.<sup>12</sup> TCH believes that this construction is overly broad, would capture firms and activities that are beyond the intention of the CFPB’s investigation into data brokers, and would be inconsistent with the FCRA’s definitions of both a “consumer report” and a “consumer reporting agency.”<sup>13</sup>

The forthcoming rules implementing Section 1033 will obligate financial institutions and others to make available to a consumer, upon request, information concerning the consumer financial product or service that the consumer obtained from the financial institution in electronic form.<sup>14</sup> Notably, the FCRA excludes any “report containing information solely as to transactions or experiences between the consumer and the person making the report...” from the definition of a “consumer report.”<sup>15</sup> Compliance with Section 1033’s requirement to provide consumers with information

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<sup>7</sup> CFPB, Consumer Protection Principles: Consumer-Authorized Financial Data Sharing and Aggregation (Oct. 18, 2017) available at [https://files.consumerfinance.gov/f/documents/cfpb\\_consumer-protection-principles\\_data-aggregation.pdf](https://files.consumerfinance.gov/f/documents/cfpb_consumer-protection-principles_data-aggregation.pdf).

<sup>8</sup> FDX is an independent subsidiary of the Financial Services Information Sharing and Analysis Center (FS-ISAC). See <https://financialdataexchange.org/FDX/FDX/About/About-FDX.aspx?hkey=dffb9a93-fc7d-4f65-840c-f2cfbe7fe8a6>

<sup>9</sup> See <https://akoya.com/about>.

<sup>10</sup> RFI at 16952.

<sup>11</sup> Id.

<sup>12</sup> RFI at 16953, 16954.

<sup>13</sup> 15 U.S.C. § 1681a(d), (f).

<sup>14</sup> 12 U.S.C. § 5533(a).

<sup>15</sup> 15 U.S.C. § 1681a(d)(2)(A)(i). We also note that there may be an inherent tension between the Section 1033

regarding their financial accounts should not constitute a “consumer report” under the FCRA and should not be sufficient on its own to qualify a financial institution as a “data broker.”

Additionally, the FCRA definition of a “consumer reporting agency” is “any person which for “monetary fees, dues, or on a cooperative nonprofit basis, 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>16</sup> Consumer-permissioned sharing of personal financial data by a financial institution to a consumer regarding the financial product or service that the consumer obtained from them in accordance with Section 1033 is not a sale of consumer information and does not make a financial institution a “consumer reporting agency.”<sup>17</sup>

Just as the transmission of deposit and credit card account statements containing account transaction activity are not considered furnishing, the act of a financial institution complying with a valid Section 1033 request by a consumer should not constitute furnishing under the FCRA, as the consumer is not a “consumer reporting agency” as defined in the FCRA.<sup>18</sup> Regulation V, implementing the FCRA, defines a “furnisher” as “an entity that furnishes information relating to consumers to one or more consumer reporting agencies for inclusion in a consumer report.”<sup>19</sup> A consumer is not a “consumer reporting agency” when requesting and receiving information about the product or service

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rulemaking and FCRA depending on how the term “consumer” is defined for each ruleset. The term consumer is defined for FCRA, at 15 U.S.C. § 1681a(c) and 12 CFR § 1022.3(f), as “an individual.” However, the definition of “consumer” referenced by the CFPB in its Section 1033 SBREFA Outline is the general Dodd-Frank Act definition which includes “an agent, trustee, or representative acting on behalf of an individual consumer.” See CFPB, “Outline of Proposals and Alternatives under Consideration for the Personal Financial Data Rights Rulemaking,” available at [https://files.consumerfinance.gov/f/documents/cfpb\\_data-rights-rulemaking-1033-SBREFA\\_outline\\_2022-10.pdf](https://files.consumerfinance.gov/f/documents/cfpb_data-rights-rulemaking-1033-SBREFA_outline_2022-10.pdf) citing 12 U.S.C. 5481(4).

<sup>16</sup> 15 U.S.C. § 1681a(f).

<sup>17</sup> We note that descriptions elsewhere of data brokers in the RFI recognize that a sale or other commercial gain from the collection and distribution of consumer data is an inherent component of acting as a data broker. See RFI at 16952 (*emphasis added*): “But since the enactment of the FCRA, companies using business models that **sell** consumer data have emerged and evolved with the growth of the internet and advanced technology.”; “These companies are sometimes labeled “data brokers,” “data aggregators,” or “platforms,” but they all share a fundamental characteristic with consumer reporting agencies—they collect and **sell** personal data.”; “The CFPA also granted the CFPB various additional authorities that may be applicable to companies that collect and **sell** personal data...”; and “This request for information is seeking information to (1) help inform the CFPB about new business models that **sell** consumer data, including information relevant to assessments of whether companies using these new business models are covered by the FCRA, given the FCRA’s broad definitions of “consumer report” and “consumer reporting agency...” The element of commercial gain is also included in many definitions of the plain English language term “broker.” See the definition of “broker” from Oxford Languages, “a person who buys and sells goods or assets for others,” available [here](#) (accessed 6/26/2023); Merriam-Webster.com, “1: one who acts as an intermediary: such as a) an agent who arranges marriages, b) an agent who negotiates contracts of purchase and sale (as of real estate, commodities, or securities)... 3: one who sells or distributes something,” available [here](#) (accessed 6/26/2023).

<sup>18</sup> As the CFPB considers the definition of a data broker under FCRA we ask that the CFPB recognize that the Regulation V definition of “furnisher” was adopted prior to the enactment of the Dodd-Frank Act and Section 1033. See Office of the Comptroller of the Currency, Federal Reserve System, Federal Deposit Insurance Corporation, Office of Thrift Supervision, National Credit Union Administration, Federal Trade Commission, “Procedures To Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transactions Act,” 74 Fed. Reg. 31484 (July 1, 2009).

<sup>19</sup> 12 C.F.R. § 1022.41(c).

obtained from a financial institution in accordance with Section 1033, as the consumer does not assemble this information for the purpose of furnishing consumer reports to third parties and does not do so for commerce.<sup>20</sup>

In light of The Clearing House's deep engagement on consumer-authorized financial data sharing, we believe it is important that any operative definition of "data broker" exclude the activities of financial institutions to make available to consumers in electronic form information "concerning the consumer financial product or service that the consumer obtained from" them, consistent with Section 1033.

Lastly, financial institutions are obliged under several state and federal laws to collect and retain information about the financial products and services that they provide to consumers.<sup>21</sup> The FCRA's definition of a "consumer report" requires that the information "is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility" for credit, employment, or another permissible purpose.<sup>22</sup> The collection and retention of information pursuant to various state and federal data retention requirements is not done for the purposes enumerated by the FCRA and should not be sufficient on its own to qualify a financial institution as a "data broker." Anti-money laundering compliance, sanctions compliance, and fraud monitoring also require financial institutions to collect, retain, and analyze information about their consumer customers and consumer counterparties to transactions. Any future definition of data broker should avoid unnecessarily capturing activities and programs of financial institutions for these purposes.

## Conclusion

As the Bureau continues its investigations into the consumer protection implications of emergent business models based on the use of consumer financial data, we respectfully request that the Bureau avoid an overly broad definition of a "data broker" which might otherwise capture routine, or even statutorily mandated, activities of financial institutions that provide financial products and services to consumers. We look forward to continuing to engage with the Bureau in its important work of protecting consumers and its development of a regulatory framework under Section 1033.

Respectfully submitted,

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<sup>20</sup> 15 U.S.C. § 1681a(f).

<sup>21</sup> See for example, Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809, §§ 6821-6827, and Bank Secrecy Act, 31 U.S.C. § 5311, *et seq.*

<sup>22</sup> 15 U.S.C. § 1681a(d)(1).