December 28, 2023

Comment Intake—FINANCIAL DATA RIGHTS
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G St. NW
Washington, D.C. 20552

RE: Request for Comment on Required Rulemaking on Personal Financial Data Rights, Docket No. CFPB-2023-0052

The Interactive Advertising Bureau (IAB) welcomes the opportunity to submit this comment in response to the Consumer Financial Protection Bureau's (CFPB) request for public comment on its proposed rule, Required Rulemaking on Personal Financial Data Rights, 88 Fed. Reg. 74,796 (Oct. 31, 2023). Founded in 1996, IAB (www.iab.com) represents over 700 leading media companies, brand marketers, agencies, and technology companies that are responsible for selling, delivering, and optimizing digital advertising and marketing campaigns. Together, our members account for 86 percent of online advertising expenditures in the United States. Working with our member companies, IAB develops both technical standards and best practices for our industry. In addition, IAB fields critical consumer and market research on interactive advertising, while also educating brands, agencies, and the wider business community on the importance of digital marketing.

The proposed rule purports to implement Section 1033 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376. Section 1033 grants consumers a statutory right to obtain certain personal financial data held by covered providers of consumer financial products or services. 12 U.S.C. § 5533(a). Much of the proposed rule appears to reasonably implement that statutory mandate by facilitating the exchange of consumer financial data contemplated in Section 1033.

Nonetheless, IAB has significant concerns about the lawfulness and policy wisdom of Subpart D of the proposed rule. Subpart D would regulate neither individual consumers nor covered providers that control consumer data, but rather "third parties" that individual consumers enlist to obtain their data from covered providers. *See* Proposed 12 C.F.R. §§ 1033.401–1033.441. In particular, the proposed rule would appear to categorically prohibit third parties from collecting, using, and retaining a consumer's covered data for any purpose beyond those the CFPB deems "reasonably necessary" to provide the individual consumer's requested product or service—even if the consumer consents to the third party's additional collection, use, and retention. *See id.* § 1033.421.

In several key respects, Subpart D of the proposed rule exceeds the CFPB's authority to implement Section 1033's narrow right of access to consumer data and threatens harmful consequences for consumers.

- *First*, as discussed below, the proposed rule is unlawful insofar as it limits consumer choice and autonomy in critical ways. Specifically, the proposed rule appears to (1) prohibit consumers from authorizing third parties to collect, use, and retain consumer financial data in certain ways that the CFPB disfavors; and (2) require third parties to limit the duration of their data collection, even when they have authorization from consumers. These restrictions are based on an unduly narrow interpretation of the Consumer Financial Protection Act's broad definition of "consumer" to include entities that receive data "on behalf of" an individual consumer. The restrictions are also arbitrary and capricious insofar as they constrain consumer autonomy with no basis in evidence or sound policy. Indeed, the proposed rule's intrusion into consent-based, consumer-third party relationships will harm consumers by limiting their ability to access—and by raising the cost of or even eliminating entirely—a host of innovative financial products and services. The proposed rule will also impede consumers' ability to receive advertisements that are genuinely tailored to their real-world needs. IAB urges the CFPB to revise the proposed rule to ensure that third parties may collect, use, and retain consumer data according to terms to which consumers consent.

- *Second*, the proposed rule is unlawful insofar as it apparently purports to regulate third parties engaging in transfers of covered financial data even when those third parties are not relying on Section 1033's access right to obtain the data. The proposed rule exceeds the CFPB's delegated authority by turning Section 1033's limited access right into an all-purpose mechanism for prohibiting access to financial data outside the purview of Section 1033. IAB therefore urges the CFPB to clarify in any final rule that the rule imposes no restrictions on third parties who are able to access consumer financial data without relying on the Section 1033 access right.

By taking those steps, the CFPB would enhance consumer autonomy with respect to personal financial data, promote consumer choice vis-à-vis financial products and services, and avoid promulgating a final rule vulnerable to legal challenge on the aforementioned grounds.

I. Background

A. The Rise of Open Banking

Recent decades have witnessed revolutionary advances in digital banking, electronic transactions, and associated third-party services. Financial institutions have widely moved to enable consumers to access banking services over the Internet. The advent of online banking—and the accompanying increased availability of consumer financial data in electronic form—has in turn generated a massive, sophisticated ecosystem of companies, products, and services. Upon receiving consumer authorization, companies within that ecosystem collect, use, and retain consumer financial data in order to provide products and services that benefit—and empower—individual consumers.

These companies leverage open banking to promote consumer financial autonomy in myriad ways. Some companies, for example, offer mobile applications that aggregate a participating user's financial data to provide insights on spending patterns. Other companies analyze credit card transactions to enable users to track, manage, and cancel unwanted

subscriptions. And other companies track income and expenses to help users manage their tax obligations. By enlisting companies to access their personal financial data for those and many other purposes, consumers can better control their spending, saving, and investing—in short, their financial well-being.

In order to provide such valuable financial services on which consumers across the globe have come to depend, many companies rely upon digital advertising and marketing. Some companies, upon obtaining a consumer's consent, will use the consumer's financial data to facilitate that advertising and marketing. By enabling consumers to learn about goods and services that may interest them, such advertising and marketing regularly benefits consumers. And if revenue derived from advertising and marketing using the financial data of freely consenting consumers were to suddenly disappear, many companies would likely be forced to increase the prices of their products and services, decrease the quality of their products and services, or even refrain from offering products and services entirely. This would inflict significant and unnecessary harm on consumers everywhere.

B. Consumer Financial Protection Act Section 1033

Congress has recognized the importance of ensuring that consumers have ready access to their personal financial data. In 2010, Congress passed and President Obama signed the Dodd-Frank Act, title X of which contains the Consumer Financial Protection Act (CFPA). *See* Pub. L. No. 111-203, 124 Stat. 1955. Of relevance here is a narrow, isolated provision of the CFPA: Section 1033. As relevant here, Section 1033 provides:

> **Consumer rights to access information**
>
> (a) In general
>
> Subject to rules prescribed by the Bureau, a covered person shall make available to a consumer, upon request, information in the control or possession of the covered person concerning the consumer financial product or service that the consumer obtained from such covered person, including information relating to any transaction, series of transactions, or to the account including costs, charges and usage data. The information shall be made available in an electronic form usable by consumers.

12 U.S.C. § 5533(a). In Section 1002(4) of the CFPA, Congress defined "consumer" as "an individual or an agent, trustee, or representative acting on behalf of an individual." 12 U.S.C. § 5481(4). And in Section 1002(6), Congress defined "covered person" as any entity "that engages in offering or providing a consumer financial product or service," along with certain affiliates thereof. *Id.* § 5481(6). Section 1033 does not purport to regulate the transfer of financial data to entities other than "consumers"—for instance, to entities that do not act "on behalf of" an individual consumer as contemplated in Section 1002(4).

C. The Proposed Rule

The proposed rule at issue here marks the CFPB's first attempt to implement Section 1033. *See* 88 Fed. Reg. at 74,799 ("The CFPB is proposing regulations to implement CFPA section 1033."); *id.* at 74,801. Intended to implement consumers' "personal financial data rights" under Section 1033, *id.* at 74,796, the proposed rule begins by requiring data providers, including covered financial institutions, to make available to consumers and authorized third parties, upon request, covered data in the data provider's control concerning a covered consumer financial product or service. The proposed rule then sets forth standards and procedures governing the exchange of covered data from data provider to consumer. *See* Proposed Subparts B–C. IAB does not address those aspects of the proposed rule, which collectively facilitate the exchange of consumer financial data contemplated in Section 1033.

Subpart D of the proposed rule, however, veers off in a different direction. Subpart D concerns neither individual consumers nor data providers. Subpart D, rather, concerns "authorized third parties"—a term nowhere to be found in Section 1033 or the CFPA's definitional provision. *See* 12 U.S.C. §§ 5481, 5533. The proposed rule details an array of criteria and obligations that would purportedly govern a third party accessing data from a data provider on a consumer's behalf. Throughout the proposed rule, the CFPB makes clear that it views Section 1033 as the source of authority for Subpart D's restrictions on third-party collection, use, and retention of consumer financial data. *See, e.g.*, 88 Fed. Reg. at 74,799, 74,802.

The CFPB purports to derive those restrictions from the CFPA Section 1002(4)'s definition of "consumer" as including entities "acting on behalf of" individual consumers. 12 U.S.C. § 5481(4). As the proposed rule puts it, "the CFPB interprets CFPA section 1033 as authority to specify procedures to ensure third parties are *truly acting on behalf of* consumers when accessing covered data." 88 Fed. Reg. at 74,802 (emphasis added); *see also id.* at 74,832–33 ("As a representative acting on behalf of the consumer, a third party authorized to access the consumer's covered data must ensure that the consumer is the primary beneficiary of such access."); *id.* at 74,799, 74,800, 74,829.

Across several pages of the Federal Register, the proposed rule purports to flesh out what third parties must do (or not do) in order to be considered "acting on behalf of" a consumer. 12 U.S.C. § 5481(4). Among other things, the proposed rule requires that third parties limit their "collection, use, and retention" of covered consumer data "to what is reasonably necessary to provide the consumer's requested product or service." Proposed 12 C.F.R. § 1033.421(a)(1). The proposed rule then enumerates certain specific activities that the CFPB believes are *not* reasonably necessary to provide any other product or service, including "[t]argeted advertising," "[c]ross-selling of other products or services," and "[t]he sale of covered data." *Id.* § 1033.421(a)(2). The proposed rule follows with a flurry of additional requirements, including a provision that limits a third party's collection of covered data to a maximum period of one year after the consumer's most recent authorization. *Id.* § 1033.421(b)(2).

II. Discussion

Section 1033 guarantees consumers the right to access their personal financial data. But Subpart D of the proposed rule unlawfully distorts that right, limiting consumer autonomy in ways

that Congress plainly did not intend. Specifically, the proposed rule is unlawful insofar as it adopts a misinterpretation of Section 1033 that (1) prohibits consumers from authorizing third parties to collect, use, and retain their financial data for certain purposes that the CFPB disfavors; and (2) requires third parties to limit the duration of their data collection. Those restrictions are also unwise: They limit consumer autonomy with no basis in evidence and harm consumers by curbing their ability to access innovative financial products and services. The proposed rule also unlawfully purports to prohibit transfers of financial data that occur outside the scope of Section 1033—even when those transfers are expressly authorized by consumers. The CFPB should modify its proposed rule to restore consumer autonomy and vindicate Section 1033's core purposes.

A. The proposed rule misinterprets Section 1033 in ways that unduly limit consumer choice and autonomy.

1. The CFPB lacks statutory authority to prohibit consumers from authorizing third parties to use their financial data in ways that do not directly provide consumers with their requested products or services.

a. Section 1033 provides that a "covered person"—namely, certain financial institutions and related entities that control or possess consumer financial data, *see* 12 U.S.C. § 5481(6)—"shall make available to a consumer, upon request, information in the control or possession of the covered person concerning the consumer financial product or service that the consumer obtained from such covered person," including information concerning transactions, costs, charges, and usage data. *Id.* § 5533(a). The plain text of Section 1033—along with its title, "[c]onsumer rights to access information"—demonstrates that the provision plays an important, but limited function: requiring data providers to give consumers their financial data upon request. By granting consumers an affirmative right to obtain their financial data from covered providers, Section 1033 facilitates consumers' ability to control their data and choose the financial products and services best suited to their individual situations.

Congress also made clear that Section 1033's access right requires covered persons to provide consumer data not only to the individual consumer herself, but also to any "agent, trustee, or representative *acting on behalf of* an individual [consumer]." *Id.* § 5481(4) (emphasis added). This definition, housed in Section 1002(4) of the CFPA, serves Section 1033's purpose of promoting consumer autonomy by ensuring that individual consumers can empower third parties to receive information in their place. Consumers, for example, may enlist third parties to obtain their personal financial data in order to provide products and services benefitting those consumers, such as tools that help consumers manage their spending, saving, and investing.

Subpart D of the proposed rule restricts Section 1033's access right by adopting a limited and implausible interpretation of what it means for a third party to be "acting on behalf of" an individual consumer under Section 1002(4). *See* 88 Fed. Reg. at 74,802, 74,807, 74,829–33. Per Subpart D of the proposed rule, to qualify as "acting on behalf of" a consumer, the third party must limit its collection, use, and retention of covered consumer data to what is "reasonably necessary" to provide the consumer's requested product or service. Proposed 12 C.F.R. § 1033.421(a)(1). Moreover, the proposed rule specifies that certain activities categorically disqualify third parties from acting "on behalf of" consumers; such activities include targeted advertising, cross-selling of other products, or resale of covered data. *Id.* § 1033.421(a)(2).

Through this understanding of Section 1002(4)'s "acting on behalf of" language, the proposed rule prohibits third parties who engage in such activities from obtaining access to consumer financial data under Section 1033. Crucially, these prohibitions apply even if the consumer consents to the third party's additional collection, use, or retention of consumer data. *See, e.g.*, 88 Fed. Reg. at 74,861 (appearing to tentatively reject "alternatives which would allow secondary use of data by third parties in certain circumstances (*i.e.*, through an opt-in mechanism allowing the consumer to consent to specific uses . . . .)"). The proposed rule thus blocks consumers from relying on their Section 1033 rights to authorize third parties to receive access to their financial data for various purposes that the consumer herself wishes to authorize.

b. The proposed rule's interpretation of Sections 1033 and 1002(4) is unlawful. The text and purpose of those provisions make clear that they provide consumers with expansive rights to obtain their own data. These rights include the right to authorize third parties to obtain that data on their behalf. But neither Section 1033 nor 1002(4) imposes any restrictions on what the individual consumer may authorize the third party to do with the data. Imposing such restrictions exceeds the CFPB's authority.

In agency law, the phrase "on behalf of" typically means "in the name of," "on the part of," or "as the agent or representative of." Black's Law Dictionary (11th ed. 2019). "[T]he concept of agency posits a consensual relationship in which one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person." Restatement (Third) of Agency § 1.01, cmt. c (Am. L. Inst. 2006). Notably, the principal-agent relationship does not disintegrate whenever the principal is not the primary beneficiary of an agent's action—or even when the principal does not benefit at all from an agent's action. As the Restatement explains, an agent's "actions 'on behalf of' a principal do not necessarily entail that the principal will benefit as a result." *Id.* § 1.01, cmt. g.

Applying these principles here, in order to act "on behalf of" an individual consumer within the meaning of Sections 1033 and 1002(4), the third party must have authorization from the consumer to stand in the consumer's shoes and receive the data from the third party in the same way that the consumer could receive that data herself. If the consumer authorizes the third party to receive the data, then the third party is "acting on behalf of" the consumer when the covered provider grants the third party access under Sections 1033 and 1002(4). That is true regardless of whatever agreement the consumer and third party have about whether and how the data will later be used.

This understanding tracks the ordinary meaning and experience. Imagine a consumer who wishes to invoke her Section 1033 right to obtain her personal financial information from a bank. The consumer instructs the bank to provide the information in hard copy to an authorized third party—for example, a subordinate, a messenger, Federal Express, another agent or representative, and so on. That transaction comports with Sections 1033 and 1002(4) because the third party has been authorized to act on the consumer's behalf in exercising the consumer's right to obtain the information under Section 1033. Nothing turns on whatever consensual agreement the third party and the consumer might have about what the third party may or must subsequently do with the information.

c. The CFPB's proposed rule appears premised on the notion that when a third party plans to use the consumer's data for purposes beyond those reasonably necessary to provide the consumer with a requested product or service, the third party is necessarily *not* acting "on behalf of" the consumer when it obtains the information from the covered provider in the first place. That conclusion does not follow. So long as the consumer agrees to have the data provider transfer the data to the third party, the third party is "acting on behalf of" the consumer with respect to the consumer's exercise of her Section 1033 rights.

Of course, the consumer is free to condition any such authorization on the third party's agreement to use (or not use) the data in certain ways. But the CFPA provides no basis for regulating that separate agreement. Nothing in Section 1033's text—which simply provides consumers an affirmative right of access to their financial data—empowers the CFPB to override a consumer's choices regarding how a third party it has authorized to receive that data may later use the data. Nothing in the statute allows the CFPB to effectively nullify ordinary contracts through which individual consumers permit third parties to (1) obtain their financial data from data providers, and (2) use or retain that data for purposes beyond those reasonably necessary to provide the consumer's requested product or service.

Indeed, the proposed rule's interpretation of Sections 1033 and 1002(4) flouts Section 1033's goal of enhancing consumer choice and autonomy. As the CFPB acknowledges, Section 1033's overriding objective is to ensure that third-party use of consumer financial data "proceeds in alignment with consumer control." 88 Fed. Reg. at 74,832. But the proposed rule impedes that control. Under the proposed rule, no matter how "informed" a consumer's consent might be, *id.* at 74,833, the consumer cannot authorize a third party to engage in collection, use, or retention of the consumer's financial data beyond that reasonably necessary to provide the consumer's requested product or service. That result directly contradicts Section 1033's core purpose by restricting—not enhancing—consumer autonomy with regard to personal financial data.

d. The CFPB appears to believe that Section 1002(4)'s "acting on behalf of" requirement addresses not only the third party's act of receiving the data, but also the third party's subsequent use of that data. For the reasons noted, that understanding is mistaken: A third party acting as a consumer's agent or representative in receiving data is necessarily "acting on behalf of" the consumer for purposes of Section 1033. But even if the CFPB were correct, then Section 1002(4)'s "acting on behalf of" requirement would be satisfied whenever the third party uses the consumer's data to provide the consumer with a requested product or service, even if the third party also puts the data to *other* (authorized) uses that do not directly benefit the consumer. Providing the desired good or service would necessarily be action "on behalf of" the consumer, and Section 1002(4) would therefore be satisfied. Nothing in Sections 1033 or 1002(4), or in agency law, supposes that the consumer must be the sole (or "primary") beneficiary of every third-party action for the principal-agent relationship to persist or for the third party to be "acting on behalf of" the individual consumer. *Id.* at 74,832–33.

In short, third parties "act[] on behalf of" individual consumers whenever such consumers have authorized them to obtain the consumers' financial data under Section 1033. At a minimum, that is true when the third party obtains the data so that it can provide the consumer with a requested service—even if the consumer also authorizes the third party to put the data to other uses. Subpart

D's interpretation of Sections 1033 and 1002(4) is unlawful insofar as it prohibits consumers from authorizing third parties to obtain—and subsequently use—their data in these circumstances.

e. To the extent the proposed rule prohibits third-party use of financial data obtained under Section 1033 for advertising purposes, it is also unconstitutional. The First Amendment protects commercial advertising. Indeed, "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 563, 568, 572 (1980). On numerous occasions, the Supreme Court has reaffirmed the important First Amendment values underlying commercial advertising by holding unconstitutional various federal and state regulations prohibiting such advertising. *See, e.g., id.* (holding unconstitutional a state regulation banning promotional advertising by electric utilities); *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 360 (2002) (holding unconstitutional a federal prohibition on advertising compounded drugs); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 176 (1999) (holding unconstitutional a federal prohibition on advertising casino gambling as applied to private casino gambling in states where such gambling is legal).

If a consumer consents to a third party's collecting the consumer's financial data from a covered data provider and then using that data to engage in targeted advertising, any prohibition on such advertising would run afoul of the First Amendment. The CFPB has not even begun to identify a "substantial interest" in regulating the third party's consented-to commercial speech, let alone asserted that a flat ban on such advertising "directly advance[s]" that governmental interest and is "no more extensive than necessary to further" such interest. *Central Hudson*, 447 U.S. at 564, 569–70. Nor could it. The CFPB has no valid interest in restricting advertising based on consumer data that the consumer herself agrees can be used for that purpose. This constitutional flaw independently confirms that the proposed rule is unlawful.

2. The proposed rule's restrictions on consumer autonomy are also arbitrary and capricious.

Even assuming that Section 1033 empowers the CFPB to restrict third parties' handling of consumer financial data to some extent, the proposed rule is arbitrary and capricious insofar as it prohibits consumers from authorizing third parties to collect, use, and retain their data in ways that the CFPB believes are not reasonably necessary to providing the consumers' requested product or service. Those restrictions arbitrarily constrain consumer choice and will prevent consumers from benefitting from other third-party uses of their data.

"[A]gencies are required to engage in reasoned decisionmaking." *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (internal quotation marks omitted). That has not occurred with respect to the proposed rule's apparent prohibition on third-party collection, use, and retention of consumer data even when consumers consent to that collection, use, and retention. For instance, according to the proposed rule, a third party's use of consumer data for targeted advertising or cross-selling of other products "would undermine a consumer's ability to control their data." 88 Fed. Reg. at 74,833. The proposed rule later maintains that its restrictions on third parties "would increase consumers' control over how their covered data are used by third parties." *Id.* at 74,858–59. But neither of these statements is true insofar the consumer consents to such targeted advertising or cross-selling.

In those circumstances, consumers *do* have—and *are* exercising—full "control" over their data. *Id.* at 74,833.

In addition, the CFPB does not appear to have meaningfully considered the consequences of the proposed rule's intrusion into private, consent-based, consumer-third party relationships. Every day, and across countless industries, myriad third-party companies access consumer financial data in order to provide products and services to those consumers.[1] In order to access such products and services, consumers regularly consent to third-party uses of their financial data for various additional purposes. A third party that secures a consumer's consent to use the consumer's data for targeted advertising, for example, may thereby acquire the revenue that permits the third party to provide the consumer's requested product or service in the first place. Such revenue may further enable the third party to improve the requested product or service, or even to develop new, related products and services.

By unwinding untold numbers of consensual consumer-third party agreements, the proposed rule would upend business models, decrease third-party revenue, and even threaten the very existence of many third-party companies.[2] Small and mid-size companies that depend on targeted advertising and cross-selling to generate growth would suffer most acutely, and new companies would struggle to overcome heightened barriers to market entry. Competition would diminish.[3] Consolidation would increase. Innovation would decline.[4] And the most immediate result from consumers' perspective would be fewer—or worse, or more expensive—third-party products and services that consumers so value.[5] In sum, everyone—consumers and third parties alike—would lose.

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[1] According to the CFPB, more than 100 million consumers have authorized a third party to access their account data. 88 Fed. Reg. at 74,798. And in 2022, third parties accessed or attempted to access consumer financial accounts on anywhere between 50 billion and 100 billion individual occasions. *Id.*

[2] *See, e.g.*, Raheel A. Chaudhry & Paul D. Berger, *Ethics in Data Collection and Advertising*, GPH Int'l J. Bus. Mgmt. (2019), at 5, https://gphjournal.org/index.php/bm/article/view/240/110; Yan Lau, *Economic Issues: A Brief Primer on the Economics of Targeted Advertising*, Bureau of Econ., Fed. Trade Comm'n (2020), at 11–12, https://www.ftc.gov/system/files/documents/reports/brief-primer-economics-targeted-advertising/economic_issues_paper_-_economics_of_targeted_advertising.pdf.

[3] Letter from Lartease M. Tiffith to Rep. Janice D. Schakowsky & Rep. Gus M. Bilirakis, *Re: Hearing on "Holding Big Tech Accountable: Legislation to Protect Online Users,"* Interactive Advertising Bureau (Mar. 1, 2022), at 4–6, https://www.iab.com/wp-content/uploads/2022/02/IAB-Letter-March-1-Hearing-Final2.pdf.

[4] J. Howard Beales & Andrew Stivers, *An Information Economy Without Data* (Nov. 2022), at 3, 9–10, 20, 23, https://ssrn.com/abstract=4279947.

[5] According to one study, the enactment of a 2018 European Union personal-data-protection regulation called the General Data Protection Regulation (GDPR) sharply curtailed the number of available applications in the Google Play Store; roughly a third of available apps exited the store, and the rate of new app entry likewise fell. Rebecca Janßen et al., *GDPR and the Lost* (continued…)

More specifically, the CFPB has inadequately supported its tentative conclusion that consented-to, third-party uses of consumer data for targeted advertising do "not primarily benefit consumers in most cases for various reasons." 88 Fed. Reg. at 74,834. As an initial matter, as discussed, a consumer need not be the "primary beneficiary" of a third-party action, *id.* at 74,832–33, for the third party to act "on behalf of" the consumer, 12 U.S.C. § 5481(4). At any rate, the few sources cited in the proposed rule do not remotely justify the CFPB's sweeping conclusion regarding the consumer benefits of targeted advertising. If anything, they arguably refute it.

One paper cited by the CFPB never suggests that consumers do not primarily benefit from targeted advertising; on the contrary, the authors highlight benefits to consumers and cite a study concluding that "71% of consumers prefer personalized ads because this helps reduce the likelihood of being flooded by irrelevant ads and it is also a way to discover new products online."[6] Another cited article does not address advertising specifically and maintains that "[t]he collection of private information" has the "potential to increase social surplus."[7] The proposed rule's final article explains that targeted advertising "generates significant consumer and economic value" in the form of more relevant advertisements, reduced time searching for products, and lower prices due to increased competition between firms.[8] The article adds that restrictions on targeted advertising "could disproportionately affect more wealth-constrained users, who may end up losing access" to free online services.[9] Each of these sources affirmatively refutes the CFPB's policy justification for the proposed rule.

Furthermore, extensive research not acknowledged in the proposed rule conclusively establishes myriad additional consumer benefits from targeted advertising. These include (1) increased consumer access to new, innovative, and relevant products, services, and businesses; (2) greater consumer choice; (3) more direct-to-consumer markets; and (4) increased consumer utility from online purchases.[10] Indeed, targeted advertising ensures that consumers receive

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Generation of Innovative Apps, Nat'l Bureau of Econ. Rsch. Working Paper No. 30028 (May 2022), at 1–2, https://www.nber.org/papers/w30028. "Whatever the benefits of GDPR's privacy protection," the authors conclude, "it appears to have been accompanied by substantial costs to consumers, from a diminished choice set, and to producers from depressed revenue and increased costs." *Id.* at 2.

[6] Chaudhry & Berger, *Ethics in Data Collection and Advertising*, at 1, 4–5; *see* 88 Fed. Reg. at 74,834, n.131.

[7] Rodney John Garratt & Michael Junho Lee, *Monetizing Privacy*, Fed. Rsrv. Bank of N.Y. Staff Rep. No. 958 (Jan. 2021), at 3, https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr958.pdf; *see* 88 Fed. Reg. at 74,834, n.131.

[8] Lau, *Economic Issues: A Brief Primer on the Economics of Targeted Advertising*, at 5–6, 11; *see* 88 Fed. Reg. at 74,834, n.133.

[9] Lau, *Economic Issues: A Brief Primer on the Economics of Targeted Advertising*, at 11.

[10] *See, e.g.*, Interactive Advertising Bureau, *The Value of Targeted Advertising to Consumers*, at 2 (last accessed Dec. 19, 2023), https://www.iab.com/wp-content/uploads/2016/05/Value-of-Targeted-Ads-to-Consumers2.pdf (conveying findings that "71% of Consumers Prefer Ads Targeted to Their Interests and Shopping Habits," "3 out of 4 (continued…)

information about products and services that are far more relevant to their actual interests, instead of merely being bombarded with generalized advertising that is largely irrelevant to their needs. To that end, many consumers may even authorize third parties to obtain their financial data with the hope or expectation that third parties will use their data to educate them about new products or services. The CFPB neither engages with those benefits nor with the significant costs to consumers that would flow from any final rule prohibiting third parties from using consumer financial data for targeted advertising upon consumer consent.

For all these reasons, if the proposed rule is finalized, IAB urges the CFPB to amend the rule to make clear that third-party uses of consumer financial data are permissible to the extent individual consumers consent to those uses.

3. The proposed rule's durational requirements governing data collection are unlawful.

The proposed rule also requires third parties to "limit the duration of collection of covered data to a maximum period of one year after the consumer's most recent authorization." Proposed 12 C.F.R. § 1033.421(b)(2). In order to collect covered data beyond that one-year maximum period, the third party would need to obtain a new authorization from the consumer no later than one year after the consumer's most recent authorization. *Id.* § 1033.421(b)(3). If the consumer does not provide a new authorization, the third party would be required to cease collecting data and, in many cases, to refrain from using and retaining data that was previously collected. *Id.* § 1033.421(b)(4).

Those proposed requirements exceed the CFPB's limited authority to implement Section 1033. Section 1033, once again, provides consumers a statutory right to access their financial data.

Consumers Prefer Fewer, but More Personalized Ads," and "Only 4% of Consumers Say Behaviorally Targeted Ads Are Their Biggest Online Concern"); Letter from Lartease M. Tiffith to Rep. Janice D. Schakowsky & Rep. Gus M. Bilirakis, at 1 (explaining that "data-driven advertising has helped to create thousands of new small, medium, and self-employed businesses across multiple sectors of the economy; maintains tens of millions of jobs across the nation in every congressional district, and delivers trillions of dollars in consumer value"; "data-driven advertising technology has in fact increased the amount of competition those large companies face"); Mark Sableman et al., *Consumer Attitudes Toward Relevant Online Behavioral Advertising: Crucial Evidence in the Data Privacy Debates* (2017), at 95, 107, https://www.thompsoncoburn.com/docs/default-source/Blog-documents/consumer-attitudes-toward-relevant-online-behavioral-advertising-crucial-evidence-in-the-data-privacy-debates.pdf?sfvrsn=86d44cea_0 (conducting study and finding that "consumers preferred advertising that was targeted to their interests to advertising that was irrelevant to them," and concluding that "policymakers need to consider the real value to consumers of new technologies that allow consumers to receive advertisements directed to their interests"); Beales & Stivers, *An Information Economy Without Data*, at ii, 2, 22 (concluding that the "availability of data to personalize advertising produces important, and substantial, consumer benefits"; reasoning that "[l]imiting online advertising's access to data about audience interests and demographics . . . will disproportionately affect small publishers and small advertisers and have the unintended effect of strengthening the competitive advantage of large platforms"; and observing that "[n]umerous economic studies have shown that restrictions on advertising increase prices to consumers").

In enacting that right, Congress did not empower the CFPB to promulgate a comprehensive scheme overriding, *inter alia*, an individual consumer's choices regarding how long a third party may collect, use, and retain her covered data. The proposed durational requirements appear predicated on the CFPB's notion that a third party who collects covered data beyond a year after an individual consumer's most recent authorization is not acting "on behalf of" the consumer. *See* 88 Fed. Reg. at 74,832, 74,835. As described above, however, a third party acts "on behalf of" an individual consumer within the meaning of Sections 1033 and 1002(4) so long as the consumer agrees to have the covered data provider transfer the data to the third party. Nothing in the CFPA empowers the CFPB to restrict an individual consumer's decisions regarding the timeframe within which a third party may collect, use, and retain her data.

Because the proposed rule's durational requirements accordingly "exceed[] the statute's clear boundaries," they would be unlawful if finalized. *Village of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011). The proposed durational requirements would also be arbitrary and capricious on account of the CFPB's failure to adequately consider the significant costs that third parties would incur—and, in some cases, likely pass on to consumers—as a result of their having to refashion authorization procedures to fit a rigid, one-size-fits-all framework. And those costs would likely prove especially burdensome for smaller third parties.

B. The proposed rule is also unlawful insofar as it purports to regulate transfers of financial data to third parties outside the scope of Section 1033's access right.

Section 1033 is limited in scope. It requires covered data providers to make an individual consumer's covered financial data available to that consumer, as well as to a third party acting on the consumer's behalf, in certain circumstances. The CFPB is authorized to promulgate regulations implementing Section 1033, including by setting forth its understanding of when and how Section 1033 applies. But the proposed rule strays beyond that limited authority insofar as it bars third parties from obtaining access to financial data outside of the confined Section 1033 data-sharing regime. In particular, the CFPB's explanation for the proposed rule appears to contemplate that if a third party is not "acting on behalf of" an individual consumer under Section 1002(4), then the third party cannot collect, use, or retain a consumer's financial data under *any* circumstances, even when the third party is not relying on the Section 1033 access right. Nothing in Section 1033 or 1002(4) authorizes such a prohibition.

The CFPB's commentary accompanying the proposed rule suggests that the CFPB views Section 1033's access right as the exclusive means by which a third party may lawfully obtain an individual consumer's financial data from a covered data provider. For example, the preamble to the proposed rule states that "[p]roposed § 1033.421 would describe the obligations to which third parties must certify to be authorized to access covered data." 88 Fed. Reg. at 74,832. Specifically, "third parties would be required to limit collection, use, and retention of covered data to what is reasonably necessary to provide the consumer's requested product or service"—and to certify as much. *Id.* Other statements similarly purport to impose categorial obligations on third parties governing all transfers of covered consumer data from covered providers. *See, e.g.*, *id.* at 74,833 ("the CFPB is limiting data collection, use, and retention to what is reasonably necessary to provide a requested product or service"); *id.* at 74,834 ("Proposed § 1033.421(a)(2) is designed to impose a bright-line rule with respect to targeted advertising, cross-selling of other products or services, and the sale of covered data.").

CFPB Director Rohit Chopra has described the proposed rule in much the same way. In public remarks, he has implied that the rule is designed to comprehensively regulate all data transfers to third parties, and not just data-sharing authorized by Section 1033. After noting the dangers of "[e]xploitation of personal data by bad actors," Director Chopra stated as follows:

> That is why our proposal sets out a clear prohibition. *Companies receiving data can only use it to provide the product people asked for, and for nothing else.* When a consumer permits their private data to be used by a company for a specific purpose, it is not a free pass for that company to exploit the data for other uses.
>
> Importantly, the rule says that *firms that receive financial data to provide a specific service cannot* feed the data into algorithms for unrelated activities, such as targeted advertising and marketing.

Rohit Chopra, *Prepared Remarks of CFPB Director Rohit Chopra on the Proposed Personal Financial Data Rights Rule*, Consumer Financial Protection Bureau (Oct. 19, 2023), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-on-the-proposed-personal-financial-data-rights-rule/ (emphasis added).[11] As explained by Director Chopra, the proposed rule's purpose is to place limits on companies receiving financial data *in general*, including in circumstances that do not implicate Section 1033's access right.

To the extent the proposed rule purports to impose an exclusive regulatory scheme with which third parties must comply in order to obtain a consumer's financial data from a covered data provider, the proposed rule "exceed[s] [Section 1033's] clear boundaries" and is unlawful. *Village of Barrington*, 636 F.3d at 660. Even assuming third parties that collect, use, and retain an individual's financial data for targeted advertising, cross-selling, or resale are not acting "on behalf of" the individual, all that means is that such third parties do not qualify as "consumers" under Section 1002(4). At most, this means such third parties are not entitled to access the individual's financial data under Section 1033's affirmative right.

But that does not mean that Section 1033 also *prohibits* those third parties from collecting, using, and retaining a consumer's data under contractual arrangements or using other lawful means that exist irrespective of Section 1033. Even if a third party cannot rely on Section 1033's access right, the third party remains free to obtain access to the data in other lawful ways, including through contractual arrangements with consumers and/or data providers. In such circumstances,

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[11] *See also CFPB Proposes Rule to Jumpstart Competition and Accelerate Shift to Open Banking*, Consumer Financial Protection Bureau (Oct. 19, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-jumpstart-competition-and-accelerate-shift-to-open-banking/ ("Third parties could not collect, use, or retain data to advance their own commercial interests through actions like targeted or behavioral advertising. Instead, third parties would be obligated to limit themselves to what is reasonably necessary to provide the individual's requested product."); *id.* ("[P]eople could be certain that their data would be used only for their own preferred purpose—and not for financial institutions or tech companies to surveil and manipulate."); *id.* ("The proposed rule . . . would forbid companies that receive data from misusing or wrongfully monetizing the sensitive personal financial data.").

Section 1033 imposes no restrictions on the data-sharing transaction or the third party's subsequent use and retention of the collected data. Nor can the CFPB create such restrictions by regulation.

Properly understood, Section 1033 creates a path by which consumers (and the third parties they enlist) can obtain their personal financial data from data providers. But it is just one path. As the CFPB recognizes, consumers (and third parties) obtained personal financial data long before Section 1033's enactment in 2010. *See* 88 Fed. Reg. at 74,797. And in the years since 2010, consumers (and third parties) continue to obtain personal financial data without relying on the Section 1033 right pursuant to lawful contractual relationships with data providers. By granting consumers a narrow statutory right to access their financial data, Congress did not somehow enact (or permit the CFPB to create) an exclusive, comprehensive regulatory scheme governing every single consumer-data provider exchange that occurs every second of every day. Indeed, nothing in Section 1033's text or unremarkable legislative history remotely evinces such sweeping congressional intent.[12] The CFPB's proposed rule fundamentally oversteps—and exceeds the agency's delegated authority—by turning Section 1033's limited access right into an all-purpose mechanism for regulating the post-access conduct of third parties that obtain consumer financial information entirely independent of Section 1033.

The CFPB should therefore make clear that proposed Subpart D's restrictions on third-party collection, use, and retention of consumer financial data, if finalized, only apply to data-sharing that occurs pursuant to Section 1033's access right. To the extent third parties receive financial data outside the scope of Section 1033, nothing in that provision or any CFPB regulation implementing the provision can regulate that data sharing. That clarification will conform the rule to Section 1033's limited scope and leave intact consumers' rights to authorize the sharing of financial data in other ways not dependent on Section 1033.

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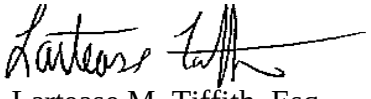
IAB thanks the CFPB for the opportunity to submit these comments. Please do not hesitate to contact me at lartease@iab.com with any questions.

Sincerely,



Lartease M. Tiffith, Esq.
Executive Vice President for Public Policy
Interactive Advertising Bureau

[12] As a Senate committee report explains, "[Section 1033] ensures that consumers are provided with access to their own financial information. This section requires the Bureau to prescribe rules requiring a covered person to make available to consumers information concerning their purchase and possession of a consumer financial product or service, including costs, charges, and usage data." S. Rep. No. 111-176, at 173 (2010); *see also* Dan Awrey & Joshua Macey, *The Promise & Perils of Open Finance*, 40 Yale J. Reg. 1, 20 (2023) ("Section 1033 only creates an express data access right in favor of customers themselves.") (emphasis omitted).