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May 27, 2020

Comment Intake
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552

SENT VIA ELECTRONIC MAIL TO 2020-RFI-Taskforce@cfpb.gov.

**Re: Request for Information to Assist the Taskforce on Federal Consumer Financial Law,
Docket No. CFPB-2020-0013**

Dear Task Force on Consumer Financial Law Members,

The Financial Data and Technology Association of North America (“FDATA North America”) appreciates the opportunity to provide comments to the Consumer Financial Protection Bureau’s (“CFPB” or “the Bureau”) Taskforce on Federal Consumer Financial Law that outline options to harmonize, modernize, and update Federal consumer financial protection laws. As the leading trade association advocating for consumer-permissioned, third-party access to financial data globally, FDATA North America and its members firmly believe that well-designed, well-implemented open finance frameworks provide the best balance of innovation, improved consumer and small business financial access and opportunity, and end-user protection possible today. The CFPB has the existing authority, proscribed by Congress a decade ago, to immediately improve the market by supporting expanded access for consumers and small businesses to financial products and services, and establishing guidelines to better protect consumer data. It must act to facilitate a modernized financial ecosystem.

About FDATA North America

FDATA North America was founded in early 2018 by several firms whose technology-based products and services allow consumers and small businesses to improve their financial wellbeing. We count innovative leaders such as the Alliance for Innovative Regulation, API Metrics, Betterment, DirectID, Envestnet Yodlee, Experian, Fintech Growth Syndicate, Fiserv, Flinks, Interac, Intuit, Kabbage, Mogo, Morningstar, MScience, MX, Petal, Plaid, Questrade, Quicken Loans, TransUnion, Trustly, Wealthica, VoPay, and others as our members. We are a regional chapter of FDATA Global, which was the driving force for Open Banking in the United Kingdom, and which continues to provide technical expertise to regulators and policymakers and to regulatory bodies internationally that are contemplating, designing, and implementing open finance frameworks.



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Consumer Data

Data Ownership

Consumers increasingly require access to and privacy of their financial data to utilize technology-powered tools that allow them to improve and manage their finances. FDATA North America and our members are united behind the notion that consumer electronic financial data access and protection are fundamental rights and a market-driven imperative. This concept was formalized in the Dodd-Frank Wall Street Reform and Consumer Protection Act under Section 1033, which assures consumers access to their electronic financial data.

Unfortunately, in the absence of a clearly articulated policy framework, the United States remains stalled in a financial system in which many consumers and other end users do not have these abilities. In 2010, Congress provided the CFPB with the authority required to assert a consumer financial data right to enable a more transparent, consumer-driven market. In countries that have formalized such financial data rights, including the U.K.'s Open Banking regime, Europe's second payment services directive ("PSD2") and Australia's Consumer Data Right, consumers benefit from greater competition, lower pricing, and innovative, technology-based tools across the financial markets. By not recognizing this modernized approach, the United States risks falling behind as the world leader in consumer financial empowerment, digital innovation, and market competition.

Though the Bureau has long studied the issue of digital consumer financial data access and published in 2017 the nonbinding "Consumer-Authorized Financial Data Sharing and Aggregation Principles,"¹ it has not taken declarative action to ensure end users have the right to access and leverage their own financial data. Though industry has attempted for the last several years to address the issue on its own, it has not been solved and policy intervention is warranted. The Bureau has been afforded by Congress the authority required to intervene. Given industry-led work in this regard, it may be premature for the CFPB to use its authority under Section 1033 of the Dodd-Frank Act to mandate a technology solution for data access. But the statute clearly provides the CFPB with the authority to promulgate, by rule, a consumer financial data right, subject to narrow, sensible exemptions included in federal law.

Data Privacy

Today, tens of millions of Americans are already sharing their financial data with third-party service providers but do so in the absence of federated standards; in fact, customers' ability to take advantage of third-party tools is subject to an amalgamation of state privacy laws and ambiguous guidance from prudential financial regulatory agencies. While consumers unquestionably benefit from their adoption of third-party financial service providers, their rights and protections are not universal across the ecosystem. Designed and executed properly, an open

¹ https://files.consumerfinance.gov/f/documents/cfpb_consumer-protection-principles_data-aggregation.pdf.



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finance regime mitigates risks and protects consumers by ensuring that providers' privacy protections meet regulatory standards, that consumer privacy is assured regardless of whether their chosen service provider is a financial institution or a non-bank fintech, and that, in the event of a data breach, recourse mechanisms exist to make affected consumers whole.

Accordingly, FDATA strongly supports the creation of federal data privacy standards as a foundational element of a U.S. open finance framework that is consistently applied to all market participants and designed and implemented with the consumer's best interests in mind. As increasing numbers of financial services customers interact with their providers on mobile devices, it is unreasonable to expect a consumer to have to consider, when they access a financial application, which data privacy or data protection regime applies to that tool. Importantly, to acknowledge the rapid pace of technological innovation and to ensure that a data privacy regulatory framework does not become an unnecessary hindrance to consumers' ability to benefit from new, innovative products and services, flexibility must be introduced into any such privacy regime to ensure that consumer protections implemented can evolve and improve over time.

Of course, the potential for bad actors to get access to consumer data will always exist, regardless of the security controls any system implements. A key component of a well-designed open finance system is a requirement for shared responsibility across the system, assuring the consumer or small business that, in the event they have lost funds as a result of a data breach, the party responsible for that breach will be responsible for making them whole. While this is a seemingly self-evident requirement, accomplishing this outcome will require that existing rules and statutes that currently apportion responsibility for consumer protection in the event of a consumer loss, many of which have shared jurisdiction across multiple regulatory agencies, most notably including Regulation E, be modernized.

Consumer Protection and Alternative Data

The integration into underwriting tools of cash-flow data – data derived, with their consent, from consumers' bank account records – has allowed scores of Americans with no or little traditional credit bureau data to access low-cost credit safely and to avoid turning to more predatory products. The inclusion of cash-flow data into underwriting models has allowed scores of lenders to better assess the credit risk of thin- and no-file applicants. The Taskforce understandably asks a series of questions regarding the harmonization of the use of this type of data with existing legal requirements regarding credit data.

The Fair Credit Reporting Act ("FCRA") was first enacted in 1970, when the only data used for underwriting in the United States was supplied to lenders by traditional credit bureaus, who themselves secured the data from consumers' creditors. The FCRA sought to promote the accuracy, fairness and privacy of consumer information contained in the files of consumer reporting agencies and to provide transparency to consumers to see and interact with their financial data in an opaque system in which they were merely a passive participant. The



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objective of the FCRA was to provide consumers with more control of and insight into the data their creditors were reporting to the credit bureaus and to afford Americans with the right to have erroneous or incorrect data that might influence credit decisions corrected.

The rationale that led to the enactment of the FCRA five decades ago simply does not exist with regard to cash-flow data. Unlike traditional credit data, cash-flow data is controlled by the consumer at all times. It is the end user – not their creditors – who decides to integrate this data into an underwriting environment. Moreover, the consumer always has complete transparency into the data; after all, this is their transactional data, which they can view and interact with online, at all times, through their financial services provider’s online portal. And critically, the tools created by the FCRA to afford consumers with the ability to have credit bureaus address incorrect information about them similarly are unnecessary in a cash-flow underwriting environment, because consumers are already empowered to see, in real time, transactions in their financial accounts as they make them and to immediately contact their financial services providers to advise them in the event of fraudulent charges.

Ambiguity in the application of the FCRA with regard to cash-flow data creates barriers for technology-powered lenders to serve their customers, many of whom would have little or no access to capital in the absence of these tools, and leaves consumers unnecessarily at risk. In the aftermath of the COVID crisis, cash-flow data will become all the more important, as lenders look to real-time indicators of the creditworthiness of consumers and small businesses to facilitate critical access to capital as small businesses and consumers alike seek to recover from the financial fallout from the pandemic. FDATA North America requests that the Taskforce consider recommending that the Bureau work with Congress and the prudential regulators to update the statute to better reflect today’s reliance on technology-powered tools, the processes by which aggregators access consumer’s financial data with their consent, and the types of data that extend affordable credit to consumers and small businesses that might not otherwise qualify for loans.

Expanding Access

Open Finance

The US financial services ecosystem can benefit from digital innovations to expand access and improve competition. In effort to bring these opportunities to bear, countries around the world are embracing the notion that the consumer and small business owner should be in control of their financial data. This open finance concept, which provides for the right of consumers and small businesses to share their financial data with, and between, their financial service providers facilitates greater financial access and market competition.



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The U.K, Canada, Australia, New Zealand, and Brazil, along with many other countries globally, have each taken steps towards providing consumers with financial data rights in open finance frameworks. In every deployment of a successful open finance framework throughout the world, government has played a significant role in asserting the right of the consumer and small business owner to access, without reasonable restriction, their own financial transaction data, which has expanded financial access to consumers.

Home to the most mature live implementation of such a regime, the United Kingdom's Open Banking Implementation Entity announced earlier this year, for example, that more than one million net new consumers across the U.K. have adopted tools deployed under the U.K.'s Open Banking regime.² Just weeks earlier, the U.K.'s Financial Conduct Authority announced its intention to expand the regime from a payment accounts-focused model to one that encompasses all financial products.³ Canada's Department of Finance signaled its intention last month to move forward with a Canadian deployment of open finance – or “customer-directed finance” as they will henceforth refer to it – following a thoughtful, wide-ranging consultation that lasted more than one year, and which included significant input from FDATA North America.⁴ Australia has ambitious scope with regard to open finance that has, since its inception, envisioned progression beyond financial services to other sectors. After enactment last year of a statutory CDR, consumers will begin to have full utility over their financial data beginning later this year.⁵ The first iteration of New Zealand's Open Banking agenda is closely tracking the U.K.'s journey from a technology perspective and, led by the Payments New Zealand, is focusing on access to payments data.

As the most advanced Latin American country in its contemplation of open finance, Brazil has developed a full customer data right through the General Law for Data Protection (“LGPD”), comparable legislation to Europe's General Data Protection Regulation (“GDPR”) and has worked over the past two years to design an open finance agenda led in consultation with industry by the Central Bank. The scope and definition of the Brazilian Open Banking policy was revealed in an initial public consultation phase that closed on 31st January, 2020. The Central Bank published its Open Banking regulation on May 4th, 2020 announcing four phases of implementation to be completed by October 31st, 2021. These culminate in a broad scope of data sharing including pensions, foreign exchange, insurance and investment products.⁶

² <https://www.openbanking.org.uk/about-us/latest-news/open-banking-adoption-surpasses-one-million-customer-mark/>

³ <https://www.fca.org.uk/publications/calls-input/call-input-open-finance>

⁴ <https://www.canada.ca/en/departement-finance/news/2020/01/minister-morneau-announces-second-phase-of-open-banking-review-with-a-focus-on-data-security-in-financial-services.html>

⁵ <https://www.accc.gov.au/system/files/Proposed%20CDR%20rules%20-%20Phasing%20table.pdf>

⁶ <https://www.bcb.gov.br/estabilidadefinanceira/exibenormativo?tipo=Resolu%C3%A7%C3%A3o%20Conjunta&numero=1>



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Among the countries of Asia at various stages of an open finance journey, which include noteworthy developments in markets such as Japan, India, Singapore, Taiwan, and Malaysia, South Korea launched open banking as a pilot scheme with ten regional banks in October, 2019. The trial period was considered a success by regulators and consumer groups alike with a total of 5.5 million accounts registered and just under 50 million transactions successfully completed. The subsequent phase of implementation added a further eight lenders including two digital banks, Citibank and Standard Chartered Bank, in December, 2019; fintechs are eligible to enroll for participation, pending mandatory security checks. Regulators are now considering expansion of the scope to include securities companies, savings banks, postal services and mutual financial institutions that support the transfer of funds between accounts.

As FDATA continues to monitor markets around the globe, similar advancing interest is also clearly apparent in nascent conversations across Africa and in the Middle East. As an illustrative example, the Bank of Israel published guidelines on December 4th, 2019 for banks and credit card companies for implementation of the open banking standard in Israel.⁷

Unfortunately, the United States remains, in the absence of a clearly articulated policy framework, stalled in a financial system in which consumers and other end users do not have these same abilities. Countries who have embraced this right have seen greater financial access and competition, lower pricing, and innovative, technology-based tools across their financial markets. By not recognizing this modernized approach, the United States risks falling behind as the world leader in digital innovation, financial centrality, and market competition, and misses an opportunity to provide critical access to financial services to consumers who otherwise might not have the ability to utilize them.

Conclusion

FDATA North America once again appreciates this opportunity to share its perspective with the Taskforce in response to many of the important questions it has posed to the public. A critical consideration in the Taskforce's review should be the central role that financial data plays in the 21st century financial ecosystem and the lack of any enforceable assertion under existing law or regulation that consumers be fully empowered to access and utilize their own financial data, safely and securely, to take advantage of financial tools that can help them manage and improve their financial positions. Moreover, as countries around the world embrace open finance ecosystems in which the customer has full utility over their data, they benefit from increased competition as well as improved consumer and small business financial access. FDATA North America encourages the Taskforce to recommend this approach in its report to

⁷ <https://www.boi.org.il/en/NewsAndPublications/PressReleases/Pages/4-12-19.aspx>



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the Director, and, in so doing, to provide to consumers across the United States a modernized framework that provides for enhanced financial protection and empowerment.

Thank you for your consideration of this submission.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Boms", followed by a long horizontal line extending to the right.

Steven Boms
Executive Director
FDATA North America