



June 1, 2020

Consumer Financial Protection Bureau
1700 G St. N.W.
Washington, D.C. 20552

Docket No. CFPB-2020- 0013

Dear Members of the Taskforce on Federal Consumer Financial Law,

The Financial Health Network is submitting this letter in response to the “Request For Information To Assist the Taskforce on Federal Consumer Financial Law” issued by the Consumer Financial Protection Bureau (CFPB) on April 1st, 2020. The Financial Health Network strongly believes in the importance of consumer protection laws in financial services, and believes that ensuring consumers are well-protected is doubly important in light of the current economic crisis.

The Financial Health Network is the leading authority on financial health. We are a trusted resource for business leaders, policymakers, and innovators united in a mission to improve the financial health of their customers, employees, and communities. Through research, advisory services, measurement tools, and opportunities for cross-sector collaboration, we advance awareness, understanding, and proven best practices in support of improved financial health for all.

Our unique position allows us to identify pain points and opportunities from both industry and consumer perspectives and to evaluate the ways policymakers can address those pain points. We believe in public policy that incents market actors to design products and services that build financial health.

In order to create such a marketplace, policymaking that carefully considers input from all interested stakeholders is vital. While we welcome the opportunity to share our perspective with the Taskforce, we are concerned that the time the Taskforce has allotted for responses is insufficient for us to respond fully to the far-ranging RFI, and that other stakeholders may not have had the opportunity to share their perspectives due to constraints brought on by the COVID-19 crisis. As the Taskforce surely understands -- and as the Bureau itself has recognized in extending the deadline for responding to other Notices -- the COVID-19 crisis has compelled individuals and organizations to spring to action to address various pressing matters, all while simultaneously navigating work and family circumstances

that have changed drastically in a short period of time. Since the questions the Taskforce asks implicate long-standing policy challenges that will shape consumer protections for years to come, we believe that, at a minimum, an extended comment period was warranted to ensure engagement with a range of differing perspectives. Indeed, given the importance of the questions the Taskforce has posed, we think that the Taskforce's engagement with stakeholders should go well beyond seeking written responses to an RFI.

Measuring Financial Health Outcomes

In order to answer the questions posed by the Taskforce, we will start at the end, and we believe the Taskforce should do likewise. That is, the Taskforce should pay close attention to the measurement of consumers' financial health or financial well-being outcomes as it seeks to determine the efficacy of consumer protection. The end goal of consumer protection in financial services should be to promote day-to-day financial systems that enable financial health, and measuring our success in achieving that is the best way to assess the efficacy of consumer financial protection.

With that in mind, the evidence seems to tell us that there is a great deal of work to do. The CFPB has defined financial well-being in terms of an individual's ability to "meet current and ongoing financial obligations," "feel secure in their financial future," and "make choices that allow enjoyment of life."¹ Yet when the Bureau conducted a national survey of consumers in 2016, it found that about one-third of all adults did not meet even the first element of financial well-being. These consumers' scores on the CFPB's well-being scale indicated a high probability of struggling to make ends meet and of experiencing material hardship.²

For the past three years, the Financial Health Network has conducted an annual financial health survey. According to the 2019 U.S. Financial Health Pulse, only 29 percent of Americans were "financially healthy," which we define in a manner consistent with the CFPB definition of financial well-being. Moreover, longitudinal data tell us that over a two-year period, almost one in four families fell into the group that we classify as "financially vulnerable" at one time or another. This means that they were struggling with all, or nearly all, aspects of their financial lives.³ These trends would be troubling to observe at any time, but the fact that they were observed during the last two years of the longest economic expansion in American history should give pause to any observer committed to financial

¹ Measuring financial well-being: A guide to using the CFPB Financial Well-Being Scale; Consumer Financial Protection Bureau, 2017

² Financial well-being in America; Consumer Financial Protection Bureau; 2017

³ U.S. Financial Health Pulse: 2019 Trends Report; Financial Health Network; 2019

health. Today, Americans' already precarious financial lives are being strained even further by the COVID-19 crisis, which has precipitated the highest levels of unemployment since World War II.

There are, of course, numerous underlying factors contributing to the precarious state of Americans' financial lives. Many of these factors, such as stagnant wages and the rising costs of healthcare and education, are outside the scope of consumer financial protection broadly and the CFPB in particular. However, markets for consumer financial products have a critical role to play in supporting consumers' financial health. Our definition of financial health states that, "financial health comes about when a consumer's day-to-day financial systems enable them to build resilience and pursue opportunities." The CFPB has a responsibility to ensure that consumer financial protections create an environment for consumers' day-to-day financial systems to function accordingly.

To help meet this responsibility, we believe the CFPB should establish an ongoing program to monitor financial health in the United States and to develop metrics that can be used to measure financial health outcomes attributable to particular financial services products or relationships. Indeed, we believe that financial services providers should be encouraged -- if not required -- to measure and monitor the financial health of their customers and the impact that the providers' activities are having on financial health. At a minimum, such measurement should be a necessary element of any No Action Letters, Approvals, Trial Disclosure Waivers, or similar actions by the Bureau to facilitate consumer-friendly innovation.

Markets for Consumer Financial Products

Against this background, we will briefly discuss the Taskforce's question about which markets function well and which do not. Specifically, we will address the markets for credit, payments, and deposits.

Credit

Credit has played a critical role in the financial lives of American consumers since at least the 1920s. Indeed, the ability to finance large purchases has proven critical to raising Americans' standard of living, and has been foundational to the creation of the middle class.⁴ However, consumers' ability to repay a loan is a fundamental principle of credit that has often been ignored. According to the Pulse,

⁴ *Borrow: The American Way of Debt*; Hyman; 2012

almost 30 percent of Americans have more debt than they can manage, and almost 25 percent say that their debt burden is delaying or preventing their being able to save for retirement. Put another way, credit can be both a blessing and a curse when it comes to consumer financial health.

Credit cards can be particularly dangerous in this regard. While their original purpose was to provide a convenient means for consumers to make purchases without having to carry lots of cash, credit cards have evolved into much more than that. Today, credit cards are a vehicle by which many consumers finance relatively small purchases and then revolve their balance from month to month for years at a time. All too frequently these consumers pay just the minimum payment, which typically pays down only one percent of the outstanding balance.⁵ While this behavior is clearly detrimental to financial health, credit card issuers have every incentive to encourage it, since finance charges are their principal source of revenue. Indeed, research on credit card utilization from the Federal Reserve Bank of Boston is illustrative of this, and shows how credit limits and credit line increases -- which issuers can offer proactively absent any consumer request -- shape how much consumers borrow, even when consumers were not close to hitting their limit.⁶ This results in a sustained debt burden for more than half of credit card users as they revolve their debt from one month to the next. According to the 2019 Pulse, the median American household with credit card debt had \$5,000 in outstanding credit card balances carried over from previous months. To put that in context, households had a median of \$2,700 in liquid savings in 2019. To put it mildly, it is a daunting challenge for many consumers to repay such debts along with the mortgage, auto, medical, and student loan debt burdens they already carry. The Financial Conduct Authority in the United Kingdom has developed a regulatory response to the issue of “persistent debt” which merits the Taskforce’s careful review.⁷

Even more than more traditional, mainstream consumer credit, small-dollar credit products can pose substantial risks to consumers, and need to be carefully regulated. To start with, there is a tendency to conflate the need for small-dollar credit with the need for short-term credit. While short-term credit may be useful for some consumers facing a temporary, misaligned cash flow (i.e. a bill that falls due before the next payday), consumers facing a financial shock may not be able to manage a short-term credit product designed for rapid repayment.

Nevertheless, the demand for small-dollar credit is clear. The 2019 Pulse found that three percent of households, more than 3.5 million, had taken out a payday loan in the preceding 12 months. While this

⁵ Minimum Payments and Debt Paydown in Consumer Credit Cards; Keys and Wang; National Bureau of Economic Research; 2016

⁶ Credit Card Utilization and Consumption over the Life Cycle and Business Cycle; Fulford and Schuh; Federal Reserve Bank of Boston; 2017

⁷ Credit card Market Study: Persistent Debt and Earlier Intervention; Financial Conduct Authority; 2018

may come as a surprise to the financially healthy, it demonstrates the precarious economic reality faced by many American families. The Financial Health Pulse found that 26 percent of households could not cover more than three weeks of expenses out of their current savings, and that 11 percent would not even be able to cover one week. This savings crisis is particularly sobering in the context of COVID-19, and indicates a potential need for well-structured small-dollar credit products to serve as a backup.

Unfortunately, many of the small-dollar credit products currently offered (such as payday loans) are not structured with the borrowers' best interests in mind, and have gone so far as to take advantage of borrowers who are perennially behind on their bills by forgoing any consideration of the borrower's ability to repay. Far from supporting consumers' financial health, such products can lure consumers into debt traps that are difficult to escape and exacerbate pre-existing financial health maladies. The Financial Health Network's research has found that there are three primary needs that drive consumers to obtain small-dollar credit products; misaligned cash flow, unexpected expenses, and expenses that consistently exceed income.⁸ Of these three, it is likely that borrowers in the last group would not see their financial health improved by adding more debt to their plate, and that borrowers in the second group are not well served by products that require rapid repayment unrelated to the time needed to recover from the financial shock. For this reason, we have supported the CFPB's efforts to require providers of small-dollar credit to make a reasonable assessment of borrowers' ability to repay without the need to reborrow.

However, the Financial Health Network has also encouraged policymakers to allow financial institutions to experiment with the price and terms of repayments for small-dollar loans, even above the common usury limit of 36 percent annual percentage rate (APR).⁹ While APR can be a useful tool for comparing many kinds of credit products, its utility diminishes as the number of days in a loan's term approaches zero. Some states have pioneered new kinds of price regulation that may be more useful for short term loans. These regulations cap the total cost of the loan at a percentage of the principal and spread the cost over the term of the loan to reward borrowers who repay early and avoid creating incentives for lenders to refinance loans.

Beyond cost, there is also a need to ensure that short-term and small-dollar credit is structured to encourage manageable repayment for borrowers. An initial determination of ability to repay is key.

⁸ Know Your Borrower: The Four Need Cases of Small Dollar Credit Consumers; Bianchi and Levy; Financial Health Network; 2013

⁹ Testimony before the House of Representatives Committee on Financial Services Sub-Committee on Consumer Protection and Financial Institutions: Hearing on Ending Debt Traps in the Payday and Small Dollar Credit Industry; Reeder; Financial Health Network; 2019

That determination must include consideration not only of the repayment terms, but must also take borrowers' other obligations into consideration to ensure that borrowers can meet all their fixed obligations and still have enough left to cover their basic living expenses.

Payments

As discussed above, one of the primary factors driving the need for small-dollar credit is misaligned cash flow. For the large share of workers who are paid bi-weekly and for others who are paid irregularly, the fact of the matter is that payday falls on different days every month. Even when payday arrives, workers must wait for a few more days to access their funds as their paycheck is processed and cleared through our antiquated payments system. While this lag may be insignificant for more affluent consumers, it can cause substantial cash flow misalignment challenges for families living paycheck to paycheck.

To mitigate these issues, the Financial Health Network has both encouraged the development of innovative products that give consumers timely access to their wages, and supported the establishment of a faster payments system. In today's economy, an hourly worker paid bi-weekly gives her employer an interest-free loan for more than two weeks before her own paycheck arrives. While this float is certainly appreciated by the employer, it comes at a real cost to the worker providing the loan. Some firms have already begun to offer products that give workers timely access to their wages (sometimes called "early wage access" or "pay on demand"), albeit at a cost to workers. While their impact is yet to be determined, we believe that further experimentation is warranted in order to lessen consumers' reliance on high cost credit, check cashing, and overdraft. Reduced demand for these products would signal a substantial improvement to consumers' financial health, and should be welcomed by regulators seeking to ensure that the market for consumer financial products is functioning optimally. The Taskforce may also wish to examine and provide clarity on the applicability of laws regulating the extension of credit to certain types of programs which enable employees to obtain their wages as earned.

However, innovative early wage access models cannot solve the misaligned cash flow problem on their own. As the Taskforce alludes to in its questions, a large share of responsibility lies with shamefully slow clearance times that exist in the payments system in the United States. It can take up to three business days for a paycheck to clear and be accessible to consumers, and may take close to a week if it falls over a weekend or holiday.¹⁰ During this time, consumers still need to pay bills, fill up their gas

¹⁰ Comment Letter on Potential Federal Reserve Actions to Support Interbank Settlement of Faster Payments; Klein, Brookings, 2018.

tank, and put food on the table for their families. With this in mind, the Financial Health Network has advocated for the Federal Reserve to move with all haste to establish a faster payments system.¹¹ We are also supportive of private sector innovation to enable faster payments, and believe that consumers would be well served by legislative action directing the Federal Reserve to mandate real-time fund availability while the Fed is in the process of setting up its recently announced FedNow system. Such a mandate would necessarily lean on private sector mechanisms such as The Clearing House's RTP system in the short term, and would incentivize the Federal Reserve to move quickly to set up its own system, which we believe to be a critical piece of financial health infrastructure.

The Taskforce also asks whether it is necessary to tie transaction services to the banking system, and whether allowing the two to exist independently may introduce new risks to consumers. We believe that it could introduce new risks, as many consumer protections related to transactions are tied to the banking system. Further, allowing payments to migrate away from the banking system and towards large technology firms, for example, may introduce new considerations for prudential regulators, not to mention considerations for competition policy and data governance.¹² In China, where such a migration has already occurred, the central bank stepped in ex post to require technology firms to link their popular payments applications to traditional bank accounts, and to keep 100 percent of the float in reserve at the central bank. Interestingly, this regulatory outcome echoes a proposal to give consumers in the United States accounts at the Federal Reserve through traditional financial institutions. As this proposal and others are fleshed out more fully, it will be critical for the Taskforce to remain on the lookout for consumer protection risks. In any event, the COVID-19 crisis has strengthened the case for building out the missing last mile of financial health infrastructure between the government and consumers, either through the banking system or otherwise.

Deposits

With the inadequacy of our financial health infrastructure in mind, the Taskforce is right to note that millions of U.S. households continue to lack bank accounts, and ask whether the Bureau should promote greater access to banking services. We believe that first, the Bureau must promote a market for deposits that maximizes financial health rather than maximizing fees charged to consumers. In particular, the Bureau should take a hard look at the incentives created by the free checking account model.¹³ Along with other factors, the normalization of free checking has meant that banks need to rely more heavily on back-end, penalty fee income to remain profitable. While this model has served many

¹¹ *Go Slow On Libra. Speed Up On Faster Payments*; Tescher; Forbes, 2020.

¹² *Big Tech's Invasion of Banking*; Murphy; The Milken Institute Review, 2019.

¹³ *The Ends of the Month: Restoring Lost Tools, Reframing "Consumer Choice"*; Stone; Medium, 2019.

banks quite well, it does not promote consumers' financial health. For example, costly overdraft fees (usually around \$35 dollars) are disproportionately borne by financially vulnerable frequent overdrafters, as the Bureau's own research has shown.¹⁴ Adding insult to injury, the price of these fees bears no resemblance to the marginal cost incurred by the bank for providing the "service" of overdraft.

This was true before the Federal Reserve Board adopted its opt-in rule¹⁵ and remains true today. Indeed, the opt-in rule has created a new set of inequities since many overdrafts result from transactions in which debits are authorized when a consumer appears (both to the bank and to the customer) to have sufficient funds, but does not at the time of settlement. In these instances those consumers who have not opted-in receive overdraft coverage for free (since the bank cannot opt-out of its commitment at authorization to pay the merchant) whereas consumers who have opted-in are charged for these very same transactions.

Moreover, consumers often incur overdraft fees for transactions that, at the time of authorization, were well within their available balance. Unfortunately, reining in these practices is not something the market can do on its own. It took a series of class action lawsuits to put an end to what had become an industry-standard practice of processing process debits from largest to smallest in amount, thereby maximizing the number of overdraft transactions. Even today, many banks assess overdraft fees based on the available balance (after taking into account previously-authorized debits) at time of settlement. This can result in overdraft fees being charged on two transactions when the consumer had enough money in the account to cover one of the transactions -- a practice that warrants regulatory attention.¹⁶

Economic research has shown that the competitive dynamics of the market for deposits will not incent banks to compete on the basis of overdraft fees and practices, as it is more profitable to compete on up-front fees, which are more salient to consumers, and exploit existing information asymmetries and consumer vulnerabilities.¹⁷

¹⁴ CFPB Data Point: Frequent Overdrafters; Consumer Financial Protection Bureau, 2017.

¹⁵ The CFPB Study of Overdraft Programs; Consumer Financial Protection Bureau, 2013.

¹⁶ By way of illustration, assume a consumer has a \$100 balance and makes a \$70 debit card purchase after which a check for \$35 is presented for settlement. When the debit card transaction is authorized, the consumer's "available balance" will be reduced by \$70 so that the check will be deemed to overdraw the account. And when the debit charge transaction is thereafter presented, the available balance will be reduced by the amount of the check and the \$35 overdraft fee, so that the \$70 will also be deemed an overdraft. Having started with \$100 and spent \$105 dollars, the consumer will end up with a negative balance of \$75 dollars.

¹⁷ Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets; Laibson and Xavier; National Bureau of Economic Research, 2005.

Many financially vulnerable and coping consumers have grown wise to the fact that this system is rigged against them, and have adopted alternatives to bank accounts such as prepaid cards. In 2018, prepaid card payments accounted for 10.5 percent of all card payments.¹⁸ Even before the adoption of the CFPB's prepaid card rule, most prepaid cards did not allow their users to overdraft, a useful limitation for financially vulnerable consumers living close to the edge. As a result of the rule, that is now universally true. However, prepaid cards can be costly to reload for consumers who cannot arrange for direct deposits. They may also offer less functionality than traditional checking accounts as a means of paying bills. Thus, we do not believe that prepaid cards should be viewed as a complete substitute for safe checking accounts.

The Taskforce also notes the emergence of digital wallets used for peer-to-peer electronic payments, but these are best understood as complementary to bank accounts rather than as alternatives to them. Unlike prepaid cards, these digital wallets must be linked to a bank account or card and cannot be reloaded with cash. For this reason, peer-to-peer digital wallets are insufficient replacements for bank accounts as they are currently structured.

Promoting Competition

As discussed above, the market often fails to incentivize banks to foster their customers' financial health. This is due to a number of market imperfections, such as high switching costs and information asymmetries. Starting with the former, the time and money required to switch to a bank that offers better pricing or service on a checking account is beyond what is reasonable for many consumers. As discussed above, these consumers' substantial liquidity constraints are simply too great to allow them to adequately fund two accounts while they switch over their direct deposits and auto-debit arrangements. Even if they do have the cash required, the time needed to make these changes is likely a substantial cause of inertia that prevents consumers from switching. As such, banks have little reason to fear that their consumers will leave them for a competitor with lower fees or better service. Asymmetric information can also be a barrier to financial health-enabling competition, as the search costs for consumers to comparison shop are prohibitive for many products. In the overdraft example, the amount consumers end up paying is a function of a myriad of bank policies that consumers are unlikely to be aware of or understand before they choose their bank. Indeed, they are unlikely to understand them even if hit with multiple overdrafts. When critical information is this opaque, opportunities to exploit consumers rather than compete to serve them abound.

¹⁸ The 2019 Federal Reserve Payments Study; The Board of Governors of the Federal Reserve System, 2020.

These phenomena are not unique to the United States. Policymakers in the United Kingdom have been working to increase competition in retail banking for some time. There, regulators have undertaken significant efforts to enable both account portability and data portability to mitigate high switching costs and information asymmetries. In order to enable account portability, the UK built a “Current Account Switching Service” (CASS) to help consumers switch their account to providers with lower fees or better service.¹⁹ While this seems to have lowered switching costs, consumer uptake has been limited.²⁰ However, some argue that the CASS doesn’t go far enough, and that true account number portability is needed. If the experience with telephone number portability is any guide, such a system could greatly increase competition in retail banking for the benefit of consumers.²¹

While conversations of account portability in banking have languished in obscurity, data portability has become one of the hottest topics in the industry. Since 2014, regulators in the UK have been working towards an “Open Banking” system, whereby financial institutions are mandated to allow their customers to share their data with licensed third parties.²² Similarly, regulators in the European Union (EU) have been implementing the EU’s Second Payment Services Directive (PSD2).²³ While PSD2’s scope is more limited, both PSD2 and Open Banking mandate the creation of Application Program Interfaces (APIs) that allow third parties to securely access consumer data. These initiatives also have a shared aim of increasing competition by enabling comparison shopping and lowering barriers to entry for innovative firms. Indeed, access to data has proven to be critical for much of the innovation we have seen in the fintech ecosystem.

Consumer Data & Consumer Protection

In the United States, the debate over consumer financial data has been characterized by far less regulatory engagement. Section 1033 of the Dodd-Frank Act states that:

“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 such person concerning the consumer financial product or service that the consumer obtained from such covered

¹⁹ Current Account Switch; Bacs operated by Pay.UK.

²⁰ FCA finds current account switching service working for consumers; Financial Conduct Authority, 2015.

²¹ Political Determinants of Competition in the Mobile Telecommunication Industry; Faccio and Zingales; National Bureau of Economic Research, 2017.

²² Retail Banking Market Investigation: Final Report; Competition and Markets Authority; 2016.

²³ Payment services (PSD 2) - Directive (EU) 2015/2366; European Commission, 2015.

person, including information related to any transaction, or series of transactions, to the account including costs, charges, and usage data.”²⁴

In the ten years since Dodd-Frank, the meaning of this passage has been increasingly hotly debated. The Financial Health Network has long believed that an inclusive and secure financial data ecosystem is one in which financial institutions, data aggregators and third-party application providers coordinate to provide data to consumers that are available, reliable, user-permissioned, secure, and limited to application functionality.²⁵ The Bureau echoed many of these principles in its own non-binding principles from 2017, but we believe the time has come for the Bureau to undertake a formal rulemaking process under Section 1033. We discussed our views on this issue at length in our written statement to the CFPB prior to its recent Symposium on consumer access to financial records.²⁶ While there were many important points raised at the Symposium, we would highlight two particular takeaways. First, we believe the discussion about the kinds of information that financial institutions regard as proprietary highlighted the need for rulemaking on Section 1033 to clarify consumers’ right to their own data as a means to facilitate competition. For example, while there are certainly proprietary data fields that financial institutions should not be compelled to share, we do not believe that pricing is one of them, as has been suggested by some. Rather, we believe that transparent pricing is key to facilitating competition. Second, it was notable that the vast majority of the diverse panelists at the Symposium agreed about the need for rulemaking, despite their disagreement on the content of such rulemaking.²⁷

In addition to the need for rulemaking on Section 1033, the emergence of new third party applications and data aggregators raises a number of other consumer protection questions that must be addressed. We discuss these in some detail in our written submission to the CFPB Symposium, but will briefly address them here as well in response to the Taskforce’s questions.

First, given that today’s financial data ecosystem continues to rely on data sharing through screen scraping using consumers’ log-in credentials, there is an outstanding question about who is liable for an unauthorized transaction resulting from credentials shared with a data aggregator. From a consumer protection standpoint, we believe that the worst possible resolution of this question would be for consumers to be held liable for a transaction executed through no fault of their own. As such, we believe that the CFPB should issue guidance that consumers are not liable for unauthorized

²⁴ H.R.4173 - Dodd-Frank Wall Street Reform and Consumer Protection Act;

²⁵ Consumer Data Sharing Principles: A Framework for Industry-Wide Collaboration; Asrow and Brockland; Financial Health Network, 2016.

²⁶ Consumer Financial Protection Bureau’s Symposium on Consumer Access to Financial Records. Section 1033 of the Dodd-Frank Act; Murphy, Financial Health Network, 2020.

²⁷ CFPB Symposium: Consumer Access to Financial Records; Consumer Financial Protection Bureau, 2020.

transactions originated with login credentials a consumer has shared with a data aggregator.²⁸ Such guidance may help to motivate industry to come to an agreed-upon liability framework. In order to ensure that a future breach does not jeopardize the solvency of data aggregators or third party application providers, we believe that the CFPB should also encourage appropriate risk mitigation policies, including third-party liability insurance.

Second, there is a need to clarify the supervision of data aggregators. While recent guidance from the Office of the Comptroller of the Currency gives insight into one regulator's view of how aggregators should be treated by financial institutions with respect to third party risk management, we continue to believe that interagency guidance is needed to ensure that aggregators are sufficiently supervised. Following such guidance, the CFPB should strongly consider whether bringing aggregators under direct supervision via larger participant rulemaking is necessary or appropriate.

Third, and perhaps most relevant to the Taskforce's questions, there is a need to clarify the applicability of the Fair Credit Reporting Act when data aggregators supply data at a consumer's request for use in lending or other FCRA-covered decisions. If some or all aggregators are deemed to be consumer reporting agencies under FCRA based upon the activities of the aggregators, there also would be a need to clarify whether banks are furnishers. If aggregators were not found to be consumer reporting agencies or if their sources of data were not found to be furnishers, there would be an open question about how the accuracy of the data obtained by aggregators and used by lenders in making credit decisions can be assured absent the rights and protections afforded by FCRA. In that case, the Bureau should be mindful of the fact that accuracy can be affected by the means through which data is collected (there is more risk of error when data is collected through screen scraping than from an API), as well as by the source of the data (data derived from a system of record used to manage accounts on a day-to-day basis may raise fewer accuracy concerns than other sources). Consideration may be given to affording consumers the right to see a preview of their data before it is shared by an aggregator with, for example, a creditor. However, this approach would necessitate the need to take great care that consumers do not bear an inordinate burden to ensure accuracy, and that aggregators are correctly incentivized to use whatever data collection and transmission mechanisms ensure the greatest accuracy for consumers.

²⁸ This guidance should, at the very least, apply to unauthorized transactions by someone other than the data aggregator in question, as in the case of a data breach. For unauthorized transactions made by the aggregator itself, there is a further complication stemming from Regulation E's treatment of consumer liability in cases where the consumer shares an "access device", but the authority to use that device is exceeded by the person with whom the consumer has shared it. This exception to consumers' liability protection under Regulation E was designed with debit cards in mind, which may commonly be shared by family members or close friends. However, in the data aggregation context, it creates ambiguity in cases where an aggregator exceeds the consumers' intent by making an unauthorized transaction. Further clarity would also be helpful in this area so that all parties can be made aware of how liability will be assigned.

More broadly, the Taskforce has asked whether or not FCRA and Regulation V sufficiently fulfill their core purpose of ensuring accuracy. We believe that FCRA's core obligation on consumer reporting agencies to take reasonable steps to assure maximum possible accuracy is, at best, opaque. The Federal Trade Commission's seminal accuracy study found that a substantial share of consumer reports contained material errors.²⁹ Moreover, the Bureau's reports on its supervisory activities involving consumer reporting agencies suggest that those agencies have under-invested both in efforts to ensure accuracy and in the infrastructure needed to identify and correct errors and respond to consumer disputes.³⁰ With these findings in mind, we believe this is an area ripe for further regulatory oversight.

Finally, the Taskforce asks about the sufficiency of the Gramm-Leach-Bliley Act (GLBA) and Regulation P, and whether they sufficiently protect consumers' personal information. The Financial Health Network believes that there is substantial room for improvement here, and that broader conversations about the need for national data privacy laws too often leave out the need to update consumer data rights and protections in banking, healthcare, education, and other sectors that already have data privacy laws. For example, we do not believe that the opt-out mechanism required by GLBA is a good model for the future. At the very least, we believe that bank-initiated data sharing should be governed by an opt-in regime, with a default assumption that customers do not have any particular desire for their financial data to be sold to, rented to, or otherwise used by other third parties as they see fit.

Conclusion

In this letter, we have described several gaps in consumer financial protections. The Financial Health Network believes that addressing these issues is necessary to improve financial health outcomes and to ensure that the CFPB's mission of protecting consumers is successful. However, this list is far from exhaustive. It will remain critical for the Taskforce to proactively identify conditions that justify regulation in the market for consumer financial products and services. In order to do so, we recommend following a framework envisioned by a thoughtful group of experts at the creation of the CFPB. This group recommended that the Bureau consider market intervention in cases where there are

²⁹ In FTC Study, Five Percent of Consumers Had Errors on Their Credit Reports That Could Result in Less Favorable Terms for Loans; Federal Trade Commission, 2013.

³⁰ Supervisory Highlights Consumer Reporting Special Edition; Consumer Financial Protection Bureau, 2019.

negative externalities, information failures, market power, public goods, cognitive biases, limited financial capabilities, and unfair outcomes to be found.³¹

These elements are present in the markets for credit, payments, and deposits, but are also likely to be found in other areas within the Bureau's purview. Should the Taskforce have doubts about the need to intervene in these cases, we believe that following the evidence presented by financial health outcomes can help them to prioritize which areas need the most immediate attention. Until all consumers' day-to-day financial systems truly enable them to build resilience and pursue opportunities, the CFPB will have no shortage of work to do.

Sincerely,



Dan Murphy
Policy Manager
Financial Health Network

³¹ *Making Financial Markets Work for Consumers*; Campbell, Jackson, Madrian, & Tufano; Harvard Business Review; 2011