



December 21, 2023

VIA ELECTRONIC SUBMISSION

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552

Re: **Required Rulemaking on Personal Financial Data Rights Docket No. CFPB–2023–0052, RIN 3170–AA78**

Dear Director Chopra:

On October 31, 2023, the Consumer Financial Protection Bureau (CFPB) published a notice of proposed rulemaking (NPRM) on Required Rulemaking on Personal Financial Data Rights in the Federal Register.¹ The proposed rule would implement personal financial data rights under the Consumer Financial Protection Act of 2010 (CFPA). The Office of Advocacy is concerned about the potential impact of the proposed rulemaking on small entities and recommends that the CFPB consider other alternatives.

Extension Request

On November 8, 2023, the Office of Advocacy (Advocacy) submitted a request for extension of the comment period for this rulemaking. As noted in the letter, the small entities that will be required to comply with the regulation are in the best position to provide the CFPB with information about the potential costs associated with the proposal, but the amount of time provided for the comments is insufficient. This information is crucial for determining the economic impact of the rule and for considering less costly alternatives as required by the Regulatory Flexibility Act (RFA). Advocacy reiterates the need for an extension of the comment period for this rulemaking and reserves the right to submit supplemental comments.

¹ 88 Fed. Reg. 74796 (Oct. 31, 2023).

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA) that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.⁴ Additionally, section 609 of the RFA requires the Consumer Financial Protection Bureau, the Occupational Safety and Health Administration, and the Environmental Protection Agency to conduct special outreach efforts through a review panel.⁵ The panel must carefully consider the views of the impacted small entities, assess the impact of the proposed rule on small entities, and consider less burdensome alternatives for small entities.⁶ If a rule will not have a significant economic impact on a substantial number of small entities, agencies may certify the rule.⁷ The agency must provide a statement of factual basis that adequately supports its certification.⁸

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁹ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.¹⁰

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."¹¹

² Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

³ Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).

⁴ 5 U.S.C. § 603.

⁵ *Id.* § 609.

⁶ *Id.*

⁷ *Id.* § 605(b).

⁸ *Id.*

⁹ Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).

¹⁰ *Id.*

¹¹ Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

In addition to the outreach required through the SBREFA panel process, the Office of Advocacy performs outreach through roundtables, conference calls, and other means to develop its position on important issues such as this one. The Office of Advocacy held a conference call with stakeholders on November 29, 2023, to discuss the potential impact of this NPRM and less burdensome alternatives to the rule as proposed. Advocacy's comments reflect the feedback that it received from stakeholders about the potential impact of the proposal on small businesses.

B. The Small Business Regulatory Enforcement Fairness Act Panel

Section 609 of the RFA requires the CFPB to conduct special outreach efforts to ensure that small entity views are carefully considered prior to issuing a proposed rule if the rule is expected to have a significant economic impact on a substantial number of small entities.⁶ The Bureau convened a SBREFA panel on small business lending data on February 1, 2023 and conducted virtual outreach meetings with small entity representatives (SERs) on February 1-2, 2023.¹² In advance of the panel outreach meeting, the CFPB, Advocacy, and OIRA held a series of telephone conferences with the SERs to describe the small business review process, obtain important background information about each SER's current business practices, and discuss selected portions of the proposals under consideration. The panel issued its report on March 30, 2023.

C. The Proposed Rule

On October 31, 2023, the CFPB published a proposed rulemaking on personal financial data rights under the Consumer Financial Protection Act of 2010. The proposed rule would require depository and nondepository entities to make available to consumers and authorized third parties data relating to consumers' transactions and accounts; establish obligations for third parties accessing a consumer's data, including important privacy protections for that data; provide basic standards for data access; and promote fair, open, and inclusive industry standards. The CFPB prepared an initial regulatory flexibility analysis (IRFA) for the proposed rule.¹³

II. The Economic Impact of the NPRM on Small Entities

The CFPB has identified several categories of small entities that may be subject to the proposals under consideration. Within the financial industry, these include depository institutions (such as commercial banks, savings associations, and credit unions), credit card issuing nondepositories, sales financing companies, consumer lending companies, real estate credit companies, firms that engage in financial transactions processing, reserve, and clearinghouse activities, firms that engage in other activities related to credit

¹² CONSUMER FIN. PROT. BUREAU, FINAL REPORT OF THE SMALL BUSINESS REVIEW PANEL ON THE CFPB'S PROPOSALS AND ALTERNATIVES UNDER CONSIDERATION FOR THE REQUIRED RULEMAKING ON PERSONAL FINANCIAL DATA RIGHTS (Mar. 30, 2023), https://files.consumerfinance.gov/f/documents/cfpb_1033-data-rights-rule-sbrefa-panel-report_2023-03.pdf [hereinafter Panel Report].

¹³ 88 Fed. Reg. 74796, 74862.

intermediation, investment banking and securities dealing companies, securities brokerage companies, and commodities contracts brokerage companies. Outside of the financial industry, potentially affected small entities include software publishers, firms that provide data processing and hosting services, firms that provide payroll services, firms that provide custom computer programming services, and credit bureaus.¹⁴ The CFPB estimates that the proposed rule will impact 6,897 small depository institutions, 100 nondepository financial institutions and data providers, and 6,800-9,500 third parties.¹⁵

According to the CFPB, small data providers would incur \$250,000 to \$500,000 in upfront costs for developing an interface and \$5,500 to \$11,900 to develop policies and procedures. They will also incur annual costs of \$20,000 for technology, \$45,000 to \$91,000 for ongoing staffing, and \$7,300 for regular testing. Small third parties would incur one-time costs of \$8,200 to develop and implement procedures. They will also incur one-time costs of \$21,900 to \$91,300 to establish systems and \$91,300 to establish a system to provide disclosures. If they already provide disclosures, it will cost between \$2,700 and \$3,700 to modify the content.¹⁶

III. The Proposed Rulemaking Lacks Clarity

A. Qualified Industry Standards

In section 1033.131 of the proposed rule, CFPB states that a qualified industry standard means a standard issued by a standard-setting body that is fair, open, and inclusive in accordance with § 1033.141(a).¹⁷ In the preamble, the CFPB explains that fair, open, and inclusive industry standards are a critical element in the maintenance of an effective and efficient data access system. The CFPB further states that it is generally proposing throughout part 1033 that indicia of compliance with the rule would include conformance to an applicable industry standard issued by a fair, open, and inclusive standard-setting body.¹⁸

Advocacy agrees that standards are important for consistent compliance and conformity. Such standards provide small entities with insight into what they can and cannot do. However, according to stakeholders, the proposed rule is problematic because there is no indication of what the qualified industry standards may be. Furthermore, a qualified industry standard may vary according to industry. Without more information, small entities are unable to ascertain what will be necessary to comply and budget accordingly.

¹⁴ *Id.* at 74,862-63.

¹⁵ *Id.* at 74,864.

¹⁶ *Id.*

¹⁷ *Id.* at 74,869.

¹⁸ *Id.* at 74,807.

Failure to provide additional insight into what the CFPB expects in a qualified industry standard may lead to confusion and excessive expense. Advocacy encourages the CFPB to provide additional information about what the qualified industry standards should be for each individual industry that may be impacted by this rulemaking. In addition, Advocacy recommends that small entities be included in the standards development process, which is important for it to be a consensus standard.

B. Third Parties

During the SBREFA panel, data provider SERs expressed concern about increased liability risk for covered data providers. These SERs stated that third parties should be subject to the same regulations and remedies as data providers to safeguard consumer data and ensure that the consumer is reimbursed when their data are lost or misused. One data provider SER stated that data providers should not be financially responsible for reimbursement of the losses to a consumer due to the failure of a data recipient's security. Other data provider SERs stated that if third parties are not held liable, community banks will be unjustly held financially liable for losses due to the negligence of others. Another data provider SER stated that without shielding the data provider from liability, there could be reluctance to share information.¹⁹

Stakeholders are concerned about the lack of clarity in the proposal about who bears responsibility if a third party misuses the data or in some other way violates the requirements of the rule. Such lack of clarity could lead to confusion and expensive litigation. Advocacy encourages the CFPB to clarify who bears responsibility if a third party misuses the data or violates the requirements of the rule.

IV. Developing a Rule That Is Less Burdensome to Small Entities Benefits Consumers

Because of the potential harm to small entities and consumers, the agency should adopt less costly alternatives. The CFPB discussed less costly alternatives in the IRFA as required by the RFA. Reducing the burden on small entities benefits small entities and consumers. When small entities are in the marketplace, the marketplace is more competitive, and the consumers have a choice of providers.

In the IRFA, the CFPB considered four alternatives. Those alternatives were (1) exemptions from the proposed rule for small data providers, (2) permitting small data providers to charge fees for making covered data available, (3) exemptions from the proposed rule for small third parties, and (4) alternative compliance dates for small depository data providers.²⁰

¹⁹ Panel Report, *supra* note 12, at 31-32.

²⁰ 88 Fed. Reg. at 74,865.

A. Exemptions

The CFPB considered exemptions for small data providers and for small third parties.

Small Data Providers

In terms of data providers, the CFPB determined that the exemption should target the entities that would have the highest cost of compliance without the exemption.²¹ Those entities would be the depositories that do not have a digital banking structure. The CFPB determined that those entities would be exempt by alternative account or asset-based exemptions.²² The CFPB further opines that the later compliance date will reduce the burden on small entities. As such, the CFPB concludes that additional exemptions are not necessary.²³

Advocacy is concerned that the exemptions for small data providers may be too limited. There may be small entities that have a digital presence but very few accounts or in other ways present a low risk of harm for consumers. Advocacy is concerned that the proposed rule may force them to choose between undertaking an expensive upgrade to their systems in order to comply or stop providing certain services and potentially lose customers. If small institutions faced with that dilemma decide to stop providing certain services, that decision may cause economic harm to the small entity. It may also cause harm to the consumer because the consumer may lose the bank with whom the consumer has a relationship.

In the IRFA, the CFPB did not discuss the possibility that firms may reduce their offerings to customers rather than comply with this regulation. Advocacy encourages the CFPB to analyze the impact if small entities decide to exit the market rather than comply with the rule. Advocacy further encourages the CFPB to work with small entities to determine if there are other possible exemptions for small data providers.

Third Parties

In terms of third-party exemptions, the CFPB estimated that there are approximately 6,800 to 9,500 third parties with fewer than 100,000 connected accounts, many of whom may be small entities. However, the CFPB concluded that exempting third parties from aspects of the proposed rule, such as the requirements on collection, use, and retention, may create risks of harm for consumers on data security and privacy grounds, provide unfair competitive advantages for exempt versus non-exempt third parties, and increase the risks of losses from data security incidents for consumers and data providers.²⁴

²¹ *Id.* at 74,866.

²² *Id.*

²³ *Id.* at 74,867.

²⁴ *Id.*

Advocacy understands that there are security and privacy concerns. A violation of security or privacy protocol could be detrimental to data providers, third parties and consumers. However, if some small third-party providers exit the market, that would mean less choice for the consumer. Advocacy encourages the CFPB to work with small entity data providers and third parties to determine if there are possible exemptions to the proposed rule that will not compromise data security and privacy.

B. Small Entities Should Be Permitted to Charge Fees for Making Covered Data Available

In the IRFA, the CFPB acknowledges that small data providers not excluded from the requirements of the proposal would incur the costs necessary to establish and maintain a developer interface. To help offset those costs, the CFPB states that it considered the alternative of permitting small data providers to charge fees for making covered data available through developer interfaces. However, the CFPB preliminarily determined that a data provider charging such fees would be inconsistent with the data provider's statutory obligation under CFPA section 1033 to make covered data available to consumers and to their authorized third-party representatives. As such, the CFPB is proposing to prohibit fees across data providers of all sizes. The CFPB also asserts that consumers at small data providers could be harmed through reduced access to third parties' products and services if the CFPB were to permit only small data providers to charge fees.²⁵

Advocacy is perplexed by the CFPB's rationale. The Freedom of Information Act is a federal government law that requires the full or partial disclosure of previously unreleased or uncirculated information and documents controlled by the federal government.²⁶ The public has the right to the information, but an agency can charge for the time it takes to search for records and for duplication of those records.²⁷ It seems to be inconsistent to say that the federal government can charge for information but small entities cannot. Instead of flatly prohibiting the collection of fees in this proposed rulemaking, Advocacy encourages the CFPB to consider developing a system that would allow small entities to charge an appropriate fee to cover any expenses incurred in fulfilling the requirements of the rule.

C. State Laws

As noted in the proposal, there may be similar requirements by other applicable laws.²⁸ Some states have similar laws. For example, in California, the California Consumer Privacy Act allows residents to ask businesses to disclose what personal information they have, what they do with that information, to delete personal information, to direct

²⁵ *Id.* at 74,867.

²⁶ *See* 5 U.S.C. § 552.

²⁷ U.S. Dep't of Just., *FOIA Frequently Asked Questions (FAQ)*, <https://www.foia.gov/faq.html> (last visited Dec. 13, 2023).

²⁸ 88 Fed. Reg. at 74,814.

businesses not to sell or share personal information, to correct inaccurate information, and to limit businesses' use and disclosure of sensitive personal information.²⁹ Advocacy recommends that the CFPB review state laws to determine the necessity of additional regulations. If additional regulations are appropriate, Advocacy further recommends that the CFPB ascertain the current requirements and develop a rule that does not conflict with state laws or create additional burden on small entities.

D. Implementation Period

Section 1033.121 of the proposed rule sets forth the compliance dates. It states:

A data provider must comply with §§ 1033.201 and 1033.301 beginning on: (a) [Approximately six months after the date of publication of the final rule in the Federal Register], for depository institution data providers that hold at least \$500 billion in total assets and nondepository institution data providers that generated at least \$10 billion in revenue in the preceding calendar year or are projected to generate at least \$10 billion in revenue in the current calendar year.

(b) [Approximately one year after the date of publication of the final rule in the Federal Register], for data providers that are: (1) Depository institutions that hold at least \$50 billion in total assets but less than \$500 billion in total assets; or (2) Nondepository institutions that generated less than \$10 billion in revenue in the preceding calendar year and are projected to generate less than \$10 billion in revenue in the current calendar year.

(c) [Approximately two and a half years after the date of publication of the final rule in the Federal Register], for depository institutions that hold at least \$850 million in total assets but less than \$50 billion in total assets.

(d) [Approximately four years after the date of publication of the final rule in the Federal Register], for depository institutions that hold less than \$850 million in total assets.³⁰

Although the CFPB is proposing a staged implementation as recommended by the Panel,³¹ Advocacy remains concerned that small entities may not be able to comply with the requirements of the rule within five years as proposed. As noted above, the proposed rule refers to qualified standards that have not been developed. Until the qualified standards are developed, small entities will not know what they need to do to comply with the requirements of the rule. If it takes three years to develop the standards, small entities would waste money building a system without knowing what the standards will be or only have one year to take the necessary steps to comply. This usurps the purpose

²⁹ State of California, Dep't of Just., *California Consumer Privacy Act*, <https://www.oag.ca.gov/privacy/ccpa>, (last visited Dec. 14, 2023).

³⁰ *Id.* at 74,869.

³¹ *Id.* at 74,806.

of providing small entities with additional time to comply. Moreover, larger entities would already be out of compliance.

Advocacy recommends that the CFPB start the compliance process after the standards are completed. By doing so, small entities will not waste valuable resources trying to play by the rules when they do not know what the rules will be.

E. The CFPB Should Develop a Less Burdensome Safe Harbor for Small Entities

The proposed rule also has a safe harbor. In the proposed rule, the CFPB asserts that 24 months of historical transaction data would support the vast majority of consumer use cases. Some data provider and consumer advocate stakeholders have explained that 24 months would be consistent with the recordkeeping requirements in Regulation E and Regulation Z. The CFPB preliminarily concluded that setting a safe harbor at a minimum of 24 months would ensure that consumers have access to sufficient historical transaction data for common beneficial use cases, while providing compliance certainty to data providers.³²

However, according to the Independent Community Bankers of America (ICBA), it is rare for community banks to retain 24 months of transaction data. Small community banks may retain anywhere from 90 days to 12 months of data and all prior transactions are only stored as PDF versions of bank statements.

Retaining data for 24 months will be problematic for those small community banks that do not currently do so. Retaining more data requires more server time, which is expensive. Banks have thousands of customers. A customer may have hundreds of transactions over the course of a year. The cost of accurately storing and protecting this additional data would be burdensome.

Moreover, in the proposal, the CFPB states that the amount of time for the response would not be commercially reasonable if it were less than 3,500 milliseconds.³³ Requiring small financial institutions to retain more information may slow down the transmission of that data and make it difficult for them to respond within the required time. It may also result in erroneous transmission of data.

It will be arduous for small entities to comply with the requirements of the safe harbor, as currently proposed. Advocacy encourages the CFPB to adopt a safe harbor of 12 months of transaction data for small entities.

³² *Id.* at 74,811.

³³ *Id.* at 74,816.

IV. The Agencies Should Provide Clear Guidance to Assist Small Entities with Compliance

Given the requirements of the proposed rulemaking, providing clear guidance for complying with the agency's rulemaking will be helpful to small entities and eliminate confusion. Small entities may lack resources to assist them in understanding regulatory requirements and performing the necessary actions to achieve compliance. Advocacy encourages the agency to provide guidance to assist small entities in complying with the requirements of the rulemaking.

V. Conclusion

Thank you for the opportunity to comment on this important proposal. If you have any questions or require additional information, please contact me or Assistant Chief Counsel Jennifer A. Smith at (202) 205-6943 or by email at Jennifer.Smith@sba.gov.

Sincerely,

/s/

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Jennifer A. Smith
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

Copy to: Richard L. Revesz
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