



October 26, 2021

The Honorable Maxine Waters  
Chairwoman  
Committee on Financial Services  
2129 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Patrick McHenry  
Ranking Member  
Committee on Financial Services  
4340 O'Neill House Office Building  
Washington, D.C. 20151

Dear Chairwoman Waters and Ranking Member McHenry:

The Consumer Bankers Association (CBA) submits the following comments for the hearing entitled “Bringing Consumer Protection Back: A Semi-Annual Review of the Consumer Financial Protection Bureau.” We appreciate the Committee’s continued oversight of the Consumer Financial Protection Bureau (CFPB or Bureau) and its activities. CBA is the voice of the retail banking industry whose products and services provide access to credit to millions of consumers and small businesses. Our members operate in all 50 states, serve more than 150 million Americans and collectively hold two-thirds of the country’s total depository assets.

CBA looks forward to working with Congress to ensure fairness and transparency at the CFPB, who is charged with the duty of protecting consumers financial wellbeing. In this letter, we offer legislative and regulatory suggestions to lawmakers and the Bureau for the purpose of ensuring consumers continue to have access to highly regulated financial products that enable them to achieve their financial goals. The remainder of this letter is organized into two main sections:

- ❖ Bipartisan CFPB Commission: This section discusses creating a bipartisan commission to insulate the CFPB from being a political football that is subjected to political swings with every new administration.
- ❖ Regulatory Actions: This section urges the CFPB to use the Administrative Procedures Act (APA) process to avoid rulemaking by enforcement and to write a larger participant rule to include unsecured loans by nonbank companies. The remaining subsections highlight CBA’s recommendations in creating rules for Sections 1071 and 1033 of the Dodd-Frank Act.

### **Bipartisan CFPB Commission**

Consistent consumer protection laws are necessary to ensure American families are best safeguarded. Stability between administrations and a need for transparency within regulatory agencies is vital to a fair and competitive financial services marketplace. CBA renews our long-standing call to Congress: Immediately pass legislation to put in place a bipartisan commission to bring stability and insulate the Bureau from political shifts.

Replacing the sole director model with a bipartisan, Senate confirmed, five-person commission will depoliticize the CFPB and increase stability, accountability and transparency. The lack of certainty and long-term consistency in leadership at the Bureau adversely affects consumers, our economy, and the financial services industry. For instance, after the departure of both Directors from the two previous Administrations, the CFPB endured drastic political changes. These political shifts make it difficult for the financial services industry to plan long term, which ultimately stifles innovation, limits access to credit, and hurts consumers. As demonstrated by other government regulators, a bipartisan commission would create more certainty and stability so banks can plan and better serve consumers. Passing legislation to create a five-person, bipartisan commission at the Bureau will bring needed long term stability to agency.

### **Regulatory Recommendations to Improve CFPB**

CBA shares the CFPB’s goal to improve the financial lives of consumers. Banks can share in this common mission when they have stable and even-handed regulatory frameworks to serve consumers. These regulatory recommendations will help ensure “financial markets work for consumers, responsible providers, and the economy as a whole:”

1. Avoid “rulemaking by enforcement” and utilize the Administrative Procedures Act (APA) to create clear, transparent rules by including supervised stakeholders in the process.
2. Amend the larger participant rule to include unsecured consumer loans so that the Bureau can supervise key nonbank financial companies in the market.
3. Expand the Section 1071 implementation timeline to 3 years and lower the covered entities threshold to \$1 million in annual revenue.
4. Include sufficient security safeguards in the Section 1033 rule to protect consumer permissioned data shared throughout the data access ecosystem and require knowing, voluntary consent for the use of consumer data.

The remainder of this section provides additional context for each of these regulatory recommendations.

### ***Use Formal Rulemaking Process and Avoid Regulation by Enforcement***

The practice known as, “regulation by enforcement” leads to a lack of clear guidance and excess legal costs. Former Director Richard Cordray stated publicly on numerous occasions that companies should draw their understanding of the compliance and legal requirements of federal law by studying consent orders and other enforcement actions by the CFPB. Enforcement actions are not, especially if they are negotiated consent orders, a fair representation of the regulator’s compliance expectations of others. Operating under the concept of “regulation by enforcement”, banks are forced hire additional lawyers to better understand and comply with the law – with still a number of unknown probable’s they are left to decipher. Conversely, the rulemaking process, as mandated by the Administrative Procedure Act (APA)

and the Dodd-Frank Act, demands the CFPB adhere to a strict process that invites those who are affected by a proposal to have a say in the creation of the rule, thus increasing clarity for all stakeholders. The CFPB should utilize the APA’s rulemaking process to create laws and guidance for supervised financial institutions and reject “regulation by enforcement”.

### ***Amend the Larger Participant Rule to Reach Fintechs Offering Unsecured Loans***

CBA urges the Bureau to add unsecured consumer loans to the larger participant rule so the Bureau can supervise key nonbank actors in that market. Financial technology companies (fintechs) increasingly provide financial products and services, but their activities are largely unsupervised by the Bureau, leaving customers vulnerable to abuse. Fintechs offering products like those offered by the nation’s leading retail banks must be held to similar standards to ensure consumers are protected. The Bureau should invoke 12 U.S.C. § 5514 to extend its authority over larger participants in markets in which fintechs are becoming increasingly more prevalent with each passing year.

A failure to examine fintechs does not just contribute to an uneven playing field between fintechs and supervised entities, but more importantly, results in a continuous and growing threat of consumer harm. Consumers are best protected when entities offering similar financial products and services are subject to the same oversight. Due to the growing popularity of products offered by nonbanks in the unsecured consumer lending market, and the prior actions by the Bureau against bad actors in this market, the unsecured consumer lending market is the perfect place for the Bureau to focus its supervisory authority through the larger participant rule.

### ***Provide Sufficient Implementation Time and a Reasonable “Small Business” Threshold***

The CFPB should provide a sufficient implementation timeline for the Section 1071 rule and lower the threshold for “small business.” On September 1, 2021, the CFPB issued a notice of proposed rulemaking (NPRM) requesting public comment on its proposed rule to implement Section 1071 of the Dodd-Frank Act. As we have maintained since the promulgation of Dodd-Frank, CBA and its member institutions strongly believe that the CFPB should keep top of mind that although Section 1071 mandates this rule, its implementation will not be a simple process and compliance will have to be streamlined to ensure reliable data. While we continue to identify concerns with the NPRM, below are CBA’s top issues to note:

- The proposed 18-month timeline is too restrictive. Lenders need at least three years to implement Section 1071 data collection requirements.
- A \$5 million dollar annual gross revenue threshold is too high. We urge the CFPB to lower the threshold to \$1 million dollars for covered small businesses.

The following section provides additional analysis of CBA's observations concerning the proposed Section 1071 rule.

- First, the CFPB has proposed an extremely constrictive implementation period of just 18 months. This approach rejects the two-year deadline endorsed in the Bureau's SBREFA outline and asserts that an implementation period of less than two years is preferable given the length of time since the passage of Dodd-Frank. In doing so, the CFPB inappropriately shifts the time burdens of the delayed rulemaking from itself to covered lenders. To implement an effective 1071 data collection process, lenders will need to build completely new reporting systems, requiring great time and expense. By way of comparison, the recent changes to the HMDA reporting system, which already had a strong foundation, took the CFPB over two years to implement. FinCEN's recently promulgated Beneficial Ownership Rule (or Customer Due Diligence), which is a far less complicated data collection compared to 1071, had a three-year implementation timeframe (2015-2018). Simply put, lenders will need considerably more time than proposed to get this right.
- Secondly, while we agree with a standardized revenue-based approach, a \$5 million gross annual revenue threshold is simply too high. Under the proposed rule, a business is a "covered entity" if its gross annual revenue for its preceding fiscal year is \$5 million or less. As acknowledged in the NPRM, most SBREFA small entity representatives commented a majority of their small business customers were under \$1 million in annual revenue. Companies that fall above the \$1 million threshold often offer different structures, are more sophisticated, and data collection would bleed into separate commercial banking operations with different systems, processes, and platforms, increasing the cost of collection, but offering little insight into actual small business lending. Lower the threshold to focus on entities that are truly small businesses.

### ***Protect Consumers Throughout the Entire Data Access Ecosystem***

A strong 1033 rule will hold all data holders accountable for consumer data security and privacy, mandate consent and data minimization, and ensure any regulation provides flexibility for continued innovation. Section 1033 of the Dodd-Frank Act states, "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 is to be made available in an electronic form usable by consumers." The current framework lacks adequate safeguards to ensure consumers' personal financial information is protected when leaving a regulated and supervised financial institution. For instance, there is no regulatory framework that establishes liability for the various data holders throughout the data access ecosystem. This uncertainty leaves consumers vulnerable to bad actors.



CBA urges the CFPB to prioritize the following in the proposed Section 1033 Rule:

- Provide sufficient security safeguards for consumer access to their financial data
- Make certain consumers are provided informed consent.

The following section provides additional context regarding CBA's top priorities for a Section 1033 Rule:

- Consumers should have full awareness and control over how their data is shared and used. Currently, if consumers' data is shared with a fintech, they likely have no knowledge of how their data is used beyond the intended purpose. Consumers also commonly mistake deleting a fintech app with revoking consent. As a result, fintechs have continued, unfettered access to consumer information even after the relationship has been severed. Therefore, consumers need clarity about secondary uses. The consumer should understand any potential use cases for their permissioned data and how to delete their information. In addition, a potential reauthorization requirement would prevent data aggregators from having infinite, unfettered access to consumer data. CBA urges the proposed rule mandate knowing, voluntary consumer consent through disclosures.
- The CFPB is responsible for facilitating a safe and secure data access ecosystem. Data holders and fintechs are not subject to the same data security and privacy standards as banks. This lack of regulation leaves consumer data exposed to potential bad actors. In addition, some data holders use screen scraping techniques to access consumer permissioned data. Screen scraping does not allow banks to know which data fields are being accessed or to control the flow of access to guard against potential misuse. CBA urges the CFPB to apply a GLBA or a GLBA-like data privacy and security standard to all participants in the ecosystem. Regulation is needed to balance the consumers' right to access their data with reasonable and appropriate controls.

### **Conclusion**

All consumers deserve consistent and equal protections regardless of financial institution or market participant. With new players entering the space every day, the world of financial services is constantly evolving. Many new stakeholders are not currently required to abide by the same rules as well-regulated banks the Bureau oversees. To ensure the most thorough consumer protection initiatives are upheld, the Bureau should strive to create a level playing field for all financial institutions. The CFPB has an obligation to apply consumer regulations equally across the board so Americans using a fintech or non-bank lender are assured the same protections as those using a well-regulated bank. CBA stands ready to work with Congress and the CFPB to implement suggested legislative and regulatory improvements to the Bureau, and we appreciate the opportunity to submit this statement for the record.



Sincerely,

A handwritten signature in black ink that reads "Richard Hunt". The signature is written in a cursive style with a large, prominent "R" and "H".

Richard Hunt  
President and CEO