**IN THE UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF KENTUCKY (LEXINGTON)**

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| FORCHT BANK, N.A., *et. al.,* | ) | CASE NO. 5:24-cv-00304 |
| | ) | |
| Plaintiffs, | ) | JUDGE DANNY C. REEVES |
| | ) | |
| v. | ) | **AMICUS AMERICAN FINTECH COUNCIL'S MOTION FOR LEAVE *INSTANTER* TO FILE AMICUS BRIEF IN SUPPORT OF DEFENDANT FINANCIAL TECHNOLOGY ASSOCIATION** |
| | ) | |
| CONSUMER FINANCIAL PROTECTION BUREAU, *et. al*. | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

In accordance with the inherent authority of this Court, Amicus American FinTech Council ("AFC") respectfully requests leave *instanter* to file an amicus brief in support of intervening defendant Financial Technology Association ("FTA"). As more fully outlined in the attached Amicus Brief (incorporated fully herein by reference), leave to file an amicus brief should be granted because, among other reasons:

- AFC's members are directly impacted by the Required Rulemaking on Personal Financial Data Rights, 89 Fed. Reg. 90838 (Nov. 18, 2024) (the "Final Rule") and their interests are not fully represented by the parties.
- AFC's members bring a unique and differing perspectives to this case that would benefit this Court and the parties.
- FTA has consented to AFC filing its amicus brief in support of its position(s) in this case.

A copy of AFC's Amicus Brief is attached hereto and fully incorporated herein.

"The role of an amicus is generally to aid the Court in resolving doubtful issues of law rather than present a partisan view of the facts." *BancInsure, Inc. v. U.K. Bancorporation Inc./United Kentucky Bank of Pendleton Cnty., Inc.*, 830 F.Supp.2d 294, 307 (E.D.Ky. 2011) (citations omitted). "There is no established standard by which district courts evaluate motions

for leave to file amicus curiae briefs." *League of Women Voters of Ohio v. LaRose*, 741 F.Supp.3d 694, 725 (N.D. Ohio 2024) (citing *Bounty Minerals, LLC v. Chesapeake Expl., LLC*, No. 17-cv-1695, 2019 WL 7048981, at *10 (N.D. Ohio Dec. 23, 2019)). Thus, a district court may grant leave to file an amicus brief pursuant to its inherent authority. *Id*., *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991). Factors district courts consider in determining whether to grant leave to file an amicus brief include:

> whether the parties are adequately represented, whether the proposed *amici* have a cognizable direct interest in the outcome of the case, and whether the proposed *amici* would address matters or advance arguments different from those raised by the parties.

*Id*. (citing *Bounty Minerals*, 2019 WL 7048981, at *10).

As more fully outlined in the Amicus Brief itself, these factors all weigh in favor of granting AFC leave *instanter* to file an Amicus Brief. First, AFC's members have a direct interest in the outcome of this case that also differs from the parties to the litigation itself. For instance, AFC's members will be both "data providers" and "third parties" with rights and responsibilities under the Final Rules. AFC has played an active role in offering comments and advocating on behalf of its membership with respect to open banking.

The interests of AFC's members differ from those of the parties. For instance AFC's members include 39 banks and credit unions (most of which are smaller organizations) that are focused on supporting the fintech ecosystem. These banks are at the forefront of open banking innovations affected by the Final Rules and approach the issues differently than Plaintiff Bank Policy Institute's ("BPI") members given their product mix and market penetration. It is critical that the court acknowledge that banks are not monolithic in their approach to open banking and that banks' perspectives on the Final Rule may differ. In other words, where BPI's members include many large incumbent banks with significant market share, many of AFC's bank and credit

union members are smaller organizations focused on finding ways, including the use of emerging technology, to compete with these incumbent banks. Similarly, whereas the FTA is primarily focused on financial technology and their membership does not include a significant number of banks, unlike AFC's membership. Moreover, AFC's membership has a difference of opinion on open banking and 12 C.F.R. § 1033 et. seq. from the current CFPB leadership.

As more fully outlined in the attached Amicus Brief, AFC brings a unique perspective to this case and the issues raised by the parties that would benefit the Court and it should be granted leave *instanter* to file its Amicus Brief as a result. In principle, AFC supports the goals of the Final Rule to codify consumers' rights to access and control their financial data, as well as advance competition through a broader range of markets due to the availability and transferability of this data by consumers. AFC further believes that the CFPB was within its delegated authority to promulgate rules addressing open banking in 12 C.F.R. § 1033 *et. seq*. and, while AFC believes the Final Rules would benefit from certain policy revisions, it believes the Final Rules should not be vacated in their entirety through this court action but instead be modified with appropriate deliberation including the typical notice and comment process as outlined in the Administrative Procedures Act ("APA").

For any and all of these reasons, AFC respectfully requests leave *instanter* to file an Amicus Brief in support of FTA in this action.

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 7, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ ECF system, which will send notification of such filing to the following:

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**BRIEF OF AMERICAN FINTECH COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT FINANCIAL TECHNOLOGY ASSOCIATION**

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## II. TABLE OF AUTHORITIES

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## III. INTEREST OF AMICUS CURIAE

American Fintech Council ("AFC") is the premier industry association representing both both responsible fintech companies ("Fintech") and innovative banks.[1] AFC's mission is to promote a transparent, inclusive, and customer-centric financial system by supporting responsible innovation in financial services and encouraging sound public policy. AFC members foster competition in consumer finance and pioneer products for underserved consumer segments and geographies.[2]

### *A. AFC's Interest in Open Banking and the Final Rule.*

AFC has played an active role in supporting the development of a fair and transparent open banking ecosystem, including by providing comments to the Consumer Financial Protection Bureau ("CFPB") throughout its open banking rulemaking journey over the last several years.[3] AFC consistently advocates for a strong, unified approach to regulation that properly balances consumer protections with innovation, while ensuring that regulators protect against actual and not merely perceived harms to consumers.[4]

The consumer access and increased competition that underpin the CFPB's *Final Rule for the Required Rulemaking on Personal Financial Data Right*, 89 Fed. Reg. 90,838 (Nov. 18, 2024) (the "Final Rule") are crucial to establishing an effective open banking ecosystem. AFC members have used consumer-permissioned data for many years to improve access to financial services, particularly for those that have been historically underserved, and to increase competition in the financial services industry. In principle, AFC supports the goals of the Final Rule to codify consumers' rights to access and control the sharing of their financial data, enhance data security

[1] *See Our Mission*, Our Mission | American Fintech Council (last visited on June 24, 2025).
[2] *Id*.
[3] *See Advocacy*, Advocacy | American Fintech Council (last visited on June 24, 2025).
[4] *Comment from American Fintech Council*, Regulations.gov (last visited on June 24, 2025).

requirements, promote the standardization of data and data sharing protocols, and advance competition through broader availability and transferability of this data by consumers.[5]

***B. AFC Offers a Unique Perspective on the Final Rule that Differs from the Parties.***

AFC brings a unique perspective to this case and the issues raised by the parties that would benefit the Court in construing the competing Motions for Summary Judgment pending before it.

AFC brings a middle-ground perspective between the large banks that Plaintiff the Bank Policy Institute ("BPI") represents and the technology companies that Defendant Financial Technology Association ("FTA") represents. For example, whereas BPI primarily represents large banks ("universal banks, regional banks and the major foreign banks doing business in the United States"),[6] and FTA primarily represents financial technology companies,[7] AFC represents a diverse array of banks, credit unions **and** Fintechs that differ from BPI's and FTA's membership, bringing a different perspective worthy of this Court's consideration. More specifically, AFC's members include nearly three dozen banks and credit unions (most of which are smaller organizations, including community banks) that are focused on supporting the Fintech ecosystem.[8] These banks are at the forefront of open banking innovations affected by the CFPB's rules and approach the issues differently than BPI's members given their product mix, market penetration, and reliance on a third-party partnership model with fintech companies to generate revenue. Banks are not monolithic in their approach to open banking and the Final Rules. Where BPI's members include many large incumbent banks with significant market share, many of AFC's bank and credit

[5] *Comment from American Fintech Council*, Regulations.gov (last visited on June 24, 2025).
[6] *About Us*, https://bpi.com/about-us/ (last visited on June 24, 2025.)
[7] *See About FTA*, About FTA - Financial Technology Association (last visited on June 24, 2025.)
[8] *See, e.g. Our Membership*, Our Mission | American Fintech Council (last visited on June 24, 2025.)

union members are smaller organizations focused on finding ways to compete with these large incumbent banks, including through the use of open banking technologies.

Finally, AFC's perspectives and interests also differ from the current CFPB's leadership. While the CFPB now believes the Final Rule is unlawful and should be vacated, AFC believes (as the CFPB itself once did) that the CFPB has authority to initiate rules governing the open banking ecosystem. And while AFC believes the Final Rules would benefit from certain policy revisions, it believes that the Final Rules should not be vacated in their entirety through this court action but instead be modified with appropriate deliberation including the typical public notice and comment process in the Administrative Procedures Act ("APA").

## IV. STATEMENT OF PARTY INTEREST

No party's counsel authored this brief in whole or in part, and no one other than AFC contributed money intended to fund preparing or submitting this amicus brief.

## V. INTRODUCTION AND SUMMARY OF ARGUMENT

AFC brings a unique perspective to the Final Rule and is generally supportive of the same, albeit with certain tweaks that can be accomplished through revised rulemaking that follows the APA's processes, including notice of a proposed rule and an opportunity for public comment in lieu of vacating the Final Rule altogether.[9] As discussed below, AFC believes the CFPB acted appropriately within its statutory powers when it:

- Interpreted the definition of "consumer" in 1033 to include "authorized third parties," as defined in the Final Rule;

[9] For example, AFC believes the CFPB should reconsider the annual data sharing reauthorization requirement and the scope of limitations placed on authorized third parties' use of data.

- Addressed data security protections and third-party risk management expectations in the Final Rule;
- Identified Recognized Standard Setters and consensus standards to assist with setting "indicia of compliance" with various aspects of the Final Rule; and
- Made policy choices with respect to managing liability and supervising certain third-parties.

## VI. ARGUMENT

### *A. The CFPB Has Authority to Promulgate Rules Under § 1033 of Dodd-Frank and Extensive Research Supports Its Various Policy Decisions.*

In 2010, Congress passed and President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"). Pub. L. 111-203, 124 State. 1376. Congress tasked the CFPB with "implement[ing]" and "enforc[ing]" a large body of consumer financial protection laws to "ensur[e] that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." 12 U.S.C. § 5511(a).

One of those laws Congress tasked the CFPB with implementing and enforcing was Section 1033 of Dodd-Frank ("1033"). That provision states that, "Subject to rules prescribed by the Bureau," covered persons must, among other things, "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 the covered person. 12 U.S.C. § 5533(a). Congress also expressly authorized the CFPB to prescribe rules "as may be necessary or appropriate to enable [it] to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof." *Id*. § 5512(b)(1).

And that is what the CFPB did. The CFPB's 1033 rulemaking journey began with years of research on the open banking market, including the issuance of a Request for Information, 81 Fed. Reg. 83,806 (Nov. 22, 2016) (the "RFI") in 2016, the issuance of "Consumer Protection Principles" based on its findings from the RFI,[10] holding a symposium with stakeholders discussing the open banking ecosystem,[11] obtaining feedback from small businesses on an outline of the rule,[12] coordinating with a host of federal agencies,[13] collecting detailed company-specific data via two sets of market monitoring orders,[14] and issuing a proposed rule to, among other things, enable consumers to more easily access their financial data electronically and permit certain

[10] *See Consumer Protection Principles: Consumer-Authorized Financial Data Sharing and Aggregation*, (Oct. 18, 2017), https://files.consumerfinance.gov/f/documents/cfpb_consumer-protection-principles_data-aggregation.pdf. and Consumer-authorized financial data sharing and aggregation: Stakeholder insights that inform the Consumer Protection Principles (Oct. 18, 2017), https://www.consumerfinance.gov/data-research/research-reports/consumer-protection-principles-consumer-authorized-financial-data-sharing-and-aggregation/.

[11] *See Consumer Fin. Prot. Bureau, Bureau Symposium: Consumer Access to Financial Records: A summary of the proceedings* (July 2020), https://files.consumerfinance.gov/f/documents/cfpb_bureau-symposium-consumer-access-financial-records_report.pdf.

[12] *See Consumer Fin. Prot. Bureau, Small Business Advisory Review Panel for Required Rulemaking on Personal Financial Data Rights, Outline of Proposals and Alternatives under Consideration* (Oct. 27, 2022), https://files.consumerfinance.gov/f/documents/cfpb_data-rights-rulemaking-1033-SBREFA_outline_2022-10.pdf and 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.

[13] *See* 89 Fed. Reg. 90,842 (stating that "[b]efore and after issuing the proposal, CFPB staff met on numerous occasions to obtain feedback from staff from the Board of Governors of the Federal Reserve System, OCC, FDIC, NCUA, and FTC, including on the subjects in CFPA sections 1022(b)(2)(B) and 1033(e). CFPB staff has also met with staff from other Federal agencies, including staff from the USDA, the U.S. Department of the Treasury, the U.S. Department of Justice, the U.S. Department of Commerce, the Federal Housing Finance Agency, as well as staff from State agencies.")

[14] *See id*. at 90,841 (described as the "Provider Collection" and "Aggregator Collection" conducted pursuant to Section 1022(e)(4) of Dodd-Frank).

authorized third parties to access that data on behalf of consumers. *See* Required Rulemaking on Personal Financial Data Rights, 88 Fed. Reg. 74,796 (Oct. 31, 2023) (the "Proposed Rule").

The CFPB received over eleven thousand comments on the Proposed Rule. Following its consideration of those comments, and building upon this significant volume of research regarding the open banking market, the CFPB issued the Final Rule in November 2024. In response, Plaintiffs immediately commenced this action. (Compl. ECF No. 1.)

Importantly, the consideration of open banking issues by federal banking regulators did not begin with the CFPB, or with Dodd-Frank, and the CFPB's extensive efforts have been built on top of prior regulatory activity. In fact, in 2001, almost a decade before Dodd-Frank and two decades before the Final Rule, the Office of the Comptroller of the Currency (the "OCC") examined issues with open banking data sharing arrangements in Bulletin 2001-12, which advised banks of risks and controls that should be considered when banks themselves engage in "account aggregation services." And Federal Reserve Board Governor Lael Brainard discussed at length the complex role of data aggregation activities in 2017, concluding that "[r]esponsibility for establishing appropriate norms in the data aggregation space should be shared, with banks, data aggregators, fintech developers, consumers, and regulators all having a role."[15]

### *B. The Definition of "Consumer" in Dodd-Frank Includes Authorized Third Parties and the CFPB's Interpretation of the Same is Not Arbitrary or Capricious to Support Vacating the Entire Final Rule.*

Contrary to the Plaintiffs' and the CFPB's latest novel interpretation of the term "consumer," Congress intended for that term to include authorized third parties, the CFPB's

[15] *See Where Do Consumers Fit in the Fintech Stack*? Remarks by Lael Brainard, Member Board of Governors of the Federal Reserve System (Nov. 16, 2017) https://www.federalreserve.gov/newsevents/speech/files/brainard20171116a.pdf (last visited June 29, 2025).

original interpretation of the term was not arbitrary or capricious, and the Final Rule should not be vacated as a result.

1. The 1033 Statutory Language Should be Given its Plain Meaning.

Dodd-Frank defines a "consumer" as "an individual or an agent, trustee, or representative acting on behalf of an individual." 12 U.S.C. § 5481(4). It is well-settled that "identical words used in different parts of the same act are intended to have the same meaning… ." *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). Thus, and by its plain language, Dodd-Frank defines a "consumer" to be not only an individual (as Plaintiffs and the CFPB now contend), but also an "agent" of an individual, a "trustee" of an individual, **or** a "representative" of an individual acting on his or her behalf. *Loughrin v. U.S.*, 573 U.S. 351, 357 (2014) (noting "[a]s we have recognized, [or's] "ordinary use is almost always disjunctive, that is, the words it connects are to be given separate meanings."). The Final Rule sets forth definitions that further parse these categories within the statutory definition of a "consumer." The Final Rule "generally refers to the individual as the 'consumer' and an agent, trustee, or representative acting on behalf of that individual as an 'authorized third party.' " 89 Fed. Reg. 90,920.

Plaintiffs and the CFPB seek to vacate the entire Final Rule on a technical concern that the term "representative" could not possibly extend to the broad category of "authorized third parties" contemplated in the Final Rule, and that only third parties with some type of "fiduciary" relationship are third parties qualified to fit within the statutory and definition of a "consumer." (Pl. Mot., ECF No. 59-1, Pg. ID # 1546-1551) (CFPB Mot., ECF No. 58-1, Pg. ID # 1505-1510). This interpretation is at odds with the definition of "consumer" in Dodd-Frank, and it overlooks the reasoned decision the CFPB undertook when it interpreted the term to include an "authorized third party."

"The language of the statute itself is the starting point in statutory interpretation." *Deutsche Bank Nat'l Trust Co. v. Tucker,* 621 F.3d 460, 462 (6th Cir. 2010). Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings. *Loughrin v. U.S.*, 573 U.S. 351, 357 (2014). As well, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Roberts v. Sea-Land Services, Inc.*, 566 U. S. 93, 101 (2012); *see also Fischer v. United States*, 603 U.S. 480, 486 (2024) (citation omitted).

While Plaintiffs and the CFPB claim that "agent," "trustee" and "representative" should be read as like terms, such an interpretation would render the third category – representative - as mere surplusage. *See Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012) (noting that the canon against surplusage favors an interpretation which avoids surplusage). In other words, **if** the phrase "representative acting on behalf of an individual" is interpreted to **only** mean a legal agent, trustee, or other person with a special fiduciary-like relationship with the individual as Plaintiffs posit, **then** that additional language would effectively be removed from the statute, becoming surplusage which the canons of statutory construction are designed to avoid. *Id*.

2. CFPB's Interpretation of the Term "Consumer" is Supported by the Record.

Contrary to the Plaintiffs' claims, and contrary to the about-face undertaken by the current CFPB's new leadership in its Motion for Summary Judgment, the CFPB exercised proper legal authority when it interpreted the term "consumer" in the Final Rule. As the Supreme Court recently reaffirmed, Congress can still delegate authority to agencies to promulgate rules. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 404 (2024). Thus, "when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it." *Id*. at 413; *United States v. Bricker*, 135 F.4th 427, 440 (6th Cir. 2025). Dodd-Frank contains such a delegation here. *See* 12 U.S.C. § 5533 (stating that the data access rights under 1033 are "[s]ubject to rules prescribed by the Bureau…"

and that "[t]he [CFPB], by rule, shall prescribe standards… to promote the development and use of standardized formats for information… ."); 12 U.S.C. § 5512(b)(1) (noting that the CFPB may develop rules "as may be necessary… to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.").

The CFPB's assessment and ultimate determination in the Final Rule that the term "consumer" includes authorized third parties under 1033 (unlike the CFPB's recent position change) is within that delegated authority and not arbitrary or capricious as alleged. The APA requires that courts "hold unlawful and set aside agency action[s]" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). But as the Supreme Court has cautioned, courts must not vacate a rule for being arbitrary and capricious unless the agency "entirely failed to consider an important aspect of a problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (citation omitted). Thus, when determining whether an agency has violated the APA, the regulatory decision need not be "the best one possible or even ... better than the alternatives." *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 292 (2016). As such, courts should uphold an agency regulation "if the agency has examined the relevant considerations and articulated a satisfactory explanation for its action." *Id.* (cleaned up).

Such is the case here. The CFPB conducted extensive research on the open banking ecosystem prior to issuing the Proposed Rule, received thousands of comments on the Proposed Rule, many of which addressed this issue, and made a rational, well-reasoned decision in interpreting the statutory definition of a "consumer" to encompass both an individual consumer

and certain authorized third parties. In fact, many of the Plaintiffs' and the CFPB's new-found issues with this definition were, in fact, considered by the CFPB in promulgating the Final Rule. For instance, the CFPB responded to comments claiming that the definition of "consumer" should be limited to entities with a fiduciary relationship, as the Plaintiffs now contend. The CFPB explained in the Final Rule that:

> [t]he CFPB does not agree with other commenters that suggest that only a narrow class of certain fiduciaries should be recognized as authorized third parties. The CFPB has framed subpart D precisely to ensure that covered data are available only to agents, trustees, and representatives acting on behalf of the consumer.

89 Fed. Reg. 90,921.

The CFPB also incorrectly states in its Motion for Summary Judgment that "an authorized third party as laid out in the rule is a commercial actor broadly allowed to use data for purposes beyond directly serving the customer." (Mot., ECF No. 58-1, Pg. ID # 1508.) On the contrary, while third parties may handle covered data under the Final Rule, their rights and authorities are derived from, and significantly restricted relative to, those of the individual consumer. *See* 89 Fed. Reg. 90,861-65. As the CFPB noted:

> The final rule establishes that a third party has a duty to act for the principal's benefit in its collection, use, and retention of data, which is in line with well-established principles of agency law. Under agency law, an agent is required to subordinate the agent's interests to those of the principal and to place the principal's interests first on all matters connected with the agency relationship. Similarly, here, the final rule limits third party collection, use, and retention of covered data to what is reasonably necessary to provide the consumer's requested product or service.

*Id*. at 90,921.

Accepting the CFPB's new-found position on the definition of "consumer" in 1033 would result in the very thing it complains of here – an arbitrary and capricious decision that violates the APA. Unlike the extensive, deliberate, and transparent notice and comment rulemaking activity

the CFPB went through to promulgate the Final Rule, the entirely new definition of "consumer" announced in the CFPB's Motion for Summary Judgment was not the result of any fact finding or public comment that is the hallmark of proper rulemaking under the APA.[16] Such an *ad hoc* policy position change of a federal agency is not and should not be entitled to any deference. *See, e.g. Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016).

Accordingly, AFC believes that the CFPB acted within its authority to interpret the statutory term "consumer" as it did in the Final Rule and, in so doing, did not act arbitrarily or capriciously to warrant vacating the entirety of the Final Rule.

### *C. The Final Rule Adequately Addresses Data Security and Third-Party Risk Management Issues.*

Contrary to the Plaintiffs' and CFPB's assertions in their Motions for Summary Judgment, the CFPB not only considered, in great detail, issues surrounding data security and third-party risk management, but it crafted the Final Rule to mitigate the very issues the Plaintiffs (and now) the CFPB complain of. And the fact that Plaintiffs, or the CFPB (now), might have come to a different conclusion on these issues does not mean the Final Rule is arbitrary and capricious as alleged. *See FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021) (noting that the APA merely requires an agency to "reasonably consider[] the relevant issues and reasonably explain[] the decision.").

#### 1. Plaintiffs' Data Security Concerns Were Carefully Considered by the CFPB when Promulgating the Final Rule.

[16] The new CFPB leadership recently withdrew a substantial amount of guidance that it deemed to be unnecessary. *See* 90 Fed. Reg. 20,084 (May 12, 2025). However, the CFPB has not withdrawn its 2017 Consumer Protection Principles regarding open banking data sharing activities which state that "Consumers are generally able to authorize trusted third parties to obtain such information from account providers to use on behalf of consumers, for consumer benefit, and in a safe manner." *See* Note 11. This apparent inconsistency in agency perspectives is yet another example of why the new CFPB position on the scope of a "consumer" under 1033, first presented in this litigation without holistic consideration of the consequences, should be disregarded.

Plaintiffs' data security concerns are real. As the record makes clear, the CFPB was aware of the data security issues presented by open banking activities and took care to ensure those risks are appropriately managed. Indeed, the Final Rule contains a variety of measures "intended to drive market adoption of safer data sharing practices," including: "not allowing data providers to rely on credential-based screen scraping…; clarifying that data providers can engage in reasonable risk management activities; implementing authorization procedures for third parties that would require they commit to data access, use, and retention limitations; implementing policies and procedures regarding data accuracy; and requiring compliance with the GLBA Safeguards Framework." 89 Fed. Reg. 90,848.

The Plaintiffs fail to acknowledge that the type of data sharing they fear will be a byproduct of the Final Rule is already prevalent today—through a variety of processes, such as screen scraping and APIs. As such, the current data sharing environment already suffers from the privacy and data security risks the Plaintiffs claim the Final Rule will present. Contrary to the Plaintiffs' claims, the Final Rules are designed not to exacerbate these risks but rather to: (1) acknowledge their presence, and (2) minimize these risks by enhancing privacy and data security protections through the establishment of common data security rules and other expectations among companies in the open banking ecosystem.

Notwithstanding this, the Plaintiffs and CFPB contend that the Final Rule "establishes a lax system for accessing and verifying authorized third parties' security practices" (Mot. ECF No. 58-1, Pg. ID # 1514) and that the Final Rule mandates "that banks share their customers' sensitive financial data with any third party that can obtain customer authorization." (Mot. ECF No. 59-1, Pg. ID # 1534). The Plaintiffs rely on this flawed argument to conclude the Final Rule is arbitrary and capricious—allegedly because it failed to consider the "cumulative impact" of the rule's

impact on consumer data security. (*Id*. at Pg. ID # 1545). In reality, the CFPB was well aware of that exact cumulative impact. The regulatory record establishes that the CFPB took great care to ensure that privacy and data security risks were not only addressed, but effectively mitigated, in the Final Rule.

The CFPB observed that sensitive financial data is being shared with many third parties, including data aggregators, in ways that present risks to consumers data privacy and security.[17] The CFPB also observed market practices indicating denials of access "carry a significant risk of being pre-textual or otherwise infringing consumers' access rights under CFPA section 1033." 89 Fed. Reg. 90,901. The Final Rule seeks to mitigate these risks by, in part, ensuring that the Gramm-Leach-Bliley Act's (the "GLBA") Safeguards Rules apply to **all** third parties accessing covered data, and ensuring that access denials are not pre-textual and do not otherwise infringe upon consumers' data access rights. Indeed, the Final Rule was carefully written to respect and overlap with a number of existing federal laws, including GLBA, the Fair Credit Reporting Act (the "FCRA"), the Electronic Fund Transfer Act (the "EFTA"), and bank safety and soundness obligations, so that an entity is able to comply with all of these requirements and 1033 all at the same time.

2. Access Denial Requirements are not Unduly Restrictive and Rely on Existing Safeguards and Standards.

The Plaintiffs further complain that the obligations under 12 C.F.R. § 1033.321—specifically the requirement for access denials related to risk management to be reasonable—are "unduly restrictive." (Mot. ECF No. 59-1, Pg. ID # 1555-1556.) To the contrary, the Final Rule respects and retains data providers' ability to evaluate third parties and deny access to data based

[17] 88 Fed. Reg. 74,799 (Noting that "[t]hird parties also collect data using methods that may compromise consumers' data privacy, security, and accuracy, as well as data provider interests related to security, liability, and risk management.)

on specific risk management concerns. Notably, this includes risks derived from a variety of data security, safety, and soundness concerns that banks identify. As the CFPB noted, the Final Rule "does not require data providers to vet third parties. Rather, any requirements regarding vetting are the result of data providers' existing requirements regarding risk management, such as the GLBA Safeguards Framework or safety and soundness standards." 89 Fed. Reg. 90,900.

The Final Rule's obligation that denials be "applied in a consistent and non-discriminatory manner" should not be read to prevent banks and other data providers from denying access or requiring them to repeat past errors, as the Plaintiffs suggest. (Mot. ECF No. 59-1, Pg. ID # 1555.) Rather, the Final Rule simply requires that data providers apply their risk management denials consistently across all third parties, without discrimination. Here, the Plaintiffs miss the forest for the trees—consistent application does not equate to consistent outcomes. If different third parties present different risks, then the application of risk management practices will necessarily result in different outcomes. And, if a data provider's risk management practices change over time, the Final Rule acknowledges that the updated practices must be applied evenly across all third party relationships to ensure consistency and non-discrimination.

The Plaintiffs incorrectly conclude that "[i]f a bank determines that it should have granted access" to a third party in the past, the Final Rule would require the bank "to repeat [an] error or otherwise risk enforcement for being 'inconsistent.'" (Mot. ECF No. 59-1, Pg. ID # 1560.) On the contrary, if a data provider denies access based on specific risks that were applied evenly to all third parties at the time of the decision, that denial would be valid. And if a data provider later sought to **modify** its risk management expectations, those modified expectations should likewise be applied evenly to all third parties.

3. The Final Rule's Approach to Screen Scraping Reflects a Balance Between Consumer Protections and Data Access Rights.

The Plaintiffs complain that the Final Rule "inexplicably rejected commenters' pleas to ban" screen scraping. (Mot. ECF No. 59-1, Pg. ID # 1556.) However, Plaintiffs fail to acknowledge the lengthy consideration of this complex issue by the CFPB throughout the rulemaking process. The Final Rule reflects an effort by the CFPB to balance competing interests, between privacy and data security protections on the one hand, and data access rights on the other. The preamble itself explains that the Final Rule does not "preclude[] data providers from blocking screen scraping… ." 89 Fed. Reg. 90,895. The preamble also warns third parties that they could engage in unfair, deceptive, or abusive acts or practices if they screen scrape data when a developer interface is available:

> As discussed in the proposal, credential-based screen scraping creates risks to consumer privacy, accuracy, and data security, and poses challenges to data providers' systems. A core objective of the final rule is to transition the market away from using screen scraping to access covered data. Final § 1033.311(e)(1) supports this goal by preventing data providers from relying on a third party's use of consumer credentials to access the developer interface.

*Id*. at 90,894.

In other words, data providers may not simply acquiesce to third party screen scraping activities as a means of making data available. The data provider must take steps to make more-secure data sharing mechanisms available. The Plaintiffs' assertion that security is impaired rather than promoted by the Final Rules fails to acknowledge the enhancements that will be driven by compliance with the Final Rules to address data security risks. In truth, the CFPB has sought to minimize the risks of insecure screen scraping while acknowledging its presence and utility.[18]

[18] As further discussed in the Final Rule, "[d]epending on the facts and circumstances… interference with the consumer's ability to share their personal financial data [by blocking screen scraping] may violate the CFPA's prohibition on acts or practices that are unfair, deceptive, or abusive. However, if a data provider has established a developer interface… then blocking screen scraping may further consumer privacy and data security while ensuring that consumers are able

### *D. The Use of Recognized Standard Setters is Appropriate and Not Arbitrary or Capricious as Alleged.*

The use of Recognized Standard Setters to set "indicia of compliance" for various provisions of the Final Rule is appropriate, commonplace, and does not support the claim that the CFPB acted arbitrarily or capriciously when it issued the Final Rule.

The use of consensus standards allows the CFPB to lean on the expertise of industry-devised standards—a practice that is especially critical in highly complex and nuanced fields such as technical software development and electronic data privacy and data security. Moreover, reliance on industry standards is not unique to the Final Rules. In fact, it has been the policy of the federal government since at least 1996 to "reduce to a minimum the reliance by agencies on government-unique standards"[19] and instead defer to voluntary consensus standards set by industry. In discussing private technical standards being incorporated into law, the Court of Appeals for the District of Columbia recognized that "federal law encourages precisely this practice." *American Society for Testing and Materials, et al. v. Public.Resource.Org, Inc.*, 896 F.3d 437, 442 (D.C. Cir. 2018) (noting that "incorporating private standards 'eliminate[s] the cost to the Federal government of developing its own standards' and 'further[s] the reliance upon private sector expertise…' ") (citation omitted).

The Plaintiffs argue that the CFPB "impermissibly [outsourced its rule writing] authority to private standard-setting organizations" (Mot., ECF No. 59-1, Pg. ID # 1551) and that "banks will have to comply with the 'consensus standards' if they hope to avoid an enforcement action"

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to authorize access to their financial data in a manner that is safe, secure, reliable and promoting of competition." 89 Fed. Reg. 90,895.

[19] OMB Circular A–119 was originally published in 1996; *see https://www.govinfo.gov/content/pkg/FR-1996-12-27/html/96-32917.htm.* The current Circular, effective January 27, 2016, is available at *https://www.whitehouse.gov/wp-content/uploads/2020/07/revised_circular_a-119_as_of_1_22.pdf.*

and that these "private standards 'lend definite regulatory force to an otherwise broad statutory mandate' and 'channel its enforcement.' " (*Id*. at Pg. ID at # 1553). However, the Plaintiffs fail to acknowledge that consensus standards set by Recognized Standard Setters are intentionally designed within the Final Rule to **not** operate as strict standards at all, and that consensus standards are consistent with existing policy to promote the efficient use of government resources.

The Plaintiffs' and CFPB's key error lies in their failure to acknowledge that a covered entities' compliance does not have a binary relationship with the standards set by Recognized Standard Setters. In the Final Rule, consensus standards are referred to throughout as providing an "indicia of compliance." Specifically, when discussing each requirement set under the Final Rules, the language uses a similar structure to denote how to apply a consensus standard: "[i]ndicia that [the covered topic] [satisfies the relevant regulatory obligation] include that it conforms to a consensus standard." *See* 12 C.F.R. § 1033.311(b)-(d). Many of those same provisions even set forth **other** indicia of compliance, outside of conformance to a consensus standard—explicitly acknowledging that failure to comply with a consensus standard is not necessarily a failure to comply with the Final Rules and that adherence to a consensus standard does not guarantee compliance either. *See* 12 C.F.R. § 1033.311(c)(2)(i)(B)-(C); § 1033.311(c)(2)(ii); § 1033.321(c)(2) and (3); § 1033.341(c)(1)–(3).

This approach to consensus standards was an intentional, reasoned choice made by the CFPB in the Final Rule. Indeed, the CFPB **initially** proposed treating compliance with consensus standards for data formats to be a safe harbor—which would bring the consensus standards closer to being a regulatory mandate the likes of which the Plaintiffs complain. *See* 88 Fed. Reg. 74,808. But the CFPB ultimately rejected that approach:

> If the final rule provided safe harbors, as some commenters suggested, recognized standard setters could play a regulatory role,

> rather than a consensus standard-setting one…. The indicia of compliance framework maintains part 1033 as the applicable legal standard while giving due weight to a fair, open, and inclusive consensus standard as evidence of compliance with the rule. Consensus standards can assist entities in fulfilling their legal obligations but do not relieve an entity from its duty to confirm that it is complying with the rule. By the same token, **consensus standards are not mandates**.

89 Fed. Reg. 90,862 (emphasis added).

Further evidencing the distance between consensus standards and a regulatory mandate is the fact that nothing in the Final Rules prevents multiple consensus standards from occupying the same field. Indeed, different Recognized Standard Setters may very well develop cohabitating or overlapping standards regarding the same topic or provision within the Final Rule, acknowledging that compliance with a particular provision of 1033 may not always look the same for each covered entity.

For example, the Financial Data Exchange ("FDX") applied for status as a Recognized Standard Setter from the CFPB in 2024. Their application was published on Regulations.gov for public feedback.[20] In consideration of the application and public feedback, FDX's application to become a Recognized Standard Setter was approved by the CFPB on January 8, 2025.[21] The Digital Governance Council also applied for status as a Recognized Standard Setter in 2024. Their application was similarly published on Regulations.gov for public feedback,[22] but it appears that the CFPB has not yet made a decision to approve or deny the application.

[20] *See* https://www.regulations.gov/document/CFPB-2024-0048-0001 (last visited on June 27, 2025).
[21] *See* Decision and Order, *In re Financial Data Exchange, Inc*., No. 2024-CFPB-PFDR-0001 (CFPB Jan. 8, 2025), available at https://files.consumerfinance.gov/f/documents/cfpb_standard-setter-decision-and-order-of-recognition-fdx_2025-01.pdf. .
[22] *See* https://www.regulations.gov/docket/CFPB-2024-0055.

Importantly, **both** standard setting bodies could publish standards addressing the format of data made available by data providers, demonstrating that the construct established by the Final Rule allows for market participants to find multiple methods of achieving compliance, whether that is choosing to follow one of multiple consensus standards or not following consensus standards at all.

### *E. The CFPB's Informed Decision to Not Address Liability and to Assume Supervisory Authority Over Certain Third Parties were Permissible Policy Decisions and Not Arbitrary or Capricious.*

Finally, AFC believes that the CFPB's decision to not address liability for data compromise and to assume supervisory authority over certain third parties were permissible policy decisions delegated to it under Dodd-Frank. While AFC believes that further clarity on liability (including third party risk management guidance from prudential banking regulators) and CFPB supervision over certain third parties would generally be helpful, the CFPB's policy decisions in the Final Rule were not improper and do not warrant vacating the entire Final Rule.

#### 1. The CFPB's Approach to Liability Reflects a Reasoned Policy Choice.

The Plaintiffs' claim that the CFPB failed "to justify its decision not to prescribe liability rules for when consumer data is inevitably misused or compromised" is not supported by the record. (Mot., ECF No. 59-1, Pg. ID # 1561). The CFPB received extensive commentary on this issue and provided its rationale for promulgating the Final Rule without addressing liability. For example, with respect to the risk of potential payments liability arising from misuse or compromise of data, the CFPB explained that "because the final rule only requires data providers to share information and does not require that they allow third parties to initiate payments using that information" error handling is "a function of how private [payment] network rules operate" and that the Final Rule would not "impinge on such private arrangements." 89 Fed. Reg. 90,848.

Rather, the CFPB reasoned that private arrangements, namely payment network rules and bilateral contracts, are more appropriate vehicles for liability allocations. The CFPB also enacted a number of other mitigating factors that, when viewed in conjunction with data access agreements, private network rules, and existing payments laws, balance the competing considerations involved in ensuring consumers have access to covered data while promoting a safe, secure data sharing ecosystem, including:

> allowing data providers to share [tokenized account numbers]; not allowing data providers to rely on credential-based screen scraping to satisfy their obligations under CFPA section 1033; clarifying that data providers can engage in reasonable risk management activities; implementing authorization procedures for third parties that would require they commit to data access, use, and retention limitations; implementing policies and procedures regarding data accuracy; and requiring compliance with the GLBA Safeguards Framework.

*Id*.

Notwithstanding the extensive record and analysis as to why the CFPB decided not address third party liability in the Final Rule, Plaintiffs argue that the CFPB's deference to private network rules (e.g., Nacha rules governing ACH payments), bilateral contracts and other laws to determine appropriate liability allocations is insufficient because "data aggregators and fintechs have no incentive to bargain for liability allocation when the Rule requires banks to share data for free subject to traditional liability arrangements." (Mot., ECF No. 59-1, at Pg. ID # 1562.) But this reasoning suffers from two fatal flaws.

First, data providers **do** have appropriate power in negotiating data access agreements. While the Plaintiffs complain that they have limited rights to deny access, the Final Rule does, in fact, give data providers justification to deny third parties from accessing their developer interface if such denial is based on specific risk management concerns (consistent with 12 C.F.R. § 1033.321). And a third party's failure to agree to contractual provisions that a data provider

believes are critical for risk management purposes, including liability for data misuse and data breaches, could be a valid basis for denying access. 89 Fed. Reg. 90,899 ("If 'required' onboarding arrangements [including data access agreements] are … permissible under final § 1033.321, a refusal to accept them can justify a denial of access.").

Second, private network rules exist to allocate liability in conformance with applicable law, and those rules are capable of being updated to address emerging risks and liability from open banking and the Final Rule. In fact, the payment network that runs the ACH network, Nacha, announced the formation of a "Pay by Bank Project Team" to "identify any operational, risk and educational issues associated with pay by bank payments."[23] Many of the Plaintiffs and/or Plaintiffs' members are or may be able to become members of Nacha capable of influencing the payment network's efforts to identify and manage the risks associated with these transactions, including liability allocations.

Moreover, these existing liability allocation mechanisms appear to have been adequate for banks to manage liability from an active open banking system to date. The Plaintiffs note that "secure open banking solutions [are] now serving over a hundred million accounts and growing [and this data sharing can] enable consumers' financial autonomy while protecting their data and assets." (Mot., ECF No. 59-1, at Pg. ID # 1533-1534). Even with this significant volume of data sharing occurring now, the Final Rule notes that:

> commenters did not provide legal analysis or factual evidence about the likelihood that data providers would actually incur legal liability under these laws when consumers request, or Federal law requires, they make data available to a third party that subsequently misuses or mishandles the data.

89 Fed. Reg. 90,848.

[23] *See* https://www.nacha.org/pay-by-bank (last visited on June 27, 2025).

As well, Plaintiffs cannot square their criticisms of the CFPB's decision not to allocate liability in the Final Rule with the requirements of the APA. The APA merely requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co*., 463 U.S. 29, 43 (1983). This requirement is satisfied when the "agency's explanation is clear enough that its path may reasonably be discerned." *Navarro*, 579 U.S. at 221 (citation omitted).

On this point there can be no doubt – the CFPB engaged in an exhaustive undertaking to explain exactly why it chose not to address liability in the Final Rule and instead rely on other laws, payment network rules, and bilateral agreements to determine liability allocations in full compliance with its duties under the APA. The fact that Plaintiffs may disagree with its ultimate conclusion is insufficient to establish that the CFPB acted in an arbitrary and capricious manner and the Final Rule should not be vacated as a result.

2. The Purported Lack of Oversight of Third Parties is a Policy Decision that Does Not Warrant Vacating the Final Rule.

The Plaintiffs further complain that the Final Rule should be vacated in its entirety because it improperly "deputizes banks to police the third parties." (Mot. ECF No. 59-1, Pg. ID # 1555.) By their telling, instead of placing the burden of policing third parties on banks, the CFPB should itself play some role in vetting third parties, like open banking regimes in other countries. (*Id*.) Indeed, several trade associations, including BPI, requested that the CFPB conduct a rulemaking to define "larger participants" in the data aggregation market and subject them to ongoing CFPB supervision (*see* Petition for Rulemaking Defining Larger Participants of the Aggregation Services Market (Docket No. CFPB-2022-0053)). While the CFPB declined BPI's request to initiate a larger participant rulemaking in a July 26, 2023 letter, the CFPB clarified in the Final Rule that it

does intend to supervise some third parties:"[t]he CFPB agrees that supervision of data aggregators is important. Supervisory examinations over one or more data aggregators, including larger participants in the consumer reporting market, are scheduled or ongoing, and the CFPB will continue to engage in this supervision as necessary." 89 Fed. Reg. 90,852.

In any event, the proper means of redress for Plaintiffs' concerns regarding the lack of oversight of third parties is not to vacate the entirety of the Final Rule but for the Plaintiffs to continue urging the CFPB to make the **policy choice** to conduct more oversight and supervision of third parties, while staying within its statutory authority. *See Prometheus Radio Project*, 592 U.S. at 423. Further, the Plaintiffs can push for prudential banking regulators to themselves consider whether to provide guidance on third party risk management obligations of data providers. In short, Plaintiffs disagreement with the CFPB's policy choices regarding oversight of third parties are not grounds to vacate any aspect of the Final Rule.

Respectfully submitted,

/s/ T. Dylan Reeves

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 7, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ ECF system, which will send notification of such filing to the following:

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**IN THE UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF KENTUCKY (LEXINGTON)**

| | | |
|---|---|---|
| FORCHT BANK, N.A., *et. al.,* | ) | CASE NO. 5:24-cv-00304 |
| | ) | |
| Plaintiffs, | ) | JUDGE DANNY C. REEVES |
| | ) | |
| v. | ) | |
| | ) | |
| CONSUMER FINANCIAL PROTECTION BUREAU, *et. al*. | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

**[PROPOSED] ORDER GRANTING THE MOTION OF AMERICAN FINTECH COUNCIL FOR LEAVE TO FILE A MEMORANDUM OF LAW AS AMICUS CURIAE IN SUPPORT OF FINANCIAL TECHNOLOGY ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT**

American FinTech Council ("AFC") respectfully requests leave *instanter* to file an amicus brief in support of intervening defendant Financial Technology Association ("FTA") motion for summary judgment.

Upon consideration of the motion and the parties' positions it is hereby

ORDERED that the motion is GRANTED and the Memorandum attached to the motion is deemed filed and will be considered by the Court.

Dated: _____

_____
Danny C. Reeves, District Judge
United States District Court
Eastern District of Kentucky

Tendered by:

/s/ T. Dylan Reeves
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