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October 21, 2025

PERSONAL FINANCIAL DATA
RIGHTS RECONSIDERATION
c/o Legal Division Docket
Manager

Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Via electronic mail to *2025-ANPR-PersonalFinancialDataRights@cfpb.gov*

Re: *Docket No. CFBP-2025-0037 Personal Financial Data Rights Reconsideration*

Dear Acting Director Vought:

My name is Solveig Singleton, and I am a policy analyst for consumer financial services at the Cato Institute's Center for Monetary and Financial Alternatives. I welcome this opportunity to comment on the Personal Financial Data Rights Reconsideration of the Consumer Financial Protection Bureau (CFPB or the Bureau), which addresses financial data sharing obligations—or "open banking"—under Section 1033 of the Dodd Frank Act.[1] The Cato Institute is a public policy research organization dedicated to the principles of individual liberty, limited government, free markets, and peace. The Center for Monetary and Financial Alternatives identifies, studies, and promotes alternatives to centralized, bureaucratic, and discretionary financial regulatory systems. The opinions I express here are my own.

The Bureau must amend the Final Rule to support balanced rules consistent with the language of the Dodd-Frank Act, and to avoid unauthorized, unnecessary, and harmful intervention in financial services markets. The best policy would be for the Bureau to revise the open banking rules to narrow their scope to fiduciaries and/or to allow data providers to charge commercially reasonable fees, without price regulation.

[1] Personal Financial Data Rights Reconsideration, 90 Fed. Reg. 40986 (proposed Aug. 22, 2025) (to be codified at 12 C.F.R. pt. 1033), https://www.federalregister.gov/documents/2025/08/22/2025-16139/personal-financial-data-rights-reconsideration.

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QUESTION SET 1: THE SCOPE OF WHO MAY MAKE A REQUEST ON BEHALF OF A CONSUMER

Question 1. What is the plain meaning of the term "representative?" Does the PFDR Rule's interpretation of the phrase "representative acting on behalf of an individual" represent the best reading of the statutory language? Why or why not?

Answer 1: The best reading of "representative" limits the term to fiduciaries. Section 1033 of the Dodd-Frank Act requires covered entities to make information relating to transactions between the covered entity and a consumer available to the consumer, in a standardized format.[2] The Act defines consumer as "an individual or an agent, trustee, or representative acting on behalf of an individual."[3]

The ordinary meaning of "representative" depends on context: it can refer to an elected legislator, a lawyer, a consumer advocate, or a sales consultant. Elsewhere in the Dodd-Frank Act, the terms "legal representative,"[4] and "authorized representative"[5] appear. This might weakly imply that "representative" appearing without qualification has a broader meaning. However, in the context of a list that begins with "agent" and "trustee," the best reading of "representative" would be to mean someone whose duties parallel those of an agent or a trustee, such as one who holds a power of attorney.[6] This would usually mean a fiduciary.

As the first open banking laws were introduced in Europe in 2015, it is improbable that the legislators who drafted the Dodd-Frank Act in 2009 understood "representative" to mean "another company providing financial services to the consumer or companies that aggregate data on behalf of such a company." Such an idea would also have been controversial because of its implications for competition, security, and privacy. Lack of discussion of this issue in 2009 and 2010 suggests that Section 1003 had more limited scope. Furthermore, Congress did not amend the liability rules applicable to situations in which financial institutions share data with third parties; the liability rules in the Gramm-Leach-Bliley Act are designed for a situation in which a financial institution voluntarily agrees to share data with a third party and are ill-suited to situations where the financial institution has no choice. Other countries with broad open banking

[2] 12 U.S.C. § 5533 (a), (d).

[3] 12 USC § 5481(4).

[4] 15 U.S. Code § 80b–11 (g)(2).

[5] 12 U.S.C. § 5567.

[6] *See, e.g.,* Dubin v. United States, 599 U.S. 110, 124–27 (2023) (explaining that "use" should be read in the context of other words appearing in same list).

regimes have revised their liability rules to suit the open banking context.[7] These factors show that the CFPB's 2024 PFDR got ahead of Congress.[8]

Arguably, extending open banking to nonfiduciaries could benefit consumers by opening the financial sector to more competition and innovation: furthermore, open banking rules would speed the end of screen scraping. However, Congress, not the CFPB, should initiate major changes in financial services policy.

Section 1033 authorizes data portability rules and data sharing direct between data providers and fiduciaries.[9] But it does not authorize the next step after data portability, the promulgation of a mandatory European-style open banking regime where data is shared with many non-fiduciaries.[10]

The options most consistent with the statute would be for the CFPB to limit its Section 1033 regime to fiduciaries. The Bureau could give data providers the option of sharing data with nonfiduciaries voluntarily, creating an optional open banking regime like that adopted in Singapore.[11] This less ambitious policy would let us learn more about how open banking could work in the U.S. context and to better understand security and liability problems. Congress would benefit from this improved understanding in considering whether to amend the statute to expand "representative" to include non-fiduciaries. Until Congress supplies clear authority, the CFPB should not use an improbably broad reading of "representative" to justify enacting a mandatory open banking regime.

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[7] Paige Pidano Paridon and Austin Anton, *The CFPB's Section 1033 Rule Is Not an "Open Banking" Rule*, BANK POLICY INSTITUTE BLOG (Dec. 19, 2024), https://bpi.com/the-cfpbs-section-1033-rule-is-not-an-open-banking-rule/.

[8] *See* Giuseppe Colangelo, *Open Banking Goes to Washington: Lessons from the EU on Data-Sharing Regimes* 17 (International Center for Law and Economics, ICLE Issue Brief 2024-06-11, Jun. 2024), https://laweconcenter.org/wp-content/uploads/2024/06/GC-Open-Banking-Lessons-from-EU.pdf ("the lack of a clear regulatory mandate is arguably what has allowed a market-driven approach to open banking to emerge in the United States over the last 14 years.").

[9] *See id.* at 5 ("Data portability does not require systemic use of APIs, as it is accomplished via a one-time transfer at a specified point in time.").

[10] *See* Bloomberg AI, *'Jamie Dimon Is Right' on Data Access Fees, Barney Frank Says,* BLOOMBERG GOVERNMENT (Sept. 9, 2025: 8:00 p.m. EDT), https://news.bloomberglaw.com/banking-law/jamie-dimon-is-right-on-data-access-fees-barney-frank-says (quoting Barney Frank, co-author of the Dodd-Frank Act, as saying "[w]hen we passed Dodd-Frank, the aim was to build trust between consumers and financial institutions; the intent was not to create a new class of middlemen who undercut the work of institutions and warehouse consumer data. . . . The current open banking approach does not empower consumers; it entrenches unaccountable practices.").

[11] *See* Giuseppe Bianco and Andras Molnar, *Data Portability in Open Banking: Privacy and Other Cross-Cutting Issues* 8–9 (OECD, Digital Economy Papers No. 348, 2023), https://www.oecd.org/content/dam/oecd/en/publications/reports/2023/02/data-portability-in-open-banking_84cca550/6c872949-en.pdf.

Question 5. If a "representative" under 12 U.S.C. 5481(4) is interpreted to mean an individual or entity with fiduciary duties, to what extent would it limit customers' ability to transfer their transaction data to third parties under Section 1033 or the ability of financial technology and other third-party service providers to compete with incumbent market participants?

Answer 5. Limiting "representative" to fiduciaries would not limit new entry unacceptably, because the costs of broad mandatory data sharing might exceed the benefits. If "representative" is read to mean someone with fiduciary duties to the consumer, this will somewhat limit the scope and scale of information-sharing under Section 1033, and (relatedly) the ability of some third parties to compete with incumbents. However, sharing would continue, as data files could be transferred directly by the consumer, data would be shared over negotiated APIs, and customer-authorized screen scraping could continue.

Some stakeholders might argue that *any* limits on sharing and competition are entirely unacceptable. But this conclusion is not self-evident, for the following reasons:

1) *Financial services markets are competitive*: Despite reduced entry as financial institutions grapple with regulatory compliance costs, United States financial services markets are competitive.[12] The depository credit intermediation sector, which includes banking, is less concentrated than department stores, wired and wireless telecommunications, local messenger and delivery services, shoe retailing, grocery and convenience stories, accounting services, and gas stations.[13] New financial services companies already compete with traditional banks.[14] By contrast,

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[12] Jim DiSalvo, *Banking Trends: Has the Banking Industry Become Too Concentrated?*, ECON. INSIGHTS (Fed. Reserve Bank of Phila., Q1 2023), https://www.philadelphiafed.org/-/media/frbp/assets/economy/articles/economic-insights/2023/q1/bt-has-the-banking-industry-become-too-concentrated.pdf (finding no universal trend to concentration in banking in the past decade and that lending concentration has declined although branch deposits became more concentrated); *see also* Colangelo, *supra* note 8, at 22 ("Rather than being highly concentrated, the U.S. market seems paradoxically to suffer from the opposite problem — namely, excessive fragmentation. As a result, the competitive issue that has emerged in the United States is one of market concentration at the intermediary level (*i.e.*, data aggregators), rather than upstream (*i.e.*, banks).").

[13] *Concentration of Largest Firms for the U.S., 2022,* U.S. CENSUS BUREAU, https://usatrade.census.gov (last visited Oct. 10, 2025).

[14] For example, even before covid, growth in deposits of online banks in the United States outstripped growth in deposits of traditional banks. Hein Bogaard, Sebastian Doerr, Nicole Jonker, Hua Kiefer, Onur Koltukcu, Calixto Lopez, José R H Ornelas, Ricky Rambharat, Sigrid Röhrs, Federica Teppa, Frans van Bruggen & Eric Vansteenberghe, *Literature Review on Financial Technology and Competition for Banking Services* 20 n. 14 (Basel Committee on Banking Supervision Working Paper No. 43, 2024), https://www.bis.org/bcbs/publ/wp43.pdf, *citing* Stuart Plesser, Devi Aurora & Brendan Browne, *The Future of Banking: The Growth of Technology*, S&P GLOBAL RATINGS (Feb. 13, 2019).

the United Kingdom adopted open banking mandates after antitrust authorities found significant problems with competition in U.K. financial services.[15]

Furthermore, the scope of financial services that absolutely require historic consumer transaction data to deliver benefits to consumers is a small subset of the universe of financial services. Payment services are a larger market[16] but raise the most troubling security concerns.

2) *Financial Services markets are moving towards open banking on their own*: Markets may converge on technical standards without regulatory intervention, as Cato analyst Jack Solowey detailed in his 2023 comments.[17] The International Organization for Standardization (ISO), the world's main international standard-setting body, is a voluntary non-governmental organization.[18] The ISO's U.S. delegate, the American National Standards Institute (ANSI), is a private non-profit organization.[19] Many industrial standards evolved primarily in response to market forces, including shipping containers,[20] the Universal Serial Bus (USB) standard,[21] and Bluetooth standards.[22]

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[15] Colangelo, *supra* note 8, at 5.

[16] *See* Patrick McKenzie, *Open Banking and Payments Competition*, BITS ABOUT MONEY (Aug. 13, 2025), https://www.bitsaboutmoney.com/archive/open-banking-and-payments-competition/ (last visited Oct. 10, 2025).

[17] *See generally* Comment of Jack Solowey, Cato Institute, Comment on Required Rulemaking on Personal Financial Data Rights (Consumer Fin. Prot. Bureau, Docket No. CFBP-2023-0052), https://www.regulations.gov/comment/CFPB-2023-0052-0764.

[18] *Structure and Governance*, INTERNATIONAL ORGANIZATION FOR STANDARDS, https://www.iso.org/structure.html (last visited Oct. 13, 2025); *See also* Cynthia J. Martincic, *A Brief History of ISO*, IT STANDARDS (Feb. 20, 1997), https://www.sis.pitt.edu/mbsclass/standards/martincic/isohistr.htm (last visited Oct. 13, 2025).

[19] *Introduction*, AMERICAN NATIONAL STANDARDS INSTITUTE, https://www.ansi.org/about/introduction (last visited Oct. 13, 2025).

[20] Barnaby Lewis, *Boxing Clever—How Standardization Built a Global Economy*, INTERNATIONAL ORGANIZATION FOR STANDARDS (Sept. 11, 2017), https://www.iso.org/news/ref2215.html.

[21] *Two Decades of 'Plug and Play' How USB Became the Most Successful Interface in the History of Computing*, INTEL, https://www.intel.com/content/dam/www/public/us/en/documents/articles/usb-two-decades-of-plug-and-play-article.pdf (last visited Oct. 13, 2025).

[22] Robert Triggs & Calvin Wankhede, *A Little History of Bluetooth*, ANDROID AUTHORITY (Sept. 1, 2023), https://www.androidauthority.com/history-bluetooth-explained-846345/; and *Governing Documents*, BLUETOOTH, https://www.bluetooth.com/about-us/governingdocuments/ (last visited Oct. 13, 2025).

Consistent with this, open banking arrangements were expanding before the CFPB's open banking rules were offered in 2024. The CFPB noted that market forces were a significant factor in this trend:

> "Awareness of CFPA Section 1033 may have contributed to these outcomes, though adoption is also influenced by data providers' desire to shift third party access away from screen scraping and towards more secure and efficient technologies, as well as the demand for third party access from data providers' customers."[23]

In 2023, the Bureau noted that "the share of access attempts using screen scraping has declined from 80 percent in 2019 to 50 percent in 2022."[24] The Bureau also found that "the use of credential-free APIs has grown from less than 1 percent in 2019 and 2020 to 9 percent in 2021 and 24 percent in 2022."[25] This growth has continued. As of April 2025, the Financial Data Exchange reports that consumer connections that use FDX API grew from 65 million in the fall of 2023 to 114 million in the spring of 2025.[26]

3) *An open banking regime that ignores property rights and investment incentives means regulatory arbitrage, not beneficial competition:* No new entrant in any business has an inherent right to access incumbents' facilities or information held by incumbents. Courts have mandated such access when an incumbent violates antitrust law. Regulators have mandated such access to foster competition in sectors dominated by government-sponsored monopolies, such as regulated utilities.[27] But property rights, not access mandates, are the normal foundation of a market.

   Creation of mandatory access rights foments ongoing disputes over pricing, quality, liability, and other issues. Competition that emerges naturally benefits consumers. But new entry spurred by mandated access regimes has limited benefits and high

[23] Proposed Rule: Required Rulemaking on Personal Financial Data Rights ("Proposed 2023 Rule"), 88 Fed. Reg. 74796, 74845 (proposed Oct. 31 2023) (to be codified at 12 C.F.R. pt. 1033).

[24] *Id.*

[25] *Id.*

[26] *114 Million Reasons to Keep Moving Forward on Industry-Led Standard for Secure Data Sharing*, FINANCIAL DATA EXCHANGE (Apr. 25, 2025), https://www.financialdataexchange.org/FDX/FDX/News/Press-Releases/114%20Million%20Reasons%20to%20Keep%20Moving%20Forward%20on%20Industry-Led%20Standard%20for%20Secure%20Data%20Sharing.aspx (last visited Oct. 8, 2025).

[27] In the Matter of Implementation of the Local Competition Provision in the Telecommunications Act of 1996, 11 F.C.C.R. 15499 ¶ 1 (1996) ("In the new regulatory regime, [the FCC] and the states remove the outdated barriers that protect monopolies from competition and affirmatively promote efficient competition using tools forged by Congress.").

regulatory costs: it might amount to little more than regulatory arbitrage.[28] Mandated access is also unfair to incumbents, who are in effect required to pay for services or assets used by competitors.

Regulators' efforts to spur competition in telecommunications in the 1990s illustrate problems with mandatory access regimes. The Telecommunications Act of 1996 required incumbent telcos to interconnect[29] with competing local exchange carriers (CLECs) — a noncontroversial measure.[30] However, The FCC then required incumbents to sell unbundled network elements to CLECs at below-market rates, so the CLECs could resell services to consumers. Many CLECs were inefficient entrants, reliant on the incumbent's underpriced assets, and ultimately failed without producing net benefits for consumers.[31] The FCC's efforts to hothouse CLECs reduced investment incentives[32] and led to years of litigation and regulatory disputes.[33] Economist Gerald Faulhaber observed that sharing mandates typically worked *only* when sharing was technically simple, or when the incumbent entity was kept out of the new entrant's line of business.[34] The history of telecommunications teaches us to be wary of rules that encourage new entrants to free-ride on value created by other economic actors.[35]

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[28] Robert S. Pindyck, *Mandatory Unbundling and Irreversible Investment in Telecom Networks*, 6 REV. NETWORK ECON. No. 3, 274, 296 (2007), https://web.mit.edu/rpindyck/www/Papers/MandatoryUnbundlingTelecomRNE2007.pdf.

[29] 47 U.S.C. § 251.

[30] Thomas W. Hazlett, Coleman Bazelon, John Rutledge, & Deborah Allen Hewitt, Sending the Right Signals: Promoting Competition Through Telecommunications Reform: A Report to the U.S. Chamber of Commerce 15 (2004), https://ripuc.ri.gov/sites/g/files/xkgbur841/files/eventsactions/docket/3692-VRI-DR%2809-23-05%29.pdf ("In contrast to interconnection mandates and the elimination of franchise barriers, network-sharing mandates have been far more problematic to devise and implement.").

[31] *See id.*, at 19–25.

[32] Pindyck, *supra* note 28, at 297 (under-pricing of network elements available to all CLECS created disincentives to investment without offsetting benefits) ("Policies that recognize and account for investment incentives are better able to insure the continued health of existing networks and the growth of new ones."); Robert W. Crandall, Allan T. Ingraham & Hal J. Singer, *Do Unbundling Policies Discourage CLEC Facilities-Based Investment?*, 4 *B.E. J. Econ. Analysis & Pol'y* 1, 1–24 (2004).

[33] HAZLETT *et al*, *supra* note 30, at 10, 17 ("The FCC has spent eight years inconclusively drafting and redrafting network-sharing rules, with ill effects spilling over to capital markets.") ("Market rivalry has given way to a telecommunications sector 'war of the roses.'").

[34] Gerald R. Faulhaber, Policy-Induced Competition: The Telecommunications Experiments, 15 INFO. ECON. & POL'Y 73 (2003).

[35] HAZLETT *et al*, *supra* note 30, at 19–25 (describing problems with regulatory pricing model that ignored incentives to invest, causing an influx of new entrants without yielding benefits for consumers).

By contrast, facilities-based wireless competition allowed new firms to enter the market without extensive piggybacking on the incumbent's networks and without distorting investment incentives.[36] Former CFPB director Chopra has posited that open banking is like wireless competition.[37] However, there are key differences:

- The financial services sector is not a government-sponsored monopoly or a regulated utility. Financial services are more competitive now than telecommunications in the 1990s and telecommunications today.[38]
- Interconnection is crucial to competition in telecommunications because it enables calls initiated on one network to reach customers on another, but such connectivity is not as important in financial services.
- Telecommunications rules provided for "reciprocal compensation" — payments, usually negotiated, made by one carrier for use of another's network.[39] Reciprocal compensation was asymmetric, but better than nothing.[40] By comparison, under the PFDR, reciprocal benefits for incumbent data providers are sparse.
- Number portability rules, which let consumers switch carriers without changing phone numbers, were low risk (when adopted) and simple: porting financial data from one institution to another is complex and has high security and privacy risks.[41]

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[36] *Id.*, at 8.

[37] Rohit Chopra, *Prepared Remarks of CFPB Director Rohit Chopra at the Federal Reserve Bank of Philadelphia on the Personal Financial Data Rights Rule*, CFPB NEWSROOM (Oct. 22, 2024), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-at-the-federal-reserve-bank-of-philadelphia-on-the-personal-financial-data-rights-rule/#:~:text=One%20foundational%20aspect%20is%20to,rule%20using%20this%20dormant%20authority.

[38] *Concentration of Largest Firms for the U.S., 2022*, *supra* note 13.

[39] 47 U.S.C. § 252; Southwestern Bell Tel. Co. v. Pub. Util. Comm'n of Texas, 208 F.3d 475, 477 (5th Cir. 2000); *see also* Verizon Maryland Inc. v. RCN Telecom Services, Inc., 248 F. Supp. 2d 468 (D. Md. 2003).

[40] Over time, the FCC moved away from reciprocal compensation to "bill and keep," a model in which each telecommunications carrier's use of others' networks is reflected in the prices it charges its own subscribers. This avoids conflict between carriers arising from asymmetric traffic patterns. *Intercarrier Compensation*, FEDERAL COMMUNICATIONS COMMISSION, https://www.fcc.gov/general/intercarrier-compensation-0?utm_source=chatgpt.com (last visited Oct. 20, 2025). Bill and keep would be another alternative model for open banking charges.

[41] Peter Swire, *The Portability and Other Required Transfers Impact Assessment (PORT-IA): Assessing Competition, Privacy, Cybersecurity, and Other Considerations*, 6 GEO. L. TECH. REV. 57, 152, 155, 158, 187 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3689171 ("Phone number portability has a combination of large benefits and low costs that has made it a prime example for proponents of other PORT initiatives. The benefits are high due primarily to the reduced lock-in effect for all phone

Unlike wireless competition, the PFDR would distort investment incentives by allowing free riding, raises serious security issues, and is likely to set off long rounds of litigation and regulatory instability.

Reading Section 1033 to limit "representatives" to fiduciaries would somewhat limit the rapid rise of new financial services. However, it would not block the emergence of new non-fiduciary competitors entirely. Negotiated access through APIs would continue, driven by consumer demand. Consumers could obtain their transactional data directly and transfer it to a new entrant, who would develop mechanisms to make this more convenient and secure.

Competition between financial institutions is healthy and open banking is already growing. Therefore, the upside of a broad open banking regime in the United States would be limited as compared to Europe.[42] The costs of a mandatory open banking regime would be high, because it would encourage inefficient entrants. Policymakers should support property rights, not enact rules that encourage free riding. The CFPB should not strain the meaning of "representative" to support a broad mandatory open banking regime, because the result would look more like regulatory arbitrage than competition.

QUESTION SET 2: DEFRAYMENT OF COSTS OF EXERCISING RIGHTS UNDER SECTION 1033

Question 9. Does the PFDR Rule's prohibition on fees represent the best reading of the statute? Why or why not?

Answer 9: The prohibition on fees is not authorized by the statute. The PFDR Rule's prohibition on fees does not represent the best reading of the statute.[43] The statute does not authorize the CFPB to engage in any kind of price regulation and does

users. The privacy and security risks were very low at the time the PORT was enacted (although security risks have become greater recently). The other case studies have not generally shown this pattern of clearly large benefits and low costs, so the phone number portability case study is less representative of the range of PORT initiatives than supporters of PORTability may have assumed.").

[42] Colangelo, *supra* note 8, at 19, 20 ("while the two primary rationales for regulator-driven open banking in other jurisdictions are chronic deficiencies in market contestability and the widespread use of screen scraping, neither of these features are present in the U.S. scenario. Since regulatory intervention is context-dependent and entails complex tradeoffs and sensitive choices . . . the absence of these justifications raises doubts about the potential added value of the CFPB's initiative — specifically, whether any benefits to innovation, competition, and consumer choice will outweigh regulatory costs.") ("a glance at the EU's recent review of its open-banking regime underscores the degree to which the proposed CFPB framework may represent an unnecessary regulatory burden. . . . [T]here should be significant doubts about the competitive implications of the proposed rules.").

[43] 12 C.F.R. 1033.301(c).

not prohibit fees.[44] Price regulation — including fee prohibitions — amounts to a drastic departure from ordinary economic practice. The CFPB should not assume that Congress intended this result without explicit authorization.[45]

The fee prohibition is also bad policy. A fee prohibition means that incumbent data providers have little incentive to participate in the open banking ecosystem. With fee prohibition, open banking rules will be experienced by many data providers almost entirely as a detriment. Data providers seek an end to screen scraping to better protect security – but security should be a baseline expectation, not a bonus. Lacking incentives to participate in open banking, data providers will be unlikely to invest in the development, installation, and servicing of high-quality interfaces.[46] Protracted litigation is also more likely.

Advocates for fee prohibition will note that if data providers always charge fees so high that no one will pay them, data will not be shared, and the open banking regime will fail. Thus, a mandatory open banking regime must logically include elements of price regulation. Following this line of reasoning, the Bureau prohibited fees, claiming there was no "workable and administrable standard" that would enable it to determine a "reasonable" fee.[47] Certainly, as detailed in answer to Question 15, regulatory fee-setting is problematic. But the Bureau's best choice would have been to recognize that if a mandatory open banking regime indeed necessitates price regulation, *the best policy would be for the CFPB to not create a mandatory open banking regime*.

If the Bureau insists on creating a mandatory open banking regime, it will need a second-best option. The second-best option is not fee prohibition. Rather, the Bureau should look for other models to allow reasonable fees without price setting. Below, I describe such second-best option in greater detail.

Trusting market forces to yield commercially reasonable pricing is a workable alternative to fee prohibition. If a mandatory open banking regime is created – either a broad regime, or a regime limited to fiduciaries – the CFPB should allow data providers to negotiate and charge commercially reasonable fees. The CFPB should not try to identify or set reasonable fees. Rather, the Bureau should trust that consumer demand for data sharing will generally encourage data providers to negotiate in good faith.

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[44] Several other statutes explicitly require information to be provided free to the customer. For example, in the case of identity theft, consumer reporting agencies must provide required disclosures "without charge to the consumer." 15 U.S.C. § 1681c-1(a)(2)(B).

[45] *See* West Virginia v. Environmental Protection Agency, 597 U.S. 697, 723 (2022) ("Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle devices.'") (citation omitted).

[46] Colangelo, *Open Banking Goes to Washington*, *supra* note 8, at 10 (reporting complaints about the quality of APIs in Europe).

[47] Required Rulemaking on Personal Financial Data Rights, 89 Fed. Reg. 90,838, 90,886 (Nov. 18, 2024).

Trusting market forces to guide pricing works in similar contexts. For example, standard-setting organizations require elements of a standard to be licensed at fair, reasonable, and nondiscriminatory (FRAND) prices; however, the standard-setting organization does not actually set the prices. In telecommunications, carriers were expected to negotiate reasonable reciprocal compensation in good faith. Arbitration was used to resolve telecommunications carrier disputes over reciprocal compensation when negotiations failed.[48]

Commercially reasonable pricing (without top-down regulatory price-setting) has been under consideration for open banking systems in other countries. The EU Data Act anticipates that data providers would charge FRAND rates for data.[49] The European Commission has supported the idea that data providers should be able to charge reasonable fees to promote investment and improve API quality.[50]

If the CFPB insists on creating a mandatory open banking regime, it could avoid both fee prohibition and the worst problems of price regulation by recommending that fees for access to data be commercially reasonable and negotiated in good faith. Skeptics will point out that, recently, one major data provider announced that it would charge fees[51] that some commentators consider unworkably high. However, it does not follow from this single controversy that market forces would not moderate fees generally, especially if the CFPB avoids enacting rules that blunt the force of consumer demand. In particular, screen scraping authorized by consumers should be allowed.[52] Screen scraping is not ideal, but it does motivate data providers to participate in open banking.

Furthermore, in the event that negotiations between data providers and data users fail sometimes, disputes over fees could be referred to binding private arbitration. In arbitration, past contracts between industry stakeholders could help parties and the arbitrators develop an understanding of what is commercially reasonable. For example, in negotiated API agreements the data provider might consider setting fees based on the

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[48] 47 U.S.C. § 252(b). Under this provision, the arbitrator is a state public utility commission. A private-sector arbitrator would be the best choice for a similar regime in financial services.

[49] Colangelo, *Open Banking Goes to Washington*, *supra* note 8, at 21-22 (describing "order to promote investment and safeguard appropriate incentives to develop high-quality inter-faces").

[50] *Id.*, at 21-22 (describing "order to promote investment and safeguard appropriate incentives to develop high-quality inter-faces"). Europe's open banking regime also will allow data providers to charge market rates for value-added premium APIs. However, this does not solve the problems associated with rate regulation of the basic tier. *See id.*, at 11.

[51] *See* Evan Weinberger, *JPMorgain-Plaid Data Fee Deal Shifts Open Banking Battlefield*, BLOOMBERG LAW (Sept. 18, 2025, 5:00 am EDT), https://news.bloomberglaw.com/banking-law/jpmorgan-plaid-data-fee-deal-shifts-open-banking-battlefield.

[52] *See* Jack Solowey, *Regulatory Scrapes: Consumer Choice Can Avert Conflict Over Open Banking Rules*, CATO AT LIBERTY (blog), CATO INSTITUTE (Feb. 3, 2023), https://www.cato.org/blog/regulatory-scrapesconsumer-choice-can-avert-conflict-over-open-banking-rules.

data recipients' own pricing model. Such a standard would be moored in supply and demand rather than in exhaustive cost inquiries.

To supplement commercially reasonable fees, the CFPB could call for reciprocal data sharing between data providers and data recipients.[53] Incumbent data providers would have more data to share than some new entrants, so reciprocal data sharing would not always provide symmetric benefits. Over time, this balance should improve. A reciprocity rule would prevent incumbent data providers from being overwhelmed by "Big Tech" entrants, who enter the market from a strong position.[54] A reciprocity rule would also benefit small data providers, who might not find anyone willing to pay for access to their data.

The prohibition on fees is not supported by any language in Section 1033. It deprives data providers of ongoing incentives to participate in or invest in the open banking system. However, if the CFPB creates a mandatory open banking regime, it will be tempted to prohibit fees or otherwise engage in price regulation. Therefore, the CFPB's best policy will be not to create a mandatory open banking regime.

If the CFPB insists on creating such a regime, it should avoid both fee prohibition and price-setting by simply allowing data providers to charge commercially reasonable fees and refer disputes to arbitration.

Question 10. Was the PFDR Rule correct to conclude that permitting fees "would obstruct the data access right that Congress contemplated"? Why or why not?

Answer 10: Permitting fees supports markets and thus does not obstruct data access rights. The PFDR Rule was not correct to conclude that permitting fees would obstruct data access rights. The best way to advance access to goods and services is to support markets in those goods and services. Service fees offer those earning them an incentive to participate in the market. As soon as fees are prohibited, this incentive vanishes. A short-sighted person might say that farms and grocery stories obstruct

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[53] Colangelo, *supra* note 8, at 22 ("[T]he CFPB replicates the asymmetric treatment imposed on financial institutions by the PSD2 (as well as by the current EU proposals), under which banks and other lenders have a duty to share account data, while no reciprocal obligation is imposed on data recipients. Restricting access and use of data may serve to hinder development of innovative products or services, and a bidirectional access-to-data-account rule in PSD2 could have been used to enhance digital-payment services. A system in which all eligible entities participate would be more dynamic and promote greater competition. Therefore, in principle, there is good reason to establish that accredited data recipients in a designated sector should also be obliged to provide equivalent data in an equivalent format, in response to a consumer request. Further, an unbalanced data-sharing burden risks over-empowering new players.").

[54] *Id.*, at 8 ("from a competitive standpoint, there have also been questions about the asymmetric nature of data-sharing provisions that, in contrast with the goal of ensuring a level informational playing field, impose on banks a duty to grant access to TPPs without including a reciprocal obligation on the latter that would equally allow banks to enhance digital services.").

people's right to food by charging for it, but prohibiting charges for food is a recipe for famine, not for plenty.

Analysis of this question is complicated by contentious ideas about the ownership of consumers' transactional data. If one insists that covered transactional data is the consumer's property, one might assume that data providers are duty bound to hand over the data for free. Others would reap the benefits of data providers' investments in maintaining the data's integrity and the transfer interface, but that is just bad luck for the data providers, because consumers' entitlement to the data takes priority. However, note that Section 1033 does not literally state that consumers own the covered transactional data. The CFPB should avoid an assumption along those lines.

Our legal system is slow to recognize ownership rights in facts and other data, for good reason.[55] This is particularly true when the data includes facts that concern multiple parties. Designating one party the owner of data is especially problematic when another party controls the data and must invest in its presentation, accuracy, and security. The best reading of Section 1033 is that both consumers and their financial institution have legitimate interests in the transactional data covered by the section. The Dodd-Frank Act does not convey ownership of this data to anyone in any simple sense.

The unhelpful idea that consumers own the transactional data covered by Section 1033 does not justify describing fees as an obstruction to data access rights.

Question 15. Absent any legal precedent from other laws, should covered persons be able to recover a reasonable rate for offsetting the cost of enabling consumers to exercise their rights under Section 1033? Why or why not?

Answer 15. The CFPB should allow commercially reasonable fees but should avoid any inquiry into costs. As described in the answer to Question 9, data providers should be able to charge commercially reasonable fees for access to data and APIs. However, the CFPB should reject the idea that fees must track actual costs, forward-looking costs, marginal costs, or any other kinds of costs. Embracing this idea would lead the CFPB inexorably to cost-based price regulation.

If the CFPB rules that data providers may charge fees for access to consumer transactional data, so long as the fees reflect the covered person's costs, there will be no end of investigations of, and disputes over, the amount and nature of the covered persons' costs. If the CFPB does not intend to make such inquiries, there is little point in having the rule. Thus, focusing on costs leads to price regulation.

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55 Matthew Feeney, *Statement for the Record: Big Data: Privacy Risks and Needed Reforms in the Public and Private Sectors*, CATO INSTITUTE (Feb. 15, 2022), https://www.cato.org/sites/cato.org/files/2022-02/feeney-statement-for-the-record-2-15-2022.pdf.

Price regulation takes many forms but is always problematic.

1) *Requiring prices to track costs breeds inefficiency*. In a market, firms generally have incentives to reduce costs. If a regulator rules that prices must be limited to an amount necessary to cover costs, the firm no longer has an incentive to cut costs. If the limit is revised to allow the firm to own a fair rate of return over costs, the firm nonetheless knows that costs may be incurred strategically to justify higher prices. Thus, economists have long found that attempts to set prices based on cost breeds inefficiencies such as gold-plating.[56] Also, this type of regulation is expensive, because of the need for constant investigation of firms' costs.[57]

2) *Incentive regulation isn't much of an improvement*. Following regulators' disenchantment with cost-based rate of return regulation, regulators experimented with incentive regulation such as price caps.[58] Price caps are extremely difficult to design and implement and require complementary quality regulation.[59]

   Sometimes, regulators have used "forward-looking" cost models that regulate prices according to costs that an ideal firm would theoretically incur. These models are particularly difficult to develop, and their effects are often arbitrary, especially when imposed on firms operating in circumstances different from the ideal circumstances of an imaginary model firm.[60]

3) *Requiring prices to track marginal costs limits investment incentives*. Marginal cost is the cost of producing an additional unit of something after one has produced the first.[61] Particularly in considering information markets, policymakers have been tempted to think that prices should track marginal cost:

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[56] Harvey Averch and Leland L. Johnson, *Behavior of the Firm Under Regulatory Constraint*, 52 AM. ECON. REV. NO. 5, 1052 (1962).

[57] *See generally*, David E. M. Sappington, *Price Regulation and Incentives*, *in* 1 HANDBOOK OF TELECOMMUNICATIONS ECONOMICS 225 (Martin E. Cave et al. eds., 2002).

[58] *Id.*

[59] David E. M. Sappington & Dennis L. Weisman, *Price Cap Regulation: What Have We Learned from 25 Years of Experience in the Telecommunications Industry?*, 38 J. REGUL. ECON. 227 (2010).

[60] *See, e.g.*, *Peer Review of Connect America Phase II Cost Model*, FEDERAL COMMUNICATIONS COMMISSION, https://www.fcc.gov/general/peer-review-connect-america-phase-ii-cost-model (last visited Oct. 9, 2025).

[61] Formally, marginal cost is "the additional cost of producing one more unit of output; the change in total costs divided by the change in output." ROBERT B. EKELUND, JR. & ROBERT D. TOLLISON, ECONOMICS 197 (3d ed. 1991).

this idea leads to bad policy outcomes,[62] as it assumes that the investment in the productive system has already been made. Insisting that prices track marginal cost means focusing on *static efficiency* (what markets are doing right now) rather than *dynamic efficiency* (what markets will tend to do over time). Studying ivory-tower models of perfect competition in which prices fall to marginal cost can be informative,[63] but careful economists emphasize that these models should not serve as normative guides to real-world policy.[64] Dynamic efficiency is the best focus: long-run incentives matter. If one is concerned about the underuse of information, it is unhelpful to ignore the incentives to promote the production of such information.[65] To return the discussion to open banking, one central problem is that data producers have few incentives to participate in the open banking system: a focus on marginal cost will reinforce that problem.

The financial services sector is not a regulated public utility, and the CFPB is not the Federal Communication Commission — which has considerable experience in price regulation, and which is nonetheless endlessly entangled with the problem of how to get rid of it. Inquiries into costs have been a sad feature of regulated utility markets but have no place in competitive markets such as banking. Market forces of supply and demand,

[62] *See* William J. Baumol, *Regulation Misled by Misread Theory: Perfect Competition and Competition-Imposed Price Discrimination* 1 (AEI-Brookings Joint Center for Regulatory Studies 2006), https://www.aei.org/wp-content/uploads/2014/03/-regulation-misled-by-misread-theory_105820523401.pdf ("Economists have generally been careful to point out that perfect competition is an artificial concept, albeit a useful and powerful analytic device. . . . But the optimality properties long associated with this market form . . . have tempted some who are not as careful as they should be to invite regulators and antitrust authorities to use perfect competition theory for guidance in their rulings, as a way to promote the public interest. . . . Never mind that this is a prescription for undermining intertemporal efficiency. Never mind that marginal-cost pricing would generally preclude recoupment of the research and development (R&D) costs of the innovations at issue, costs that will have to be incurred many times again if innovation is to continue. And never mind that a world of perfect competition requires constant returns to scale and firms so small that they would never attract the attention of regulatory or antitrust personnel.").

[63] *See* EKELUND & TOLLISON, *supra* note 61, at 239–41. (Noting that "[i]f [Price] equals [long-run marginal cost] resource allocation is ideal in the sense that the things consumers want are produced by competitive firms in the exact quantities and combination . . . that consumers desire and at the lowest cost. . . . The model of perfect competition is based on several key assumptions. One of these assumptions is that information about the prices and services is free. . . . We live, of course, in a more complex world.").

[64] Carl J. Dahlman, *The Problem of Externality*, in *Public Goods and Market Failures* 209, 212–17 (Tyler Cowen ed., 1992); Ronald Coase, *The Coase Theorem and the Empty Core: A Comment*, 24 J. L. & ECON. 183, 187 (1981) ("[W]hile consideration[s] of what would happen in a world of zero transaction costs can give us valuable insights, these insights are . . . without value except as steps on the way to the analysis of the real world of positive transaction costs."); *see also* Gordon Tullock, The Two Kinds of Legal Efficiency, 8 HOFSTRA L. REV. 659, 668 (1980) (describing the misuse of transaction costs concepts in law and economics literature).

[65] *See* Harold Demsetz, *Information and Efficiency: Another Viewpoint, 12* J. L. & ECON. *1*, 11 (1969) ("It is hardly useful to say that there is 'underutilization' of information if the method recommended to avoid 'underutilization' discourages the research required to produce the information.").

not costly, prolonged, and divisive inquiries into costs, should determine fees for data and API access.

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Thank you for this opportunity to contribute to the CFPB's reconsideration of the rules for personal financial data rights. I am happy to answer questions or participate further in the discussion of this topic.

Sincerely,

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