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Comment Intake
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, D.C. 20552

Re: Comments on Request for Information and Comment on Financial Institutions' Use of Artificial Intelligence, Including Machine Learning [Docket No. CFPB-2021-0004]

To Whom It May Concern:

I write on behalf of the Consumer Data Industry Association ("CDIA") to comment upon the interagency Request for Information and Comment on Financial Institutions' Use of Artificial Intelligence, Including Machine Learning (the "RFI") published by the Board of Governors of the Federal Reserve System, the Bureau of Consumer Financial Protection, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of the Comptroller of the Currency (collectively, the "Prudential Agencies").[1]

CDIA is the voice of the consumer reporting industry, representing consumer reporting agencies including the nationwide credit bureaus, regional and specialized credit bureaus, background check and residential screening companies, and others. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals, and to help businesses, governments, and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity, help ensure fair and safe transactions for consumers, facilitate competition, and expand consumers' access to financial and other products suited to their unique needs. CDIA is an international trade association with approximately 100 corporate members that educates policymakers, consumers, and others on the benefits of using consumer data responsibly. CDIA also provides companies with information and tools to manage risks and protect consumers. Members of CDIA are consumer reporting agencies ("CRAs"). Our members provide factual, reliable, unbiased data to decision makers, like lenders, creditors, and credit score developers. The information CRAs provide undergirds the American

[1] 86 Fed. Reg. 16837 (Mar. 31, 2021), available at https://www.govinfo.gov/content/pkg/FR-2021-03-31/pdf/2021-06607.pdf.

economy, and the strength of our economy is based upon dependable, consistent, and accurate information.

The RFI asks certain questions regarding "financial institutions' risk management practices related to the use of artificial intelligence ("AI"); barriers or challenges facing financial institutions when developing, adopting, and managing AI and its risks; and benefits to financial institutions and their customers from the use of AI."[2] The RFI also seeks input on the use of AI in financial services and whether clarification is needed to allow financial institutions to use AI "in a safe and sound manner and in compliance with applicable laws and regulations, including those related to consumer protection."[3]

CDIA recognizes that there are unique issues raised by the development, use, and monitoring of AI tools in a variety of arenas, including financial services. However, although AI raises regulatory questions and challenges, its use and expansion in the context of consumer credit is worthwhile because of the tremendous role it can play in ensuring financial inclusion, when properly developed, used, and monitored. There is untold societal value in expanding the pool of financially-included consumers, particularly given current societal conditions, in which individuals are experiencing more economic disparity than ever. Because of the important consumer benefits offered by using AI, it is of tremendous importance that the use of AI and machine learning ("ML") is not over-regulated, as doing so would stifle innovation and growth, thereby restricting access to credit, rather than expanding it. With these concepts in mind, CDIA sets forth the following comments relevant to the topics and questions articulated by the Prudential Agencies in the RFI.

Explainability. The RFI articulates the Prudential Agencies' concerns regarding AI approaches that demonstrate a lack of explainability for their overall function or how they arrive at an individual outcome in each situation. According to the Prudential Agencies, lack of explainability poses various challenges, including (a) inhibiting understanding of the conceptual soundness of an AI approach, thus increasing uncertainty and risk regarding the AI approach's reliability and potential uses; and (b) inhibiting independent review of the approach, making compliance with laws and regulations more challenging. Thus, the RFI seeks information regarding identifying and managing risks relating to AI explainability, including evaluating soundness; barriers and challenges that exist for developing, adopting, and managing AI, and any uses of AI for which lack of explainability is a particular challenge.

While lack of explainability may present challenges with AI approaches in some cases, any

[2] *Id.* at 16840.
[3] *Id.*

required disclosure and transparency for AI must be balanced with the significant need to protect intellectual property ("IP"). Risk assessment, risk management, disclosure, and transparency are key to building public trust in AI and to its overall success, and explainability is a crucial component of these keys. However, as the former director of the Federal Trade Commission ("FTC") Bureau of Consumer Protection identified in a 2020 blog post, AI developers must also think about how AI tools can be abused and control access to the tools in a way that helps to guard against such misuse.[4]

Thus, the Prudential Agencies must take care to avoid imposing explainability requirements that require a degree of explainability that, in turn, impedes the innovative development and use of AI for fear of disclosure of IP, leading to unauthorized replication of AI tools and the potential for uncontrollable misuse by competitors and others who seek to game the system. CDIA members have made significant investments in IP that is critical to their success, and members would be irreparably harmed if the Prudential Agencies take disclosure and transparency too far. Rather, any potential disclosure and transparency regulation, as well as any potential safety and security regulation, should be designed to encourage public trust without endangering legitimate trade secrets. Further, risk assessment and management approaches relating to explainability and conceptual soundness should take costs and potential benefits into account in such a manner that, in appropriate circumstances, allows some AI regulation to be deferred until markets and innovations have time to further mature.

Risks from Broader or More Intensive Data Processing and Usage. The RFI acknowledges the importance of data quality in AI usage, as AI is designed to interact with data, identify correlations and patterns, and use that information to make predictions and develop categorizations. Thus, the Prudential Agencies seek information as to how financial institutions manage risks related to data quality and data processing and whether there are specific uses of AI for which alternative data are uniquely effective.

CDIA members stress that access to greater amounts and more varied types of data about consumers, which can be relied upon by creditors in unbiased credit underwriting systems, is vital to expanding credit offerings to increased numbers of creditworthy consumers. Accordingly, the Prudential Agencies should take care to not stifle innovation in the fields of AI and ML, and in the use of alternative data in credit reporting and credit scoring, as the ability to use alternative data in novel ways driven by AI tools is an important element in expanding and leveling the financial playing

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[4] Andrew Smith, Federal Trade Commission, *Using Artificial Intelligence and Algorithms* (Apr. 8, 2020), available at https://www.ftc.gov/news-events/blogs/business-blog/2020/04/using-artificial-intelligence-algorithms.

field.

Though heavy-handed regulation is not needed, a guidance-based approach to providing regulatory clarity could result in uniformity in state regulation of the use of AI and ML, thereby increasing financial institutions' confidence in developing and relying upon such systems. As the Bureau of Consumer Financial Protection (the "Bureau") has stated, AI and ML "has the potential to expand credit access by enabling lenders to evaluate the creditworthiness of some of the millions of consumers who are unscorable using traditional underwriting techniques."[5] Further, use of AI may result in favorable "eligibility decisions or price reductions for customers that would otherwise lack access," potentially benefiting thin-file and unscorable customers.[6] But lack of regulatory clarity as to the use of AI and ML, particularly when it comes to inclusion of alternative data, leads to creditors failing to adopt the use of such methods and data for fear of adverse regulatory action.

CRAs understand that, for AI and ML systems to work effectively, provision of accurate data is of paramount importance for both consumers and financial institutions who rely upon consumer report information. Accurate data ensures that consumers are evaluated fairly. Thus, CRAs are committed to the accuracy of consumer report information, and have made significant investments in ensuring the accuracy of the data upon which such reports are built. The Federal Reserve Board has stated that, "[o]verall, research and creditor experience has consistently indicated that credit reporting company information…generally provides an effective measure of the relative credit risk posed by prospective borrowers."[7]

In addition to accurate traditional credit reporting products, the federal banking agencies have recognized the value and importance of alternative data in certain risk decisions. In the *Interagency Statement on the Use of Alternative Data in Credit Underwriting*, "alternative data" is described as "information not typically found in the consumer's credit files of the nationwide consumer reporting agencies or customarily provided by consumers as part of applications for

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[5] Consumer Financial Protection Bureau, *Innovation spotlight: Providing adverse action notices when using AI/ML models* (Jul. 7, 2020), available at https://www.consumerfinance.gov/about-us/blog/innovation-spotlight-providing-adverse-action-notices-when-using-ai-ml-models/.
[6] Dr. Florian Ostmann and Dr. Cosmina Dorobantu, The Alan Turing Institute, *AI in Financial Services* (2021), available at https://www.turing.ac.uk/sites/default/files/2021-06/ati_ai_in_financial_services_lores.pdf.
[7] Federal Reserve, *An Overview of Consumer Data and Consumer Reporting, Federal Reserve Bulletin,* at pp. 50-51 (citations omitted) (Feb. 2003), available at http://www.federalreserve.gov/pubs/bulletin/2003/0203lead.pdf; *see also* Federal Reserve, *Credit Report Accuracy and Access to Credit, Federal Reserve Bulletin, at* p. 320 (Summer 2004), available at https://www.federalreserve.gov/pubs/bulletin/2004/summer04_credit.pdf.

credit."[8] Moreover, "[t]he agencies recognize alternative data's potential to expand access to credit and produce benefits for consumers."[9] The federal banking agencies noted that alternative data "may improve the speed and accuracy of credit decisions and may help firms evaluate the creditworthiness of consumers who currently may not obtain credit in the mainstream credit system."[10] Further, "[t]hese innovations reflect the continuing evolution of automated underwriting and credit score modeling, offering the potential to lower the cost of credit and increase access to credit."[11] In line with this recognition, several large banks have recently announced their intention to begin factoring in data from consumers' checking or savings accounts in underwriting applications for credit cards, with a goal of expanding access to credit to consumers "who have traditionally lacked opportunities to borrow."[12]

In July 2019 testimony to Congress, Chi Chi Wu of the National Consumer Law Center indicated that "[a]lternative data has the potential to benefit millions of consumers, whether they are 'credit invisible' or they have impaired records…"[13] As Ms. Wu's testimony acknowledges, unfortunately, communities of color are more likely to be credit invisible and, as a group, have credit scores lower than those of whites.[14] But the means of resolving this gap is the nondiscriminatory use of increased types of data that can be used to accurately report credit outcomes. Increasing access to factual, accurate, and nondiscriminatory alternative data, and the automation of the use of such data through unbiased, algorithmic systems, will thus inevitably lead to creditors expanding credit offerings, rather than restricting them. As such, permitting novel and broader uses of alternative data, such as, for example, utility and telecommunications payment behavior, cashflow data, and rental payment data, beyond the narrow parameters currently available, and continuing to foster the evaluation of that data using AI and ML tools would be beneficial to consumers. Moreover, the marketplace itself inherently regulates AI systems by incentivizing accurate and

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[8] *Interagency Statement on the Use of Alternative Data in Credit Underwriting* (Dec. 3, 2019), available at https://files.consumerfinance.gov/f/documents/cfpb_interagency-statement_alternative-data.pdf.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Peter Rudegeair and AnnaMaria Andriotis, "JPMorgan, Others Plan to Issue Credit Cards to People With No Credit Scores" (May 31, 2021), available at https://www.wsj.com/articles/jpmorgan-others-plan-to-issue-credit-cards-to-people-with-no-credit-scores-11620898206?st=t23k7ojse4jwvd1&reflink=article_imessage_share.
[13] Testimony before the U.S. House of Representatives Committee on Financial Services Task Force on Financial Technology regarding "Examining the Use of Alternative Data in Underwriting and Credit Scoring to Expand Access to Credit" (Jul. 25, 2019), available at https://www.nclc.org/images/pdf/credit_reports/testimony-alternative-data-credit-scoring.pdf.
[14] *Id.*

predictive tools that allow the user to identify profitable opportunities that less accurate tools would not.

CDIA also notes that allowing states free rein to restrict use of AI and ML hampers financial institutions' abilities to effectively use AI systems and alternative data in a manner that will allow for greater financial inclusion. For example, the California Consumer Privacy Act added a provision to California law mandating that the California Attorney General issue regulations "governing access and opt-out rights with respect to businesses' use of automated decisionmaking technology, including profiling and requiring businesses' response to access requests to include meaningful information about the logic involved in those decisionmaking processes, as well as a description of the likely outcome of the process with respect to the consumer."[15] Though these types of statutes are generally passed with good intentions, the obligation to provide "meaningful information" about the logic involved in automated decision-making and to allow consumers to opt out of such decision making will unnecessarily burden the use of AI and ML and may interfere with financial institutions' abilities to access and analyze useful alternative data on consumers.

Moreover, stringent regulation creates apprehension amongst financial institutions that using such AI and ML tools that incorporate alternative data into the data subsets will result in increased state and federal regulatory scrutiny or the imposition of penalties. Clear guidance from the Prudential Agencies regarding use of alternative data, and reliance upon AI and ML systems, would provide certainty to creditors. Further, guidance could inform state legislatures and result in a more uniform approach to regulation throughout the country, rather than subjecting financial institutions to an untenable patchwork of state regulation.

Fair Lending. With respect to fair lending, the Prudential Agencies articulate concerns regarding the challenges presented by ensuring that AI approaches align with applicable consumer protection legal and regulatory frameworks. Thus, the RFI asks questions about techniques available to evaluate compliance of AI-based credit underwriting with fair lending laws, the risks of discrimination in the use of AI approaches, and the challenges faced when applying internal model risk management principles and practices to models based on AI. The RFI also identifies and asks for feedback on approaches that can be used to notify applicants of adverse action taken on a credit application, when AI is used in the credit determination, and whether the Equal Credit Opportunity Act ("ECOA") and Regulation B provide sufficient clarity for the statement of reasons for adverse action when AI is used.

[15] Cal. Civ. Code § 1798.185(a)(16).

In April 2021, the European Commission published its Proposal for a regulation laying down harmonized rules on artificial intelligence.[16] The proposal contains comprehensive and specific regulation pertaining to AI, including rules for developing AI systems, prohibitions of certain AI practices, specific requirements for developers, transparency rules, and rules on market monitoring and surveillance.[17] While such regulation may be appropriate in the European Union, the United States need not attempt to model its own regulatory approach on the Proposal, as doing so would result in the stifling of innovation and growth in the marketplace, ultimately harming consumers.

Rather, existing regulatory paradigms should continue to be applied to the use, development, and monitoring of AI. As the FTC has stated, "while the sophistication of AI and machine learning technology is new, automated decision-making is not."[18] Further, "the Fair Credit Reporting Act (FCRA), enacted in 1970, and the Equal Credit Opportunity Act (ECOA), enacted in 1974, both address automated decision-making, and financial services companies have been applying these laws to machine-based credit underwriting for decades."[19] Current laws applicable to CDIA members[20] require that data used by such members be accurate, and users of CDIA member data are subject to laws prohibiting discrimination.[21] Accordingly, federal law in the United States already places sufficient guardrails applicable to AI that need only be supplemented with supervisory guidance, where appropriate, and industry consensus standards, as technology grows and evolves.

Financial institutions are often reluctant to adopt AI approaches, particularly those that incorporate alternative types of data, because of fears of running afoul of the ECOA and Regulation B. However, use of AI models analyzing alternative data for credit underwriting leads to greater financial inclusion. Therefore, any regulatory systems adopted to evaluate compliance of AI approaches with applicable fair lending laws must be developed considering the necessity of giving lenders comfort in adopting and applying such approaches. Moreover, it is important that the Prudential Agencies recognize that tests and requirements already existing under the Fair Credit

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[16] European Commission, Proposal for a Regulation laying down harmonized rules on artificial intelligence (Apr. 21, 2021), available at https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-laying-down-harmonised-rules-artificial-intelligence.
[17] *Id.*
[18] *Using Artificial Intelligence and Algorithms*, available at https://www.ftc.gov/news-events/blogs/business-blog/2020/04/using-artificial-intelligence-algorithms.
[19] *Id.*
[20] Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.*
[21] *See* Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.* (prohibiting discrimination in employment); Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 *et seq.* (prohibiting discrimination in credit); Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* (prohibiting discrimination in housing).

Reporting Act ("FCRA") and the ECOA and Regulation B are well-suited for evaluation of such systems, with, in some cases, the addition of guidance issued by the appropriate regulator. Though "cavalier use of AI could result in discrimination against a protected class,"[22] the answer is not to stifle use of AI and ML. Rather, because consumers and the marketplace as a whole benefit from the use of such tools, the potential for bias should instead be tempered by vigilant monitoring of data inputs and outcomes, and continued technological innovation.

Both public trust and public participation are important factors in establishing best practices for the enabling AI growth and innovation. Without public trust, AI may never be able to provide the consumer benefits and economic efficiencies it promises. However, while risk assessment, management, and monitoring are key to building public trust in AI and to its overall success, the Prudential Agencies should take care to avoid protocols that too severely impede innovative use of AI.

The RFI also seeks information regarding approaches that can be used to identify the reasons for taking adverse action on a credit application when AI is used, as required by the ECOA and Regulation B. Regulation B requires creditors to provide applicants with notices of adverse action, and dictates the required contents of such notices.[23] To facilitate such notifications, model forms are provided.[24] While the ECOA requires disclosing the principal reasons for denying or taking other adverse action on an application for an extension of credit, the FCRA requires a creditor to disclose when it has based its decision in whole or in part on information from a source other than the applicant or its own files.[25] Depending on the information used in the credit decision, such disclosures include the applicant's credit score, key reasons affecting the score, and other information gleaned from the applicant's report.[26]

Because of the increasing use of AI, ML, and dynamic credit scoring models using novel intersections between non-traditional data, the model adverse action forms need to be revised and updated to consider the use of alternative data in credit underwriting, compiled and analyzed using AI approaches. However, CDIA and its members also suggest such model forms are in fact innately confusing to consumers and should be revised to more plainly and clearly describe why a creditor denied a particular consumer. The goal of the model notices is to inform consumers as to why they

[22] *Using Artificial Intelligence and Algorithms*, at https://www.ftc.gov/news-events/blogs/business-blog/2020/04/using-artificial-intelligence-algorithms.
[23] 12 C.F.R. § 1002.9.
[24] 12 C.F.R. § Pt. 1002, App. C.
[25] 12 C.F.R. § Pt. 1002, Supp. I.
[26] *Id.*

were denied for credit, thus enabling them to identify derogatory factors that may be impacting their attempts to obtain credit. As a result, to truly be effective, such notices should be plain language, clear, and easily understood by most consumers. However, when used as currently drafted, such notices have a Flesch-Kincaid grade level score in excess of the 12th grade and the readability level indicates that a minimum of a college education is required to understand them. Such overly-complicated notices merely place an administrative burden on creditors, without a corresponding benefit to consumers.

Accordingly, CDIA members support revising the model forms. CDIA members also support the Bureau's prior efforts to act in this area, such as the October 2020 Adverse Action Virtual Tech Sprint,[27] as much-needed steps to improve the usefulness and readability of consumer disclosures, as well as to explore innovative ways to deliver the notices in a manner that better ensures that consumers will receive, read, understand, and make constructive use of them. Moreover, we support the Bureau continuing its efforts at consumer financial education, in general. Increased financial education and financial literacy is yet another key component of financial inclusion.

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CDIA appreciates the opportunity to comment on this RFI, which is of great importance to its members. CDIA members believe that because of the vast potential for AI use and the magnitude of its varying uses, the best approach to AI management is through voluntary consensus standards developed by private industry and through supervisory guidance, published and adopted by the Prudential Agencies in accordance with their Interagency Statement Clarifying the Role of Supervisory Guidance.[28] A policy of regulatory forbearance – unless it is absolutely necessary to regulate or avoid a patchwork of inconsistent state regulation – combined with full participation in the development of voluntary consensus standards—will ensure an orderly development of AI policy that works.

Sincerely,

Eric J. Ellman
Senior Vice President, Public Policy & Legal Affairs

[27] Consumer Financial Protection Bureau, *Electronic disclosure of adverse action virtual tech sprint* (available at https://www.consumerfinance.gov/policy-compliance/innovation/cfpb-tech-sprints/electronic-disclosures-tech-sprint/).
[28] 86 Fed. Reg. 18173 (Apr. 8, 2021).