



October 30, 2023

Submitted Via Electronic Mail (CFPB_consumerreporting_rulemaking@cfpb.gov)

Hon. Rohit Chopra, Director
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Re: MX Technologies, Inc.'s Comment on the CFPB's Outline of Proposals and Alternatives Under Consideration related to the Consumer Reporting Rulemaking

Dear Director Chopra:

MX Technologies, Inc. (MX) appreciates the opportunity to respond to the Consumer Financial Protection Bureau's (Bureau or CFPB) invitation to provide feedback on the Outline of Proposals and Alternatives Under Consideration (Outline) for the CFPB's rulemaking under the Fair Credit Reporting Act (FCRA). Thank you for the opportunity to provide MX's perspective on important issues raised by the CFPB's anticipated rulemaking.

MX's mission is to empower the world to be financially strong. MX believes that consumers must have the ability to access, direct, and control their financial data in order to make informed financial decisions that lead to financial strength. In support of this mission, MX's products and services provide participants of all sizes in the financial marketplace, including banks, credit unions, and fintech companies, with tools that they can use to help consumers access, better understand, and identify actions to take for their financial well-being. MX believes that data should be accessible and actionable for all consumers to enable better decisions, experiences, and outcomes.

The Outline suggests that the CFPB may propose a regulation interpreting the term "consumer reporting agency" broadly to include certain types of "data aggregators" who "engage in activities that the FCRA was designed to regulate." MX is a "data aggregator" as described in CFPB regulatory documents published as part of Rulemaking on Personal Financial Data Rights,¹ but it does not "engage in activities the FCRA was designed to regulate." MX's technology plays an essential role in the emerging open banking ecosystem by facilitating consumers' access to their own financial data, which MX collects and transmits *exclusively* at consumers' request. MX's business model and its treatment of consumers' data is distinct—in fundamental and legally significant ways—from "data brokers," traditional "consumer reporting agencies," and even some other "data aggregators," who collect and compile dossiers on individual consumers without their informed consent and often sell that information to third parties. MX urges the CFPB to ensure that any rulemaking under the FCRA considers and reflects these critical distinctions.

¹ See, e.g., CFPB, Advanced Notice of Proposed Rulemaking re Consumer Access to Financial Records, 85 Fed. Reg. 71003, 71004 (Nov. 6, 2020) (defining "data aggregator" as "an entity that supports data users and/or data holders in enabling authorized data access."); see also Proposed 12 CFR 1033.131 (defining "data aggregator" as "an entity that is retained by and provides services to the authorized third party to enable access to covered data.").

I. Legal Background

The FCRA was enacted in 1970 to address the emergence of a credit reporting industry that developed to meet the needs of the emerging national consumer credit industry but was rife with abuses. As the Bureau itself has observed, consumer reporting agencies were collecting a broad amount of highly personal information about ordinary Americans without their consent—and indeed typically without their knowledge—and selling this information to creditors, potential employers, and others without regard to the information’s accuracy or relevance.² To address these abuses, Congress enacted the FCRA, which was primarily focused on regulating the conduct of “consumer reporting agencies” who provide “consumer reports.”

The FCRA defines a “consumer reporting agency” as “any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of *assembling or evaluating* consumer credit information or other information on consumers *for the purpose of* furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.”³ A “consumer report,” in turn, is defined, as “any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of servicing as a factor in establishing the consumer’s eligibility for—(A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) [certain other specifically enumerated purposes set forth in 15 U.S.C. § 1681b(a)].”⁴ These definitions cannot be construed “in a vacuum,” but must be understood in light of the overall statutory context, the history and the purposes of the FCRA.⁵

Properly understood, the consumer reporting agencies subject to the FCRA have four essential characteristics:

- First, consumer reporting agencies will collect information about individual consumers from a variety of sources without consumers’ knowledge or consent. Consumers have no ability to “opt out” of the consumer reporting industry, and no control (absent the FCRA) over the information that is collected or reported.⁶
- Second, a consumer reporting agency can furnish a consumer report at the consumer’s request, but a consumers’ request is not a prerequisite for furnishing a consumer report. Instead, consumer reporting agencies can and often do furnish a consumer report to any third party who intends to use the information in connection with a credit transaction with the consumer, for employment purposes, in connection with insurance underwriting, or for a number of other purposes, even if the consumer would decline to authorize the transmission of their personal information.⁷
- Third, because consumers do not direct consumer reporting agencies to specific sources of information that they control (*e.g.*, a specific credit card account or deposit account), consumer reporting agencies rely on the voluntary provision of information by “furnishers,” whose conduct is

² See generally CFPB, Request for Information Regarding Data Brokers and Other Business Practices Involving the Collection and Sale of Consumer Information, 88 Fed. Reg. 16951, 16952 (Mar. 21, 2023); S. Rep. No. 517, 91st Cong., 1st Sess. 4 (1969).

³ 15 U.S.C. § 1681a(f) (emphasis added).

⁴ *Id.* at § 1681a(d).

⁵ See *Gundy v. United States*, 588 U.S. ---, 139 S. Ct. 2116, 2126 (2019).

⁶ S. Rep. No. 517, 91st Cong., 1st Sess. 3 (1969).

⁷ 15 U.S.C. § 1681b.

also regulated by the FCRA,⁸ and publicly available sources of information that are more difficult to match to particular individuals and therefore often result in inaccuracies (*e.g.*, information regarding someone with a similar name will erroneously be included in an individual's consumer report).⁹

- Finally, consumer reporting agencies create a “file” on individual consumers that exists within the consumer reporting agency regardless of any existing need and is therefore available for sale to any third parties with a “permissible purpose” on demand.¹⁰

The FCRA is designed to regulate entities with these fundamental features, and it would be error to extend the definition of “consumer reporting agency” to an entity that does not possess all—or in the case of MX—*any* of these features.

II. MX Does Not Engage in Consumer Reporting

The Outline suggests that the CFPB is considering proposing a regulation that would provide that a “data broker”—an umbrella term used by the CFPB to describe “firms that collect, aggregate, sell, resell, license, or otherwise share personal information about consumer with other parties”—that “sells certain types of consumer data would be a consumer reporting agency.”¹¹ MX does not engage in consumer reporting. Indeed, the services it provides possess none of the essential characteristics of a “consumer reporting agency.”

- *First*, MX only collects financial data about a consumer with the consumer's consent and will delete that data at the consumer's request. Presently (and under the 1033 NPRM), MX can only collect financial data from a consumer's financial account with the consumer's express, informed consent, which is provided to our end user customers (as contemplated by the 1033 NPRM). In addition, presently (and under the 1033 NPRM) the consumer can revoke her authorization by contacting the end user, and once the end user notifies MX, MX will then cease collection of any of the consumer's data for that end user and delete any financial data that has been obtained from the consumer's account(s) (subject to a contrary legal obligation such as a government subpoena) with respect to that end user. Thus, unlike the traditional consumer reporting market, consumers *must* “opt in” for MX to collect any data about their accounts and can “opt out” at any time.
- *Second*, just as MX will only collect financial data at the express request of the consumer who owns the data, it will only provide the data to the end users (called “authorized third parties” by the 1033 NPRM) at the consumer's express, informed direction. Thus, a central concern animating the passage of the FCRA—that the consumer might not “know that he is being damaged by an adverse credit report” or even that the end user has relied upon a credit report¹²—is not possible.
- *Third*, unlike a traditional consumer reporting agency, MX does not gather information from those who voluntarily “furnish” the information or from public sources that may or may not reflect the correct individual. Rather, it collects information from specific financial accounts *identified by the*

⁸ 15 U.S.C. § 1681s-2.

⁹ *See, e.g.*, CFPB, Advisory Opinion re Fair Credit Reporting; Name-Only Matching, 86 Fed. Reg. 62468 (Nov. 10, 2021).

¹⁰ 15 U.S.C. § 1681g

¹¹ Outline at 8. The recently released Notice of Proposed Rulemaking on Personal Financial Data Rights (1033 NPRM) likewise expresses a view that data aggregators may be consumer reporting agencies, at least in certain circumstances.

¹² *See* S. Rep. No. 517, 91st Cong., 1st Sess. 3 (1969).

consumer and transmits that information to authorized end users. The data accuracy issues that motivated the passage of the FCRA,¹³ and that still plague certain elements of the consumer reporting market, do not exist with MX's business. In addition, MX presently (and as would be required under the 1033 NPRM) has well designed policies and procedures to ensure that data that is transmitted from a data provider to an authorized end user maintain a constant value (i.e., are accurate).

- Finally, and most critically, MX does not maintain a "file" on any individual consumer. Some data aggregators employ data architecture that consolidates data requested by multiple end users regarding a single individual into a single digital "file," which allows them to identify data by an individual's name or personal identifier. This "file" could be incredibly useful to data aggregators if, contrary to the limitations in the 1033 NPRM, the data aggregator intended to sell the data to third parties (without consumer consent) or use the data for its own purposes. But MX does not have such intentions and therefore does not create or maintain a "file" on any individual consumer. Rather, MX has structured its data architecture by individual end-user (i.e., "authorized third party"), and does not maintain direct identifiers (e.g., name or social number) associated with any set of consumer data within an end-user's data store, unless doing so is necessary to the end-user's use case (e.g., account verification). For a consumer connecting financial account information to multiple end users using MX, MX's architecture would ensure that the consumer's authorized financial information is both accessed on a per end user basis and stored on an end user basis (without direct identifiers, where possible), based on consumer authorized end user requirements. As a result, because (i) MX does not combine or correlate consumer financial information across end users, MX's architecture helps ensure that consumer financial information is accessed, stored, and used exclusively to meet the requirements of each of the consumer's unique end user authorizations, and (ii) MX does not store consumer direct identifiers unless needed to support an end user use case, were a consumer to reach out to MX to ask for a copy of the consumer's "file" (i.e., information MX stores about the consumer), MX would be unable to comply with the request because (a) MX could not authenticate the consumer's identity (since MX does not have a direct relationship with the consumer), (b) MX would not know which end user(s) the consumer may be associated with, and (c) even if the consumer identified all applicable end users, in many cases, MX would still not be able to identify that consumer's data within the end user's independent MX data store. Instead, requests for data would have to be routed through the end users who can authenticate the consumer and correlate the consumer's identity with each end user's independent MX data store. This structure is far better for consumers (distributed, de-identified databases are much less valuable to hackers and more protective of consumers' privacy), and lends itself to compliance with the 1033 NPRM's proposed limitations on data collection, use, and retention (e.g., if a consumer asked a particular end-user to cease collecting or delete data pursuant to proposed § 1033.421(h) or failed to authorize continued collection or retention of data under proposed 1033.421(b)(3), once the end user notifies MX, MX could easily identify and delete the data). Indeed, imposing FCRA obligations designed for "consumer reporting agencies" on MX would have the perverse effect of *requiring* MX to create a "file" on consumers,¹⁴ to their detriment and without any countervailing benefit.

¹³ *Id.* at 4.

¹⁴ 15 U.S.C. § 1681g(a).

The Outline indicates that the CFPB intends to provide a “bright-line definition for when” an entity will be regarded as “assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties.”¹⁵ MX respectfully submits that the CFPB must consider the distinctions above and make clear that an entity—like MX—that (1) only collects data with a consumer’s express, informed consent, (2) does not “sell” data or otherwise use data for any purpose other than to satisfy the consumer’s express informed request to enable an authorized end user’s access to covered data; (3) does not collect data from sources other than those identified by a consumer; and (4) does not “assemble” a “file” on any individual consumer is not a “consumer reporting agency.”

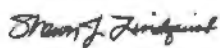
II. A Tortured Interpretation of “Consumer Reporting Agency” Is Unnecessary

Finally, extending the FCRA definition to entities who do not possess the four characteristics above is at best unnecessary, and possibly inconsistent with other obligations the CFPB has proposed to impose. Unlike traditional “consumer reporting agencies” or the actual “data brokers” upon which the CFPB has reasonably focused its regulatory spotlight, the data security, consumer privacy, and data accuracy practices of “data aggregators” like MX will not be unregulated at the Federal level absent an unnatural attempt to shoe-horn them into the definition of “consumer reporting agencies.” Indeed, the CFPB has recently proposed a rule that, unlike the FCRA, was designed to reflect the features of the consumer-permissioned open banking financial marketplace. This rule, if finalized, would ensure that data aggregators are subject to requirements related to data accuracy and data security, as well as limitations on their collection, use, and retention of consumer data.¹⁶ Any attempt to impose the FCRA’s obligations on those “data aggregators” who, like MX, do not possess the characteristics of a “consumer reporting agency” risks creating inconsistent regulatory obligations, consumer confusion, and (at a minimum) unnecessary regulatory burdens that will ultimately be passed along to the consumer.

In summary, we urge the CFPB to adopt a “bright-line definition” of the term “consumer reporting agency” that accords with the FCRA’s text, context, and purpose and avoids unnecessary and likely inconsistent regulatory burdens that could only create more cost and friction for consumers, reduce the effectiveness of existing money management tools, and impede the market’s shift towards open banking.

Respectfully submitted,

MX Technologies, Inc.



Shawn Lindquist
Chief Legal Officer

¹⁵ Outline at 9-10.

¹⁶ See Proposed 12 CFR § 1033.421.