New Market BANK
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November 6, 2023

The Honorable Rohit Chopra
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

RE: SER response to SBREFA Outline for Consumer Reporting Rulemaking

Dear Sir or Madam:

New Market Bank ("NMB") appreciates the opportunity to respond to the Bureau of Consumer Financial Protection's ("CFPB" or "Bureau" or "Agency") Outline of Proposals and Alternatives Under Consideration ("Outline") for Consumer Reporting Rulemaking. New Market Bank is a family-owned community bank serving the southwest Twin Cities Metropolitan area primarily in Dakota and Scott counties of Minnesota. The communities we serve are on the fringe of the metropolitan area where the city meets farm fields. We have just under 188 million in assets as of 10/31/2023. As a data furnisher of loan information to Consumer Reporting Agencies ("CRA's") and a user of credit reports as part of our loan decision making process, we value the importance of accurate and appropriate information and processes.

In addition to submitting this written comment, I participated in the Small Business Review Panel Process (SBREFA) hosted by the CFPB. As a 2nd generation community banker, I have over 25 years of experience as a compliance officer, and I appreciate the opportunity to participate as a SER. Thank you for the opportunity to serve on the SBREFA panel. With that said, there are several comments I would like to raise in response to the SBREFA Outline.

"Data Broker" and "Consumer Report"

New Market Bank is concerned that defined terms in the Outline are too broad and bring unanticipated entities within the scope of FCRA, not likely to intentionally be targeted by the Bureau. For example, the Outline provides that "data brokers that sell certain types of consumer data (e.g., data typically used for credit, employment, and certain other eligibility determinations) are selling consumer reports," and that "consumer information provided to a user who uses it for a permissible purpose is a "consumer report."

Other parts of the Outline make clear that "data brokers" are "firms that collect, aggregate, sell, resell, license, or otherwise share personal information about consumers with other parties," where data brokers can include first parties that interact with consumers directly.

Under this construct, routine commercial activity will render virtually every merchant a data broker if it sells customer information that is eventually used to underwrite a consumer loan. It is not difficult to imagine a hypothetical where a creditor might use something as routine as grocery store purchase data to underwrite a consumer loan. For example, with the increased adoption of alternative data, a creditor might determine a customer that buys more fruits and vegetables is a lower credit risk than someone that predominantly buys highly processed foods.

In such a scenario, the terms defined in this Outline would classify the grocery store as a "data broker" (a first party selling personal information about consumers) that is selling a consumer report (customer information used for a permissible purpose, i.e., credit underwriting).

While it is possible that the Bureau intended to characterize nearly every merchant as a "data broker" and all customer information they sell as "consumer reports," I believe it is more likely that the Bureau has unintentionally defined these terms too broadly and that the proposed rule should employ a narrower definition.

Regardless of how the Bureau eventually defines data broker and consumer report, New Market Bank does not believe that they should not be classified as CRAs. While data brokers should be required to adhere to FCRA's disclosure and transparency requirements, New Market Bank is concerned that such a dramatic increase of entities classified as CRAs will create a corresponding increase in the number and types of disputes that are subject to reinvestigations under FCRA. Such a dramatic increase would become an insurmountable operational burden.

Credit Header Data

The Outline suggests that a proposed rule would clarify the extent to which credit header data—i.e., consumer-identifying data, such as a consumer's current and former addresses and Social Security number, that are maintained by consumer reporting agencies—is a consumer report. New Market Bank has several concerns about this contemplated provision, as highlighted in a recent joint-trades letter submitted by ICBA and other trade associations.

I support the positions raised in that letter. In particular, if this provision were implemented, it would "harm consumers and facilitate fraud, identity theft, and other crimes and thwart know your customer efforts." As the joint trades letter noted, "the information is used… to comply with federal customer identification procedures and customer due diligence rules intended to prevent money laundering and terrorism financing, financial institutions obtain and confirm the name, address, date of birth, and identifying number (e.g., a Social Security number) of applicants for financial services."

By classifying credit header data as a consumer report, the Bureau would increase the burden of acquiring that information, thereby delaying the confirmation of the borrower or applicant. This would in turn delay the ability of the customer to get a timely loan.

Targeted Marketing and Aggregated Data

The Outline discusses how the proposed rule would potentially clarify that certain activities that consumer reporting agencies undertake to help third-party users market to consumers violate the FCRA prohibition on furnishing consumer reports to third parties without a permissible purpose.

New Market Bank would support a proposed rule that would prohibit a credit reporting agency from selling "trigger leads" when a consumer applies for a residential mortgage unless the consumer has opted into the creation and sale of such leads. Today, consumers are inundated with unwanted and invasive solicitations after they apply for a mortgage, yet the current process for a consumer to opt out is confusing and does not take effect immediately. As a result, consumers may believe that their accounts have been hacked. A mortgage application should not be public information.

New Market Bank supports the provision that the sale of data addressed in the proposals by data brokers that qualify as consumer reporting agencies under the proposals would be prohibited without the written instructions of the consumer or another permissible purpose.

Data Security and Data Breaches

When a breach occurs at any point in the financial services chain, community banks take a variety of steps to protect the integrity of their customers' accounts, including, among other things, monitoring for indications of suspicious activity, changing customer identity procedures, responding to customer inquiries, reimbursing customers for confirmed fraudulent transactions, modifying customer limits to mitigate fraud losses, and blocking and reissuing payment cards of affected account holders at a cost to the community bank. Deposit account-holding and payment card-issuing banks repeatedly bear these costs up front because prompt action following a breach is essential to protecting the integrity of customer accounts. But these costs should ultimately be borne by the entity that incurs the breach, not by the party protecting the consumer. This is not only a matter of fairness; a liability shift is needed to properly align incentives for entities that store consumer financial and personally identifiable data to strengthen their data security. When breaches have a material impact on entities' bottom line, they will quickly become more effective at avoiding them.

The Outline discusses how the proposed rule would clarify a consumer reporting agency's obligation to protect consumer reports from data breaches or unauthorized access by third parties.

New Market Bank believes that while CRAs are subject to the data security standards of the Gramm-Leach-Bliley Act (GLBA), they are not examined or supervised for their compliance with these standards in the same manner as financial institutions, yet they hold equally critical, personally sensitive information about consumers. Significant third-party vendors that serve financial institutions are already subject to examination and supervision for compliance with GLBA standards. By the same logic, CRAs should be examined and supervised by the Prudential Financial regulators.

Disputes

The Outlines discusses how the proposal would codify that there is no distinction in the FCRA between "legal" and "factual" disputes, such that consumer reporting agencies and furnishers have obligations to conduct reasonable investigations of both types of disputes.

New Market Bank strongly objects to this new interpretation and does not believe its adoption in the proposed rule would codify existing law. The Outline's discussion would implement a *new* expectation on data furnishers that is not reasonable. New Market Bank supports the positioned raised in ICBA's amicus brief in Holden v. Holliday Inn Club Vacations, where "proposals to expand the FCRA's obligations and require furnishers and consumer reporting agencies to adjudicate legal disputes would raise operating costs and lead to unpredictable and unwarranted legal liability. Our bank does not have the staff to adjudicate these disputes, nor the resources to hire legal counsel to review the legal questions raised in every dispute.

As several SERs raised in the panel discussion, factual disputes are straightforward investigations that don't require interpretation of regulations or law. In contrast, making legal determinations requires expert knowledge of the law, which is only made less practical when considering the different laws and interpretations of laws across jurisdictions.

For example, a consumer might be in default on a loan, but the consumer could dispute that information, claiming that the debt is unenforceable under state law, perhaps due to the state's usury statute. In order to investigate that dispute, my team would have to understand that particular state's law on usury, its effect, and remedies in order to reasonably investigate that consumer's dispute. That's simply not possible, especially when multiplied hundreds or thousands of times.

Medical Debt

The Outline contemplates prohibiting creditors from obtaining or using medical debt collection information to make determinations about consumers' eligibility (or continued eligibility) for credit. While the Bureau continues to have long-standing concerns about the usefulness of medical debt collections tradeline information in predicting a consumer's creditworthiness, the fact remains that the inclusion of medical debt in a consumer's credit report adds relevant information about that consumer's ability to repay a loan.

While medical debt is a growing concern, especially for those that are un- or under-insured, debt of any kind is a factor in a consumer's ability to repay a loan. In certain instances, we are required by other CFPB regulations to determine and reasonably assess the customer's ability to repay a loan. If a portion of a consumer's debt is not included in a consumer report, then our ability to make that determination is hindered.

Further, failing to understand the full financial situation of the borrower and constraints on cashflow poses certain risks to our bank. Obfuscating the total debt liability of a consumer would pose a risk to our bank's ability to accurately underwrite that borrower. A borrower's debt-to-income is a critical risk factor when underwriting loans. A consumer that has a higher debt-to-income is simply a higher credit risk and should be priced at a rate to reflect that risk. Failure to do so would be to the consternation of my prudential bank examiners that require us accurately monitor our credit portfolios and risk the likelihood of defaults.

Finally, if the Bureau were to enact this provision, it would be doing a disservice to consumers. The Bureau fully recognizes that determining a consumer's ability to repay is of benefit to the consumer. After the financial crisis, the Bureau and other regulators required creditors to conduct ability-to-repay calculations as a means to protect consumers. The theory was that, if a consumer is too heavily indebted relative to their income, then he or she should not incur further debts that would inhibit their ability to pay back the loan.

Here, the Bureau is curiously suggesting that only certain debts should be counted as a means to protect consumers from over-burdening themselves with debt when the reality is that every debt – regardless of classification – affects a consumer's cashflow and ability-to-repay.

In conclusion, NMB requests the CFPB to carefully consider our comments and address our concerns. We appreciate the opportunity to provide comments and I appreciate the opportunity to participate as a SER. I would be happy to respond to any questions you may have by contacting me at jjacobson@newmarket.bank, or 952-223-2321.

Sincerely,

/s/

Jeff Jacobson
Vice President, Compliance & CRA Officer