

**BANKS ARE “OPEN” FOR BUSINESS: RECOMMENDED REVISIONS
TO SECTION 1033 OF THE DODD-FRANK ACT**

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The reliance on technology to facilitate the movement of money has continued to grow since the inception of online and mobile banking. Instead of a bank, many users now access their financial information through an app. This technological shift has made it more important than ever that consumers are able to harness technology to understand their finances. Unfortunately, for many users, navigating this financial system is difficult and there is a lack of financial laws to make that navigation easier. By analyzing international approaches and developments from the Consumer Financial Protection Bureau, this Article illustrates how changes under Section 1033 would improve the financial ecosystem. Additionally, it will explain why new regulations are needed to improve consumer financial portability by cutting through the red tape that encompasses the current system.

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I. INTRODUCTION

After receiving another notice that her rent will soon increase, Jane is eager to purchase her first home and begin to gain equity instead of enriching her landlord. However, Jane has a credit history that would make many lenders hesitant to give her a significant line of credit. To make matters worse, Jane is confused by the complicated terms that are being thrown at her during her research, such as “adjustable-rate mortgage” and “amortization.” With hundreds of lenders offering varying interest rates and closing costs in a complicated financial system, it is easy to see how a consumer like Jane faces a daunting task in securing a lender best positioned to service her specific financial needs.

Since the inception of currency in ancient Mesopotamia in 2500 B.C., the transfer, storage, and exchange of money for goods has evolved to form the financial system we know today.¹ Similarly, the regulatory landscape of the financial services sector in the United States (“U.S.”) has constantly been changing. What began as a simple system of bartering, exchanging commodities, and using foreign coins in pre-revolution America, has now transformed into a system defined by expansive regulations, complex financial vehicles, and increasing difficulty for the user.² While some have rallied against changes to the financial state, others have lauded the progress that has been made, such as the Banking Act of 1933, which reinforced consumer protection through the Federal Deposit

¹ See LISSA L. BROOME ET AL., REGULATION OF BANK FINANCIAL SERVICE ACTIVITIES CASES AND MATERIALS 2 (W. Acad., 6th ed. 2021).

² *Id.* at 5.

Insurance Corporation (“FDIC”)³ and restored trust in the financial system.⁴ In many ways, these changes have improved the lives of everyday consumers by providing safeguards for users and avenues for consumers to address grievances. Unfortunately, all these changes have made the process of switching financial institutions inefficient and have led to financial service providers failing to provide a connected experience for the end user.⁵ Additionally, society’s increasing dependence on technology raises the question of whether the current landscape is best suited for the constant innovations and demand for convenience from the consumer.

Fortunately for many account holders in the U.S., like Jane, the process of enjoying a connected experience or the ability of financial intuitions to provide users with financial information in an efficient manner may soon change with the advent of “open banking.”⁶ On October 22, 2020, the Consumer Financial Protection Bureau (“Bureau”)⁷ issued an Advance Notice of Proposed Rulemaking (“ANPR”) in order to solicit comments about developing regulations under Section 1033 of the Dodd-Frank Act.⁸ The ANPR process allows executive agencies to officially announce an

³ The FDIC is an independent agency that “insures deposits; examines and supervises financial institutions for safety, soundness, and consumer protection; makes large and complex financial institutions resolvable; and manages receiverships.” *About*, FED. DEPOSIT INS. CORP., <https://www.fdic.gov/about/> [https://perma.cc/9T6W-5S9H] (last visited Oct. 13, 2022).

⁴ See BROOME ET AL., *supra* note 1, at 35.

⁵ See *Nearly Half of Millennials Have Considered Switching Banks for Better Digital Experience*, MULESOFT, <https://www.mulesoft.com/press-center/trends/2019-consumer-research-financial-services> [https://perma.cc/BUH5-LBHP] (last visited Sept. 9, 2022).

⁶ See *id.*

⁷ The Bureau is a government agency “that implements and enforces Federal consumer financial law and ensures that markets for consumer financial products are fair, transparent, and competitive.” *About Us*, CFPB, <https://www.consumerfinance.gov/about-us/> [https://perma.cc/ULL5-D5BB] (last visited Oct. 13, 2022).

⁸ Press Release, Consumer Fin. Prot. Bureau, Dodd-Frank Act Section 1033—Consumer Access to Financial Records (Oct. 22, 2020), <https://www.consumerfinance.gov/rules-policy/notice-opportunities-comment/archive-closed/dodd-frank-act-section-1033-consumer-access-to-financial-records/> [https://perma.cc/6KLN-TKLG].

agency's strategy to address problems which fall within its purview.⁹ Through this rulemaking process, the Bureau can address Section 1033, which encodes the right for consumers to access their financial information, such as "information relating to consumer transactions or account usage."¹⁰ This Article suggests that the Bureau should implement new consumer-friendly regulations under this Section to facilitate open banking, which will encourage innovation in the financial services industry and improve "the portability of consumer financial transaction data."¹¹ Certainly, such changes will burden financial services providers, but under the open banking paradigm, these concerns are overcome by the net benefit regulations could have on the consumer's financial service experience.

Part II of this Article introduces the problem of consumer data portability in the U.S.'s current financial system. Part III of this analysis provides the backdrop and basic outline of what open banking is, as well as explains the benefits and disadvantages of such a system. Part IV illustrates how changes to Section 1033 could be implemented in the U.S. financial system while also looking at Australia's open banking system as a case study. Part V assesses possible exceptions to Section 1033 and shows why adopting the Australian approach is the best option for the U.S. Finally, Part VI works to resolve any burdens that stem from changes to Section 1033, such as its impact on banks and consumers. This Article concludes with a discussion on why the Bureau is ultimately making the correct decision in implementing changes to Section 1033.

II. OPEN BANKING

A. What is Open Banking?

In many ways, open banking represents the next frontier in the development of financial technology and banking. Open banking is

⁹ *A Guide to the Rulemaking Process*, FED. REG., https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [<https://perma.cc/E9US-BLKW>] (last visited Sept. 9, 2022).

¹⁰ CHERYL R. COOPER, CONG. RSCH. SERV., IN11745, OPEN BANKING, DATA SHARING, AND THE CFPB'S 1033 RULEMAKING 2 (2021).

¹¹ *Id.*

best described as a system in which banks adopt open application programming interfaces (“APIs”)¹² that allow consumers to share their financial information with third-party providers (“TPPs”)¹³ by allowing their software to communicate with each other.¹⁴

A more in-depth definition provides:

Under open banking, banks allow access and control of customers['] personal and financial data to third-party service providers, which are typically tech startups and online financial service vendors. Customers are normally required to grant some kind of consent to let the bank allow such access, such as checking a box on a terms-of-service screen in an online app. Third-party providers['] APIs can then use the customer's shared data (and data about the customer's financial counterparties). Uses might include comparing the customer's accounts and transaction history to a range of financial service options, aggregating data across participating financial institutions and customers to create marketing profiles, or making new transactions and account changes on the customer's behalf.¹⁵

In an open banking system, financial entities such as Bank of America would be able to securely communicate with a third-party financial technology company (“FinTech”) like Credit Karma. From there, with the consumer's consent, Credit Karma would be able to build personalized financial tools based on the consumer's financial

¹² An API is a “software intermediary that allows two applications to talk to each other. Each time you use an app like Facebook, send an instant message, or check the weather on your phone, you're using an API.” *What is an API? [Application Programming Interface]*, MULESOFT, <https://www.mulesoft.com/resources/api/what-is-an-api> [<https://perma.cc/3A5E-CMBK>] (last visited Oct. 13, 2022).

¹³ A third-party provider is a company “that use[s] APIs ... to access customers' accounts, in order to provide account information services and/or initiate payments.” *Third Party Provider*, OPEN BANKING, <https://www.openbanking.org.uk/glossary/third-party-provider/> [<https://perma.cc/JGB6-QYW5>] (last visited Oct. 13, 2022).

¹⁴ John Egan, *What is Open Banking?*, U.S. NEWS (June 2, 2021, 4:17 PM), <https://money.usnews.com/banking/articles/what-is-open-banking> [permanent link unavailable].

¹⁵ *Open Banking: Definition, How It Works, and Risks*, INVESTOPEDIA (Apr. 4, 2022), <https://www.investopedia.com/terms/o/open-banking.asp#> [<https://perma.cc/PV9N-V7BW>].

data, and the consumer would be able to determine the length as well as the scope of that continued access.¹⁶

For example, Jane, the first-time home buyer, like many first-time purchasers, has no idea how to start the loan process. From her basic research, she has deduced that opening a savings account with her local bank might be a good starting point, as she will be able to set aside interest-accruing funds for her mortgage. Jane then heads down to her local branch and opens a savings account titled “New House Fund,” in which she deposits an initial amount of \$10,000. Under new Section 1033 regulations, Jane could consent to the transmission of her financial data from the local bank to a third-party platform such as a FinTech. Harnessing the power of open banking, these FinTechs could access that local bank’s APIs and suggest financial products or align Jane with proper lenders that would help her fulfill her goal of purchasing a home. These third-party providers’ automated technologies would save Jane from the pain-staking process of physically searching for the best lenders and products herself. Once the purchase of her new home is completed, Jane could terminate or restrict the consent she initially gave to access her financial data.

B. The Good and the Bad

Proponents of open banking tout its many benefits, such as: (1) allowing consumers with adverse credit histories the ability to qualify for more loans, as lenders could review payroll data; (2) more personalized financial products; (3) reduced barriers to establishing a deposit account; and (4) improved data aggregation, as consumers can view all of their checking, investment, and retirement accounts in one spot.¹⁷ Moreover, open banking not only delivers benefits to the individual consumer, but also to the small, medium, and large business industries.¹⁸ By connecting to financial institutions’ APIs, small businesses could utilize consumer financial

¹⁶ See Egan, *supra* note 14.

¹⁷ *Id.*

¹⁸ Joshua Hoppes et al., *The Future of Open Banking and Why Banks Should Take the Lead*, WESTMONROE (Apr. 2021), <https://www.westmonroe.com/perspectives/point-of-view/future-of-open-banking> [https://perma.cc/C6EZ-KPUP].

data in a manner conducive to their business and the U.S. financial system.¹⁹

An interconnected system like open banking also brings with it the opportunity to gain significant streams of income in sectors like retail overdraft management.²⁰ In the United Kingdom (“U.K.”) alone, open banking is expected to have a \$9 billion revenue potential for financial service providers this year.²¹ A report by PricewaterhouseCoopers—a leading business advisory and accounting firm—stated that open banking presents a \$2.7 billion opportunity for financial service providers as “[n]ew entrants are expected to threaten existing bank overdraft revenues by leveraging transactional data to automatically identify opportunities to offer customer[s] lower cost alternatives.”²² If regulations in the U.S. are crafted to facilitate this system, and if targeted marketing spreads awareness, one can assume that these potential figures will increase to even larger proportions.

However, a regime transition such as this is likely to be accompanied by various growing pains and risks. Here, the inherent risks of such a system include: (1) concerns over data security as personal information is being transferred to third parties; (2) lack of regulatory powers that government agencies have over this novel area of the law; and (3) overzealous marketing as personal data becomes available to more companies who are eager to gain a consumer’s business.²³ These concerns are illustrated by the fact that some studies have shown consumers’ concerns relating to open banking are primarily focused on cybersecurity and data.²⁴ These concerns from consumers are certainly justifiable, as open banking

¹⁹ *Id.*

²⁰ *UK Open Banking is a \$9.2B Industry Opportunity for Disruptors*, PAYMENTSNEXT, <https://paymentsnext.com/uk-open-banking-is-a-9-2b-industry-opportunity-for-disruptors/> [<https://perma.cc/W9RK-Y4CS>] (last visited Oct. 12, 2022).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Andreas Habersetzer & Anita Kimber, *Five Approaches to Secure Open Banking*, ERNST & YOUNG (Mar. 6, 2019), https://www.ey.com/en_gl/banking-capital-markets/five-approaches-to-secure-open-banking [<https://perma.cc/3Z3R-5QX3>].

creates a target-rich environment since “aggregated customer data such as transactions and balances held in the third-party provider’s infrastructure” provide an opportunity for hackers to exploit weaknesses in the system.²⁵ As a regulator, the Bureau penalizes companies that fail to provide adequate consumer protection for customers’ sensitive personal information.²⁶ For example, in 2019, Equifax, a credit reporting agency, was fined nearly \$700 million for “[f]ailing to provide reasonable security for the massive quantities of sensitive personal information stored within its computer network” and “[d]eceiving consumers about the strength of its data security program”²⁷

Additionally, since financial service providers are often in a race to be first in the market, there is a concern that FinTechs or other start-ups may overlook vulnerabilities that could irreparably harm consumers.²⁸ Of particular concern is startups, as they “often want to be the first in market to increase sales and traffic.”²⁹ For example, imagine open banking regulations are passed and a startup is the first to launch a product allowing consumers to completely integrate their investment, retirement, and depository accounts into one app. In their rush to be the first provider, the startup may overlook security holes or choose to delay fixing those holes until after the product is launched.³⁰ Should a cyberattack access this sensitive information, the potential loss to the consumer could be astronomical because all their financial data is located in one place. These possibilities pose

²⁵ Sasidharan Chandran, *Open Banking: Implications and Risks*, FINANCIER WORLDWIDE MAG. (July 2017), <https://www.financierworldwide.com/open-banking-implications-and-risks#.Y0iHqS-B30o> [<https://perma.cc/EN7S-GFUD>].

²⁶ See Press Release, Consumer Fin. Prot. Bureau, CFPB, FTC and States Announce Settlement with Equifax Over 2017 Data Breach (July 22, 2019), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-ftc-states-announce-settlement-with-equifax-over-2017-data-breach/> [<https://perma.cc/XV3A-ALY5>].

²⁷ *Id.*

²⁸ See Sharon Bauer & Imran Ahmad, *Digital Disruptor: The Legal Challenges of Open Banking*, LEXISNEXIS, <https://www.lexisnexis.ca/en-ca/ihc/2018-04/the-legal-challenges-of-open-banking.page> [<https://perma.cc/SXA2-QBRC>] (last visited Oct. 12, 2022).

²⁹ *Id.*

³⁰ *Id.*

several questions that financial service providers must answer for the future of a healthy open banking system: What constitutes reasonable security in a new structure that aggregates such large quantities of consumer data? In the event of a breach, what backstops does the institution have in place to ensure consumer protection?

III. OPEN BANKING IN THE U.S. & ABROAD

A. *The U.S. Approach*

Currently, the U.S. has already passed legislation, Section 1033, that would provide the legal grounds for having an open banking system.³¹ However, as the agency primarily in charge of consumer financial protection, the Bureau has yet to implement new rules to facilitate open banking.³² Further, relying on the private sector to effectuate change is a dubious proposition, as there is no privacy framework in place and banks have increasingly made it difficult for consumers to share account data.³³ Without a new regulatory scheme, the opportunities provided by open banking are dead in their tracks.

One of the primary concerns the Bureau should aim to address with the rulemaking process is how the agency can work within the parameters of Section 1033 to provide the framework needed for open banking. Section 1033 is encompassed within the Dodd-Frank Act, which was passed in the wake of the Great Financial Crisis of

³¹ Jason Gross, *Open Banking Can Become a Reality in 2022*, BLOOMBERG LAW (Jan. 13, 2022, 4:00 AM), <https://news.bloomberglaw.com/banking-law/open-banking-can-become-a-reality-in-2022> [<https://perma.cc/47WT-G973>].

³² See Jim Probasco, *Consumer Financial Protection Bureau (CFPB)*, INVESTOPEDIA (Sept. 27, 2021), <https://www.investopedia.com/terms/c/consumer-financial-protection-bureau-cfpb.asp> [<https://perma.cc/T6C2-M2PB>].

³³ See Gross, *supra* note 31.

2008³⁴ and “addresses financial institution[s] . . . in several different ways.”³⁵ Specifically, Section 1033 states

Subject to rules prescribed by the Bureau, a covered person shall make available to a consumer, upon request, information in the control or possession of the covered person concerning the consumer financial product or service that the consumer obtained from such covered person, including information relating to any transaction, series of transactions, or to the account including costs, charges and usage data. The information shall be made available in an electronic form usable by consumers.³⁶

Currently, two arguments prevail on how Section 1033 should be interpreted regarding open banking. The narrower interpretation, put forth by some financial service companies, argues that the law provides consumers with direct access to their data, but does not permit those consumers to authorize third-party data aggregators to access that same data.³⁷ In contrast, consumer groups and FinTechs assert that the law entitles consumers to authorize third parties “to access their financial account and transaction data via [F]in[T]ech applications.”³⁸ In the 2020 Bureau symposium entitled “Consumer Access to Records,” panelists of large banks and non-bank data aggregators discussed the scope of these interpretations.³⁹ In particular, while some banks agreed that consumers should be able

³⁴ The Great Financial Crisis “began with cheap credit and lax lending standards that fueled a housing bubble. When the bubble burst, the banks were left holding trillions of dollars of worthless investments in subprime mortgages. The Great Recession that followed cost many their jobs, their savings, and their homes.” Manoj Singh, *The 2007–2008 Financial Crisis in Review*, INVESTOPEDIA (Sept. 18, 2022), <https://www.investopedia.com/articles/economics/09/financial-crisis-review.asp> [<https://perma.cc/ZXH8-DR83>].

³⁵ BROOME ET AL., *supra* note 1, at 74.

³⁶ 12 U.S.C. § 5533.

³⁷ U.S. DEP’T OF THE TREASURY, 2018-04417, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: NONBANK FINANCIALS, FINTECH, AND INNOVATION 31 (2018), https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation_0.pdf [<https://perma.cc/E85F-YDJ9>].

³⁸ *Id.*

³⁹ CONSUMER FIN. PROT. BUREAU, BUREAU SYMPOSIUM: CONSUMER ACCESS TO FINANCIAL RECORDS (July 2020), https://files.consumerfinance.gov/f/documents/cfpb_bureau-symposium-consumer-access-financial-records_report.pdf [<https://perma.cc/S66N-JW46>].

to authorize third-party access to consumer data, others were concerned that an expansive interpretation may require banks to share data, such as account numbers, that pose more of a risk than other types of data.⁴⁰ Additionally, banks were concerned that they might be forced to share information considered proprietary, such as pricing data or interest rates on accounts.⁴¹

While opponents of the latter interpretation resist this expansive reading, it is worth noting that Title X of the Dodd-Frank Act defines “consumer” as “an agent, trustee, or representative acting on behalf of an individual.”⁴² Thus, it is defensible to argue that permitting wholesale third-party access falls within the statutory power of Section 1033. Moreover, the U.S. Department of the Treasury (“U.S. Treasury”) has argued that “narrowly interpreting Section 1033 as applying only to direct consumer access would do little to advance consumer interests by eliminating many of the benefits they derive from data aggregation and the innovations that flow through from [F]in[T]ech applications.”⁴³ Therefore, the U.S. Treasury has recommended that the Bureau affirm the policy that for purposes of Section 1033, third parties authorized by customers fall within the definition of “consumer.”⁴⁴

B. Open Banking Abroad

To understand how the U.S. would implement an open banking system, it is helpful to examine how similar systems have been implemented abroad. For example, unlike the U.K., which has a law called Payment Services Directive 2 (“PSD2”)⁴⁵ that enables open

⁴⁰ *Id.* at 3.

⁴¹ *Id.*

⁴² 12 U.S.C. § 5481(2).

⁴³ U.S. DEP’T OF THE TREASURY, *supra* note 37, at 31.

⁴⁴ *Id.*

⁴⁵ PSD2 “regulated the information requirements, the rights and the obligations of payment services users, as well as the prudential requirements for entering the market of entities qualified to provide these services (payment service providers or ‘PSP’). The establishment of uniform rules for the provision of payment services, has encouraged the creation of a EU internal market for payments.” *PSD2 in a Nutshell*, PRICEWATERHOUSECOOPERS 2, <https://www.pwc.com/it/en/industries/banking/assets/docs/psd2-nutshell-n03.pdf> [<https://perma.cc/2Q62-TEGF>] (last visited Oct. 15, 2022).

banking, the U.S. has no such regulatory power.⁴⁶ Since 2018, PSD2 has allowed open banking to flourish in the U.K., as it “outlines two types of regulated TPP that can be granted direct access to customer accounts.”⁴⁷ Reinforced by data security laws, such as the European Union’s General Data Protection Regulation (“GDPR”), the U.K. open banking system provides several safeguards for consumers, such as requiring “explicit consent for the usage of their transaction data[]” and requiring that consumers are made aware in a “clear, concise and transparent fashion, of how their personal data will be used and by whom.”⁴⁸

Several other countries such as Australia, Brazil, Japan, and South Africa have also taken the requisite steps to prepare their markets for open banking.⁴⁹ For example, in the Asian Pacific Region, twenty-five of fifty-one banks are reportedly ready to embrace open banking.⁵⁰ Australia in particular poses an interesting case-study, because rather than passing a specific piece of legislation, it instead implemented amendments to existing legislation to facilitate open banking.⁵¹ As illustrated later in this Article, the Australian method of working with existing legislation is likely the best route for the U.S. to follow.⁵²

Similar to the U.S.’s Bureau, Australia has the Australian Competition & Consumer Commission (“ACCC”), which is one of the Australian federal government’s regulators in the realm of competition, fair trading, and national consumer law.⁵³ In 2018, the

⁴⁶ See *Open Banking and PSD2: A Revolution in the Provision of Retail Banking Services*, 6 J. INT’L BANKING & FIN. L. U.K. 395 (2018) (discussing open banking in the U.K.).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See Andrew M. Dahdal & Bruno Zeller, *Open Banking and Open Data: Global Context, Innovation, and Consumer Protection*, 2021 BANKING L. J. § 2021-7.03 (2021).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See discussion *infra* Part IV.B.

⁵³ AUSTRALIAN COMPETITION & CONSUMER COMM’N, <https://www.accc.gov.au> [<https://perma.cc/MV5P-CJJB>] (last visited Oct. 14, 2022) (“We are Australia’s competition regulator and national consumer law

ACCC and the Australian Parliament began reviewing the Competition and Consumer Act 2010, the Privacy Act 1988, and the Australian Information Commissioner Act 2010 to see how these laws could be amended to implement open banking.⁵⁴ The previous year, the Australian government published a report that recommended changes to the current system in order to give consumers more control, choice, convenience, and confidence in their data.⁵⁵ In particular, the government was interested in creating a regime that would allow consumers to have more control over their data, such as dictating who can have and use their data.⁵⁶ This interest was a part of an initiative called the “Consumer Data Right in Australia”—a general right the government intended to create and make scalable across different sectors of the economy.⁵⁷ In choosing the banking sector as their first case study, the Australian government aimed to capitalize on the intrinsic fiduciary nature of the banker-customer relationship, which requires bankers to keep both a customer’s money and confidential information safe.⁵⁸

Following this report, the government passed the Treasury Laws Amendment (Consumer Data Right) Bill 2018, which amended the Competition and Consumer Act 2010, the Privacy Act 1988, and the Australian Information Commissioner Act 2010.⁵⁹ As a result, the bill implemented “Part IVD—Consumer data right” into the Competition and Consumer Act 2010, which outlines the goals of the Consumer Data Right, and by proxy, enables open banking.⁶⁰ The objectives of this Part are

champion. We promote competition and fair trading and regulate national infrastructure to make markets work for everyone.”).

⁵⁴ Treasury Laws Amendment (Consumer Data Right) Bill 2018 (Cth) (Austl.).

⁵⁵ COMMONWEALTH OF AUSTRALIA, REVIEW INTO OPEN BANKING: GIVING CUSTOMERS CHOICE, CONVENIENCE, AND CONFIDENCE (2017), <https://treasury.gov.au/sites/default/files/2019-03/Review-into-Open-Banking-For-web-1.pdf> [<https://perma.cc/K5MZ-JR73>].

⁵⁶ See *id.* at v.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Treasury Laws Amendment, *supra* note 54.

⁶⁰ See *Competition and Consumer Act 2010* (Cth) pt IVD (Austl.).

- (a) to enable consumers in certain sectors of the Australian economy to require information relating to themselves in those sectors to be disclosed safely, efficiently, and conveniently:
 - (i) to themselves for use as they see fit; or
 - (ii) to accredited persons for use subject to privacy safeguards; and
- (b) to enable any person to efficiently and conveniently access information in those sectors that:
 - (i) is about goods (such as products) or services; and
 - (ii) does not relate to any identifiable, or reasonably identifiable, consumers; and
- (c) as a result of paragraphs (a) and (b), to create more choice and competition, or to otherwise promote the public interest.⁶¹

Additionally, the amendment permitted the implementation of rules relating to the disclosure, collection, use, accuracy, and deletion of eligible data under the Consumer Data Right regime.⁶² The amendment also took care to vest the Data Standards Body with the power to create new data standards on how consumer data is to be shared.⁶³

The 2018 changes also created two categories of data that are excluded from the open banking system.⁶⁴ The first is “certain credit information,” such as credit infringement or information about personal insolvency.⁶⁵ This policy is important for consumers as it would help ensure they are treated fairly by financial institutions by shielding some of their previous financial missteps. However, for financial institutions, this could lead to an information gap where they can no longer gain access to information that helps them analyze a consumer’s financial history and determine if lending to that consumer would be financially sound. The changes also exempted certain “materially enhanced information,” which ensured that consumers would not have to disclose information like the result of an income verification assessment, and forbade financial

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Australian Government Passes Consumer Data Right Legislation on 1 Aug. 2019*, DENTONS (Aug. 8, 2018), <https://www.dentons.com/en/insights/alerts/2019/august/8/australian-government-passes-consumer-data-right-legislation-on-1-august-2019> [https://perma.cc/TJ4W-VY7E].

⁶⁴ *Id.*

⁶⁵ *Id.*

institutions from categorizing transactions.⁶⁶ However, the exclusions did not include earned or charged interest, calculated balances, or data on authorizations in the definition of materially-enhanced information.⁶⁷

Since the implementation of the Consumer Data Right, open banking in Australia has blossomed into a system that increases value for consumers by facilitating data portability, product personalization, and holistic approaches to consumer finance.⁶⁸ Initially, the government mandated that the four major banks (ANZ, Commonwealth Bank, NAB, and Westpac) allow their customers to opt in to this program, but many other banks have since been required to join.⁶⁹ With plans to expand coverage to the energy sector and the telecommunications market, Australia has created the gold standard in consumer data rights.⁷⁰

IV. ASSESSING CHANGES TO SECTION 1033

Rulemaking or issuing interpretive rule decisions is not unfamiliar to the Bureau. As recently as 2022, it issued an interpretive rule on states' powers under the Fair Credit Reporting Act.⁷¹ While enacting regulations under Section 1033 falls within the purview of the Bureau, its jurisdiction would still be subject to limitations imposed by other agencies that have regulatory power over financial service companies, such as the Securities and Exchange Commission ("SEC") and the Department of Labor.⁷²

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See Alasdair Duncan, *Open Banking in Australia: What is it and How Does it Work?*, CANSTAR (Apr. 19, 2022), <https://www.canstar.com.au/credit-cards/open-banking-live-australia/> [<https://perma.cc/KY2C-FN5B>].

⁶⁹ *Id.*

⁷⁰ See *What is CDR?*, COMMONWEALTH OF AUSTL., <https://www.cdr.gov.au/what-is-cdr> [<https://perma.cc/3HNM-X937>] (last visited Oct. 12, 2022) ("The Consumer Data Right has already been rolled out to banking, with the energy sector to follow next and telecommunications to follow as the third sector.").

⁷¹ See Press Release, Consumer Fin. Prot. Bureau, CFPB Affirms Ability for States to Police Credit Reporting Markets (June 28, 2022) (on file with author) (discussing that the FCRA does not stop states from enacting laws to deal with credit reporting problems).

⁷² See U.S. DEP'T OF THE TREASURY, *supra* note 37, at 38.

Therefore, it is critical that these agencies analyze their internal mechanisms to see how they can best support these rule changes.⁷³

A. Exceptions to Section 1033

The applicability of Section 1033 to financial service providers also depends on whether the entity is a “covered person” under Section 1002(6) of Dodd-Frank.⁷⁴ Section 1002 defines a “covered person” as “any person that engages in offering or providing a consumer financial product or service.”⁷⁵ However, there are exceptions, as Section 1033 does not apply to information that “the covered person cannot retrieve in the ordinary course of its business.”⁷⁶ Unfortunately, “ordinary course of its business” can have several different meanings depending on the industry of the covered person. This certainly makes the data aggregation goals of changing Section 1033 even more difficult to achieve. For example, in 2019, the Second Circuit considered whether an “original note” on a mortgage fell within the scope of the statute.⁷⁷ The court dismissed the plaintiff’s claims, holding that the statute did not require creditors to produce an original note.⁷⁸

“Ordinary business” is not the only exception to Section 1033; confidential information such as “an algorithm used to derive credits scores or other risk scores” is also excepted from coverage.⁷⁹ While protecting proprietary commercial technology is important for businesses, this exception calls into question the ability of Section 1033 to tackle issues pertaining to “black-box modeling,” which is the use of complex and possibly discriminatory algorithms to make credit decisions.⁸⁰ Another consideration worth analyzing is what remedies a consumer may have if a financial provider refuses to turn over the consumer’s financial data. This is important, as some courts

⁷³ *Id.* at 32.

⁷⁴ 12 U.S.C. § 5841(6).

⁷⁵ *Id.*

⁷⁶ 12 U.S.C. § 5533(b)(4).

⁷⁷ *Hariprasad v. Master Holdings Inc.*, 788 Fed. App’x 783, 785–86 (2nd Cir. 2019).

⁷⁸ *Id.* at 787.

⁷⁹ *See* 12 U.S.C. § 5533(b)(1).

⁸⁰ *See infra* note 134 and accompanying text.

have held that exceptions to Section 1033 do not “suggest the information belongs to the consumer, and do[] not create a property right: [t]he right to demand inspection does not suggest inspected material is owned by the inspector.”⁸¹ Thus, it may be up to FinTech providers with abundant resources to litigate these claims, rather than the resource-deprived consumer.

B. Adopting the Australian Approach

In deciding how to properly implement new regulations, the previously mentioned approach by the Australian government serves as a compelling road map. Fortunately, the U.S. has already begun to follow a similar path that can be modified to ensure the viability of the structure it hopes to create.

First, much like Australia, the U.S. should try and work with existing laws on the books.⁸² However, Congress’s legislative process can be quite long, with ninety percent of bills never making it past the necessary committees and subcommittees.⁸³ Whether the cause stems from bipartisan differences or the structure of the U.S. government itself, the process can make accomplishing anything meaningful a difficult endeavor.⁸⁴ Therefore, operating through the constitutional power granted to the President and Congress to delegate authority to issue implementations is an advantage the Bureau should capitalize on.⁸⁵ By issuing relatively few new regulations, the Bureau could expedite the long process of getting new laws on the books.

The second aspect that the U.S. should adopt from Australia is the creation of an overarching data right akin to the “Consumer Data Right.”⁸⁶ Currently, there is no single consumer data protection legislation in the U.S., but rather a patchwork of different federal

⁸¹ Wang v. Bank of America, No. CGC-12-526452, 2013 WL 9745486, at *1 (Cal. Super. Aug. 16, 2013).

⁸² See DENTONS, *supra* note 63.

⁸³ *Good Question: Why is it so Hard to Pass a Law?*, CBS NEWS (June 23, 2016), <https://www.cbsnews.com/minnesota/news/good-question-passing-bills> [<https://perma.cc/SEK7-8QF2>].

⁸⁴ See *id.*

⁸⁵ See FED. REG., *supra* note 9, at 1.

⁸⁶ COMMONWEALTH OF AUSTL., *supra* note 70.

and state laws that occupy the current landscape.⁸⁷ For example, there is the Driver's Privacy Protection Act of 1994, which regulates the privacy of personal information garnered by the Department of Motor Vehicles at the federal level.⁸⁸ At the state level, there is also the California Privacy Rights Act of 2020 and the California Consumer Privacy Act of 2018, which govern privacy rights for California consumers.⁸⁹ Additionally, there are some federal laws which are explicitly non-preemptive of state laws on the same subject, such as the Gramm-Leach-Bliley Act ("GLBA").⁹⁰

In light of this, the U.S. should take note of how the Australian government approached the implementation of open banking by soliciting feedback from applicable agencies and groups such as the Australian Financial Markets Association, the Commonwealth Bank of Australia, Deloitte, and Equifax.⁹¹ An example of this can be seen in the letter submitted by American Express Australia Limited, which, as a payment provider, had a significant interest in the development of the Consumer Data Right Bill.⁹² In its letter, American Express brought to regulators' attention its concern that the parallel privacy framework created by imposing new privacy safeguards would be unworkable.⁹³

Navigating a convoluted regulatory landscape can often burden the implementation of new laws, as regulators are forced to navigate

⁸⁷ F. Paul Pittman et al., *Data Protection Laws and Regulations USA 2022*, ICLG (Aug. 7, 2022), <https://iclg.com/practice-areas/data-protection-laws-and-regulations/usa> [<https://perma.cc/E3AV-VMKY>].

⁸⁸ *Id.*

⁸⁹ California Consumer Privacy Act of 2018, ch. 55, sec. 3 (codified at Cal. Civ. Code §§ 1798.100–199) (securing “new privacy rights for California consumers, including: [t]he right to know . . . right to delete . . . right to opt-out [and] . . . right to non-discrimination”).

⁹⁰ Pittman et al., *supra* note 87.

⁹¹ Treasury Laws Amendment, *supra* note 54.

⁹² *Submission on the Exposure Draft of Treasury Laws Amendment (Consumer Data Right) Bill 2018*, AM. EXPRESS (Sept. 7, 2018), <https://treasury.gov.au/sites/default/files/2019-03/t329531-American-Express.pdf> [<https://perma.cc/4YFF-H4ZX>].

⁹³ *Id.* (“The proposed Privacy Safeguards duplicate existing privacy laws and obligations in Australia. This approach creates a parallel privacy framework for the CDR data which is at odds with how personal information is regulated in comparable jurisdictions.”).

novel legal issues such as geofencing⁹⁴ and the preemption of state laws. Thus, beyond rule implementation by the Bureau, Congress should work to implement a general data protection law or right such as the GDPR⁹⁵ in the U.K and the European Union. In particular, Congress should look at how the GDPR established key principles for an entire continent on how consumer's data should be handled, such as with "fairness and transparency."⁹⁶

According to the U.S. Treasury, collaboration with regulatory agencies and, by extension, those subject to their examinations, is crucial in creating a fair ecosystem for consumers and institutions alike.⁹⁷ For example, during the Great Financial Crisis of 2008, a lack of government oversight of credit rating agencies allowed those agencies to become "key enablers of the financial crisis."⁹⁸ Had the SEC and other regulators been more adept with their collaboration, perhaps much of the heartache that followed could have been avoided. While the consequences of a failure to collaborate and to provide proper oversight here are not nearly as dire, the Crisis still offers an important lesson on the need for cross-agency

⁹⁴ See Amber Kemmis, *What is Geofencing? Everything You Need to Know About Location-Based Marketing*, SMARTBUG (Jan. 8, 2020), <https://www.smartbugmedia.com/blog/what-is-geofencing> [<https://perma.cc/M7XQ-G9QX>] ("Geofencing is a location-based service in which an app or other software program uses radio frequency identification (RFID), Wi-Fi, GPS, or cellular data to trigger a targeted marketing action (such as a text, email, social media, advertisement, app notification) when a mobile device or RFID tag enters or exits a virtual geographic boundary, known as a geofence.").

⁹⁵ Matt Burgess, *What is GDPR? The Summary Guide to GDPR Compliance in the UK*, WIRED (Mar. 24, 2020), <https://www.wired.co.uk/article/what-is-gdpr-uk-eu-legislation-compliance-summary-fines-2018> [<https://perma.cc/MZ49-FQT3>] ("GDPR can be considered as the world's strongest set of data protection rules, which enhance how people can access information about them and places limits on what organization can do with personal data.").

⁹⁶ See *id.*

⁹⁷ U.S. DEP'T OF THE TREASURY, *supra* note 37, at 33.

⁹⁸ See Frank Partnoy, *What's (Still) Wrong with Credit Ratings*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 31, 2017), <https://corpgov.law.harvard.edu/2017/05/31/whats-still-wrong-with-credit-ratings/> [<https://perma.cc/KK6K-G5JH>] (explaining how credit rating agency failures were at the center of the Great Financial Crisis and how post-crisis, the government's ability to oversee them was increased).

organization. This is particularly true when considering how, in the U.S., an entity can be subject to multiple regulators who may each inspect different sections of the institution.⁹⁹

In sum, Australia has done tremendous work to provide its consumers with fair, transparent, and relatively burden-free regulations. By working with existing laws, adopting a general data right, and ensuring collaboration among its agencies, the U.S. can create a fair, open banking system. After all, it is said that imitation is the highest form of flattery, and the U.S. should pay homage to Australia's methodology.

V. RESOLVING BURDENS

In his 2021 "Executive Order on Promoting Competition in the American Economy," President Biden made it explicitly clear that combatting antitrust and promoting competition in the markets are some of his administration's highest priorities.¹⁰⁰ In furtherance of that, President Biden directed Bureau Director Rohit Chopra to continue rulemaking under Section 1033.¹⁰¹ This directive from the President, as well as Director Chopra's previous experience at the Federal Trade Commission ("FTC"), indicate a strong push to facilitate a financial system that is ultimately better for the consumer.¹⁰² In light of the directives from President Biden and Director Chopra, the question arises of how regulators will navigate between providing fairness to the consumer without overburdening financial institutions. Further, new regulations must be analyzed in light of the resources and the level of impact that any changes to the current system would have on relevant parties. For example, a bank or large financial institution may be able to bear the burden of new

⁹⁹ See BROOME ET AL., *supra* note 1, at 127.

¹⁰⁰ See Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 9, 2021) ("[E]xcessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers.").

¹⁰¹ *Id.*

¹⁰² See Bill Hulse, *The CFPB Under Rohit Chopra is Harming Competition and Consumer Choice*, U.S. CHAMBER OF COM. (Apr. 20, 2022), <https://www.uschamber.com/economy/the-cfpb-under-rohit-chopra-is-harming-competition-and-consumer-choice> [<https://perma.cc/47JW-M8ZU>].

regulations better than a smaller business, because changes could entail the implementation of new privacy and disclosure standards.

A. Impact on Banks

Although the emergence of new regulations can prove to be burdensome or unprofitable for banks, they can also create opportunities for emerging financial firms to address new areas of market demand.¹⁰³ For example, before the passage of the GLBA, banks were restricted in their activities, but after its passage, banks were allowed to create Financial Holding Companies that enabled them to enter new marketplaces such as insurance.¹⁰⁴ This was ultimately good for the end-user as it allowed a consumer to get all their insurance and securities needs met by the same bank they have trusted for years.¹⁰⁵ Similarly, new regulations under Section 1033 would have the same effect, as consumers could now have a one-stop shop for all their financial needs in one centralized location, like a FinTech. In a digitized financial services market, this need for convenience and speed has become ever more paramount to the consumer.¹⁰⁶

In his Executive Order, President Biden specifically cited the need to improve the ease for consumers to switch financial institutions.¹⁰⁷ This statement could be related to the fact that, on average, a U.S. adult maintains the same primary checking account for about sixteen years.¹⁰⁸ The length of such continued account usage poses an important question: What keeps consumers with one bank for so long? The answer may be that it has become increasingly difficult to transfer from a brick-and-mortar bank, such as Wells Fargo, to a neo-bank or FinTech that has depository offerings. For example, many account holders in the U.S. have automatic

¹⁰³ U.S. DEP'T OF THE TREASURY, *supra* note 37, at 4.

¹⁰⁴ See Gramm-Leach-Bliley Act, 113 Stat. 1338 (1999).

¹⁰⁵ See *id.*

¹⁰⁶ U.S. DEP'T OF THE TREASURY, *supra* note 37, at 144.

¹⁰⁷ See Exec. Order No. 14,036, *supra* note 100.

¹⁰⁸ See Amanda Dixon, *Our Long, Long, Long Relationships with Banks: Are We Missing Out on Better Deals?*, BANKRATE (Oct. 23, 2017), <https://www.bankrate.com/banking/best-banks-consumer-survey/> [<https://perma.cc/FH9N-FGYS>].

payments set up for expenditures such as streaming services, utilities, or gym memberships.¹⁰⁹ Rather than painstakingly transferring over each subscription service to their new financial institution, consumers could click a button and have all their subscription management fulfilled by the new provider. Again, this area showcases the need for new regulations under Section 1033, as dissatisfied users would now be able to quickly move their financial data.¹¹⁰

Additionally, new Section 1033 regulations would allow users to have control of their full financial picture so they can comparison shop and find the financial provider that offers the best rates for their specific consumer profile.¹¹¹ Thinking back to the original example of Jane, the first-time home buyer, the current system may make it hard for her to figure out what financial institution is the best for her, as her deposit, investment, and retirement accounts are dispersed across several different providers. Since tracking down each institution and price-comparison shopping may be a taxing effort, Jane could choose to stay with the same banking institution she always has. However, in an open banking system, Jane may become a more informed consumer and would be able to make financial decisions conducive to her and not just the bank.

Perspectives such as this may be a source of pain for many of the large banks who depend on the naivety of the consumer to stay with the same bank they had as a teenager, even though that bank may not be offering them the most competitive services. Large banks operate on a business model that generates most of the bank's profit from its Net Interest Margin ("NIM"), which allows banks to pocket the difference between the interest they pay on deposits and the interest they receive on loans.¹¹² If consumers can easily switch

¹⁰⁹ Spencer Tierney, *5 Reasons Why You Haven't Switched Banks*, NERDWALLET (July 5, 2022), <https://www.nerdwallet.com/article/banking/obstacles-to-switching-banks> [<https://perma.cc/79VK-VTNB>] (discussing how automatic payments can affect the transferring of banks).

¹¹⁰ See *A Review into the Merits of Open Banking*, DEP'T OF FIN. CAN. (Jan. 2019), <https://www.canada.ca/en/department-finance/programs/consultations/2019/open-banking.html> [<https://perma.cc/8QXQ-XWKH>].

¹¹¹ *Id.*

¹¹² BROOME ET AL., *supra* note 1, at 256.

financial institutions, this could force banks to offer higher rates on deposits and lower interest on loans, which in turn could cut into their profitability. However, it warrants mentioning that the entrance of a new competitor in the market could have negative effects on the marketplace and create a race to the bottom.¹¹³ For example, while lower interest rates on loans are good for the consumer, the need to compete could cause banks to engage in “ruinous competition” as they struggle to maintain their customer base.¹¹⁴ With so much of the nation’s wealth tied up in national banks, this is concerning as banks may push the risk envelope while being backed by government FDIC insurance on deposits.¹¹⁵ Yet, there is still a convincing argument that the benefits to the user in this aspect outweigh the burden on the banks.

Another point of contention for many financial providers revolves around liability for unauthorized transactions of permissioned consumer data.¹¹⁶ If there is no regulatory framework, and instead, the industry depends on a “market-driven equilibrium” to resolve issues, there is concern that ultimate liability would fall on the banks.¹¹⁷ Imagine Jane is able to link her financial data from First Southeast Bank to DigiMoney, a FinTech, but months later, there is an unauthorized transfer of her financial data. Without a regulatory framework that covers this situation, Jane may be forced to choose to recover damages from either a start-up FinTech or the deep-pocketed First Southeast Bank. This fear of banks becoming the spot of ultimate liability allocation concerns financial service providers, as it would result “in banks bearing outsized burden and

¹¹³ James Chen, *Race to the Bottom: Definition, Meaning, Impact, and Importance*, INVESTOPEDIA (Oct. 3, 2022), <https://www.investopedia.com/terms/r/race-bottom.asp> [<https://perma.cc/XD58-56N8>] (“The race to the bottom refers to a competitive situation where a company, state, or nation attempts to undercut the competition’s prices by sacrificing quality standards or worker safety (often defying regulation), or reducing labor costs.”).

¹¹⁴ See BROOME ET AL., *supra* note 1, at 510 (“After the 1929 stock market crash, Congress attempted to quell what it viewed as potentially ruinous competition among banks based on interest rates paid to depositors.”).

¹¹⁵ See *id.* at 512 (explaining how the FDIC creates a moral hazard as the loss from excessive risks are borne by the insuring entity and not the risk-taker).

¹¹⁶ CONSUMER FIN. PROT. BUREAU, *supra* note 39, at 9.

¹¹⁷ *Id.*

losses regardless of whether consumers could also raise these issues with other entities.”¹¹⁸

However, this fear may be misplaced, as the industry has successfully implemented centralized standards in other realms, such as with payment cards.¹¹⁹ Additionally, the Federal Reserve Board’s Regulation E offers a preliminary set of rules that could be applied in this context.¹²⁰ In particular, Regulation E provides rules and procedures for protecting bank customers who use electronic methods to move money.¹²¹ For example, Regulation E provides the basic framework for disputing a fraudulent transaction with your bank.¹²² Thus, it may not be completely out of the realm of possibility for the U.S. to encompass open banking liability within the Regulation E framework, or to implement entirely new liability frameworks.

Although the concerns mentioned above are certainly valid, this could also offer banks the chance to truly embrace the digital age of consumer financial services. The “[i]nvestment in new technologies must be made to modernize existing operations, . . . and to meet customer expectations.”¹²³ However, it should be noted that the full benefits of new technology are not always realized quickly or even at all for some sectors.¹²⁴ That being said, fear of open banking and increased access to consumers’ financial data has led to some interesting actions by the banks.¹²⁵ Take the PNC-Venmo disruption

¹¹⁸ *Id.*

¹¹⁹ *See id.*

¹²⁰ *See id.*

¹²¹ Will Kenton, *What is Regulation E in Electronic Fund Transfers (EFTs)?*, INVESTOPEDIA (Apr. 6, 2022), <https://www.investopedia.com/terms/r/regulation-e.asp> [<https://perma.cc/ZC8G-6D8Y>]. Put forth by the Federal Reserve Board, Regulation E “outlines rules and procedures for electronic fund transfers (EFTs) and provides guidelines for issuers of electronic debit card. The regulation is meant to protect banking customers who use electronic methods to transfer money.” *Id.*

¹²² *Id.*

¹²³ BROOME ET AL., *supra* note 1, at 234.

¹²⁴ *Id.* (“[B]ank management needs to enter these investments recognizing that the full benefits may not be gained quickly . . . and may, indeed, not be captured at all.”).

¹²⁵ *See* Kate Rooney, *PNC’s Fight with Venmo Highlights Bigger Issue Over Who Owns Your Banking Data*, CNBC (Dec. 16, 2019), <https://www.cnbc.com/>

that occurred in 2019, where it is alleged that PNC Bank pushed consumers, who were trying to connect to peer-to-peer payment providers such as Venmo, to the Wall Street bank-owned app Zelle instead.¹²⁶ In response, PNC cited “rising security concern[s] across the financial services industry . . . regarding the potential vulnerability to consumers . . . when using financial apps, and particularly ones that utilize data aggregators.”¹²⁷ While PNC’s true intentions may never be known, one can speculate that the bank’s actions indicate a concern for the ownership and transmission of consumer financial data.

While some financial service providers are pushing back against open banking, others, like Visa, are truly embracing it.¹²⁸ In 2022, Visa acquired Tink, which is,

[An] open banking platform in Europe that enables banks, [F]in[T]echs[,] and startups to develop data-driven financial services. Through one API, Tink allows customers to access aggregated financial data, initiate payments, enrich transactions, verify account ownership[,] and build personal finance management tools. Tink connects to more than 3,400 banks that reach over 250 million bank customers across Europe.¹²⁹

As the leading open banking platform in Europe, this acquisition will allow Visa to utilize data from banks across Europe while also preparing them to enter the U.S. market should changes be implemented.¹³⁰ Additionally, in 2019, JP Morgan Chase partnered with data-aggregator Envestnet to facilitate requests for Chase customer data through a secure API.¹³¹ While these developments are not dispositive, they do signal that at least some financial

2019/12/16/venmo-and-pncs-fight-over-sharing-consumer-financial-data.html [https://perma.cc/SN7F-ESRB].

¹²⁶ *Id.*

¹²⁷ *Id.* (noting “rising security concern across the financial services industry and among regulators regarding the potential vulnerability to consumer of cyber fraud when using financial apps, and particularly ones that utilize data aggregators”).

¹²⁸ See Press Release, Businesswire, JP Morgan Chase, Envestnet I Yodlee (Dec. 5, 2019) (discussing JPMorgan’s acquisition of open-banking platform Envest I Yodlee).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

institutions have been forward-thinking in creating opportunities for the convenient and secure transmission of consumer data.

B. Impact on Consumers

While the benefits of speed and convenience are ideal for the consumer, another prong that merits consideration is how open banking would allow financial service providers to innovate better products. Currently, many financial service providers utilize some form of machine learning or artificial intelligence to help make decisions about things such as creditworthiness or risk management.¹³² However, some of these “black-box” models have recently fallen under increasing scrutiny as their complicated nature can make it difficult to determine how a certain outcome was reached.¹³³ This is a disturbing development, as often the reasoning behind a model’s outputs are not even known by its creator, which has led to concerns over companies violating the Equal Credit Opportunity Act and other consumer protection laws.¹³⁴ With open banking, financial service companies would be able to “unlock the application of data-driven digital technologies in the financial sector” and have more data to enter into these models, thus leading to more equitable outcomes for the end-user.¹³⁵

For Jane, the first-time homebuyer, increased portability of data could allow her mortgage issuer to pull information from her bank showing her past five years of rent payment history. Data such as this could increase the fairness of the lender’s credit modeling and allow users to make accurate decisions that could benefit someone with good financial awareness but perhaps not the best credit score. After all, one of the Bureau’s purposes is to ensure that consumers

¹³² Cynthia Rudin & Joanna Radin, *Why Are We Using Black Box Models in AI When We Don’t Need to? A Lesson From an Explainable AI Competition*, 1 HARV. DATA SCI. REV. 2 (2019).

¹³³ *Id.*

¹³⁴ Press Release, Consumer Fin. Prot. Bureau, CFPB Acts to Protect the Public from Black-Box Credit Models Using Complex Algorithms (May 26, 2022) (discussing that companies are not excepted from liability just because they use black-box modeling).

¹³⁵ DEP’T OF FIN. CAN., *supra* note 110.

are “treated fairly by banks, lenders and other financial institutions.”¹³⁶

1. Addressing Consumer Consent

While there are palpable benefits to implementing new regulations under Section 1033, it is important that potential burdens on the consumer are addressed. One area of concern relates to the burden that would be placed on financial institutions to ensure that consumer financial data is protected and properly approved for dissemination.¹³⁷ In practicality, the portability of consumer data would likely be authorized through the consumer’s consent in the Terms and Conditions clickwrap. This raises two issues, as it is important that the consumer knows the scope of their consent in allowing a financial institution to disseminate their financial information, and consumers often make uninformed decisions when accepting Terms and Conditions.¹³⁸ Furthermore, the sheer volume of available consumer data makes it crucial that consumers have an easy way to revoke their consent to share their transaction data.¹³⁹

These concerns mean that the Bureau must work with the private sector to create consistent disclosure standards that are “written in plain language, readily accessible, readable through the preferred device used by consumers to access services, and presented in a reasonably simple and intuitive format.”¹⁴⁰ Fortunately, the Bureau has already begun to address this issue with its 2017 publication “Consumer Protection Principles.”¹⁴¹ This document outlines the principles that the Bureau thinks are important for the new age of

¹³⁶ See CONSUMER FIN. PROT. BUREAU, [https://www.consumerfinance.gov/\[https://perma.cc/7NQX-Y22X\]](https://www.consumerfinance.gov/[https://perma.cc/7NQX-Y22X]) (last visited Oct. 12, 2022) (“We’re the Consumer Financial Protection Bureau, a U.S. government agency dedicated to making sure you are treated fairly by banks, lenders and other financial institutions.”).

¹³⁷ U.S. DEP’T OF THE TREASURY, *supra* note 37, at 33.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See generally CONSUMER FIN. PROT. BUREAU, *Consumer Protection Principles: Consumer-Authorized Financial Data Sharing and Aggregation* (2017), https://files.consumerfinance.gov/f/documents/cfpb_consumer-protection-principles_data-aggregation.pdf [<https://perma.cc/DL4Q-MREZ>].

consumer-authorized data aggregation, such as “Informed Consent” and the “Ability to Dispute and Resolve Unauthorized Access.”¹⁴² Particularly, the guidance states:

Consumer-authorized access and use of consumer financial account data may enable the development of innovative and improved financial products and services, increase competition in financial markets, and empower consumers to take greater control of their financial lives. To accomplish these objectives, however, such access and use must be designed and implemented to serve and protect consumers. The Bureau intends for the following Consumer Protection Principles to help safeguard consumer interests as the consumer-authorized aggregation services market develops. The Principles are intended to be read together. They are not intended to alter, interpret, or otherwise provide guidance on—although they may accord with—existing statutes and regulations that apply in this market.¹⁴³

The principles serve as an important starting point for implementing a U.S.-based open banking system. For example, one of the principles lists some of the financial data that could be accessed, like “series of transactions, . . . terms of any account, . . . and realized consumer benefits, such as interest earned or rewards.”¹⁴⁴ Similar to the Australian distinction between data that constitutes “material enhanced information” and data that does not, a lineation in the U.S. would ensure consistency from one financial institution to another.¹⁴⁵ Furthermore, such line-drawing would ensure that consumers know exactly what information they are consenting to share, or what information they are unable to access due to its proprietary nature.

2. *Moving From Screen-Scraping to APIs*

These proposed principles are important to the security of our economic ecosystem because current methods the U.S. uses for data aggregation pose certain risks that could be addressed through the medium of open banking.¹⁴⁶ Many third-party providers utilize some

¹⁴² *Id.* at 3–4.

¹⁴³ *Id.* at 3.

¹⁴⁴ *Id.* at 3.

¹⁴⁵ *See* DENTONS, *supra* note 63.

¹⁴⁶ *See* COOPER, *supra* note 10, at 1 (explaining how “web scraping can be performed without a direct relationship with the website or financial firm maintaining the data.”).

form of credential-based access, a process in which providers use the consumers' credentials to login into their banking or financial account.¹⁴⁷ For example, currently, many financial service providers utilize "screen-scraping," the process of scanning a website and extracting data, to access consumer information.¹⁴⁸ While this technique allows for data collectors to quickly gather information, it poses risks that could be alleviated by the use of open APIs, improving the safety, scope of access, and consent of the consumer.¹⁴⁹ However, some data aggregators have reservations about the switch to such a system, as "onboarding an API [is] an expensive and technically daunting task for small financial institutions."¹⁵⁰ Additionally, as with any new technology, there are questions concerning the reliability of implementing an API-based system.¹⁵¹

In light of the risks posed by screen-scraping, the U.S. Treasury has recommended consumer data changes that "would effectively move firms away from screen-scraping to more secure and efficient methods of data access."¹⁵² Moreover, this would not be the first time that new technology in the financial sector was initially burdensome, only to become a valuable mainstay after its implementation. An example of this is the implementation of Automated Teller Machines ("ATMs") in the banking sector.¹⁵³ Initially, the move towards ATMs was designed to reduce costs for banks.¹⁵⁴ As ATMs were implemented, banks found that they created a high cost but provided little return, as they only accounted for a small amount of bank transactions.¹⁵⁵ Should changes to Section 1033 be passed, documents such as the one proffered by the Bureau will ensure that

¹⁴⁷ CONSUMER FIN. PROT. BUREAU, *supra* note 39, at 3.

¹⁴⁸ COOPER, *supra* note 10, at 1.

¹⁴⁹ *See id.*

¹⁵⁰ CONSUMER FIN. PROT. BUREAU, *supra* note 39, at 4.

¹⁵¹ *Id.*

¹⁵² U.S. DEP'T OF THE TREASURY, *supra* note 37, at 10.

¹⁵³ *See* BROOME ET AL., *supra* note 1, at 234.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

the transition from a closed to an open financial system is seamless for the consumer and financial institution alike.¹⁵⁶

As with any new development, change can be a difficult and costly proposition. However, fear of the uncharted should not serve as a barrier when the promise of a better system for the consumer is at the end of the journey. This is particularly true when considering how other countries have successfully navigated these same waters.¹⁵⁷ For the consumer, open banking will usher in a new age where “consumers are the ultimate owners of their financial data, free to access and share that information however . . . they choose.”¹⁵⁸ For the financial institution, this change is also beneficial because it presents the opportunity to create “fresh revenue streams and . . . more valuable relationships with their customers.”¹⁵⁹ While the externalities posed by open banking merit consideration, the power given to the consumer and the opportunity presented to financial institutions should alleviate any doubts that this is a necessary development in the financial services industry.

VI. CONCLUSION

Written into the law that created the Bureau is language that states the Bureau “empowers consumers with the information they need to make financial decisions in the best interests of them and their families.”¹⁶⁰ Furthermore, its mission statement states that it will make “consistent rules that allow banks and other consumer financial services providers to compete on a level playing field and that let consumers see clearly the costs and features of products.”¹⁶¹ Implementing new regulations under Section 1033 would allow the

¹⁵⁶ See CONSUMER FIN. PROT. BUREAU, *supra* note 141, at 1.

¹⁵⁷ See *Competition and Consumer Act 2010*, *supra* note 60.

¹⁵⁸ Gross, *supra* note 31.

¹⁵⁹ Eric Christensen, *Why Open Banking Could Usher in a New Era of Growth in 2022*, FORBES (Mar. 10, 2022), <https://www.forbes.com/sites/forbesfinancecouncil/2022/03/10/why-open-banking-could-usher-in-a-new-era-of-growth-in-2022/?sh=257b73c5c89a> [<https://perma.cc/YQ6N-HD7K>].

¹⁶⁰ *Consumer Financial Protection Bureau*, FED. REG., <https://www.federalregister.gov/agencies/consumer-financial-protection-bureau> [<https://perma.cc/XW2D-TS7N>] (last visited Sept. 17, 2022).

¹⁶¹ *Id.*

Bureau to live up to these promises and would ensure a more fair, competitive, and transparent marketplace. For every roadblock created by changes to Section 1033, such as concerns over squeezing banks out of the marketplace, there is also an opportunity to innovate. Moreover, as illustrated by the progress of other countries like Australia, it is clear that these changes can be successfully accomplished.

While these new regulations will certainly pose burdens on the consumer and financial service provider alike, ultimately, the changes made will transform the U.S. financial landscape into one that is equitable for all parties. Thus, whether the Bureau follows the path laid out by Australia or strikes out on its own, it will be working towards the goal of ensuring that consumers are treated fairly by their financial institutions while ushering in a new age in the realm of technology and banking.