March 27, 2023

California Privacy Protection Agency
Attn: Kevin Sabo
2101 Arena Blvd.
Sacramento, CA 95834

Re: PR 02-2023 Cybersecurity Audits, Risk Assessments, and Automated Decisionmaking

Dear Mr. Sabo:

On behalf of the American Financial Services Association (AFSA),[1] thank you for the opportunity to provide comments on the California Privacy Protection Agency's (Agency) February Invitation for Preliminary Comments on Proposed Rulemaking Cybersecurity Audits, Risk Assessments, and Automated Decisionmaking. AFSA members share the state's goal of protecting the privacy of consumers, promoting understanding by consumers of the personal information about them that is collected, sold, and shared for a business purpose, and guarding personal information from unauthorized access. We appreciate the Agency's efforts to engage stakeholders to consider how various industries use these technological tools to interact with consumers and how such industry practices are currently regulated. We also appreciate the Agency's consideration of our comments on previous Agency rulemakings and look forward to engaging with and serving as a resource as the rulemaking process moves forward.

Consumer Benefits of Automated Decisionmaking

The financial services industry believes that technology holds tremendous opportunity to make financial services safer, more convenient, and more inclusive, and there are many everyday benefits that automated decisionmaking systems provide. As such, financial institutions are continuously evaluating ways to safely and responsibly integrate automated decisionmaking technology and algorithmic solutions to better serve customers and communities across the country. Algorithms make credit decisions more accurate, fair, faster and more affordable by judging applicants on their credit worthiness. Automated tools also eliminate some of the risk of the biases that can be found in human interactions and can help identify products and services designed to benefit communities, including historically underserved populations, helping close the racial wealth gap. Consumers want—and sometimes need—fast access to responsible credit approval.

The use of algorithms is also crucial for protecting all consumers and financial institutions alike from fraud. Fraudulent transactions annually amount to billions of dollars,[2] making the need for fraud prevention services greater than ever. Detecting fraudulent patterns is typically based on large multi-

[1] Founded in 1916, the American Financial Services Association (AFSA), based in Washington, D.C., is the primary trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including direct and indirect vehicle financing, traditional installment loans, mortgages, payment cards, and retail sales finance. AFSA members do not provide payday or vehicle title loans.

[2] See FTC, *New Data Shows FTC Received 2.8 Million Fraud Reports from Consumers in 2021* at https://www.ftc.gov/news-events/news/press-releases/2022/02/new-data-shows-ftc-received-28-million-fraud-reports-consumers-2021-0.

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country data sets, as fraudsters will use similar methods from one country to another and then attempt to take them globally. Human logic alone is slower and unable to identify such complex patterns. The use of artificial intelligence and algorithms makes this process more efficient and effective. Limiting the use of artificial intelligence (AI) to identify fraud would increase risks and costs for merchants, exposing them to potentially higher chargeback costs.

Many financial institutions also use technology-enabled tools to automate routine customer interactions, triage customer calls, provide tailored marketing, and customize trade recommendations. Customers want the convenience of online and mobile platforms, and companies are using algorithms to better connect with customers in their preferred channels. These technologies can also help customers manage budgets and make digital tools more accessible.

Existing Consumer Protections for Automated Decisionmaking

As noted above the financial services industry uses technology to benefit consumers and each use of technology is governed by a robust legal framework designed to prohibit discrimination. We believe that discrimination in the allocation of credit and financial services is wrong and is prohibited under existing federal and state laws. We support enforcement of fair lending laws at the federal, state, and local levels. These laws apply regardless of the use of technology. For decades, the financial services industry has worked with state and federal regulatory partners to combat and overcome historical discriminatory practices. Current law already provides increased transparency and consumer protections in all credit transactions, regardless of whether that transaction in conducted in person, manually, or involves an algorithm or automation.

Importantly, federal regulators have been active on this issue. The Consumer Financial Protection Bureau (CFPB), Board of Governors of the Federal Reserve System (FRB), Office of the Comptroller of the Currency (OCC), Federal Deposit Insurance Corporation (FDIC), and the National Credit Union Administration (NCUA) all have been actively engaged on this topic.[3] These agencies are also closely monitoring the work of the National Institute of Standards and Technology (NIST) within the U.S. Department of Commerce, and other government bodies in the U.S. and around the world, to assess the benefits and risks associated with emerging technologies and issue appropriate guidance. For example, in May 2022, the CFPB issued Circular 2022-03: Adverse action notification requirements in connection with credit decisions based on complex algorithms, which makes it clear that a creditor's obligations regarding discrimination and adverse action notices "apply equally to all credit decisions, regardless of the technology used to make them."[4]

The Equal Credit Opportunity Act (ECOA) has—for nearly 50 years—prohibited discrimination in credit transactions based on certain protected characteristics. ECOA's protections extend beyond just offers or denials of credit based on protected characteristics and also include the fairness of the terms of the credit. ECOA prohibits the use of protected characteristics in any credit decision making system, whether automated or manual. Importantly, ECOA also requires financial institutions to provide adverse

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[3] See, e.g., https://www.federalregister.gov/documents/2021/03/31/2021-06607/request-for-information-and-comment-on-financial-institutions-use-of-artificial-intelligence

[4] See CFPB, *Consumer Financial Protection Circular 2022-03* at https://www.consumerfinance.gov/compliance/circulars/circular-2022-03-adverse-action-notification-requirements-in-connection-with-credit-decisions-based-on-complex-algorithms/.

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action notices explaining the principal reasons for a denial of credit or other unfavorable credit decision. Under ECOA, financial institutions face regulatory scrutiny from multiple federal agencies, including the Consumer Financial Protection Bureau (CFPB). Similarly, the Department of Housing and Urban Development (HUD) also enforces compliance with the Fair Housing Act for mortgage lending.

The Gramm-Leach-Bliley Act (GLBA) protects the privacy of consumer financial information held by financial institutions. Under GLBA and subsequent regulations, financial institutions are required to make clear and conspicuous privacy disclosures to both customers and consumers who are not customers. These notices must disclose what information is collected or shared and allow a consumer to opt-out of sharing. Similarly, the Fair Credit Reporting Act (FCRA) regulates the collection and use of consumers' credit information to ensure fairness, accuracy, and privacy. The FCRA only permits financial institutions to use credit information for specific purposes limited by the Act and also requires financial institutions to provide adverse action notices in instances where the credit information negatively affected an offer of credit. Special disclosures are also required when a decision is based in any part on a consumer's credit score. Importantly, consumers have a right to see their scores and their consumer reports and to dispute information they believe to be inaccurate.

Federal banking regulators also have oversight over the use of credit modeling that is used to inform decision making. The Office of the Comptroller of the Currency (OCC), Federal Reserve, and the FDIC have published model risk management guidance.[5] These laws and regulations are in addition to numerous other broader laws, like the Federal Trade Commission Act and Consumer Financial Protection Act of 2010, which generally prohibit unfair, deceptive, or abusive acts or practices, and California's own laws that provide enforcement authority on specific protections to the Department of Financial Protection and Innovation (DFPI) or the Attorney General.

Federal Lending Programs

In addition to the uses for automated decisionmaking technology outlined above, many financial institutions participate in lending programs that are administered by federal agencies or government sponsored enterprises (GSEs) like Fannie Mae or Freddie Mac. Covered products include federally insured mortgages and those sold on the secondary market to GSEs. Many of these products rely on automated processes that financial institutions have no control of and are administered by the federal agency.

One such example comes from the Federal Housing Administration (FHA). FHA identifies its TOTAL mortgage scorecard process as: "a statistically derived algorithm developed by HUD to evaluate borrower credit history and application information."[6] As with other federal affordability programs, this algorithm was developed and is maintained by a federal agency, but any financial institution

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5 Office of the Comptroller of the Currency, Supervisory Guidance on Model Risk Management, OCC Bulletin 2011-12 (Apr. 4, 2011), https://www.occ.gov/news-issuances/bulletins/2011/bulletin-2011-12.html; Board of Governors of the Federal Reserve System, SR Letter 11-7 (Apr. 4, 2011), https://www.federalreserve.gov/supervisionreg/srletters/sr1107.htm; Federal Deposit Insurance Corporation, Guidance on Model Risk Management, FDIC FIL-22-2017 (June 7, 2017), https://www.fdic.gov/news/financial-institution-letters/2017/fil17022.html.

[6] See U.S. Department of Housing and Urban Development, *FHA TOTAL Scorecard*, at https://www.hud.gov/program_offices/housing/sfh/total.

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participating in HUD programs has no control over the process. The TOTAL mortgage scorecard is one example, but similar issues exist with the Fannie Mae Desktop Underwriter, Freddie Mac Loan Product Advisor, and other federally administered Automated Underwriting Systems (AUS) such as those approved by the Department of Veterans Affairs. Given the scale of these various programs, and the potential impact to California consumers if these programs were unavailable, the Agency must take into account the federal use of automated tools for various financial services.

Thank you in advance for your consideration of our comments. If you have any questions or would like to discuss this further, please do not hesitate to contact me at 202-469-3181 or mkownacki@afsamail.org.

Sincerely,

Matthew Kownacki
Director, State Research and Policy
American Financial Services Association