

CFPB Seeks Public Comment in Implementing Dodd-Frank's Consumer Right of Access to Financial Records

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On October 22, 2020, the Consumer Financial Protection Bureau (“CFPB” or “the Bureau”) published an advanced notice of proposed rulemaking (“ANPR”) inviting public comment in developing regulations to implement Section 1033 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which governs consumer access to electronic financial records. The key part of Section 1033, although only two sentences long, establishes a consumer’s right to access information in a financial institution’s possession “including information relating to any transaction, series of transactions, or to the account including costs, charges and usage data.”¹ And, in words that have proved critical to the genesis of the fintech movement, Section 1033 further provides that “information shall be made available in an electronic form usable by consumers.”²

The ANPR is a preliminary step in the rulemaking process that does not add new substantive requirements on industry; instead it poses a series of questions for public comment. Nonetheless, the document’s approving tone towards innovation that the fintech ecosystem has developed in recent years is noteworthy. Specifically, the ANPR’s questions to industry center on issues of balancing benefits and costs of data access, contemplating a role for industry-developed data access standards and mechanisms, and seeking to harmonize data access rights with other legal obligations of data holders, users, and aggregators.

While the CFPB has not promulgated any regulations to implement Section 1033 to date, last month’s ANPR follows a series of steps demonstrating the agency’s interest in consumer-authorized data access. For example, the ANPR comes eight months after the CFPB held a February 2020 symposium including the input of banks, data aggregators and their trade groups, fintechs, consumer advocates, and other market observers and researchers.³

¹ Pub. L. 111-203, Title X, § 1033(a); codified at 12 U.S.C. § 5533(a).

² *Id.*

³ See CFPB Symposium: Consumer Access to Financial Records (Feb. 26, 2020), <https://www.consumerfinance.gov/about-us/events/archive-past-events/cfpb-symposium-consumer-access-financial-records/>.

In recent years, a host of market participants, including traditional banks and non-bank financial technology firms, have been utilizing consumer financial data with authorization in order to provide services to consumers. The services offered by these firms range from helping consumers to budget more effectively and avoid overdraft fees to securing credit via cash-flow data in lieu of traditional credit scores. The ANPR acknowledges that many of these market players “have helped authorized data access become more secure, effective, and subject to consumer control.”⁴ At the same time, the ANPR also cautions that “some emerging market practices may not reflect the access rights described in [S]ection 1033.”⁵

Below we highlight a few salient features of the ANPR and its immediate context.

Background

Traditional banks and fintech firms are watching the regulatory process under Section 1033 closely, and in some respects, the process presents some tension between the interests of these two key industry groups.⁶

In recent years, following the passage of Section 1033 of Dodd-Frank, an ever-growing ecosystem of fintech firms has developed to offer consumers novel applications or “use-cases” for their financial data. To date, most of these firms have accessed consumer data through banks’ online banking portals using credentials shared by the consumer in a process commonly referred to as “screen scraping.” In screen scraping, the fintech application logs in to an online banking portal as the customer on an automated basis, copies her financial data, and stores it on an external database, which is often managed by yet another third party. Credential-based access of this kind does not typically involve any legal agreement between data holder (the bank) and data user (the fintech application) or data aggregator (the external database operator).

Data holders such as banks, however, have expressed concerns about the security and financial risks associated with screen scraping, precisely because the practice involves the sharing of a consumer’s sign-in credentials and financial data not only with fintech firms, but also the data aggregators with which these firms contract.⁷ Critics of the

⁴ See CFPB Advance Notice of Proposed Rulemaking (“ANPR”) Docket No. CFPB-2020-0034 (Oct. 22, 2020), at 3, https://files.consumerfinance.gov/f/documents/cfpb_section-1033-dodd-frank_advance-notice-proposed-rulemaking_2020-10.pdf.

⁵ *Id.*

⁶ See Victoria Guida, “Banks, fintech startups clash over ‘the new oil’ - your data” (Feb. 7, 2020), <https://www.politico.com/news/2020/02/07/banks-fintech-startups-clash-over-the-new-oil-your-data-112188>.

⁷ See CFPB Symposium, Statement of Becky Heironimus on behalf of Capital One (Feb. 18, 2020), at 2, https://files.consumerfinance.gov/f/documents/cfpb_heironimusstatement_symposium-consumer-access-

credential-based access regime argue that consumers are not aware of how their data becomes portable and commoditized, in large part because not all fintech firms make fulsome disclosures to their app users. In lieu of screen scraping, some financial institutions recommend that access to consumer financial information be achieved through tokenized access or so-called application programming interfaces (“APIs”). In the case of APIs using tokenized access, “a third party seeking access uses unique credentials that other parties cannot use,”⁸ which may result in a more secure process. The movement away from credential-based access and screen scraping has gained steam through “formal, bilateral access agreements between large aggregators and large data holders”⁹ establishing APIs.

For their part, fintech firms and associations are taking the position that the CFPB should use its authority to establish a broad data right for consumers in order to pave the way for an “open banking” regime in the United States. While fintech firms acknowledge that meaningful cooperation has been achieved between banks and fintech firms in negotiating bilateral API agreements, the fintech firms argue that continued credential-based access is a non-negotiable ingredient of an innovative fintech ecosystem.¹⁰ A regime based entirely on negotiated APIs would be unworkable according to the Financial Data and Technology Association (“FDATA”) of North America because “it is impossible for the thousands of financial institutions in the United States to negotiate and execute bilateral agreements with every financial aggregation firm or fintech company.”¹¹ And, even assuming such a regime were possible, FDATA asserts that it would create an uneven playing field for consumers “in which access to vital third-party tools is determined by where a customer banks and the terms of the agreements that bank has signed with aggregators.”¹² For example, if credential-based screen scraping were prohibited and instead access could only be obtained via APIs negotiated with large financial institutions, 1.8 billion American consumers and small businesses would lose access to a function they rely on to plan their financial lives.

[financial-records.pdf](#); see also CFPB Symposium, Statement of Lila Fakhraie on behalf of Wells Fargo (Feb. 13, 2020), at 2, https://files.consumerfinance.gov/f/documents/cfpb_fakhraie-statement_symposium-consumer-access-financial-records.pdf.

⁸ CFPB ANPR, at 15.

⁹ *Id.* at 14.

¹⁰ See CFPB Symposium, Statement of Steve Boms on behalf of Financial Data and Technology Assoc. of North America (Feb. 26, 2020), at 4, https://files.consumerfinance.gov/f/documents/cfpb_boms-statement_symposium-consumer-access-financial-records.pdf.

¹¹ *Id.*

¹² *Id.*

CFPB's Advanced Notice of Proposed Rulemaking

Last month in issuing its ANPR, the CFPB took its most concrete step yet towards regulating the access of consumer financial data. Striking a decisively pro-innovation tone, the CFPB declared that “[a]uthorized data access holds the potential to intensify competition and innovation in many, perhaps even most, consumer financial markets.”¹³ Yet, as the Bureau recognized, “some emerging market practices” appear to fall short of the access rights to financial records granted to consumers in Dodd-Frank Section 1033.¹⁴ As such, the Bureau’s ANPR seeks public comment on “the possible scope of data that might be made subject to protected access, as well as information that might bear on other terms of access, such as those relating to security, privacy, effective consumer control over access and accessed data, and accountability for data errors and unauthorized access.”¹⁵

The ANPR provides ten pages of questions for public comment in a number of categories. Below is a brief sampling of some of the questions posed by the ANPR for each category.

Benefits and Costs of Consumer Data Access

- How does authorized data access facilitate competition and innovation in the provision of consumer financial services?
- What should the Bureau learn about the costs and benefits of authorized data access from regulatory experience in State jurisdictions or in jurisdictions outside the United States?

Competitive Incentives and Authorized Data Access

- Should the Bureau expect data access ecosystem participants to develop and adopt multilateral rules applicable to authorized data access?
- Do customers of smaller data holders receive the same benefits from competition and innovation enabled by authorized data access as do customers of larger data holders? If not, why is that the case?

Standard-Setting

- Should the Bureau seek to encourage broad-based standard-setting work by authorized data access ecosystem participants?

¹³ *Id.* at 12.

¹⁴ *Id.*

¹⁵ *Id.* at 3.

- What steps, if any, should the Bureau take to promote particular mechanisms of authorized data access?

Access Scope

- How might the Bureau protect against the exposure of confidential commercial information, information that must be kept confidential by law, or information collected for the purpose of preventing fraud or other illegal conduct while at the same time protecting the access rights provided in Section 1033?

Consumer Control and Privacy

- To what extent does direct access to consumer data pursuant to Section 1033 raise any privacy concerns that should be considered by the Bureau?
- In what respects do consumers understand the actual movement, use, storage, and persistence of authorized data?

Legal Requirements Other Than Section 1033

- How, if at all, are data holders subject to laws or regulations (whether Federal, State, or foreign) that may be in tension with any proposed obligation to make consumer data accessible per Section 1033?

Data Security

- Do data holders, data users, and data aggregators have adequate market incentives to ensure that consumer data is secure?
- If the Bureau proposes a rule to protect the access rights described in Section 1033, how should that rule take appropriate account of data security concerns?

Data Accuracy

- What risks of data inaccuracy are introduced as a result of the data access ecosystem?
- Do data users and data aggregators have adequate market incentives or legal requirements to ensure that the consumer data they use is accurate or sufficiently accurate for the purposes to which it is put?

Examples from Abroad

FDATA, the fintech industry association, has decried the lack of a “clearly articulated policy framework” for open banking in the United States, and argues that the U.S. financial sector risks falling behind its foreign counterparts.¹⁶ The CFPB’s ANPR is perhaps the most dramatic sign to date of interest among U.S. regulators to establish a clearer framework for open banking. In recent years, by comparison, the governments of Australia, the United Kingdom, and Canada have taken more concrete steps toward an open finance framework. For example, in 2016, the U.K. government set up the Open Banking Implementation Entity (“OBIE”) that has since developed, among other things, the APIs used between banks and third-party data aggregators.¹⁷ Whether the U.K.’s government-led foray into open banking has actually led to more innovation is an open question. Indeed, some commentators have noted that despite all of the government activity, the pace of innovation and the entrance of fintech upstarts in the United Kingdom have been “relatively underwhelming.”¹⁸ We expect the experience of foreign jurisdictions such as the United Kingdom to be presented to the Bureau, as the ANPR explicitly invites commenters to reference open banking outcomes abroad.¹⁹

Conclusion

Whether and to what extent a new regulatory framework will be enacted for consumer financial data access under Section 1033 remains unclear. However, last month’s ANPR is the latest indication that the CFPB remains interested in ensuring data access to consumers under Section 1033 while promoting “consumer-friendly market innovation.”²⁰

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¹⁶ See Boms, at 2, 6.

¹⁷ See Open Banking Implementation Entity: About Us (Oct. 30, 2020), <https://www.openbanking.org.uk/about-us/> (“The Open Banking Implementation Entity was created by the U.K.’s Competition and Markets Authority to create software standards and industry guidelines that drive competition and innovation in UK retail banking.”); see also OBIE publishes version 3.1.6. of the Open Banking Standard (Jun. 25, 2020), <https://www.openbanking.org.uk/about-us/latest-news/obie-publishes-version-3-1-6-of-the-open-banking-standard/#:~:text=It%20is%20funded%20by%20the,of%20Ireland%2C%20Nationwide%20and%20AIBG.> (explaining that the OBIE “is a private body; its governance, composition and budget was determined by the CMA. It is funded by the UK’s nine largest current account providers and overseen by the CMA, the Financial Conduct Authority and Her Majesty’s Treasury”).

¹⁸ Kevin McCallum, “Here’s How Big Banks Have Turned Open Banking To Their Advantage” (May 29, 2019), <https://www.finance-monthly.com/2019/05/heres-how-big-banks-have-turned-open-banking-to-their-advantage/>.

¹⁹ See ANPR at 23.

²⁰ *Id.*

Please do not hesitate to contact us with any questions.

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