

Consumer Finance Monitor (Season 3, Episode 45): A Look at the CFPB's Section 1033 Rulemaking to Provide Consumer Access to Financial Information

Speakers: Alan Kaplinsky and Kim Phan

Alan Kaplinsky:

Welcome to the Consumer Finance Monitor Podcast, where we follow very closely developments that are of interest to the consumer finance industry. I'm Alan Kaplinsky, the chair of our Consumer Financial Services Group at Ballard Spahr. And it's my pleasure today to have, as my guest, my partner, Kim Phan, who, when things are normal works out of our DC office. Kim is not only a member of our Consumer Financial Services Group, but she's also a partner in our privacy and data security group. So she is particularly expert in things involving consumer finance that also have an impact on privacy. And that's the reason I wanted Kim to be my guest today on our show, because the topic we're going to talk about definitely has not only consumer finance importance, but also bears on privacy issues as well. So welcome to our show, Kim.

Kim Phan:

Thank you for having me, Alan.

Alan Kaplinsky:

It's indeed a pleasure. So we're going to talk about an Advance Notice of Proposed Rulemaking that was recently published by the CFPB, and it involves consumer access to his or her own data. And so I want you to at first, describe to our listeners what's the legal basis for this rulemaking.

Kim Phan:

So the Dodd-Frank Act, which was enacted back in 2010 and created the CFPB, also instructed the CFPB to develop regulations around consumer access to financial information. And that section in Dodd-Frank is Section 1033, specifically it instructs the Bureau to ensure that financial institutions are making available to consumers upon request any information in the control or possession on the financial institution concerning the consumers' financial product or services that they obtain from that particular financial institution. And that could include things like transaction history, account costs, charges, usage data, and all of that information is supposed to be made available to those consumers in an electronic form. The CFPB's rulemaking is also supposed to prescribe standards for that type of electronic format so that there's a standardization across the industry and that consumers can get this data in a way that's machine readable and that they can transfer it between financial institution.

Alan Kaplinsky:

Well, I guess I'm a little baffled by something, Kim, and that is, it seems to me that based on my own experience and notwithstanding that language in Dodd-Frank that you quoted and this initiative of the CFPB, I've always been able to get access to my own data. If I want to find out, get a history on my checking account, I call up the bank and I asked them to send me some statements that I'm looking for. So I guess I don't understand why this is such a big deal. Am I missing something here, Kim?

Kim Phan:

You're not, Alan. Now, there are some issues around direct consumer access to their financial records that are addressed such as the ability of a consumer to move from one financial institution to another. I don't know how recently you might have changed banks, but it can be a challenging time if a consumer is trying to move their say, checking or savings accounts from

one financial institution to another, but that's not really the main focus of where the CFPB is looking for this rulemaking. The CFPB is actually much more focused on third-party access. What's called authorized access for third parties that consumers might want to give to agents, service providers or others who might be able to pull from various different financial institution resources and aggregate that data into a single location. These companies are often called data aggregators and they provide a broad array of new and developing products that can be provided not only to consumers themselves, but also to other financial institutions.

Alan Kaplinsky:

So can you give me an example of, without mentioning the name of particular data aggregator, why would a consumer want to go to a data aggregator? What's that going to do for him or her?

Kim Phan:

Well, as you can imagine, consumers have lots of different financial institutions that they do business with. It could be their bank, it could be various credit card companies. It could be other types of financial institutions that they are engaged in various services with investment services, savings accounts, basic checking and data aggregators are able with consumer authorization to pull information from all of these disparate financial institutions, and then aggregate it into a single view for consumers. Consumers then use that information to become educated about their own personal financial situation and that the data aggregators can offer different types of advice to consumers, budgeting advice, savings advice, product recommendations. So that's the big value that comes from this type of activity.

Alan Kaplinsky:

The data aggregators, I assume, have an ulterior motive, right? I mean, they want to get a hold of the consumer's data aggregate it, and then I assume they have some other products that they want to offer, right? Maybe they want to offer a debt consolidation loan. So they have the consumer give them authority to get access to all the records, wherever they have loans. Am I right? Or am I being too cynical?

Kim Phan:

You're not being cynical at all. And that's definitely one of the areas where the CFPB is focusing for its rulemaking. The secondary uses of this data, right, there is the actual consumer-authorized purpose so that the consumer can again see a consolidated view of their financial situation. But then there's the secondary uses. And these data aggregators not only provide services directly to consumers, like I mentioned, personal financial management services, but then they can use that same data and offer services directly to other financial institutions and businesses, things like account verification, verifying income on a loan application, providing support for underwriting and decision-making. And like you were saying, market different products and services on behalf of these financial institutions directly to the consumers.

Alan Kaplinsky:

Now let me ask you one other question before we dig a little deeper, Kim, and that is this Section 1033, which gives the CFPB the right to do a rulemaking, dealing with consumer access to their data. Does it require the company with whom the consumer is dealing, let's say the bank with as the checking account or some company that's extended a loan, do they just have to provide the raw data or might they have to manipulate the data? And let's say the consumer says I want to know what I've been charged in certain kinds of fees, going back for five years. And that's not data that's easily available to the company. Does the company, nevertheless, have to put the data in the form that the consumer wants it, or can the company just do a data dump?

Kim Phan:

So there are exceptions that the CFPB is contemplating and that are laid out in Section 1033. They do have to provide information about the products and services the consumer is obtaining from that financial institution. But things like

information that the business can't easily retrieve in the ordinary course of business is not something that a financial institution is expected to create out of wholesale cloth. If it's not information that they already retained, 1033 does not require a financial institution to create any new kinds of financial records in response to a consumer request.

Alan Kaplinsky:

Okay. My guess is banks are probably not too happy with this development, right? I mean, it seems like one of the side effects, so to speak, of allowing consumers to have access to their own data is that the banks might lose that customer, that somebody else will come in and say, Oh, I can get a better deal for you on your mortgage loan or on your home equity loan. So I am I right, that there's some tension there?

Kim Phan:

Well, there are certainly some tensions arising from what you're asking about, the potential loss of a customer. But I think you'll see that as the financial institutions are seeing what's going on, they're actually incorporating a lot of these data aggregation services into their own platform. It could be a white label program where a data aggregator sells its services to a bank that the bank then in turn provides to its own consumers or banks are developing their own data aggregation services and providing the same types of consumer value that the data aggregators have to try to do an end run around this third-party access.

Kim Phan:

But that's only one concern that the banks have to worry about. There's a number of other issues that arise from this third-party data access that are certainly things that CFPB is paying close attention to in developing their rules. For example, there's a lot of technical issues that arise from the fact that these data aggregators are accessing this data on behalf of consumers. The way data aggregators have been doing this in the last few years as this industry has developed is what's called screen scraping. They would get a consumer's username and password, and they would basically log in as the consumer onto a financial institution website, and then pull all of that consumer's data again, on behalf of the consumer, from that financial institution, and basically scrape all of that data from a financial institution's existing website.

Kim Phan:

This causes a lot of technical issues. There is a frequency and volume issue as far as constantly pinging a financial institution server, sometimes hundreds of times each day in a way that a consumer would never do. Right. I mean, you might log into your financial account once or twice a month. These data aggregators are doing it repeatedly throughout every day to try to capture all the updated transaction information and then aggregate it. So that can cause all kinds of problems for uptime for financial institution websites, can cause other types of availability issues.

Kim Phan:

So there's a movement in the market to try to move to something what's called an API, an application program interface where a financial institution would create a separate channel by which data aggregators could access this data rather than through the website. But of course that creates all kinds of security, privacy issues. And then there's also concerns that banks might try to throttle some of the information that's made available through those APIs. Because again, they have an incentive to try to retain things like proprietary information about what their account fees are, what their pricing data is, so that these data aggregators can't unfairly have a competitive advantage as far as analyzing business practices. So there's a lot of different issues that come up that the banks are trying to address in trying to accommodate these third-party data aggregators.

Alan Kaplinsky:

Yeah. So Kim, lets Dodd-Frank became law in July 2010, the CFPB got stood up a year later. It's taken a long time for the CFPB to get to this topic. Did this just come out of the blue or is there CFPB been doing anything in advance of issuing the ANPR?

Kim Phan:

Sure. I mean, certainly after Dodd-Frank was first enacted, the CFPB was taking time to get itself set up. There were a number of rulemakings laid down in Dodd-Frank that had specific time deadlines. They had to get certain rules out within one year, two year of the CFPB getting set up. So they were focused on other things. So, it has taken them a little while to get around to this particular rulemaking, but they have been doing some preliminary steps before issuing this Advance Notice of Proposed Rulemaking.

Kim Phan:

Back in 2016, the CFPB issued a request for information from the industry just to get their hands around who the different market participants are, what are some of the products and services that data aggregators make available, what are some of the challenges that traditional financial institutions face in dealing with these types of companies. And in 2017, based on some of the information they received in response to that request, they developed what are called Consumer Protection Principles for consumer-authorized financial data sharing and aggregation. And that, those principles focus very exclusively on this concept of authorized third parties and how consumers can provide consent, how they can have control over that level of authorized access, how they can revoke authorization by these third parties to access their financial information.

Kim Phan:

And so those were some basic concepts the CFPB laid out pre-rulemaking as far as what their expectations were for the industry. And then earlier this year in February, the CFPB held a symposium. And that symposium on this 1033 Section also focused almost exclusively on this concept of third-party authorized access to financial information. So there's been quite a bit of activity leading up to this ANPR, and I don't think the ANPR is going to be the last step. There's no actual rule taxed here. It's just, again, another more information seeking by the CFPB so they can develop rules.

Alan Kaplinsky:

So can you, Kim, give us an idea without getting into everything that's in the ANPR because I know they do ask a lot of questions, but can you figure out what is the CFPB, what are the core issues that the CFPB seems to be focused on by reading between the lines of the questions that they're asking?

Kim Phan:

Well, the CFPB actually has grouped their questions into nine different areas that highlight the key focus points, where the CFPB is likely to issue rules. One is with regards to the cost of benefits of consumer data access. They certainly don't want to be in the position where they're hindering the development of innovative financial products and services for consumers, but they also don't want to create competitive disadvantages in the marketplace. So that's one area. Another area is the incentives, competitive incentives between the different market participants. Again, the traditional financial institutions who are the holders of this data and these fintechs, these new and evolving companies that are trying to find again, innovative ways to reuse data.

Kim Phan:

Standard setting, ensuring how information is being provided. Again, whether or not it's screen scraping, APIs, or some other sort of access, what type of standard that access will be and the format for that data. The scope of access, a consumer might give a third-party access by using their username and password, but maybe they don't actually want the third party to have access to everything. Maybe they just want a third party to analyze their debt liabilities. Maybe the only one to look at investment issues. I mean, giving consumers more control over what the scope of this access is, is another area the CFPB is looking at.

Kim Phan:

Privacy considerations. Again, consumers may want to give these third parties access for this information for very specific purposes. They may want to limit some of those secondary uses that we described, the marketing, the data analytics, the third-party uses and sale of this data to other financial institutions. Data security is certainly a big question. Once a data aggregator accesses as data and pulls it down from a financial institution. Who's responsible for that? If there was a data breach at a data aggregator, that's the financial institution's data that now is being held by a third party that the financial institution never intended to do business with, but it's the consumer who has inserted that third party into the relationship.

Kim Phan:

Accuracy is also another issue. In the world of screen scraping, data aggregators are able to identify a Kool-Aid data based on where information appears on a website. Every time a financial institution updates their website or launches a new consumer portal, the data aggregators have to remap how they're pulling down that data. It can be challenging to keep that updated and could potentially introduce errors and other inaccuracies into the process. So these are a lot of different issues that the CFPB is looking at and will likely try to address in their rulemaking.

Alan Kaplinsky:

Well, let me ask you this question. A lot of the consumers' data in the financial services area might relate to things that the CFPB has no jurisdiction over at all. For example, brokerage accounts, stock brokerage accounts, CFPB has no jurisdiction over stock brokers. The SEC does. Insurance companies, there is no federal agency that's really got jurisdiction over insurance companies. They're licensed by the states. So it seems to me, this can only cover a slice of the consumers financial history or the accounts that the consumer has. It can't cover everything. Am I right, Kim?

Kim Phan:

The CFPB is instructed under 1033 to work with other regulators in developing these rules. So specifically the 1033 requires the CFPB to consult with the Federal Reserve, the OCC, the FDIC and the FTC. Now that doesn't cover all the different regulators that you had just cited, but it will be challenging for the CFPB to try to, again, set a standard across areas that it doesn't have jurisdiction over.

Alan Kaplinsky:

Right. Right. Okay. This seems the type of issue that perhaps there ought to be some inter-agency group that deals with it, if they want to deal with it thoroughly, because whatever the CFPB comes up with, it may not be able to cover the waterfront and it might create competitive advantages and disadvantages that don't make any sense. So at least that's one reaction that I have. Do you agree with that?

Kim Phan:

Yeah. The CFPB is not in the business of what I think is picking winners and losers in the marketplace. I mean, their goal is not to try to promote anyone particular technology, but as you were saying, some of these market participants are outside the regulated space. And that's certainly a concern for traditional financial institutions that have to deal with these fintech entities that again, might fall between the regulatory cracks, as you might say, and having to deal with unregulated entities, again, creates a lot of those potential liabilities that traditional financial institutions want to avoid. Issues like compliance with the Fair Credit Reporting Act, the Gramm-Leach-Bliley Act, the Electronic Fund Transfer Act. These are all things that data aggregators may or may not have to comply with, but certainly the traditional financial institutions do.

Kim Phan:

So there's a lot of concern about that. And I know right now there's a group of market participants who started working together on some self-regulatory standards that could try to bridge the gap and depending on what the CFPB decides to do, it might be prudent for them to sort of step back and let that self-industry group try to work out some of these challenges. But of course, just giving my own two cents on that initiative, any standards that a industry group comes up with have to of course

incorporate the strong Consumer Protection Principles that the CFPB has made clear they want to see in this type of interaction between financial institutions and data aggregators.

Alan Kaplinsky:

Right. Right. So Kim, what connection, I know you've done a lot of work on the California privacy law, and how does that relate to this initiative? Is there some connection?

Kim Phan:

Yeah, I think there's been some concern that what you're referring to, Alan, is the California Consumer Privacy Act. It has incorporated into the California Consumer Privacy Act what's known as a right to know if the ability of consumers to make requests, not only of financial institutions, but any business in California of what personal information that business has about the consumer. Now, I guess there's some concern that this particular rulemaking, this consumer access rulemaking might have parallels to that request right that is in California. But I don't think that concern is something that will come to fruition for initial matter.

Kim Phan:

The CCPA has a very expansive definition of what personal information is. It covers a wide gamut of any interaction a consumer might have with a business. 1033 is much more narrowly written, and that it applies only to information about the financial product or services the consumer actually obtains from a financial institution. So marketing information and other information this financial institution might collect about consumer is out scope for 1033. And then of course we mentioned earlier, some of the exceptions that are built into 1033. Confidential commercial information is excluded. Information financial institutions collect for fraud, money laundering, or other legal violations is excluded. And then again, the information that a financial institution might not necessarily collect in the order course of its business are not required to create new records just in response to this particular rulemaking.

Alan Kaplinsky:

Yeah. Let me go back to this industry. It seems like in an industry that's developed fairly recently of data aggregators. It seems to me, while they might claim that they're not subject to a lot of the consumer protection laws that around the books, it seems pretty clear to me that they would be considered a consumer reporting agency, right? I mean, isn't that sort of what they do. They aggregate data and then they report it to various other parties. Am I right? Or am I going astray here?

Kim Phan:

It's definitely a concern. So the Fair Credit Reporting Act in compliance with the expectations for companies that collect, evaluate, and otherwise are pulling together what could be considered credit information or other consumer report information is definitely a concern. It's something that I think participants in the industry are definitely walking a fine line around. I think you'll see that some data aggregators embrace the FCRA and position themselves as consumer reporting agencies and comply with the full, all the requirements of the FCRA.

Kim Phan:

Other data aggregators might for different reasons believe that they fall outside of the FCRA. For example, if a data aggregator is providing services to a consumer, like we were saying, financial management planning, investment advice directly to the consumer, certainly a data aggregator can provide and collate information directly to the consumer. It's where as you were saying, they start sharing this information with a third party, other financial institutions where again, the FCRA raises its head. But it would also depend again on the end uses of that data.

Kim Phan:

So you might collect, a data aggregator might collect a ton of information about a consumer, but again, if it's for a fraud purpose, or if it's for verification purposes that may fall out outside of the FCRA. If it's for an eligibility determination or for any kind of underwriting purpose, that likely falls within the gambit of the FCRA. So there's a lot of complexities on where the data comes from, who it's being shared with and how it's being used that could really control that final determination as to whether any one company is subject to the FCRA or not.

Alan Kaplinsky:

Yeah. Are there other, in addition to the FCRA, are there other federal consumer protection laws that a data aggregator would arguably be subject to? I mean, things like the Equal Credit Opportunity Act? What about Truth in Lending, Truth in Savings? What's your thoughts on that?

Kim Phan:

Well, data aggregators generally are not themselves lenders, so they wouldn't necessarily be subject to some of those requirements, and they're not in a generally depository institution. So also not necessarily subject to those requirements, but depending again, on finding of what their activities are. If the data aggregators themselves are found to be financial institutions, they would be subject to the requirements to the Gramm-Leach-Bliley Act with regard to the privacy of the consumer information they aggregate, the security of the consumer information that they aggregate as well as implications under the EFTA. You know, to the extent that a consumer is giving authorization for a data aggregator to access their information. That's not necessarily the same thing as giving that data aggregator authorization to conduct transactions on behalf of the consumer.

Kim Phan:

So if, for example, a data aggregator is providing debt counseling to a consumer. Maybe that data aggregator wants to take the next step and actually make payments on behalf of that consumer to the various financial institutions from which they have money in their depository account. And then making payments to say a credit card financial institution. That would have to be also subject to a separate authorization under EFTA, and just making sure that you're complying with all these different legal complexities based on the specific services that are being provided has to be paid attention to. Because again, this is complex and these are brand new services. And so again, I think that financial institutions are a little bit hesitant with regard to these, again, fintechs, they might not be fully aware of all their various obligations.

Alan Kaplinsky:

Right. And so another question about data aggregators, I take it's not just a snapshot of the consumer's data than once if a consumer enters into a contract with a data aggregator that data aggregator, it could be, it's basically getting information continuously from the consumer. It's very dynamic I would think, not a snapshot. So it essentially can follow everything the consumer's doing with his or her bank account or his or her loan account. And it sounds a little bit like a type of GPS where you can monitor everything the consumer's doing. A little creepy, isn't it?

Kim Phan:

And that's certainly something that the CFPB raised in its ANPR. So as I mentioned earlier, a consumer might check their account maybe once a day. Again, these data aggregators, once they have a consumer's username and password could be checking it once a minute, once a second, or even more quickly. With automation, this type of monitoring and tracking of consumer's financial activity can, as you said, get very, very creepy. And one of the issues that super protection advocates have raised is that consumers may not understand the scope of what they're allowing when they consent to these third-party authorizations. And that, that consent should be very clear that the scope of the consent, the frequency of the checking, as well as the duration of the consent should be closely evaluated.

Kim Phan:

Consumer protection advocates have specifically asked the CFPB to make sure that authorizations expire after a certain period of time so that the consumer has to reauthorize and so that they are made aware that this activity is continuing. It's not a set it and forget it type of authorization that the consumer has to be made fully aware at regular intervals that this third party is continuing to track all of their financial information.

Alan Kaplinsky:

Sure, sure. Can the data aggregator take that data and then use artificial intelligence to manipulate the data?

Kim Phan:

That's definitely a concern that the secondary uses by the data aggregators, again, from a consumer perspective, could be analyzed to target marketing to them in a very granular way, but the financial institutions whose data is being accessed by these data aggregators also are very concerned about that data analytics and AI that can be brought to bear to again, identify confidential proprietary business practices by the financial institution, and that could be used with their competitors or sold to others in the market, or even the creation of competitive products and services that again, might challenge the bank's relationship directly with the consumer.

Alan Kaplinsky:

Yeah. So Kim, where do you think the CFPB is headed now? They're doing this ANPR, that's going to take a while to get the comments sort through them. What's the next step after that? And what do you have any idea what we're talking about in terms of a timetable?

Kim Phan:

I think we're on a very long timetable, Alan. Again, the ANPR is mostly just a series of questions, more information seeking by the Bureau so they could get their hands around again, what's a very rapidly developing marketplace. And the CFPB is in the position where any rulemaking they come out with could potentially be out of date as soon as it comes out, right? Because the market, the financial technology that's being brought to bear here is developing so rapidly. So, for those in the marketplace, certainly there is a 90-day comment period after the ANPR to submit those public comments once it's published in the Federal Register.

Kim Phan:

But there's so many entities that are involved in what the CFPB characterizes as the authorized data access ecosystem. There's those traditional financial institutions that hold the data. There's also other financial institutions that want to use the data. And then of course the data aggregators themselves in the middle. So it gets very complex very quickly. And I think the CFPB is going to have a hard time wrapping their arms around this and developing rules that make sense while also not trying to get in way of innovation, which I know is very important to the CFPB.

Alan Kaplinsky:

Yeah. And then of course, this is all happening in the midst of an election. And there I take it depending upon the outcome who wins the presidency and whether there's a blue wave, that there might be political aspects of this that could shift very rapidly. The head of the CFPB could change if Biden decides to remove Kraninger if he becomes president. So that isn't, am I right, that that's something else that probably will slow the process down?

Kim Phan:

It's possible. I mean, the CFPB has been going at a very slow pace with this already. As we talked about earlier, I mean, it took them six years just to even issue a request for information about this particular rulemaking. So they're going pretty slowly. And I don't see that a change at the top, whether or not Director Kraninger stays, or if there's someone else appointed into that position. The CFPB has been pretty clear that their priority in this rulemaking is ensuring that consumers are fully protected.

Not only, again, accessing their own data, but in giving third parties access. So I don't see that focus changing. Maybe some of the finer details about the rulemaking will shift. But again, I think that the primary focus will stay protecting consumers, their privacy, their security and...

Alan Kaplinsky:

Is that what you're saying is that it's really a bipartisan concern that unlike some other issues, such as a national use resealing of 36%, where I think that the Republicans and the Democrats are largely on opposite sides of the issue. This is something where people will be generally in agreement as to the appropriate approach, which will be consumer-centric.

Kim Phan:

Well, I would say that it's not a partisan issue as to whether consumers should be given access to their financial information, I think is a question of how that access is created, which will be the challenge.

Alan Kaplinsky:

Yeah. Okay. Well, Kim, we've drawn to the end of our program today and we want to thank you very much for coming on our show and doing a terrific job in really explaining the ABCs of this ANPR and what it's all about and why it's so important. And certainly we will want to do future programs as there are further developments in that area.

Alan Kaplinsky:

So I want to thank all of our listeners today for downloading the program and remind you that we release new podcast every Thursday, once a week during the year, except when a Thursday falls on a legal holiday. And the name of our podcast is Consumer Finance Monitor. And we share the name with our well-known blog, also called Consumer Finance Monitor. And I refer you to that blog because we could not only we'll be covering and have covered in detail, the issues that we're talking about today, but we covered the waterfront of the consumer finance industry. We really cover it all. So thank you once again.