Consumer Finance Monitor (Season 8, Episode 3): The CFPB's Proposed Data Broker Rule

Speakers: Alan Kaplinsky, John Culhane, Jr., Joseph Schuster and Dan Smith

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm. I'm your host, Alan Kaplinsky, the former practice group leader for 25 years, and now senior counsel of the Consumer Financial Services Group at Ballard Spahr. I'll be moderating today's program.

For those of you who want even more information about the topic that we'll be discussing today or for that matter, anything else that's going on in the world of consumer finance, please don't forget about our blog, which also goes by the name of Consumer Finance Monitor. We've hosted our blog since July 2011, the very same day that the CFPB got stood up and became operational. So, there's a lot of relevant industry content there. We also regularly host webinars on subjects of interest of those in the industry. So to subscribe to our blog, or to get on our list for our webinars, please visit us at ballardspahr.com. If you like our podcast, let us know about it.

You can leave us a review on Apple Podcasts, YouTube, Spotify, or whatever platform you use to access your podcasts. Also, please let us know if you have any ideas for other topics that we should consider covering, or speakers that we should consider as guests on our show. So, let me first of all describe to you the topic that we're going to be talking about today. Yes, like so many of our podcast shows and webinars, it does deal with the CFPB, or I should say the last gasp effort by the director of the CFPB, Rohit Chopra, to leave behind a legacy of what he thinks the CFPB should be doing, and what they should stand for.

What we're going to be talking about today in particular is one proposed regulation that really is it's beyond pushing the envelope if there is such a thing. I mean, it really is very extreme. So, this happened on December 3rd. They published a long anticipated proposed rule aimed at regulating data brokers under the Fair Credit Reporting Act or from now on we'll be calling it the FCRA. Although the CFPB's future is uncertain, we don't know at least at this point who's going to run the agency either as an acting director or as the next full director. If implemented, this rule would significantly expand the reach of the FCRA.

In the press release that accompanied the release of the proposed rule, the CFPB stated, and I'm quoting now, "The proposal would ensure data brokers comply with federal law, and address critical threats from current data broker practices, including national security and surveillance risks, criminal exploitation and violence, stalking and personal safety threats to law enforcement personnel and domestic violence survivors." The CFPB even went well beyond that in a fact sheet that they issued at the same time that they issued the proposed regs. In short, and this is very much in short, and we're going to get delved into the subject with three experts in the area very shortly, to address these risks that the CFPB identified, the proposed rule would treat data brokers as if they were credit bureaus or background check companies.

Companies that sell data about income or financial tier, credit history, credit score or debt payments would be considered consumer reporting agencies required to comply with the FCRA regardless of how the information is used. So, the rule would end up turning data broker's disclosure of such information to the communication of consumer reports fully subject to the FCRA's regulation. So, that's the topic. Let me introduce our speakers for today. First of all, as we often do, we have a very special guest presenter or participant, and I'm referring to Dan Smith. Dan is president and

CEO of the Consumer Data Industry Association, or as we like to call it the CDIA is a trade association representing the U.S. consumer reporting industry.

Prior to becoming CEO and president of CDIA, Dan was with the Consumer Bankers Association where he was executive VP and head of regulatory affairs. Prior to that, Dan was senior vice president and executive director of the American Bankers Association Card Policy Council. Even prior to that, and actually the first time I got to know Dan a little bit, Dan was the CFPB's first assistant director for the Office of Financial Institutions and Business Liaison. I recall the first time I dealt with Dan was when I got invited to be on a panel that the CFPB was conducting about the arbitration rule or the proposal to adopt a rule pertaining to consumer arbitration.

So, Dan, a very warm welcome to you. Really delighted to have you on the program today.

Dan Smith:

Thank you for having me. I'm excited to talk about this issue. Our history goes back a long way, and I still have some nightmares from some of those engagements. Not because of you though.

Alan Kaplinsky:

Right. I hope not. I wasn't trying to scare you. I was trying to scare Richard Cordray. Now, I also want to introduce my two colleagues who are going to participate in the show today. First of all, Richard Andreano. I call him Rich. He's the practice leader of our mortgage banking group at Ballard Spahr, and an important member of the Consumer Financial Services Group. He's devoted more than 35 years of practice to mortgage banking and consumer finance law. Rich advises the mortgage and settlement service industries on regulatory compliance and related matters.

Rich also assists clients with the implementation of the CFPB's small business loan data collection and reporting rule, and also has been very engaged in consulting with clients about the data broker rule that we're going to be talking about today. Second, John Culhane, who should be no stranger to our regular listeners to our podcast show. John certainly participated in, probably over the years, several dozen of our shows. John has practiced law with me for over 40 years, [starting at another] law firm before we joined Ballard Spahr in 1995. John really is a... I call him the jack of all trades, well, the Jack of all consumer financial services law, and the master of all of them.

He really has encyclopedic knowledge about a lot of different areas, and the topic we're talking about today certainly fits within his area of expertise. So with those introductions out of the way, I have a lot of questions from my guests today. I'm going to start off by asking you a question, Rich, and I'm going to go back and forth. Dan is going to chime in to certain of the questions that I have. Then toward the end of the podcast, I have some questions that I'm going to direct to Dan.

So, Rich, the headline of the press release announcing the proposed rule is, "CFPB proposes rule to stop data brokers from selling sensitive personal data to scammers, stalkers, and spies." Is the proposal limited to this specific focus, Rich?

Rich Andreano:

Not at all. This proposal is much broader than a data broker rule. It includes proposals to materially modify what is considered a consumer report, who's considered a consumer reporting agency, the requirements to obtain a consumer's written authorization to acquire a consumer report, and the requirements to rely on the legitimate business need permissible purpose. It's a very significant proposal. The fact that the bureau is portraying it simply as a data broker proposal is troubling as that folks that should focus on this proposal may not, thinking it's much more limited.

Alan Kaplinsky:

Thank you, Rich. John, does the rule include a definition of a data broker?

John Culhane:

Alan, it does not. The preamble has a description of data brokers, and uses a fairly common definition, “entities that collect, aggregate, sell, resell, license enable the use of, or otherwise share consumer information with other parties,” but that's not part of the rule itself. Somewhat surprisingly, given the reference that you and Rich noted to protecting against selling sensitive information to spies, the rule makes no mention of the Protecting Americans' Data from Foreign Adversaries Act of 2024, which speaks directly to that topic.

That act passed in April. It took effect in June, and it's very specific and very broad in its reach, [but it’s] not mentioned anywhere in any of the materials provided by the CFPB.

Alan Kaplinsky:

John, let me ask you this. Are there specific provisions of the rule that by their expressed terms would only apply to data brokers?

John Culhane:

Now, as Rich said, it's a very broad rule, and given the publicity, you might expect it to graft data broker provisions onto the FCRA or Regulation V, but it doesn't do that. Instead, what it does is it builds off a number of the items that were addressed in the SBREFA panel on consumer reporting rulemaking back in September of 2023, and then the follow-up report on that process that was issued by the CFPB.

Alan Kaplinsky:

So as I understand it, I'm going to ask you this question, Rich. The proposal is actually much broader than is advertised by the CFPB. How would the proposal change the concept of what constitutes a consumer report?

Rich Andreano:

Significantly, and let's start with the actual FCRA definition, and it's pretty basic. In short, it's really any written or oral or other communication of information by a consumer reporting agency that bears on certain characteristics of a consumer, and those are their credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living. That is then going to be used or expected to be used, and there's the key expected to be used or otherwise collected in whole or part for the purpose of serving as a factor in establishing the consumer's eligibility for various things such as credit or insurance specified in the FCRA.

Now admittedly, that is a broad definition, but it is not without its limits, and the CFPB basically is ignoring those limits. What they would do in the proposal is define the concept of is used or is expected to be used, and very significantly add the concept that personal identifiers, which often are referred to as credit header information are themselves consumer reports. Now, the is used proposals, fairly straightforward information is used for one or more of the specified purposes if a recipient of the information actually uses it for such a purpose. That's pretty basic.

Expected to be used is the issue. It would be expected, something would be expected to be used for one or more of the specified purposes. If the person making the communication expects or should expect, whatever that means, that the recipient of the information will use it for one of the purposes, or importantly, the information is about a consumer's credit history, credit score, debt payments, or income, or financial tier. Now important with that second aspect, those items, credit history, credit score, debt payments or income or financial tier would always be considered to be expected to be used for an FCRA-covered purpose, and therefore would always be a consumer report. Very significant.

Now on the personal identifier part, again, automatically, information that isn't considered a consumer report under the FCRA would now be considered under this rulemaking, broadly referred to as personal identifiers. What the bureau

identifies in the proposal as a personal identifier is a consumer's name or former names or names including aliases, their age or date of birth, their current or former address or addresses, current or former telephone number or numbers, current or former email address or addresses, and the social security number or individual taxpayer identification number, and then also any other personal identifier that's similar to the listed identifiers, whatever that means. So, incredibly broad expansion of the concept of what's a consumer report.

Alan Kaplinsky:

John, if information on a consumer's financial tier is considered a consumer report, it's going to be important to understand the concept of what is a consumer's financial tier. Does the proposal provide any guidance on what that means?

John Culhane:

Not a lot, Alan. As you and Rich both noted, the key elements that the CFPB is focused on are credit history, credit score, debt payments, and then income or financial tier. There's no precise definition of financial tier. The preamble does mention in discussing financial tier lists of people with income or credit scores above or below a certain number or within a certain range, but the concept seems to be much broader than just a range of credit scores, and more like a combination of some or all of these criteria along with other criteria to segment a population into different categories or subcategories.

For example, something like the A, B, C and D subcategories that we sometimes see with subprime credit, or the descriptors of groups of individuals that we sometimes see with other kinds of marketing, but no precise definition.

Alan Kaplinsky:

Okay. So Rich, let's focus on the proposal to treat credit header information as a consumer report. First of all, tell our audience because not everybody listening to our show may know what credit header information is, but would the treatment of credit header information as a consumer report vary based on whether the information is modified to exclude any information that identifies the consumer?

Rich Andreano:

Yes, and the credit header information is basically just information helping to identify the consumer. So, you're sure you've got the right John Smith when you're doing something. That's really what it's for. It's intended to improve the accuracy to make sure you're dealing with the right person. So, proposing to treat that as a consumer report itself is a bit disturbing for the various purposes. It's used to prevent fraud or identity theft frankly. As to de-identification, a big part of the preamble, what the bureau says is, "Look, today with all the vast amount of information available and algorithms and all this other data crunching, you could take basic information, and really figure out a lot of information about a consumer, and that presents a risk of harm to consumers."

So, we're concerned that even if we de-identify information, it nonetheless could eventually by combining it with other information be identified to a particular consumer. So, they propose three alternatives on de-identification. The first is it's completely irrelevant to whether or not a identifier is a consumer report. So, it doesn't make a difference. Even if it's de-identified, it's still a consumer report. The second one is pretty close, is de-identification is not relevant if you could still somehow link the information to the consumer, or it's linkable in some way to the consumer.

Then the third alternative, which they view as being the least strict but it's strict in any way is that the information, even if it's de-identified, would still be consumer for it if one of three conditions was satisfied. First, the information is still linked or reasonably linkable to the consumer, in other words, the second alternative. Then the next two are a little different. The information is used to inform a business decision about a particular consumer such as whether to engage

in targeted marketing with that consumer. Then third, the person that directly or directly receives the communication or any information from the communication is able to identify the particular consumer to whom the communication relates.

Now, as to the third one that none of them are appealing, the bureau's reason for proposing the third is it said it would allow government and academia and others to still conduct research, that if under the third alternative, then believing that the other two alternatives would not allow that to continue. They even said, in fact, the national mortgage database, which the FHFA and the CFPB use that that would be implicated by the first two alternatives. So, it gives you an idea how incredibly broad this part of the proposal is that just basic research for improving and government purposes would be swept under the FCRA.

Alan Kaplinsky:

Right. So John, with the second and third alternatives regarding de-identified information that Rich described, does the proposal include any guidance on when information would be linked or reasonably linkable to consumer?

John Culhane:

Alan, it provides some. I'll get to these, but there are some examples that are specifically identified in the proposed rule, and then there's some references to the standards used by other federal agencies to determine when information is linked or reasonably linkable. But I think building off of what Rich said is really a concern here about technological developments, and it's almost as if the CFPB is signaling that it expects all information to ultimately be linked to reasonably linkable to a consumer. The CFPB makes a big deal about reports about an algorithm that's capable of identifying 99.8% of all Americans from almost any available data set with as few as 15 attributes such as gender, zip code, or marital status.

So, there really is a big concern here. I don't know if linked or reasonably linkable is going to be much of a standard for long if this stands. The CFPB provides three examples of information that would be considered linked or reasonably linkable to a consumer, information that identifies a specific household regardless of the number of members of that household, information that identifies a specific ZIP plus four code in which a consumer resides, and then persistent identifiers such as cookies, internet protocol addresses, and processes or device serial numbers or unique device identifiers. There's clearly a lot of concern about persistent identifiers being used to recognize the consumer over time and across different websites or online services.

The other guidance that the CFPB provides, and there's really not a lot about this, is that the CFPB notes that the OMB, the National Institutes of Standards and Technology and various other federal agencies use a similar linked or linkable standard in defining personally identifiable information, but they don't really go on... The CFPB doesn't really go on to discuss how those standards work, and which ones would be the most suitable here. It just sprinkles that in the preamble, and stops at that point.

Alan Kaplinsky:

So Rich, what's the CFPB's rationale for treating credit header information that you described earlier as a consumer report?

Rich Andreano:

Basically, the threat of harm to consumer is based on the availability of data. Otherwise, that could be combined with a credit header data, and then used for illicit purposes. I'll give you a quote out of the preamble. They say the sale by consumer reporting agencies of personal identifiers, which may include sensitive information such as a consumer's Social Security number, contributes to the availability of such information for purchase online potentially by fraudsters

or other persons seeking to dox and expose consumers' personal information, or otherwise exploit or harm consumers." So, that's the stated rationale, and that is a theme that runs through the entire preamble.

Alan Kaplinsky:

Also, Rich, is the CFPB's positions that de-identified information still can be linked to consumer, and that limiting the availability of credit header information will help protect the privacy of consumers consistent with how the CFPB has approached the public release of data under, I know statutes very near and dear to your heart, the Home Mortgage Disclosure Act or HMDA?

Rich Andreano:

Yeah, not at all. They're completely inconsistent. With the public guidance on the release of HMDA data publicly, the bureau relied heavily on the public disclosure aspect of HMDA, basically dismissing privacy concerns notwithstanding that Congress provided for the deletion of information prior to public release to protect the privacy interests of the applicant. Now, I wrote a blog, and it's still up on our consumer finance monitor dated January 8th, 2019, and the title gives you what I thought CFPB finalizes off-balanced approach to public disclosure from the data, because they were supposed to balance public disclosure with consumer privacy, and I thought it leaned too much on public disclosure.

They took a very cavalier attitude towards the consumer privacy risk, where a lot of commenters said, "Hey, bureau, we could take the HMDA data today, which is much less than the HMDA data that was going to be released in 2019," because new requirements went into effect in 2018. We could already identify who's in that loan application register. You're going to make it even easier by publicly releasing a lot of this data. They just gave it the back of their hand thinking it wasn't an issue at all. Now, we fast-forward to the FCRE proposal, and they're sounding the alarms that, "My goodness, there is a significant risk to consumers here, and because you can easily identify who they are."

Well, you can't have it both ways. Either there's a risk of identification or there's not. Now, I always thought that their public policy guides would come to bite them on the backside, and here, it's going to bite them on the backside because you're going to say, "Well, wait a minute, bureau. Just a few years ago, you said there was no risk, and now you're saying there is a risk. Which is it?"

Alan Kaplinsky:

So Dan, I'd like to get your thoughts on that.

Dan Smith:

Oh, I have so many thoughts on that, but on a lot of other issues, but I have a question for Rich. I know you read the entire document. Can you point to what evidentiary data the bureau provides to support this approach?

Rich Andreano:

They do cite various studies, but I was reading the footnotes and everything. I wasn't exactly impressed by the level of detail that they went into.

Dan Smith:

You're not going to find much.

Rich Andreano:

No.

Dan Smith:

They quote their own study, which we know is completely flawed, and they quote studies that quote their own studies.

Rich Andreano:

Their studies, yeah. What I thought this was is it was the classic case or the facts are what we say they are.

Dan Smith:

We met with the bureau on credit header, and asked what they were getting at, and the answer was completely underwhelming, and they never could actually explain the harm they were trying to prohibit. They talked about marketing purposes, which by the way is already prohibited by law. I had my largest members publicly state, "We don't sell this information for marketing purpose. It's illegal," and they talked about the worry of leakage. I didn't know what they were talking about. So we said, what leakage are you worried about?

There's only a few institutions outside of the three large credit bureaus that have access to the data, which they don't actually have the data itself. They have access to it. I said, "By the way, you have complete supervision over the entire market, including those third parties where you examine them on a regular basis." Where's the actual harm? They just sat there and laughed and looked at us like, "Well, we believe it's happening."

Rich Andreano:

Yep, exactly.

Alan Kaplinsky:

Okay. So John, how would this proposal change the concept of what's a consumer reporting agency?

John Culhane:

Well, it keeps the same definition from section 603F of the Fair Credit Reporting Act: “Any person which for monetary fees dues are on a cooperative nonprofit basis regularly engages in whole or in part in the practice of assembling or evaluating consumer credit or other information.” The definition goes on from there. What it does do is it cites that new font of legal wisdom that the CFPB has been relying on in recent regulations, the dictionary, and it relies broadly on dictionary definitions of assemble or evaluate, and then [it] sprinkles in a handful of references to the FTC's 40-year report and some few odd cases to then add very broad definitions of assemble or evaluate.

So, a person “assembles or evaluates” consumer credit information or other information if the person “collects, brings together, gathers or simply retains” such information – so retaining information now makes a company a consumer reporting agency, a really absurdly broad concept – “appraises, assesses, makes a judgment regarding, determines or fixes the value of, verifies or validates the information, or contributes to or alters the content of such information.” The proposal then goes on to provide a number of examples of how this works. For instance, the proposal says that a person “assembles or evaluates” information when collecting information from a consumer's bank account, and assessing it such as by grouping or categorizing it based on transaction type.

As another example, the proposal says that a person “assembles or evaluates” when a person makes a judgment about the order in which to display search results such as when a person hosts an online database regarding criminal histories, and orders search results in order of perceived relevance to the user of the online database. Then as another example, and I think Rich can elaborate on this, the proposed rule says that a person “assembles or evaluates” when it alters or modifies the content of consumer information, and that doesn't require a whole lot. For example, modifying information for formatting purposes such as when a person receives date fields with four digits for the year from one data source,

and date fields with two digits for the year from a different data source, and goes through those and modifies them to ensure consistency.

Other examples that the bureau includes are retaining data files containing payment histories, and then another one is verifying or validating date of birth, and verifying that that date of birth received from a third party matches the consumer's date of birth as listed in an external database, or is properly formatted. That's the case even if errors aren't corrected. So, really, really broad definitions for assembling or evaluating, not building off much in the way of legal precedent here.

Alan Kaplinsky:

So Rich, if assembling or evaluating information would include a simple alteration of information received about a consumer to reflect a four-digit year instead of a two-digit year, how could a party modify information without being considered a consumer reporting agency?

Rich Andreano:

I thought about that particularly the two and four-digit year example, which just baffles me. I thought, "Well, maybe what if I change the font, either the type or the size?" But then thinking about that, I said, "Well, if I did it in a way that appeared to highlight certain types of information over others, that would appear to fall within assemble or evaluate." I mean, that's how broad this darn proposal is. The only question, "Could you only look at it, and is that the only thing?" But as John said, retain is in the definition, so it's just mind-blowingly broad.

Alan Kaplinsky:

Yeah. So John, would the concept of furnishing a consumer report include any activity other than actually providing consumer report information to another party?

John Culhane:

Yes, turning the statutory terms almost on their head. We know and have mentioned that the CFPB is concerned about the use of consumer report information for advertising and marketing purposes. So, it's now the case that where a consumer reporting agency uses information from reports to present advertisements to consumers from third parties, that information is now considered to be a consumer report. A very broad expansion of the terms in the statute.

Dan Smith:

John, Rich, can you guys explain to me where the bureau gets their legal authority to rewrite the statute in this form?

Rich Andreano:

I certainly haven't found it. This to me is one of their classic. They don't like the current reach of the statute despite Congress having rejected various attempts to increase the reach of the statute. So, they're just going to do it themselves, and that violates our basic separation of powers. The Congress, the legislative body makes the laws. The executive branch implements the laws, and the judicial branch interprets the laws. This is an executive agency trying to make law. They're by rule trying to amend the breadth of the FCRA, even when Congress has chosen not to do so.

Unfortunately, it's not the first time with statutes that this bureau has attempted to go down this path. So this rule... We'll talk about the future, but if it ever became law, you'd probably count nanoseconds at the time between publishing and the filing of the complaint probably in a federal district court in Texas.

John Culhane:

I would just add that the CFPB makes quite a bit out of the notion that the Fair Credit Reporting Act should be construed broadly to protect consumers. What they've done is taken “broadly” about as far as it can go to cover everything and anything. So, consumer reports and consumer reporting agencies, those definitions are just expanded to the nth degree, and any exceptions or exclusions that might otherwise exist are just narrowed as much as the bureau can narrow them.

Alan Kaplinsky:

So, what you've just said, it goes beyond what we typically say about a lot of the things that the bureau has done under Rohit Chopra's stewardship that is pushing the envelope, right? This is what tearing up the envelope, right?

Dan Smith:

I would say this is the largest example of irresponsible regulatory action I have ever seen. I don't say that lightly. I've been involved... I worked at the bureau. I've been involved in almost every rule at some level. I've never seen something this reckless and irresponsible.

John Culhane:

I think it's fair to say that the bureau here is not going to let the words of the Fair Credit Reporting Act stand in the way of its accomplishing policy goals that it wants to accomplish. So, it's just gone off and issued this proposal.

Alan Kaplinsky:

All right. Unfortunately, it's a shame, Dan, that you can't bring a lawsuit based on a proposed rule. Otherwise, I'm sure you would've brought it by now, but we have to wait until it becomes a final rule. I'm not betting on that ever happening. Rich, what changes are proposed regarding the permissible purposes to obtain a consumer report?

Rich Andreano:

Yes, what they would do there is make two main changes. One is changing the requirements around the written authorization permissible purpose. That would be burdensome and include an upfront disclosure, and John's going to visit with that a little bit. Also, they propose to interpret the legitimate business need permissible purpose in a way that I'll address in a little bit.

Alan Kaplinsky:

Okay. John, what does the CFPB propose as the requirement for the disclosure to obtain a consumer's written authorization?

John Culhane:

Quite a lot actually. Basically, the proposed rule requires that the consumer provide express informed consent as the bureau sees the elements for express informed consent. That would mean that there would have to be a disclosure provided either by the consumer reporting agency or the user of the consumer report that identifies the consumer reporting agency, identifies the user, identifies the specific product or service or specific use for which the report will be furnished or obtained, sets forth the fact that there are limitations on the scope of the use, and also spells out how a consumer may revoke consent. That grant of written permission would also have to be signed by the consumer.

Alan Kaplinsky:

Okay. Thanks, John. Rich, would there be any time limitation on how long a written authorization remains valid?

Rich Andreano:

Yes. It would be one year as proposed, and the bureau acknowledges that that will have implications for various services that even services consumers want, such as credit monitoring, where the credit monitoring service at least annually would have to go to the consumer, and get a reauthorization. They just think the benefits however they see them of the consumer being able to annually reauthorize outweighs the time and cost of the reauthorization effort without really fully explaining why that's the case.

Alan Kaplinsky:

John, how could a consumer revoke their written authorization for a priority to obtain a consumer report?

John Culhane:

Well, the proposed rule requires an equal dignities approach to revocation. That is the method to revoke consent has to be as easy to access and use as the method by which the consumer initially provided consent to the furnishing of the consumer report. The proposal also provides that a consumer couldn't be charged any costs or incur any penalties in connection with revocation, [and] the whole penalty concept is interesting. If the report's being used for particular purposes related to furnishing credit, and you have to stop using it, the proposal does stop short of requiring either the user or the consumer reporting agency to notify the consumer on some kind of periodic basis about their ability to revoke consent.

But if this CFPB were going forward with this proposed rule, it wouldn't surprise me if we saw something like that show up in a final rule.

Alan Kaplinsky:

Right. Right. Rich, would there be any limitations on how a party who obtains a consumer report pursuant to a consumer's written consent then is able to use the report?

Rich Andreano:

Yes, and it ties in with the disclosure that John mentioned where the disclosure written authorization has to be very specific as to how the report is going to be used. Then the use restriction would be whoever receives it could use a report only as reasonably necessary to provide the product or service the consumer requested, or if they have not requested a product or service, for this specific use that the consumer actually identified. So, then there's also the one-year limit. Let's not forget that as well.

But, the reasonably necessary standard again with this proposal adds an element of uncertainty that even if someone has written authorization, will the bureau or someone else believe they're using it only as reasonably necessary for whatever the consumer has requested? So again, creating more uncertainty over whether you have liability under the FCRA.

John Culhane:

Alan, if I could jump in here, there's also a requirement that there be a separate authorization for each product or use. I think that raises some interesting issues. For example, in Rich's neck of the woods where you have mortgage financing where there are two products combined to cover the financing for the mortgage loan, that raises the question of

whether that would require two separate authorizations. Certainly in connection with the onboarding of new customers, you would have very significant limitations on what you could do in the way of getting consent for consumer reports. Is a savings account, one use, and a checking account, another use? We don't really know that yet. But given the way this proposal is worded, certainly, that possibility exists.

Alan Kaplinsky:

Let me ask you, does the proposal identify any examples of what would or wouldn't reasonably be necessary to provide a product or service to a consumer?

John Culhane:

It provides examples of uses that would not be reasonably necessary to provide a product or service. In particular, activities such as targeted advertising, cross-selling of other products or services, and the sale of information in the consumer report are not part of or couldn't be considered reasonably necessary to provide a product or service. It doesn't provide any examples or any real guidance on what reasonably necessary to provide the product or service means. It just leaves that as the standard.

Alan Kaplinsky:

Rich, does the CFPB propose any changes regarding the legitimate business need, permissible purpose?

Rich Andreano:

Yes. Again, they're adding elements of uncertainty. What they're focusing on, the key to that is the consumer has to have initiated the transaction. If they haven't, then you're in the pre-screen situation, but here's where the consumers initiated a transaction. They tend to address that, but really more by providing some non-exhausted examples, which then means what else is on the list of initiate versus non-initiate. For initiate, the examples they provide are the consumer applies to rent an apartment. They apply to open a brokerage or checking account, or they offer to pay for merchandise by personal check.

An example, and they only give one example, when they have not initiated is they simply ask about the availability or pricing of products or services leaving open, what other examples are their bureau of the consumer not initiating a transaction that you believe exists? So, adds yet another element of uncertainty. Now, always in the past when you weren't sure exactly if you had a permissible purpose, you could go the written authorization route, but they made the written authorization so cumbersome. They really reduced the benefits of that as an alternative if you're not absolutely sure that you could establish the consumer initiated the transaction.

Alan Kaplinsky:

Well, thank you Rich. John, does the proposal include any limitations on the legitimate business need for reasonable purpose?

John Culhane:

Well, it does in the sense that the CFPB says that a person can furnish a consumer report only when it has reason to believe that the recipient has a legitimate business need for the information, either in connection with a business transaction that's initiated by the consumer or to review an account to determine whether the consumer continues to meet the terms of the account. Rich discussed the business transaction initiated by the consumer portion of legitimate business need. With regard to the account review portion, the CFPB says that a consumer reporting agency could furnish a consumer report to a bank, for example, if it has reason to believe that the bank needs the report to determine as part

of an account review whether to modify the terms of the consumer's existing checking account based on indicia that the consumer has been using the account to defraud others.

It doesn't really elaborate on that, but it does give that as an example. Then there's a clear directive, as there is throughout this proposal, not to use information for marketing services, and not to use the account review purpose under the guise of getting information that will then be used to market other products or services. But, that's pretty much the extent of the direction that's provided.

Alan Kaplinsky:

Okay, thanks, John. Final question I have for you, Rich, before I've got some questions for Dan. What are the potential practical implications of this extremely broad CFPB proposal?

Rich Andreano:

I think one of the natural ones is almost any information about a consumer would be a consumer report, and almost any party who for monetary fees, dues or on a cooperative nonprofit basis provides that information to others would be a consumer reporting agency. It's just that broad, and I don't think Congress ever intended to go there. What it may do is cause various parties to exit the information service business they're in now, which would decrease competition, increase prices which ultimately be boring to consumers. For those that decide to remain and comply, it would increase their costs of operation, and, again, consumers would've to bear that expense.

The written authorization to obtain a consumer report, that's going to make things more burdensome. We'll probably increase the cost of credit insurance, because of the extra requirements. But also as we've noted, information that's used for good, fraud detection, anti-money laundering, other methods to protect consumers and businesses and the government from harm would be implicated by this, and it would make it much more costly or difficult to engage in those endeavors. That's not a good thing nowadays where fraud and anti-money laundering similarly are very huge concerns to the financial industry, to consumers, and to the government security as a whole, and the overall uncertainty that we've mentioned.

Uncertainty creates the risk of litigation, the risk of regulatory action, and that's going to make things much more burdensome for the industry. So in the end, this is an ill-advised proposal, and it should be abandoned.

Alan Kaplinsky:

So Dan, I almost feel in asking you this question, it reminds me of the old joke about other than that, Mrs. Lincoln, how did you enjoy the play, right? So, this large expansion of the FCRA, is this a good thing?

Dan Smith:

I have a difficult time finding anything in this proposal that is good. They are taking a statute that is specific to consumer reporting, and trying to squeeze in data privacy under that umbrella. It's mixing apples and oranges. It is likely going to destroy the free flow of information in our society. It's going to put consumers at enormous risks that they don't even consider. The good news about this is it's so bad that I can never envision this ever being implemented.

Alan Kaplinsky:

Well, I want to get to... That's one of the questions I'm going to ask you, but I'm going to leave that for the end. So, can you identify the many provisions that John and Rich wanted the detail about? What are the provisions that give you the most concern?

Dan Smith:

So, there's several, but I would say for this audience, the number one issue that they should be concerned about is the credit header information. Credit header information is the most reliable, accurate piece of data that a financial institution has access to verify and validate who you are. So, think about when you call your bank. Just on your cell phone, you pick up the phone. They don't know that you are who you are, so they have to validate you are. So, they're going to ask you a series of questions, and often, those questions might be, "Have you ever lived at 1 Main street in McLean, Virginia?"

You're going to go, "Wow, I lived there 25 years ago." Only am I going to know that, right? So now, they can say, "I am very confident that this is the real Dan Smith." Without that information, that exists nowhere else, a bank or your healthcare provider or your insurance company is going to have a very difficult time verifying you are who you say you are, which then opens up to an enormous amount of risk to the system, which means financial institutions are going to say, "Stop, and we're going to have to put friction into the system to verify before we'll give you access to your account." That alone is an enormous change.

Think about what credit header information is. It's coming from multiple sources at a ongoing basis. You're getting information that's reliable and accurate and updated from your mortgage lender, from your one, two or three credit cards, from your auto loan, right? You're getting this information that's coming into a system from multiple sources on a monthly or weekly basis that you can verify its accuracy because it's consistent across the different institutions. Then when you move, what do you do? You contact your mortgage company or your credit card, and say, "I have mood."

Now, they start reporting the new information. Now, you can verify that the new information is correct. You get rid of this. You shut down the entire financial systems and the ability for a consumer to pick up the phone, and call a credit card company, and get credit immediately. To be able to walk into a auto dealer, and get a loan, and walk out of there with the car, they need to know that you are who you say you are. This is probably the most important tool that they use, and it's not the only tool, but it is the glue that holds together databases of information that fraud protection tools use. So, that to me is probably the biggest.

Then every other piece of it is just insane, and that if you think about it, they're taking this rule, this law that requires adverse action notice, accuracy requirements, dispute requirements, and saying, "You are now an FCRA credit report. You have to tell the consumer that they have all of these protections." I don't know where you get an adverse action when you're not actually providing credit to somebody where they'd be adversely acted upon, or accuracy requirements. If I'm pulling public records, which are public, and I'm including in my database, and now I'm a CRA, the consumer has the right to dispute the accuracy of that public information.

How do I do that? By the way, who's the furnisher when it's a public record? There are so many questions. It's just insane. The biggest thing people forget about is FCRA itself has a liability provision, and that there's a private right of action. So, the amount of lawsuits that are going to take place on every furnisher and every new credit reporting agency is through the roof. There's probably one main reason why you have three national credit reporting agencies is because the liability risk is enormous.

Alan Kaplinsky:

Wow. So, this is a rhetorical question, Dan. Is this good for consumers?

Dan Smith:

I think you are taking a law that has been tested and Congress has amended many times over the years. It allows consumers access to credit. It is an enormously important tool to the financial health of every consumer. It drives credit scores, right? Credit reports allows consumers to be evaluated for credit on an equal basis based on their history of the way they performed and their loans. It puts all of that at risk.

Alan Kaplinsky:

Now, how does this rule or proposed rule, Dan, intersect with the CFPB's so-called open banking rule, the rule that they issued, but not too long ago, under Section 1033 of Dodd-Frank?

Dan Smith:

I think this is their attempt to drag data aggregators under their jurisdiction. So, they tried to say, "Oh, you're a data aggregator, and even though you have permission, we're now going to call you a CRA. So now, we have supervision and enforcement authority over you," where they may not have previously under 1033. It's a quagmire, right? They're now calling that information part of a credit report. Though it's taken from a bank, it's not furnished. It's taken. So, who's the furnisher? I have no idea. Who's got the liability of that information? Is it the data aggregator? I don't know. I am perplexed on this one. I would not want to be in the data aggregator world right now trying to figure out who has authority to regulate me.

Alan Kaplinsky:

All right, so here's really the final issue, and to get a reaction, really want to go back to Rich, John, and you, Dan, a reaction from all of you. What happens now? January 20th, new acting director, presumably appointed by then President Trump comes into office. The comment period I think extends through, I think, March 3rd if I've got that correct. There will be comments coming in, and very soon, that acting director is going to have to make some decisions. What are the options that are available, so to speak, on the table?

Dan Smith:

I think the acting director has two options, basically. One is to basically file with the federal register, and intend to repeal the proposal, and have comments on that, or he could just let the comment period go until March 3rd, and then sit on it, and not do anything. He does not have any legal requirement to take action. He can just take the comments, and let the comment period close, and put it up on the shelf.

Alan Kaplinsky:

Now, it would be... That's what I think is going to happen here, because there's so much that that new acting director is going to have on his or her plate to deal with. I mean, the list goes on and on and on. It seems like something's happening every day. That's very controversial. The new acting director has only got a certain bandwidth to deal with, doesn't have unlimited resources. Seems to me, the point of least resistance is just let the thing die on the vine, but that's not Dan. I mean, that's an okay result. I'm not going to bicker with anybody over that, but we'd really like to see the new acting directors reject this thing, right? I mean, say this is not a regulation of the CFPB, and we disagree with it completely.

Dan Smith:

Yeah, I think that would be the best result is for the bureau to come out and say, "We actually don't have any legal authority to do what this proposal proposes."

Alan Kaplinsky:

I guess since it's not a final regulation, they can just let it wither on the vine, and then come out with... I don't think they have to propose anything for comment, unless anyone else thinks so, because it's not a final rule. I think they could just come out and say, "We disagree with this. This is bad policy," and provide the reasons. We've given them all the

ammunition today on all the reasons why this thing is really a holy mess. Rich, what do you think? Then I'd like to get John's reaction, and we'll wrap up our program for today.

Rich Andreano:

One thing I think will be important, assuming the bureau doesn't act before the comment deadline to stop this, and given it's going to be relatively soon that obviously there'll efforts to try to get the director or whoever, and we don't even know who the director's going to be. So, that's another factor. But it will be important, I think, to get comments in... Unless this rule is proposal stopped before that on the point that, one, it's beyond statutory authority, and two, it's ill-advised, even if it was within the statutory authority as to serve as a basis for the bureau to say, "Okay, we're not going to move forward on this proposal. The comments have supported it."

There'll be consumer groups that will say, "This is the most wonderful thing since sliced bread." What we have to do is equally get on the record the industry view that one, beyond statutory authority, two, bad idea.

Alan Kaplinsky:

I'm not so sure, Rich, that the first thing that you mentioned that is to withdraw the regulation. That's, I think, a little more complicated.

Rich Andreano:

It's more complicated. You have to publish. You got to go unpublished.

Alan Kaplinsky:

You've got to jump through all the administrative procedure act hoops, right? You got proposal. That in itself could be challenged in litigation.

Rich Andreano:

Exactly. Groups have challenged that when the bureau has abandoned efforts in the past. So, I think what we're in the mode of is... While I think none of us think this rule will ever actually be implemented, we still have to go through the hoops, putting in comments, explaining why this rule should never be implemented so that there is a record, so that if the bureau doesn't proceed with it and someone sues to say, "No, you should proceed," the court could just say, "No, they had ample reason not to proceed."

Alan Kaplinsky:

So, it seems to me the appropriate strategy is just let the comments come in. The industry ought to supply all the comments. In fact, maybe this podcast show ought to be an exhibit or a separate comment that comes in to put that on the record. Then a short time thereafter that, after they've read all the comments, they ought to just say, "We're not going to finalize it. We're not doing it. No need to propose that. It's only a proposed record." What do you think, John?

John Culhane:

Well, I agree with everybody's comments. I think a pocket veto is the most likely way that this ends under the new administration. Maybe we see this in the semiannual regulatory agenda as canceled or with just no dates for any further action. That's something that the CFPB has done in the past. I think this is a longer shot, but it's certainly possible that a new CFPB could take its time, and basically turn this proposal on its head, and take all of these provisions or many of

them, and rewrite them to say, state affirmatively, "This provision does not stretch to this area. It does not cover this kind of activity."

Once you open the door for comments and rulemaking, there is room for the agency to go in a different direction. So, I think that's less likely, but that's a possibility.

Alan Kaplinsky:

Dan, what do you think?

Dan Smith:

I think it's going to really depend on who they put in the seat, either as acting or permanent. The permanent won't be before this gets resolved in terms of the comment period. If they care about the law at all, they may actually repeal it. They may go through the APA process, because this is such a flagrant ignoring of statute that some directors and their staff would be like, "We can't just let this go. We have to speak up and say, "This is just absolutely wrong." I will tell you, I will be pushing hard for that, because just letting this go and close the comment period in four years, eight years, guess what?

Another director comes in and says, "Ha, I'm going to take it off the shelf. We've done a comment period. I'm going to finalize the rule." Now, they would probably have to repropose because of the time, but they're already a step ahead. We need to back this out and get it out of the realm of possibility ever.

Alan Kaplinsky:

Right. Right. Any final comments from you, Dan, as our very special honored guest?

Dan Smith:

I always ask, "Why did they do this, right?" People think it's crazy. Why would the director put this proposal out knowing it's likely going to get reversed? Based on my experience at the bureau, there is this conceptual theory, which I think is completely false, that if they move a conversation forward, that that's where you start the conversation in the future. So, if you think about HMDA under Director Cordray, they proposed a broad expansion weeks before he was relieved of his duties or resigned. Well, the concept was, "Well, that's where we'll take up when we come back in."

That's what he's trying to do. That's one piece is we'll come back in four or eight years, and we could start with this proposal. We don't have to start from ground one. The second is he's sending clear signals to his allies and friends around the country. His attorney general buddies in very liberal states on how to go about doing this. Data broker is a huge issue at the state level, and he's trying to give them ammunition and arguments for why they should regulate it. The bureau put out an interpretive rule on preemption of FCRA two years ago, right?

It's completely wrong, not surprising, but it has been used at the state level as for reasons why states should enact more restrictive FCRA because the CFPB said, "Go and do it. You have legal authority." They're wrong, but they're still doing it. So, he's using it as a tool to get state Ags, congressional friends to introduce legislation. It's not just the CFPB.

Alan Kaplinsky:

That's interesting. So, let me thank our participants today, especially Dan Smith from CDIA. Also want to thank Rich Andreano and John Culhane, my two colleagues. Also, I want to thank all of our listeners today. We really appreciate the many of you who listen to our podcast show each week. To make sure you don't miss any of our future episodes, you should subscribe to our show on your favorite podcast platform, be it Apple Podcasts, YouTube, Spotify, or wherever

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