

How CFPB Rule Would Affect Data Brokers And Beyond

By **Marshall Bell, Sherry Safchuk and Sasha Leonhardt** (December 10, 2024)

Over the past several years, data brokers have been subject to increased scrutiny from regulatory and enforcement agencies at both federal and state levels. On Dec. 3, the Consumer Financial Protection Bureau took a significant step to expand data broker oversight — and upend the regulatory environment — by proposing the Protecting Americans from Harmful Data Broker Practices rule.

The proposed rule would significantly revise Regulation V, which implements the Fair Credit Reporting Act. If adopted, the changes would substantially expand the FCRA's scope and result in regulators classifying many data brokers as "consumer reporting agencies."

This would subject them to the FCRA's accuracy, dispute, disclosure, permissible purpose and other requirements. The same thing could happen to other companies that handle consumer data.

In addition, the proposed rule goes beyond its stated focus on data brokers to impose new substantive and disclosure limitations on companies seeking to obtain information from consumer reporting agencies. If enacted, the rule may require companies to alter their business models.

Here's a look at key points for the industry.

Coverage of Data Brokers

Although the CFPB's stated goal was to bring data brokers within the scope of the FCRA, the proposed rule does not define "data broker" at any point.

Rather, it proposes new definitions of "consumer report," also commonly known as a credit report, and "consumer reporting agency" that purport to interpret the FCRA's statutory definitions and cover activities performed by data brokers. In doing that, though, the proposed rule appears to go beyond the statutory text.

Consumer Report

The proposed rule would expand the definition of "consumer report" to include communications that only contain so-called credit header, or above-the-line data.

This information includes name, age, date of birth, address, phone number, email or Social Security number, and traditionally appears in the header of a consumer report to identify the subject of the report.

Data brokers often collect and use credit header data to verify identity, prevent fraud, and perform background checks and similar limited services. However, the CFPB's proposal to have credit header information count as a consumer report appears to contradict the FCRA's



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statutory text.

Standing alone, credit header data is purely identifying information, the law says, and does not have "bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." [1]

The CFPB's position also conflicts with the Federal Trade Commission's long-standing view that such identifying data is not a consumer report under the FCRA. [2]

In addition, the FCRA's statutory definition of "consumer report" requires a communication to be "used or expected to be used" for a permissible purpose.

The proposed rule would expand the definition to state that information about a consumer's credit history, credit score, debt payments, or income or financial tier is automatically expected to be used for a permissible purpose.

This would be the case regardless of whether the people collecting or using the information actually expect it to be used for an FCRA eligibility purpose. As a result, if the proposed rule takes effect, the "used or expected to be used" standard would expand the FCRA's scope to include other information regardless of its actual or expected use.

Consumer Reporting Agency

The proposed rule would also expand the definition of "consumer reporting agency" to capture data brokers.

Under the FCRA's statutory text, a consumer reporting agency is any person who, "for monetary fees, dues, or on a cooperative nonprofit basis," regularly assembles or evaluates information regarding consumers to furnish consumer reports to third parties. [3]

If enacted, the proposed rule would define "assembles or evaluates" to include a variety of actions with respect to consumer data, including collecting, retaining, assessing, verifying, validating, contributing to, or altering such data.

The proposed rule includes examples of assembling or evaluating consumer information that would sweep in a wide variety of rote data processing activities, including:

- Modifying a date field to format years with four digits, rather than two;
- Retaining customer information in a database; and
- Verifying or validating information from a third party against an external database, or checking whether "the consumer's date of birth ... is properly formatted."

A wide variety of companies beyond traditional data brokers engage in these basic data processing activities with consumer information.

By expanding the definition of a consumer reporting agency, the proposal appears to go beyond the plain text meaning of "assemble or evaluate" in the statutory text.

Several of the provided examples do not involve bringing information together or applying judgment to such information, and the proposed rule is likely to cause companies to reevaluate how they process consumer data.

Consumer Instructions and New Disclosure Requirements

CFPB Director Rohit Chopra's public comments and the agency's press release highlighted the proposed rule's focus on data brokers. However, the rule would also impose significant new obligations on financial institutions and other companies that obtain consumers' written instruction to pull consumer reports.

Those companies would need to provide consumers with a detailed written disclosure that identifies the purpose for obtaining the report, the reporting agency that will provide it, and rights the consumer would have under the proposed rule, among other things.

Companies also would need to get the consumer's express, informed consent and their written or electronic signature to obtain a consumer report. In addition, a consumer's written instruction to obtain a consumer report would expire after one year.

If the proposed rule is finalized without change, companies that rely on written authorization on an ongoing basis — such as to provide consumers with uninterrupted access to products or services — would need to rely on other permissible purposes or obtain a new written authorization from the consumer every year.

Companies also would need to offer consumers a way to revoke their authorization that is "as easy to access and operate as the method by which the consumer provided consent for their report to be furnished."

This revocation right would be a new FCRA requirement, but it mirrors the FTC's Negative Option Rule from this year, as well as broader concerns regarding dark patterns and the ability to revoke consent.

Finally, the proposed rule states that once a company obtains a consumer report, it can only be used as is "reasonably necessary" to offer the product or service identified in the disclosure, adding that targeted advertising, cross-selling or the sale of consumer report information are not reasonably necessary. However, a CFPB discussion accompanying the proposed rule indicates a company may conduct these activities with a consumer's written authorization.

Intersection With Other Regulations Affecting Data Brokers

The CFPB's proposed rule contributes to a series of actions aimed at the data broker industry.

In 2022, the FTC issued an advanced notice of proposed rulemaking on commercial surveillance. And while the FTC has not issued a draft rule for review, it has used its unfair or deceptive acts or practices authority to target data brokers in a variety of industries.

Meanwhile, several states have passed laws governing data brokers, some of which require data brokers to register. Notably, however, such laws in at least four states — California, Nevada, Oregon and Texas — generally exempt information covered by the FCRA. As a result, the CFPB's proposed rule may have the unintended effect of weakening existing state regulation of the data broker industry.

Next Steps and Industry Impact

For now, the proposed rule is just that — proposed. The window for comments is open until

March 3, 2025, and given that this rule may have wide-ranging effects, a number of comments are likely.

Once the comment window closes, it will be at least several months before a final rule emerges. The proposed rule suggests an effective date between six months and one year after the Federal Register publishes a final rule. This assumes, of course, that the CFPB continues with this rulemaking process, which it is under no obligation to do.

Under a new administration and new leadership, the CFPB may make substantial changes to the proposed rule or decide not to move forward with the rulemaking process at all.

Even if the proposed rule is finalized, it could face legal challenges. In recent years, the industry has challenged several CFPB final rules in court.

Industry participants have sued over the CFPB's 1033 Data Access Rule, the 1071 Small Business Lending Data Rule and its Payday Lending Rule — and the industry may challenge the proposed rule as well.

If finalized in its current form, the proposed rule would be a sea change to data brokers, existing consumer reporting agencies and those who obtain consumer reports.

Data brokers would face FCRA limits on sharing consumer reports and other complicated requirements, and would need to invest significant time and resources to comply.

Consumer reporting agencies would need to alter their operations to account for limits on permissible purposes and the use of data.

The proposed rule also would affect recipients of consumer report information who rely on consumers' written authorization — which a significant majority of the industry does. They would need to identify an alternative permissible purpose or comply with the proposed rule's new requirements.

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[1] 15 U.S.C. § 1681(a)(d)((1).

[2] FTC, 40 Years of Experience with the Fair Credit Reporting Act, p. 20 (2011).

[3] 15 U.S.C. § 1681a(f).