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# CFPB Proposed Data Broker Rule

Online Lenders Alliance: Legal Issues Conference

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## Roadmap



- FCRA background
- CFPB SBREFA proposals under consideration
- Potential impacts
- Effective CFPB rulemaking engagement
- Questions?

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# The Fair Credit Reporting Act (FCRA)

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## FCRA

- Federal legislation enacted to promote the accuracy, fairness, and privacy of information in the consumer reports of consumer reporting agencies
- Enforced by the Consumer Financial Protection Bureau (CFPB) and Federal Trade Commission (FTC)
- Applies to:
  - Consumer Reporting Agencies
  - Furnishers of consumer information
  - Users of consumer reports

**cfpb** Consumer Financial  
Protection Bureau



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## Important Definitions

- **Consumer Reporting Agency (CRA)** – any person that regularly engages in **assembling or evaluating** consumer credit information **for the purpose of furnishing consumer reports to third parties**, either for fees or on a cooperative nonprofit basis



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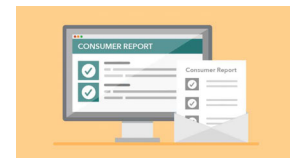
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## Important Definitions

- **Consumer Report** – any written, oral, or other communication of information by a CRA bearing on a consumer's:

- Creditworthiness
- Credit standing
- Credit capacity
- Character
- General reputation
- Personal characteristics
- Mode of living



which is used **or** expected to be used for the purpose of serving as a factor in establishing the consumer's eligibility for:

- credit or insurance to be used primarily for personal, family or household purposes,
- employment purposes, or
- **any other permissible purpose under FCRA**

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## Permissible Purposes

- A CRA may furnish a consumer report under the following circumstances:
  - In response to a court order
  - In accord with written instructions of the consumer to whom it relates
  - In connection to certain child support issues
  - To the FDIC or NCUA as part of its powers as conservator, receiver, or liquidating agent

## Permissible Purposes

- To a person which the CRA has reason to believe intends to use the information:
  - In connection with a credit transaction involving the extension of credit or review or collection of an account
  - For employment purposes
  - In connection with the underwriting of insurance
  - In connection with an eligibility determination for a benefit granted by a governmental instrument
  - As a potential investor, servicer, or current issuer in connection with an assessment of the credit or prepayment risks associated with an existing credit obligation
  - For a legitimate business need in connection with a business transaction that is initiated by the consumer, or to review an account to determine whether the consumer continues to meet the terms of the account
  - In connection with the issuance of a government-sponsored travel charge card

# CFPB SBREFA Proposals Under Consideration

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## Background

- On December 15, 2023, the CFPB released the Final Report of the Small Business Review Panel on the CFPB's Proposals and Alternatives Under Consideration for the Consumer Reporting Rulemaking
- CFPB considering proposals to address consumer harms arising from data brokers and their activities
  - "Data broker" not statutorily defined
  - As used in the Report, "data broker" is an umbrella term to describe firms that collect, aggregate, sell, resell, license, or otherwise share personal information about consumers with other parties
  - "Data broker" includes first-party data brokers that interact with consumers directly and third-party data brokers with whom the consumer does not have a direct relationship

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## Proposals Under Consideration: Updating Definitions

- **Data Brokers** – Proposals to clarify that:
  - Consumer information provided to a user who uses it for a permissible purpose would be a “consumer report” regardless of whether the data broker knew or should have known the user would use it for that purpose
  - Data brokers that sell certain types of consumer data (e.g., data typically used for credit and employment eligibility determinations) are selling consumer reports
  - A data broker that collects consumer information for permissible purposes may not sell it for non-permissible purposes
  - A data broker may not obtain consumer report information from a CRA without a permissible purpose or sell such information to a user unless the user has a permissible purpose

## Proposals Under Consideration: Updating Definitions

- **Assembling or evaluating** - When the activities of entities facilitating electronic data access between parties (acting as intermediaries or vendors) would constitute “assembling or evaluating”
- **Credit header** - The extent to which “credit header” (name, current and former address, SS #, and phone #) data constitutes a consumer report
- **Targeted marketing** - When CRAs helping third-party users market to consumers would violate the FCRA prohibition on marketing and advertising
- **Aggregated data** - Whether aggregated or anonymized consumer report information constitutes a consumer report

## Proposals Under Consideration: Permissible Purposes

- **Written instructions** – Clarify steps companies must take to obtain a consumer’s written instructions, who can collect written instructions, limits on scope of authorization, and methods for revoking any ongoing authorization
- **Legitimate business need** – Specify that: (1) FCRA requires a transaction to have been initiated by the consumer for personal, family, or household purposes and permits use of consumer reports only for the purpose of determining the consumer’s eligibility for the business transaction; and (2) FCRA section requires that there is an account review for which the use of a consumer report is actually needed to make a decision about whether the consumer continues to meet the terms of the account
- **Data security** – Clarify a CRA’s obligations under the FCRA to protect consumer reports from unauthorized access

## Proposals Under Consideration: Disputes

- **Legal Matters** – Codify the interpretation that the FCRA dispute provision does not exempt “legal disputes” from the requirement that CRAs and furnishers reasonably investigate disputes
- **Systemic Issues** – Specifying how furnishers and CRAs must investigate systemic issues, whether to provide consumers with a specific process to notify regarding systemic issues, and whether a notice to consumers impacted by systemic issues may be appropriate

# Potential Impacts

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## Potential Impacts: Expanded Scope of CRA

- Concerns that data retrieval and delivery services will become CRAs under definition of “assembling or evaluating” → SAAS providers or cloud-based platform service providers
- Depending on when credit header data would be considered a consumer report → could lead to entities sharing public data being considered CRAs
- Aggregated data used in contexts including economic research, pricing, etc. → concern that the CFPB proposal would impede these purposes and push entities engaged in these activities within the definition of CRA

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## Potential Impacts

- Increased costs associated with FCRA compliance
  - Increased transaction and security costs for online transactions → these costs may be passed on to consumers
  - Excessive legal disputes may increase costs
    - Instead of investigating legal disputes, financial institutions may prefer to remove tradelines
- Narrowing legitimate business need to only “personal, family, or household purposes” may be difficult when consumer intent is not clear (e.g. renting a car)
- The rule may reduce the overall availability of consumer data on the market and will hamstring lenders’ ability to perform certain functions

# Effective CFPB Rulemaking Engagement

## Proposed rule – Pre-NPRM (SBREFA, Outreach)

- CFPB internal policy development process
- Outreach with external stakeholders
  - E.g., potentially-regulated parties, industry trade associations, consumer advocates, state governments, academics, other stakeholders
- Inter-agency consultations (federal prudential regulators)
- SBREFA – if proposals under consideration would have “significant economic impact on a substantial number of small entities”
  - Panel – CFPB, OMB, SBA Office of Advocacy
  - SERs (small entity representatives)
  - Process (outline of potential proposals, meeting, Panel report)

## Effective Use of Rulemaking Process – Pre-NPRM

- Engage with CFPB Markets and OFIBL Offices
- Integrate into SBREFA process
- Data submissions
- Review Panel Report carefully for clues as to direction

## Proposed rule – Drafting, Notice and Comment

- Drafting of proposed reg. text, commentary, and section-by-section analysis consistent with Administrative Procedure Act (“reasoned basis”)
  - NPRMs moving toward less commentary and streamlined preamble
- Drafting of preliminary impact analyses (Dodd-Frank 1022 analysis, Regulatory Flexibility Act, Paperwork Reduction Act)
- Public release and publication in the *Federal Register*
- Comment period – now typically 60 days
- *Ex parte* policy

## Final Rule – Drafting and Implementation

- Comment review and analysis
- Policy development leading to decisions for final rule
- Drafting – similar elements to proposal, plus comment responses
- Public release and publication in *Federal Register*
- Regulatory implementation
  - During implementation period, CFPB makes available resources such as webinars and compliance guides; ongoing guidance function
  - Rule amendments to address stakeholder feedback

## Effective Use of Rulemaking Process – Final Rule

- Write a thoughtful, constructive comment letter
  - Engage NPRM on its terms; suggest alternative language
  - If opposed, provide strong but reasoned criticism of evidence, authority, or policy rationales. Reserve rights to challenge but avoid invective or threats.
  - Discuss robust available data
  - Mass mail campaigns can be useful but not sufficient; not a popularity contest
  - E.g., OLA 2016 letter on CFPB small-dollar NPRM
- *Ex parte* discussions – continue pre-NPRM dialogue, but on record
- Regulatory implementation process

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