



# Financial Services Management

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## Consumer Data Ownership

### Cite

Bureau of Consumer Financial Protection (CFPB), Advance notice of Proposed Rulemaking (ANPR), Consumer Access to Financial Records

### Recommended Distribution

Retail Finance, Fintech, Policy, Legal/Government Relations

### Website

[https://files.consumerfinance.gov/f/documents/cfpb\\_section-1033-dodd-frank\\_advance-notice-proposed-rulemaking\\_2020-10.pdf](https://files.consumerfinance.gov/f/documents/cfpb_section-1033-dodd-frank_advance-notice-proposed-rulemaking_2020-10.pdf)

## Impact Assessment

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- Consumer data ownership is a defining strategic question for legacy versus new-entry companies, especially tech platforms.
- Federal regulatory policy is at only a preliminary stage, but legislation could transform it far more quickly. Comments on this ANPR will frame that debate.

## Overview

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In 2010, Congress told the CFPB to determine how consumer-finance providers are to give consumers access to their data.<sup>1</sup> Although the Bureau issued a 2017 statement of principle establishing ownership rights,<sup>2</sup> the CFPB appears to be starting again from scratch with this ANPR. While it initiates a potential rulemaking that could prove more binding, regulation to effectuate Congress's directive remains far off given the sweep of issues on which the CFPB seeks comment. Given also the critical importance of consumer-data ownership rights to consumer privacy, data security, and competitive advantage, Congress is likely to renew its work on this question in 2021, perhaps preempting CFPB and other regulatory actions with a new statutory framework.

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<sup>1</sup> See **CONSUMER14**, *Financial Services Management*, July 19, 2010.

<sup>2</sup> See **FINTECH14**, *Financial Services Management*, October 24, 2017.

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## Impact

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The ANPR praises providers for improving consumer-data access and security, describing how consumer-data access could enhance an array of policy objectives, but it also cites a range of emerging practices that may require regulation. The ANPR also describes data-management and -distribution processes in detail, noting the critical importance of policy in this area to innovation, competitive advantage, and financial inclusion.

Although suggesting that the ANPR might lead to new rules, the Bureau does not appear to accord benefits to the ability of regulation to ensuring data privacy and security. The Bureau does, however, note recent OCC statements identifying risk to banks from third-party aggregators who do not ensure privacy or security. The ANPR observes also that industry self-regulatory standards that enhance secure and sound screen-scraping may offer considerable promise, but express regulation and even new law may nonetheless be required to address an array of uncertainties also detailed in this ANPR.

Although the ANPR seeks views on many issues germane to consumer-data access, the CFPB has jurisdiction over only some of them. Its authority is clear to the extent data-access requirements create consumer-protection concerns – e.g., use of data for marketing predatory products – but is less certain when it comes to privacy and likely still more limited with regard to data security. Federal and state bank regulators have more clear authority over security and sound practice as well as residual authority over any consumer-data practice an agency deems so abhorrent to consumers as to create a safety-and-soundness problem for a bank, its parent company and certain affiliates, and perhaps even those with which it has third-party lending arrangements. In its most recent “true-lender” standard,<sup>3</sup> the OCC states that it will hold national banks and federal savings associations accountable for consumer safeguards at fintech companies or others for which the bank originates or funds loans. This standard clearly encompasses data access and, while the FRB and FDIC do not have like-kind statements, their approach is likely to be similar.

State insurance regulators have limited authority over consumer-data access and that of other state regulators for fintech companies and other financial entities varies considerably. Differences in international practice – e.g., the far-reaching EU standards for “open banking” – also create both complex regulatory challenges and opportunities for arbitrage.

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## What's Next

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This ANPR was issued on October 22; comments are due ninety days after *Federal Register* publication. This Congress has had extensive hearings on data privacy and ownership,<sup>4</sup> with high-profile bills coming from both Democrats and Republicans in both the House and Senate. It remains to be seen if differences that forestalled action can be resolved in the next Congress, but the pace of data-use aggregation suggests Congress will at the least turn to this issue.

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<sup>3</sup> See **PREEMPT35**, *Financial Services Management*, November 2, 2020.

<sup>4</sup> See for example: *Client Report PRIVACY84*, May 7, 2019 and *Client Report PRIVACY86*, November 21, 2019.

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## Analysis

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Much in the ANPR provides background information on the Dodd-Frank Act's requirements and the consumer-data ecosystem. This analysis focuses only on issues on which the Bureau seeks comment, including:

- general questions about the benefits and costs of direct access and the regulatory steps best suited to enhancing benefits and reducing quantitative and qualitative costs. The Bureau also wants information on how costs and benefits vary across institutions (e.g., community banks, credit unions);
- the extent to which competitive incentives may facilitate or undermine authorized data access at small companies;
- if the CFPB should expect providers to develop industry access agreements and any resulting competitive implications;
- whether consumer data-access choices impose negative externalities on other consumers or data aggregators, holders, and users;
- the extent to which private standard-setting efforts suffice to achieve policy objectives and the proper role in such efforts for the CFPB;
- if the Bureau should promote some data-access methods over others;
- who should be allowed to authorize data access for a consumer;
- the best way to protect proprietary commercial information and prevent fraud, considering also the need for data-access restrictions;
- if the Bureau should address the operational reliability of authorized data access and, if so, how;
- an extensive series of privacy questions differentiating between primary and secondary data use and situations in which data may be anonymized to permit additional use;
- the extent to which consumers understand data access and if this understanding comports with appropriate protections. Views are also sought on current disclosures and whether the CFPB should take steps to align user data use and consumer expectations;
- current regulatory and legal uncertainties and the best way to resolve them;
- the implications of foreign data-access standards for the U.S.;
- the extent to which current law protects data security, whether the Bureau should take steps to improve security, or if market incentives suffice to ensure it;
- risks posed by data inaccuracies and the extent to which law and/or market incentives protect accuracy; and
- any other information of use to the CFPB.