



# *FedFin Client Report*

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Tuesday, September 21, 2021

## **HFSC Tackles Consumer Data Ownership**

Client Report: DATA2

### **Executive Summary**

Today's HFSC Fintech Task Force Hearing featured an appearance by Full Committee Chairwoman Waters (D-CA) arguing against consumer opt-out. Although her statement was focused on privacy given the nature of the hearing, it may have broader implications for other financial services issues, including overdrafts. The hearing also featured bipartisan support for the CFPB's consumer data ownership ANPR ([see FSM Report DATA](#)), with Ranking Member Davidson (R-OH) highlighting the need to read consent narrowly and provide "property rights" for consumers over their financial data. Rep. Davidson indicated that he is also developing a bill to secure those rights.

### **Analysis**

#### ***Opening Statements***

Chairman Lynch (D-MA) highlighted fintech's potential inclusion and access benefits, but also serious privacy concerns and regulatory gaps. Ranking Member Davidson encouraged the CFPB to move forward on its consumer data ownership ANPR.

#### ***Testimony***

Tom Carpenter, Director of Public Affairs of Financial Data Exchange, urged Congress and the CFPB to let the industry define technical standards, arguing that government mandated technical standards related to financial data sharing and open banking are limited in scope, time consuming, and unable to quickly adapt to market conditions and technological changes.

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Raúl Carrillo, Associate Research Scholar at Yale Law School and Deputy Director of the Law and Political Economy Project, urged Congress to structurally separate commercial and financial power, restricting data usage to a short list of permissible purposes. He further urged the CFPB to clarify what data are included in its ANPR's access rights and prohibit certain data collection, expand FCRA to encompass alternative reporting systems, issue a rulemaking to grant the CFPB supervision of data aggregators, and strongly enforce UDAAP violations.

Kelly Thompson Cochran, Deputy Director of FinRegLab, emphasized the need for clear regulatory baselines for consumer data access, supporting the FTC's proposal to modernize information safeguard requirements for non-bank financial services providers, the CFPB's ANPR, and the banking agencies' third-party RFI ([see FSM Report VENDOR9](#)).

Chi Chi Wu, Staff Attorney at the National Consumer Law Center, supported President Biden's EO calling on the CFPB to continue its ANPR, suggesting that the CFPB should also establish supervisory authority over the larger participants in the data aggregator market. She also encouraged Congress to urge the FTC to complete its strengthened Safeguards Rule.

Steve Smith, Co-Founder and CEO of Finicity, also supported the CFPB's ANPR.

## Q&A

- **Opt-Out:** As noted, Chairwoman Waters raised concerns about opt-out practices, asking if Congress could change or make a law that says an institution cannot offer only an opt-out option; Ms. Cochran noted that consumers tend to not see opt-out, while Mr. Carpenter countered that consumer-permissioned data sharing, which is being done at his company, is opt-in.
- **CFPB ANPR:** Rep. Torres (D-NY) worried that banks are opposing the CFPB ANPR to stifle competition and choice under the guise of consumer protection and cybersecurity, noting that standards should not be left to the industry and arguing that big banks have a conflict of interest.
- **Open Banking:** Rep. Steil (R-WI) asked about the appropriate role of the federal government in open banking; Mr. Carpenter believes that there are friction points where the government may need to step in, advocating for a hybrid approach that is both regulatory and standards based. Rep. Davidson asked about data minimization; Mr. Carpenter noted that APIs provide far greater consumer control over data sharing than screen-scraping. Rep. Luetkemeyer (R-MO) asked why

screen-scraping is allowed given the number of consumers who are either unaware of or disapprove of the practice, and if individuals could have a separate agreement to allow screen-scraping; Ms. Wu agreed, noting the need for separate, meaningful, informed consent, while Mr. Carpenter noted movement towards API which circumvents the sharing of login details.

- **Consumer Friendliness:** Rep. Davidson asked about the need for greater consumer friendliness; Ms. Cochran noted the large problem of overloading consumers, agreeing that there needs to be crisper and more consumer-friendly consumer disclosures, further noting that the CFPB has disclosure authority that could be useful in this arena.
- **GDPR:** Chairman Lynch noted that the GDPR has recognized various rights, including the rights to be informed and access data, the rights to rectification and portability, as well as to restrict processing and erase, asking if this is a useful framework and if any gaps exist; Ms. Wu noted that it is generally a stronger framework than the United States', with Ms. Cochran describing it as a helpful framework. Mr. Carpenter noted that the U.S. market is unique in its complexity, highlighting the need to balance both industry and regulators.
- **Disparate Impact:** Rep. Williams (D-GA) asked how to ensure personal consumer data is not used to enforce racial biases, suggesting that greater use of no-fee accounts could help address disparities; Ms. Wu agreed, also suggesting overdraft reform and highlighting AI/ML bias that reflects bias in underlying data.
- **Data Aggregators:** Rep. Torres asked what obligations data aggregators have; Mr. Smith noted that as an aggregator he has maintained CRA status and signed bilateral agreements with financial institutions to maintain compliance with GLBA.