

CFPB May Be Creating New Financial Privacy Standards

By **David Stein** (January 19, 2023, 3:49 PM EST)

The Consumer Financial Protection Bureau increasingly is using the doctrine of unfair, deceptive, or abusive acts or practices, or UDAAP, particularly the unfairness prong, to identify practices it considers presumptively unfair and press financial institutions to change those practices.

The CFPB has announced new regulatory expectations without notice-and-comment rulemaking using a range of legally nonbinding releases, including advisory opinions, circulars, compliance bulletins and blog posts,[1] punctuated by occasional enforcement actions, to establish new regulatory policy.



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Some CFPB reports offer a preview of how the bureau may address certain issues.

This article suggests that the bureau is poised to leverage UDAAP to create substantive new financial privacy standards, particularly if the Congress remains deadlocked on privacy legislation.

Indeed, the Federal Trade Commission released its commercial surveillance advance notice of proposed rulemaking with great fanfare last August — proposing to use unfairness and deception principles to address privacy concerns — and the CFPB may want to play a role in any such initiative.[2]

Background

Federal financial privacy law is based on three pillars:

- The Gramm-Leach-Bliley Act privacy provisions and Regulation P;
- The GLBA information security provisions and related rules and guidelines; and
- The Fair Credit Reporting Act and Regulation V.

The GLBA privacy provisions establish a notice and opt-out requirement that must be satisfied before consumers' nonpublic personal information can be shared with nonaffiliates, subject to numerous exceptions.[3] These provisions do not create private rights of action and administrative enforcement has been rare.

The federal banking agencies and the Federal Trade Commission, not the CFPB, implement the GLBA information security provisions.[4] The bureau, however, has used its UDAAP authority to bring information security-related enforcement actions,[5] and more recently to issue UDAAP-based

information security guidance for companies under its jurisdiction.[6]

The FCRA limits access to consumer reports and establishes notice and opt-out prerequisites for sharing consumer reports with affiliates and for allowing affiliates to use shared data for marketing solicitations.[7]

A UDAAP Basis for New Privacy Standards

The CFPB may rely on unfairness to establish new, broad-based financial privacy standards. An act or practice is unfair if it:

- Causes or is likely to cause substantial injury to consumers;
- Is not reasonably avoidable by consumers; and
- Is not outweighed by countervailing benefits to consumers or competition.[8]

Unfairness is well suited to this purpose because it is a flexible standard, readily adaptable to a variety of circumstances, and remediation of an unfair practice typically requires a substantive change in the practice.[9]

Deception and abusiveness have less utility for reshaping financial privacy standards. Deception requires a material misrepresentation or omission and often can be cured by disclosure, rather than a substantive change in practices.[10]

Further, existing privacy laws consist of a congressionally mandated, disclosure-based, notice-and-opt-out regime that the bureau cannot readily disregard.

Abusiveness requires a showing of either material interference with consumer understanding or taking unreasonable advantage of a consumer's lack of understanding, inability to protect their own interests, or reasonable reliance,[11] factors that may limit the usefulness of abusiveness as the foundation for substantive, broad-based financial privacy standards.

Laying the Groundwork for UDAAP-Based Privacy Regulation

The CFPB and Director Rohit Chopra appear to be laying the groundwork for UDAAP-based privacy regulation.

During the fall of 2021, the CFPB began using terms like "data harvesting," "data monetization" and "data surveillance" in public documents. The October 2021 order issued to six large technology companies included multiple questions about data harvesting and data use and data monetization.[12]

The CFPB's August report titled "The Convergence of Payments and Commerce" highlighted the monetization of consumer financial data as an emerging consumer risk and flagged the bureau's intent to carefully monitor and scrutinize certain data uses for both fair lending and UDAAP risks.[13]

The bureau's September buy now, pay later, or BNPL, report warned that "[t]he practice of harvesting and monetizing consumer data across the payments and lending ecosystems may threaten consumers' privacy, security, and autonomy." [14]

In his statement on the BNPL report, Chopra noted that "I have asked that staff identify the data

surveillance practices" of BNPL firms "that may need to be curtailed,"[15] without indicating how or on what grounds the bureau might curtail any such practices.

Preliminary Steps

The CFPB has taken preliminary steps toward the adoption of substantive UDAAP-based privacy protections.

Under the outline of proposals under consideration for Section 1033 of the Dodd-Frank Act data access rule, the bureau is considering proposals to:

- Prohibit some or all secondary uses of consumer data by data aggregators; and
- Require data aggregators to delete consumer data when no longer necessary or when the consumer revokes authorization for access.[16]

The bureau could base such proposals, explicitly or implicitly, on the doctrine of unfairness. Some financial institutions may welcome such restrictions on data aggregators.

Once a legal precedent for such restrictions is established, however, similar restrictions could be extended to creditors and account-holding institutions.

Two days prior to release of the outline of proposals in October, Chopra telegraphed the bureau's focus on secondary use restrictions: "We are exploring ways to ensure that when consumers share their data for a specific use, that is the only use it will be used for."[17]

He also added: "When a consumer permits their private data to be used by a company for a specific purpose, it is not a free pass for a firm to exploit the data for other uses, no matter what the legal mouse-print may say."[18] Significantly, the director did not limit his statements to data aggregators.

Chopra further stated that "the longstanding Gramm-Leach-Bliley Act privacy rules don't give consumers meaningful control over how their data is being used."[19]

He reported that he had asked bureau staff to "look at alternatives to the so-called notice-and-opt out regime that has been the standard for financial data privacy."[20]

What alternatives may emerge and what this statement portends is unclear, but it raises the prospect of a CFPB UDAAP-style challenge to usual and customary data collection, use, sharing and retention practices.

In a Dec. 14 congressional testimony, Chopra reiterated his concern that the GLBA "privacy notice is ineffective," particularly as applied to large tech firms that use consumer financial data "in ways that challenge traditional notions of privacy and autonomy."[21] In addition to encouraging Congress to act on privacy, Chopra testified that the CFPB

will be looking closely at ways to better protect privacy in areas under our jurisdiction, including, for example, the collection and distribution of personal data in credit reporting and the use of data authorized by a consumer under the CFPB's personal financial data rights rulemaking.[22]

Potential Next Steps

The bureau is considering proposing substantive privacy protections in the Section 1033 data access rulemaking, specifically secondary use restrictions and data deletion requirements.

However, the Section 1033 rule is not expected to be proposed until the latter half of 2023 or finalized until 2024.

The CFPB also could incorporate unfairness-based privacy protections into other regulations, such as consumer reporting regulations under the FCRA.

Echoing Chopra's congressional testimony, the CFPB's most recent unified agenda indicates that the bureau is considering an FCRA rulemaking to amend Regulation V without specifying the possible substance or content of any such rule.[23] Like the Section 1033 rule, however, any such rulemaking would take time to propose and adopt.

The CFPB may pursue faster ways to promote substantive UDAAP-based privacy protections.

Consistent with recent patterns, the CFPB could issue a legally nonbinding release, such as an advisory opinion, circular or bulletin, that deems certain data sharing and data use practices presumptively unfair. The bureau followed this approach with information security.

The CFPB's Circular 2022-04 presumptively concluded that the failure to implement three specific information security measures — multifactor authentication, password management and timely software updates — likely would constitute unfair practices, even in the absence of a data breach.[24]

Alternatively, the CFPB could take a regulation-by-enforcement approach and launch one or more UDAAP enforcement actions against financial institutions related to data collection, use, sharing, or retention in an effort to impose new data restrictions by consent order.

A regulated entity involved in such an action, however, may balk at such terms and choose to litigate with the bureau, rather than agree to operate at a disadvantage relative to competitors.

In addition, the bureau would need a case that factually supports its desired policy outcome.

What To Do

The financial services industry should heed these signals from the CFPB and assess its positioning on financial privacy.

At a minimum, industry should have or develop a coherent advocacy strategy in the event the CFPB takes action to create UDAAP-based privacy protections. Key themes to incorporate in such a strategy may include:

- Identifying how data sharing and use benefits consumers, competition, innovation, government agencies, the financial system and the economy in general;

- Highlighting the unintended consequences of restrictions on data collection, use, sharing and retention;
- Emphasizing the importance of informed consumer choice over substantive government mandates that take away consumer choice; and
- Preserving the use of de-identified or anonymized data.

Further, industry should be mindful of the long-term implications of potential secondary use restrictions and data deletion requirements, even if confined initially to the Section 1033 data access rulemaking and especially if inconsistent with the GLBA or other federal laws permitting or requiring data collection, use or maintenance by financial institutions.

At the institutional level, financial institutions may want to reassess their privacy practices and consider measures to mitigate privacy risks, for example, by:

- Reviewing consumer-facing privacy notices and policies for transparency and alignment with actual data collection, use, sharing, and retention policies, procedures, and practices;
- Reviewing consumer complaints related to data collection, use, sharing and retention for potential UDAAP implications;
- Evaluating new and existing data collection, use, sharing and retention practices under a UDAAP framework and, if necessary, adjusting such practices to mitigate UDAAP risk;
- Understanding how the institution's partners and vendors use shared consumer data and how the institution uses consumer data obtained from third parties;
- Adopting contractual restrictions on partners' and vendors' retention and use of shared consumer data;
- Evaluating whether and how the institution uses consumer data to make targeted offers to some consumers but not others, or to price offers differentially; and
- Implementing or enhancing legal and compliance review of marketing campaigns, website design, and website process flows to ensure clarity, transparency, and meaningful consumer choice regarding data collection, use, sharing, and retention.

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[1] CFPB, Consumer Financial Protection Circular 2022-06, at 6 (Oct. 26, 2022), available at https://files.consumerfinance.gov/f/documents/cfpb_unanticipated-overdraft-fee-assessment-practices_circular_2022-10.pdf (charging unanticipated overdraft fees on "authorize positive, settle negative" or APSN transactions "may generally be an unfair practice"); CFPB, Bulletin 2002-06: Unfair

Returned Deposited Item Fee Assessment Practices, 87 Fed. Reg. 66940 (Nov. 7, 2022) ("Blanket policies of charging Returned Deposited Item fees to consumers for all returned transactions irrespective of the circumstances of the transaction or patterns of behavior on the account are likely unfair.").

[2] FTC, Advance Notice of Proposed Rulemaking, Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273 (Aug. 22, 2022).

[3] 15 U.S.C. §§ 6801-6809; 12 C.F.R. Part 1016.

[4] See 15 U.S.C. § 6801(b); 12 C.F.R. Part 30, app. B (OCC); 12 C.F.R. Part 208, app. D-2 and Part 225, app. F (Federal Reserve Board); 12 C.F.R. Part 364, app. B (FDIC); 16 C.F.R. Part 314 (FTC Safeguards Rule).

[5] See, e.g., In the Matter of: Dwolla, Inc., Consent Order, File No. 2016-CFPB-0007, at ¶¶ 49-51 (March 2, 2016), available at https://files.consumerfinance.gov/f/201603_cfpb_consent-order-dwolla-inc.pdf.

[6] CFPB, Consumer Financial Protection Circular 2022-04, at 2-3, 6-8 (Aug. 11, 2022), available at https://files.consumerfinance.gov/f/documents/cfpb_2022-04_circular_2022-08.pdf.

[7] 15 U.S.C. §§ 1681a(d)(2)(A)(iii), 1681b, and 1681s-3; 12 C.F.R. §§ 1022.20-27.

[8] 12 U.S.C. § 5531(c); CFPB Bulletin 2013-07, at 2 (July 10, 2013), available at https://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf; FTC Policy Statement on Unfairness (Dec. 17, 1980), available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>.

[9] CFPB Bulletin 2013-07, at 3 (July 10, 2013), available at https://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf.

[10] FTC Policy Statement on Deception (Oct. 14, 1983), available at https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

[11] 12 U.S.C. § 5531(d); CFPB Bulletin 2013-07, at 4 (July 10, 2013), available at https://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf.

[12] CFPB, Order to File Information on Payments Products, at 7-10 (Oct. 21, 2021), available at https://files.consumerfinance.gov/f/documents/cfpb_section-1022_generic-order_2021-10.pdf.

[13] CFPB, The Convergence of Payments and Commerce: Implications for Consumers, at 16-17 (Aug. 2022), available at https://files.consumerfinance.gov/f/documents/cfpb_convergence-payments-commerce-implications-consumers_report_2022-08.pdf.

[14] CFPB, Buy Now, Pay Later: Market trends and consumer impacts, at 75 (Sept. 2022), available at https://files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf.

[15] CFPB Press Release, Director Chopra's Prepared Remarks on the Release of the CFPB's Buy Now, Pay Later Report (Sept. 15, 2022), available at <https://www.consumerfinance.gov/about-us/newsroom/director-chopras-prepared-remarks-on-the-release-of-the-cfpbs-buy-now-pay-later->

report/.

[16] CFPB, Small Business Advisory Review Panel for Required Rulemaking on Personal Financial Data Rights, Outline of Proposals and Alternatives Under Consideration at 43-45 (Oct. 27, 2022), available at https://files.consumerfinance.gov/f/documents/cfpb_data-rights-rulemaking-1033-SBREFA_outline_2022-10.pdf.

[17] CFPB Press Release, Director Chopra's Prepared Remarks at Money 20/20 (Oct. 25, 2022), available at <https://www.consumerfinance.gov/about-us/newsroom/director-chopra-prepared-remarks-at-money-20-20/>?

[18] Id.

[19] Id.

[20] Id.

[21] Prepared Statement of Director Rohit Chopra before the Senate Committee on Banking, Housing, and Urban Affairs (Dec. 14, 2022), available at <https://www.consumerfinance.gov/about-us/newsroom/prepared-statement-of-director-chopra-before-senate-committee-on-banking-housing-urban-affairs/>; Prepared Statement of Director Rohit Chopra before the House Committee on Financial Services (Dec. 14, 2022), available at <https://www.consumerfinance.gov/about-us/newsroom/prepared-statement-of-director-chopra-before-house-committee-on-financial-services/>.

[22] Id.

[23] See CFPB, Agency Rule List – Fall 2022, available at https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&tPubId=202210&agencyCode=&showStage=active&agencyCd=3170.

[24] CFPB, Consumer Financial Protection Circular 2022-04, at 2-3, 6-8 (Aug. 11, 2022), available at https://files.consumerfinance.gov/f/documents/cfpb_2022-04_circular_2022-08.pdf.