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July 14, 2023

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

RE: Request for Information: Data Brokers and Other Business Practices Involving the Collection and Sale of Consumer Information, Docket No. CFPB-2023-0020

Dear Director Chopra:

The Independent Community Bankers of America (“ICBA”)¹ appreciates this opportunity to respond to the Consumer Financial Protection Bureau’s (“CFPB” or “Bureau”) Request for Information (“RFI”) related to data brokers and data aggregators. The RFI seeks a better understanding of data brokers’ business models to determine their obligations under the Fair Credit Reporting Act (“FCRA”), including whether they constitute consumer reporting agencies (“CRA”).

As explained more fully below, ICBA believes that the CFPB should hold data brokers and aggregators accountable by requiring disclosures to consumers about the information they collect and use. However, ICBA contends that data brokers do not meet the definition of a CRA, and as such, community banks should not be classified as “furnishers” of information when a data broker obtains consumer information from a bank.

¹ The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services. With nearly 50,000 locations nationwide, community banks employ nearly 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding \$5.8 trillion in assets, \$4.8 trillion in deposits, and \$3.8 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.

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Background

The Bureau has initiated a series of efforts to examine data collection and use as part of its rulemaking authority under FCRA. The Bureau is gathering information about new businesses that collect, aggregate, sell, resell, license, or otherwise share consumers' personal information with other parties (hereinafter, "data brokers"), and whether these data brokers and their business models are covered by FCRA.

FCRA governs the collection, assembly, and use of consumer report information and provides the framework for the credit reporting system in the United States. FCRA also promotes the accuracy, fairness, and privacy of consumer information, and sets requirements related to accuracy and dispute resolution. For the purposes of this RFI, the Bureau is interested in FCRA's applicability on both first-party data brokers (those that interact directly with consumers) as well as third-party data brokers (those with whom the consumer does not have a direct relationship).

As a threshold matter in determining whether data brokers should be covered by FCRA, the Bureau will first need to assess if data brokers and aggregators meet the definition of "consumer reporting agency" and whether their products comprise "consumer reports." FCRA defines a "consumer reporting agency" as any person which regularly assembles or evaluates information on consumers for the purpose of furnishing "consumer reports" to third parties,² where "consumer report" is defined as a communication by a consumer reporting agency bearing on a consumer's credit worthiness, character, general reputation, or other factors that are used to establish a consumer's eligibility for credit, insurance, or employment purposes.³

If a company is classified as a CRA, then FCRA imposes certain obligations, such as ensuring accuracy of information contained in a consumer report and procedures for a consumer to contest the accuracy of that information. Further, entities that provide information to CRAs for use in consumer reports are defined as "furnishers of information." As furnishers, those parties are also subject to certain requirements under Regulation V, FCRA's implementing regulation.⁴ Community banks are often classified as furnishers of information when they routinely report loan repayment information to CRAs.

² 15 U.S.C. 1681a(f).

³ 15 U.S.C. 1681a(d).

⁴ 16 C.F.R. 660.2(c), "Furnisher means an entity that furnishes information relating to consumers to one or more consumer reporting agencies for inclusion in a consumer report."

ICBA Comments

Data brokers and aggregators engage in behavior that is not transparent

Community banks are model stewards of their customers' data. As required under FCRA, they closely hold consumer data, allow consumers to see what data is being held, ensure accurate information, and provide mechanisms to dispute incomplete or inaccurate information.

In contrast, many data brokers and aggregators do not emulate these transparent practices. There is no shortage of examples of data brokers and aggregators using data for their own benefit, and often, to the detriment of the consumers.⁵ Consumers have limited visibility into and ability to correct the data transmitted by a broker or aggregator. Data brokers and aggregators are not required to provide the same level of transparency or accuracy to consumers as other stakeholders in the financial services ecosystem, which often results in consumer harm.

As empowered by FCRA, the Bureau can greatly reduce consumer harms. ICBA recommends that the Bureau use its formal supervision and enforcement authority to require data brokers to comply with the requirements of FCRA and Regulation V, at a minimum, to the extent to which data furnishers currently abide.

Heightened protection for consumer-permissioned data brokers and aggregators

While the Bureau is understandably focused on applying FCRA to third-party data brokers that obtain information about consumers without their knowledge and/or consent, ICBA encourages the Bureau to also apply FCRA standards to first-party data brokers that furnish or collect information on a consumer's behalf.

When first-party data brokers seek permission from consumers to access their data, consumers should be provided with clear disclosures on the specific data being collected and how it will be used, along with any downstream usage and sharing of that data. Again, this is common practice and required for banks under federal law.

Among other requirements, data brokers should provide notice to consumers that their data is being collected, and in turn, consumers should be able to review which third parties are authorized to access their information. Such disclosure requirements would provide a baseline for consumers to make informed decisions over the course of their relationship with first-party data brokers' collection, use, and retention of consumer-authorized information.

⁵ [Marketing Company Agrees to Pay \\$150 Million for Facilitating Elder Fraud Schemes | OPA | Department of Justice](#), where data broker acknowledged that it sold consumer lists to a number of mass-mailing fraud schemes that sent false "sweepstakes" and "astrology" solicitations to consumers.

Data brokers are not consumer reporting agencies, and regardless, community banks are not “data furnishers” when data brokers obtain bank information

While data brokers should be required to adhere to FCRA’s disclosure and transparency requirements, ICBA stresses that they should not be classified as CRAs. As the statutory language makes clear, an entity only qualifies as a CRA if it regularly assembles information on consumers for the purpose of furnishing consumer reports *to third parties*.⁶ When a consumer grants permission to a first-party data broker to generate a report on their own initiative, that is by definition a report for a *first party*, and as such, would not meet the definition of a CRA under FCRA. Several recent court decisions have also interpreted the definition of a CRA in a similarly limited interpretation.⁷ Furthermore, the information obtained by data brokers is not generally collected for use in consumer reports. Because the information is not used for purposes of generating consumer reports, data brokers should not be considered CRAs.⁸

Regardless of whether the CFPB classifies data brokers as CRAs, the Bureau should not define community banks as data furnishers when data brokers obtain bank information. In most circumstances, community banks are not actively furnishing information to data brokers, but rather, data brokers are accessing consumer data by using the customer’s online log-in credentials. Since the customer gives the data broker permission to access this information, the bank is not “furnishing” that information, as that term is commonly understood.

Additionally, the emergence of data brokers presents a novel situation that is not easily addressed by the existing framework. Traditionally, as data furnishers, community banks provide information directly to a CRA as part of a contractual relationship between the community bank and the CRA. In such scenarios, the CRA and the bank are in the best position to provide a mechanism for dispute resolution and ultimately ensure the accuracy of the information as is required by data furnishers. This is because the bank initiates and controls the information it provides.

⁶ 15 U.S.C. 1681a(f), where the term “consumer reporting agency” means “any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties.”

⁷ *E.g.*, see *Kidd v. Thomson Reuters*, ___ F.3d. ___, 2019 WL 2292190 (2d Cir May 30, 2019), where the plaintiff alleged that Thomson Reuters was a consumer reporting agency because the plaintiff’s potential employer used the defendant’s report as a basis for not employing the plaintiff. The Second Circuit held the defendant was not a CRA because it did not generate the report for employment purposes, but only for non-FCRA purposes, such as law enforcement, fraud prevention, and identity verification.

⁸ See *supra* notes 2 and 3, where an entity is only a CRA when it regularly collects information for the purposes of furnishing “consumer reports” to third parties.

In contrast, data brokers can, and often do, collect consumer data without the bank's awareness by acting as a consumer's agent, accessing the data as if the customer accessed the information themselves. In this situation, a community bank is not a party to the production and receipt of information collected by the data broker. When a dispute arises regarding the information held, processed, comingled, managed and shared by a data broker, it is unclear from where the inaccurate information was generated and exacerbates the uncertainty of how to remedy the problem. Ultimately, ICBA believes that the parties who control, process, and manage the data are in a position to resolve disputes and ensure the accuracy of the information.

Conclusion

ICBA has long held that nonbank financial services companies, such as data brokers, should be examined and supervised for compliance with federal consumer protection laws. By exploring the business practices of nonbank data brokers and aggregators, the Bureau should be better positioned to apply consumer protection standards, such as FCRA, to nonbank participants. Should you have any questions or would like to discuss these comments further, please do not hesitate to contact me at Michael.Emancipator@icba.org or 202-821-4469.

Sincerely,

/s/

Michael Emancipator
Vice President and Regulatory Counsel