

Why Data Sources Aren't Furnishers Under Credit Report Regs

By **Kwamina Williford** and **Brian Goodrich**

Consumers' ability to maintain control of their data is a modern imperative, particularly in the context of financial well-being. Many consumers' ability to buy a house, car or attend the school of their choice depends on whether banks and other lenders decide to extend credit. Recent technology advances have presented great opportunities for consumers and businesses, alike.

However, the impact of these technology advances has not been lost on regulators, which have recently expressed renewed interest in regulatory issues related to credit reporting. For example, the Federal Trade Commission and the Consumer Financial Protection Bureau have recently announced that they will hold a joint workshop to discuss issues related to the assurance that companies report and consider only accurate consumer information in making decisions.

A significant technological development related to ensuring the efficient transfer of accurate consumer data is consumer-permissioned data access. This technology allows consumers to permit access to their personal financial data directly through an application programming interface, or API, as opposed to relying solely on traditional consumer reports containing information compiled from large, third-party databases.

Traditionally, a credit reporting agency's consumer report contains information that is provided by entities defined as furnishers under the Fair Credit Reporting Act.[1] Being a furnisher under the FCRA comes with obligations related to ensuring accuracy, including investigation requirements.

Whether data sources who house data retrieved through consumer-permissioned access via an API for use in a credit report are furnishers is a matter of first impression. No definitive ruling exists related to this inquiry. Nonetheless, if data is retrieved from data sources through consumer-permissioned access for use in a consumer report, then such retrieval should not convert that data source into a furnisher.

Data sources are not furnishers under the FCRA, particularly when providing access to data in response to a singular directed request from a consumer. This reasoning is supported by a plain reading of the FTC's furnisher rule,[2] case law dicta, a commonsense approach to the regulations governing credit reporting, as well as the CFPB and U.S. Treasury Department commentary related to innovation and consumer access to financial information.

Furnisher Analysis

The use case when a consumer seeks to utilize her data to obtain credit is similar to the following: When a consumer applies for a loan, the API includes a widget that allows the consumer to identify the data sources with whom she does business, identify accounts with those data sources that should be factored into the credit decision, and then provide her authorization to allow access to that information.



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Utilizing the authorization provided by the potential borrower, the API allows the potential borrower's data to be obtained directly from the borrower-identified data sources and accounts. The API then summarizes the information into a single-use, user-friendly consumer report that the lender may use in making its credit decision. In essence, the service digitizes the process of data gathering normally conducted by a consumer applying for credit.

Both legal and policy reasons support the conclusion that, in such a use case, data sources should not be regulated as furnishers.

Legal Reasons

A furnisher proactively transmits information to CRAs. The FCRA defines furnisher as "an entity that furnishes information relating to consumers to one or more consumer reporting agencies for inclusion in a consumer report."^[3] A furnisher does not include a consumer who provides her own account information to a CRA.^[4]

The few courts that have interpreted the term have done so in a simple and literal manner, finding an entity that transmits information to a CRA to be a furnisher.^[5] Taken together, any reasonable assessment of the plain meaning of the statute indicates that the definition requires an affirmative undertaking by the furnisher to provide information.

The FCRA explains a CRA's notification obligations to furnishers, stating that the CRA only needs to provide notice to those "who regularly and in the ordinary course of business [furnish] information to [a CRA]."^[6] This notification serves to set the terms of the relationship.

If a data source decides to affirmatively and in the ordinary course of business transmit self-select information to a CRA, then it establishes a direct furnisher-CRA relationship, triggering these specific obligations. With a consumer-permissioned data access model, a traditional furnisher-CRA relationship in the sense contemplated by the FCRA does not always exist. With a consumer-permissioned model, the consumer initiates the relationship. The data source does not take an affirmative action.

A consumer's decision to allow access to her data should not create added obligations for data sources. Data sources are not required to engage in credit reporting. The decision to credit report comes with affirmative obligations to provide accurate information and investigate consumer disputes related to the information transmitted.

A data source thus could choose to take on the obligations of a furnisher when it chooses to engage in credit reporting. This is not a decision to be taken lightly. There is nothing within the regulations that suggests that a consumer's independent decision alone could convert a data source into a furnisher.

Moreover, Section 1033 of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires that most data sources provide consumers with access to their data. The definition of consumer in Title X of Dodd-Frank includes not only an individual, but "an agent, trustee, or representative acting on behalf of an individual."^[7]

In a 2018 report, the Treasury Department embraced such an approach, recommending:

that the Bureau affirm that for purposes of Section 1033, third parties properly authorized by consumers, including data aggregators and consumer fintech application providers, fall within the definition of 'consumer' under Section 1002(4) of Dodd-Frank for the purpose of obtaining access to financial account and transaction data.[8]

It does not follow that the act of a consumer or her representative accessing their data converts that data source into a furnisher. If it were so, all entities subject to Section 1033 would be furnishers.

Utilizing the authorization provided by the consumer, the API allows the consumer's data to be obtained directly from the borrower-identified data sources and accounts. The data sources are not proactively transmitting consumer information to a CRA. Such a model serves to enhance the reach of the consumer. The consumer is allowing and facilitating the access.

This process most closely resembles a consumer providing her own account information to a CRA, which is explicitly excluded from the definition of a furnisher. A plain and reasonable interpretation of the FCRA suggests that data sources highlighted within such a credit decisioning API model would not be considered furnishers because data is gathered through consumer-permissioned access.

Policy Reasons

The CFPB has publicly taken positions evincing that regulators may be amenable to the understanding that data sources are not furnishers. According to former CFPB Director Richard Cordray's statements in Salt Lake City in November 2016, the CFPB recognizes that the digitization of data collection increases transparency and efficiency in credit decisioning.

As Cordray remarked:

Whereas once upon a time consumers might have brought a shoebox full of paper to a financial advisor or loan officer, now consumers can accomplish the same thing just by providing access to their digital financial records. This is a world full of new promise, where consumers have the chance to gain the tremendous benefits of ease, speed, convenience, and transparency.[9]

Other regulators have expressed sentiments indicating they may be amenable to applying regulations in a manner that supports consumer-friendly innovation. At a fintech conference hosted by the Federal Deposit Insurance Corporation, Treasury Secretary Steven Mnuchin expressed a preference for consumer opt-in for data reporting, over the collection and sharing of consumers' financial information[10].

This transparent credit decision model should appeal to regulators. The model places greater control in the hands of consumers because it only provides potential lenders with information from data sources identified by the consumer.

Because the consumer identifies and provides the API with access to her accounts, the risk of a lender being provided with inaccurate information by data sources is lower than in an arrangement in which a furnisher self-selects reported information. The control and transparency fostered by the API's consumer-permissioned access distinguishes it from CRA interactions with traditional furnishers.

Moreover, the access provided by such a model is especially important to consumers who want to borrow money but lack enough credit history to generate a credit score. By allowing a prospective creditor to assess a consumer's cash flow with various data sources, this model will increase the amount of consumers that are able to obtain credit. The Treasury Department recognized this in a 2018 report, affirming that "new credit models and data sources have the potential to meaningfully expand access to credit and the quality of financial services."^[11]

As the recipient of the information transmitted is a CRA, critical consumer protections remain in place. A CRA has distinct and direct obligations toward consumers, as well as restrictions on what may be done with the information retrieved.

Specifically, CRAs are required to use the information collected only for a permissible purpose, as defined by the FCRA. In addition, CRAs are required to disclose to consumers their rights related to credit reporting and to facilitate the investigation of potentially inaccurate information on a report if challenged by the consumer.

These added protections provide data sources and regulators with the enhanced comfort that a CRA's handling of consumer-permissioned data would not lead to exploitation. Added regulation or oversight related to this process, by deeming such a data source to be a furnisher or otherwise, is not necessary.

Conclusion

Innovation has paved the way for enhanced consumer access to consumers' financial information. The model described herein epitomizes this innovation. It enables a consumer to select the data sources and accounts she wants considered in an application for credit and allows streamlined access to such data, enabling the development of a consumer report that facilitates an informed credit decision.

A consumer allowing access to her own data housed with a data source should be viewed the same as the consumer accessing her own data under the FCRA: no traditional furnisher exists. Simply put, the data source does not fit the mold of a furnisher.

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[1] 15 U.S.C. § 1681, et seq.

[2] 16 C.F.R. § 660.2(c).

[3] 16 C.F.R. § 660.2(c).

[4] 16 C.F.R. § 660.2(c)(3).

[5] See, e.g., *McLean v. Big Dog Grp., LLC*, No., 2016 WL 3211514, at *10 (M.D. La. Mar. 11, 2016) ("...the courts within the Fifth Circuit have defined this term broadly to include 'an entity that transmits information concerning a particular debt owed by a consumer to a consumer reporting agency.'" (citations omitted).

[6] 15 U.S.C. § 1681e(d).

[7] 12 U.S.C. § 5481(4).

[8] U.S. Department of the Treasury, *A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation* (July 2018), at page 31, available at <https://home.treasury.gov/sites/default/files/2018-07/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financi....pdf>.

[9] Prepared Remarks of CFPB Director Richard Cordray at the Field Hearing on Consumer Access to Financial Records, CFPB (Nov. 17, 2016), available at <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-field-hearing-consumer-access-financial-records/>.

[10] "Mnuchin: Consumers Need Much More User Friendly Ways Of Controlling Who Gets Their Personal Data," *Forbes* (April 24, 2019), available at <https://www.forbes.com/sites/tedknutson/2019/04/24/mnuchin-consumers-need-much-more-user-friendly-ways-of-controlling-who-gets-their-personal-data/#40a3d13e2534>.

[11] U.S. Department of the Treasury, *A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation*, at p.138 (Released on July 31, 2018), available at https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation_0.pdf.