

DavisPolk

Summary of developments: Dodd-Frank Act Section 1033

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This deck provides an overview of Dodd-Frank Act Section 1033, sometimes referred to as the Dodd-Frank Act’s “open banking” provision, and reviews developments over the past several years, as the Consumer Financial Protection Bureau (**CFPB**) works towards proposing a rule later this year and adopting a final rule in 2024.

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Overview of Dodd-Frank Act Section 1033

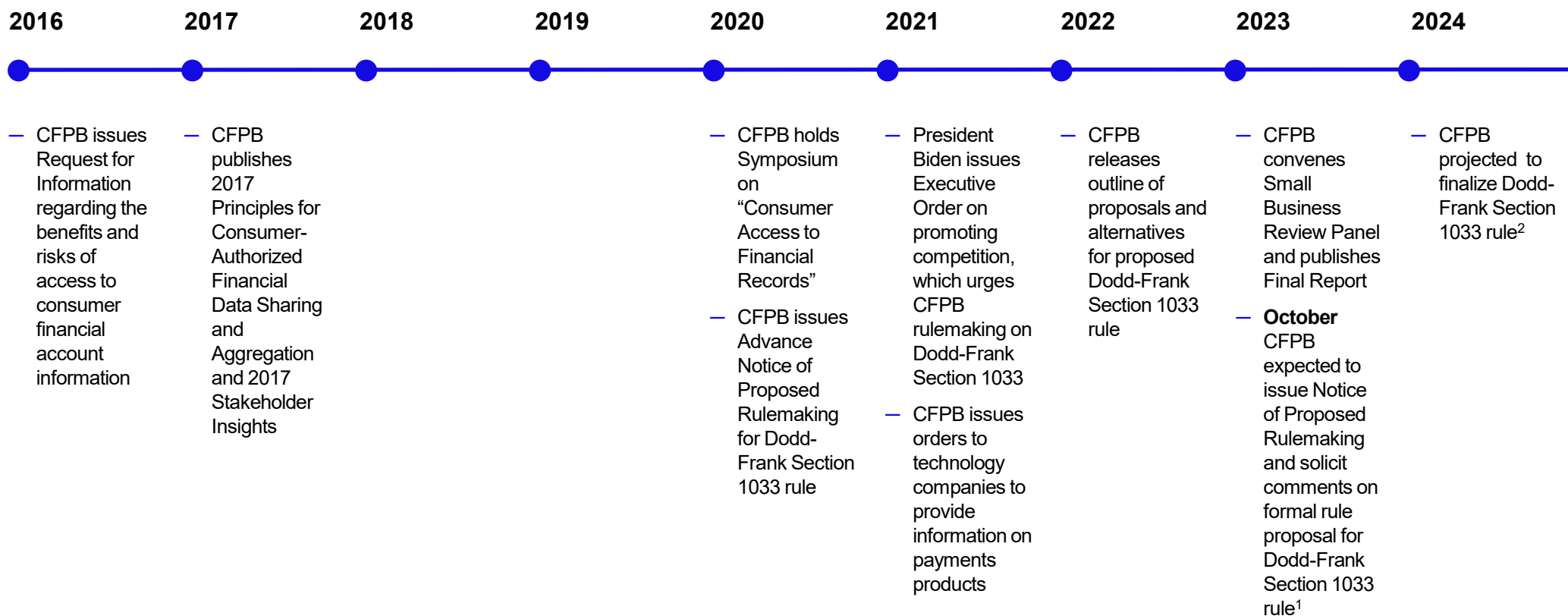
The Dodd-Frank Act's provision granting consumers rights to access information about financial accounts

Section 1033 requires that “a covered person shall make available to a consumer, upon request, information in the control or possession of the covered person concerning the consumer financial product or service that the consumer obtained from such covered person, including information relating to any transaction, series of transactions, or to the account including costs, charges, and usage data”

- “Covered persons” include any person that engages in offering or providing a consumer financial product or service and any affiliate of any such person if such affiliate acts as a service provider to such person
- Section 1033 is subject to four enumerated exceptions. A covered person is **not** required to make available to a consumer:
 - Confidential commercial information (including an algorithm used to derive credit scores or other risk scores or predictors)
 - Information collected by a covered person for the purpose of preventing fraud or money laundering, detecting or making any report regarding other unlawful or potentially unlawful conduct
 - Information required to be kept confidential by law
 - Information the covered person cannot retrieve in the ordinary course of its business with respect to that information
- The CFPB must consult with the federal banking agencies and Federal Trade Commission when issuing the rules to implement Section 1033

CFPB actions to date

Timeline of CFPB rulemaking



1. See CFPB Director Rohit Chopra testimony to the House Financial Services Committee, June 14, 2023.

2. See CFPB Director Rohit Chopra blog post, “Laying the foundation for open banking in the United States,” June 12, 2023.

CFPB 2017 principles

A set of [nine Consumer Protection Principles](#) for safeguarding consumer interests

Principle	Description
Access	Consumers should be able to access and obtain information about their ownership and use of financial products and services in a timely and safe manner
Data scope and usability	Financial data to be made available may include transactions, account terms, realized consumer costs and realized consumer benefits. Authorized third parties should only access necessary data
Control and informed consent	Terms of authorized access, storage, use and disposal of consumer information should be fully and effectively disclosed to, and understood by, the consumer
Authorizing payments	Third parties must obtain a separate and distinct consumer authorization to obtain payments, and providers may reasonably require consumers' authorization for data access and payment authorization
Security	Consumer data should be accessed, stored, used and distributed securely. Access credentials should be secured. Parties processing data must have protections in place to mitigate the risk of data breaches
Access transparency	Consumers should be informed of or able to readily ascertain which authorized third parties are accessing their information, the security of such parties, the data they access, their use of the data and the frequency at which they access data
Accuracy	Data accessed should be accurate and current, and consumers should have a reasonable means to resolve data inaccuracies
Ability to dispute and resolve unauthorized access	Consumers should have reasonable and practical means to dispute and resolve issues of unauthorized data access, data sharing, unauthorized payments and failure to comply with other obligations
Efficient and effective accountability mechanisms	Incentives of parties that grant access to, access, use, store, redistribute and dispose of consumer data should promote safe consumer data access

CFPB 2017 stakeholder insights

The CFPB [published a summary of feedback](#) from key stakeholders

Key stakeholders

Aggregators

Entities involved in providing aggregation services and collecting information from other providers

Account data users

Use aggregators to offer consumers financial products and services

Account data holders

Hold account data and other data about consumers (e.g., banks, credit unions)

Topics of disagreement

The scope of data that authorized third parties should be able to access

How a secure data sharing ecosystem should be established

CFPB 2020 symposium & consumer data access

The CFPB held a symposium including key stakeholders and [published](#) a document summarizing its understanding of key facts, issues and points of contention related to “Consumer Access to Financial Records”

Background on consumer data access methods

- The industry has begun to move away from screen scraping and credential-based data access and towards data sharing through application programming interfaces (**APIs**)
- Data sharing through APIs tends to be more accurate and secure and provides data holders with more control in managing data access
- Data sharing through APIs requires bilateral access agreements between a data holder and aggregator
- Industry criticisms of screen scraping include that:
 - Requiring consumers to turn over log-in credentials to aggregators creates security and privacy concerns; and
 - Screen scraping is more susceptible to inaccuracies

Key takeaways from the CFPB 2020 symposium

- Symposium participants generally agreed that moving towards API-based access would benefit consumers and market participants
- Bank and consumer participants were concerned about privacy issues arising from credential-based access and screen scraping
- Panelists disagreed on the scope of data that authorized third parties should be able to access
- Symposium participants asserted that, in cases of unauthorized access, the law is unclear on issues of scope and liability involving other legislation (e.g., Electronic Fund Transfer Act and Regulation E, Fair Credit Reporting Act, Gramm-Leach-Bliley Act)

Key legal questions raised at the CFPB 2020 symposium

- Is Section 1033 self-executing?
- Are consumers’ agents deemed consumers for the purposes of Section 1033? Are fintechs and aggregators acting as consumers’ agents? Are consumer rights extended to third parties under Section 1033?
- Does the CFPB have authority under Section 1033 to allow for data field exclusions or denials of a consumer’s or third party’s access rights due to security concerns?

CFPB 2020 Advance Notice of Proposed Rulemaking (ANPR)

The CFPB [solicited comments](#) regarding ways the agency should develop regulations to implement Section 1033

Preamble

“Authorized data access holds the potential to intensify competition and innovation in many, perhaps even most, consumer financial markets . . . One notable aspect of the competition fostered by consumer-authorized data access is that in many cases data users may compete for customers with the data holders from which they have obtained data . . . These competitive dynamics mean that data holders may have an incentive to restrict access by certain data users or to seek greater clarity about the purposes to which particular accessing parties may put accessed data. By the same token, data users may have incentives not to be forthcoming about such purposes.”

The CFPB sought and received comments (see Appendix) on nine topics:

1. Benefits and costs of consumer data access
2. Competitive incentives and authorized data access
3. Standard-setting
4. Access scope
5. Consumer control and privacy
6. Legal requirements other than Section 1033
7. Data security
8. Data accuracy
9. Any other information that would help inform the CFPB

2021 developments

The Biden Administration called on the CFPB Director to implement Section 1033 to help enhance marketplace competition

2021 executive order on promoting competition in the American economy

- Affirmed the Administration’s policy to enforce antitrust laws
- Called on the CFPB Director to consider “commencing or continuing a rulemaking under [S]ection 1033 of the Dodd-Frank Act to facilitate the portability of consumer financial transaction data so consumers can more easily switch financial institutions and use new, innovative financial products”

2021 CFPB orders to provide information on payments products

- The CFPB ordered numerous technology companies to provide the agency with information regarding payments products
- CFPB Director Rohit Chopra said the inquiry will “yield insights that may help the CFPB to implement other statutory responsibilities, including any potential rulemaking under Section 1033”

CFPB 2022 rulemaking kickoff

The CFPB [outlined proposals](#) as a step towards publishing a proposed Section 1033 rule

Covered data providers and covered accounts

- Covers financial institutions and card issuers
- The CFPB is considering exemptions based on asset size, activity levels or a combination thereof

Access and informed consent

- Third-party access proposals would require third parties to:
(1) provide an authorization disclosure to inform the consumer of key terms of access, (2) obtain the consumers' informed consent to the key terms of access in the authorization disclosure and (3) certify to the consumers that they will abide by certain obligations

Data scope and usability

- Six categories being considered: (1) periodic statement information for settled transactions and deposits, (2) information regarding prior transactions and deposits that have not yet settled, (3) other information about prior transactions not typically shown on periodic statements or portals, (4) online banking transactions that the consumer has set up but that have not yet occurred, (5) account identity information and (6) other information covered data providers might have about consumer account holders

Screen scraping vs. Data portals

- The CFPB is considering what role screen scraping should play in the context of a covered data provider's compliance with the rule
- The CFPB is also considering proposing that covered data providers be required to establish and maintain a third-party portal that does not require the third party to possess or retain consumer credentials

Security and accuracy

- The CFPB is considering proposing requirements related to the availability, security, and accuracy of information made available to authorized third parties, including creating a general framework of industry-set standards

Accountability mechanisms

- The CFPB is considering proposals that would require third parties accessing consumer-authorized information to limit their collection, use and retention of such information

CFPB 2023 small business review panel

The CFPB sought feedback from small businesses regarding the potential benefits of implementing Section 1033

Results of CFPB small business review panel

- In February 2023, the CFPB [convened](#) a small business review panel
- In April 2023, the CFPB released the [final report](#) of its findings and feedback from the small business review panel
 - Many of the small entity representatives “agreed that consumer-authorized data sharing and consumer control over their data can increase competition and improve financial well-being”
 - One small entity representative asserted “that consumer-authorized data sharing enables consumers to increase savings behavior, provide insights into the lives of low-income consumers, and measure the impacts of social policies on households”
 - Some small entity representatives raised concerns about the potential unintentional impact on smaller financial institutions, stating that “requiring covered data providers to adopt a third-party access portal could be burdensome for small providers, potentially forcing consumers to move to larger financial institutions, thereby reducing competition”

Regulators' recent comments on open banking

CFPB Director Rohit Chopra [published a blog post](#) and the U.S. Treasury's Assistant Secretary for Financial Institutions Graham Steele [delivered remarks](#) discussing the future of open banking

Chopra June 2023 blog post

- **Anticipated benefits of CFPB rule and open banking**
 - Higher rates on savings for consumers
 - Lower rates on loans for consumers
 - Easier for consumers to efficiently manage their finances
 - Greater financial privacy and control of data rights for consumers
- **CFPB rulemaking priorities**
 - Support an open banking system that empowers consumers
 - Allow the market to develop fair standards that leverage the CFPB rule and that can “evolve as new technologies emerge, new products develop, and new data security challenges arise”
 - Prevent standard-setting organizations from skewing to the interests of the largest players in the market
 - Prevent dominant firms from limiting consumers' exercise of their data rights, particularly through coordinated efforts

Steele June 2023 remarks

- **U.S. Treasury priorities for CFPB rulemaking on open banking**
 - Emphasis on protecting consumers and promoting healthy competition and innovation
 - Look to lessons learned from regulatory frameworks in other jurisdictions, such as the Revised Directive on Payment Services in Europe (PSD2)
 - Promote regulatory certainty that will facilitate collaboration between traditional depository institutions and fintechs on issues such as building APIs for secure data sharing
 - The CFPB should “review its authorities to consider if and how the agency might supervise data aggregators”
- **Challenges for CFPB Rulemaking on Open Banking**
 - Must balance fostering innovation and competition with ensuring data security and consumer protection
 - Slow progress in the industry to move from screen scraping to tokenized API access due to policy uncertainties and competitive tensions

Regulators' recent comments on open banking

CFPB Director Rohit Chopra provided further insight into CFPB rulemaking related to open banking at a [hearing](#) with the House Financial Services Committee

The importance of open banking

“The CFPB is working to ensure broad benefits for consumers and businesses alike, when it comes to technological progress. One of our most important initiatives is to accelerate the shift in the United States to open banking, allowing consumers to more easily switch and gain access to new products, while protecting their financial data.”

Industry standard-setting and benefits of open banking

“We want to make sure that [industry] standards are giving . . . consumers, and all market participants, the ability to switch . . . it's not just more access to credit, lower interest rates for borrowers, higher interest rates for savers. I think it's also going to have an impact on customer service quality too. When a consumer . . . has the power to vote with their feet, you'll see how our system will give them better service as well.”

Priorities when regulating open banking

“[O]pen banking is going to probably be one of the most important things we should all work on together. It's basically about the future of finance, and how do we shape it in ways that [are] good for consumers, businesses and others . . . [W]e asked industry, asked experts, what [are] the most valuable types of data to get? And what they said was, it's transaction data, cash flow data . . . because that's what's going to give a mortgage lender, auto lenders, others, the ability to say maybe this credit score I shouldn't rely on – maybe I should look at their actual income and expenses . . . I see this as a sequencing just like other jurisdictions in the OECD have done.”

The end of screen scraping?

“I think we can set the stage for making sure screen scraping is not going to be part of our financial infrastructure in the future . . . screen scraping is not really a viable, long-term way for data sharing.”

Regulators' recent comments on open banking

Acting Comptroller of the Currency Michael Hsu delivered remarks at the [FDX Global Summit](#) and Vice Chair for Supervision of the Federal Reserve Board Michael Barr delivered remarks at [D.C. Fintech Week](#)

The potential future of open banking

“Of course, banks will likely respond to account portability by taking steps to retain customers, much as wireless carriers did after cell phone number portability was adopted. In time, such steps by banks could actually increase the stickiness of retail deposits and lower their liquidity risk, despite consumers having the ability to easily move accounts. I believe such a state is possible, even likely, but the transition to that state warrants careful monitoring.” – Michael Hsu, Acting Comptroller of the Currency, [FDX Global Summit](#), April 19, 2023

Benefits of open banking for consumers

“The Consumer Financial Protection Bureau is charged with implementing regulations to give consumers access to their financial data, pursuant to Section 1033 of the Dodd-Frank Act. While this is not an ‘open banking’ rule, it will set the stage for consumers to gain greater control when it comes to sharing their data with prospective providers. The goal of this effort is to advance consumer autonomy, enhance competition for financial services, and to provide easier portability of account information from bank to bank as well as nonbank providers. I look forward to hearing more on this from the CFPB.” – Michael Barr, Vice Chair for Supervision of the Federal Reserve Board, [D.C. Fintech Week](#), October 12, 2022

Appendix: Key concerns in 2020 ANPR comment letters

Aggregators and bank trade associations [raised concerns](#) related to regulatory uncertainty and the scope of potential regulations

Bank trade associations

- Concerns with regulatory uncertainty surrounding aggregator and data user practices
- Desire for coordination between CFPB and federal financial regulators on relevant issues
- Concerns with the types of data that consumers should be able to access and share
- Concerns related to insufficient transparency of the consumer consent process and specific disclosure requirements
- Concerns with the CFPB potentially setting specific technical standards

Aggregators

- Concerns related to regulatory uncertainty regarding Section 1033's interaction with existing law
- Concerns with the supervision of aggregators, preferring indirect supervision via existing supervisory authorities over certain aggregators and direct supervision by the CFPB over "larger participants"
- General view that Section 1033 was enacted to allow consumers to benefit from access to financial data and account portability (open banking)
- Preference for principles-based guidelines

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If you have any questions about the topics covered in this deck, please contact any of the lawyers listed above or your regular Davis Polk contact.

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