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July 8, 2022

**BY ECF**

Honorable Georgette Castner, U.S.D.J.  
Clarkson S. Fisher Building & U.S. Courthouse  
402 East State Street  
Trenton, New Jersey 08608

**Consumer Data Industry Association v.  
Matthew J. Platkin, in his official capacity as  
Attorney General for the State of New Jersey  
Case No. 3:19-cv-19054**

Dear Judge Castner:

We serve as local counsel to plaintiff Consumer Data Industry Association (“CDIA”) in the referenced matter. As of April 19, 2022, CDIA and defendant, Matthew J. Platkin, Acting Attorney General for the State of New Jersey (“Defendant”), have fully briefed their respective motions for summary judgment, which have been submitted to this Court for decision.

Defendant filed an unsolicited letter with this Court requesting that it consider supplemental authority in support of Defendant’s Motion for Summary Judgment. The submission of this supplemental authority has substantive and procedural defects. The interpretive rule that the State would have this Court accept was promulgated by the Consumer Financial Protection Bureau (“CFPB”), without notice and comment, and absent any statutory authority to support its issuance. Further, the rule amounts to an impermissible interference with matters submitted to this Court for decision in violation of the Administrative Procedures Act and principles of separation of powers under the U.S. Constitution. Also, the interpretive rule was presented to this Court (a) without prior notice to CDIA, and (b) in spite of local rules which do not permit a supplemental briefing without leave of court.

By filing the rule as a “supplemental authority” the Defendant has effectively submitted an additional 16 pages of briefing on the pure legal question ripe for decision by this Court – noticeably advancing certain legal theories not previously argued by the parties to date. In the interest of fundamental fairness, this Court should either disregard the supplemental filing in its entirety or grant CDIA an opportunity to respond to the merits of the arguments made by the CFPB and to those raised by the Defendant in his July 1 letter as to the weight of authority, if any, that this Court should give the rule.

In particular, CDIA respectfully submits that the rule should not be accorded any

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deference by this Court, as it is well settled that interpretive rules “do not have the force and effect of law and are not accorded that weight in the adjudicatory process.” *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995) (internal citations omitted). Moreover, CDIA believes that the CFPB exceeded its limited rulemaking authority - both under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, and the Consumer Financial Protection Act, Title X of the Dodd Frank Act, 12 U.S.C. § 5481 *et seq.*, in promulgating the rule, which renders the rule ultra vires and/or unenforceable under the APA and general Constitutional principles. *See* 5 U.S.C. §706(2) setting forth the scope of judicial review courts have to “hold unlawful and set aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;” “contrary to constitutional right, power, privilege, or immunity;” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”

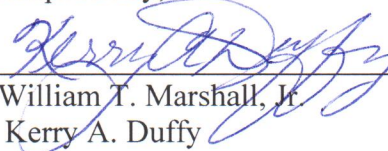
Even if not procedurally infirm, the CFPB’s rule submitted to the Court is an inappropriate attempt to influence this Court’s decision on matters solely within its power and authority to effect. It is “emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The scope of federal preemption is not an issue delegated to this agency to regulate or enforce, yet the CFPB decided to examine the New Jersey law at issue and decide for itself whether federal law preempts it. It was wholly inappropriate for the CFPB to opine on the very issues presented to this Court for decision.

Given the substantive and procedural defects inherent in the State’s submission, CDIA respectfully requests this Court disregard the Defendant’s supplemental filing in its entirety as improperly filed, and irrelevant to the issue presented to the Court. Alternatively, CDIA respectfully requests that it be granted leave to file a memorandum of law addressing the supplemental filing. CDIA requests that it be granted 21 days from the date of any order of this Court and that it be allowed 15 pages for such memorandum.

Should the Court deem it useful, CDIA is prepared to appear by phone to discuss this matter as well as CDIA’s request for oral argument, which remains outstanding.

Thank you for your consideration of this request.

Respectfully,

  
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William T. Marshall, Jr.  
Kerry A. Duffy

cc: Olga E. Bradford, Esq. by email - [olga.bradford@dol.lps.state.nj.us](mailto:olga.bradford@dol.lps.state.nj.us))