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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:

Thank you for granting the Consumer Data Industry Association leave to file this letter brief addressing the Consumer Financial Protection Bureau's ("CFPB") interpretive rule on the scope of FCRA preemption of state laws (the "Interpretation"). [1]

The question before this Court is the degree of deference, if any, that should be afforded to this informal guidance on the question presented to this Court. As it is not a formal rulemaking undertaken with due process protections afforded by an APA notice-and comment process, the Interpretation carries no force of law, and is not entitled to *Chevron*[2] deference. As the Supreme Court phrased it, "interpretations contained in policy statements, agency manuals, and enforcement guidelines . . . are beyond the *Chevron* pale."[3]

An agency's lawfully-adopted guidance may merit some deference by the judiciary, but only in cases where Congressional intent with respect to the statute is unclear or ambiguous.[4] Moreover, the weight of any deference to which agency action is entitled "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[5] Further, the Supreme Court has declined to give deference to agency interpretations that

[1] The Fair Credit Reporting Act's Limited Preemption of State Laws." 87 Fed. Reg. 41042 (2022).
[2] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
[3] *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.") *Id.* at 227.
[4] *Chevron,* 467 U.S. at 842-43.
[5] *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944).

address "major questions" [6] where "the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[7]

This Court should afford no deference to the Interpretation because: (i) the FCRA provision is clear, thus further review is unwarranted; (ii) the CFPB exceeded its authority in adopting the Interpretation in the first instance, as Congress granted only limited rulemaking authority to the CFPB; (iii) the Interpretation does not include a thoughtful analysis of the relevant FCRA preemption case law and is unreasonable; and (iv) the Interpretation is an impermissible interference with this Court's authority and tantamount to a violation of the bedrock principles of separation of powers.

1. The CFPB's Interpretation is entitled to no deference because the FCRA is clear regarding federal preemption.

This Court should give no deference to the CFPB's Interpretation because the plain text of the FCRA clearly and unambiguously addresses its preemptive scope. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[8] In the absence of any ambiguity, it is not necessary for this Court to consider any agency interpretation.

As set forth in CDIA's Motion for Summary Judgment briefing, Congress deliberately chose to establish a set of standards for consumer reporting in 2003 when it removed the then-existing authority of states to continue to enact laws that would regulate the subject matters preserved to federal review.[9] Having affirmatively revoked the state authority it initially reserved to the states to allow them to regulate these specific subject matters and conduct required by the FCRA, even where state law afforded more protections to consumers than the FCRA provided, Congress left no doubt that only those pre-existing state laws expressly preserved in §1681t(b)'s subparts, together with federal law, could regulate those subject matters and conduct requirements.[10]

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[6] *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2595 (2022). *See also Biden v. Nebraska*, 143 S. Ct. 2355, 2374 (2023) (finding the HEROES Act did not give the Secretary of Education the authority to establish a comprehensive student loan forgiveness program because Congress would not delegate such an important economic decision implicitly); and *Gonzalez v. Oregon*, 546 U.S. 243 (2006) (declining to defer to interpretive rule prohibiting doctors from prescribing regulated drugs for use in physician-assisted suicide issued by Oregon attorney general on the basis that Congress would only grant such expansive regulatory authority clearly and expressly).

[7] *W. Virginia,* 142 S. Ct. at 2595.

[8] *Chevron,* 467 U.S. at 842–43.

[9] Fair and Accurate Credit Transactions ("FACT") Act of 2003, Pub. L. 108-159, §211(d), 117 Stat. 1952, 1970 (2003).

[10] *Id.*

2. The CFPB's Interpretation is entitled to no deference, regardless of any ambiguity, because the CFPB lacked authority to adopt the Interpretation regarding preemption, a "major question."

Even if this Court were to find that the FCRA's preemption provision is ambiguous, the CFPB's Interpretation should be given no deference because the agency exceeded its authority in issuing the Interpretation. Moreover, the question is a pure legal one, and the CFPB does not have any particular experience or skill that would justify deference. Congress delegated to the CFPB limited authority issue regulations regarding the FCRA - only as "necessary or appropriate to administer and carry out the purposes and objectives of the FCRA, and to prevent evasions thereof or to facilitate compliance therewith."[11] The CFPB does not enforce the preemption provisions of the FCRA. Adopting guidance that effectively says what the law is, and which opines (in summary fashion) on the very legal question presented to this Court, is not "necessary or appropriate" for the CFPB to enforce the FCRA.

The question of a federal law's supremacy is too complex and important an issue for Congress to have intended the CFPB to exercise interpretive authority to the CFPB without an explicit grant of authority. "A decision of such magnitude and consequence" on a matter of "'earnest and profound debate across the country' must "res[t] with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[12] The matter of statutory preemption is a matter that is contentiously litigated in courtrooms throughout the country and is clearly "a matter of earnest and profound debate."[13]

Congress specifically granted authority to the CFPB to determine the scope of federal preemption under other laws.[14] Certainly, had Congress intended for the CFPB to have such authority under the FCRA, it would have expressly stated as such. Absent such an express delegation of authority on such an important legal question, the CFPB over-reached.

3. The Interpretation is unreasonable.

This Court may only rely on the Interpretation to the extent that the Court finds it to be persuasive. As *Skidmore* instructs, to be entitled to deference, an agency's opinion must be reasonable, and its analysis thorough, to be persuasive.[15] Such is not the case here.

The scope of the FCRA's preemption of state laws is not a novel question of law. In fact, many courts across the country have interpreted the scope of federal preemption under §1681t(b)(1),

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[11] 15 U.S.C. § 1681s(e)(1).
[12] *Biden v. Nebraska*, 143 S. Ct. 2355, 2374 (2023) (*quoting W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2615 (2022)).
[13] *Id.* at 2374.
[14] *See, e.g.* Gramm-Leach Bliley Act, 15 U.S.C. §6807(b) (providing the CFPB with authority to make determinations, on its own motion or petition, that a specific state law affords greater protection "than the protection provided by this chapter" for purposes of preemption).
[15] 323 U.S. at 140.

and found that it preempts myriad of state laws over the last decade.[16] Notwithstanding that fact, the CFPB cited to only one, single case addressing the scope of FCRA preemption in its analysis, which, as CDIA explained in its brief, is helpful to CDIA's argument here.[17] The Interpretation does not address, or attempt to distinguish, any of the many cases where courts have held that state law is preempted to the extent it concerns or relates to the same subject matter as the FCRA provisions falling under §1681t(b)(1).

With regard to §1681t(b)(5), the CFPB simply compares two "hypothetical" laws, one of which is the very kind of requirement at issue here, to demonstrate how preemption under §1681t(b)(5) may affect state law: (a) "if a State law required that a consumer reporting agency provide information required by the FCRA at the consumer's requests [sic] in languages other than English;" and (b) "a state law requiring consumer reporting agencies to provide semi-annual credit reports to consumers."[18] The Interpretation summarily declares, without explanation, that the former "would generally not be preempted by section 1681t(b)(5)(E)", while the latter "would likely be 'with respect to the conduct required' by this provision" and thus preempted.[19] The Interpretation lacks any analysis as to why the provision of a file disclosure would not be "conduct" regulated by the FCRA. The CFPB offers no rationale as to why a law that changes the *frequency* of the provision of file disclosures regulates the same conduct as that required by the FCRA, but a law that affects the *language in which those disclosures were to be provided* does not. Because the CFPB's Interpretation lacks a rational basis, this Court should not rely upon it as it considers the issues in this case.

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[16] *See e.g., Ross v. FDIC*, 625 F.3d 808, 813 (4th Cir. 2010) (finding that plaintiff's common law claim "runs into the teeth of the FCRA preemption provision. Her claim concerns a furnisher's reporting of inaccurate credit information to CRAs, an area regulated in great detail under §§ 1681s-2(a)-(b))"; *Aleshire v. Harris*, 586 Fed. Appx. 668, *6 (7th Cir. 2013) (state common law claim preempted by § 1681t(b)(1)(F); *see also Purcell v. Bank of Am.*, 659 F.3d 622, 625 (7th Cir. 2011) (finding claims related to inaccurate furnishing of account data preempted by § 1681t(b)(1)(F) stating "[the] extra federal remedy in §1681s-2 was accompanied by extra preemption in §1681t(b)(1)(F), in order to implement the new plan under which reporting to credit agencies would be supervised by state and federal administrative agencies rather than judges.") (relying on *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103 (2d Cir. 2009) (where state law claims were held to be preempted by § 1681t(b)(1)(A)); *Pinson v. Equifax Credit Info. Services, Inc.*, 316 Fed. Appx. 744 (10th Cir. 2009) (unpublished opinion) (state law claims barred by 15 U.S.C. §1681t(b)(1)(F)); and *Marshall v. Swift River Academy, LLC*, 327 Fed. Appx. 13 (9th Cir. 2009) (unpublished opinion) (state law claims barred by § 1681t(b)(1)(F)).

[17] *Galper v. JP Morgan Chase Bank., N.A.*, 802 F.3d 437 (2d Cir. 2015). *See* CDIA's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, Dkt. 60, p.15.

[18] Interpretation, p. 15.

[19] *Id.*

4. The CFPB's adoption of the Interpretation violates separation of powers principles.

The CFPB not only acted outside the delegation of authority granted to it by Congress under the FCRA, the CFPB's Interpretation is an attempt to usurp the power of the judiciary and amounts to a violation of separation of powers principles. The CFPB issued the Interpretation in response to communications from this Defendant about the issues in this case.[20] And, as described above, the CFPB went so far as to opine on the *ultimate issue* herein.

The role of the judiciary as the sole arbiter of the law is fundamental to the American legal system – "**it is emphatically the province and duty of the judicial department to say what the law is.** Those who apply the rule to particular cases, must of necessity expound and interpret that rule. **If two laws conflict with each other, the courts must decide on the operation of each.**"[21] It is thus the judiciary who is tasked with determining whether the FCRA preempts a state law – not an administrative agency such as the CFPB. "[I]t is the Court's job to interpret the statute and determine its preemptive scope, including whether the statute provides complete preemption. In doing so, this Court must 'rely[ ] on the substance of state and federal law and not on agency proclamations of preemption.'"[22]

Conclusion

In sum, this Court should not permit the CFPB to place its thumb on the scales of justice and affect the outcome of this litigation. Instead, this Court should disregard the Interpretation in its entirety. Even if the Court were inclined to give some deference to the CFPB's analysis of those FCRA provisions which are arguably "necessary and appropriate" to facilitate its enforcement of the FCRA, the dearth of analysis found within the Interpretation gives this Court nothing to rely upon here - other than the CFPB's unsupported, conclusion on the ultimate legal issue.

Respectfully,

/s/ William T. Marshall, Jr.
William T. Marshall, Jr.
Kerry A. Duffy

cc: Olga E. Bradford, D.A.G., by email - olga.bradford@law.njoag.gov)

[20] *See* Interpretation, p. 5, footnote 5.
[21] *Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803) (emphasis added).
[22] *Dorsett v. Highlands Lake Ctr., LLC*, 557 F. Supp. 3d 1218, 1232 (M.D. Fla. 2021) (finding that the preemptive scope of the Public Readiness and Emergency Preparedness Act (quoting *Wyeth v. Levine*, 555 U.S. 555, 576 (2009)).