State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
PO BOX 080
TRENTON, NJ 08625-0080

PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

MATTHEW J. PLATKIN
Attorney General

September 19, 2023

VIA ECF

Hon. Georgette Castner, U.S.D.J.
United States District Court, District of New Jersey
Clarkson S. Fisher Building & U.S. Courthouse
402 East State Street
Trenton, NJ 08608

Re: *Consumer Data Industry Ass'n v. Matthew J. Platkin*
Civil Action No. 19-cv-19054

Dear Judge Castner,

The CFPB's interpretive rule resoundingly supports the State's position here. Nothing in plaintiff CDIA's letter overcomes the rule or the Fair Credit Reporting Act's (FCRA) plain text. *See* ECF 75.

1. As the State's briefing already explains, CDIA's preemption claim cannot be squared with the language of FCRA's preemption clause, 15 U.S.C. § 1681t(b). *See* ECF 43-1 at 11-19; ECF 58-1 at 3-7; ECF 58-3 at 4-8. As relevant here, that clause preempts only state laws that impose requirements "with respect to the conduct required by the specific provisions of … (B) [15 U.S.C. §] 1681c-1 … [or] (E) [15 U.S.C. §] 1681j(a) …" 15 U.S.C. § 1681t(b)(5). But the challenged New Jersey law—which concerns only the *language* in which a consumer's free annual credit report must be transmitted—does not impose any requirements "with respect to" section 1681j(a)'s requirement that this report be disclosed once annually and free of charge, or section 1681c-1's requirement accelerating the deadline for disclosure in cases of suspected identity theft. *See id.* §§ 1681c-1(a)(2)(B);

1681j(a)(1)-(2); N.J. Stat. Ann. § 56:11-34. This plain-text reading is bolstered by the First Circuit's holding that the similar use of "with respect to" in neighboring 15 U.S.C. § 1681t(b)(1)(E) "narrows the scope of preempted subject matter to its referent or referents." *CDIA v. Frey*, 26 F.4th 1, 7 (1st Cir. 2022). And even if the interpretive question were close, the presumption against preemption that applies in cases implicating "areas of traditional state regulation" requires adopting the reading that disfavors preemption. *Lupian v. Joseph Cory Holdings LLC*, 905 F.3d 127, 131 & n.5 (3d Cir. 2018); *see Pennsylvania v. Navient Corp.*, 967 F.3d 273, 294 (3d Cir. 2020) (consumer protection is an area of traditional state regulation).

To the extent any ambiguity remains as to FCRA's preemptive scope, the CFPB's interpretive rule confirms that New Jersey's law is not preempted. *See* The Fair Credit Reporting Act's Limited Preemption of State Laws, 87 Fed. Reg. 41,042, 41,046 (July 11, 2022) ("Rule"). The Rule clarifies that 15 U.S.C. §§ 1681t(b)(1) and 1681t(b)(5) "have a narrow and targeted scope." *Id.* at 41,042. The Rule construes these provisions together, as they share a similar structure and syntax, in particular their use of the phrase "with respect to," which courts have held "means to 'concern.'" *Id.* at 41,043; *id.* at 41,044 (same, citing *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 261 (2013); *Frey*, 26 F.4th at 7).

15 U.S.C. § 1681t(b)(5) thus preempts only state laws that "concern 'the conduct required by'" the specific FCRA subsection. 87 Fed. Reg. at 41,046. This analysis requires first identifying what the "conduct required" by a given subsection is, which the Rule does by looking to the text. *See id.* In the case of section 1681t(b)(5)(E), which preempts state laws "with respect to the conduct required by the specific provisions of section 1681j(a)," the relevant conduct is section 1681j(a)'s "annual disclosure requirement." *Id.* So, a state law requiring consumer reporting agencies to provide free credit reports to consumers at a different frequency—*e.g.*, semi-annually instead of annually—would be "with respect to the conduct required by" section 1681j(a), and thus generally preempted.

Conversely, state laws that do not regulate how frequently credit reports must be provided do not concern the "conduct required by" section 1681j(a). *Id.* "For example, section 1681j(a) provides no requirements regarding the language in which disclosures of information are provided." *Id.* The Rule thus concludes that "if a State law required that a consumer reporting agency provide information required by the FCRA at the consumer's requests in languages other than English, such a law would generally not be preempted by section 1681t(b)(5)(E)." *Id.* That squarely rejects CDIA's lead-off claim that New Jersey's law is preempted by 15 U.S.C. § 1681t(b)(5)(E). And while the Rule does not specifically discuss 15 U.S.C. § 1681t(b)(5)(B), this provides no basis to find preemption for the same

reasons—namely, that the subsection it references, 15 U.S.C. § 1681c-1, also "provides no requirements regarding the language in which disclosures of information are provided." 87 Fed. Reg. at 41,046.

2. The CFPB's well-reasoned interpretation of FCRA is entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). An agency's interpretation of a statute it implements[1] is entitled to weight based on "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." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (quoting *Skidmore*, 323 U.S. at 140). "The most important considerations" are whether its view "is consistent and contemporaneous with other pronouncements of the agency and whether it is reasonable given the language and purpose of the Act." *Hayes v. Harvey*, 903 F.3d 32, 46 (3d Cir. 2018) (en banc).

Here, the Rule explains why its construction is compelled by the plain text and structure of 15 U.S.C. § 1681t(b)(5). It construes the operative text in harmony with the use of similar terminology in neighboring 15 U.S.C. § 1681t(b)(1), relying on judicial interpretations of the same words. 87 Fed. Reg. at 41,044 (citing, *inter alia*, *Dan's City Used Cars*, 569 U.S. at 261); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995) (statutory terms should be read to have "a consistent meaning throughout the Act"). And the Rule is reasonable given FCRA's purposes, as FCRA's guarantee of a free annual credit report aims to help consumers better understand their credit history—a purpose *advanced* by allowing States to ensure this report is disclosed in a language the consumer can understand. *See* 15 U.S.C. § 1681j(a)(1)(A); *Gillespie v. Equifax Info. Servs., LLC*, 484 F.3d 938, 941 (7th Cir. 2007) (finding "primary purpose[]" of disclosure scheme "to allow consumers to identify inaccurate information in their credit files"); *see also Spokeo, Inc. v. Robins*, 578 U.S. 330, 334-35 (2016) (general purposes). The Rule is thus at least "a reasonable construction"—indeed, the only textually plausible one—and so is entitled to considerable weight in the preemption analysis. *Hayes*, 903 F.3d at 46.

3. CDIA does nothing to justify its view that the Rule is "unreasonable." ECF 75 at 3. It does not show that the CFPB's construction of 15 U.S.C. § 1681t(b)(5) is inconsistent with the text or purpose of FCRA. It does not engage with the Rule's

[1] Congress expressly delegated authority to the CFPB to issue rules and guidance implementing "Federal consumer financial law" which includes FCRA, 12 U.S.C. §§ 5511(c)(5), 5481(12) & (14); *id.* § 5512(b)(1), and to "prescribe such regulations as are necessary to carry out the purposes of" FCRA specifically, 15 U.S.C. § 1681s(e)(1).

distinction between state measures that impermissibly govern the frequency of free credit reports (which is the focus of the preemption provision's text) and measures that address the language they are issued in (which appears nowhere in the text). *See supra* at 2. Nor does CDIA dispute that the Rule is consistent with prior judicial interpretations of key statutory terms—including *Frey*, which most directly rejected CDIA's atextual reading of the FCRA. *See* 87 Fed. Reg. at 41,043-44. CDIA faults the Rule for not specifically discussing the cases finding preemption under 15 U.S.C. § 1681t(b)*(1)*, ECF 75 at 4 n.16, but it cites no reasoning in these cases that would actually undermine the CFPB's construction. Indeed, because the suits challenging language access requirements (including this one) are all pursued under 15 U.S.C. § 1681t(b)*(5)*—not subsection (1)—it is unclear why the CFPB would need to address those cases.

CDIA's remaining objections identify no reason why the Rule should not receive deference. CDIA initially argues there is no ambiguity as to FCRA's preemptive scope, making it unnecessary "to consider any agency interpretation." ECF 75 at 2. To be sure, deference only comes into play where "Congress has not directly addressed the precise question at issue." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984). Thus, if after applying traditional tools of interpretation (including the presumption against preemption), this Court finds that Congress did *not* intend for this state-law language access requirement to be preempted, the analysis ends there. *See id.* at 843 n.9. But if the Court finds "the interpretive question still has no single right answer," *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019), then FCRA is by definition ambiguous on this score, and the Court must decide whether to defer to the CFPB's interpretation. In other words, FCRA's silence as to state-law requirements that a free annual credit report be disclosed in languages other than English is either why this preemption challenge fails right out of the gate, or is a basis for finding ambiguity exists and proceeding to determining how much weight the agency interpretation is owed.

CDIA next argues that, assuming there is ambiguity, no deference is warranted because the CFPB "exceeded its authority." ECF 75 at 3. But CDIA simply ignores the CFPB's *express* delegation of authority to issue rules and guidance implementing FCRA specifically. *See supra* at 3 n.1; 87 Fed. Reg. at 41,046 & n.25 (invoking its authority under 12 U.S.C. §§ 5511 and 5512). Congress even specified that normal principles of deference apply to the CFPB's interpretation of "any provision of" FCRA. 12 U.S.C. § 5512(b)(4)(B). Because the CFPB enjoys general authority to administer the FCRA through interpretive guidance and the Rule "was promulgated in the exercise of that authority," the prerequisites to *Skidmore* deference are satisfied. *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 307 (2013); *id.* at 306 (holding courts do not ask whether such a general delegation

"covers the specific provision and particular question before the court."). Nor does the analysis change simply because preemption is at issue: courts have repeatedly accorded *Skidmore* deference to an agency's statement regarding the scope of preemption even absent such an express delegation. *See, e.g.*, *Farina v. Nokia, Inc.*, 625 F.3d 97, 126-27 (3d Cir. 2010). The "major questions" doctrine is inapposite, as the Rule does not have anything approaching the economic impact of the nationwide student-debt forgiveness program, *see Biden v. Nebraska*, 143 S. Ct. 2355 (2023), or of binding, nationwide emission standards for power plants, *see West Virginia v. EPA*, 142 S. Ct. 2587 (2022). Indeed, CDIA cites no case applying the doctrine to *interpretive* rules—nor would it make sense to, where such rules generally do not impose any direct costs or bind regulated parties.

While CDIA's real concern appears to be that the Rule weighs in on the issues in this case, *see* ECF 75 at 5, that actually undermines CDIA's contentions. It is commonplace for agencies to issue guidance (and even binding rules) in response to litigation, and courts have repeatedly rejected this as a basis to deny deference to the agency. *See, e.g.*, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007); *Barnhart v. Walton*, 535 U.S. 212, 221 (2002); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996). Courts even accept an agency interpretation expressed directly to the court in an amicus brief—which invariably seeks to "affect the outcome of th[e] litigation." ECF 75 at 5; *see, e.g.*, *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *Hayes*, 903 F.3d at 47 n.7. That is consistent with separation-of-powers principles, because even where an agency interpretation commands respect under *Skidmore*, "it is the court that ultimately decides whether [the statute] means what the agency says." *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 104 n.4 (2015). Here, whether the Court defers to the CFPB's interpretation or finds the traditional interpretive tools point to a single right answer, the result is the same: New Jersey's law is not preempted.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Olga E. Bradford
Olga E. Bradford
Deputy Attorney General

cc: All counsel of record (via CM/ECF)