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August 16, 2020

Ms. Nicole Hisatomi, Deputy Commissioner of Legislation
California Department of Business Oversight
Sacramento, CA 95814-4052

Re: Trailer bill to create the Department of Financial Protection and Innovation

Dear Ms. Hisatomi:

Thank you for taking time today to discuss the concerns of the Consumer Data Industry Association ("CDIA"),¹ on behalf of our consumer reporting agency ("CRA") members regarding the trailer bill to create the Department of Financial Protection and Innovation ("DFPI"). This email complements our August 5, letter to Chairs Ting and Limon.

I appreciate your willingness to discuss our concerns with and possible changes to the trailer bill. CDIA members are already heavily regulated by a myriad of federal and state laws, including the federal Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 *et seq.*, and the California Consumer Credit Reporting Agencies Act ("CCRAA"), Cal. Civ. Code §§ 1785.1 *et seq.*² CRAs are already subject to the oversight, supervision and the enforcement authority of federal regulatory agencies including the Consumer Financial Protection Bureau ("CFPB").³

In follow up to our call, I want to offer several key points on law and operations, and one point on a broader policy matter. The first three points are areas where the trailer bill needlessly interferes and/or impermissibly conflicts with and the FCRA and the CCRAA. The fourth point covers one area where the trailer bill is unnecessary, given existing administrative practices. The fifth point is one area where the trailer bill is unnecessary, given existing business standards.

In addition to the legal and technical matters noted below, there is a broader policy matter to be considered. Since CRAs are already heavily regulated by federal and state law already, additional state regulation is unnecessary. Yet, if the DFPI is to regulate CRAs, it is our

¹ CDIA is the voice of the consumer reporting industry, representing consumer reporting agencies, including the nationwide credit bureaus, regional and specialized credit bureaus, background check and residential screening companies, and others. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals and to help businesses, governments, and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity all over the world, helping ensure fair and safe transactions for consumers, facilitating competition, and expanding consumers' access to financial and other products suited to their unique needs.

² Other laws that regulate CRAs include the federal Gramm-Leach-Bliley Act ("GLBA"), 15 U.S.C. §§ 6801 *et seq.*; and the California Consumer Privacy Act ("CCPA"), Cal. Civ. Code § 1798.140 *et seq.*

³ See 77 F.R. 42873. <https://www.federalregister.gov/documents/2012/07/20/2012-17603/defining-larger-participants-of-the-consumer-reporting-market>

hope that the law address our five points on law and operations to better meet consumer expectations, to avoid rough points in the California credit economy, and to avoid conflicts with federal and state law.

1. Section 90005(k)(9)(A). The trailer bill should be amended to allow affiliate sharing governed by the FCRA and the CCRAA

The FCRA and the CCRAA permit the sharing of consumer reports among affiliates, but the trailer bill could upend that necessary sharing.⁴ Many consumer transactions occur because of the affiliate sharing permitted by federal and state law. Consumer needs might not be met as quickly as consumers would like were Section 90005(k)(9)(A) unamended. To address this problem for consumers and businesses, we respectfully request that this section replace “all” with “any”.

The trailer bill includes “consumer reports,” (as defined by federal and state law), as a “consumer financial product or service.”⁵ Yet, the trailer bill goes too far and includes reports *specifically excluded* from what a “consumer report” is under both federal and state law. The bill would include as a “consumer report,” communications of a company’s internal transactions, and experiential information to another entity, which is permitted by both the FCRA and CCRAA.⁶ The sharing that has statutorily sanctioned for decades, but potentially disallowed under the trailer bill, would include “consumer report” sharing information between affiliates, which is also explicitly permitted by federal and state law.⁷ Additionally, the FCRA preempts the state regulation of affiliate sharing.⁸

⁴ According to the CFPB,

By their very nature..third parties as banks, credit unions, and other financial institutions (“FIs”) have a significant amount of consumer information that could constitute a consumer report...The FCRA contains several exceptions that enable parties, such as [FIs], to communicate financial information, within strict guidelines, without becoming a CRA. Rather than containing strict information-sharing prohibitions, the FCRA creates a business disincentive such that if an entity shares consumer report information outside of the exceptions, then the institution is a consumer reporting agency and will be subject to the significant, substantive requirements of the FCRA applicable to those entities.

CFPB Consumer Laws and Regulations Manual v.2 (Oct. 2012), https://files.consumerfinance.gov/f/documents/102012_cfpb_fair-credit-reporting-act-fcra_procedures.pdf.

⁵ See 15 U.S.C. § 1681a(d); Cal. Civ. Code § 1785.3(c).

⁶ See 15 U.S.C. § 1681a(d)(2)(A); Cal. Civ. Code § 1785.3(c).

⁷ 15 U.S.C. § 1681s-3; Cal. Civ. Code § 1785.3(c).

⁸ Under the FCRA, “no requirement or prohibition may be imposed under the laws of any State...with respect to the exchange of information among persons affiliated by common ownership or common corporate control...” 15 U.S. Code § 1681t(b)(2). FCRA preemption of affiliate sharing was confirmed in *Am. Bankers Association v. Lockyer*, 541 F.3d 1214, (9th Cir. Sept. 4, 2008).

One last point on Sec. 90005(k)(9)(A): By regulating affiliate sharing, the trailer bill risks supplanting the CCPA and other privacy statutes that regulate information flows.⁹

2. Section 90005(k)(9)(B) should be amended to clarify its focus to avoid federal and state conflicts.

Since the trailer bill is intended to focus on financial transactions, Sec. 90005(k)(9)(B) should limit its focus. As currently drafted, there is a lack of clarity as to whether Sec. 90005(k)(9) is limited to consumer financial products or services. Section 90005(k)(9)(B) could be read to suggest that transaction and experience information is more limited than other consumer information. This lack of clarity could, for the same reasons as discussed above, result in conflict with federal law (including raising preemption concerns) and internal conflict with state law, like the CCRAA. The DBO could fix this lack of clarity by making reference to consumer report information as a whole, instead of transaction and experience information, and confirming that the bill would limit consumer report information—which is defined under federal and state law—when used or expected to be used in connection with consumer financial products or services. We therefore request that the bill amend Sec. 90005(k)(9)(B) to add “consumer report” between “The” and “information”, and that the bill strike “described in clause (i) of subparagraph (A)”.¹⁰

3. Section 90008(c)(1) conflicts with the federal and state obligations for CRAs to disclose “consumer reports” to consumers

Consumer reporting agencies are required to provide to consumers, upon a consumer’s request, copies of their consumer reports.¹¹ The trailer bill would require CRAs to comply with DFPI-written rules on responding to consumer complaints or inquiries, while the FCRA and state law already set out specific requirements relating to consumer disputes to CRAs. The long-standing federal and state requirements are very specific and relate to the timing of those disclosures, the content of those disclosures, and more. Without a specific exclusion, this trailer bill will be in impermissible conflict with federal law, and unnecessary conflict with state law.¹²

⁹ The CCPA exempts the sale of personal information to or from a consumer reporting agency if that information is to be reported in, or used to generate, a consumer report and the use of the information is limited by the FCRA. Cal. Civ. Code § 1798.145(d).

¹⁰ So the subparagraph reads: “The consumer report information described in clause (i) of subparagraph (A) is not used by the person or affiliate in connection with any decision regarding the offering or provision of a consumer financial product or service to the consumer, other than credit described in subparagraph (A) of paragraph (1) of subdivision (e) of Section 90006.”

¹¹ 15 U.S. Code § 1681g, Cal. Civ. Code § 1785.10.

¹² Under the FCRA, “no requirement or prohibition may be imposed under the laws of any State...the disclosures required to be made under [15 U.S. Code § 1681g, concerning disclosures to consumers]...” 15 U.S. Code § 1681t(b)(3).

4. Section 90008(a) conflicts with federal and state obligations for CRAs to process consumer disputes

Federal and state credit reporting laws establish lengthy processes for consumer disputes where consumers have substantial legal rights, and CRAs have significant legal obligations.¹³ The trailer bill would require CRAs to comply with consumer requests for information in the control or possession of a CRA, but the FCRA and state law already set out specific requirements for disclosures of the file of consumer information maintained by the CRA. Under the FCRA, all a consumer must do is request their “file,” and all information in the consumer’s file must be provided to them, in specific detail. A separate DFPI disclosure process would conflict with federal and state law, which already provides these disclosure rights. This trailer bill provision is also preempted.¹⁴

5. Section 90009(a)(2)(D), concerning registration, should not apply to CRAs

If the trailer bill does not exempt CRAs, as we request in this letter, it should exempt CRAs from the registration requirements laid out in the bill. CDIA presumes the purpose of registration is to allow the public and regulators to know who regulated entities are and where they can be reached for dispute purposes. This provision should not apply to CRAs since law and administrative processes already make the identity of CRAs well-known to consumers and regulators. The CFPB maintains a [list of CRAs](#) to “help [consumers] take advantage of [their] right[s] to review the information in [their] consumer reports, and dispute possible inaccuracies with companies as needed.”¹⁵ Unlike most other regulated entities, a user of a consumer report that takes an “adverse action” on a consumer based on a “consumer report,” is required by law to provide an adverse action notice which must include “the name, address, and telephone number of the [CRA] that furnished the report to the user...”¹⁶

6. Section 90005(k)(13)(B) should exempt credit monitoring or identity theft prevention consumers

Businesses often offer credit monitoring or identity theft prevention services to consumers to allow consumers to better educate themselves about their credit standing and credit history, or to allow consumers to protect themselves from identity theft. These products are typically not “consumer reports” under federal and state law because they are provided directly to consumers, not to third parties like creditors. Consumer services are generally not covered by the FCRA as

¹³ 15 U.S. Code § 1681i, Cal. Civ. Code § 1785.16.

¹⁴ Under the FCRA, “no requirement or prohibition may be imposed under the laws of any State...with respect to...any subject matter regulated under 15 U.S. Code § 1681i, relating to...any procedure related to the disputed accuracy of information in a consumer’s file...”

¹⁵ CFPB List of consumer reporting agencies, <https://www.consumerfinance.gov/consumer-tools/credit-reports-and-scores/consumer-reporting-companies/companies-list/>.

¹⁶ 15 U.S. Code § 1681m(a)(3)(A).

consumer reports. Since these products may be preempted from state regulation by the FCRA, and because by their nature consumers have direct control over these products, we propose to clarify that these products are not “financial products or services” under the law.

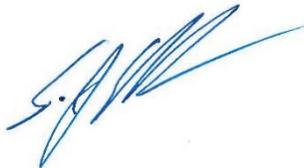
7. The trailer bill should exempt CRAs because of their long-standing and extensive state and federal regulation

We noted above several conflicts between the trailer bill and federal and state credit reporting laws. These conflicts highlight why CRAs should be exempted from the trailer bill. The existing regulatory framework provided by the FCRA, CCRAA, and GLBA provide comprehensive, well-established consumer protections, so much so that no further state regulation is necessary. Additional regulation of CRAs risks conflicting and inconsistent consumer protections and unclear compliance obligations. These conflicts and opacity could harm the very consumers the trailer bill intends to protect. Moreover, as applied to CRAs, certain aspects of the bill are subject to preemption by federal law.

Conclusion

We hope that our comments help your office in this policy process. We stand ready to answer any questions or provide any additional information that you or your colleagues may require.

Sincerely,



Eric J. Ellman
Senior Vice President, Public Policy & Legal Affairs