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June 16, 2020

The Honorable Karl A. Racine
Attorney General, District of Columbia
441 4th Street, NW,
Washington DC 20001

Dear General Racine,

On behalf of the Consumer Data Industry Association ("CDIA"), we are writing to open a dialogue with your office on the official interpretation of changes to District of Columbia law related to credit reporting. As you know, our member credit reporting agencies ("CRAs") are immediately affected by these changes and desire a way to navigate the operational challenges with respect to the new law.

The District of Columbia Council adopted and amended D.C. Code § 28-3871 through the adoption of various legislative vehicles, creating a "COVID-19 Emergency credit alert." The statute provides, in relevant part:

- (a) If a consumer reports in good faith that he or she has experienced financial hardship resulting directly or indirectly from the public health emergency declared pursuant to § 7-2304.01, a credit reporting agency maintaining a file on the consumer shall accept and include in that file a personal statement, if furnished by the consumer, indicating that the consumer has been financially impacted by the COVID-19 emergency and shall provide that personal statement along with or accompanying any credit report provided by the agency, beginning on the date of such request, unless the consumer requests that the personal statement be removed. . .
- (c) When a District resident requests a copy of a credit report pursuant to 15 U.S.C. § 1681j, the entity providing the credit report must notify the resident of his or her right to request a personal statement to accompany the credit report.

D.C. Code § 28-3871(a) and (c). Your office has been granted authority to enforce this provision by seeking a temporary or permanent injunction, and to recover monetary damages to compensate consumer harm resulting from a violation of this section. D.C. Code § 28-3871(e).

1. Section 28-3871 and the related bills are preempted by federal law.

The language in § 28-3871(a) requires CRAs to include a personal statement provided by the consumer, explaining how the consumer has been impacted by COVID-19, in any consumer report (including any credit score) (a "COVID-19 Alert"). By requiring the inclusion of a COVID-19 Alert in consumer reports, this legislation seeks to impermissibly regulate the content of consumer reports.¹

¹ The language in § 28-3871(c) is also potentially preempted by a different section of the FCRA. D.C. Code § 28-3871(c) requires CRAs to notify a consumer requesting a copy of their credit report (known as a "file disclosure") under 15 U.S.C. § 1681j of the right to request a personal statement to accompany the credit

Congress, in enacting the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.* (“FCRA”), and in various amendments thereto, expressly reserved the subject matter of the content of consumer reports to itself. See 15 U.S.C. § 1681t(b)(1)(E). The FCRA preemption rule states, in relevant part, “[n]o requirement or prohibition may be imposed under the laws of any State... (1) with respect to any subject matter regulated under... (E) section 605 [§ 1681c], relating to information contained in consumer reports...” This broad language preempts state laws like the ones recently passed by the DC Council.

In the context of federal preemption analyses, the Supreme Court has made clear that the phrase “relating to” has a “broad scope,” and “an expansive sweep,” noting it is “deliberately expansive,” “broadly worded,” and “conspicuous for its breadth.” *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (internal citations omitted). *Morales* involved the scope of the Airline Deregulation Act’s preemption provisions, which prohibited the states from “enact [ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier....” 49 U.S.C. § 1305(a)(1) (emphasis added). The Supreme Court first looked to the ordinary meaning of the phrase “relating to” and stated:

The ordinary meaning of these words is a broad one—“to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with,” Black’s Law Dictionary 1158 (5th ed. 1979)—and the words thus express a broad pre-emptive purpose.

Morales, 504 U.S. at 383 (emphasis added). In the end, the Supreme Court held that state laws “having a connection with or reference to” the protected subject matters (there, the “rates, routes, or services of airlines) to be preempted. *Id.* Similarly, D.C. Code § 28-3871(a) is preempted because it attempts to regulate the content of consumer reports, the very subject matter of FCRA § 1681c, titled “Requirements relating to information contained in consumer reports.”

2. Consumers have protections built into the credit reporting system today.

Notwithstanding the fact that the FCRA preempts DC’s new law, your office should rest assured that residents of the District already have protections built into the credit reporting system to address the hardships experienced by consumers during this unprecedented time. First, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES)² Act on March 27, 2020, which

report when the consumer requests a copy of their report. The timing of this disclosure is subject to various interpretations, and thus, could run afoul of the duties of the nationwide consumer reporting agencies (those CRAs that meet the definition of 603(p) of the FCRA, 15 U.S.C. § 1681a(p)) prescribed by the particular rules regarding the consumer’s right to receive their free annual credit report from each CRA, as enumerated in 15 U.S.C. § 1681j(a). Thus, DC’s law is potentially preempted under 15 U.S.C. § 1681t(5)(C), which states: “[n]o requirement or prohibition may be imposed under the laws of any State. . . (5) with respect to the conduct required by...(C) section 605B [§ 1681c-2].”

² <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf>

amended the FCRA to protect consumers' credit history during this unprecedented time. These amendments to the FCRA prescribe specific reporting requirements on accounts where consumers who have been impacted by COVID-19 and receive an "accommodation" with respect to their account are reported either as "current" or potentially the same status as previously reported, maintaining the *status quo* until certain trigger events require changes to the reporting. 15 U.S.C. §1681s-2(a)(1)(F). The concept of a payment "accommodation" under the CARES Act is intentionally broad.

Second, the credit reporting system is built to consider factors such as consumer hardships resulting from economic crises and natural disasters. Credit reporting furnishing systems stood up in compliance with the FCRA, such as the Metro 2 format, provide options to creditors and other furnishers to accurately reflect the nature of consumer payment conditions, like indicating consumers who are experiencing financial distress (forbearance plans, deferred payment plans) or who are subject to natural or declared disasters. Moreover, leading credit score providers such as VantageScore and FICO treat these special codes neutrally, thereby helping level the playing field for affected consumers.

Furthermore, the FCRA provides for consumers to submit a statement to be appended to their file, and a "clear and accurate codification or summary" of that statement to be included in subsequent reports prepared on the consumer. See 15 U.S.C. §§ 1681i(b) and (c). Consumers are able to request a statement at no cost through the Internet, over the phone, or by mail with the three largest credit reporting agencies (Experian, Equifax, and Trans Union), and by one or more channels with other CRAs. CRAs have invested substantially to build procedures and systems designed to comply with these federal rules. DC's rules are applicable back to March 11, 2020, and while targeted at the same ultimate goal, are written in such a way that they could be interpreted to require significant changes to the procedures in place today.

In adopting the bills, the DC Council also included the following admonition: "[t]his section shall not be construed in a manner inconsistent with the Fair Credit Reporting Act, (15 U.S.C. § 1681 *et seq.*), or any other federal law or regulation." D.C. Code § 28-3871(g). CDIA submits that you may issue interpretative guidance regarding how CRAs may comply with its obligations under DC law, namely that compliance with the FCRA should be considered compliance with DC law.

3. CDIA's request for interpretative guidance.

CDIA recognizes that the D.C. Council is working to address the needs of District residents, especially those with limited resources, and has passed legislation it hopes to have a positive impact on them. While CDIA members have the right to raise a legal challenge to the DC law, and argue that the FCRA's preemption provisions give it no effect, CDIA would prefer to explore alternative solutions to mutual benefit. Unfortunately, given the urgency of the issues, CDIA and the Council were unable to resolve their disagreement through the legislative process in a timely fashion.

CDIA is requesting that you consider issuing an opinion or other interpretative guidance to bridge the gap between industry and the law. In particular, CDIA asks that the guidance declare that:

- (i) should a DC resident contact a credit reporting agency to place a personal statement in their file consistent with DC Code § 28-3871(a), that a CRA shall be deemed in compliance with DC law if it allows the consumer to place the statement in their file, and disseminates the statement (or the FCRA permitted summary or codification thereof) pursuant to its processes in place designed to comply with 15 U.S.C. §1681i(b) and (c); and
- (ii) a CRA shall be deemed in compliance with the notice requirement of D.C. Code § 28-3871(c) if it either:
 - a. places a notice to consumers on its website of the consumer's right to file a personal statement in their credit file with the CRA, the CRA shall be deemed to have given notice to the consumer pursuant to, and shall be deemed in compliance with, D.C. Code § 28-3871(c); or
 - b. has policies and procedures in place to inform consumers who contact the CRA via phone of the option to add a consumer statement to their credit file pursuant to policies and procedures designed to comply with 15 U.S.C. § 1681i(b).

In this way, all residents of the District will have immediate access to existing technologies in place today designed to alert potential creditors and other users of reports of the consumer's financial circumstances resulting from this national emergency. CRAs will have assurance from this office that it will not be subjected to immediate enforcement action and can remain focused on its ongoing compliance efforts with federal law.

Thank you for the consideration of this request. We would be happy to discuss all of this in more detail, as you may prefer.

Sincerely,

A handwritten signature in blue ink, appearing to read 'E. Ellman', with a long horizontal flourish extending to the right.

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