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Via Electronic Delivery

Jedd Bellman
Assistant Commissioner
Maryland Department of Labor
500 N. Calvert St.
Baltimore, MD 22012
jedd.bellman@maryland.gov

Re: Proposed Credit Reporting Agencies Rulemaking, COMAR 09.03.07

Dear Mr. Bellman:

The Consumer Data Industry Association ("CDIA") is pleased to offer its comments on the Commissioner of Financial Regulation's proposed rulemaking on Credit Reporting Agencies, 47:02 Md. R. 77, from January 17, 2020. CDIA greatly appreciates the opportunity to comment on this proposed rulemaking and provide feedback on issues impacting the consumer reporting industry.

CDIA is the voice of the consumer reporting industry, including the nationwide consumer reporting agencies ("NCRAs"), regional and specialized consumer reporting agencies, background check and residential screening companies, and others. CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals and to help businesses, governments and volunteer organizations assess risk and avoid fraud. CDIA members help to ensure fair and safe transactions for consumers, facilitate competition, locate crime victims and fugitives, reunite consumers with lost financial assets, help keep workplaces and apartment tenants safe, and expand consumers' access to financial and other products suited to their unique needs.

CDIA recognizes the work of the Office of the Commissioner of Financial Regulation in the drafting of this proposed regulation, specifically the way in which the Commissioner and the Office engaged with and considered the feedback and viewpoints of stakeholders. This proposed regulation makes great effort toward effective and appropriate regulation of consumer reporting in Maryland.

Despite the progress that has been made, CDIA remains concerned about some of the proposals in this rulemaking. CDIA provides the following comments on the proposed rulemaking:

1. Timing for initial or renewed registration.

Proposed section .03(B) provides that the Commissioner will establish a time period of at least 2 months after the effective date of these regulations within which a registrant must transfer registration information to NMLS. Proposed section .03(C) provides that the Commissioner must notify all registrants of the transfer period and provide instructions for the transfer at least 30 days before the transfer period is to begin.

CDIA requests that the Commissioner set the period by which a CRA must register to be at least 6 months. Transitioning to NMLS registration will be complicated for many CRAs. Many have no experience with NMLS, and even for those that do, it may take more than 2 months to coordinate responses from affected stakeholders to all questions included in the registration process.

2. Certifications required to be included in registrations.

Proposed section .03(E)(5) requires a registration to include a certification from a control person that the CRA has trained personnel sufficient to promptly and properly investigate and respond to "consumer complaints and inquiries." Proposed section .03(E)(7) requires a registration to include a certification by a control person who has primary oversight responsibility for the CRA's technology system that that the CRA is "in compliance with all applicable data security requirements, including the requirements of the Fair Credit Reporting Act . . . and the Gramm-Leach-Bliley Act."

With regard to the requirement to certify compliance with the FCRA, CDIA notes that the federal Consumer Financial Protection Bureau already supervises and examines financial CRAs for compliance with the FCRA, and both the CFPB and the Federal Trade Commission investigate and enforce the FCRA against CRAs. This certification requirement seems unnecessary.

Additionally, this proposed certification requirement implies that all CRAs must comply with the data security requirements of the Gramm-Leach-Bliley Act. However, the Gramm-Leach-Bliley Act, or GLBA, imposes data security requirements only on financial institutions, and many CRAs that would be regulated by this rule are not "financial institutions," as defined by GLBA, as they provide public records, employment history, or tenant history information, for example, not credit history information. Therefore, CDIA recommends that the language "if applicable" be inserted into this certification requirement.

3. Cyber risk insurance policies.

Proposed section .03(E)(8) requires registrations to include a copy of the declaration page, certificate of liability, or similarly summarized coverage page of the CRA's cyber risk insurance policy, "if applicable."

CDIA is concerned that this provision would, if finalized, require the disclosure of confidential and proprietary information. Specifically, declaration pages, certificates of liability, or similarly summarized coverage pages may include specific coverage, policy limitations, and other proprietary information. This information may be confidential and proprietary to the CRA and should not be required to be disclosed. Alternatively, the Commissioner should provide for a confidential means of submitting such information.

4. Other Information required to be included in registrations.

Proposed section .03(E)(10) requires a CRA to include in its annual registrations the total number of Maryland resident consumers for which the CRA "assembles or evaluates files." Proposed section .03(E)(11) requires a CRA to include in its annual registration the name of "any third-party technology vendor" that the CRA "utilizes to assemble, evaluate, or store consumer files prepared by" the CRA.

There is no basis in Maryland for requiring a CRA to disclose the number of Maryland resident consumers that the CRA "assembles or evaluates files" in its registration. Additionally, many CRAs do not have files on consumers from which they create consumer reports, instead consulting public records or other sources each time they create a consumer report for a user. This is true for employment and tenant background screening CRAs as well as for many credit report resellers.

Even for those CRAs that do maintain files of consumer information, it would be difficult to determine how many unique Maryland consumers are present in such files, as information is matched to a consumer when a consumer report is created, not just when information is added to a CRA's database. And it would be even more difficult to determine whether a particular piece of information matches a Maryland resident, as many CRAs may not have any address information—let alone up-to-date address information—for all pieces of information. A CRA may have a Maryland address on a consumer, but it may not know whether the address is current and represents, at the time it makes the disclosure, a Maryland resident consumer.

Instead, CDIA recommends that the Commissioner require disclosure of the number of consumer reports that the CRA sold during the previous calendar year. That data would be consistent with the information needed to assess an appropriate bond.

5. Bonding requirements.

Proposed section .04 would impose bonding requirements on CRAs based on the number of consumer reports that the CRA "assembled, evaluated, or sold" in the previous calendar year, ranging from a bond of $100,000 to a bond of $1,000,000. The proposal provides that the Commissioner may waive a required bond if, among other things, the granting of the exemption is not detrimental to the public interest, the CRA has conducted its business in a lawful manner, the CRA has complied with and has the capability to comply with the Maryland Personal Information Protection Act, and the CRA has demonstrated the financial ability to pay potential claims by one or more specific ways.

First of all, CDIA suggests that the Commissioner simplify this disclosure requirement to the number of consumer reports that the CRA "sold," eliminating the words "assembled" and "evaluated." Currently, the distinctions between when a CRA would be "assembling," "evaluating," and "selling" a particular consumer report are confusing. The FCRA defines a "consumer report" as a "communication of any information by a consumer reporting agency" for an FCRA permissible purpose. 15 U.S.C. § 1681a(d)(1). Therefore, consumer information only becomes a "consumer report" when it is *communicated* by a CRA. Accordingly, the Commissioner could determine the number of consumer reports a CRA creates in a given year by requesting the number of consumer reports it *sold*. CDIA believes that this change would eliminate the confusion around this disclosure requirement.

Additionally, the proposed regulation does not specify how the Commissioner would determine whether granting an exemption is not detrimental to the public interest, whether the CRA has conducted its business in a lawful manner, and whether the CRA has complied—and has the capability to continue to comply—with the Maryland Personal Information Protection Act. These reviews appear to be permissive, and it is not clear how CRAs should expect to be evaluated by the Commissioner on these standards, either for an initial exemption or on a continuing basis. CDIA suggests that the Commissioner remove these conditions and consider the granting of an exemption only on the basis of whether the CRA has the financial ability to pay potential claims.

6. Inclusion of loans found to be usurious, void, or unenforceable in consumer file.

Proposed section .05(B)(2) prohibits a CRA from including in a consumer's file any loan that has been determined to be usurious or otherwise void or unenforceable under Maryland law pursuant to a court order or final order issued by the Commissioner.

This prohibition does not indicate how a CRA is expected to be made aware of an order of a court or the Commissioner relating to such a loan. However, proposed section .07(B) contemplates that the Commissioner is to issue a written order to the CRA, instructing the CRA not to include such a loan in the consumer's files. Therefore, CDIA suggests that section .05(B)(2) be amended to clarify that the prohibition applies pursuant to a court order

or final order issued by the Commissioner "and sent to the CRA by the court, the Commissioner, or the consumer to which the information relates."

7. Matching of tax liens and judgments.

Proposed section .05(B)(3) requires CRAs to "use personal information and publicly available information to match tax liens and judgments" to the appropriate consumer file.

However, this proposed requirement should not be made applicable to all CRAs. First, this requirement should incorporate an exception for resellers of consumer reports, as such CRAs resell information in consumer reports that were originally created by another CRA. Second, not all CRAs create consumer reports with liens and judgments, and the regulations should clarify that the requirement does not apply to a CRA that does not sell any consumer reports containing lien and judgment information.

8. Commissioner investigations costs.

Proposed section .05(E) provides that a CRA would be required to pay the actual daily cost for each investigator engaged in an investigation by the Commissioner.

However, this provision does not place any limits on costs required to be reimbursed by a CRA, including a flat dollar amount on per day costs plus a total cost limit for an investigation. Additionally, there is no exception to the requirement to cover costs if the investigation does not result in any charges against the CRA. Accordingly, CDIA proposes that this provision be amended to place limits on investigator costs, including per day and total investigation maximums, as well as relief from this requirement where there is no charge resulting from the investigation.

9. Restrictions on sale of consumer reports for marketing purposes.

Proposed section .06(A) would require a CRA to provide notice to consumers of their right, under Md. Code Ann., Com. Law § 14-1202(b), to instruct a CRA not to sell, offer to sell, or furnish information in the consumer's file for marketing purposes. Proposed section .06(B) provides that the notice would have to include a link to or instructions to access a secure electronic method to opt out of this sale or transfer of consumer information. Proposed section .06(C) and (D) sets out when and where a CRA would have to provide this notice, including each time a summary of rights is provided to consumers.

Proposed section .06(E)(1) provides that the CRA would be expected to opt consumers out of this sale or transfer of personal information within 2 business days after the consumer notifies the CRA. Proposed section .06(E)(2) provides that this opt out would be effective to "each parent company, affiliate, or subsidiary" of the CRA.

Proposed section .06(F) states that a CRA would be required to establish a notification system, including a toll-free telephone number and secure electronic method, by which consumers can exercise this opt out.

Maryland law does not require the Commissioner to promulgate regulations imposing notice and opt out mechanism requirements related to consumer rights under Md. Code, Com. Law § 14-1202(b).

CDIA has serious concerns about proposed section .06. First of all, the FCRA does not permit consumer reports to be sold for general marketing purposes. Instead, the law only permits the sale of consumer reports for marketing purposes related to the offering of credit and insurance by way of its "prescreening" provisions. The FCRA's prescreening rules provide that a consumer report may only be provided for a credit or insurance purpose where the consumer has not initiated the transaction if either (1) the consumer authorizes the report to be provided or (2) the report is limited to certain specified pieces of information, the user makes a firm offer of credit or insurance, and the consumer has not—as is their right—opted out of prescreening. Section 1681b(e) permits consumers to opt out of their information being provided for prescreening.

Not only does the FCRA already regulate the sale of consumer reports for marketing purposes through its prescreening provisions, which includes providing consumers with opt out rights, the FCRA preempts any state laws that regulate prescreening. FCRA section 625(b)(1)(A) provides that the FCRA preempts state laws imposing any requirement or prohibition with respect to the "subject matter regulated under" 15 U.S.C. § 1681b(c) or (e) "relating to the prescreening of consumer reports." 15 U.S.C. § 1681t(b)(1)(A). Therefore, not only does the FCRA preempt Md. Code Ann., Com. Law § 14-1202(b), but it also would preempt this proposed rule's notice and opt out mechanism requirements.

The scope of section 625(b)(1)(A) preemption is broad and covers any state laws regulating the subject matter of prescreening, of which these requirements would qualify. Courts have confirmed the broad scope of this subject matter preemption provision. For example, in *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103 (2d Cir. 2009), the Second Circuit held that the FCRA preempted state tort claims relating to consumer reports under section 625(b)(1)(A) because section 625(b)(1)(A) preempted any subject matter relating to the prescreening of consumer reports and the tort allegations "relate[d] to the prescreening of consumer reports." *Id.* at 106. Additionally, in a case against the Minnesota Attorney General, CDIA successfully argued that Minnesota's law prohibiting the sale of a mortgage trigger list was preempted by section 625(b)(1)(A) because the law "unquestionably regulated" prescreening, noting in a hearing for interim relief that the "preemptive reach of the FCRA is both broad and explicit." *CDIA v. Swanson*, 2007 WL 2219389 (D. Minn. 2007).

Additionally, even if this opt out and notice requirements were not preempted, CDIA is particularly concerned about this proposed section's requirement that an opt out be effective to "each parent company, affiliate, or subsidiary" of the CRA. Many CRAs have affiliates that are not consumer reporting agencies and, as a result, are not subject to the FCRA or similar state laws. Per Maryland law, consumers do not have the same rights with non-CRAs as they might with CRAs. Furthermore, because of complex corporate structures, this requirement would be difficult to operationalize.

For these reasons, CDIA strongly suggests that the Commissioner strike the entirety of proposed section .06.

Conclusion.

CDIA wants to reiterate its appreciation to the Commissioner and the Office for the effort to receive and work through comments and feedback on issues concerning consumer reporting agencies as part of this rulemaking. CDIA is grateful for the many changes reflected in the proposed regulation and asks for the Commission's consideration of the issues and suggestions discussed above to further improve this rulemaking.

Please contact us if you have any questions concerning our comments.

Sincerely,

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