

MEMORANDUM IN OPPOSITION

S.8118-B by Senator Thomas (Senate Consumer Protection Committee)

AN ACT to amend the general business law, in relation to prohibiting a consumer reporting agency from reporting certain adverse information during the state of emergency caused by the novel coronavirus pandemic; and providing for the repeal of such provisions upon expiration thereof

On behalf of the Consumer Data Industry Association (CDIA) we respectfully oppose [S. 8118-B](#). CDIA and our members recognize that the COVID-19 pandemic is causing substantial financial pain in New York and beyond. You and your colleagues are right to look for ways to help consumers affected by the financial stress of the COVID-19 pandemic. Respectfully, while well-intentioned, S. 8111-B is not the answer. In addition to being preempted by federal law, S. 8111-B is more likely to hurt consumers than to help them.

The Consumer Data Industry Association 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.

Summary of S. 8111-B:

- Prohibits consumer reporting agencies (CRAs) from reporting any new adverse information that is a result of COVID- 19 in a consumer report pertaining to an affected person who notifies the CRA.¹
- Permits an affected person to contact any CRA and request that the CRA “disregard any adverse information that is a result of COVID-19.”

¹ “adverse information that is a result of the novel coronavirus pandemic (COVID-19)’ shall mean any adverse information regarding an affected person's late payments, default, or non-payment of consumer debt or other financial obligations, or a creditor's exercise of remedies arising from such late payments, default, or non-payment where the event occurs during the novel coronavirus pandemic (COVID-19).”

- Provides that CRA that “receives a request shall respond to the affected person and the superintendent of the department of financial services [DFS] within five days of receiving the request.”

Measures already exist to protect consumers in a situation like the COVID-19 pandemic

- Lenders and creditors have programs, like forbearance programs and deferred payment plans, to help consumers through financial distress, including natural and declared disasters.
- Credit bureaus have codes in place to enable lenders and creditors to report consumers in financial distress (forbearance plans, deferred payment plans) or who are subject to natural or declared disasters.
- These disaster and forbearance codes have been in place since before September 11, and have helped consumers then, now, and in the hurricanes, floods, fires, tornadoes in between.
- The leading score modelers, VantageScore and FICO, have systems in place to minimize the impact of forbearance plans and deferred payment plans on consumers’ credit scores.

The bill is more likely to hurt consumers than help them

The bill upsets the ability for lenders and creditors to rely on the completeness and accuracy of a consumer’s credit report, among other reasons, suppression of credit reporting increases risk to lenders and creditors, resulting in less available credit or higher interest rates for all consumers. Suppression of credit reporting risks the credit history a consumer may have established and does nothing to manage the actual delinquency with the consumer’s creditor. Current available reporting methods effectively protect and benefit consumers. At the attached document attests, suppression of credit information does will do more harm than good.

The bill makes it hard to serve consumers because it lacks operational clarity

The bill states that a consumer may request that a CRA “disregard any adverse information that is a result of COVID-19.” This provision is vague at best. The uncertainty of the intent of this clause makes it difficult to impossible for CRAs to comply, and will lead to consumer confusion regarding the impact of this provision.

The bill imposes an enormous and unnecessary burden on CRAs and the DFS

The bill requires any CRA that “receives a request respond to the affected person and the superintendent of the [DFS] within five days of receiving the request.” Requiring CRAs to notify the DFS of the potentially hundreds of thousands of New Yorkers who seek to have adverse information suppressed is deeply problematic. First, neither CRAs nor DFS have a system in place to send and receive such information and establishment of such a secure, encrypted system would likely not be complete in time to be implemented during the pandemic. Second, New York consumers reaching out to a CRA under this provision may not contemplate that their sensitive financial information must be shared with the government DFS. Third, DFS would bear substantial administrative and financial burdens that come with receiving sensitive financial information about consumers.

The bill is preempted by the FCRA

The federal Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, preempts this bill. The subject matter preemption provided in FCRA § 1681t(b)(1) is broad and explicit and has been held to preempt state laws that attempt to regulate that which the FCRA expressly regulates. Thus, where the subject matter of the state law is what information is contained within a consumer report, such as S. 8118-B, such laws are preempted.

Section 605 of the FCRA (15 U.S.C. § 1681c) establishes a national standard relating to the information that may be included in consumer reports, i.e., the content of consumer reports. Section 605 enumerates certain information which must be excluded from consumer reports (certain older, negative information) and other information which must be included (such as certain bankruptcy information and notations relating to account closure and disputes). Because the subject matter of Section 605 is the content of consumer reports, any state law that seeks to govern the content of consumer reports is preempted. This preemption is necessary to secure the accurate and uniform reporting of information about consumers nationwide.

Conclusion

Understandably, you and your colleagues are looking for legislative options to mitigate the financial effects of the COVID-19 pandemic. S. 8111-B, however, is not an effective option. Even if the bill was not preempted by the FCRA, suppressing accurate and valid credit information ultimately harms consumers and, more immediately, does not help consumers manage or mitigate an actual delinquency causing negative credit information. As always, we would welcome the opportunity to engage in discussion regarding legislative options to assist consumers in a way that is not preempted by the FCRA or harmful to the greater credit ecosystem.