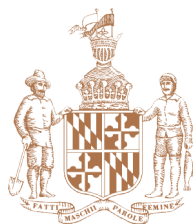


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January 23, 2024

The Honorable Anne Healey
Maryland House of Delegates
361 Taylor House Office Building
Annapolis, Maryland 21401
Via email

Dear Delegate Healey:

You have inquired whether prohibiting a consumer reporting agency from including in a consumer report certain records involving criminal proceedings that did not result in a conviction or which has been expunged, as proposed in House Bill 994 of 2023, is preempted by the federal Fair Credit Reporting Act (“FCRA”). While I have not discovered any controlling cases that would apply to Maryland law in this instance, based on the recent analysis of a related question in the federal First Circuit, in my view a controlling reviewing court in this instance likely would similarly find that federal law would not preempt the State from enacting such a prohibition.

In pertinent part, House Bill 994 of 2023 (“Consumer Reporting Agencies – Records of Criminal Proceedings – Prohibition”) would have prohibited a consumer reporting agency from including in a consumer report the following information: (1) any record of a criminal proceeding concerning the consumer in which the consumer was falsely accused, acquitted, or exonerated, or for whom a nolle prosequi was entered, or for whom no guilty verdict or guilty plea was entered; or (2) any criminal records concerning the consumer that have been expunged.

The federal FCRA (15 U.S.C. §§ 1681 *et seq.*) “regulates the creation and use of consumer report[s] by consumer reporting agenc[ies] for certain specified purposes, including credit transactions, insurance, licensing, consumer-initiated business transactions, and employment.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 334-35 (2016). Congress adopted a general rule against federal preemption of state laws in the FCRA, providing that except under certain circumstances, the FCRA “does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provisions of this subchapter, and then only to the extent of the inconsistency.” 15 U.S.C. § 1681t(a). One of the exceptions to the non-preemption rule is § 1681t(b)(1)(E), which provides that: “No requirement or prohibition may be imposed under the laws of any State-(1) with respect to any subject matter regulated under ... section 1681c of this title, relating to information contained in consumer reports, except that this

subparagraph shall not apply to any State law in effect on September 30, 1996.” In pertinent part, § 1681c(a)(5) prohibits a consumer reporting agency from making any consumer report containing an “adverse item of information, other than records of convictions of crimes which antedates the report by more than seven years.” In other words, in this context, a state is preempted under § 1681c(a)(5) from acting inconsistent with the federal prohibition against consumer reporting agencies including in a report an “adverse item of information, other than records of convictions of crimes which antedates the report by more than seven years.”

The U.S. Court of Appeals for the First Circuit recently examined a similar federal preemption question and these provisions in *Consumer Data Industry Association v. Frey*, 26 F.4th 1 (1st Cir. 2022). In that case, the court examined a federal FCRA preemption challenge to a Maine statute that prohibited consumer reporting of medical debt or debt from economic abuse. The court rejected the plaintiffs’ claim that § 1681t(b)(1)(E) “preempts all state laws ‘relating to information contained in consumer reports,’ regardless of whether they regulate subject matter regulated by Section 1681c” and explained the limited scope of preemption in this context: “[w]e see no reason to presume that Congress intended, in providing some federal protection to consumers regarding the information contained in credit reports, to oust all opportunity for states to provide more protections, even if those protections would not otherwise be preempted as ‘inconsistent’ with the FCRA as under 15 U.S.C. § 1681t(a)[,]” and “even where Congress has chosen to preempt state law, it is not ousting states of regulatory authority; state regulators have concurrent enforcement authority under the FCRA, subject to some oversight by federal regulators.” *Frey*, 26 F.4th at 9.

With specific reference to the “adverse item[s] of information,” such as the criminal records contemplated in your question, the court explained that:

Measuring the reach of preemption, Section 1681c(a)(5) points to age. Subject to three exceptions found in Section 1681c(b), it prohibits consumer reporting agencies from reporting adverse information that is more than seven years old. Correspondingly, agencies may report that information, provided it does not predate the report for more than seven years. But they are not required to do so. See [Federal Trade Commission, *40 Years of Experience with the Fair Credit Reporting Act* (July 2011)] at 55 (Section 1681 c(a)(5) does not require consumer reporting agencies ‘to report all adverse information within the time period[] set forth, but only prohibits them from reporting adverse items beyond [that] time period[]’). [] In drafting (a)(1)-(a)(5) of Section 1681c, Congress defined the subject matter, the kinds and uses of information, it was regulating narrowly and with specificity: information older than seven years relating to bankruptcies, civil suits, civil judgments, records of arrest, paid tax liens, accounts in collection, or that is otherwise adverse.

Frey, 26 F.4th at 11.

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Although the First Circuit remanded the specific question of § 1681t(b)(1)(E) preemption of Maine's statute, the lower federal court on remand adopted the First Circuit's interpretation of the scope of preemption in that provision in finding no preemption of Maine's restriction on consumer reporting agencies' reporting medical debt in that case, recently explaining that because there is no

congressional intention to preempt state reporting regulation insofar as the information in question is not more than seven years stale, [the court] do[es] not identify a viable facial challenge to the Maine reporting requirements. Reporting agencies should be able to comply with both Maine and federal law without fear that Maine has required them to do something that Congress has expressly foreclosed. The mere fact that Section 1681c lists "items of information" that reporting agencies may not report, 15 U.S.C. § 1681c(a), should not be interpreted as a congressional desire to remove from the field of state regulation all reporting concerning similar information not so prescribed, which regulation is simultaneously, expressly anticipated and permitted by Congress in Section 1681t(a).

Consumer Data Industry Association v. Frey, ___ F.Supp.3d ___ (D. Me, Jan 9, 2024) (2024 WL 98437) *3.

In this instance, there does not appear to be any federal obstacle to Maryland enacting the reporting restrictions proposed in House Bill 994 of 2023. As explained by the First Circuit in *Frey*, § 1681c(a)(5) of the FCRA prohibits consumer reporting agencies from reporting "adverse information" that is older than seven years relating to adverse items, such as arrest records. It does not require consumer reporting agencies to report all adverse information within that time period, but only prohibits them from reporting adverse items beyond then. *Frey*, 26 F.4th at 11. *See also Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995) ("The legislative history of the FCRA reveals that it was crafted to protect consumers from the transmission of inaccurate information about them ..."). Federal law does not appear to preempt or otherwise restrict additional protections enacted by states to limit the reporting of non-criminal conviction information by a consumer reporting agency in a consumer report, such as those proposed in House Bill 994 of 2023.

I hope this is responsive to your request. If you have any questions or need any additional information, please feel free to contact me.

Sincerely,



Jeremy M. McCoy
Assistant Attorney General