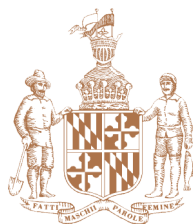


AG Opinion (2) HB 622-24, HB 994-23)Healey 01 23 2

Uploaded by: Anne Healey

Position: FAV

ANTHONY G. BROWN
ATTORNEY GENERAL



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JEREMY M. McCoy
ASSISTANT ATTORNEY GENERAL

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

January 23, 2024

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

Dear Delegate Healey:

This letter supplements our office's response to your recent inquiry 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 have been expunged, as proposed in House Bill 994 of 2023, is preempted by the federal Fair Credit Reporting Act ("FCRA"). See Letter of Advice to the Honorable Anne Healey from Asst. Atty. Gen. Jeremy M. McCoy (Jan. 23, 2024).

While not addressed in that letter, but relevant to and consistent with that advice, the Bureau of Consumer Financial Protection ("Bureau") has issued an interpretive rule explaining that the preemptive scope of the federal Fair Credit Reporting Act ("FCRA") is "narrow and targeted" and concludes that if a state law prohibits consumer reporting agencies from including information about arrest records in a consumer report, "such a law would generally not be preempted." Interpretive Rule, Bureau of Consumer Financial Protection (12 CFR Part 1002), *The Fair Credit Reporting Act's Limited Preemption of State Laws*, 87 Fed. Reg. 41042 (July 11, 2022). This federal interpretive rule additionally supports the conclusion that the FCRA would not preempt the type of restrictions proposed in House Bill 994 of 2023.

As addressed in our Letter of Advice, 15 U.S.C. § 1681t(b)(1)(E) of the FCRA preempts state laws "with respect to any subject matter regulated under" § 1681c "relating to information contained in consumer reports." As the Bureau explains, § 1681c relates only to four topics of information in consumer reports: (1) obsolescence of information; (2) information about medical information furnishers; (3) information on veteran medical debt; and (4) specifically required information in a report. 87 Fed. Reg. at 41044. Additionally, the interpretive rule makes clear that

The legislative history of the FCRA preemption provision confirms that the only subject matter at this level of specificity is subject to preemption. The legislative history expressly references "obsolescence periods" as an example of a subject matter governed by preemption – not the broader subject matter of the content of a consumer report more generally. Hence, FCRA 1681t(b)(1)(E) does

The Honorable Anne Healey

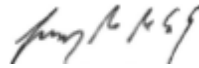
January 23, 2024

Page 2

not preempt State laws about subject matter regarding the content of or information on consumer reports beyond these topics.

87 Fed. Reg. at 41044 (Emphasis in original). Consequently, “[a] State law prohibiting a consumer reporting agency from including information (or certain types of information) about a consumer’s ... arrests on a consumer report would generally not be preempted under section 1681t(b)(1).” *Id.* Accordingly, consistent with the Letter of Advice earlier provided, in my view the FCRA likely would not preempt the State from enacting the type of consumer reporting prohibitions as proposed in House Bill 994 of 2023.

Sincerely,



Jeremy M. McCoy
Assistant Attorney General

AG Opinion 1 (HB 622-24, HB 994-23) Healey 01 23 2

Uploaded by: Anne Healey

Position: FAV

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OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

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.

The Honorable Anne Healey

January 23, 2024

Page 3

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

Healey FINANCE Testimony SUPPORT HB 622.pdf

Uploaded by: Anne Healey

Position: FAV

ANNE HEALEY
Legislative District 22
Prince George's County

Chair
Rules and Executive
Nominations Committee

Environment and Transportation
Committee

Chair
Local Government and
Bi-County Agencies Subcommittee



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Testimony in Support of HB 622 – Consumer Reporting Agencies – Records of Criminal Proceeding – Prohibition February 13, 2024

Chair Beidle and Members of the Committee,

For the record, I am Delegate Anne Healey, seeking a favorable report on HB 622.

This bill simply requires that a consumer reporting agency not include information from a criminal proceeding where persons are falsely accused, acquitted, or exonerated, as well as dispositions that are dropped, nolle pros, not guilty, or expunged. This does not refer to obsolete information.

This bill came before your committee last year with testimony stating that federal law would preempt this legislation. This testimony was not from the Office of Policy Analysis. I have attached 2 Attorney General's opinions regarding this issue addressing an interpretive rule that was issued "explaining that the preemptive scope of the federal Fair Credit Reporting Act ("FCRA") is "narrow and targeted" and concludes that if a state law prohibits consumer reporting agencies from including information about arrest records in a consumer report, "such a law would generally not be preempted." I asked

for this opinion regarding last year's bill, HB 994, which contains the similar language as this year's bill.

The Fair Credit Reporting Act, Title VI, requires that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce, which must be fair and equitable to the consumer.

Because a consumer report has a bearing on a person's creditworthiness, as well as their character and general reputation, it is neither fair nor equitable that records of arrest that do not result in a guilty conviction or dispositions that are dropped, nolle pros, not guilty, or expunged, preclude persons from the justice to which they are entitled.

Justice delayed is justice denied, and this bill would eliminate the unintended consequences of allowing misleading criminal procedures to remain on a person's consumer report. Innocent people are being harmed. Their reputation and livelihood are being damaged.

This bill does not preempt federal law but goes above and beyond to protect the consumers of the state.

Therefore, I am asking for a favorable report on HB 622.

CPD Testimony - HB 622 - SUPPORT - Senate.pdf

Uploaded by: Steven M. Sakamoto-Wengel

Position: FAV

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Deputy Attorney General

LEONARD J. HOWIE III
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CHRISTIAN E. BARRERA
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PETER V. BERNS
General Counsel



ANTHONY G. BROWN
Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
CONSUMER PROTECTION DIVISION

WILLIAM D. GRUHN
Chief
Consumer Protection Division

Writer's Direct Dial No.
(410) 576-6307

March 20, 2024

TO: The Honorable Pamela Beidle, Chair
Finance Committee

FROM: Steven M. Sakamoto-Wengel
Consumer Protection Counsel for Regulation, Legislation and Policy

RE: House Bill 622 – Consumer Reporting Agencies – Record of Criminal Proceedings - Prohibition (SUPPORT)

The Consumer Protection Division of the Office of the Attorney General supports House Bill 622, sponsored by Delegate Healey, which would prohibit consumer credit reports from including information about criminal proceedings that did not result in a conviction or that have been expunged. House Bill 622 is consistent with Maryland's longstanding efforts to remove barriers to employment, housing and credit for individuals who have a history with the criminal justice system.

The Fair Credit Reporting Act already requires credit reports to exclude records of arrest, indictment, or conviction of a crime whose date of disposition, release or parole is more than seven years before the report date because of the prejudicial nature that information may have on the individual who is the subject of the report. Records of a criminal proceeding in which (1) the consumer was falsely accused, acquitted or exonerated; (2) a *nolle prosequi* was entered; or (3) that did not result in a guilty verdict or guilty plea can be just as prejudicial to a consumer seeking housing, employment or credit. Similarly, the General Assembly has been seeking to streamline the process of expunging records that may have resulted from wrongful arrests or convictions.

House Bill 622 would help prevent consideration of information that should not be relevant to whether an individual should be hired, approved for housing, or given credit. Consequently, the Consumer Protection Division requests that the Economic Matters Committee give HB 622 a favorable report.

HB622 Written Testimony crossfile.pdf

Uploaded by: Zoe Gallagher

Position: FAV



HB622 Consumer Reporting Agencies - Records of Criminal Proceedings - Prohibition
Position: Favorable

3/20/2024

The Honorable Pamela Beidle, Chair
Senate Finance Committee
3 East
Miller Senate Office Building
Annapolis, MD 21401
CC: Members of the Senate Finance Committee

Economic Action Maryland (formerly the Maryland Consumer Rights Coalition) is a people-centered movement to expand economic rights, housing justice, and community reinvestment for working families, low-income communities, and communities of color. Economic Action Maryland provides direct assistance today while passing legislation and regulations to create systemic change in the future.

As an organization with a long history of advocating for consumer protection, I am writing to urge your favorable report on HB622. HB622 seeks to prohibit consumer reporting agencies from including crimes in which the consumer was falsely accused, acquitted, exonerated, found not guilty, or those that have been expunged, in determination of whether or not a consumer is creditworthy.

The creditworthiness of a consumer as determined by these consumer reporting agencies can be used in a myriad of contexts, including mortgage and loan applications, apartment rentals, university applications, and even utility services. In fact, 9 in 10 employers, 4 in 5 landlords, and 3 in 5 colleges and universities now use background checks to screen out applicants with criminal records.¹

People of color and low-income individuals are disproportionately arrested for petty crimes, particularly drug possession. As Maryland has made strides to decriminalize cannabis and improve expungement processes of nonviolent crimes, and as nearly a third of working-age Americans have some sort of criminal record, these petty crimes should not prevent an individual from accessing credit.

Maryland already prohibits consumer reporting agencies from including crimes that have been expunged for over seven years in consumer reports,² this bill would simply shorten that timeline to ensure that individuals are able to find well-paying employment and stable housing after exoneration or expungement, which lowers the likelihood of recidivism in the long term.

People should not be doubly punished for low-level crimes that disproportionately impact vulnerable communities, and no one should be prevented from accessing credit due to a crime they did not commit.

For these reasons we urge a favorable report on HB622.

¹ <https://www.americanprogress.org/article/criminal-record-shouldnt-life-sentence-poverty-2/>

² <https://iprospectcheck.com/maryland-background-check/#::~:~:text=Maryland%20also%20forbids%20CRAs%20from,of%20information%20can%20be%20reported.>



Sincerely,
Zoe Gallagher, Policy Associate

MD HB622 CDIA Senate Testimony - Opposed.pdf

Uploaded by: Keith Walmsley

Position: UNF



Consumer Data Industry Association
1090 Vermont Ave., NW, Suite 200
Washington, D.C. 20005-4905

P 202 371 0910

CDIAONLINE.ORG

March 20, 2024

Chair Pamela Beidle
Senate Finance Committee
3 East
Miller Senate Office Building
Annapolis, Maryland 21401

Chair Beidle & Members of the Committee:

HB622: Consumer Reporting Agencies - Records of Criminal Proceedings – Prohibition Unfavorable

On behalf of the Consumer Data Industry Association, I write to raise concerns regarding HB 622, which attempts to prohibit consumer reporting agencies (CRAs) from including certain criminal records on consumer reports and prohibit CRAs from relying on those prohibited records when determining a consumer's creditworthiness. We respectfully request that the committee reject this proposal as it is precluded by federal law.

CDIA, founded in 1906, is the trade organization representing the consumer reporting industry, including agencies like the three nationwide credit bureaus, regional and specialized credit bureaus, background check companies and others. CDIA exists to promote responsible data practices to benefit consumers and to help businesses, governments and volunteer organizations avoid fraud and manage risk.

In many ways, the Fair Credit Reporting Act (FCRA) can be considered the country's first national privacy law. The FCRA provides important and necessary protections to consumers, lenders, government agencies, law enforcement, volunteer organizations, and businesses who rely on full, complete and accurate consumer reports to make informed decisions.

The FCRA also serves as the legal floor for background checks in the United States. Maryland also has incorporated much of the FCRA into its Commercial Law article. These laws demand accuracy in background check processes and afford legal rights to consumers. Maintaining alignment between state consumer reporting laws and federal consumer reporting laws is critical.

Records of criminal proceedings are considered a public record under the FCRA and thus are eligible for inclusion in consumer reports. The records described in (A)(1) would fall under this category. However, expunged criminal records do not get reported by CRAs as they are no longer publicly available. Further, the FCRA has strict accuracy guidelines for the information contained in consumer reports and mechanisms for consumers to dispute content included in their reports as well as seek remedies.

In addition to setting requirements for what can be included in a consumer report, Congress also expressly reserved authority over limits to what CRAs may include in consumer reports to itself, preempting the states from establishing their own requirements or prohibitions relating to information contained in consumer reports. **As section (A) of HB 622 imposes requirements on CRAs as it relates to information to be included or excluded from consumer reports, it is preempted by 15 U.S.C. § 1681t(b)(1)(E).**

Section (B) misinterprets the role of CRAs and their relationship to users of consumer reports and as a result is unnecessary. CRAs do not make determinations regarding the creditworthiness of a consumer. Decisions on those matters are made by the party interaction with the consumer, whether they

obtained a consumer report, relied on the contents of that consumer report in making a determination of creditworthiness or neither.

We respectfully request that the committee reject HB 622 and issue an unfavorable report on this measure given that section (A) conflicts with the FCRA and is preempted and that section (B) would have no impact as CRAs do not make determinations of the creditworthiness of a consumer.

CDIA and its members stand ready to work with this committee on consumer report-related matters. Please contact me via email at ztaylor@cdiaonline.org should you, your staff, or your colleagues wish to discuss our concerns in greater detail.

Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'ZWT', with a stylized flourish extending to the right.

Zachary W. Taylor
Director, Government Relations
Consumer Data Industry Association

CC: Maryland Senate Finance Committee