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February 13, 2025

The Honorable Julie Palakovich Carr
Maryland House of Delegates
202 Lowe House Office Building
Annapolis, Maryland 21401
Via email

Re: House Bill 1020 – "Consumer Protection – Credit Reporting – Medical Debt (Fair Medical Debt Reporting Act)"

Dear Delegate Palakovich Carr:

You have inquired whether prohibiting a consumer reporting agency from including in a consumer report certain records containing adverse information relating to medical debt incurred by the consumer or any collection action against a consumer to collect medical debt, as proposed in House Bill 1020, is preempted by the federal Fair Credit Reporting Act ("FCRA"). Based on recent analysis of related questions in other federal circuits and based on a 2022 interpretive rule explaining the "narrow and targeted" preemptive scope of the FCRA, in my view, a controlling reviewing court likely would find that the FCRA does not preempt the State from enacting such a prohibition.

In pertinent part, House Bill 1020 as introduced, would prohibit a consumer reporting agency from: (1) making, creating, or furnishing any consumer report containing, incorporating, or reflecting: (i) any adverse information that the reporting agency knows or should know relates to medical debt incurred by the consumer; or (ii) any collection action against a consumer to collect medical debt; or (2) maintain in a file on a consumer any information relating to: (i) medical debt incurred by the consumer; or (ii) any collection action against the consumer to collect medical debt.

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 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 medical debt shielded in proposed HB 1020, 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.

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, 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, 710 F. Supp.3d 73, 79 (D. Me. 2024).

In this instance, there does not appear to be any federal obstacle under the FCRA to Maryland enacting the reporting restrictions proposed in House Bill 1020. 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 is 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 medical debt information by a consumer reporting agency in a consumer report, such as those proposed in House Bill 1020.

Relevant to and consistent with that conclusion, the Bureau of Consumer Financial Protection ("Bureau") issued an interpretive rule in 2022 explaining that the preemptive scope of the FCRA is "narrow and targeted" and concludes that if a state law prohibits consumer reporting agencies from including medical debt information 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 1020.

As explained above, 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;[1] (3) information on veteran medical debt;[2] 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 *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).

In summary, the Bureau concluded that states "retain substantial flexibility to pass laws involving consumer reporting to reflect emerging problems affecting their local economies and citizens." 87 Fed. Reg. at 41042. For example, "if a State law were to forbid consumer reporting

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[1] As the Bureau explained in its Interpretive Rule with respect to the regulation of medical information furnishers:

> Section 1681s-2 sets forth several requirements for furnishers in order to assure the accuracy of information provided to consumer reporting agencies. For instance, "[a] person shall not furnish information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate. However, section 1681s-2 says nothing about when a furnisher may or must begin furnishing information about a consumer's account. . . . Accordingly, when a furnisher may or must begin furnishing information about a consumer's account is not a 'subject matter regulated under section 1681s-2." Thus, a State law governing when a furnisher may begin furnishing on a consumer's account (including medical debt) would not be preempted by section 1681t(b)(1)(F).

87 Fed. Reg. at 41045.

[2] As the Bureau explained in its Interpretive Rule in relation to veterans' medical debt:

> Section 1681c(a)(7) provides requirements regarding veterans' medical debt, but section 1681c does not regulate the subject matter of medical debt more generally. Further, although medical debt information may be "adverse information" regulated under 1681c(a)(5) … that provision regulates only the subject of *how long* such information may appear on a consumer report, not the content of the information or when such information may initially appear.

87 Fed. Reg. at 41045. (Emphasis in original).

agencies from including information about medical debt … in a consumer report (or from including such information for a certain period of time). Such a law would generally not be preempted." *Id*. "Likewise, if a State law were to prohibit [medical information] furnishers from furnishing such information to consumer reporting agencies, such a law would also not generally be preempted." *Id*.

Accordingly, in light of the foregoing analysis of the federal case law and the conclusions of the interpretive rule of the federal agency administering the FCRA with respect to preemption of state laws, in my view a controlling reviewing court likely would find that the FCRA does not preempt the State from enacting the prohibitions proposed in House Bill 1020.

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