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November 17, 2017

VIA ELECTRONIC MAIL
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RE: I.D. No. DFS-40-17-00003-P

Dear Mr. Rock:

The Consumer Data Industry Association ("CDIA") appreciates the opportunity to comment on the proposed rulemaking on Registration Requirements and Prohibited Practices for Credit Reporting Agencies, published by the New York Department of Financial Services ("NY DFS") in the New York State Register on October 4, 2017.

CDIA is an international trade association, founded in 1906, with more than 130 corporate members. CDIA's mission is to educate consumers, media, legislators and regulators about the benefits of the responsible use of consumer data which creates opportunities for consumers and the economy.

CDIA members form the backbone of the U.S. credit reporting system and include the nationwide consumer reporting agencies, nationwide specialty consumer reporting agencies, resellers, and other consumer reporting agencies (collectively "CRAs"). Our members provide businesses with the information and analytical tools necessary to manage risk. They help ensure fair and safe transactions for consumers, facilitate competition, and expand consumers' access to a market which is innovative and focused on their needs. CDIA member products are used in more than nine billion transactions each year.

CDIA members are consumer reporting agencies heavily regulated by both the Fair Credit Reporting Act ("FCRA") and the New York Fair Credit Reporting Act ("New York FCRA").[1] Many CDIA members are "financial institutions" under federal law and subject to the privacy and data security provisions of Title V of the Gramm-Leach-Bliley Act ("GLBA"), including the Federal Trade Commission's ("FTC") Safeguards Rule.[2] Under both federal and state law, all CDIA members are prohibited from engaging in unfair or deceptive trade practices.[3] In addition, many CDIA members are service providers to financial institutions and other regulated entities, and are subject to extensive oversight from their customers with regard to their ability to comply with federal consumer protection and data security laws and regulations.[4]

CDIA members' data is used every day to promote social and public good. The data provided by CDIA members creates economic opportunity by enabling consumers to obtain mortgages, auto loans, student loans, and retail credit. CDIA members' data is used by government to prevent tax and public assistance fraud; by law enforcement to locate victims, witnesses, and fugitives; by child support agencies to locate deadbeat dads; and by banks, credit unions, and retailers to prevent identity theft.

CDIA is deeply troubled that one of its members was the subject of a criminal intrusion that resulted in the compromise of data on approximately 145.5 million consumers. The success of this criminal attack, however, should not taint the entire consumer reporting industry. CDIA believes that the proposed rule is fundamentally flawed, represents an overreaction to one very unfortunate and troubling incident, and jeopardizes the continued functioning of the national credit reporting system.

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[1] 15 U.S.C. § 1681 *et seq.*; N.Y. Gen. Bus. L. § 380 *et seq.*

[2] 15 U.S.C. §§ 6801-6809; 16 C.F.R. Part 314 (Standards for Safeguarding Customer Information).

[3] 15 U.S.C. § 45; N.Y. Gen. Bus. L. § 349.

[4] 12 U.S.C. §§ 1861 *et seq.*; 12 U.S.C. § 5481(26).

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I. Introduction and Overview of CDIA's Concerns

CDIA believes that the proposed rule would have adverse consequences for consumers in New York and elsewhere, and for banking organizations, insurance companies, and other users of consumer reports, including law enforcement and government agencies. CDIA is concerned that the proposed rule disregards and rewrites existing law, and undermines the very foundations of the U.S. credit reporting system, which is a national system that serves the needs of consumers nationwide and the U.S. banking system.

The proposed rule was released shortly after revelations by Equifax about a criminal hack that resulted in the compromise of data on approximately 145.5 million consumers. The press release accompanying the proposed rule contains statements from Governor Cuomo and Superintendent Vullo indicating that the proposed rule is a direct reaction to the Equifax data breach.[5] CDIA finds it disturbing that the NY DFS is using this very regrettable data breach incident to tarnish an entire industry that has served and continues to serve New York consumers, businesses, and government entities so well for decades.

Unfortunately, the substance of the proposal makes the following abundantly clear:

- The proposed rule would undermine and frustrate the purpose of the carefully crafted national credit reporting standards set forth in the FCRA—the federal statute that has regulated CRAs and the national credit reporting system since 1970—and the New York FCRA, and jeopardize the continued viability of the national credit reporting system.
- The proposed rule would make the superintendent of the NY DFS the *de facto* regulator of the national credit reporting system, roles currently vested in the Consumer Financial Protection Bureau ("CFPB") and the FTC.
- The proposed rule would expose consumers to irreparable harm to their credit histories, increase the risk of identity theft, undermine the safety and soundness of financial institutions that use consumer reports to make prudent lending decisions, and prevent other legitimate users of consumer reports, such as law enforcement and government agencies, from accessing vital information.
- The proposed rule would impose inconsistent and unachievable obligations on CRAs that have nothing to do with information security.

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[5] Press Release, "Governor Cuomo Announces New Actions to Protect New Yorkers' Personal Information in Wake of Equifax Security Breach" (Albany, NY, Sept. 18, 2017).

- The proposed rule would impose duplicative and unnecessary information security requirements on CRAs that are already subject to extensive and overlapping federal, state, and contractual information security requirements.
- The proposed rule exceeds the authority of the NY DFS, is preempted in part by federal law, and is replete with vague, subjective, and contradictory standards that make it arbitrary and capricious.

CDIA and its members have no objection to, and, in fact, would welcome real solutions to the all-too-common problems of data security experienced at consumer reporting agencies, users and furnishers of consumer report data, merchants, universities, government agencies, and other entities that possess sensitive consumer information. The proposed rule, however, does nothing to improve data security while it jeopardizes the finely-crafted federal scheme for a national consumer reporting system and potentially undermines bedrock consumer protection and safety and soundness principles.

The proposed rule would impose a new and unparalleled state licensing regime on "consumer credit reporting agencies" ("CCRAs"), a subset of CRAs. The scope of the proposed rule is not clear in places and clearly wrong or overly broad in other places. Specifically, the proposed rule should not apply to consumer reports provided to persons not licensed by the NY DFS or to consumer reports provided for employment, tenant screening, and other non-financial purposes that plainly fall outside the NY DFS's scope of authority. Although styled as a "registration" requirement, the proposed rule does much more than create a simple registration requirement for certain consumer reporting agencies doing business in New York.

The proposed rule would impose two sets of substantive requirements on consumer credit reporting agencies. First, every CCRA would be required to comply with the NY DFS Cybersecurity Rule (23 NYCRR 500). Proposed Section 201.07. Second, CCRAs would be prohibited from engaging in six "prohibited practices" that have no direct relationship to cybersecurity or the NY DFS Cybersecurity Rule. Proposed Section 201.06. One prohibited practice, for example, would preclude a CCRA from "[i]nclud[ing] inaccurate information in any consumer report relating to a consumer located in New York State," an unachievable standard that is inconsistent with the accuracy standard set forth in both the FCRA and the New York FCRA.

In addition, the proposed rule would give the superintendent of the NY DFS broad authority to examine and to request information from CCRAs, including via quarterly

or other information reporting requirements and other inquiries. Proposed Sections 201.02(f) and 201.04.

Of particular concern to CDIA is that the proposed rule would give the superintendent unlimited discretion to revoke, suspend, or refuse to renew the registration of a CCRA for a wide range of reasons. Proposed Sections 201.02(e) and 201.05. Some enumerated reasons are so vague and ambiguous as to be meaningless, while others would permit the revocation, suspension, or non-renewal of a CCRA's license for the isolated acts of a single officer or director. In effect, the superintendent would have the power to put a national CRA out of business in New York and, by such action, change its status as a "nationwide" CRA or "nationwide specialty" CRA under the FCRA.

Exercise of this de-licensing power would preclude the affected CCRA from assembling, evaluating, or maintaining "a consumer credit report on any consumers located in New York." *See* Proposed Section 201.03(a). Such an action would disrupt financial markets, adversely impact law enforcement and government agencies that rely on consumer reports, reduce competition in the credit reporting market, and cause irreparable harm to New York consumers. Once a CCRA is de-licensed, the proposed rule would mandate that it stop selling consumer reports on New York consumers to any person, not just to persons regulated by the NY DFS, and to purge and remove from its files New York consumers' credit records. *See* Proposed Section 201.03.

As a result, New York consumers may no longer be able to qualify for mortgages, credit cards, auto loans, student loans, or other valuable products or benefits that depend on access to consumer reports. And financial institutions and other creditors would lose access to valuable data on New York consumers that helps those firms make prudent and safe and sound lending decisions. Government agencies and law enforcement would similarly lose access to valuable data that supports their important public service missions. Contrary to the stated objective of the proposed rule, the exercise of this de-licensing power would not "ensure that consumer credit reporting agencies operate in a safe and sound manner, . . . , in order to protect consumers and financial markets."[6]

The fallout from any de-licensing decision could not be contained within the borders of New York, but would have significant and adverse ripple effects across the country. Consumers move in and out of New York all the time. The requirement that a de-

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[6] *See* N.Y. State Register at 10 (Oct. 4, 2017).

licensed CCRA purge a consumer's credit records from its files would be triggered when a consumer moves into New York and would apply to records assembled when the consumer was not a New York resident. Likewise, a consumer's lack of a credit file, as a result of a NY DFS-mandated de-licensing decision, would follow that consumer when he or she moves out of New York. Further, financial institutions and other users located outside New York State, and not regulated by the NY DFS, would lose access to consumer report data on New York consumers.

Given the sweeping authority outlined above and the impact the exercise of this authority could have, the superintendent would become the *de facto* national regulator of national consumer reporting agencies and the national credit reporting system. The powers the superintendent could exercise under the proposed rule far exceed any powers granted by Congress or a State legislature to the CFPB, the FTC, or any other State regulator. By regulatory fiat, the NY DFS would arrogate to itself the ability to dictate who can and cannot be a nationwide CRA or nationwide specialty CRA, and to nullify or rewrite substantial portions of the FCRA and the New York FCRA.

We note, in this context, that the proposed rules are not needed to protect New York consumers. The State of New York is not powerless with respect to CRAs, and where there are issues that the State believes need to be redressed, it has ample power to do so. In fact, the State Attorney General recently entered into a comprehensive settlement with the national credit bureaus, addressing issues relating to data furnishing, accuracy of public records, consumer dispute handling, and related issues. [7]

CDIA believes the proposed rules constitute an unlawful and unconstitutional expansion of the NY DFS's powers and misguided public policy. Making the continued functioning of our national credit reporting system dependent upon the exercise of unfettered discretion by a single state's regulator poses a grave, existential risk to that system and could harm both consumers and the entities that rely on consumer report information supplied by CDIA members to make prudent and responsible decisions.

[7] *See* Settlement Agreement, *In re Investigation by Eric T. Schniederman, Attorney General of the State of New York, of Experian Information Solutions, Inc., Equifax Information Servs., LLC, & TransUnion LLC* (Mar. 8, 2015) (settlement agreement with all three nationwide CRAs related to the accuracy of credit reports, dispute resolution for errors, and medical debt credit history issues).

A. The Alleged "Deficient" Practices Have No Basis in Fact

The first paragraph of Proposed Section 201.0 suggests that the NY DFS has identified "deficient practices" by consumer reporting agencies in connection with: (a) safeguarding consumer data; (b) maintaining accurate consumer credit data; and (c) appropriately investigating consumer disputes of alleged inaccuracies in credit reports. CDIA and its members find the assertion of such industry-wide deficiencies offensive and groundless. The implication that the industry fails in each of these areas is demonstrably false.

Although the Equifax breach is a serious and disturbing incident, Equifax's core consumer reporting databases reportedly were not compromised by the breach.[8] CDIA knows of no other data breach affecting the consumer reporting databases of other CRAs. There is no evidence that CRAs have a pattern of failing to safeguard consumer data, particularly consumer report information.

If the purpose of the proposed rule is, as stated, to improve data security, then accuracy and dispute handling bear no rational relationship to the purpose of the rule – that is, they are arbitrary and capricious. Further, the New York Attorney General recently concluded a settlement on data accuracy and dispute handling with the three nationwide CRAs, which presumably should address any concerns in these areas.[9] At the very least, the NY DFS should allow this settlement to be implemented before second-guessing the conclusions of the New York Attorney General and the efficacy of the relief imposed.

In each of these areas, CRAs are subject to extensive and effective regulation and oversight. Since 2012, the CFPB has supervised "larger participants" in the consumer reporting market, specifically CRAs with annual receipts of more than $7 million, which includes all of the nationwide CRAs and most nationwide specialty CRAs.[10] Since that time, the CFPB has had each of the nationwide CRAs under continuous and extensive

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[8] Equifax Press Release, "Equifax Announces Cybersecurity Incident Involving Consumer Information" (Sept. 7, 2017), https://investor.equifax.com/news-and-events/news/2017/09-07-2017-213000628.

[9] *See* Settlement Agreement, *In re Investigation by Eric T. Schniederman, Attorney General of the State of New York, of Experian Information Solutions, Inc., Equifax Information Servs., LLC, & TransUnion LLC* (Mar. 8, 2015) (settlement agreement with all three nationwide CRAs related to the accuracy of credit reports, dispute resolution for errors, and medical debt credit history issues).

[10] 12 C.F.R. § 1090.104.

examination. The CFPB also examines other CRAs and has made numerous supervisory findings at CRAs.[11]

CFPB examinations cover compliance with consumer financial services laws, including the FCRA, and potential unfair, deceptive, or abusive acts or practices ("UDAAPs") under Sections 1031 and 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"). The CFPB has examined each of the nationwide CRAs, as well as other large CRAs, with respect to their Compliance Management Systems, credit report accuracy, dispute handling process, and credentialing. To date, the CFPB has not brought any enforcement actions against CRAs related to these or other legal requirements imposed on CRAs. The only CFPB consent orders in place relate to credit monitoring services offered directly to consumers by the nationwide CRAs.[12]

The CFPB has noted that its "work is producing an entirely different approach at the major consumer reporting companies: one of proactive attention to compliance."[13] The CFPB further noted that "[t]his proactive approach to compliance management will reap benefits for consumers – and the lenders that use consumer reports – for many years to come."[14] Contrary to the objectionable statements in Proposed Section 201.0, the CFPB's own statements, based on first-hand knowledge, show that CDIA members have proven to be responsible stewards of consumer credit data and that the data compiled by members is used to promote social good.

B. Consumer Reporting Agencies Must Satisfy Extensive Federal and State Data Security Standards

Although the stated basis for the proposed rule is to improve data security, the NY DFS has failed to consider relevant evidence that CRAs are subject to extensive federal and state information security standards. As discussed below, consumer reporting agencies

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[11] *See* CFPB, Supervisory Highlights Consumer Reporting Special Edition (Issue 14) (Winter 2017) ("Supervisory Highlights Consumer Reporting").

[12] *See In re Experian Holdings, Inc., et. al.,* No. 2017-CFPB-0012 (Mar. 23, 2017); *In re Equifax Inc. and Equifax Consumer Servs. LLC,* No. 2017-CFPB-0001 (Jan. 3, 2017); *In re TransUnion Interactive, Inc., et al.,* No. 2017-CFPB-0002 (Jan. 3, 2017).

[13] *Id.* at 2.

[14] *Id.* at 2.

must adhere to extensive federal and state data security standards. Moreover, the federal banking regulators recently decided not to proceed with proposed rules on cyber risk management standards after concluding that more rules were unlikely to protect the financial system against cyber attacks.[15]

Gramm-Leach-Bliley Act and the FTC Safeguards Rule: Most CRAs are financial institutions subject to the data security requirements of the Gramm-Leach-Bliley Act ("GLBA") and its implementing regulation, the Standards for Safeguarding Customer Information ("Safeguards Rule") promulgated by the FTC.[16]

The Safeguards Rule imposes specific standards designed to (1) ensure the security and confidentiality of customer information; (2) protect against any anticipated threats to the security or integrity of such records; and (3) protect against unauthorized access to or use of such records or information which could result in substantial harm or inconvenience to any consumer.[17]

The Safeguards Rule requires financial institutions, including CRAs, to "develop, implement, and maintain a comprehensive written information security program" that includes appropriate administrative, technical, and physical safeguards to achieve these objectives.[18] This program must be tailored to the institution's size and complexity, the nature and scope of its activities, and the sensitivity of any customer information at issue.[19]

In addition, the Safeguards Rule requires financial institutions to designate an employee to coordinate its information security program; conduct a risk assessment to identify reasonably foreseeable risks and assess the sufficiency of safeguards in place to control such risks; and design, implement, and regularly test its information safeguards to

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[15] *See* 81 Fed. Reg. 74,315 (Oct. 26, 2016) (proposed Enhanced Cyber Risk Management Standards); Yalman Onaran, "Regulation Can't Solve Cybersecurity Problems, Fed Official Says" (Bloomberg Nov. 6, 2017), https://www.bloomberg.com/news/articles/2017-11-06/regulation-can-t-solve-cybersecurity-problems-fed-official-says.

[16] 15 U.S.C. § 6801(b); 16 C.F.R. Part 314 (Standards for Safeguarding Customer Information).

[17] 15 U.S.C. § 6801(b); 16 C.F.R. § 314.4(b).

[18] 16 C.F.R. § 314.3(a).

[19] *Id.*

protect against such risks.[20] Finally, the Safeguards Rule obligates financial institutions to oversee their service providers' cybersecurity practices, both by taking reasonable steps to ensure the institutions only deal with service providers that employ strong security practices, and by entering into contracts with such providers that require them to implement appropriate safeguards.[21]

The FTC complements the Safeguard Rule with an active and longstanding data security enforcement program. The FTC has brought more than a dozen actions against financial institutions under its jurisdiction for violating the Safeguards Rule.

The FTC Act: Consumer reporting agencies are subject to Section 5 of the Federal Trade Commission Act ("FTC Act"), which prohibits unfair or deceptive acts or practices.[22] The FTC has interpreted its Section 5 authority to include inadequate data security practices.[23] The FTC has issued detailed guidance explaining what it considers to be reasonable cybersecurity safeguards. These include practices such as encryption, use of firewalls, use of breach detection systems, maintaining physical security of objects that contain sensitive information, and training employees to protect such information.[24] The FTC zealously enforces these standards under its FTC Act authority. Since 2006, the FTC has brought more than 60 such public enforcement actions under Section 5 of the FTC Act for putting consumers data at unreasonable risk.[25]

For example, in the ChoicePoint case, the FTC collected millions of dollars in consumer redress and civil penalties against ChoicePoint, a CRA, in connection with the

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[20] 16 C.F.R. § 314.4.

[21] 16 C.F.R. § 314.4(d).

[22] 15 U.S.C. § 45.

[23] Cong. Res. Serv., The Federal Trade Commission's Regulation of Data Security Under Its Unfair or Deceptive Acts or Practices (UDAP) Authority (Sept. 11, 2014), https://fas.org/sgp/crs/misc/R43723.pdf.

[24] *See, e.g.,* Fed. Trade Comm'n, Protecting Personal Information: A Guide for Business (Oct. 2016), https://www.ftc.gov/tips-advice/business-center/guidance/protecting-personal-information-guide-business.

[25] FTC Report, Privacy & Data Security Update – 2016 (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/privacy-data-security-update-2016/privacy_and_data_security_update_2016_web.pdf.

unauthorized disclosure of nearly 10,000 credit reports.[26] The FTC also entered into a consent order with CardSystems Solutions, Inc., for failing to take appropriate measures to protect the security of sensitive information on tens of millions of consumers, resulting in millions of dollars in fraudulent purchases.[27] More recently, the FTC sued and prevailed in litigation against the Wyndham Hotels chain for inadequate information security, ultimately leading to a settlement of claims that the company unfairly exposed consumer's payment card information to hackers in three separate breaches.[28]

The FCRA and the New York FCRA: The FCRA and the New York FCRA also contain important data security provisions. The FCRA requires that CRAs only provide credit reports to persons who have a permissible purpose to receive such reports, such as credit or insurance underwriting.[29] The FCRA requires that every CRA maintain reasonable procedures designed to ensure that credit reports are provided only to legitimate users for legitimate purposes. These procedures provide that prospective users of credit reports must identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose.[30] The New York FCRA imposes substantially similar permissible purpose restrictions on CRAs.[31]

The FTC has brought numerous actions over the years seeking to enforce these FCRA provisions, most notably against ChoicePoint, which was alleged to have unwittingly sold credit reports to a ring of identity thieves. In the ChoicePoint case, the FTC collected millions of dollars in consumer redress and civil penalties, including a $10 million civil penalty in connection with the unauthorized disclosure of "nearly 10,000

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[26] *United States v. ChoicePoint Inc.*, No. 1-06-CV-0198 (N.D. Ga. Feb. 15, 2006) (stipulated final judgment and order); Complaint at 4, *United States v. ChoicePoint Inc.*, No. 1-06-CV-0198 (N.D. Ga. Jan. 30, 2006).

[27] *In re CardSystems Solutions, Inc.*, No. C-4168 (FTC Sept. 5, 2006) (decision and order); Complaint at 2, *In re CardSystems Solutions, Inc.*, No. C-4168 (FTC Sept. 5, 2006).

[28] *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236 (3d Cir. 2015) (upholding FTC jurisdiction to challenge data security practices and unfair and deceptive in violation of the FTC Act); *FTC v. Wyndham Worldwide Corp.*, No. 2:13-CV-01887-ES-JAD (D.N.J. Dec. 9, 2015) (settlement order).

[29] 15 U.S.C. § 1681b(a).

[30] 15 U.S.C. § 1681e(a).

[31] N.Y. Gen. Bus. L., Art. 25, §§ 380-b and 380-k.

credit reports" allegedly sold by ChoicePoint to persons without a permissible purpose.[32]

Consumer reporting agencies take these "credentialing" responsibilities very seriously. In addition, the nationwide CRAs have been examined by the CFPB with respect to the strength and resiliency of their credentialing procedures. As a part of their credentialing procedures, CRAs generally maintain detailed written procedures which take into account the risks presented by prospective users and their proposed uses of data. These procedures routinely include:

- site visits to ensure the premises are consistent with the stated business of the prospective customer;
- review of public information sources and public filings to confirm licensure and good standing;
- review of company websites and other public-facing materials;
- checking financial references, including credit reports of owners for certain types of companies, such as those that are not publicly traded;
- specific and detailed contractual representations and warranties, as well as specific certifications, that credit report information will be used only for specified purposes;
- detailed customer on-boarding and training procedures; and
- ongoing monitoring of customers – including transaction testing – to ensure that customers are in fact using credit reports for legitimate and permissible purposes.

In addition to these credentialing requirements, the FCRA prohibits CRAs – and anyone else handling consumer report information – from disposing of that information in a manner that is not secure.[33] The FTC's Disposal Rule implements this provision and provides that a person who maintains or otherwise possesses consumer report information, or information derived from credit reports, must properly dispose of such information by taking reasonable measures to protect against the unauthorized access to or use of the information in connection with its disposal.[34]

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[32] *United States v. ChoicePoint Inc.*, No. 1-06-CV-0198 (N.D. Ga. Feb. 15, 2006) (stipulated final judgment and order); Complaint at 4, *United States v. ChoicePoint Inc.*, No. 1-06-CV-0198 (N.D. Ga. Jan. 30, 2006).

[33] 15 U.S.C. § 1681w.

[34] 16 C.F.R. § 682.3.

Finally, CDIA members that are publicly traded on U.S. exchanges are subject to the Sarbanes-Oxley data security requirement, which is part of the audit of a company's controls.[35]

Consumer reporting agencies also have numerous data security obligations under state law. First, CRAs may be subject to data security enforcement under state "mini-FTC Acts" that prohibit unfair or deceptive acts or practices and state FCRA laws, such as the New York FCRA. Second, at least thirteen states require businesses that own, license, or maintain personal information to implement and maintain reasonable security procedures and practices and to protect personal information from unauthorized access, destruction, use, modification, or disclosure.[36] Third, the majority of states, including New York, require businesses to dispose of sensitive personal information securely.[37] Finally, New York, like nearly every U.S. state, the District of Columbia, and several U.S. territories, has enacted a law requiring notification to affected individuals following a breach of personal information.[38]

C. Consumer Reporting Agencies Have Contractual Obligations to Comply with Other Data Security Standards

Consumer reporting agencies are also subject to contractual obligations related to data security as a result of doing business with regulated financial institutions.

Many CRAs are service providers to financial institutions, and many of these customers must independently satisfy the information security standards of the federal prudential regulators—the Federal Reserve Board, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, and National Credit Union Administration—

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[35] 15 U.S.C. § 7262 (also known as Section 404 of the Sarbanes-Oxley Act, Pub. L. No. 107-204).

[36] *See* Nat'l Conf. of State Legis., Data Security Laws – Private Sector (Jan. 16, 2017), http://www.ncsl.org/research/telecommunications-and-information-technology/data-security-laws.aspx.

[37] *See* N.Y. Gen. Bus. Law § 399-H; *see also* Nat'l Conf. of State Legis., Data Disposal Laws (Dec. 1, 2016), http://www.ncsl.org/research/telecommunications-and-information-technology/data-disposal-laws.aspx.

[38] *See* N.Y. Gen. Bus. Law § 899-AA; *see also* Nat'l Conf. of State Legis., Security Breach Notification Laws (Apr. 12, 2017), http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx.

which are similar to the FTC's Safeguards Rule.[39] Under comprehensive and detailed information security standards published by the Federal Financial Institutions Council ("FFIEC") – an interagency body of financial regulators – these financial institutions must oversee the information security programs of their third-party service providers.[40] Pursuant to these FFIEC requirements, financial institutions and their auditors subject CRAs to dozens of information security audits each year, many of which include onsite inspections or examinations.

Many CDIA members also comply with the Payment Card Industry Data Security Standard ("PCI DSS"). The PCI DSS is a set of cybersecurity requirements that are mandatory for all organizations that store, process, and transmit sensitive payment card information of the major credit card associations.[41] The standard requires credit reporting companies to take a number of specific steps to ensure the security of certain data. For example, the PCI DSS requires members to install and maintain firewalls, encrypt the transmission of cardholder data, protect against malware and implement and update anti-virus programs, restrict both digital and physical access to cardholder data, regularly test security systems and processes, and maintain a detailed information security policy for all personnel.[42] The standard imposes further detailed and specific technical requirements for the protection of cardholder data, such as a restriction on service providers' storage of personal identification or card verification numbers after card authorization.[43] In addition, the standard requires a service provider to ensure that any third parties with whom it shares data also comply with the PCI DSS.[44]

The card networks have processes in place to certify service providers as "PCI DSS Validated Service Providers," meaning that they are approved to store, process and

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[39] *See* Interagency Guidelines Establishing Information Security Standards, 12 C.F.R. pt. 30, App. B (interagency guidelines as promulgated by the OCC); 12 C.F.R. pt. 208, App. D-2 (as promulgated by the Federal Reserve); 12 C.F.R. pt. 364, App. B (as promulgated by the FDIC).

[40] *See* FFIEC, IT Examination Handbook Infobase, Information Security: Oversight of Third-Party Service Providers, https://ithandbook.ffiec.gov/it-booklets/information-security/ii-information-security-program-management/iic-risk-mitigation/iic20-oversight-of-third-party-service-providers.aspx.

[41] Payment Card Industry Security Standards Council, Requirements and Security Assessment Procedures, Version 3.2 (Apr. 2016).

[42] *Id.*

[43] *See, e.g., id.* at 38-39.

[44] *Id.* at 12.

transmit cardholder data. To obtain certification, service providers that store, process, or transmit cardholder data must be registered with the card networks and demonstrate PCI DSS compliance. PCI DSS compliance validation is required every 12 months for all service providers. Many CDIA members have been certified by the card networks as "PCI DSS Validated Service Providers." For example, the Visa Service Provider Registry lists the CRAs that have successfully validated PCI DSS compliance with an on-site assessment, based on the report of an independent Qualified Security Assessor, and met all applicable Visa program requirements.[45]

Finally, many CRAs have contractual obligations to comply with or voluntarily comply with the ISO/IEC 27001 standard, the best-known standard for information security management systems.

[45] *See, e.g.*, Visa Global Registry of Service Providers, https://www.visa.com/splisting/index.html.

II. The Proposed Rule Exceeds the Authority of the NY DFS

A. The NY DFS Has No Statutory Authority to Require the Registration or Licensing of Consumer Reporting Agencies

The New York Financial Services Law does not vest the NY DFS with authority to require consumer reporting agencies to register with NY DFS, or otherwise subject them to NY DFS rules and oversight. None of the sections of the New York Financial Services Law cited in the proposed rule, specifically sections 102, 201, 202, 301, 302, and 408, give the superintendent the authority to require certain CRAs to register with NY DFS, and no other provision of the New York Financial Services Law gives the superintendent such authority.

Where New York law grants the NY DFS specific authority to require registration and/or licensure of business entities, for example, the New York Banking Law and New York Insurance Law, the New York legislature expressly grants such authority to the NY DFS.[46] No such express grant of authority exists with regard to the registration or licensing of CRAs.

Some New York legislators appear to recognize that the NY DFS lacks authority to supervise CCRAs. New York Senate Bill 6878, introduced by Senator Comrie on September 20, 2017, would amend the New York Financial Services law to require the licensing of consumer reporting agencies.

Three states—Maine, Maryland, and Rhode Island—require the registration of consumer reporting agencies. In each of those jurisdictions, the state registration requirements are expressly authorized or mandated by state statutes.[47] By contrast, the New York Legislature has not conferred any such authority upon the NY DFS. Significantly, none of the three states that require registration of CRAs vest state regulators with broad discretion to suspend, revoke, or not renew registrations and put CRAs out of business, thereby disrupting the FCRA's framework for regulating the national credit reporting system.

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[46] *See, e.g.*, N.Y. Banking Law §§ 556, 559, 581, 587, and 590; N.Y. Insurance Law § 1102 and 1104.

[47] *See* 10 Maine Rev. Stat. §§ 1310-A.1.G and 1310.A.2-.5; Code of Maryland Regulations 09.03.07.03; R.I. General Law § 6-13.1-24.

The absence of any comparable statutory grant of authority from the New York Legislature to the NY DFS renders the proposed rule unlawful and outside the scope of the authority delegated to the NY DFS.

B. The Proposed Rule Is Not Authorized by the New York Fair Credit Reporting Act or New York Data Security Statutes that Apply to Consumer Reporting Agencies

The New York Legislature enacted the New York Fair Credit Reporting Act ("New York FCRA") in 1977.[48] The New York FCRA regulates the activities of CRAs that do business in New York. As discussed more fully below, many provisions of the New York FCRA are substantially similar to the provisions of the federal FCRA. In 2006, the New York Legislature amended the New York FCRA to require CRAs to place security freezes on consumer reports upon a written request from the consumer and to maintain a secure website and separately dedicated toll-free number to process requests for security freezes.[49] In addition, the statute allows a representative of a protected minor to place a security freeze on the credit record of the minor.[50] These security freeze provisions provide consumer protections beyond the requirements of the federal FCRA.

The liability provisions of the New York FCRA mirror the liability provisions of the federal FCRA. The statute creates private rights of action and provides civil liability for both willful and negligent noncompliance with punitive damages available only for willful noncompliance.[51]

The New York Legislature did not vest supervisory or enforcement authority for the New York FCRA in the NY DFS or any other state agency. Nonetheless, the New York Attorney General has brought complaints against CRAs for alleged violations of the

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[48] N.Y. Gen. Bus. Law §§ 380–380-u.

[49] N.Y. Gen. Bus. Law. § 380-t; N.Y. L. 2006, c. 63, § 2 (eff. Nov. 1, 2006) (adding § 380-t the NY FCRA to require CRAs to place security freezes on consumer reports upon request by the consumer).

[50] N.Y. Gen. Bus. Law. § 380-u.

[51] N.Y. Gen. Bus. Law. §§ 380-l and 380-m.

New York FCRA, using the Attorney General's enforcement authority under New York's Executive Law.[52]

Similarly, in the area of data security, the New York Legislature has enacted both a data disposal law[53] and a data breach notification law.[54] Both laws apply to consumer reporting agencies, including CCRAs, yet neither law vests supervisory or enforcement authority in the NY DFS.

Accordingly, the proposed rule is outside the scope of the NY DFS's authority because the New York Legislature has not vested the NY DFS with authority over the state's credit reporting or data security laws. In addition, as discussed below, the proposed rule directly conflicts with certain provisions of the New York FCRA.

III. The Proposed Registration Revocation, Suspension, and Non-Renewal Authority Is Arbitrary and Capricious, Subjective, Vague, and Overly Broad

A. The Proposed Rule's Grounds for Revocation, Suspension, and Non-Renewal

The grounds upon which the proposed rule would permit the superintendent to revoke, suspend, or refuse to renew a CCRA's registration are arbitrary and capricious, subjective, vague, and overly broad. Sections 201.02(e) and 201.05 of the proposed rule enumerate the relevant grounds.

Proposed Section 201.2(e) gives the superintendent the power to refuse to renew a CCRA's registration if, "in the superintendent's judgment, the applicant or any member, principal, officer, or director of the applicant, is <u>not trustworthy and competent</u> to act as or in connection with a consumer credit reporting agency, . . . has <u>given cause for revocation or suspension</u> [of the registration,] or has <u>failed to comply with any minimum standard</u>." (Emphasis added). Similarly, Proposed Sections 201.05(a)(4)(B) and (C) give the superintendent vast discretion to refuse to renew,

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[52] *See* Settlement Agreement, *In re Investigation by Eric T. Schniederman, Attorney General of the State of New York, of Experian Information Solutions, Inc., Equifax Information Servs., LLC, & TransUnion LLC* (Mar. 8, 2015); *see generally* N.Y. Exec. Law § 63(12).

[53] N.Y. Gen. Bus. Law § 399-h.

[54] N.Y. Gen. Bus. Law § 899-aa.

revoke, or suspend for a period a CCRA's registration if, "after notice and hearing, the superintendent determines that the registrant or any member, principal, officer, director, or controlling person of the registrant has," among other things, demonstrated "incompetence" or "untrustworthiness."

Proposed Section 201.05(a) also gives the superintendent the power to refuse to renew, revoke, or suspend for a period a CCRA's registration if, "after notice and hearing, the superintendent determines that the registrant or any member, principal, officer, director, or controlling person of the registrant" has done any of the following:

- Violated any insurance, financial service, or banking laws, or any regulations, subpoenas, or orders of the superintendent or of another state or federal agency with authority to regulate CCRAs, or has violated any law in the course of his or her dealings in such capacity;
- Provided materially incorrect, misleading, incomplete, or untrue information in the registration application;
- Failed to comply with the requirements Part 201 (the proposed rule), including but not limited to, Section 201.07, concerning compliance with the NY DFS Cybersecurity Rule;
- Used fraudulent, coercive, or dishonest practices;
- Demonstrated financial irresponsibility in the conduct of business in New York or elsewhere;
- Improperly withheld, misappropriated or converted any monies or properties received in the course of business in New York or elsewhere;
- Been convicted of a felony;
- Admitted or been found to have committed any unfair trade practice or fraud;
- Had a CCRA registration or its equivalent denied, suspended or revoked in any other state, province, district, or territory; or
- Failed to pay state income tax or comply with any administrative or court order directing payment of state income tax.

B. Preliminary and Procedural Observations

Before addressing the striking breadth of the de-licensing discretion the proposed rule would vest in the superintendent, CDIA has the following preliminary and procedural comments.

Minimum thresholds: At a minimum, any decision to revoke, suspend, or refuse to renew a CCRA's registration should be based on finding that the entity engaged in a "pattern or practice" of legal or regulatory violations, or "willfully violated" any subpoena or order of the superintendent or other New York regulatory authority. CDIA submits that any lesser standard vests too much discretion in the superintendent and invites abuse of that discretion.

Inconsistent and contradictory terminology: Proposed Sections 201.02(e) and 201.05(a) each state grounds upon which the superintendent can refuse to renew a registration. However, the proposed rule is internally inconsistent and ambiguous regarding whether a refusal to renew a registration must be preceded by notice and an opportunity for a hearing. Proposed Section 201.02(e) contains no provision for notice and a hearing, and Proposed Sections 201.05(b) and (c) indicate that notice and a hearing is only required before revoking or suspending a registration. On the other hand, Proposed Section 201.05(a) suggests that a refusal to renew a registration may only take place "after notice and hearing."

CDIA submits that these provisions are internally inconsistent and contradictory. The proposed rule, if adopted, should be amended to afford CCRAs basic due process in all cases, including adequate notice and a hearing, before making any determination that puts the CCRA out of business in New York.

In addition, Proposed Sections 201.02(e) and 201.05 use different terminology. The former section refers to an "applicant," while the latter section refers to a "registrant." Similarly, Proposed Section 201.05(a) extends to any "controlling person of the registrant," while Proposed Section 201.02(e) contains no comparable reference. If adopted, the proposed rule should use consistent terminology.

Notice and hearing provisions: The proposed rule permits the superintendent to schedule a revocation or suspension hearing as soon as ten days after providing notice to a licensed CCRA. The proposed rule sets no requirements for content of the notice.

CDIA contends that any de-licensing process must provide for meaningful notice to the CCRA of the basis for the determination and afford the CCRA a robust opportunity to contest the allegations. Such procedural protections are necessary given the grave and irrevocable consequences of putting a CRA out of business in New York State, including the fact that a de-licensed CCRA could no longer maintain records on New York residents. Each of the nationwide CRAs maintains files on millions of New York

consumers out of a statewide population of 20 million people. The requirement to cease maintaining—and to purge—files on millions of New York consumers would make it extraordinarily difficult, if not impossible, for a de-licensed CCRA to continue to compete with CRAs who can provide files on the entire national population. The de-licensing of a CRA would effectively cripple that entity's ability to re-enter the New York credit reporting market at a later date and, in all likelihood, put that entity out of business entirely and permanently reduce competition in the national credit reporting market. Given the severe impact of any de-licensing decision, the proposed rule's minimal notice and hearing requirements fail to satisfy due process and basic principles of fairness in violation of the U.S. and New York Constitutions and the New York Administrative Procedures Act.[55]

The proposed rule, at a minimum, should require any notice to be provided in writing and articulate the specific grounds for the superintendent's determination supported by verifiable factual evidence in support of the determination. The CCRA should have an opportunity to respond in writing to the allegations contained in the notice and, if necessary, request and obtain further evidence regarding the basis of the allegations from the NY DFS, including the opportunity to depose witnesses.

The hearing should be scheduled only after the CCRA has had a sufficient opportunity to review and respond to the NY DFS's evidence. A hearing should not be held for at least 60 days after receipt of the notice to give the CCRA time to gather evidence in its defense. Any hearing should provide for witness testimony and give the CCRA the opportunity to call and to cross-examine witnesses on the record.

Finally, following the hearing, the superintendent should be required to issue a written decision containing specific findings and conclusions to justify a decision to revoke, suspend, or refuse to renew a CCRA's registration. Absent such procedural protections, the de-licensing process fails to afford CCRAs an adequate opportunity to understand, evaluate, and challenge the allegations underlying a de-licensing determination.

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[55] U.S. CONST. AMEND. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."); N.Y. CONST. ART I, § 6 ("No person shall be deprived of life, liberty or property without due process of law."); 19 NYCRR Pt. 400.1 (describing the intent of the State Administrative Procedure Act to afford all those appearing in any hearing "due process of law and an opportunity to be heard").

Post-revocation, suspension, or non-renewal activities: Although the proposed rule vests the superintendent with sweeping powers to de-license a CCRA, it says nothing about what happens after a CCRA's registration is revoked, suspended, or not renewed.

Consumer credit reporting is a complex business that relies on extensive information flows between CRAs, furnishers, users, and consumers. While Proposed Section 201.03(a) prohibits an entity from assembling, evaluating, or maintaining consumer credit reports on New York residents without a valid CCRA registration in effect, the proposed rule contains no provisions governing the process or time frame for a de-licensed CCRA to come into compliance with this prohibition.

A CCRA cannot simply flip a switch and cease assembling, evaluating, or maintaining consumer credit reports on New York residents. A de-licensed CCRA would have to undertake a lengthy and complex process to wind down its operations in New York State. For example, furnishers would have to be notified and adjust their systems to stop furnishing information about New York residents to the de-licensed CCRA. This likely would require significant changes to the Metro-2 reporting format used furnishers of information to the nationwide CRAs. The de-licensed CCRA would have to identify which consumer files it must purge from its systems, a task complicated by the fact that some consumers maintain addresses in multiple states. The CCRA would have to establish guardrails to prevent it from ingesting new information about New York consumers, and adopt procedures for removing consumers from its database when a consumer moves to New York from another State.

CDIA believes that the effort to extract a CRA from New York operations, as required by the proposed rule, would be measured in years, not days, weeks, or months. CDIA further believes that the requirements and timing for such an undertaking should not be left to the discretion of the superintendent. Rather, the proposed rule should clearly delineate a reasonable process and timetable for a de-licensed CCRA to achieve compliance with the restriction on assembling, evaluating, or maintaining consumer credit reports on New York consumers. In the absence of any guidance on the steps required after a de-licensing decision is made, the proposed rule is arbitrary and capricious.

C. The Grounds for Revocation, Suspension, and Non-Renewal Are Unlawful

CDIA contends that the grounds upon which the proposed rule would permit the superintendent to revoke, suspend, or refuse to renew a CCRA's registration, as outlined above, are arbitrary and capricious, subjective, vague, and overly broad.

<u>*Meaningless Grounds*</u>: CDIA and its members simply have no idea what conduct would risk to the level of "untrustworthiness" or "incompetence," "give cause for revocation or suspension" or constitute a "failure to comply with any minimum standard." Terms such as "not trustworthy and competent," "given cause for," and "any minimum standard" used in Proposed Section 201.02(e) and "incompetence" and "untrustworthiness" used in Proposed Section 201.05(a)(5) are so unclear, vague, and subjective as to render these grounds for non-renewal of a license completely meaningless. These terms could be interpreted to mean practically anything the superintendent wants them to mean, place no constraints on the superintendent's exercise of discretion, and give the superintendent plenary power to revoke, suspend, or refuse to renew a CCRA's license for just about any imaginable reason. As a result, these terms are arbitrary and capricious, subjective, vague, and overly broad.

CDIA and its members similarly have no idea what conduct would demonstrate "financial irresponsibility in the conduct of business" in New York or elsewhere. Proposed Section 201.05(a)(4)(D). As written, the superintendent could deem a CCRA financially irresponsible if it fails to earn a profit on its credit reporting business in a given year. Here again, the financial irresponsibility basis for de-licensing is arbitrary and capricious, subjective, vague, and overly broad. While a "financial responsibility" requirement may make sense for other financial services businesses, such as those that hold or safeguard funds for their customers, such a requirement is a red herring when applied to CCRAs.

CDIA submits that each of these grounds should be deleted from the final rule.

<u>*Bad Conduct Grounds*</u>: Several other "bad conduct" grounds for a de-licensing decision are no less deficient. A CCRA could lose its license if it admits or has been found to have committed "any unfair trade practice or fraud," uses "fraudulent, coercive or dishonest practices," or fails to "comply with the requirements of this Part," including any of the "prohibited practices" in Proposed Section 201.06, such as:

- Directly or indirectly employing any scheme, device, or artifice to defraud or mislead a consumer;
- Engaging in any unfair, deceptive or predatory act or practice or misrepresent or omit any material information in connection with the assembly, evaluation, or maintenance of a credit report for a New York consumer;
- Engaging in any unfair, deceptive of abusive act or practice in violation of section 1036 of the Dodd-Frank Act;
- Including inaccurate information in any consumer report relating to a consumer located in New York; and
- Refusing to communicate with an authorized representative of a consumer located in New York State who provides a written authorization signed by the consumer, provided that the CCRA may adopt procedures reasonably related to verifying that the representative is in fact authorized to act on behalf of a consumer.

CDIA and its members are concerned that a finding that a CCRA engaged in an unfair trade practice or a UDAAP could result in a CCRA losing its ability to conduct business in New York. The CFPB, FTC, and state regulators regularly make findings, file suit, and enter into consent orders with regulated entities involving allegations of unfair or deceptive acts or practice or unfair trade practices. Each of the nationwide CRAs is subject to a CFPB consent order arising from alleged unfair or deceptive acts or practices related to direct to consumer credit monitoring services.[56]

CDIA finds it disturbing that, under the proposed rule, a UDAAP consent order would provide sufficient grounds for the superintendent to de-license any or all of the nationwide CRAs. The proposed rule would allow the superintendent to de-license a CCRA for failing to comply with the requirements of this Part, violating a regulation of the superintendent, or having been found to have committed an unfair trade practice by engaging in any UDAAP in violation of Section 1036 of the Dodd-Frank Act. Proposed Sections 201.05(a)(1), (3) and (7). Not even the CFPB Director is vested with such life-or-death powers over larger participants in the consumer reporting market.

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[56] *See In re Experian Holdings, Inc., et. al.,* No. 2017-CFPB-0012 (Mar. 23, 2017); *In re Equifax Inc. and Equifax Consumer Servs. LLC,* No. 2017-CFPB-0001 (Jan. 3, 2017); *In re TransUnion Interactive, Inc., et al.,* No. 2017-CFPB-0002 (Jan. 3, 2017).

Likewise, by exercising the authority in Proposed Sections 201.05(a)(1) and/or (a)(3), the superintendent could de-license a CCRA if the CCRA: (a) includes any "inaccurate information in any consumer report related to a consumer located in New York State"; (b) "omit[s] any material information" from a credit report for a New York consumer; or (c) refuses "to communicate with an authorized representative of a consumer located in New York." Proposed Sections 201.06(1), (4), and (5) (emphasis added). CDIA objects to giving the superintendent the power to make a de-licensing determination based on a finding that a CCRA provided a single inaccurate consumer report, omitted material information from a single consumer report, or refused to communicate with a New York consumer's authorized representative in a single case. Giving the superintendent such sweeping de-licensing authority is pure regulatory overreach. At a minimum, any de-licensing authority should be based on a "pattern or practice" of violations of existing FCRA and New York FCRA legal standards, not the newly-minted standards contained in the "prohibited practices" in Proposed Section 201.06.

CDIA also fails to see why the superintendent should have the authority to de-license a CCRA for failing to pay state income tax or comply with orders directing payment of state income tax. The enforcement of New York's tax laws falls within the purview of the New York tax authorities, not the NY DFS.

CDIA further objects to empowering the superintendent the de-license a CCRA based on a denial, suspension, or revocation of a license in another state. For one thing, the scope and substance of other states' laws almost certainly will not be identical to the proposed rules. More importantly, de-licensing is a very grave and consequential action. Any such determination should be based on verifiable factual evidence and the independent findings of the superintendent regarding a CCRA's conduct in New York and should not simply piggyback on determinations in other states.

Neither the CFPB, the FTC, nor any other state regulator, to our knowledge, treats regulatory violations, consumer report inaccuracies, or even occasional UDAAPs as grounds for putting CRAs out of business. As discussed above, the CFPB has addressed CRA data accuracy solely through supervisory actions, while UDAAP allegations have resulted in consent orders.[57] The proposed rule potentially makes any violation of law,

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[57] *See In re Experian Holdings, Inc., et. al.,* No. 2017-CFPB-0012 (Mar. 23, 2017); *In re Equifax Inc. and Equifax Consumer Servs. LLC,* No. 2017-CFPB-0001 (Jan. 3, 2017); *In re TransUnion Interactive, Inc., et al.,* No. 2017-CFPB-0002 (Jan. 3, 2017).

regulation, subpoena, or order, <u>any</u> failure to comply with the requirements of Part 201, or <u>any</u> admission or finding of an unfair trade practice a capital offense for a CCRA that can result in de-licensing. CDIA submits that such authority constitutes regulatory overreach, and is excessive, unnecessary, and unlawful.

Further, if the purpose of the rule is to tighten cyber security requirements for CCRAs, as stated in the various press releases surrounding publication of the proposed rule, these "bad conduct" provisions bear no rational relationship to that stated purpose, and cannot be seen as anything but arbitrary and capricious.

<u>Cybersecurity Grounds</u>: Based on Proposed Sections 201.05(a)(1) and (3), the superintendent would have the authority to de-license a CCRA if a CCRA fails to comply with Proposed Section 201.07 and the NY DFS Cybersecurity Rule. As in the case of the "bad conduct" grounds discussed above, CDIA objects to the superintendent having the discretion to put a CRA out of business in New York State based on the violation of a regulation.

CDIA knows of no other federal or state data security law or regulation that permits regulatory authorities to put a CRA or any other financial institution out of business based on a violation of applicable data security rules. Where authority is vested in an agency for such matters, the appropriate and customary response to a legal or regulatory violation with regard to data security is to require enhanced information security practices and provide for consumer redress where appropriate. Other regulatory agencies such as the FTC handle security lapses and data breaches at financial institutions and other companies in just this manner.

The proposed rule, however, contains no provision that would allow the superintendent to impose a less drastic remedy on CCRAs than de-licensing. If the superintendent's lacks the authority to impose injunctive and other customary forms of relief against CCRAs, it would be an abuse of discretion for the superintendent to have de-licensing authority—the ultimate penalty—but not have the ability to impose less extreme sanctions on CCRAs.

<u>Application to Key Persons</u>: CDIA finds it particularly objectionable that a decision to revoke, suspend, or refuse to renew a CCRA's registration may be based solely on the acts of any single "member, principal, officer, or director" of the CCRA under Proposed Section 201.02(e), or on the acts of any single "member, principal, officer, director, or controlling person" of the CCRA under Proposed Section 201.05(a)(5). For a regulator to

grant itself the discretion to deem a corporate entity unfit to engage in business in a state based on the acts of an individual member, principal, officer, director, or controlling person represents a breathtaking overreach of regulatory powers.

CDIA finds no shortage of examples of how the discretion afforded by the de-licensing power with respect to the acts of key individuals may be abused and produce irrational outcomes. Under the untrustworthy and incompetence grounds, the superintendent could refuse to renew a CCRA's registration if a corporate director is charged with fraud, perjury, or other crime related to trustworthiness, but unrelated to her duties as a director. A CCRA also could have its registration revoked, suspended, or not renewed if a member, principal, officer, director, or controlling person is convicted of an unrelated felony, such as a DUI conviction.

These examples illustrate just how overly broad the proposed de-licensing power is. CDIA requests that the NY DFS limit any power to revoke, suspend, or refuse to renew a license so that it focuses on acts of the CCRA, and does not punish CCRAs for the acts of a member, principal, officer, director, or controlling person. At a minimum, only the acts of a controlling person should trigger the authority to de-license a CCRA.

D. The Proposed De-Licensing Provisions Would Harm Consumers and Users of Consumer Reports Nationwide

Prohibiting a CCRA from doing business in New York through the revocation, suspension, or non-renewal of a license would cause irreparable harm to consumers, law enforcement, government agencies, financial institutions, and other users of consumer reports located in New York and nationwide. These consequences flow from the fact that Proposed Section 201.03(a) would prohibit a CCRA from <u>assembling, evaluating, or maintaining</u> consumer credit reports on New York consumers without having a valid registration.

1. Consumers Nationwide Would Lose Important FCRA Protections

The FCRA imposes enhanced consumer protection requirements on nationwide CRAs. These enhanced protections include the requirements for nationwide CRAs to:

- Place fraud and active duty alerts on consumers' credit files; [58]
- Coordinate their identity theft investigations to relieve victims of the burden of contacting each nationwide CRA separately; [59]
- Provide free annual file disclosures to consumers through the centralized source;[60]
- Disclose to consumers a toll-free telephone number for contacting the nationwide CRA;[61] and
- Notify users of consumer reports of an address discrepancy for the purpose of reconciling the address and preventing and mitigating identity theft.[62]

In addition, nationwide specialty CRAs must provide free annual file disclosures to consumers through a streamlined process.[63]

The superintendent's exercise of the proposed rule's vast power to revoke, suspend, or refuse to renew the registration of a CCRA that is a nationwide CRA would undercut important consumer protection provisions contained in the FCRA. The de-licensed CRA could no longer assemble or evaluate, or maintain, files on consumers residing nationwide, since it would be barred from assembling, evaluating, or maintaining files on New York residents. As a result, the de-licensed nationwide CRA would no longer qualify as a nationwide CRA and would no longer have any legal obligation to provide consumers in any state or territory with the enhanced consumer protections the FCRA imposes on nationwide CRAs. Further, if any nationwide specialty CRAs were to fall within the scope of the rule, a de-licensing decision by the superintendent would eliminate that CRA's "nationwide" status and deprive consumers of the ability to obtain free annual file disclosures through the streamlined process.

Therefore, any action taken by the superintendent pursuant to the de-licensing authority created by proposed rule could have the perverse effect of reducing consumer

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[58] 15 U.S.C. § 1681c-1(a)–(c).

[59] 15 U.S.C. § 1681c-1(a)(1)(B), (b)(1)(C), (c)(3) (each referring to 15 U.S.C. § 1681s(f)); 15 U.S.C. § 1681s(f) (requiring coordination of consumer complaint investigations by the nationwide CRAs).

[60] 15 U.S.C. § 1681j(a)(1)(A) and (B); 12 C.F.R. § 1022.136.

[61] 15 U.S.C. § 1681g(c)(2)(B).

[62] 15 U.S.C. § 1681c(h)(1).

[63] 15 U.S.C. § 1681j(a)(1)(C); 12 C.F.R. § 1022.137.

protections for consumers nationwide, particularly in vital areas such as identity theft. Such a result is contrary to the proposed rule's stated consumer protection objective.

2. Loss or Purging of Valuable Data and Multi-Jurisdiction Impacts

Under the proposed rule, any CCRA that has its registration revoked, suspended for a period of time, or not renewed would be required to purge from its files all information about New York consumers to comply with the prohibition on "maintaining" credit report information on New York residence without a license. Proposed Section 201.03(a). Such a step would harm New York consumers. The purging and resulting loss of such consumer reporting data would mean that many more New York consumers would have thin files or no files, would become credit invisible, and would be unable to qualify for credit or would qualify for credit only at higher prices.

From a competitive standpoint, prohibiting a de-licensed CCRA from maintaining its files on New York consumers would harm competition by making it extraordinarily difficult, if not impossible, for the de-licensed CCRA to ever re-enter the consumer reporting business with regard to New York consumers. The prohibition on assembling, evaluating, or maintaining records is particularly inexplicable in the case of a CCRA whose registration is suspended for a finite period of time.

The loss of consumer credit data resulting from compliance with a de-licensing decision could not be confined within New York's borders. A de-licensed CCRA would be required to purge consumer credit data from its files whenever an out-of-state resident moves into New York, even if such data was assembled before the consumer became a resident of New York. Further, the purging of consumer credit data would continue to disadvantage a former New York resident after that consumer moves out of New York, because if the data cannot be assembled or maintained, then it cannot be retrieved and restored to the consumer's credit file after the consumer moves out of New York. In effect, New York effectively would be exporting and applying its law to residents of other states who are former and future New York residents.

Further, as noted above, the proposed rule provides no guidance regarding how, or how quickly, a CCRA must purge its files of information it maintains on New York consumers after the superintendent has revoked, suspended, or refused to renew its license. Absent such guidance, the proposed rule is vague and unenforceable.

3. Safety and Soundness and Secondary Market Impacts

The elimination of data about New York consumers and New York transactions from de-licensed CCRA databases would make it more difficult for financial institutions and other users of consumer reports to evaluate and manage risk. The greater risk management challenges posed by the loss of access to such data likely would increase the cost of credit for all consumers, both New York residents and non-New York residents. Furthermore, the purging of CCRA data about New York consumers would pose safety and soundness concerns for financial institutions.

In addition, law enforcement would lose access to vital information on New York consumers, while state child welfare agencies would no longer be able to access consumer reports to track down deadbeat dads.

The proposed rule also overlooks the secondary market impacts of de-licensing CRAs and purging the credit report data they maintain on New York consumers. Certain types of credit require the consideration of consumer reports from multiple CCRAs. For mortgage loans, Fannie Mae and Freddie Mac underwriting guidelines require mortgage lenders to obtain and evaluate tri-merge reports, reports from all three nationwide CRAs, that are assembled by a specific type of CRA, known as "resellers." If the superintendent exercises the de-licensing powers contained in the proposed rule to revoke, suspend, or refuse to renew the registration of a nationwide CRA, resellers would be unable to assemble and sell to mortgage lenders the tri-merge reports necessary for lenders to make secondary market qualifying mortgage loans to consumers residing in New York, even though resellers do not appear to be covered by the proposed rule.

As a result of such a de-licensing decision, New York consumers may find themselves unable to qualify for mortgages. One potential consequence could be an unintended freezing of mortgage lending across New York State and catastrophic economic repercussions for New York homeowners and all New Yorkers. CDIA fails to see how making consumers, resellers, law enforcement, government agencies, and other users of consumer credit reports collateral damage of the regulatory powers contained in the proposed rule serves the stated objective of "protect[ing] consumers and financial markets."[64]

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[64] N.Y. State Register at 10 (Oct. 4, 2017).

IV. The Proposed Rule Conflicts with the Federal and New York Fair Credit Reporting Acts

Consumer reporting agencies are subject to regulation under two comprehensive credit reporting statutes: the federal FCRA and the New York FCRA. The CRAs that would be subject to the proposed rule already are subject to supervisory examinations and enforcement actions by the CFPB, as well as enforcement actions by the FTC and the New York Attorney General. Most importantly, CDIA is deeply concerned that the proposed rule undermines the national scheme for regulating credit reporting activities, includes provisions that directly conflict with provisions of the FCRA and the NY FCRA, and is, in large measure, preempted by the FCRA.

A. Background on the Federal Fair Credit Reporting Act

The federal FCRA creates a comprehensive regulatory scheme for CRAs and establishes uniform national standards for many aspects of credit reporting, which has evolved from a local system of regional credit bureaus into a national system.[65]

First adopted in 1970, Congress has amended the FCRA several times. The most substantial amendments date from 1996 and 2003. These amendments imposed additional duties on consumer reporting agencies, including duties relating to preventing and mitigating identity theft, and created expanded obligations for furnishers of information to CRAs.[66]

The FCRA's congressional findings note that the banking system, which is a national system, depends on fair and accurate credit reporting.[67] The FCRA further notes that inaccurate credit reports impair the efficiency of the banking system and unfair credit reporting methods undermine the public confidence essential to the continued

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[65] *See* S. Rep. No. 104-185, at 54-55 (Dec. 14, 1995), H.R. Rept. No. 108-263, at 3 (Sept. 3, 2003); S. Rept. No. 108-166, at 10 (Oct. 17, 2003).

[66] Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, title II, subtitle D, ch. 1, 110 Stat. 3009 (adding responsibilities for furnishers of credit report information); Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (adding, among other things, provisions designed to prevent and mitigate identity theft).

[67] 15 U.S.C. § 1681(a)(1).

functioning of the banking system.[68] The congressional findings recognize that CRAs play "a vital role" in assembling and evaluating consumer credit information and describe the credit reporting system as "[a]n elaborate mechanism" for investigating and evaluating consumers' credit worthiness.[69] Given the vital role of CRAs, a final congressional finding recognizes a need to insure that CRAs "exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy."[70]

Based on these findings, the FCRA's statement of purpose is to require CRAs to "adopt reasonable procedures for meeting the needs of commerce" for consumer credit and other information "in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information."[71]

The specific obligations the FCRA imposes on CRAs are consistent with the statute's congressional findings and statement of purpose and include without limitation:

- Following "reasonable procedures to ensure maximum possible accuracy" of the information concerning the individual about whom the consumer report relates;[72]
- Conducting "reasonable investigation[s]" of disputes regarding the accuracy or completeness of information contained in a CRA's file;[73]
- Providing consumer reports to users only for a permissible purpose certified by the user;[74]
- Disclosing to consumers "[a]ll information in the consumer's file," as well as a credit score, upon request, including free annual file disclosures from nationwide CRAs and nationwide specialty CRAs;[75]

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[68] *Id.*

[69] 15 U.S.C. §§ 1681(a)(2) and (3).

[70] 15 U.S.C. § 1681(a)(4).

[71] 15 U.S.C. § 1681(b).

[72] 15 U.S.C. § 1681e(b).

[73] 15 U.S.C. § 1681i.

[74] 15 U.S.C. §§ 1681b(a) and 1681e(a).

[75] 15 U.S.C. § 1681i.

- Maintaining reasonable procedures for excluding outdated adverse information from consumer reports;[76] and
- Taking specific measures to prevent and mitigate identity theft, such as enabling consumer to place fraud or active duty alerts on their credit reports (nationwide CRAs only), blocking fraudulent tradelines, and notifying users of address discrepancies (nationwide CRAs only).[77]

The CFPB's extensive supervision of larger participants in the consumer reporting market is detailed above. The CFPB and the FTC share enforcement authority over CRAs. As previously noted, the CFPB has brought public enforcement actions and entered into consent orders with each of the three nationwide CRAs for alleged UDAAP violations in connection with credit monitoring products sold directly to consumers.[78] The FTC, which has a longer track record of FCRA enforcement, has brought public enforcement actions and entered into consent orders with each of the three nationwide CRAs and other CRAs.[79]

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[76] 15 U.S.C. §§ 1681c, 1681e(a), and 1681g.

[77] 15 U.S.C. §§ 1681c-1, c-2, and c(h).

[78] *See In re Experian Holdings, Inc., et. al.,* No. 2017-CFPB-0012 (Mar. 23, 2017); *In re Equifax Inc. and Equifax Consumer Servs. LLC,* No. 2017-CFPB-0001 (Jan. 3, 2017); *In re TransUnion Interactive, Inc., et al.,* No. 2017-CFPB-0002 (Jan. 3, 2017).

[79] *See, e.g., In re Equifax Information Servs. LLC,* No. C-4387 (FTC Mar. 5, 2013); *United States v. Equifax Credit Info. Servs., Inc.,* No. 1:00-CV-0087 (N.D. Ga. Jan. 13, 2000); *FTC v. Experian Mktg. Solutions, Inc.,* No. 3-00CV0056-L (N.D. Tex. Jan. 13, 2000); *United States v. TransUnion LLC,* No. 00C 0253 (N.D. Ill. Jan. 13, 2000); *see also, e.g., United States v. Infotrack Information Servs., Inc., et al.,* No. 14-CV-2054 (N.D. Ill. Mar. 25, 2014); *United States v. Instant Checkmate, Inc.,* No. 14-cv-0675-H (JMA) (S.D. Cal. Apr. 1, 2014); *United States v. Central Credit, LLC,* No. CV-0565 (D. Nev. Apr. 22, 2010).

B. Background on the New York Fair Credit Reporting Act

The New York FCRA also regulates the activities of consumer reporting agencies in areas not preempted by the federal FCRA.[80] The New York FCRA defines the terms "consumer reporting agency" and "consumer report" in a manner substantially similar to the federal FCRA, and triggers coverage based on the activities, not the licensing, of a CRA.[81] In addition, many of the New York FCRA's substantive requirements closely track the requirements of the federal FCRA. For example, a CRA's legal obligations under the New York FCRA include without limitation:

- Maintaining "reasonable procedures to ensure maximum possible accuracy" of the information concerning the individual about whom the consumer report relates;[82]
- Conducting re-investigations of consumer disputes regarding information contained in the CRA's file on the consumer;[83]
- Providing consumer reports to users only for a permissible purpose;[84]
- Disclosing to a consumer, upon request, "all information in its files" concerning the consumer;[85] and
- Maintaining reasonable procedures for excluding outdated adverse information from consumer reports.[86]

As noted previously, the New York Legislature did not grant the NY DFS the authority to issue regulations, or engage in supervisory or enforcement activities, with regard to the New York FCRA.

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[80] N.Y. Gen. Bus. Law § 380 *et seq.*

[81] N.Y. Gen. Bus. Law § 380-a(c) and (e).

[82] N.Y. Gen. Bus. Law § 380-j(e).

[83] N.Y. Gen. Bus. Law § 380-f.

[84] N.Y. Gen. Bus. Law §§ 380-b(a) and 380-e.

[85] N.Y. Gen. Bus. Law § 380-d(a).

[86] N.Y. Gen. Bus. Law § 380-j(f).

C. The Proposed Rule Contains Provisions that Directly Conflict with Established Federal and New York FCRA Standards

Proposed Section 201.06 enumerates six "prohibited practices" that will henceforth violate New York regulations. These prohibited practices include:

- Directly or indirectly employ any scheme, device, or artifice to defraud or mislead a consumer;
- Engaging in any unfair, deceptive or predatory act or practice or misrepresent or omit any material information in connection with the assembly, evaluation, or maintenance of a credit report for a New York consumer;
- Engaging in any unfair, deceptive of abusive act or practice in violation of section 1036 of the Dodd-Frank Act;
- Including inaccurate information in <u>any</u> consumer report relating to a consumer located in New York; and
- Refusing to communicate with an authorized representative of a consumer located in New York State who provides a written authorization signed by the consumer, provided that the CCRA may adopt procedures reasonably related to verifying that the representative is in fact authorized to act on behalf of a consumer.

A finding that a CCRA engaged in any one of these practices would subject a CCRA to the revocation, suspension, or refusal to renew its NY DFS license because de-licensing may be based on, among other things, a violation of any regulation of the superintendent or failure to comply with the requirements of Part 205. Proposed Sections 201.05(a)(1) and (3). Any of the prohibited practices would violate a regulation of the superintendent and fail to comply with the requirements of Part 205. CDIA notes that these two grounds for de-licensing are duplicative as applied to the prohibited practices in Proposed Section 201.06. In addition, the first three prohibited practices listed above could result in de-licensing based on using "fraudulent, coercive or dishonest practices," or being found to have committed "any unfair trade practice or fraud." Proposed Section 201.05(a)(4)(A) and (7).

The interplay between Proposed Sections 201.05 and 201.06 creates a situation where every covered CRA would be in violation of the rule and at risk of being de-licensed immediately after the rule becomes effective. Under the proposed de-licensing standards, every covered CRA could have a NY DFS license revoked, suspended, or not renewed immediately upon the effective date of final rule either because: (a) it is

impossible for any CRA to achieve one-hundred percent accuracy in consumer reports, so some inaccuracies inevitably will exist; (b) it is impossible for any CRA to ensure that, in every single instance, it does not "omit any material information" in assembling, evaluating, or maintaining a consumer credit report on a New York consumer; or (c) each nationwide CRAs is operating under a CFPB consent order, an FTC consent order, and/or State attorney general settlements for unfair, deceptive, or abusive acts or practices.[87]

Accuracy Standard: As noted above, the both the FCRA and the New York FCRA require CRAs to follow "reasonable procedures to ensure maximum possible accuracy" of the information they include in consumer reports.[88] By contrast, the proposed rule would make it unlawful for a CCRA to "[i]nclude inaccurate information in any consumer report relating to a consumer located in New York State." Proposed Section 201.06(4) (emphasis added). The proposed rule also would make it unlawful for a CCRA to "omit any material information in connection with the assembly, evaluation, or maintenance of a credit report for a consumer located in New York State." Proposed Section 201.06(2) (emphasis added).

On its face, the proposed rule gives the superintendent the authority to de-license a CCRA and disrupt the national credit reporting market simply because a single piece of information on any single consumer report relating to a single New York consumer happens to be inaccurate, or because any material information is omitted from a single consumer report relating to a single New York consumer. These two prohibited practices mandate one-hundred percent accuracy in each and every consumer report. Not only is such a standard completely unrealistic, but it repudiates the both FCRA's and the New York FCRA's longstanding and pragmatic "maximum possible accuracy"

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[87] *See supra* notes 78 and 79. *See also* Settlement Agreement, *In re Investigation by Eric T. Schniederman, Attorney General of the State of New York, of Experian Information Solutions, Inc., Equifax Information Servs., LLC, & TransUnion LLC* (Mar. 8, 2015). As a further example, in 2013, the Mississippi Attorney General alleged that Experian violated multiple provisions of the FCRA and engaged in deceptive marketing for its credit monitoring services. *Mississippi v. Experian Information Solutions, Inc.*, No. 1:14cv243LG-JMR (June 12, 2014), *available at* https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2014/06/USDC-MS-14-243.pdf. These allegations ultimately led to a settlement with the all three nationwide CRAs reportedly for total of $7.75 million. Press Release, Office of the Attorney General State of Mississippi Jim Hood (Oct. 19, 2016), *available at* http://www.ago.state.ms.us/releases/attorney-general-jim-hood-announces-that-experian-transunion-and-equifax-will-overhaul-credit-reporting-practices-and-end-deceptive-marketing-in-mississippi/.

[88] 15 U.S.C. § 1681e(b); N.Y. Gen. Bus. Law § 380-j(e).

standard and replaces it with a standard of absolute accuracy. CDIA and its members fail to see how the NY DFS has any authority to adopt a standard of accuracy that repudiates and contravenes the accuracy standard the New York Legislature adopted by statute.

As a policy matter, an absolute accuracy standard is unattainable and would punish CCRAs for inaccuracies they did not introduce into consumer credit files. A CFPB white paper published in 2012 recognized that inaccuracies in credit reports can occur for a variety of reasons, many of which involve no fault of the CRA. The reasons noted by the CFPB include challenges in matching a tradeline to a consumer's file, errors or a lack of identifying information in government records, data entry errors, identity theft and fraud, furnisher system or process inaccuracies, CRA system or process inaccuracies, or time lags.[89] In a report earlier this year, the CFPB noted that CRAs had made "significant advances to promote greater accuracy."[90] When the CFPB recognizes that one-hundred percent accuracy is not achievable and that inaccuracies in consumer reports are often introduced by parties or circumstances beyond the CRA's control, the proposed rule's zero-tolerance policy for credit report inaccuracies is arbitrary, capricious, and an abuse of discretion. If the NY DFS adopts any accuracy standard, it should be the same standard used in the FCRA and the NY FCRA.

UDAAP: Each of the nationwide CRAs is subject to a UDAAP consent order under section 1036 of the Dodd-Frank Act related to direct to consumer credit monitoring services.[91] In an era where UDAAP and other compliance consent orders have become common, it is irresponsible public policy to vest a regulator with broad discretion to put a company out of business because it violated or allegedly violated a law or regulation or engaged in an unfair, deceptive, or abusive act or practice. Similarly, the 2015 settlement between the three nationwide CRAs and the New York Attorney General

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[89] CFPB, Key Dimensions and Processes in the U.S. Credit Reporting System, at 3-4, 23-26 (Dec. 2012).

[90] Supervisory Highlights Consumer Reporting, at 3.

[91] *See In re Experian Holdings, Inc., et. al.,* No. 2017-CFPB-0012 (Mar. 23, 2017); *In re Equifax Inc. and Equifax Consumer Servs. LLC,* No. 2017-CFPB-0001 (Jan. 3, 2017); *In re TransUnion Interactive, Inc., et al.,* No. 2017-CFPB-0002 (Jan. 3, 2017).

arguably would provide grounds for revoking, suspending, or refusing to renew a registration or license under the proposed rule.[92]

In addition, CDIA sees no reason why the proposed rule needs to include three prohibited purposes that essentially involve UDAAPs. Terms like "predatory," "defraud," and "mislead" used in Proposed Sections 201.06.1 and .2 add nothing to the UDAAP standard. Accordingly, Proposed Sections 201.06.1 and .2 should be eliminated. Proposed Section 201.06.3 is adequate to address unfair, deceptive, or abusive acts or practices.

Communications with a consumer's authorized representative: The prohibited practice in Proposed Section 201.06(5) also conflicts with the FCRA and the New York FCRA. Proposed Section 201.06(5) would prohibit a CCRA from refusing to communicate with an authorized representative of a consumer located in New York who provides a written authorization signed by the consumer, provided that the CCRA may adopt procedures reasonably related to verifying that the representative is, in fact, authorized to act on behalf of the consumer.

By contrast, the FCRA permits a consumer who seeks to obtain disclosures in person to be accompanied by one other person of his or her choosing if the person furnishes reasonable identification and the consumer furnishes a written statement granting permission to the CRA to discuss the consumer's file in such person's presence.[93] The New York FCRA even more explicitly provides that a consumer who seeks disclosure "by means of a personal interview" may be accompanied by another person, subject to the same conditions.[94]

The proposed rule would extend the requirement to communicate sensitive consumer information to a person other than the consumer to communications conducted via telephone, mail, electronic, and other remote communication channels. This expanded requirement to communicate sensitive consumer report information to a person other than the consumer in these broader circumstances contravenes both the federal and

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[92] *See* Settlement Agreement, *In re Investigation by Eric T. Schniederman, Attorney General of the State of New York, of Experian Information Solutions, Inc., Equifax Information Servs., LLC, & TransUnion LLC* (Mar. 8, 2015).

[93] 15 U.S.C. § 1681h(d).

[94] N.Y. Gen. Bus. Law § 380-e(d).

New York FCRAs, and poses substantial risks to consumers and the credit reporting system.

The prohibition against refusing to communicate with an "authorized representative" of the consumer, even in remote channels, actually increases the risk of New York consumers becoming victims of identity theft. Specifically, in remote communications, written authorizations can easily be forged and CRAs have fewer options for verifying authorizations transmitted through remote channels, thereby increasing the risk that fraudulent authorizations may appear valid and be verified.

The new prohibition also would frustrate the ability of CCRAs to prevent credit repair organizations from making untrue or misleading statements designed to fix or conceal adverse, but accurate, consumer report information, as set forth in the Credit Repair Organizations Act.[95] The activities of credit repair organizations degrade the accuracy and quality of consumer reports.

D. The Proposed Rule Violates the FCRA's Preemption Provisions

A number of the proposed rule's substantive provisions, as well as its provisions for licensing and revoking, suspending, or refusing to renew the licenses of certain CRAs, are preempted by the FCRA. In enacting the FCRA, Congress "was motivated at least in part by a desire for uniformity of reporting obligations."[96] To achieve uniformity, Congress expressly preempted state laws that attempt to regulate certain areas governed by the FCRA.[97] Specific provisions of the proposed rule are subject to the FCRA's express preemption provisions. In addition, the proposed rule's de-licensing scheme is subject to conflict preemption because it frustrates the purpose of the FCRA and would result in a patchwork of inconsistent federal and state standards.

Federal preemption analysis focuses on "the plain wording of the [express statutory preemption] clause, which necessarily contains the best evidence of Congress' pre-emptive intent,"[98] as well as on the "structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding

[95] 15 U.S.C. § 1679b(a).

[96] *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1172 (9th Cir. 2009).

[97] 15 U.S.C. § 1681t.

[98] *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002).

of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law."[99]

CDIA maintains that the proposed rule's licensing requirement for CCRAs undermines the operation and preemptive effect of the FCRA. Specifically, the de-licensing provisions give the superintendent unfettered discretion to revoke, suspend, or refuse to renew a license for persons that otherwise qualify as consumer reporting agencies under the FCRA (and the NY FCRA), and to deny such persons the ability to function as CRAs in New York. These de-licensing provisions directly conflict with the FCRA and its preemption provisions.

1. Categories of Preemption

The FCRA contains three relevant categories of express preemption: (a) subject matter preemption; (b) disclosure preemption; and (c) conduct required preemption. 15 U.S.C. § 1681t(b). Each of these preemption provisions applies to certain requirements imposed on CRAs by the FCRA. Some of the preempted provisions apply to all consumer reporting agencies, while others apply only to nationwide CRAs.

Subject matter preemption: The FCRA preempts state laws related to the subject matter of certain activities CRAs must undertake, including:

- Prescreened consumer reports;
- Reinvestigations of disputes; and
- The contents of consumer reports.[100]

Disclosure preemption: The FCRA preempts state laws related to certain disclosures the CRAs must provide to consumers and the frequency of free report disclosures, including:

- Summary of consumer rights, including rights to obtain and dispute information and obtain credit scores;
- Summary of the rights of identity theft victims;

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[99] *Medtronic Inc. v. Lohr*, 518 U.S. 470, 486 (1996).

[100] 15 U.S.C. § 1681t(b)(1).

- The disclosure of credit scores to consumers; and
- The frequency of free consumer report disclosures.[101]

Conduct required preemption: The FCRA preempts state laws with respect to the following conduct required of consumer reporting agencies:

- The placement of fraud and active duty alerts by nationwide CRAs;
- The blocking of information resulting from identity theft;
- The disclosure to consumers of all information in a consumer's file;
- Free annual disclosures to consumer, including a centralized source established by the nationwide CRAs;
- The coordination of identity theft complaint investigations among nationwide CRAs; and
- The disposal of records.[102]

2. Express Preemption Analysis

An entity becomes a consumer reporting agency under the FCRA by assembling or evaluating eligibility information on consumers for the purpose of providing consumer reports to third parties. Similarly, the classification of an entity as a nationwide CRA, nationwide specialty CRA, reseller, or some other type of CRA depends upon the nature of the information it assembles or evaluates, and maintains, and how the consumer reports it sells are used. FCRA coverage and classification turns on an entity's activities, not on meeting any registration or licensing requirement. As noted previously, a nationwide CRA assembles or evaluates, and maintains, on "consumers residing nationwide" public record information and credit account information obtained from furnishers for the purpose of furnishing consumer reports to third parties.[103]

The proposed rule subverts the activity-based structure and classification scheme of the FCRA by declaring that only entities the superintendent deems eligible can operate a CCRA business in New York. What this means is that entities that otherwise qualify as nationwide CRAs, or possibly nationwide specialty CRAs, by application of the

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[101] 15 U.S.C. § 1681t(b)(3) and (4).

[102] 15 U.S.C. § 1681t(b)(5).

[103] 15 U.S.C. § 1681a(p).

activity-based classifications set forth in the FCRA would cease to qualify for those "nationwide" categories based on a de-licensing decision by the superintendent.

An entity ceases to be a nationwide CRA if it no longer assembles or evaluates, and maintains, consumer credit information on "consumers residing nationwide." A similar standard applies to nationwide specialty CRAs. A decision by the superintendent to de-license a nationwide CRA would preclude that CRA from assembling or evaluating, and maintaining, consumer credit information on New York residents, and that CRA could no longer assemble or evaluate, and maintain, "consumers residing nationwide," thus disqualifying it as a nationwide CRA under the FCRA.

As a consequence, consumers nationwide would lose important FCRA protections that apply only to CRAs that operate on a "nationwide" basis. Specifically, consumers nationwide would lose the ability to:

- Place fraud or active duty alerts with that CRA;[104]
- Have that CRA investigate identity theft complaints in coordination with other nationwide CRAs;[105] and
- Obtain free annual file disclosures from a nationwide CRA through the centralized source or from a nationwide specialty CRA through the FCRA's streamlined process.[106]

Each of these important FCRA consumer protections and rights are subject to conduct required preemption under the FCRA.[107]

In addition, the summary of rights required to be included with consumer reports from that CRA would no longer have to include the toll-free telephone number that only nationwide CRAs must disclose.[108] The toll-free telephone number disclosure makes it

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[104] *See* 15 U.S.C. § 1681c-1(a)–(c).

[105] *See* 15 U.S.C. § 1681c-1(a)(1)(B), (b)(1)(C), (c)(3) (each referring to 15 U.S.C. § 1681s(f)); 15 U.S.C. § 1681s(f) (requiring coordination of consumer complaint investigations by the nationwide CRAs).

[106] *See* 15 U.S.C. § 1681j(a); 12 C.F.R. §§ 1022.136 and 1022.137.

[107] 15 U.S.C. § 1681t(b)(5).

[108] *See* 15 U.S.C. § 1681g(c)(2)(B).

easier for consumers to contact nationwide CRAs. This disclosure is subject to disclosure preemption under the FCRA.[109]

A CRA that loses its status as a nationwide CRA based on the superintendent's decision to revoke, suspend, or refuse to renew a registration would no longer be required to comply with the FCRA's notice of address discrepancy provision or participate in the E-Oscar automated reinvestigation system, because those requirements only apply to nationwide CRAs. The address discrepancy provision requires a nationwide CRA that provides a consumer report in response to a user request to notify the user if the consumer address provided by the user in requesting the report substantially differs from the consumer address in the file of the CRA.[110] Congress adopted this requirement in 2003 as a part of a set of amendments designed to prevent and mitigate identity theft. A decision by the superintendent to de-license a nationwide CRA would eliminate the identity theft protections afforded by the address discrepancy notice not just for New York consumers, but for consumers residing nationwide. The FCRA requires the nationwide CRAs to implement an automated reinvestigation system so that when furnishers report dispute reinvestigation results that find incomplete or inaccurate information, the corrected or updated information is provided to all nationwide CRAs.[111] Subject matter preemption applies to both of these FCRA provisions.[112]

Accordingly, the proposed rule's de-licensing provisions both subvert the FCRA's foundational and definitional structure and violate the FCRA's express preemption provisions as they apply to nationwide CRAs that may have their CCRA licenses revoked, suspended, or not renewed by the superintendent.

3. Conflict Preemption Analysis

The proposed rule also violates principles of conflict preemption. Conflict preemption exists not just when it is impossible to comply with federal and state law, but also when the state law "'stands as an obstacle to the accomplishment and execution of the full

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[109] 15 U.S.C. § 1681t(b)(5).

[110] 15 U.S.C. §§ 1681c(h)(1).

[111] 15 U.S.C. § 1681i(a)(5)(D).

[112] 15 U.S.C. §§ 1681t(b)(1)(B) and (E).

purposes of Congress.'"[113] Congress' purpose in enacting the FCRA, as described above, was to establish rules for a national credit reporting system that would serve the needs of the national banking system.

The proposed rule usurps Congress' prerogative and overarching purpose to establish a national regulatory framework for the U.S. credit reporting system. As explained above, the proposed rule would enable the superintendent, by exercise of the authority to revoke, suspend, or refuse to renew the license of a CCRA, to dictate whether an entity is or is not a nationwide CRA or a nationwide specialty CRA under the FCRA. For the NY DFS to create for itself the power to determine the particular sub-category of CRA into which a particular consumer reporting agency will fall, irrespective of the FCRA's definitional scheme, is a clear instance of conflict preemption.

V. The Proposed Rule Violates the U.S. Constitution and the New York Constitution

A. The Proposed Rule Violates the First Amendment of the U.S. Constitution

The First Amendment of the U.S. Constitution protects commercial speech.[114] When commercial speech concerns a lawful activity and is not misleading, the First Amendment requires a government regulator to: (1) identify a substantial government interest; (2) demonstrate that its regulation "directly advances" the asserted interest; and (3) demonstrate that its regulation is no more extensive than is necessary to serve that interest.[115]

The U.S. Supreme Court struck down on First Amendment grounds a Vermont law imposing "content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information" involving pharmacies and other regulated entities furnishing such data to data miners who then sell reports to pharmaceutical companies for use in marketing their products to doctors.[116] The Court also noted that "the

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[113] *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 874 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

[114] *Virginia Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

[115] *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

[116] *Sorrell v. IMS Health, Inc.*, 564 U.S. ___, 131 S. Ct. 2653 (2011).

creation and dissemination of information are speech within the meaning of the First Amendment."[117]

A business credit report is considered speech.[118] By analogy, a consumer credit report also is a form of commercial speech.

The proposed rule is an unconstitutional abridgement of the protection of free speech in violation the First Amendment of the U.S. Constitution, as applied to the states by the Fourteenth Amendment's Due Process Clause. The proposed rule prohibits a CCRA from receiving consumer credit information on consumers located in New York for use in assembling, evaluating or maintaining consumer credit reports without a license, a NY DFS-regulated user from purchasing consumer reports from an unlicensed CCRA, and a NY DFS-regulated furnisher from transmitted information about New York consumers to an unlicensed CCRA. Proposed Section 201.03.

Section 201.03(a) prohibits a person from assembling, evaluating, or maintaining a consumer credit report on New York consumers without having a valid registration on file as a CCRA. This prohibition would apply to a nationwide CRA, and potentially to certain other CRAs, whose license has been revoked, suspended, or not renewed by the superintendent. A person who is prohibited from assembling, evaluating, or maintaining consumer credit reports would be effectively barred from communicating consumer reports about New York consumers to third party users located both in New York and outside New York. Such a person also could not receive communications of information from non-New York furnishers about New York residents without violating the prohibition on assembling, evaluation, or maintaining such records. The rule thus interferes with commercial speech by nationwide CRAs, between persons located outside New York, and by persons not regulated by the NY DFS.

Section 201.03(b) prohibits NY DFS-regulated persons who are users of consumer credit reports from paying any fee or other compensation to an unregistered CCRA. Section 201.03(c) prohibits NY DFS-regulated persons who furnish information to CCRAs from transmitting any information about a New York consumer to an unregistered or de-licensed CCRA. These provisions interfere with commercial speech between nationwide CRAs and persons regulated by the NY DFS.

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[117] *Id.*

[118] *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U. S. 749, 759 (1985) (plurality opinion).

Based on the foregoing, the proposed rule regulates commercial speech, but does not meet the three-prong test outlined in *Central Hudson*. The NY DFS has not identified a substantial government interest in prohibiting non-misleading commercial speech between CCRAs and users of consumer credit reports and between furnishers and CCRAs. The stated data security, data accuracy, and dispute handling bases for the proposed rule do not provide sufficient justification for the restriction of non-misleading commercial speech. The NY DFS has not demonstrated how the proposed rule, particularly its licensing and de-licensing provisions, "directly advances" the asserted interests. Finally, the NY DFS cannot demonstrate that its regulation is no more extensive than is necessary to serve those interests. The CFPB, FTC, and other state regulators have ample authority to address data security, data accuracy, and dispute handling issues at CRAs without trammeling on the First Amendment rights of CRAs, users, and furnishers.

B. The Proposed Rule Violates the Commerce Clause of the U.S. Constitution

The proposed rule imposes an unconstitutional burden on interstate commerce under the Commerce Clause in Article I, Section 8 of the U.S. Constitution. The Commerce Clause prohibits state and local actions that discriminate against or impose excessive burdens on interstate commerce.[119]

The "dormant" Commerce Clause bars state and local actions that could interfere with interstate commerce even when Congress has not acted. Dormant Commerce Clause issues typically arise in contexts where state or local governments take measures designed to protect local interests.[120]

The proposed rule violates the Commerce Clause by giving the superintendent the authority to revoke, suspend, or refuse to renew a CCRA's registration, thereby precluding it from engaging in the consumer reporting business on a nationwide basis or from assembling, evaluating, or maintaining any consumer credit report on New

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[119] *N.L.R.B. v. Jones-Laughlin Steel Corp.,* 301 U.S. 1, 31 (1937); *Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978); *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970).

[120] *See C&A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383 (1994); *Chemical Waste Management v. Hunt,* 504 U.S. 334 (1992); *Dean Milk Co. v. Madison,* 340 U.S. 349 (1951).

York consumers (including, presumably, any information previously collected). The proposed rule regulates beyond New York's borders and imposes excessive burdens on interstate commerce by:

- Preventing non-regulated persons, including national banks, other financial institutions, and creditors, from obtaining consumer credit reports from de-licensed CCRAs on New York consumers, because de-licensed CCRAs could not assemble, evaluate, or maintain reports on New York consumers, thus jeopardizing the safety and soundness of the financial system;

- Preventing such non-regulated persons from furnishing information about New York consumers to a CRA whose license has been revoked, suspended, or not renewed, because a de-licensed CCRA would not be able to assemble, evaluate, or maintain information on New York consumers, thus jeopardizing the accuracy and completeness of the U.S. credit reporting system;

- Exercising excessive interference with the interstate commerce conducted by CRAs, furnishers, and users in accordance with the nationwide credit reporting scheme established by the federal FCRA; and

- Undermining the credit histories of consumers who move into or out of New York state whose files would have to be purged by a CCRA if the superintendent revokes, suspends, or refuses to renew the CCRA's license.

C. The Proposed Rule Violates the Due Process Clauses of the U.S. Constitution and the New York Constitution

The proposed rule violates the due process clause of the Fourteenth Amendment of the U.S. Constitution and Article I, Section 6 of the New York Constitution in several respects.[121]

First, Proposed Sections 201.02(e) and 201.05(b) permit the superintendent to refuse to renew the license of a CCRA without notice or an opportunity for a hearing. The ability

[121] U.S. CONST. AMEND. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."); N.Y. CONST. ART I, § 6 ("No person shall be deprived of life, liberty or property without due process of law.").

to put a CCRA out of business in New York and cripple its ability to re-enter the credit reporting business in New York at a later date without notice and a hearing violates due process under the U.S. and New York Constitutions.

Second, for the reasons discussed above, Proposed Section 201.05(b) would empower the superintendent to revoke or suspend a CCRA's license after unspecified notice and a hearing held in as little as ten days. A revocation or suspension decision would put a CCRA out of business in New York and require it to cease assembling, evaluating, or maintaining files on New York consumers, effectively precluding the CCRA from re-entering the New York market at a later date. Under these circumstances, due process demands a more specific notice requirement, the opportunity to call and cross-examine witnesses, and a longer period of time between notice and a hearing.

Third, Proposed Section 201.07(a) belatedly deems CCRAs to be "Covered Entities" under the NY DFS Cybersecurity Rule. Because CCRAs were not originally within the scope of the NY DFS Cybersecurity Rule, they had no reason to engage and comment on the rule when it was proposed since there was no indication that the rule would apply to them. By making CCRAs subject to the NY DFS Cybersecurity Rule as an afterthought, the proposed rule deprives CCRAs of any meaningful opportunity to comment on, and inform the final form of, the NY DFS Cybersecurity Rule. In addition, proposed rule provides unreasonably short deadlines for compliance with the requirements of the NY DFS Cybersecurity Rule, beginning April 4, 2018.

VI. The Proposed Rule Fails to Comply with the New York State Administrative Procedures Act

The proposed rule fails to provide adequate statements and analyses required by the New York State Administrative Procedures Act ("SAPA").

Regulatory Impact Statement: The SAPA requires New York agencies to issue a regulatory impact statement with a proposed rule containing certain specified content.[122] The proposed rule's regulatory impact statement falls short in several respects.

First, the cost statement does not detail the "projected costs" of the proposed rule or even set forth an estimate of such costs, and provides no information on "the source or sources" for its cost analysis or "the methodology upon which the cost analysis is

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[122] N.Y. Consol. L., SAPA § 202-a.2 and .3.

based."[123] The cost analysis, such as it is, consists of several non-specific statements that compliance with the proposed rule, the registration and annual reporting requirements, and the cybersecurity requirements will or may "impose some costs" on CCRAs. It contains no numbers, not even estimates. The cost analysis also states that "[f]or consumer credit reporting agencies currently operating in a safe and sound manner the costs to come into compliance should be limited." By way of example, the cost statement omits any analysis of costs to CCRAs of complying with the proposed one-hundred percent accuracy standard compared to the existing standard of "reasonable procedures designed to ensure maximum possible accuracy." As a result, the cost statement does not meet the requirements of SAPA § 202-a.3(c).

Second, the duplication statement does not identify all relevant federal and state rules that may duplicate, overlap, or conflict with the proposed rule.[124] The duplication statement only mentions the NY DFS Cybersecurity Rule. As discussed previously, the proposed rule duplicates, overlaps, or conflicts with the FCRA, the New York FCRA, the FTC's Safeguards Rule, the FTC's Disposal Rule, and federal and state UDAAP and unfair practices laws. As a result, the duplication statement does not meet the requirements of SAPA § 202-a.3(f).

Third, the federal standards statement does not identify all federal minimum standards that the proposed rule exceeds or explain why.[125] The federal standards statement fails to identify the FTC's Safeguards Rule and the overlapping concurrent authority of the FTC with regard to cybersecurity or the federal FCRA standards, such as the accuracy standard, that the proposed rule exceeds. As a result, the duplication statement does not meet the requirements of SAPA § 202-a.3(h).

Job Impact Statement: The SAPA requires New York agencies to issue a job impact statement with a proposed rule.[126] The NY DFS concludes, without explanation, that the proposed rule "will not have a substantial adverse impact on jobs and/or employment opportunities." This determination ignores the possibility of the superintendent exercising the power to revoke, suspend, or refuse to renew a CCRA's license. A de-licensing determination clearly would affect jobs and employment opportunities in

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[123] N.Y. Consol. L., SAPA § 202-a.3(c).

[124] N.Y. Consol. L., SAPA § 202-a.3(f).

[125] N.Y. Consol. L., SAPA § 202-a.3(h).

[126] N.Y. Consol. L., SAPA § 201-a.2.

New York because many employers obtain credit reports on job applicants, and the loss of data from a de-licensed CRA would likely have an adverse impact on some job applicants. Except where it is evident from the subject matter of the rule, a conclusion of no job impact must be supported by "a summary of the information and methodology underlying [the] determination," which is absent from the NY DFS's statement.[127]

Regulatory Flexibility Analysis: The SAPA requires New York agencies to issue a rural area flexibility analysis with a proposed rule to "minimize any adverse impact of the rule on small businesses and local governments."[128] The NY DFS limits its regulatory flexibility analysis by concluding that no CCRA is likely to be a small business. It may be that no CCRA is a small business, but many small businesses interact with CCRAs, including users of credit reports and furnishers of credit report information. The proposed rule applies not only to CCRAs, but it prohibits users of credit reports regulated by the NY DFS from paying any fee or compensation to a de-licensed CCRA and furnishers of consumer report information regulated by the NY DFS from furnishing information on New York consumers to a de-licensed CCRA. Proposed Sections 201.03(b) and (c). As a result, the regulatory flexibility analysis does not address the full impact of the rule on small businesses.

Rural Area Flexibility Analysis: The SAPA requires New York agencies to issue a rural area flexibility analysis with a proposed rule to "minimize any adverse impact of the rule on public and private sector interests in rural areas."[129] The NY DFS limits its rural area flexibility analysis by concluding that it does not believe "any entity subject to the regulation operates in a rural area." CDIA finds this hard to believe. Some users and furnishers covered by Proposed Sections 201.03(b) and (c), such as community banks and credit unions, surely are located in rural areas of New York. As a result, the rural area flexibility analysis does not address the full impact of the rule on private sector interests in rural areas.

VII. Specific Comments on the Proposed Rule

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[127] N.Y. Consol. L., SAPA § 201-a.2(a).

[128] N.Y. Consol. L., SAPA § 202-b.1.

[129] N.Y. Consol. L., SAPA § 202-bb.2(b).

If the NY DFS decides to finalize the proposed rule, despite its lack of authority and the fundamental deficiencies discussed in Sections II-VI above, there are specific issues that must be addressed to provide clarity and to make the rule workable.

A. The Scope of the Proposed Rule Is Overly Broad

CDIA submits that the proposed rule could apply to too many types of consumer reports and impact users beyond the jurisdiction of the NY DFS. Even when provided by a CCRA, CDIA maintains that the proposed rule cannot apply to consumer reports provided for any purpose that is not subject to regulation by the NY DFS, such as tenant screening or employment purposes, or adversely impact users of consumer reports who are not regulated by the NY DFS.

The definition of "consumer report" in Proposed Section 201.01(b) includes consumer reports provided for employment purposes or other purposes outlined in the New York FCRA. CDIA believes this definition is overly broad because the NY DFS generally does not regulate employers or other non-financial users and uses of consumer reports. The definition of "consumer credit report" in Proposed Section 201.01(e) is narrower in certain respects. CDIA submits that the proposed rule should avoid having layered definitions and should more clearly delineate, and narrow, the scope of the proposed rule.

CDIA contends that the NY DFS has no authority to regulate CRAs when they provide consumer reports for employment, tenant screening, criminal background checks, and other non-financial purposes which fall outside the purview of the financial services regulated by the NY DFS. In addition, consumer reports provided at the consent of the consumer or directly to the consumer, including the free annual report available to all U.S. consumers, should fall outside the scope of the proposed rule.

The proposed rule should not restrict on the ability of persons not regulated by the NY DFS to obtain consumer reports from any CRA, including consumer credit reports from a de-licensed CCRA. CDIA fails to see how the superintendent can legitimately prevent any CRA, including a de-licensed CCRA, from providing consumer reports to federal and state law enforcement agencies, state family services agencies charged with enforcing child support obligations, landlords, employers, employment agencies, or consumers. These persons are not regulated by the NY DFS and should not be adversely affected by the proposed rule. Similarly, the proposed rule cannot possibly

preclude CRAs from providing consumer reports on New York consumers in response to a federal or state court order or subpoena.

CDIA recommends limiting the scope of the proposed rule to consumer credit reports provided to persons regulated by the NY DFS. Proposed Sections 201.03(b) and (c) impose restrictions on users and furnishers, but only those who are regulated persons. CDIA submits that any restrictions on CRAs should be consistent with and mirror the scope of those two subsections. Specifically, CDIA recommends revising paragraph 5 of Proposed Section 201.00, Proposed Section 201.03(a), and other sections of the proposed rule to limit its scope to consumer credit reports provided to persons regulated by the NY DFS.

B. Entities Covered by the Proposed Rule

The FCRA defines several specific categories of consumer reporting agencies: (a) a "consumer reporting agency that compiles and maintains files on consumers on a nationwide basis" or nationwide CRAs; (2) a "nationwide specialty consumer reporting agency"; and (3) a "reseller."[130] Nationwide CRAs – currently comprised of Equifax, Experian and TransUnion – assemble or evaluate, and maintain, on "consumers residing nationwide" public record information and credit account information obtained from furnishers for the purpose of furnishing consumer reports to third parties.[131] Nationwide specialty CRAs compile and maintain files on consumers on a nationwide basis relating to: (1) medical records or payments; (2) residential or tenant history; (3) check writing history; (4) employment history; or (5) insurance claims.[132] A reseller assembles and merges information contained in the database of one or more other CRAs to furnish to third parties and does not maintain a database of the information it assembles or merges.[133] CRAs that do not fall within any of these categories may compile and maintain different types of information on consumers or may operate on a regional, as opposed to a national, basis.

The proposed rule does not use existing terminology or categories, but instead applies to any "consumer credit reporting agency" or CCRA. Proposed Section 201.01(d)

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130 15 U.S.C. §§ 1681a(p), (u), and (w).

131 15 U.S.C. § 1681a(p).

132 15 U.S.C. § 1681a(w).

133 15 U.S.C. § 1681a(u).

defines the term "consumer credit reporting agency" to mean "a consumer reporting agency that regularly engages in the practice of assembling or evaluating and maintaining, for the purpose of furnishing consumer credit reports to third parties bearing on a consumer's credit worthiness, credit standing, or credit capacity, <u>public record information</u> and <u>credit account information</u> from persons who furnish that information regularly and in the ordinary course of business." (Emphasis added).

Subject to the points raised in the previous subsection, CDIA generally agrees that the rule should apply only to CRAs that assemble or evaluate and maintain <u>both</u> public record information <u>and</u> credit account information, *i.e.,* credit account tradelines, that they obtain from furnishers. Any CRA that does not assemble or evaluate and maintain both types of information properly falls outside the scope of the rule. For example, a CRA that assembles and maintains consumer reports on residential or tenant history, employment history, check writing history, or deposit account history, but not credit account information, is not and should not be subject to the rule. Similarly, a CRA that does not assemble or evaluate and maintain public record information is not and should not be subject to the rule.

For the reasons discussed more fully below, CDIA also urges the NY DFS to narrow the CCRA definition so that it applies only to CRAs that: (1) assemble or evaluate, and maintain, files on more than 50,000 New York consumers; and (2) regularly provide consumer credit reports on New York consumers to persons regulated by the NY DFS.

Resellers do not maintain files on consumers and only obtain consumer credit account information from other CRAs, not from furnishers. CDIA requests confirmation that the proposed rule does not apply to resellers.

CDIA also believes CRAs that conduct credit background checks for purposes of providing consumer reports for tenant screening, employment, and other non-financial purposes should not be covered by the proposed rule. The NY DFS does not regulate non-financial products or services or the landlords, employers (other than financial institutions), and other users of such reports. CDIA requests confirmation that the proposed rule does not apply to CRAs that conduct credit background checks for tenant screening, employment, and other non-financial purposes.

More generally, even CRAs that do assemble or evaluate and maintain public record information and credit account information should not be subject to the proposed rule when they provide consumer credit reports for tenant screening, employment, law

enforcement, and other non-financial purposes that fall outside the jurisdiction of the NY DFS as discussed above.

C. Location of the Consumer Is an Unworkable Standard

The proposed rule applies to consumer credit reports on “any consumer(s) located” in New York state. Proposed Sections 201.0, 201.02(a), 201.03(a), 201.04(a) and (b), and 201.06(a). CDIA submits that while ascertaining the location of a consumer sounds simple in theory, it is, in fact, an unworkable standard. CDIA members typically consider the most current address they have on file as the consumer’s residence or location. CDIA members rely on external sources, primarily furnishers, to provide the current address of the consumer.

Some consumers, however, maintain multiple residences. For example, it is not clear whether a consumer who resides seven months of the year in Florida and five months of the year in New York would be covered by the rule. Legally, the consumer’s residence is Florida, but the consumer is “located” in New York for five months of the year. Moreover, if the consumer’s most recent credit tradeline was opened using the Florida address, the Florida address likely will appear in CRA files as the consumer’s address. In other cases, a consumer residing in Connecticut may open a credit account using his or her business address in New York as the mailing address for the account, even though the CRA files may still list the consumer’s primary address as a Connecticut address.

Other examples illustrate the difficulty of applying a location test. A New Jersey resident may travel to a retail store in New York and apply for a retail credit card in-store, or may go to a car dealership in New York to purchase and finance a new car. In both instances, the consumer is physically located in New York when applying for credit, but the CRAs’ files will list that consumer as having a New Jersey address. Based on the foregoing examples, CDIA believes that a location test is unworkable and would extend the reach of the rule to impact consumers residing outside New York State.

In addition, a significant portion of the population moves each year. The proposed rule provides no guidance on how it applies to consumers who move in and out of New York.

CDIA requests that the NY DFS revise the proposed rule to define the term “New York consumer(s)” to mean an individual(s) who, on the files of the consumer reporting agency subject to the rules, has his or her principal address of residence or best address

at a location within the State of New York at the time a consumer report is requested by a regulated person. CDIA submits that such a definition would avoid the ambiguity of the consumer's "location" in New York and replace it with a workable standard.

D. The Proposed Registration/Licensing Requirement Is Overly Broad and Requires Additional Guidance and Time to Implement

CDIA submits that the registration or licensing requirement in Proposed Sections 201.02 and 201.03(a) is overly broad. As drafted, the registration requirement would be triggered simply by having consumer credit report information on a single New York consumer. Proposed Section 201.02(a). This is an impractical standard as it fails to account for the fact that consumers move in and out of New York all the time. It provides no safe harbor for a CRA that inadvertently obtains information on a New York consumer. Clearly, a higher threshold for registration or licensing is warranted.

CDIA believes that the registration requirement should only be triggered if: (1) the CRA assembles or evaluates, and maintains, files on more than 50,000 New York consumers; and (2) regularly provides consumer credit reports on New York consumers to persons regulated by the NY DFS. Such a standard would still cover the large nationwide CRAs, but would avoid circumstances where smaller CRAs inadvertently find themselves in violation of the rule.

Proposed Section 201.02(b) sets unrealistic expectations for one or more directors to have responsibility for ensuring compliance. Accepted governance practice is to make an officer, such as the Chief Compliance Officer or General Counsel, responsible for compliance, while directors simply review such activities in their role of providing oversight and direction. CDIA urges the NY DFS to revise Proposed Section 201.02(b) so that one or more officers, but not directors, could be designated as responsible for compliance.

The requirements for obtaining an initial license and renewing a license in Proposed Sections 201.02(c) and (d) are too ambitious and unrealistic. First, the proposed rule does not specify, and the NY DFS has not otherwise published, the actual information that must be provided to apply for registration or a sample application form. CDIA submits that its members cannot assess the time and effort involved without clearer guidance. Second, February 1, 2018 is an unrealistic deadline for registration since the comment period closes November 17, 2017, and the final rule will not be published until some period of time after comments are received.

The initial registration deadline should be set no earlier than one-hundred eighty (180) days after the effective date of the rule, and that subsequent registrations should be due one year after the initial registration.

Comments on the authority to revoke, suspend, or refuse to renew a registration or license have been discussed previously.

E. The Proposed Reporting, Investigative, and Examination Powers Are Vague and Unduly Burdensome

Section 201.04 of the proposed rule would require every CCRA doing business in New York to report to the superintendent the information s/he requests annually, quarterly, and/or upon request. The proposed information reporting requirements are vague, non-specific, and overly broad. There is no indication as to what would be required in annual or quarterly reports, and what, if anything, would have to be reported upon request. The proposed rule gives the superintendent broad and undefined powers to request information on whatever schedule he or she chooses.

CDIA requests that the NY DFS delete these reporting requirements because they are vague, non-specific, and overly broad. At a minimum, since the NY DFS drafted these proposed rules, the rules should specify what information must be reported and when. Further, any reporting requirement should apply annually, not quarterly or on an ad hoc basis, to avoid unnecessary burdens.

Proposed Section 201.02(f) gives the superintendent the authority to examine certain CRAs. CDIA submits that any examination authority should prohibit the superintendent from making examination findings or imposing any obligations, requirements, or restrictions on CRAs with respect to matters preempted by the FCRA, as described above.

F. Application of the NY DFS Cybersecurity Rule to Consumer Reporting Agencies Is Unnecessary and, at a Minimum, Should be Revised and Clarified

Given the extensive federal, state, and contractual data security requirements to which CRAs are subject, as described above, CDIA submits that it is unnecessary, burdensome, and beyond the authority of the NY DFS to apply the NY DFS Cybersecurity Rule to CCRAs. New York already has a data breach notification law,

which the NY DFS does not enforce, so the notification provisions of the NY DFS Cybersecurity Rule simply duplicate existing requirements.

In late 2016, the federal banking regulators published proposed rules on cyber risk management standards.[134] Recently, a senior Federal Reserve Board official indicated that the agencies had decided not to proceed after concluding that more rules would not the best way to protect the financial system against cyber attacks. "I don't think the solution to the cybersecurity problem rests in regulations," said Arthur Lindo, senior associate director of the Federal Reserve Board's division of supervision and regulation.[135] "We're going to try a more flexible approach."[136]

The NY DFS Cybersecurity Rule does not enhance data security in any meaningful way beyond the existing and overlapping federal, state, and contractual information security standards that CRAs already must follow. Moreover, it runs counter to the findings of federal regulators who have been examining cyber threats at financial institutions in depth for the past several years. For the foregoing reasons, CDIA submits that CCRAs should not be subject to the NY DFS Cybersecurity Rule.

If the NY DFS Cybersecurity Rule is made applicable to CCRAs, the proposed rule should establish a safe harbor for compliance. For example, the annual submission to the NY DFS of an information security audit report prepared by a qualified auditor, such as an AICPA Soc. 2 report prepared using the SSAE 16 or its equivalent, should be sufficient to demonstrate that a CCRA is following appropriately high information security standards.

In addition, CDIA requests that CCRAs have at least six (6) months from the effective date of the final rule to comply with the requirements of Proposed Section 201.07(a), with a corresponding amount of additional time added to the compliance deadlines in Proposed Section 201.07(b) and (c).

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[134] 81 Fed. Reg. 74,315 (Oct. 26, 2016) (proposed Enhanced Cyber Risk Management Standards).

[135] Yalman Onaran, "Regulation Can't Solve Cybersecurity Problems, Fed Official Says" (Bloomberg Nov. 6, 2017), https://www.bloomberg.com/news/articles/2017-11-06/regulation-can-t-solve-cybersecurity-problems-fed-official-says.

[136] *Id.*

VIII. Conclusion

For the foregoing reasons, CDIA respectfully requests that the NY DFS withdraw the proposed rule, or, in the alternative, substantially revise the proposed rule in accordance with the recommendations outlined above.

Sincerely,

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