VIA EMAIL: CFPB_consumerreporting_rulemaking@cfpb.gov and Jennifer.smith@sba.gov

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552
c/o Comment Intake Consumer Financial Protection Bureau

RE: Small Entity Representative ("SER") Jack W. Brown III's Comment to Small Business Review Panel regarding the Fair Credit Reporting Act Proposal (the "Proposal")

Dear Director Chopra and Bureau Staff:

I. Background

My name is Jack W. Brown III, and I am a second-generation operator of a consumer collection agency focused on healthcare self-pay and revenue cycle receivables management. I am a past president of ACA International, the trade association for credit and collection professionals. Over the past 23 years, I have helped develop best practices for healthcare revenue cycle management including credit reporting policies, 501(r) compliance, and communication of charity care policies from the provider to the patient. Accordingly, my comments will mostly focus on the medical debt proposals for the Fair Credit Reporting Act ("FCRA").

Each day, my team has hundreds of interactions with patients regarding their medical bills. Our team works collaboratively with the patient to find the proper resolution of each account we handle. This is a difficult process that requires skill and expertise. The financial component of a healthcare visit is a very complicated process that many consumers do not understand how to navigate. Debt collectors in the healthcare space are some of the top experts in understanding the challenges presented with the financial component of a healthcare visit.

My colleagues and I are concerned that the Proposal as it is now articulated will cause more harm to consumers, not help them with the costs of medical care. First, the Proposal missed several steps in engaging all stakeholders to address the affordability problem. Further, the Proposal may exacerbate America's problem of underinsured families by making it less attractive to have health insurance.

Finally, the proposals to prohibit creditors from reviewing all debts related to a potential borrower conflicts with ability-to-repay requirements for creditors. This undermines the very reason the CFPB was created under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). The Dodd-Frank Act was passed in the wake of the 2008 mortgage crisis to ensure that the American taxpayer would not be on the hook to bail out financial institutions that provided mortgages and other loans to consumers who could not afford the loan. It seems the lessons learned during the Great Recession have been forgotten. Now the very same agency is inserting its opinion that medical debt is not as predictive as other debt to determine a consumer's ability to repay the loan in contrast to actions already taken to address the concerns regarding medical debt in underwriting decisions.

I urge the CFPB, as a first step, to refrain from issuing the Proposal until there is comprehensive research studying the impact of recent changes announced by the Consumer Reporting Agencies (CRAs) to require a one year waiting period before a medical debt can be credit reported; raising the minimum account balance for furnishing to $500; and the deletion of paid in full medical accounts from the consumer's report. These changes, in addition to the heightened notice requirements under Regulation F,[1] and the implementation of the No Surprise

[1] 85 FR 76887, Nov. 30, 2020.

Billing Act have marked a major shift in the marketplace and those changes have not been considered in the underlying reasoning that the CFPB has pursued this rule.

The Real Problem is not Credit Reporting

Medical debt stems from much more than a financial transaction. Healthcare providers deliver lifesaving and prolonging care when we need them most. Recently, they have been referred to as Healthcare Heroes for putting their own safety at risk while caring for patients suffering effects from the COVID-19 virus.

The Healthcare industry constitutes nearly 20 percent of the nation's total Gross Domestic Production (GDP).[2] In 2020, Hospitals provided more than $42 Billion in uncompensated care.[3] Providers are responding to the challenges faced by patients by automatically applying self-pay discounts for uninsured patients and providing other solutions to help consumers grapple with the high cost of care.

The Affordable Care Act has gone a long way in expanding health insurance coverage in the United States, however, there are still too many uninsured Americans. Affordable, comprehensive health care coverage is the most important protection against medical debt. Affordability is the main reason for persons not having coverage.

The systems to allow for consumers to save for and plan for healthcare expenditures has not kept pace with the rate of increase in deductible and out-of-pocket maximum amounts. Over the last 30 years, the health insurance market has seen major changes to how costs are divided between premiums, higher deductibles, and higher share-of-costs plans. A bronze plan under the

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[2] Keehan et. al., *National Health Expenditure Projections, 2022-31*, 42 Health Affairs 886 (June 14, 2023) https://www.healthaffairs.org/doi/epdf/10.1377/hlthaff.2023.00403.
[3] Am. Hosp. Assoc. "Uncompensated Hospital Care Cost Fact Sheet" (Feb. 2022) https://www.aha.org/system/files/media/file/2020/01/2020-Uncompensated-Care-Fact-Sheet.pdf.

health exchange created pursuant to the Affordable Care Act carries a maximum out-of-pocket cost of $9,100 per year for an individual and $17,400 for a family.[4] But health savings accounts allow for a maximum annual contribution of $7,300 per year.[5] This simply will not cover a typical family's medical care out-of-pocket expenses.

II. The Proposal Would Have Deleterious Effects on Consumers, Markets, Small Businesses, and the Entire Credit and Debt Collection Industry

- To ensure clear and consistent interpretation, it is important that the CFPB create a definition of medical debt that ties the medical debt to the entity to which the debt is owed. For example, there are significant nuances between surprise medical expenses from emergency room visits and elective or preventive procedures, and health-related items like Advil and Band-Aids routinely purchased at places like Target. To avoid such an overbroad interpretation, and to provide clarity on what is being referred to as "medical debt," we respectfully ask for a clear set of definitions of "medical debt" that differentiates between emergency services and other types of incurred health care related debt.
- Even for medical providers and collection agencies that do not credit report, we have data which highlights that the "message behind the message" that you do not have to pay medical debt, has already harmed providers and their collection agency partners. This will lead to a variety of consequences including the need for more cash-upfront payments and an increase in medical providers turning directly to litigation to seek to recover payment. The economic analysis showing this, and anecdotal support will be provided in comments.
- The Affordable Care Act requires that nonprofit hospitals establish "charity care"—essentially financial assistance policies—for patients unable to cover their expenses. IRS Regulation 501(r) already addresses extraordinary collection activities. For providers in many states, ACA members have seen the threshold at 200% or 300% of the Federal Poverty Level as the starting point before any copays or deductibles need to be paid to a non-profit provider. Since there are already many programs and laws in place to help consumers that truly cannot afford medical debt, the CFPB's efforts are more likely to encourage people that can pay their debt to become free-riders on the medical system, not to address unaffordability. This may not benefit them since hospitals or medical providers can take legal action, or in the case of non-emergency care, not provide care.
- Medical providers and their third-party collection agency partners will need to consider changes to their collection practices for unpaid medical care including

[4] HealthCare.Gov "Out-of-Pocket Maximum/Limit" (last visited Nov. 4, 2023) https://www.healthcare.gov/glossary/out-of-pocket-maximum-limit/.

[5] 26 CFR 601.602 § 2.01.

litigation, denial of care, or pulling out of a market all together. If the CFPB removes the incentive to maintain good credit, consumers will have no reason to pay their medical bills, which will force stakeholders to turn to other remedies sooner and more often. This will ultimately lead to more costs for consumers as a whole to absorb the highs costs associated with litigation, increased costs for small businesses, and a loss of privacy for consumers when their medical debts become part of the public legal record.

- By the CFPB's own admission, medical debt information is less predictive, not "not predictive". Thus, underwriters will have less information to make credit determinations if the CFPB moves forward with its goal to remove all medical debt from credit reports, and credit will be extended in situations when consumers do not have the ability to repay. As such, the host of negative consequences that the CFPB itself has outlined in its ability to repay test in mortgage, and other rules when creditors do not have accurate information will come into play. Similar to the factors of the 2008 financial crisis, which led to the creation of the CFPB, lenders will be operating with blind spots and overlooking debt and legal obligations for consumers who are seeking credit.
- The data analysis supporting the Proposal has serious methodological defects and did not consider data that reflects the current state of the industry or the critical economic impacts of medical debt reporting.
- The Proposal will create overly burdensome costs to small businesses, which will likely result in the reduction of consumer choice, increased upfront costs and costs overall, and less access for patients to lifesaving care services. This Proposal will increase the cost and availability of credit for ACA members, as well as their medical provider clients, since this fundamentally changes the law and will make it harder to collect payment for medical bills. Stymieing collections and changing the credit reporting process will hurt both clients and their third-party collection agencies' bottom lines.
- The Proposal fails to consider, and has done no research, on less expensive alternatives that avoid the significant constitutional problems and reduce monetary impacts on small businesses, and consumers, and governments, such as implementing a waiting period before a medical debt can be reported; allow for deletion of paid medical debt; review marketplace responses to the issue including the vantage score model that reduces the weight of a medical debt on the consumer's score.

Thank you for the opportunity to allow me to participate in this process and share my experiences on these issues. Please find attached with this letter a discussion and analysis of the Proposal along with data and supportive materials.

Best Regards,

Jack W. Brown III, President
Gulf Coast Collection Bureau, Inc.

Attachments (1)

Comments of Jack Brown
to
Small Business Review Panel for the Fair Credit Reporting Act Proposal

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COMMENTS

I. THE CFPB FAILS TO SUPPORT ITS POSITION WITH ANALYSIS AND LACKS LEGAL AUTHORITY TO ISSUE RULES IN THIS AREA

A. The Proposal Lacks Data and Analysis; it Fails to Consider Recent Changes in the Marketplace

Recently, the CRAs changed how medical debt is reported including requiring the deletion of paid medical debt, requiring a one year waiting period before medical debt can be reported, and raising the minimum balance to $500 for medical debt to be included on a consumer's credit report. **Even without CFPB rulemaking, t**he market is responding to concerns about medical debt.

There is evidence that American consumers have seen medical debt on their credit reports decline over the past year as major credit rating agencies removed small unpaid bills and debts that were less than a year old.[6] In addition to the changes announced by the CRAs, Regulation F requires debt collectors to take additional steps to ensure that a consumer has received their validation notice under the Fair Debt Collection Practices Act ("FDCPA") before an account may be reported. Section 1006.38(d)(2) of Regulation F states the upon receipt of a dispute submitted by the consumer in writing within the validation period, a debt collector must cease collection of the debt, or any disputed portion of the debt, until the debt collector: (i) Sends a copy either of verification of the debt or of a judgment to the consumer in writing or electronically in the manner required by § 1006.42; or (ii) In the case of a dispute that the debt collector reasonably determines is a duplicative dispute, either: (A) Notifies the consumer in writing or electronically in the manner required by § 1006.42(a)(1) (requirements for sending the required disclosures) that the dispute is duplicative, provides a brief statement of the reasons for the determination, and refers the consumer

[6] Fredric Blavin et al, "Medical Debt Was Erased From Credit Records for Most Consumers, Potentially Improving Many Americas' Lives" Urban Institute (Nov. 2, 2023) https://www.urban.org/urban-wire/medical-debt-was-erased-credit-records-most-consumers-potentially-improving-many.

to the debt collector's response to the earlier dispute; or (B) Satisfies paragraph (d)(2)(i) (sends verification/judgment) of this section.

This provision has helped ensure that consumers **can** contact the debt collector and provide any information that is needed to get the account properly resolved, including providing any information regarding an insurance company's liability for payment on the account.

In addition to the new regulations, the No Surprises Act[7] is just starting to show improvements in the way consumers are covered when visiting an out of network provider**;** ensuring patients don't get stuck in a dispute between the provider and the insurance company about the proper payment amount when the consumer's insurance carrier does not have a contract with the provider.

The CFPB should not move forward until it first studies and considers the impacts of the changes already made and include the changes that have occurred in their analysis.

B. The CFPB's Jurisdiction Only Extends to Financial Products and Services

1. CFPB Authority Under the Dodd-Frank Act

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act[8] (the "Dodd-Frank Act") in response to consumer abuses in mortgages, credit cards, and other financial products. The Dodd-Frank Act made substantial changes to many of the statutes in the Consumer Protection Act and established in Title X, the CFPB. The Dodd-Frank Act assigns to the CFPB some of the rulemaking and enforcement authority that the FTC and banking regulators

[7] Pub. L. No. 116-260 (2021).
[8] Pub. L. No 111-203(2010).

previously held. It also grants the CFPB rulemaking authority regarding unfair, deceptive, or abusive practices.

Notably, the language in the CFPB's Enabling Act grants it the authority to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."[9] The CFPB's jurisdiction is thus limited to "financial products" and "financial services."

A consumer financial product or service is a financial product or service that is offered or provided for use by consumers primarily for personal, family, or household purposes. A financial product or service means one of a handful of specified activities (with certain exceptions):

- Extending credit and servicing loans;
- Extending or brokering leases;
- Providing real estate settlement services;
- Engaging in deposit-taking or funding custodial activities;
- Selling, issuing, or providing stored value cards or payment instruments;
- Check cashing, check collection, or check guaranty services;
- Providing payments or other financial data processing products or services;
- Providing financial advisory services;
- Collecting, maintaining, or providing consumer report information or other account information;
- Debt collection related to consumer financial products or services;
- Products or services permissible for a bank or financial holding company to offer that will impact consumers.

[9] 12 U.S.C. § 5491(a).

Moreover, the CFPB's rulemaking and enforcement authority related to consumer financial products and services is strictly limited to "covered persons." This includes only those who offer or provide a financial product or service, and anyone controlling, controlled by, or under common control with such a person who acts as a service provider for such a person.

Here, the CFPB's consideration of the proposals discussed above goes far beyond the CFPB's statutory authority. While it is clear that the CFPB may regulate the offering and provision of debt collection, what the CFPB is now considering—whether and to what extent, medical debt appears on a consumer's credit report—goes far beyond the realm of mere debt collection. Indeed, while the intention behind the proposals is aimed at credit reporting agencies, the practical effect is a regulation of the healthcare system. The rules now being considered therefore do not fit within the definition of a "financial product" or "service" and the CFPB lacks jurisdiction to issue rules in this area.

2. The Proposal to Restrict Creditors' Ability to Review all of a Borrower's Debt Obligations is Contrary to the Mission of the CFPB.

The CFPB was created in the wake of the "Great Recession" to change the regulatory environment to ensure that financial institutions were not underwriting loans to consumers who could not afford the loan. It appears that the lessons learned in the crisis have been forgotten and the very agency that is charged with preventing another Great Recession is laying the groundwork for the next Great Recession by prohibiting creditors from considering all debt obligations of a potential borrower.

C. **By Attempting to Regulate in the Field of Healthcare and Associated Medical Transactions, the CFPB Exceeds its Statutory Authority**

The CFPB does not have the authority, expertise, or proper tools to regulate the medical, healthcare, and insurance industries and cannot do so through Regulation V. When Congress

passed the FCRA, it did so with a narrow and explicit prerogative: to promote fair and accurate credit reporting.[10] It did not intend for the Act to be used to regulate the non-financial products and services simply because they are purchased on credit.

Financial services and products play a very limited role in the healthcare and medical services industries and the CFPB has a correspondingly limited authority to regulate or make policies in those fields. In fact, the CFPB has already acknowledged that it lacks authority to regulate within the medical industry by specifically *excluding* medical debt from its definition of "large market" participants in the consumer debt collection market.[11] While promulgating regulations of large market participants, the CFPB stated that it has authority to regulate the debt collection market because that "is a market for financial products and services under the Act" but that debt arising from medical expenses should be excluded because it is "unrelated to consumer financial products or services."[12]

Similarly, and as further detailed below, in many of its public statements, the CFPB takes aim at complex insurance coverage related to healthcare. It is true insurance coverage is a nuanced and complicated process. That is why there are certain Congressional Committees and agencies such as the U.S. Departments of Health and Human Services ("HHS"),[13] Labor ("DOL"),[14] and the Treasury,[15] that are tasked with creating laws and regulations surrounding insurance.[16] In fact, Congress recently passed the No Surprises Act to address some of these issues.[17] Unfortunately,

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[10] *See e.g.*, 3 Fair Credit Reporting Bill, 115 Cong. Rec. S2410-11 (daily ed. Jan. 31, 1969) ("Credit reporting agencies are absolutely essential in today's credit economy. . .my objective in introducing the fair credit reporting bill is to correct certain abuses which have occurred within the industry and to insure that the credit information system is responsive to the needs of consumers as well as creditors.").
[11] 12 C.F.R. § 1090.105.
[12] 77 FR 9597.
[13] 42 U.S.C. § 3501 *et. seq*.
[14] 29 U.S.C. § 551 *et seq*.
[15] 31 U.S.C. § 301 *et. seq*.
[16] *See e.g.*, 26 U.S.C. §§ 9801–9834 (regulating group health plans and assigning enforcement and regulation to the IRS); 42 U.S.C. § 300gg (regulating insurance requirements including limiting cost-sharing and assigning enforcement and regulation to HHS); 42 U.S.C. 1320f (directing HHS to establish a Drug Price Negotiation Program).
[17] Pub.L. 116–260 (2021).

the "research" and data that the CFPB cites for its interest in this issue was collected years before this sweeping law that already addresses many of the issues the CFPB raises about the healthcare system.

Credit reporting laws are not intended to combat high medical costs or simplify insurance coverage. The CFPB's authority to promulgate rules under Regulation V is limited to rules that effectuate the purpose of the FCRA, which is narrow and entirely unrelated to healthcare policy or insurance issues. The FCRA's stated purpose is to support the needs of commerce by providing fair and accurate credit information. Manipulation of what consumer information can appear on a credit report based on external policy considerations is directly contrary to that purpose and exceed the CFPB's grant of authority. Congressional intent regarding the role of the CFPB is clear: first, the FCRA simply does not authorize the CFPB to make industry specific credit reporting regulations; second, the FCRA does not authorize the CFPB to regulate the healthcare industry; and third Congress has specifically delegated rulemaking power in the healthcare and medical industries to other specialized agencies.

1. <u>The FCRA Does Not Grant the CFPB Discretion to Exempt Medical Debt From Credit Reporting.</u>

The CFPB does not have the authority to unilaterally determine what types of consumer debt can be reported and used by creditors. The FCRA grants the CFPB the authority to "prescribe such regulations as may be necessary and appropriate to administer and carry out the purposes of [the FCRA]".[18] The stated purpose of the FCRA is to create rules and procedure for credit reporting that balance the need for access to complete and accurate credit reports with the consumer's

[18] 15 U.S.C. 1681(s)(e)(1).

interest in privacy and fair access to credit products.[19] Congress did not delegate how to strike this balance to the CFPB. Rather it enacted a law that that makes consumer information broadly reportable, with the exception of specifically enumerated categories of protected information.

The CFPB asserts that it has authorization to prohibit reporting or use of medical debt to lower the burden of healthcare costs because the FCRA already limits the use of medical information. This is a misreading of the statute. The CFPB's Proposal states its proposed rulemaking is necessary because: (1) "[m]edical debt collection tradelines appearing on consumer reports can have negative consequences for consumers, including impacting consumers' ability to obtain credit (or to obtain it at favorable rates) after experiencing, for example, a medical emergency"[20] and (2) that medical debt collection tradelines appearing on consumer reports "can also be used as leverage by collectors to coerce consumers to pay sometimes spurious or false unpaid medical bills."[21] But these concerns have no specific tie to medical debt: any consumer with a high amount of consumer debt on their credit report will have more difficulty obtaining new credit; and any debt tradeline can be used as leverage for repayment by a creditor. Indeed, that credit reporting allows creditors to limit its risk by not lending to or imposing higher rates on people with a large amount of debt are features, not bugs, of the credit reporting system created by the FCRA.

Congress empowered the CFPB to regulate the use of medical information consistent with the overall purpose of the statute—to protect consumer privacy while preserving creditor access to accurate debtor information.

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[19] 15 U.S.C. 1681(b); (*See also* Fair Credit Reporting Bill, 115 Cong. Rec. S2410-11 (daily ed. Jan. 31, 1969).

[20] Small Business Advisory Review Panel for Consumer Reporting Rulemaking Outline of Proposals and Alternatives Under Consideration ("Rulemaking Outline") at 17-18.

[21] *Id*. at 18.

2. Congress' Limits on Medical Debt Reporting set a Boundary for CFPB Regulation.

Congress already did the work that the CFPB proposes concerning medical debt. Congress prohibits reporting of medical information that could allow third parties to determine what type of medical product or service the consumer received at 15 U.S.C. 1681(b). This statutory text reflects the stated policy goal of protecting privacy. But the FCRA also implicitly allows medical debt reporting. In 15 U.S.C. 1681(c), Congress specifically excludes a narrow category of medical debt. That is, CRAs may not report medical debt owed by veterans for medical services received more than a year before the report was created.[22] Again, this reflects a legislative policy determination that veterans should not have accurate medical debt reported, but that this protection does not apply to other categories of consumers.

Importantly, Congress clearly considered the impact of medical debt reporting and specifically chose not to exclude all categories of medical debt from consumer reports, even though it could have if that was its intent. In the context of the FCRA's stated purpose of providing accurate credit reports, the choice *not* to exclude reporting of medical debt reflects a policy determination: medical debt is the type of information necessary to provide fair and accurate credit reports.

The Bureau's Proposal raises a major question concerning the balance between accurate credit reporting, consumer privacy, and fairness. It did so by specifically enumerating what types of information are exempt from reporting. The FCRA does not delegate to the CFPB the authority to unilaterally upend this balance by deciding without any mandate or guidance from Congress that medical debt—or any other category of consumer debt—is uniquely harmful to consumers.

[22] 15 USC § 1681c(a)(6).

Those decisions are inherently legislative; the FCRA does not have any indication that Congress intended to delegate them to the CFPB.

Congress did not intend for the CFPB to use its authority under FCRA to impact healthcare policy or mitigate the effect of healthcare policy on consumers. The legislative intent of the medical debt limitations in the FCRA is to prevent a scenario where a consumer's access to credit is limited or impacted because the creditor determined that a person with their specific medical needs or condition should not be granted credit. This is entirely distinct from the harm the CFPB seeks to prevent by eliminating the reporting or use of all medical debt. The CFPB's Proposal makes clear that the concern its rule is meant to address is that consumers have large amounts of medical debt, and having debt reduces access to credit. This purpose is entirely inconsistent with the legislative purpose of the FCRA.

3. The FCRA does not Authorize the CFPB to Prevent the Reporting of Accurate Information About Credit and Doing so Defies the FCRA's Stated Purpose

The very first line of the FCRA is a congressional finding that "the banking system is dependent upon fair and accurate credit reporting."[23] "Accurate" credit reporting is that which correctly identifies the transactions, accounts, and debts of the consumer. A report that does not reflect significant debts owed by a consumer is, by definition, inaccurate. By finding that the banking system depends on accurate reporting, Congress has expressed its intent to create a system under which all valid debts, including those incurred for medical expenses, appear on a consumer's credit report. While it is arguably not "fair" that consumers are burdened with medical debt in the first instance, that is not the fairness that Congress contemplates or intended to address through

[23] 15 USC §1681(a)(1).

the FCRA. Our banking system does not "depend" on a credit reporting system that only reports debts incurred out of choice rather than necessity. Rather, it depends on creditors having access to the information necessary to accurately predict the risk associated in lending to a particular individual. Ability to pay, amount of debt, past payment history, and history of default are essential to that prediction regardless of how the debt was incurred.

A procedure that prevents agencies from accurately reporting the amount of debt owed by a consumer and prevents lenders from issuing credit based on an accurate assessment of a consumer's finances neither meets the needs of commerce for consumer credit nor results in a system that is fair and equitable to consumers. The stated purpose of the FCRA is to "require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit. . . in a manner which is fair and equitable to the consumer. . . and proper utilization of such information."[24] If creditors are not able to accurately assess the default risk of consumers, the result will be (1) consumers will be allowed to take out more credit than they can repay, resulting in default or bankruptcy and (2) creditors will increase the cost of credit for all consumers to account for the increased risk in lending. Neither of these outcomes benefits consumers.

The CFPB twists language in the statute and incorrectly states that Congress, "has raised concerns with the presence of medical debt information on credit reports."[25] In fact, the CFPB incorrectly added the term "debt" and "debt collection" to a statutory provision that states, "medical information." Here the CFPB is rewriting the statute to concoct an argument about

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[24] 15 USC §1681(b).
[25] Rulemaking Outline at 18.

medical debt credit reporting that is clearly not backed by the legislative history or Congressional intent.

4. Rulemaking Authority About Medical Payment and Cost Lies with Other Federal Agencies

Congress has enacted significant legislation addressing healthcare policy and has expressly delegated regulation and implementation of those policies to other agencies. And this is for good reason—the CFPB's involvement in medical care is tangential. Authority aside, the CFPB does not have the expertise or tools to implement policy that would significantly alter the landscape of medical services and payments. The CFPB has no role in the sale or delivery of medical services, the medical insurance market, or the medical billing system. This is by Congressional design and reflects Congress' intent that the CFPB only regulate financial products and services, not healthcare or medical products and services.

Indeed, Congress has squarely delegated the authority to make policy related to healthcare costs and spending to other agencies. As mentioned above, the recently passed No Surprises Act aims to reduce burdens by helping consumers understand healthcare costs in advance of care to minimize unforeseen medical bills. The No Surprises Act delegated interpretive and rulemaking authority to the HHS, DOL, and the Treasury.[26]

Congress, through its work in the No Surprises Act, makes several points clear: (1) it believes that legislation is needed to make sweeping changes in this market, not that agencies have unfettered unilateral authority; (2) it does not discuss debt collection, so did not identify that market as part of the problem;[27] and (3) it identified certain agencies to address these issues and

[26] *See* 87 FR 52618 (final rules implementing the No Surprises Act issued by the Internal Revenue Service, the Employee Benefits Security Administration, and the Health and Human Services Department).
[27] *See generally*, Pub.L. 116–260, the Consolidated Appropriations Act of 2021. The text of the Act focuses on front-end billing and not collections.

specifically did not include the CFPB. Unless and until Congress acts, nothing changes their directives on these issues.

Similarly, Congress has passed the Affordable Care Act,[28] which contains comprehensive legislations aimed to reduce the cost of healthcare, streamline insurance claims, and increase access to quality medical care. The ACA delegates rulemaking authority primarily to the Department of Health and Human Services, but also to several other federal agencies, yet does not delegate any regulatory authority to the CFPB.[29] Indeed, the Affordable Care Act specifically legislates requirements for the reporting and collection of medical debt but delegated the authority to interpret and enforce this provision to the IRS, *not* the CFPB.[30] The fact that Congress has repeatedly determined that the CFPB is not an appropriate agency and/or does not have the appropriate powers and authority to implement healthcare policy shows that Congress did not intend to grant the CFPB the authority to do so, either under the FCRA or any other financial regulation.

II. THE PROPOSAL WILL HARM SMALL BUSINESSES AND CONSUMERS

Apart from the legal deficiencies and constitutional infirmities discussed above, the Proposal as currently contemplated, will cause substantial harm to both businesses and consumers. Various portions of the Proposal lack clarity, which will undoubtedly lead to confusion about who is covered by the FCRA on a going forward basis and what any given company's precise compliance obligations consist of. This uncertainty will create significant compliance burdens, increased costs (which will likely be passed onto consumers), as well as regulatory and litigation risk. Additionally, the prohibition of medical debt reporting will cause significant harms to small

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[28] Pub. L. 111-148 (2010)
[29] *See generally*, *Id.*
[30] *See* Pub. L. 111-148 § 9007.

businesses, medical and healthcare providers, and consumers. As discussed below, the type of transactions covered by the Bureau's interpretation of the phrase "medical information" will certainly create sweeping and unintended negative consequences in all credit markets. This in turn will harm many small businesses, as well as consumers.

A. The Proposal Undermines the Purpose of the FCRA

As detailed above, Congress enacted the FCRA to ensure fair and accurate credit reporting.[31] This is important because accurate and complete credit reporting facilitates the efficient functioning of credit markets. Those who have consistently repaid their debts and have sufficient income to meet their liabilities qualify for ongoing credit. And those who have a poor history of repayment behaviors or simply lack sufficient income to accommodate their various debt obligations will be offered less credit or on more stringent terms.

The Proposal, as currently contemplated, runs afoul of the FCRA's guiding purpose. Specifically, the Proposal arbitrarily assumes, without sufficient evidence, that one type of debt, medical debt, is nonpredictive of consumer risk. Without any supporting data, the Bureau takes the position that the reporting of medical debt harms consumers and prevents them from obtaining credit to which they would otherwise be entitled to. The Bureau then proposes that medical debt tradelines should be removed entirely from consumer reports.

As a threshold matter, the Bureau's determination that medical debt should be afforded less protections and different treatment than other types of debt is arbitrary and capricious, not to mention likely unconstitutional. As discussed more below, the Bureau's Proposal relies on a skewed reading of data that is nearly ten years old and fails to consider any of the recent regulations

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[31] 15 U.S.C. § 1681.

that have been implemented to address the Bureau's perceived failings of the healthcare system. And even that (arguably obsolete) data acknowledges that medical debt information has some predictive value of credit risk. But the Bureau ignores this and takes the unsupported position that medical debt data has no value in credit risk predictions. On the contrary, medical debt data, like any other debt obligation financial data is critical to the determination of a consumer's capacity to take on more debt and repay that debt in a timely and consistent manner. Thus, the removal of medical debt information from consumer reports will directly contravene the stated purpose of the FCRA and its goal of ensuring fair and accurate credit reporting.

1. Fair and Accurate Credit Reporting

Our entire financial market depends on accurate credit reporting. This is because when a potential lender or creditor evaluates whether to extend credit to any particular person, they must have a complete picture of the applicant's financial profile. Certainly, this inquiry considers an individual's borrowing and repayment behaviors. But, critically, it also shows what liabilities that individual already has. If a consumer report omits certain information, then potential creditors are left without the information they need to assess repayment and delinquency risk. The Bureau takes the position that medical debt is less, or even non-predictive of consumer risk. However, the reality is that medical debt, like any other type of consumer debt, must be considered when evaluating the creditworthiness of any particular applicant.

For example, if a consumer has $24,000 in medical debt that they are supposed to be paying in monthly installments of $1,000 per month, this information is absolutely critical to other potential lenders. If the same consumer goes to a dealership to purchase a new vehicle, the lender will be able to see that any financing it offers should account for that existing $1,000 per month liability. However, under the Proposal, this medical debt obligation would be invisible to the

dealership lender. The result would be that the lender may be willing to extend more credit than the consumer can actually afford, because the lender does not know about the prior obligation. If the consumer then took on the additional debt for a vehicle, they could easily become over leveraged. Now, the lender is at risk of non-repayment, and the consumer is at heightened risk of delinquency across all their financial obligations. All of this is due to having inaccurate and incomplete information.

B. The Proposal Will Hurt Access to Credit in the Market Generally

The above example illustrates the risks that will lead to a credit crunch, thereby damaging economic mobility for many financially healthy consumers, as well as small businesses.

1. Incomplete Credit Data will Result in a Credit Crunch

When lenders and creditors are faced with incomplete credit data, their risk increases. This then translates to more stringent underwriting standards and subsequent reductions in lending activity. And those that are hurt the most are consumers and small businesses. The incremental steps already taken have shown that the market can implement solutions that consider the unique nature of medical debt while also ensuring access to information about a potential borrower that could impact their ability to repay the loan obligation. While the intent of the Proposal is to increase consumer's credit scores so that they can more easily access credit and obtain credit at better terms, the actual impact of the Proposal would be to increase the cost of credit to all consumers, not just those consumers who have outstanding debt obligations. Many creditors have discussed the impact of these changes and have already introduced "FICO creep" in their underwriting decisions – meaning the related FICO underwriting requirements for scores increases across each segment.

C. The Proposal Will Result in Increased Inaccuracy in Consumer Reports

As detailed by several SERs during the SBREFA panel discussions, incomplete financial data creates inaccurate consumer reports. When lenders and creditors cannot rely on the information provided in consumer reports, they either refuse to extend credit altogether or use other, less particularized methods, to ascertain credit worthiness on a statistical basis. This leads to the exclusion of certain groups and people that can no longer set themselves apart through their historically positive payment behaviors. It also increases the risk that lenders and creditors are forced to rely on statistical information that may further promote systemic biases in the financial markets, further excluding individuals who would otherwise have been offered credit.

For example, take an individual who lives in an older and less affluent area. This person has $10,000 in medical debt but has consistently been paying it on time, each month, and is almost finished paying it off. Under the Proposal, this medical debt tradeline, along with all its positive payment history, would be erased from the individual's consumer report. Now, potential creditors have less information about this individual and will be forced to rely on less predictive and potentially biased information about this person. Indeed, a potential creditor may only be able to consider this person's statistical probability of repayment based on their demographic information, where they live, and generally whether people in that area are good about repaying their debts. Now, the consumer suffers because, while their own payment history is exemplary, they have no way to distinguish themselves from others in their statistical group who may have less positive repayment history. All this consumer's efforts to be responsible and honor their debt obligations are for naught, and now they will be assessed in a way that ignores the reality of their financial situation and repayment behaviors.

Not only does this reality harm the consumer who has been financially responsible; it also creates a direct disincentive for consumers to pay their medical debts. If all the money poured towards paying off their medical debt is invisible to lenders, why bother making payments at all? A reasonable consumer would elect to spend that money elsewhere, paying down other debts, or putting it in savings. Credit reporting efficiencies are based on a carrot and stick approach. People want to pay their debts so that they are attractive to lenders and qualify for superior credit offers. Likewise, people want to avoid becoming delinquent on their debts because they understand that negative marks on their consumer reports will hinder their eligibility for credit in the future. The Proposal ignores these realities.

D. **The Proposal Will Harm Small Businesses**

Multiple commentators during the SBREFA process explained that the Proposal, even as vague as it is right now, will create significant harms to small businesses. As a threshold matter, the Proposal is unclear on who and what types of businesses will be covered by the expansive definitions of consumer reports and medical debt. The CFPB even acknowledged that this Proposal was not fully thought out and only included broad policy ideas. Additionally, some of the coverage will be triggered by conduct outside of the particular businesses' control. For example, one SER commented that third-party use of certain information would be the ultimate determining factor of whether the provider of such information was a credit reporting agency. Multiple SERs commented that the Proposal is unclear regarding what constitutes medical debt. Does medical debt include veterinarian services? Does it include dental or eye care? Does it include counseling and therapy? Would the prohibition against medical debt tradelines apply to consumers who finance cosmetic procedures? And what about consumers who use credit cards to pay for medical care and devices like OTC medications, bandages, or a trip to the dermatologist? The Proposal

includes no indication of who and what is covered, leading to regulatory risk and a situation where small businesses will be forced to accept the costs of compliance "just in case."

1. Compliance with the Proposal will be Unduly Expensive.

Given the nonspecific nature of the Proposal, as well as uncertainty about who it covers, it is difficult for companies to ascertain the full scale of their compliance costs at this time. However, what is clear is that the sweeping coverage and regulatory changes contained in the Proposal will be significant and will harm many small businesses. One category of small businesses that stand to lose the most are those providing medical and health care. Doctors, dentists, physical therapists, etc. will undoubtedly suffer severe consequences under the CFPB's Proposal. However, given the broad language in the current Proposal, essentially any lender, creditor, debt collector, data broker, and anyone who shares or uses consumer data, could be significantly impacted.

For those that might be considered credit reporting agencies under the new proposed definition, they will have to revamp their entire businesses to comply with the FCRA obligations specific to CRAs. This will be cost prohibitive for many companies. Among other costs, numerous SER commentators explained that the current Proposal would require substantial financial investment, both as an initial matter and for ongoing compliance. Many small businesses would need to hire additional staff to meet the compliance burdens. They would also need to hire legal counsel to help guide them through the regulatory morass. Computer programs and software will need to be updated and companies will need to invest in different technologies. Many will be forced to renegotiate contracts with vendors and third parties to accommodate the changing nature of each business and how they are covered by the FCRA. A conservative estimate from some of that initial compliance costs for affected small businesses is that the initial cost will exceed $250,000.00, with annual follow-on compliance costs of at least $125,000.00.

For ACA's members, the cost will further accelerate the pace of small business closures. Small businesses in the collection industry have been going out of business at an increasing rate and the leading reason that these companies claim as the driving factor for the closing is the increased compliance costs required to remain in the industry. As the CFPB has acknowledged, nearly 93% of companies in the debt collection industry fall within the definition of a "small business." Thus, it cannot be overstated that the Bureau's current Proposal will have extremely detrimental effects for nearly the entire debt collection industry and those that they serve, including but not limited to doctors and other healthcare providers.

2. The Proposal will Result in the Reduction or Elimination of Small Businesses.

For many small businesses, the Proposal will ultimately result in their reduction or elimination. As mentioned by multiple SERs during the SBREFA panel discussions, when compliance costs become too burdensome, small businesses pay the highest price. They are often forced to reduce offerings or cut entire business lines and products. In the worst-case scenarios, they either go out of business completely, or they are acquired by a larger company that has the ability to absorb the compliance burdens. This leads to market and industry consolidation, whereby only the biggest companies, who already utilize vertical integration, can survive. Small businesses that operate through the use of many vendors and third parties will simply be unable to compete. The trickle-down effect then also hurts consumers. Where a consumer might have previously had better access to care, they are now dependent on large companies that may not have a meaningful presence in their community. And even for those who still have physical access to care, the reduced competition in the market drives up consumer pricing, meaning that some will be prevented from accessing care because of increasing consumer costs.

The compliance burden is not the only part of the Proposal that will harm small businesses. The practical effects of the medical debt tradeline prohibition will also create significant financial harms to small businesses, some of which have not been included in the SBREFA process. For example, medical providers have already seen a marked reduction in successful collection efforts based on the CFPB's public opinion that medical debt should not be reflected in consumer reports. As multiple SER commentators noted, many consumers believe that if a debt is not reflected on their report, they don't have to pay it. And even for those that do understand that they still have a financial obligation to repay, there is absolutely no incentive to pay their medical debts if it will not go on their consumer report and impact their future eligibility for and access to credit. The result is that medical providers, who have become creditors by nature of allowing consumers to finance their healthcare procedures, are put into a position where there is no incentive for consumers to actually pay their bills. Critically, medical and healthcare providers were not invited to participate in the SBREFA panel and therefore, the CFPB has failed to include input from potentially the most important stakeholders who will be affected most directly by this Proposal. Not only does the CFPB's arbitrary singling out of medical debt place our healthcare professionals in second class status, but the long-term results will be deleterious to consumers, the very people that the Bureau claims to be protecting.

E. **The Proposal Will Harm Consumers**

Turning back to the portion of the Proposal that seeks to eliminate the reporting of medical debt, we explain how that particular provision will harm consumers. As detailed above, when lenders, creditors, or even medical providers are evaluating whether to extend financing to a particular consumer, they are handicapped in this process when they only have access to incomplete and inaccurate consumer information.

1. Lack of Access to Credit for Critical Care.

When medical debt is eliminated from consumer reports, many consumers believe that it is not owed. And for those that understand they still have a debt liability outstanding, there is no incentive to pay it. The result is that many medical providers will see a marked decrease in results from their collection efforts. While many healthcare providers currently allow their patients to finance services, this option will be eliminated in favor of pre-payment. If doctors and other healthcare workers are unable to collect payment after services have been rendered, they will undoubtedly stop offering financing options and will only provide services to those who can pay for them beforehand. This means that those consumers who cannot afford the out-of-pocket costs for care will be forced to use high-cost financing methods like credit cards, or in the worst case, forego medical treatment altogether. This predictably will hurt consumers generally but will harm traditionally underserved communities like minorities and rural people the most. While affluent consumers may be frustrated by the lack of convenience offered through financing options, they will still be able to get the care they need by paying for it upfront. However, for those who do not have the means to pay for an entire procedure upfront, they will be denied access to care. And then, what may have been a small or preventable issue, could grow into a life-threatening emergency, where the individual is forced into emergency care at the ER. Not only is this person's health more at risk, but the cost of care has increased significantly. And because hospitals are not able to turn away life threatening emergencies, those providers are forced to absorb even higher costs of care (which otherwise could have been prevented), that are then passed onto society in the form of higher healthcare costs generally. Given the Bureau's stated goal in reducing some of the healthcare burdens, the result of the Proposal will exacerbate the issues that already exist in the healthcare industry.

2. Lack of Care Altogether where Small Businesses have Closed Locations or Entire Lines of Business.

In addition to care denial caused by lack of credit and financing options, the Proposal and its associated costs will also harm consumers by eliminating their physical access to healthcare. In many communities, including those in rural areas, there is a dearth of healthcare access already. Small towns and disadvantaged communities are less likely to have large medical facilities, including hospitals. They are also less likely to have specialists in critical areas like oncology. It is not uncommon for these locations to only be served by small medical providers. If the cost of compliance becomes too great, these small businesses will be forced to close or merge with a large company, leading to further market consolidation. The closure of these practices will mean reduced access for consumers. Consumers will now be forced to drive excessive distances to reach care. While this may be a matter of convenience for those who have the luxury of time, it could mean life or death for others. It is easy to see how having to drive 45 minutes to reach a hospital could be too long for some healthcare emergencies. Alternatively, if the medical need is great enough to warrant flight for life, the consumer is then saddled with excessive costs for that emergency transport. Even for those small businesses and providers that remain in a community, they may have insufficient staff or funding to be open more than a few days a week. Again, consumers are the ultimate losers in this situation.

III. RESPONSES TO SPECIFIC QUESTIONS POSED IN THE PROPOSAL

A. General Response about Questions Related to Disputes

Debt collectors do not differentiate between legal and factual disputes. This would be impossible to do because it would require collectors to make legal determinations, which could result in the unauthorized practice of law. However, under the FDCPA, consumers have the ability to dispute a debt orally or in writing. A disputed debt must be marked as disputed in a debt

collector's records, and if the debt is subsequently reported to a CRA, the report must reflect the dispute. If a consumer disputes a debt in writing and within thirty days of receiving the validation notice, a debt collector must send verification of the debt to the consumer before continuing collection activity. Under Regulation F, if a debt collector furnishes information to CRAs, the debt collector also has additional compliance obligations under the FCRA if a consumer disputes a debt. Despite rhetoric from the CFPB not acknowledging this, the law already prohibits a debt collector from communicating to any person credit information, which the debt collector knows or should know to be false, including the failure to communicate that a debt is disputed. Therefore, if a debt collector reports the debt to a CRA, either method of dispute requires the debt collector to mark the account as disputed on the consumer's credit report when initially reporting the debt.

A consumer, under current law, does not need to state a reason for the dispute to trigger the debt collector's duty to mark the account as disputed when the debt collector reports the debt to a CRA. The disputed status must remain on the report until the consumer no longer disputes the information.

Since debt collectors are already prohibited from knowingly reporting false information, they already have a system in place to address any one-off issues that would result in a so-called "systematic dispute." Any additional regulation in this area would be duplicative to the many protections under the FDCPA and FCRA that do not allow for reporting inaccurate information, and the various legal mechanisms to address it if it happens.

B. Response to Medical Debt Questions

Q. **Under the proposals under consideration, would you anticipate that medical debt collectors would stop furnishing medical debt collection information to consumer reporting agencies and use alternative debt collection methods? If so, which ones?**

- If the Proposal to prohibit data furnishers from reporting medical debt to the consumer reporting agencies is moved forward, medical debt collectors would ensure they are in compliance with all applicable laws and regulations. If the proposals to permit data furnishers to continue to report medical debts but would prohibit creditors from considering this information in an underwriting decision were to move forward, it is uncertain whether medical debt collectors would continue to furnish the data to the consumer reporting agencies. There would most likely be a split approach with each medical debt collector to continue to analyze the cost of reporting against the perceived benefit received. If the costs outweigh the benefits, most reasonable operators would cease from engaging in that activity.
- If medical debt collection information was prohibited from being used on consumer reports, providers will likely pursue a variety of modifications to their billing strategy including requiring upfront payments, restricting access to care, and to consider pursuing a litigation strategy if that was their only avenue to collect the balances due for services provided.

Q. To what extent do creditors currently use medical debt collection information when making credit eligibility determinations, including to comply with other laws or requirements? Do creditors use medical debt collection information for other purposes in connection with a credit transaction?

- Creditors review an applicant's eligibility for credit based on income, expenses, assets, and liabilities. Creditors and regulators alike may disregard certain assets and certain liabilities (i.e. medical debt) when making their net worth evaluations. CRA's have various scoring

models that are also adjusted to weight certain items on a consumer's report higher than other items based on the circumstances.

- The CFPB's own research says medical debt is less predictive, not non-predictive. Even though some credit reporting agencies have given less weight to medical debt, they still consider it. Thus, any lender providing credit and relying on credit scores is using this information. The CFPB does not appear to have studied this issue at all, and it is too soon to determine how the CRA change related to debts under $500 will impact lending.
- If medical debt tradelines have no value in identifying risk, then the market would not use the information. As outlined in the economic analysis, the CFPB's own research shows that medical tradelines are informative in assessing a potential consumer's risk. However, given that there is no obligation to use credit report data, if medical debt had no value in assessing risks, then good risks, having depressed credit scores due to medical debts, were being offered bad terms of financing. Enterprising firms would be incentivized to identify this mispriced risk and offer better terms of financing. The business stealing effect is real, powerful, and works to discipline markets. By removing medical tradelines, the CFPB is removing valuable information for the pricing of risk and causing other issues associated with tinkering with credit scores and modeling.

Q. What are the pros and cons of an alternative approach of mandating a delay in the furnishing and reporting of medical debt for a particular period of time, and not reporting or furnishing medical debt below a particular dollar amount?

- A benefit in delaying credit reporting for a particular period of time is that, in theory, it provides more opportunity for the medical debt collector resolve the account for the consumer before the debt negatively affects the consumer's credit history.

- The biggest con with the delay in the furnishing of medical debt for a particular period of time would be related to the "Timely Filing" requirements of many insurance contracts that removes the liability of the insurance company to have to pay for a covered claim. If a patient doesn't provide information to allow the insurance company to process a claim within the timely filing requirements, the patient will be liable for the entirety of the bill despite the fact that they paid for insurance coverage. If a provider's attempts to assist the patient with their insurance claim are unsuccessful, the credit reporting action provides incentives to provide the necessary information to get the insurance company to process the claim.
- Learning about a financial obligation on their credit report may alert a consumer about an issue with their insurance company, or act to avoid future litigation. Taking away this option for learning about financial obligations means more consumers will be surprised when the first time they become aware of a debt is after they are served with a lawsuit. At that point, they must immediately spend additional resources to respond. They also may miss important insurance deadlines and be forced to pay out of pocket for medical care that could have been covered by insurance or charity care. Credit reporting provides for the most efficient mechanism to achieve resolution of the account and at much reduced cost as compared to the costs of litigation or delay. Further, the stress and embarrassment of having to respond to a lawsuit as opposed to not getting approved for a new car loan more than likely prefers the denial of credit option especially considering the account will be deleted once paid or otherwise resolved.
- Healthcare Financial Management Association ("HFMA") and ACA International in 2020 jointly published the 2nd edition of Best Practices for Resolution of Medical Accounts with

input from consumer groups and providers. These Best Practices further enhanced controls over credit reporting, and purposefully arrived at 120 days from the date of first discharge billing as an appropriate time for credit reporting to ensure accuracy in the final adjusted amounts as well as for the consumer to file a claim with the payer if needed. In addition, the 120-day period could be extended if the claim was subject to an insurance dispute. Extended deadlines provide the appearance that the matter isn't important and don't need to be addressed.

Q. What are the pros and cons of an alternative approach of requiring consumer reporting agencies and furnishers, upon receiving a dispute, to conduct an independent investigation to certify that a disputed medical debt is accurate and not subject to pending insurance disputes?

- A Benefit of an approach requiring CRA's and furnishers to conduct an independent investigation to certify that a disputed medical debt is accurate and not subject to pending insurance disputes is that this would presumably improve the accuracy of medical debt being reported when the account should have been paid by insurance. The con to this approach is that it overlooks the reality that the medical provider and/or its revenue cycle partners are able to resolve the insurance dispute without the cooperation of the patient. The medical provider would much prefer to get paid by an insurance company and to imply that medical debt collectors attempt to collect amounts from patients that they know is due from an insurance company is illogical.
- If a matter is subject to a "pending insurance dispute" is not clearly defined. If the medical provider has done all they can do to resolve the insurance dispute, it still may be subject to a dispute by the consumer that is beyond the control of the medical provider.

- It is important that any insurance disputes would require the consumer to provide all necessary information to submit the claim, substantiate the claim, or otherwise coordinate benefits with other liable parties for whom the consumer believes is liable for payment of the account.
- As discussed above, there are already many legal requirements and protections related to disputes. If an insurance company should be paying and it is disputed, there is already a mechanism and legal requirements in place to address that. This is a matter of law that the CFPB does not have jurisdiction over.
- At a higher level, this seems like a problem with insurance companies that should be fixed on the front end, not on the back end, by adding even more complexity to the credit reporting process.

Responses to High Level Questions Related to the Entire Proposal

Q. How, if at all, will the proposal under consideration require your firm to change its operations, products, or services?

- The proposals under consideration would require our firm to conduct a comprehensive compliance review to determine all areas in our company that are affected by the final rule. We would need to determine which policies and contracts would need to be updated to reflect the new regulations. New contracts or addendums would need to be provided to all clients who credit report along with outreach about why the new regulations required an update in the contracts with our clients.
- As far as how it would require our firm to change its services, we would need to evaluate each client agreement to determine if fees for services need to be adjusted as a result of any new regulations.

- Many clients would choose to no longer do business with our company if we are not able to credit report their medical account balances and instead the clients would require payment before any services are rendered.
- Costs to collect outstanding medical debt would skyrocket. Debt collectors would not be able to handle the expected increase volume and reduced liquidity under existing fee structures. Administration costs already contribute to the affordability of healthcare problem, this Proposal would further exacerbate the affordability of healthcare issue.
- There would be significant costs associated with making compliance changes, including rewriting policies and procedures, employee training, and system updates. If ultimately it became more difficult to collect, and there was a need for an increase in litigation, hiring attorneys and retaining law firms would be a significant costs increase.

Q. What do you anticipate will be the initial and ongoing costs to your firm, if any, of complying with the proposal under consideration? If applicable, how do those costs compare to your firm's current costs to comply with the provision(s) of the FCRA or Regulation V related to the proposal under consideration? Please quantify all such costs by type and amount to the extent possible.

- The data provided in this comment outlines that there would be nearly a 10 percent decrease in collections, or approximately $800,000 in annual revenue to an average small business in the consumer collection industry (less than $15 million in Revenue).
- Medical debt collectors measure their unit cost which, in rough format, would be total costs of operation divided by the total number of accounts placed during the same period (cost / accounts). Utilizing credit reporting allows debt collectors to keep their unit costs below $10 per account on average. If debt collectors were required to pursue a litigation strategy

instead, the unit costs increase to around $500 per account depending on the account balance. This is a 500% increase in unit costs. These costs are attributed to the court costs and service of process costs along with the attorney fees.

- The Bureau's Proposal would essentially make medical debt payment voluntary. The economic consequences of this will be massive and cannot even be quantified in the short time frame provided for comments.
- For many ACA members and creditors, adding or expanding legal programs would be a significant cost. Hiring in-house or outside law firms, and the cost of litigation may be approximately a million dollars a year, and much more for businesses with larger volumes of healthcare debt.

Q. What aspect or aspects of complying with the proposal under consideration would be the most challenging?

- The most challenging aspect of complying with the Proposal under consideration is that we would need to review and amend every customer contract and explain the changes in the law to our clients.
- The proposals would require more firms to increase the frequency of communication attempts and increase overall FTE count by 10% to maintain the same results achieved by utilizing credit reporting as an efficient tool to aid in recovery of justly owed debts.
- Communications with consumers would be more challenging and complaints against medical debt collectors will most likely increase because the message being sent by the CFPB in these proposals is that consumers do not need to pay their medical bills or that the medical bill is somehow less important than other obligations.

Q. What alternative approaches, if any, should the CFPB consider in lieu of the proposal under consideration?

- The CFPB should consider studying the impacts of the changes enacted by the CRAs related to medical debt including raising the minimum balance for reporting to $500.00.
- There is universal support for removal of paid medical debt from a consumer's report.
- Consumer education and outreach on understanding the complex healthcare financial transaction including how to read an Explanation of Benefits received from the insurance carrier and comparing that to the itemized statement from the provider to help consumers better understand the process. The Bureau could work cooperatively with industry to deliver that education.
- The CFPB should consider providing guidance to medical debt collectors that the inclusion of a medical provider's financial assistance policy in any debt collection communications would be covered under the safe harbor provisions of Regulation F.
- Consider limiting the application of the rule to emergency medical situations such as care provided in the Emergency room. This type of medical issue is distinctly different from a scheduled procedure. Issues surrounding challenges to the billing component of an emergency medical situation include the consumer not having the proper insurance information (whether they don't have their health insurance card, know who their employer's work comp carrier is, or information related to the liability insurance for the accident); intake paperwork is not as accurate as pre-scheduled procedures because of the rushed nature of the intake; and the services are generally not planned or expected. The CFPB should consider limiting the application of the rule to emergency medical situations.

- Provide a clear definition of medical debt specifically exempting payments made for medical services on a credit card. If payments made for medical services on a credit card are considered medical debts, credit card companies would need to implement new processes to ensure that the portion of the balance that was used for medical services is not credit reported or communicated to creditors.
- Provide a clear definition of medical debt and the scope of application. Exempt out certain types of medical procedures, including veterinarian, dental, primary and specialty care to ensure continued access to these services.
- The No Surprises Act went into effect on January 1, 2022, which will reduce the level of emergency services costs and out-of-network insurance bills. This will reduce the easier to challenge medical tradelines that may be driving the Bureau's observed results. The No Surprises Act and Regulation F have already reduced the level of medical debt tradelines on credit reports. Both of these just recently went into effect. We suggest the CFPB wait and study this issue to determine if there is a problem before moving forward.

Q. Other than compliance costs, what costs, burdens, or unintended consequences should the CFPB consider with respect to the proposal under consideration? Please quantify if possible. What alternatives, if any, would mitigate such costs, burdens, or unintended consequences?

- The Proposal provides an incentive for consumers and employers to drop their employer sponsored health plans. Health insurance premiums are expensive; small businesses pay the highest level of premiums since they do not have the bargaining power of a larger employer or government plan. The Proposal will increase the costs of insurance and reduce

the consequences of not paying medical bills. This impact would make the worsen the affordability of healthcare challenges.

- Consumers who pay an out-of-pocket premium on health insurance may choose to no longer carry health insurance if medical debt is no longer credit-reported. Even for individuals who qualify for Medicaid, they may not see the value of taking the time to apply if there is no impact on their credit score. The unintended consequence may be a large reduction in insurance dollars to Medical providers, leading to a reduction in services or staff available to consumers.
- FICO Creep may increase the cost of credit to consumers who didn't have medical debt on their credit report. A recent urban institute study stated that 5% of Americans have medical debt on their credit report after the changes instituted by the CRA's.[32] If these accounts are removed for the 5% of Americans that have medical debt reported on their credit, the 95% of Americans who pay their medical bills will be forced to pay for the increased defaults resulting from the higher credit risk assumed.
- Reduction in funds to government entities at the state and federal levels. Increased need for funds out of the general budget.
- The costs of litigation will be increased and borne by consumers. As more debt collectors and health care providers turn to the legal system, the costs will be charged to the consumers and raise the overall costs for all patients.

Q. Are there any statutes or regulations with which your firm must comply that may duplicate, overlap, or conflict with the proposal under consideration? What challenges or

[32] https://www.urban.org/urban-wire/medical-debt-was-erased-credit-records-most-consumers-potentially-improving-many

costs would your firm anticipate in complying with any such statutes or regulations and the CFPB's proposal under consideration?

- The FDCPA, the FCRA, GLBA, the Health Insurance Portability and Accountability Act, several other privacy laws, and many state laws already address the CFPB's concerns related to reporting of inaccurate information and protecting consumer privacy. Duplicative regulations create a number of compliance burdens including rewriting policies and procedures, employee training, and system updates. If ultimately it became more difficult to collect, and there was a need for an increase in litigation, hiring attorneys and retaining law firms would be a significant cost increase.
- Medicare cost reporting rules require hospitals to engage in "reasonable collection efforts" to attempt to collect Medicare beneficiaries' share of costs. Medicare recognized that it is in the best interest of taxpayers for medical providers to attempt to collect the patient share of costs as determined by the Medicare benefit calculation. Included in the reasonable collection efforts discuss credit reporting of those accounts as a reasonable collection effort.
- The Bureau's ability-to-repay requirements cannot be met when creditors do not have access to all the information about consumer's expenses and obligations.

Q. What factors disproportionately affecting small entities should the CFPB be aware of when evaluating the proposal under consideration? Would the proposal under consideration provide unique benefits to small entities?

- All of the outlined compliance and costs burdens are exacerbated for small businesses who have fewer staff members, less in-house legal counsel, in some instances very specific

client bases that will be disproportionally impacted, and fewer resources to devote to duplicative compliance requirements.

- Small businesses pay higher premiums for health care than larger employers. As the market adapts to the proposed changes, increased health premiums are expected as medical providers become more reliant on the insurance payment. Small businesses would absorb a higher percentage of the increases as they lack the bargaining position of larger employers or government employers.
- Most of the medical providers that credit report their bad debt accounts are small businesses. Dentists, family practitioners, and other such small businesses are unable to absorb the credit losses as easily as a large health system. There is already a consolidation trend and challenges for the small and solo practitioners in the healthcare industry; the proposals will accelerate this shift and make it nearly impossible for the small provider to remain independent from a health system.

Other Questions Related to Impact, Implementation and Costs

Q. Please provide input on an appropriate implementation period for complying with a rule finalizing the proposals under consideration. Are there any aspects of the CFPB's proposals under consideration that could be particularly time consuming or costly to implement? Are any of these challenges particular to small entities? Are there any factors outside a covered entity's control that would affect its ability to prepare for compliance?

- At least three years. This is a massive change, so small entities will need as much time as possible and could go out of business regardless of what the timeframe is. Section 501(r) of the internal revenue code was implemented as part of the Affordable Care Act that

addressed similar provisions relating to Medical debt. That law was implemented in a three-year period.

Q. Please provide feedback on the CFPB's understanding of the small entities that could be affected by the proposals under consideration.

- As discussed above, the CFPB does not appear to have any healthcare or housing providers, both groups that could be impacted by these changes.

Q. For the proposals under consideration that are relevant to their businesses, small entity representatives are encouraged to provide specific estimates, information, and data on the projected one-time and ongoing costs of compliance if the proposals were adopted. Information and data on current FCRA compliance costs (baseline costs) will be valuable as well.

- Medical debt collectors generally appoint a compliance officer over their operations to develop and maintain the compliance management system for the business. During the implementation period, the compliance manager would need to focus substantially all of their time dedicated to updating the company's policies and procedures. Outside counsel will need to be retained on an hourly basis to review and approved the changes to the policy at an estimated expense of $20,000 that would not otherwise be required.
- Client communication and updated contracts would require the medical debt collector to review every client contract that includes credit reporting as a service and negotiate a new contract. This would require legal review of each contract modification. The client services requirement would require the hiring of an additional FTE for a period of one year to complete the process at an estimated total costs for that FTE at $72,000 for the year. The legal review portion is estimated between $10,000-$20,000.

- Implementation of alternative collection strategies including litigation. This would require the hiring of one FTE (for a small business) to manage the new workflow at an estimated costs of $72,000 for the first year and continuing thereafter. Processes to invoice clients for courts costs and maintaining a client costs trust account would require further additional costs to implement and maintain.
- Ongoing costs of compliance would require the continued employment of the compliance officer (approximately $125,000 annually), litigation manager FTE ($72,000 annually), and increased expenses of alternative collection strategies (litigation) would be $500 per account. The volume of accounts anticipated to be pursued would equate to close to $500,000 annually, if not higher.

Q. For each of the proposals under consideration above, do you expect that your firm would restrict or eliminate any product or service offerings to comply with the rule? If so, how would the proposals impact those products or services?

- If credit reporting medical accounts becomes prohibited, we would stop offering these services to medical providers. This is a complete elimination of service offerings of many medical debt collectors and would cause many small businesses to close their doors.

Q. What benefits do you expect small entities may experience from any of the proposals under consideration listed above?

- None. Instead, we think instead there are many unintended consequences as outlined above and in the attached economic analysis.

Q. Would the proposals under consideration affect the cost and availability of credit to small entities?

- Yes, please see attached economic analysis.

IV. THE BUREAU SHOULD CONDUCT ANOTHER SBREFA OR ISSUE AN ADVANCED NOTICE OF PROPOSED RULEMAKING

During the panel, the CFPB on multiple occasions was not able to provide specifics or to define aspects of the proposal that were needed to give a conclusory response to estimates about the full impact on small businesses. Specifically, not knowing how the CFPB defines medical debt, makes it nearly impossible to respond to a number of questions the CFPB poses. Since multiple stakeholders, including the American Hospital Association[33] have indicated that the Proposal could have a sweeping impact on the health care market and the economy, it is critical for the CFPB to solicit more comprehensive feedback from a variety of stakeholders before moving forward. Accordingly, I request that the CFPB hold another Small Business Review Panel with more complete information, or alternatively issue an Advanced Notice of Proposed Rulemaking, to allow stakeholders to understand and comment on the CFPB's policy making goals.

V. THE PROPOSAL LACKS DATA, RIGOROUS ANALYSIS, AND MAKES UNFOUNDED ASSUMPTIONS

Separately attached, please see economic analysis provided by Dr. Andrew Rodrigo Nigrinis.

[33] "It is also possible that this proposal may incentivize patients to forego paying bills for care that they received and for which they have been determined liable. However, it is not possible to quantify the cost of either of these potential consequences." American Hospital Assoc., Letter to the Consumer Financial Protection Bureau on Consumer Reporting Rulemaking and Medical Debt.