AMERICANS for TAX REFORM
722 12th Street, N.W. • 4th Floor • Washington, D.C. 20005

August 9, 2024

Comment Intake—2024 NPRM FCRA Medical Debt Information
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Submitted via regulations.gov

Re: Prohibition on Creditors and Consumer Reporting Agencies Concerning Medical Information (Regulation V) (Docket No. CFPB-2024-0023)

To whom it may concern:

Americans for Tax Reform (ATR)[1] appreciates the opportunity to comment on the Consumer Financial Protection Bureau's (CFPB) proposed rule entitled: P*rohibition on Creditors and Consumer Reporting Agencies Concerning Medical Information (Regulation V).*[2] **ATR requests that the proposal be withdrawn given its egregious anti-market provisions and its arbitrary nature.** The proposed rule sets an unaccountable precedent expanding the CFPB's authority without congressional authorization. The CFPB is attempting to remove consideration of medical debt during the assessment of a potential borrower's credit worthiness. This initiative will have wide-reaching effects for both borrowers and lenders, as shown by the CFPB's own data.

Congress specifically enacted the Fair Credit Reporting Act (FCRA) to establish strong privacy protections for consumers' sensitive medical information.[3] However, in 2005, federal financial agencies, including the National Credit Union Administration (NCUA), issued a regulatory exception that allowed creditors to use medical debt information under certain conditions. This exception was created to balance the need for consumer privacy with the operational and risk management needs of creditors. The exception is valid when a criterion test is met:

(1) the information is the type of information routinely used in making credit eligibility determination
(2) the creditor uses the information in a manner and to an extent no less favorably than comparable nonmedical information
(3) the creditor does not take the consumer's physical, mental, or behavioral health, condition or history, type of treatment, or prognosis into account when making the determination

[1] ATR is a nonprofit, 501(c)(4) taxpayer advocacy organization that opposes all tax increases and supports limited government, free market policies. In support of these goals, ATR opposes heavy regulation and taxation of financial services. ATR was founded in 1985 at the request of President Ronald Reagan.
[2] 89 FR 51682.
[3] https://www.ftc.gov/system/files/ftc_gov/pdf/fcra-may2023-508.pdf.

This is a vastly broad exception and is generally applicable to most individuals carrying medical debt.

The CFPB's proposal aims to eliminate the exception for using medical debt. This is based on the premise that medical debt is often unexpected, unwanted, and plagued with inaccuracies. While it is true that medical billing can be complex and prone to errors, prohibiting consideration of medical debt for credit assessments is not the solution. Creditors rely on comprehensive credit reports to assess a consumer's creditworthiness accurately.[4] Eliminating medical debt information will likely reduce the accuracy of credit assessments by failing to take into account all owed debts. This will heighten borrower risk and artificially inflate creditworthiness. Credit scores use credit report data to gauge the reliability of a borrower. It stands to reason that a lower credit rating due to an outstanding debt balance will protect that consumer from additional debt exposure. Diluting the true credit worthiness of a borrower will only result in consumers being over-leveraged beyond what they can realistically afford. It does not benefit borrowers by allowing them to gain access to additional credit when they cannot afford it. In fact, this resembles the impetus for the subprime mortgage crisis.[5]

Furthermore, the CFPB's interpretation of its authority under the FCRA and the Consumer Financial Protection Act (CFPA) raises significant legal concerns.[6] The Administrative Procedure Act (APA) requires that agencies provide substantial evidence and sound reasoning when making regulatory changes, along with authorization from Congress when enacting rulemaking proposals.[7] Congress has not issued any directive for the CFPB to pursue such a program—making it a potentially arbitrary and capricious rulemaking.

The CFPB proposal states private companies and CRAs have been eliminating or decreasing the weighting of medical debt in newer versions of their credit risk models. The private market has already begun to address concerns the CFPB raised without government compulsion. Private businesses should make decisions regarding their approach to risk-taking without government interference. The CFPB's proposal is duplicative and unnecessary.

The CFPB also explains another component of the rationale behind the proposal. The CFPB cites statistics on "consumer reports" that show that a large percentage of medical bills are erroneous and charge people more than what they owe realistically. This cause for concern is irrelevant to the matter at hand. A person's credit profile reflects one's ability to pay back incurred debts. If billing errors occur, then it should be dealt with between patients and their healthcare providers. A mistake on the part of a third party does not warrant placing restrictions on how CRAs and creditors assess borrower risk.

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[4] https://corporatefinanceinstitute.com/resources/commercial-lending/credit-report-analysis/.
[5] https://www.federalreservehistory.org/essays/subprime-mortgage-crisis.
[6] https://www.law.cornell.edu/wex/dodd-frank_title_X.
[7] https://www.law.cornell.edu/wex/administrative_procedure_act.

The U.S. Supreme Court's decision in *West Virginia v. EPA* underscores the importance of adhering to statutory limits and respecting congressional intent.[8] The principles set forth in *West Virginia v. EPA* provide a clear judicial mandate against such overreach when they have outsized economic consequences, reaffirming the necessity for agencies to respect the boundaries of their statutory mandates. The CFPB's proposed rule appears to overstep its authority by fundamentally altering the balance struck by Congress in the FCRA. Unless Congress curtails, amends, or repeals the FCRA, the provisions within the bill must remain in force. Contradicting this principle would exceed the statutory authority of the CFPB by allowing it to ignore and selectively enforce provisions of the FCRA.

The CFPB's proposed rule is an overreach of the CFPB's statutory authority. The FCRA was designed to ensure accuracy and fairness in credit reporting, but it did not envision the complete exclusion of entire categories of debt from consideration. By unilaterally deciding to exclude medical debt, the CFPB is not merely implementing the FCRA but is effectively amending it, a power that resides solely with Congress.

Furthermore, the issue of medical debt errors, while significant, does not justify such a sweeping regulatory change. Billing errors should indeed be addressed, but the proper area for these corrections is between patients and healthcare providers, not through altering credit reporting rules, which is tantamount to dealing with second order effects rather than fixing the cause of the issue. It is also essential to consider the broader implications of the CFPB's proposal on the credit market. Creditors rely on comprehensive and accurate information to assess the creditworthiness of borrowers. By removing medical debt from this equation, the CFPB undermines the ability of lenders to make informed decisions, potentially leading to higher credit costs or reduced access to credit for consumers. This unintended consequence could disproportionately affect those who rely on accurate credit assessments to secure loans for homes, cars, and education.

Moreover, the proposed rule sets a concerning precedent for regulatory overreach. If the CFPB can exclude medical debt from credit reports, it opens the door for future exclusions based on other types of debt or considerations, further eroding the integrity of the credit reporting system. While the CFPB argues that medical debt is not predictive of consumer repayment abilities, the precedent being set is a slippery slope. The potential for future categorical debt exclusions will inevitably diminish the predictive power of credit reports and models. This whitewashing of informative data will ultimately harm both borrowers and creditors.

The FCRA, as amended by the CFPA, grants the CFPB the authority to issue regulations that are "necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof."[9] However, this authority is not without limitations. The FCRA specifically allows the CFPB to "prescribe regulations that permit transactions under paragraph (2) that are determined to be necessary and

[8] West Virginia v. Environmental Protection Agency, 597 U.S. ___ (2022).
[9] https://www.law.cornell.edu/uscode/text/12/5512.

appropriate to protect legitimate operational, transactional, risk, consumer, and other needs."[10] The CFPB's proposed rule seeks to remove the regulatory exception allowing creditors to consider medical debt information, expanding the prohibition on using such information in credit eligibility determinations. This move appears to extend beyond the statutory limitations, as it does not adequately demonstrate that the removal of the exception is "necessary and appropriate" as required by the FCRA. **Congress clearly intended medical debt to be furnished in certain circumstances where it is necessary to maintain credit operations.** This does not diminish the privacy protections that Congress also included in statute.

Courts have historically been critical of regulatory actions that extend beyond the clear mandate of statutory provisions. In the ruling of *Utility Air Regulatory Group v. EPA* (2014), the Supreme Court emphasized that agencies must understand that "the power to execute the laws does not include a power to revise clear statutory terms that turn out not to work in practice."[11] Execution of laws must follow congressional intent and cannot be tailored to the policy preferences of federal agencies. The court found that in regard to climate regulations the "EPA lacked authority to 'tailor' the Act's unambiguous numerical thresholds of 100 or 250 tons per year to accommodate its greenhouse-gas-inclusive interpretation." Agencies must operate within the confines of their statutory authority and cannot extend their reach based on policy preferences alone. This is more important now that Chevron deference has been repealed.[12] Applying this principle, the CFPB's proposed rule can be seen as an overextension of its regulatory authority. The judiciary branch, not the executive branch, interprets the law.

Removing the financial information exception appears to be driven by policy goals concerning "equity" rather than adherence to the statutory intent authorized within the FCRA. This approach risks judicial invalidation on the grounds of exceeding statutory authority, as the CFPB has not provided compelling evidence that the existing exception no longer serves legitimate operational, transactional, risk, consumer, or other needs.

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If you have any questions or need any additional information, please contact Bryan Bashur at bbashur@atr.org.

Sincerely,

Americans for Tax Reform

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[10] https://www.law.cornell.edu/uscode/text/15/1681b.
[11] Utility Air Regulatory Group v. EPA, 573 U.S. 302 (2014).
[12] Loper Bright Enterprises v. Raimondo, 603 U.S. ___ (2024).