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The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G St. NW
Washington, DC 20552

Submitted via www.regulations.gov

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

Dear Director Chopra:

Equifax Inc. submits its comments concerning the Consumer Financial Protection Bureau's (CFPB) June 18, 2024, proposed rule entitled *Prohibition on Creditors and Consumer Reporting Agencies Concerning Medical Information (Regulation V)*.[1] As a nationwide consumer reporting agency (CRA), Equifax is a trusted provider of data, analytics, and technology delivering insights that help consumers, lenders, government agencies, and businesses make decisions. Equifax believes that positive economic change can start with a single opportunity and we are committed to help make those opportunities possible. Like CFPB, Equifax recognizes the impact unanticipated medical debt can have on consumers' financial health and wellbeing. Our decision to change the way we report medical collection information, announced in March 2022 alongside Experian and TransUnion, demonstrates our commitment to helping expand economic opportunities for consumers.[2] Unlike the proposed rule, this decision was made on a voluntary basis and is consistent with previous announcements such as decisions to remove civil judgments and tax liens. Though similarly intended to help consumers, CFPB's proposed rule is flawed because it does not meet the requirements of rulemaking and is not permitted under the current statutory regime.

Equifax's analysis of CFPB's prohibition on creditors and CRAs concerning medical information finds the proposed rule to be arbitrary and capricious. This comment letter details the reasons for this arbitrary and capricious finding including that the proposed rule (I) fails to consider Congress's intent to authorize the

[1] 89 Fed. Reg. 51,682 (June 18, 2024). For ease of reference we refer here generally to creditors, just as the agency has done. In a separate section below we discuss the agency's distinction between provider creditors (and their agents and assignees) and other creditors.

[2] Equifax, Experian, and TransUnion. (March 18, 2022). Equifax, Experian and TransUnion Remove Medical Collections Debt Under $500 From U.S. Credit Reports [Press release]. https://investor.equifax.com/news-events/press-releases/detail/1222/equifax-experian-and-transunion-support-u-s-consumers.

reporting of medical debt information; (II) does not include a meaningful cost-benefit analysis; (III) does not offer substantial evidence to support its assertion that medical debt information is less predictive; (IV) does not provide substantial evidence that medical debt information is inaccurate; and (V) improperly distinguishes between medical debt owed to healthcare providers (or their agents or assignees) and medical debt owed to credit card issuers.

Based on the matters set forth below, Equifax respectfully requests CFPB to withdraw the proposed rule and encourages CFPB to work with Congress to resolve the underlying problem of medical debt.

I. ***CFPB failed to consider congressional intent to permit the reporting of medical debt information under appropriate circumstances.***

The text of the Fair and Accurate Credit Transactions (FACT) Act shows that Congress intended to permit inclusion of medical debt information in credit reports. The statute says that a CRA cannot report information about "transactions, accounts, or balances relating to debts arising from the receipt of medical services, products, or devi[c]es" — "unless" certain privacy conditions are met.[3] In other words, a CRA is affirmatively *authorized* to furnish a credit report that contains such medical debt information *if* the privacy conditions are met. The conditions are that the information is "restricted or reported using codes that do not identify, or do not provide information sufficient to infer, the specific provider or the nature of such services, products, or devices . . . ."[4] The proposed rule directly conflicts with this broad authorization. Under the proposed rule, "a consumer reporting agency generally would be *prohibited* from furnishing to a creditor a consumer report containing medical debt information in connection with a credit eligibility determination."[5]

CFPB effectuates that general prohibition by barring creditors from receiving medical debt information for purposes of evaluating credit risk and then (in parallel) restricting credit reports to information that creditors are entitled to use.[6] CFPB lacks statutory authority to impose that bar on creditor access. CFPB erroneously claims that there is a broad-based statutory prohibition on creditor access and use (in section 1681b(g)(2)), and that it is up to the agency to decide whether or not to make exemptions, through regulations, to the prohibition. CFPB misreads the scope of this statutory prohibition. Section 1681b(g)(2) bars creditor access and use, but only if the medical information identifies, or provides information sufficient to infer, the specific provider or the nature of medical services, products, or devices used by the consumer. If the medical information has been coded to mask such identifying information, the prohibition on creditor access and use does not apply.[7] Accordingly, CFPB lacks statutory authority for its broad-based prohibition.

Even assuming for the sake of argument that the prohibition on creditor access and use (without a regulatory exemption) applies to medical information regardless of whether it is coded as described above, we

[3] 15 U.S.C. §§ 1681b(g)(1), (g)(1)(C).

[4] 15 U.S.C. § 1681b(g)(1)(C).

[5] 89 Fed. Reg. at 51,683 (emphasis added). The FACT Act has a definition of "medical information" that is broader than information concerning medical debt. In these comments, we use the term "medical debt information" to refer to the information described above, which concerns "transactions, accounts, or balances relating to debts arising from the receipt of medical services, products, or devi[c]es." 15 U.S.C. § 1681b(g)(1)(C). We do not use the different definition of that term set forth in section 1022.3(j) of the Proposed Rule, because that definition arbitrarily and capriciously excludes debt owed to credit card issuers, as described below.

[6] 89 Fed. Reg. at 51,736 (Proposed Rule § 1022.38).

[7] *See* 15 U.S.C. § 1681b)(g)(2) (creditor bar applies to "medical information (other than medical information treated in the manner required under section 1681c(a)(6) of this title)"); *id*. § 1681c(a)(6)(A) (requiring "codes that do not identify, or provide information sufficient to infer, the specific provider or the nature of such services, products, or devices to a person other than the consumer").

submit, in the alternative, that the agency's statutory analysis is arbitrary and capricious. By first cutting off creditor access and then reverse-engineering a parallel restriction on credit reports, CFPB turns the statutory scheme upside down. The way the statute is designed, the proper starting point for analysis is section 1681b(g)(1) — the provision that gives CRAs broad authority to report medical debt information for purposes of assessing credit risk. The statute then gives CFPB authority to tailor the specifics of that information by regulation, articulating the details of what creditors may receive and use — by balancing a variety of "legitimate . . . *needs*" against a requirement to "restrict the use of medical information for inappropriate purposes."[8] By putting the cart before the horse, the proposed rule is arbitrary and capricious.

First, the proposed rule is arbitrary and capricious, because it eviscerates the balancing of interests contemplated by the statute. An agency decision is arbitrary and capricious if it is not "based on a consideration of the relevant factors,"[9] such as when the agency "fail[s] to consider . . . a factor" that a statute requires "the agency must consider."[10] CFPB has effectively abandoned the statutorily-required balancing process by largely ignoring legitimate *needs* for the information and concluding that use of medical debt information for purposes of assessing credit risk is virtually *always* an inappropriate purpose.[11]

Second, by concluding that creditors can be prohibited from receiving and using medical debt (for purposes of assessing credit risk) in the face of a broad statutory authorization for CRAs to report such debt, CFPB establishes an irrational, internally contradictory regulatory regime. An agency decision that is "internally inconsistent . . . is arbitrary and capricious."[12] The proper way to construe the statute is to "read statutory text as a harmonized whole, not to foment irreconcilability."[13]

Third, CFPB has a duty to consider "an important aspect of [a] problem" addressed by a rulemaking, and its failure to comply with that duty renders the rule arbitrary and capricious.[14] No aspect of this rulemaking could be more important than assuring that the rule is consistent with Congress's intent and purpose in enacting the FACT Act. By enacting section 1681b(g)(1), Congress intended that CRAs must be permitted to report medical debt information under appropriate circumstances. But CFPB does not even discuss the important implications of that statutory section in the preamble to the proposed rule. CFPB's

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[8] 15 U.S.C. § 1681b(g)(5)(A) (emphasis added).

[9] *Lilliputian Systems, Inc. v. Pipeline and Hazardous Materials Safety Administration*, 741 F.3d 1309, 1312 (D.C. Cir. 2014) (citations omitted).

[10] *Public Citizen v. Fed. Motor Carrier Safety Admin*., 374 F.3d 1209, 1216 (D.C. Cir. 2004).

[11] The specific issues that that CFPB must consider are those "necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (and which shall include permitting actions necessary for administrative verification purposes)." 15 U.S.C. § 1681b(g)(5)(A). The proposed rule would authorize limited creditor access to medical information, by preserving some existing provisions of Regulation V. But those provisions do not satisfy the balancing of interests required by statute. In general, those provisions authorize creditor use of medical information unrelated to debt (such as information necessary to assess consumers' legal capacity or qualification for various types of benefits). *See* 12 C.F.R. §§ 1022.30(e)(i), (e)(iii), (e)(v), (e)(vii)-(e)(ix); *see* also Proposed Rule § 1022.30(e)(x). The statute *requires* CFPB to authorize creditor use of medical information for such "administrative verification," which is only one of the many considerations noted in the statute. Other longstanding provisions preserved by the proposed rule address medical information necessary to comply with other laws (*see* 12 C.F.R. §§ 1022.30(e)(ii), (e)(iv)) and information authorized by a consumer (*see* 12 C.F.R. §§ 1022.30(e)(vi)). Those limited authorizations are at the periphery of, and do not satisfy, the balancing of interests contemplated by the statute.

[12] *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1029 (D.C. Cir. 2018)), *rev'd on other grounds*, *West Virginia v. EPA*, 597 U.S. 697 (2022).

[13] *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 986 (D.C. Cir. 2021).

[14] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

proposed rule is arbitrary and capricious, because the agency has not "show[n] a 'rational connection' between the regulation[ ] and the statute's purposes."[15]

When the agency does consider legitimate needs, it does so in a cursory, superficial manner. CFPB follows that approach with regard to other statutes that impose duties on creditors to assess a borrower's ability to repay.[16] For example, a provision of the Dodd-Frank Act requires mortgage lenders to assess borrowers' ability to repay, among other things by considering their credit history:

> [N]o creditor may make a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan . . . A determination under this subsection of a consumer's ability to repay a residential mortgage loan shall include consideration of the consumer's credit history.[17]

CFPB gives the issue short shrift, stating that a lender can still ask the borrower directly for all current debts, and the borrower may include medical debt information in response.[18] But CFPB does not acknowledge that consumers might decline to include the information. And CFPB does not address the fact that even if consumers provided information, creditors would be unable to verify its accuracy.[19]

II. ***CFPB's cost-benefit analysis is flawed and incomplete.***

When CFPB issues a new rule, it has a statutory obligation to "consider . . . the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule."[20] The proposed rule preamble contains a flawed cost-benefit analysis that would render a final rule that relies upon it arbitrary and capricious.[21]

Equifax and CFPB share a goal of improving access to credit, especially for consumers who have been traditionally underserved by the financial system and those who may have thin credit files or be credit invisible altogether. Given this value it is important for CFPB to consider the impact of the proposed rule on this population and the scoreability of those consumers if this proposed rule is finalized. Equifax reviewed how the removal of all medical collection items would impact consumers who are scoreable today and found that over three million consumers could move from scoreable to unscoreable by removing medical collection items from their files. The removal of medical collections does not move any consumers from an unscoreable

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[15] *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 542 (2002) (Breyer, J., concurring and dissenting) (citing *State Farm*, 463 U.S. at 56).

[16] "Where the text permits, congressional enactments should be construed to be consistent with one another." *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 108 (2010).

[17] 15 U.S.C. § 1639c.

[18] 89 Fed. Reg. at 59,696 ("For example, if a consumer applies for a mortgage loan and the creditor has not specifically requested medical information on the application, but asks for all current debts or obligations, and the consumer self-discloses by providing medical information in the form of a monthly medical payment plan, the creditor does not violate the prohibition on obtaining medical information.").

[19] 15 U.S.C. § 1639c.

[20] 12 U.S.C. § 5512(b)(2)(A)(i).

[21] *See, e.g.*, *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012); *see also Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 54 (reasoned decision-making requires agencies to "look at the costs as well as the benefits" of the actions they take).

position to a scoreable position. The idea that removing medical collection items from a consumer's file may be harmful to a consumer's ability to be scored by a credit model is concerning and should be carefully reviewed. CFPB does not appear to have considered this impact on consumers' access to credit.

This scoreability analysis is not the only research that shows that eliminating medical debt may not improve consumers' access to credit. A recent National Bureau of Economic Research (NBER) working paper reviewed the impact of paying off the medical debt of consumers. The NBER working paper found that relieving the debt had no impact on credit access or utilization.[22] Though CFPB reviewed this paper, CFPB discounted the study's findings because of a small sample size.[23]

CFPB has failed to address the proposed rule's costs and benefits to the economy and lenders. A detailed report by former CFPB enforcement economist, Andrew Rodrigo Nigrinis, specifies that CFPB needed to, but did not, "perform a meaningful analysis of the effects on consumers, lenders, small businesses, Providers, or the broader market that relies on credit reporting before promulgating the proposed rule."[24]

Furthermore, in its cost-benefit analysis, CFPB repeatedly admits that it lacks sufficient data to conduct a robust analysis (or definitively determine the impact of the proposed rule) with respect to both costs and benefits, in numerous areas.[25] Specifically, CFPB concedes that it lacks sufficient data to evaluate the following:

- the costs and benefits to creditors of using medical debt information in credit determinations;[26]
- the costs to CRAs resulting from potential loss of revenue from credit reports, one-time operational costs, and compliance costs;[27]
- the potential benefits to CRAs in the form of reductions in dispute management costs;[28]
- the potential costs to healthcare providers, including potential reductions in revenue from post-service bill and, increased litigation costs to collect medical debt;[29] and
- potential costs to consumers, including reductions in the availability of healthcare (due to provider reluctance for fear of nonpayment without recourse), increased litigation costs as an

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[22] Raymond Kluender et al., The effects of medical debt relief: evidence from two randomized experiments, Nat'l Bureau of Econ. Rsch. Working Paper No. 32315 (April 2024), https://www.nber.org/system/files/working_papers/w32315/w32315.pdf.

[23] 89 Fed. Reg. at 51,712.

[24] Andrew Rodrigo Nigrinis, Ph.D., Economic Analysis of the Consumer Financial Protection Bureau's Prohibition on Creditors and Consumer Reporting Agencies Concerning Medical Information (Regulation V) (July 2024), https://policymakers.acainternational.org/wp-content/uploads/2024/07/AndrewNigrinisEconomicAnalysis-CFPB-FCRA-NPRM-July2024.pdf.

[25] *See* 89 Fed. Reg. at 51,697-51,713.

[26] 89 Fed. Reg. at 51,698-51,699, 51,704-51,709 (further described in the *Technical Appendix*).

[27] 89 Fed. Reg. at 51,699-51,701.

[28] 89 Fed. Reg. at 51,701.

[29] 89 Fed. Reg. at 51,701-51,703.

alternative mechanism for healthcare providers to obtain payment, and an increase in the population of consumers without credit scores (consumers who are credit invisible).[30]

CFPB seeks data and information in each of these areas through rulemaking comments. If not remedied with additional information and analysis in the final rule, CFPB's cost-benefit analysis will render the final rule arbitrary and capricious.

III. ***CFPB's assessment of the predictiveness of medical debt is not supported by substantial evidence.***

In the preamble to the proposed rule, CFPB asserts that medical debt is less predictive of credit risk than other types of debt. CFPB's analysis is arbitrary and capricious.

First, the proposed rule is predicated on CFPB's assertion that "medical debt may be less predictive of whether a consumer will pay a future loan."[31] This standard is not supported under the medical information or general rulemaking provisions of the Fair Credit Reporting Act (FCRA).[32] Regardless of the statutory authority to promulgate a rule based on a finding of relative predictive value, the premise for decision-making on the degree of predictive value of a single data element is flawed. For example, in the industry, data scientists assemble a variety of data points (commonly referred to as data attributes) to determine if the combination and relationship of those attributes are predictive of risk, leveraging commonly accepted data science techniques. It would be unreasonable to rely on a single data attribute and, as a result, all attributes but one in the combination will always be less predictive than the most predictive attribute. Moreover, credit scoring models seek to differentiate consumers who will likely pay on time versus those who likely will not; removing one relevant attribute even if "less predictive" may have a material impact on the overall predictiveness of the model. Relatedly, the level of predictiveness for data is highly dependent on the population that is studied. Some data may show strong predictiveness in certain subsets of the population, but not show any predictiveness at all in other subsets. Blanket statements on what is "more" or "less" predictive are unlikely to stand for every use case.

Second, CFPB's assertion is not supported by substantial evidence.[33] CFPB's primary factual support for its analysis of predictiveness is its own 2014 Report.[34] The data underlying the report are at least ten years old. And CFPB has not considered other publicly-available studies demonstrating that unpaid medical debt is in fact predictive of credit risk.[35] An agency decision is not supported by substantial evidence where, as here,

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[30] 89 Fed. Reg. at 51,709-51,712.

[31] 89 Fed. Reg. at 51,682.

[32] 15 U.S.C. §§ 1681b(g)(5), 1681s(e).

[33] An agency's action is "arbitrary and capricious if it rests upon a factual premise that is unsupported by substantial evidence." *Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018) (citation omitted). "Substantial evidence" means "more than a scintilla" of proof but "less than a preponderance of evidence." *Epsilon Elecs., Inc. v. U.S. Dep't of Treasury*, 857 F.3d 913, 925 (D.C. Cir. 2017) (quoting *Town of Barnstable v. FAA*, 740 F.3d 681, 687 (D.C. Cir. 2014)).

[34] 89 Fed. Reg. at 51,684 (citing Consumer Fin. Prot. Bureau, *Consumer credit reports: A study of medical and non-medical collections* (Dec. 2014), https://files.consumerfinance.gov/f/201412_cfpb_reports_consumer-credit-medical-and-non-medicalcollections.pdf.).

[35] *See, e.g.*, Ethan Dornhelm, *The Impact of Medical Debt Collections on FICO Scores*, FICO Blog (July 13, 2015), https://www.fico.com/blogs/impact-medical-debt-collections-ficor-scores (emphasis added) ("[w]hile consumers with unpaid medical collections are less risky than those with unpaid non-medical collections, *they are still substantially more risky than the population with no derogatory information in their files*….").

it is based merely upon "evidence which in and of itself justified [the agency's decision], without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn."[36]

Furthermore, CFPB's researchers concluded that "new credit accounts of consumers whose medical collections were not included on their consumer reports at the time of their credit applications were no more likely to be seriously delinquent…than the new credit accounts of consumers whose medical collections were included on their consumer reports."[37] There are a couple of flaws with this conclusion — first, the CFPB's research does not distinguish between consumers with medical collections and those without medical collections, only whether the collections are reported or not. This is important because consumers who have medical collections and those who do not have medical collections do have differences in payment performance; therefore, medical collection information is an important factor. Equifax's analysis of its own comprehensive national database demonstrates delinquency rates are at least eight percent higher for consumers with medical collections, indicating that medical collections are significantly predictive of future payment performance.

Equifax also performed a predictive analysis to determine whether medical collections are predictive of a consumer's future payment performance. Equifax constructed scoring models comparing the predictive value — measured by an industry standard method (known as the KS or Kolmogorov-Smirnov statistic) — using medical collections, non-medical collections, and both medical and non-medical collections to predict future payment performance. The models demonstrated that medical collections were predictive of a consumer's payment/delinquency rate. Furthermore, when medical collections are added to a model with non-medical collections, the addition of medical collections yields 34 percent predictive lift.

This analysis directly contradicts CFPB's declaration that medical debt information "has relatively limited predictive value."[38] Because CFPB's assertion that medical debt information has limited predictive value is not supported by substantial evidence, is based on a subjective valuation of a specific type of debt, and is not based on a consideration of contrary evidence, CFPB's analysis is arbitrary and capricious.

Finally, CFPB has entirely failed to consider important aspects of the question whether medical debt is predictive of credit risk:

- CFPB expressly admits that its proposed rule would exclude medical debt information from credit reports even if it "aris[es] from medical care that is elective, or otherwise not medically necessary (e.g., some cosmetic surgeries)."[39] CFPB has not considered that voluntarily-incurred medical debt is indistinguishable from other debt that is incurred voluntarily. CFPB also does not consider the fact that voluntarily-incurred medical debt has nothing to do with the overarching policy concern that led to the proposed rule: that "[f]or tens of millions of consumers, medical debt is an unexpected and unwanted expense that can lead to financial hardships."[40]

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[36] *Morall v. DEA*, 412 F.3d 165, 177 (D.C. Cir. 2005) (quoting *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 962 (D.C. Cir. 2003)).

[37] 89 Fed. Reg. at 51,692.

[38] *Id*.

[39] 89 Fed. Reg. at 51,690.

[40] 89 Fed. Reg. at 51,682.

- CFPB has not considered the fact that consumers might be offered more credit if their medical debt is not considered than they would if it is, such that they may be less able to repay larger extensions of credit.

IV. ***CFPB's assessment of the accuracy of medical debt is not supported by substantial evidence.***

CFPB's determination that medical debt is inaccurate also is arbitrary and capricious, because it "rests upon a factual premise that is unsupported by substantial evidence."[41] For example:

- CFPB rests its determination in part upon evidence that consumers often believe that they have received a medical bill with an error.[42] The agency does not provide evidence that this perception is correct.

- CFPB cites to a list of five federal and state enforcement actions against healthcare providers and debt collectors that charged inflated or unearned bills.[43] The agency does not provide any evidence that the issues in these cases are any different than issues in enforcement actions relating to other types of debt.

- CFPB notes that there are healthcare schemes in Virginia involving fraudulent billing,[44] but the agency does not provide any evidence about how prevalent that practice may be.

- CFPB cites to its own 2014 report in claiming that medical debt is inaccurate,[45] but the report does not support the claim. For example, the report refers to consumer confusion about medical billing,[46] but that does not necessarily mean the billing is factually inaccurate. The report also asserts that consumers may receive multiple bills for the same claim,[47] but that does not necessarily mean the billing is factually inaccurate. And the report asserts that consumers are more likely to delay payment when they are confused or uncertain about the validity of a bill,[48] but that does not necessarily mean the billing is factually inaccurate.

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[41] *Genuine Parts Co*., 890 F.3d at 312 (citation omitted).

[42] 89 Fed. Reg. at 51,684 & n.24.

[43] 89 Fed. Reg. at 51,682, 51,684, n. 26.

[44] 89 Fed. Reg. at 51,684, n.26.

[45] 89 Fed. Reg. at 51,684 (citing Consumer Fin. Prot. Bureau, *Consumer credit reports: A study of medical and non-medical collections* (Dec. 2014), https://files.consumerfinance.gov/f/201412_cfpb_reports_consumer-credit-medical-and-non-medicalcollections.pdf.).

[46] Consumer Fin. Prot. Bureau, *Consumer credit reports: A study of medical and non-medical collections*, at 38 (Dec. 2014), https://files.consumerfinance.gov/f/201412_cfpb_reports_consumer-credit-medical-and-non-medicalcollections.pdf ("Lack of price transparency and the complex system of insurance coverage and cost sharing means many consumers, including those who have health coverage, receive medical bills that are a source of confusion. As a result, they can incur medical debts in collections without certainty about what they owe, to whom, when, or for what.")

[47] *Id*. at 41 ("A consumer may also receive multiple bills from the same provider when the provider bills the consumer before the insurer has completed its review and adjudication of the provider's claim. When treatments involve multiple visits, each can result in a separate bill or series of bills.").

[48] *Id*. at 41-42.

- CFPB notes that medical debt collections are disputed at higher rates than collections concerning credit-card or student-loan debt.[49] The agency provides no evidence that the disputes arise from inaccuracies as opposed to consumer confusion.

- CFPB cites to reports that consumers paid medical debt that they believed they did not owe in order to remove the tradeline from their consumer report.[50] The agency again provides no evidence that this practice arises from inaccuracies as opposed to consumer confusion.

In addition, Equifax's assessment of its own comprehensive national dataset confirms that medical collection information is as at least as accurate as other collection information. For example, Equifax compared dispute rates of medical collection information versus other types of collection items and found that medical collections were disputed less frequently than other types of collection items. Beyond being disputed at a lower rate, medical collections, when disputed, are also verified at a higher rate than other types of collection items.

V. ***The proposed rule's distinction between credit card creditors and creditors that are providers, their agents, or their assignees is arbitrary.***

The proposed rule's bar on reporting medical debt only applies to debt owed to healthcare providers (or their agents or assignees). Accordingly, the bar does not apply to medical debt owed to credit card issuers. [51] That distinction is arbitrary and capricious for at least three reasons.

First, the distinction between these two groups of creditors is wholly arbitrary as a matter of fact. The distinction is premised upon a chance event (not a substantive difference between categories of creditors or consumers). The chance event is the fortuity of how a consumer happens to incur medical debt. In one case, the consumer pays a provider by credit card, and the debt is included in the consumer's credit report (among other credit card charges). In the other case, the provider sends the consumer a bill for later payment (and the debt is not included in the credit report). These disparate results occur even if the two consumers have exactly the same credit risk, for exactly the same amount of medical debt. The unpredictable billing predilections of providers compound this arbitrariness; a consumer may fall into one category or the other simply because one provider demands payment by credit card and another provider does not. And under the proposed rule, if the providers do not demand a particular form of payment, consumers would have the ability to manipulate their credit scores arbitrarily, by choosing to be billed for later payment (which would exclude the debt from a credit report) instead of paying by credit card (which would include the debt in a credit report).

Second, CFPB does not even address the manifest unfairness of distinguishing between creditors based upon their form of payment. That omission is arbitrary and capricious, because CFPB has ignored

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[49] 89 Fed. Reg. at 51,685 ("A CFPB analysis found that almost 6 percent of medical collections in its data were flagged as having been disputed at some point, almost three times higher than the rate of dispute flags on credit cards and seven times the rate of dispute flags on student loans."); *see also id*. at 51,685 n. 38 (citing Consumer Fin. Prot. Bureau, *Paid and Low-Balance Medical Collections on Consumer Credit Reports* (July 27, 2022), https://www.consumerfinance.gov/data-research/researchreports/paid-and-low-balance-medical-collectionson-consumer-credit-reports/.).

[50] 89 Fed. Reg. at 51,685 ("Some consumers reported paying debt they did not believe they owed in order to have the tradeline removed from their consumer report."); *see also id*. at 51,685 n. 39 (citing Consumer Fin. Prot. Bureau, *Complaint Bulletin: Medical billing and collection issues described in consumer complaints* (Apr. 2022), https://files.consumerfinance.gov/f/documents/cfpb_complaint-bulletin-medical-billing_report_2022-04.pdf.).

[51] 89 Fed. Reg. at 51,690.

relevant potential impacts of its rule;[52] failed to consider an important aspect of the problem addressed by the rule;[53] and applied different standards to similarly-situated parties without a reasoned explanation and substantial evidence in the record.[54]

Third, the only justification that CFPB gives for distinguishing between these two groups of creditors is a statutory interpretation that is arbitrary and capricious. CFPB bases the distinction solely upon its interpretation of the statutory term "medical information" — the distinction has nothing to do with any substantive differences between creditors. In pertinent part, the statutory definition of "medical information" means "information or data . . . created by or derived from a healthcare provider or the consumer, that relates to . . . the payment for the provision of healthcare to an individual."[55] CFPB interprets "payment for the provision of healthcare to an individual" to mean only the debt that a consumer owes directly to a healthcare provider (or its agent or assignee) — not medical debt owed to a credit card issuer.[56] The proposed rule gives this interpretation of the statutory text a new name — "medical debt information" — which is the operative term defining the information that CRAs are restricted from providing to creditors.[57]

This interpretation is a major change from the agency's longstanding prior interpretation. When they promulgated Regulation V in 2005, the banking agencies construed the statutory provisions regarding medical debt to apply equally to all creditors:

> The prohibition on creditors obtaining or using medical information in connection with credit eligibility determinations in section 604(g)(2) applies to all creditors. As noted above, section 605(g)(5) does not, by its terms, limit the creditors that may rely on the exceptions granted by the Agencies. Moreover, that section, by its terms, applies to 'transactions' for which the Agencies determine exceptions are necessary, not to 'creditors' that the Agencies determine must be protected by the exceptions. Accordingly, the combined scope of the exceptions adopted pursuant to section 604(g)(5) in the interim final rules is as broad as the prohibition to which it applies, and is available to all creditors.[58]

In 2016, CFPB effectively ratified the banking agencies' original approach to the statute by finalizing Regulation V unchanged.[59] In stark contrast, CFPB's statutory interpretation in the proposed rule

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[52] Congressional Research Service, *A Brief Overview of Rulemaking and Judicial Review* (R41546), 15, (Mar. 27, 2017), https://crsreports.congress.gov/product/pdf/R/R41546 (citations omitted) ("An agency decision . . . that fails to consider an important factor relevant to its action, such as the policy effects of its decision or vital aspects of the problem in the issue before it; or that fails to consider 'less restrictive, yet easily administered' regulatory alternatives, will similarly fail the arbitrary and capricious test."). *See Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.,* 698 F.3d 1101, 1124 (9th Cir. 2012). Furthermore, the agency must provide an adequate explanation within the administrative record. *See Humane Soc'y of U.S. v. Locke,* 626 F.3d 1040, 1050 (9th Cir. 2010).

[53] *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43.

[54] *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005).

[55] 15 U.S.C. § 1681a(i)(1)(C).

[56] 89 Fed. Reg. at 51,690.

[57] 89 Fed. Reg. at 51,735-51,736 (Proposed Rule §§ 1022.3(j), 1022.38 (b)).

[58] Interim Final Rule, 70 Fed. Reg. 33958, 33963 (June 10, 2005).

[59] 81 Fed. Reg. 25,323 (April 28, 2016).

distinguishes between two groups of creditors. And CFPB does so without addressing its about-face from its prior understanding of the statute. CFPB's interpretation is arbitrary and capricious, because the agency does not even acknowledge that it has changed its interpretation of the statutory text (much less explain why its new interpretation is a better reading of the text).[60]

In conclusion, Equifax appreciates CFPB's work to help consumers gain access to credit and especially those who have experienced a medical hardship necessitating that they incur medical debt; however, this proposed rule does not solve the problem of a complicated healthcare and medical billing system. In fact, the proposed rule masks the issue by preventing potential lenders from understanding a potential borrower's complete credit profile. More significantly, the proposed rule is arbitrary and capricious as CFPB inappropriately interprets the FCRA and fails to provide sufficient support for its decision. For the reasons outlined in this letter, we urge CFPB to withdraw the proposed rule and work with Congress to resolve the underlying problem of medical debt.

Sincerely,

Stephanie Gunselman
Vice President, Government Relations

[60] *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017) ("A central principle of administrative law is that, when an agency decides to depart from decades-long past practices and official policies, the agency must at a minimum acknowledge the change and offer a reasoned explanation for it."); *Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013) (internal quotation marks and citation omitted) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. Failing to supply such analysis renders the agency's action arbitrary and capricious.").