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Consumer Financial Protection Bureau
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Re: Consumer Financial Protection Bureau (CFPB) Proposed Rule Amending Prohibition on Creditors and Consumer Reporting Agencies Concerning Medical Information (Regulation V) (Docket No. CFPB-2024-2023; RIN 3170-AA54)

To Whom It May Concern:

We file these comments on behalf of our client, a physician group whose primary business is the provision of emergency medical services within hospital emergency departments. While our client's physicians practice in hospital emergency departments, they do so as independent providers and not as hospital employees. That arrangement is hardly unique. In fact, the majority of emergency medical physicians in the United States are not hospital employees but rather practice independently through private medical groups.[1]

Our client is specifically concerned with application of the proposed rule to the reporting of known, defined, and limited debts owed by insured patients to physicians subject to the requirements of the Emergency Medical Treatment and Labor Act ("EMTALA").[2] Eliminating the ability of such emergency department physicians to report these small debts, which traditionally consist of unpaid co-payments and deductibles under $500, risks unintended consequences, including increased healthcare costs from patients relying on emergency departments to provide primary care, increased patient costs as insurers exploit the rules by shifting greater proportions of their payment obligations to patients through even higher copayments and deductibles, increased litigation against patients in lieu of credit reporting over these small dollar amounts, and, ultimately, increased patient debt.

[1] *See* Physician Practice Benchmark Survey | American Medical Association (ama-assn.org)
[2] 42 U.S.C. §1395dd.

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Eliminating the ability of physicians subject to EMTALA restrictions to report an insured patient's failure to pay known, defined, and limited debts—co-payments and deductibles spelled out in the patient's own health insurance policy—also runs contrary to the public policy goals of both EMTALA and the Fair Credit Reporting Act ("FCRA").[3] Physicians who are required by law to provide emergency medical care to all patients should reasonably expect that unpaid deductibles and co-payments will be afforded at least the same priority as consumer debt for retail purchases. Equally, a credit file should accurately and fairly reflect a consumer's known and defined credit load for purposes of future underwriting and should fairly assess what type of new debt consumers can reasonably afford to repay.

Clinicians Operating Under EMTALA Have No Option to Demand Payment in Advance, And Have Few Options to Pursue Unpaid Co-Payment and Deductible Amounts from Insured Patients

Enacted in 1986, EMTALA requires hospitals with emergency departments to screen and treat patients' emergency medical conditions in a non-discriminatory manner, regardless of the patient's general ability to pay.[4] The law places several restrictions on hospitals' ability to transfer patients to other facilities,[5] and imposes strict civil money penalties on hospitals and individual physicians who violate the law.[6] In short, EMTALA ensures that patients will receive appropriate care when they present themselves at a hospital.

Unlike primary care physicians and other medical professions not subject to EMTALA, emergency departments and associated physicians cannot refuse to provide care to patients unable or unwilling to provide advance payment, and cannot refuse care to patients with a history of failing to make payment following treatment. That outcome comports with public policy objectives: emergency medical care should not be delayed or made contingent upon confirmation of a patient's ability to pay or receipt of payment in advance of care. In return, emergency department physicians should reasonably expect that the amounts the patient's insurance company instructs the patient to pay pursuant to the co-payment and deductible obligations in the contract agreed to by the patient and the insurance company in advance of receiving care should be treated at least on an equal basis with, for example, credit card debt incurred for entertainment.[7]

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[3] 15 U.S.C. §1681.
[4] *See* 42 U.S.C. §1395dd(a).
[5] *See* 42 U.S.C. §1395dd(c).
[6] *See* 42 U.S.C. §1395dd(d).
[7] This comment does not focus on debts owed to emergency department physicians by uninsured patients who seek and receive care pursuant to EMTALA. Providers often reduce such debts significantly through charity care programs and other write-downs, resulting in clear bills to uninsured patients frequently below $500. To the extent those debts are known, limited, and defined, withholding them from credit reports may also deny future creditors access to fair and accurate data under the FCRA.

Unfortunately, some insured patients who seek emergency department medical care from clinicians subject to EMTALA fail to pay the deductibles or co-payments detailed in their health insurance policies, in a plan the patient has selected. Those amounts are known to the patient and voluntarily elected in their selection of health insurance programs. While the health event that led them to seek emergency medical care may have been unanticipated, the price of the healthcare service provided was, in every case, negotiated by a sophisticated insurer, significantly discounted, and agreed to be accepted by the physician well in advance. The patient's deductible and co-payment obligation for such care is also agreed upon by the patient well in advance. Unlike large and unexpected medical debts that pose a meaningful risk of bankruptcy for a patient, the amount of the copayment or deductible is typically well under $500.

Reporting a patient's obligation to pay deductibles or co-payments, after making all appropriate efforts to inform the patient of their debt and providing them a reasonable period to pay or dispute all or a portion of the debt, as required by Regulation F, is one of the only actions available to EMTALA obligated physicians short of litigation.[8] If physicians are forced to resort more quickly to litigation, the result is often worse for the patient: litigation will result in a reportable judgment against the patient for the original debt plus court costs, which remains a blemish on the patient's credit profile that survives longer than a credit reported tradeline.

Allowing these known, defined, and limited debts to be reportedly accurately reflects the interest of EMTALA physicians in collecting the agreed-upon payment for services provided, as required by law, while providing prospective lenders with a more complete and accurate picture of the consumer's debt load. Moreover, it also prevents litigation from becoming the sole recourse for EMTALA physicians.

Not Reporting Medical Debt May Have Unintended Consequences, Including Increased Healthcare Costs and Patient Premiums as well as Promotion of Medical Credit Cards

Beyond reducing the avenues available to emergency department physicians to respond to longstanding unpaid deductibles and co-payments, the proposed rule could also have the unintended consequence of increasing the costs to the health care system as a whole, including patient premiums.

[8] *See* 12 C.F.R. §1006.30(a).

First, in response to this proposed rule, primary care physicians, which are not subject to the EMTALA requirements referenced above, can require upfront payments of deductibles and co-payments before treating patients, particularly those with outstanding unpaid medical bills. The result is patients unwilling or unable to pay in advance will seek their primary care in hospital emergency departments where the cost of treating the patient is usually significantly greater than doing so in a primary care physician office.

Even if an insured patient with longstanding deductible and co-payment debts sought new emergency treatment from the very same physicians whom they had previously failed to pay, EMTALA would require the physicians to provide the care. By shifting the incentive structure in favor of seeking emergency care and prohibiting resulting debt from appearing on consumer credit reports, the proposed rule would risk increasing costs both to EMTALA physicians and to the health care system as a whole, including through higher patient premiums.

Second, were the rule to be adopted as proposed, both emergent and non-emergent health care providers may feel pressure to compensate for losing the ability to report patient debt by instead more proactively offering patients point-of-care financing options that shift the debt to third parties. Those financing options, often in the forms of medical credit cards, may charge patients higher or deferred interest and create more expensive debt that is subsequently reportable.[9]

These potential unintended consequences, together with the possibility of more costly litigation to pursue unpaid medical debts, warrant further study and analysis by the Bureau prior to finalizing or adopting any proposed rule, especially when the rule involves deductibles and copays owed to EMTALA obligated physicians.

Debts Owed by Insured Patients to EMTALA Physicians Are Both Accurate And Relevant to Future Underwriting Decisions, Consistent with the Intent of FCRA

As noted above, debts that insured patients owe to EMTALA physicians consist of small amounts usually under $500 due as deductibles and co-payments, both clearly defined in a patient's health insurance policy and often a deciding factor when the patient selects a specific health insurance plan. Compared to other medical debts, there are fewer questions as to their accuracy and they are directly relevant to future credit underwriting decisions.

[9] *See*, https://www.consumerfinance.gov/data-research/research-reports/medical-credit-cards-and-financing-plans/

The purpose of a consumer's credit file is to provide an accurate snapshot of a consumer's financial standing at a particular point in time. In enacting the FCRA, Congress underscored that "the banking system is dependent upon fair and accurate credit reporting" and that "inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system."[10] The FCRA values accuracy, fairness, and privacy.[11] The FCRA does not address the predictive value of reported data, instead leaving that analysis to prospective lenders. Those lenders, in turn, have an incentive to assess data and accurately determine its predictive value. Precluding those lenders from accessing all medical debt data, alongside other types of debt that a consumer has incurred, denies them the ability to create for themselves a fully informed picture of a consumer's current debt load and future creditworthiness.[12] The fact that many market participants are already differentiating between various forms of medical debt and excluding or underweighting some such debt only underscores this point.[13]

That problem is particularly acute when the debts in question are in fact known, defined, limited, and foreseeable to the patient. When a patient selects a specific health insurance plan, co-payment and deductible limits are among the factors they consider, along with premiums and treatment coverage. Patients are informed through their policy documentation whether seeking emergency medical attention will require a co-payment and the amount of that co-payment. They are likewise informed what their deductible and maximum out-of-pocket expenses will be. Patients may not expect to need emergency medical care, but the amounts they will owe as co-payments and deductibles are nonetheless defined, limited, and foreseeable. Emergency department physicians commence collection from an insured patient who has failed to pay their bill only after receiving a fully adjudicated and processed claim from the patient's insurer. The amount pursued in collection reflects the amount determined and validated by the insurer based on the patient's chosen benefits. Moreover, physicians wait 12 to 14 months from the date of care before reporting outstanding debts, permitting time both to identify other third-party sources of financing and to seek financial assistance or apply for charity care support.

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[10] 15 U.S.C. §1681(a)(1)
[11] *See* 15 U.S.C. §1681(a)(1) and 15 U.S.C. §1681(a)(4).
[12] A recent study by the Kaiser Family Foundation concluded that "[p]eople with medical debt are much more likely than those without such debt to show other signs of financial vulnerability, like having no 'rainy day' fund, overdrawing a checking account, or relying on costly loans." *See* https://www.kff.org/health-costs/press-release/people-with-medical-debt-are-much-more-likely-to-experience-other-forms-of-financial-stress/. Furthermore, an individual's failure to pay smaller defined debts that often within their means, such as co-payment and deductible amounts, may be more predictive than their failure to pay large unanticipated medical debts.
[13] *See*, https://www.fico.com/blogs/medical-collection-removals-have-little-impact-fico-scores

When a patient incurs such expenses through visiting an emergency department and receiving care from EMTALA physicians then fails to pay those debts after due notice guaranteed by Regulation F, it is fair for those debts to appear on their credit report. On the other hand, excluding those debts on a credit report denies future lenders a complete and accurate picture of the patient's current debt load and future creditworthiness.

In their commentary on the proposed rule, CFPB staff note that the sometimes complicated nature of health care billing and insurance can cause confusion for patients as to their share of medical expenses. Patients should have less cause for confusion when it comes to co-payments, which are typically small and defined amounts, and amounts payable toward their deductibles, which are again defined and capped in a patient's policy documentation. To the extent confusion exists between a policyholder and their insurer over co-payment and deductible amounts, that confusion should not be resolved at the expense of the EMTALA physicians or future lenders who rely on credit files for accurate information. If incorrect amounts are in fact reported, the patient retains the right under federal law to dispute the validity of that information.[14]

Prioritizing Predictive Value Over Accuracy Runs Counter to Congressional Intent

Finally, as noted above, the FCRA emphasizes the need for accuracy, fairness, and the privacy of consumer information. It does not consider the predictive value of debt as a factor in determining whether that debt should be reported. While legislation has been introduced that would prohibit reporting of certain medical-related debts, [15] that only underscores both the appropriate existing use of such reporting to create an accurate picture of a consumer's debt load and the appropriate role of congress in determining whether to exclude such debt from consideration under FCRA. By prohibiting all medical debt from being reported, the CFPB would in effect claim for itself the power to determine what information future lenders should be able to access in making their credit underwriting decisions. Such a decision may be in conflict with the clearly stated purpose of the FCRA and could speak to the scope of the CFPB's own power, an issue "on which abdication in favor of the agency is least appropriate."[16]

[14] *See* 15 U.S.C. §1681s-2(b).
[15] *See* H.R.1773, Consumer Protection for Medical Debt Collections Act, introduced March 23, 2023.
[16] *See*, *Loper Bright Enterprises v. Raimondo*, 603 U.S. 23 (2024).

Recommendation

For the reasons noted above, the CFPB should, at a minimum, exclude from this rule any prohibition on reporting co-payment and deductible debts for EMTALA medical services under $500. This would help to avoid several unintended consequences, including increased health insurance costs to patients and increased litigation over smaller unpaid medical bills. Moreover, in the case of co-payments and deductibles, patients can more easily anticipate these smaller amounts, and reporting their obligation to pay such debts is fair, accurate, and relevant to their future creditworthiness.

We thank you for the privilege of submitting these comments on behalf of our client and would welcome the opportunity to answer any questions or provide further information.

Respectfully,

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