



August 5, 2024

VIA ELECTRONIC SUBMISSION

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552

Re: Prohibition on Creditors and Consumer Reporting Agencies Concerning Medical Information (Regulation V) Docket No. CFPB–2024–0023, RIN 3170–AA54

Dear Director Chopra:

On June 18, 2024, the Consumer Financial Protection Bureau (CFPB) published a notice of proposed rulemaking (NPRM) on Prohibition on Creditors and Consumer Reporting Agencies Concerning Medical Information (Regulation V) in the Federal Register.¹ The proposed rule would implement the Fair Credit Reporting Act concerning medical information. The Office of Advocacy is concerned about the potential impact of the proposed rulemaking on small entities and recommends that the CFPB consider alternatives.

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA) that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

¹ 89 Fed. Reg. 51682 (June 18, 2024).

The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.⁴ Additionally, section 609 of the RFA requires the Consumer Financial Protection Bureau, the Occupational Safety and Health Administration, and the Environmental Protection Agency to conduct special outreach efforts through a review panel.⁵ The panel must carefully consider the views of the impacted small entities, assess the impact of the proposed rule on small entities, and consider less burdensome alternatives for small entities.⁶ If a rule will not have a significant economic impact on a substantial number of small entities, agencies may certify the rule.⁷ The agency must provide a statement of factual basis that adequately supports its certification.⁸

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁹ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.¹⁰

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."¹¹

In addition to the outreach required through the SBREFA panel process, the Office of Advocacy performs outreach through roundtables, conference calls, and other means to develop its position on important issues such as this one. The Office of Advocacy held a roundtable with stakeholders on July 18, 2024, to discuss the potential impact of this NPRM and less burdensome alternatives to the rule as proposed. Advocacy also met with small stakeholders at ACA International's conference on July 22, 2024. Advocacy's comments reflect the feedback that it received from stakeholders about the potential impact of the proposal on small businesses.

B. The Small Business Regulatory Enforcement Fairness Act Panel

Section 609 of the RFA requires the CFPB to conduct special outreach efforts to ensure that small entity views are carefully considered prior to issuing a proposed rule if the rule is expected to have a significant economic impact on a substantial number of small entities.⁶ The Bureau convened a SBREFA panel on creditors and consumer reporting agencies concerning medical information on October 16, 2023 and conducted virtual outreach meetings with small entity

² Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

³ Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).

⁴ 5 U.S.C. § 603.

⁵ *Id.* § 609.

⁶ *Id.*

⁷ *Id.* § 605(b).

⁸ *Id.*

⁹ Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).

¹⁰ *Id.*

¹¹ Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

representatives (SERs) on October 18 and 19, 2023.¹² In advance of the panel outreach meeting, the CFPB, Advocacy, and OIRA held a series of telephone conferences with the SERs to describe the small business review process, obtain important background information about each SER's current business practices, and discuss selected portions of the proposals under consideration. The panel issued its report on December 15, 2023.

C. The Proposed Rule

On June 18, 2024, the CFPB published a proposed rule amending Regulation V, which implements the Fair Credit Reporting Act (FCRA), concerning medical information. The CFPB is proposing to remove a regulatory exception in Regulation V from the limitation in the FCRA on creditors obtaining or using information on medical debts for credit eligibility determinations. The proposed rule would also provide that a consumer reporting agency generally may not furnish to a creditor a consumer report containing information on medical debt that the creditor is prohibited from using.

Specifically, the CFPB is proposing amendments to Regulation V that would:

- 1) Remove the financial information exception which broadly permits creditors to obtain and use medical financial information (including information about medical debt) in connection with credit eligibility determinations, while retaining select elements of the exception related to income, benefits, and loan purpose; and
- 2) Limit the circumstances under which consumer reporting agencies are permitted to furnish medical debt information to creditors in connection with credit eligibility determinations.¹³

These amendments would apply to any person that participates as a creditor in a transaction, except for a person excluded from coverage by Section 1029 of the Consumer Financial Protection Act of 2010 (CFPA) 14 (*i.e.*, certain auto dealers). Under the proposed rule, a creditor would no longer be able to obtain or use medical information related to debts, expenses, assets, or collateral, in connection with a credit eligibility determination, unless a specific exception otherwise applies to the creditor's consideration of the medical information. 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.¹⁴

The CFPB prepared a certification and an initial regulatory flexibility analysis (IRFA) for the proposed rule.¹⁵ Advocacy asserts that neither the certification nor the IRFA complies with the requirements of the RFA.

¹² CONSUMER FIN. PROT. BUREAU, FINAL REPORT OF THE SMALL BUSINESS REVIEW PANEL ON THE CFPB'S PROPOSALS AND ALTERNATIVES UNDER CONSIDERATION FOR THE CONSUMER REPORTING RULEMAKING (December 15, 2023), https://files.consumerfinance.gov/f/documents/cfpb_sbrefa-final-report_consumer-reporting-rulemaking_2024-01.pdf [hereinafter Panel Report].

¹³ 89 Fed. Reg. 51682, 51683.

¹⁴ *Id.*

¹⁵ *Id.* at 51,713.

II. The Certification Lacks a Factual Basis and the IRFA Fails to Adequately Address the Economic Impact on Small Entities

Section 605(b) of the RFA allows an agency to prepare a certification in lieu of an IRFA, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. The certification must be supported by a factual basis.

There is not enough information in the RFA section of the proposed rule to form a factual basis to support a finding of no significant economic impact on a substantial number of small entities. In fact, there is no information in the certification section about the economic impact of the proposal on small entities.

The proposed rule could significantly impact small entities involved in debt collection. During the SBREFA process, several SERs stated that they were unable to provide information about the proposals under consideration because the proposals were unclear.¹⁶ A recent study found that medical account collections referred to third-party debt collectors is expected to decrease by eight percent or more, thus reducing revenue for medical service providers.¹⁷ An eight percent decrease would amount to a significant economic impact on small entities.

In terms of affecting a substantial number of small entities, the CFPB has underestimated the number of small entities that may be impacted. The CFPB has identified several categories of small entities that may be subject to the proposals under consideration. These include depository institutions (such as commercial banks, savings associations, and credit unions), credit reporting agencies, and non-depository firms (such as mortgage companies, consumer lending, real estate credit, sales financing) credit bureaus.¹⁸ The CFPB estimates that the proposed rule will impact 1,662 small depository institutions, 14,454 nondepository financial institutions and 281 consumer reporting agencies.¹⁹

By Advocacy's calculations, according to the Federal Financial Institutions Examination Council (FFIEC) and the National Credit Union Administration (NCUA), there are 3,434 small banks out of 4,624 total (74.3% of all banks) and 4,201 small credit unions out of 4,702 total (89.3%). This totals 7,635 small depository institutions, which is substantially higher than the CFPB's estimate of impacted institutions.²⁰ Advocacy encourages the CFPB to reconsider the number of institutions that may be impacted by this rulemaking.

¹⁶ Panel Report at page 40.

¹⁷ ACA Int'l, *Former CFPB Economist's Groundbreaking Research Shows Lack of Analysis in Bureau's Proposed Medical Debt Credit Reporting Rule* (July 11, 2024), <https://www.acainternational.org/press/former-cfpb-economists-groundbreaking-research-shows-lack-of-analysis-in-bureaus-proposed-medical-debt-credit-reporting-rule/>.

¹⁸ 89 Fed. Reg. at 51,714-15.

¹⁹ *Id.* at 51,715.

²⁰ CFPB underestimates the number of small depository institutions. The SBA size standard for commercial banks and credit unions is \$850 million in assets. According to the NCUA, there are 3,890 credit unions with less than \$500 million in assets, and another 282 with assets between \$500 million and \$1 billion. NAT'L CREDIT UNION ADMIN., QUARTERLY CREDIT UNION DATA SUMMARY: 2023 Q4 9, <https://ncua.gov/files/publications/analysis/quarterly-data-summary-2023-Q4.pdf> (last accessed July 29, 2024). For commercial banks, there are 699 banks with less than \$100 million in assets and 2,899 with assets between \$100 million and \$1 billion. FED. DEPOSIT INS.

III. The Economic Impact of the NPRM on Small Entities

As noted above, the CFPB has not provided sufficient information about the economic impact of the proposal on small entities to meet the requirements of a factual basis for the certification. Likewise, the CFPB failed to provide information about the nature of the impact to meet the requirements of an IRFA. As provided in 5 USC § 603(a), the RFA requires agencies to describe the impact of the proposed rule on small entities. Section 603(c) states that agencies must describe alternatives to minimize any significant economic impact of the proposed rule on small entities. An agency cannot consider alternatives to reduce the economic impact if the agency does not know what the economic impact is.

The CFPB acknowledges that small entities will incur compliance costs. For example, in the projected reporting, recordkeeping, and other compliance requirements section of the IRFA, the CFPB states that consumer reporting agencies may need to devise policies and procedures. It also states that small consumer reporting agencies would generally require professional skills related to software development, legal expertise, compliance, and customer support.²¹ However, there is no information about how much it will cost small entities to implement the changes that are necessary to comply.

Similarly, in terms of creditors, the CFPB states that creditors may have to change their underwriting procedures to ensure they are in compliance with the proposed rule. The CFPB also states that the changes would require professional skills related to compliance, underwriting, and legal expertise.²² Again, there is no information about how much it will cost small entities to implement the changes that are necessary to comply. Instead of providing economic information, including compliance costs, the CFPB states that the IRFA describes the impact on small entities.²³

Providing sufficient information about the potential economic impact on small entities provides the public and the agency with important insight into the costs of the proposed rule. Without this information, the public cannot provide meaningful feedback on the agency's assumptions. The public cannot provide, and the CFPB cannot consider, meaningful alternatives without sufficient information about the economic impact on small entities. It is not possible to consider less costly alternatives if it is not known what costs are associated with the rulemaking.

III. The Proposed Rulemaking Needs Additional Clarification

The proposed rule provides that small institutions may not consider medical debt in connection with the determination of eligibility for credit.²⁴ However, if the information is unsolicited medical information, and it falls within at least one of the listed exceptions, the creditor can use it.²⁵ This means that small institutions can no longer consider all medical debt, but also have a

CORP., FDIC QUARTERLY BANKING PROFILE: 4TH QUARTER 2023 11 (2024)

<https://www.fdic.gov/analysis/quarterly-banking-profile/qbp/2023dec/qbp.pdf#page=1>

²¹ 89 Fed. Reg. at 51,716.

²² *Id.*

²³ *Id.* at 51,713.

²⁴ *Id.* at 51,736.

²⁵ *Id.*

process for voluntary disclosures. It may be difficult to verify that the consumer offered the information voluntarily.

This could be very complicated and costly. Small entities may need to hire an attorney to ascertain the meaning of the provisions and spend money training their employees. In addition, it may subject small institutions to the risk of liability. Advocacy encourages the CFPB to clarify the proposed rule.

V. The Proposed Rulemaking May Conflict with Other Laws

The CFPB acknowledges that the proposal may conflict with other laws. The CFPB identified several federal statutes and regulations that address consumer credit eligibility, debt collection, and privacy issues as having provisions that may duplicate, overlap, or conflict with certain aspects of the proposals under consideration. These statutes include the Truth in Lending Act (TILA), the Equal Credit Opportunity Act (ECOA), Fair Debt Collection Practices Act (FDCPA), and the Gramm-Leach-Bliley Act (GLBA).

TILA imposes disclosure and other requirements on creditors. TILA and Regulation Z generally prohibit creditors from making mortgage loans unless they make a reasonable and good faith determination that the consumer will have the ability to repay the loan. TILA and Regulation Z also contain ability-to-repay requirements for credit cards.

ECOA prohibits creditors from discriminating in any aspect of a credit transaction, including a business-purpose transaction, on the basis of race, color, religion, national origin, sex, marital status, age (if the applicant is old enough to enter into a contract), receipt of income from any public assistance program, or the exercise in good faith of a right under the Consumer Credit Protection Act.

FDCPA governs certain activities of debt collectors. Among other things, the FDCPA and Regulation F prohibit debt collectors from engaging in unfair, deceptive, or abusive conduct when collecting or attempting to collect debts. It requires debt collectors to make certain disclosures to consumers in debt collection.

GLBA requires financial institutions subject to the CFPB's jurisdiction to provide their customers with notices concerning their privacy policies and practices. It also places certain limitations on the disclosure of nonpublic personal information to nonaffiliated third parties, and on the redisclosure and reuse of such information. Other parts of the GLBA, as implemented by regulations and guidelines of certain other federal agencies (*e.g.*, the Federal Trade Commission's Safeguards Rule and the prudential regulators' Safeguards Guidelines), set forth standards for administrative, technical, and physical safeguards with respect to financial institutions' customer information.

The small entities that Advocacy met with are particularly concerned about the conflict between the proposal and the ability-to-repay requirements under TILA and Regulation Z. A large medical debt may interfere with a consumer's ability to repay. By not considering it, a consumer may become overextended and suffer financial embarrassment. Small entities are concerned that if they do not consider the consumer's ability to repay and the consumer faces financial

embarrassment, the small entity may be exposed to an enforcement action by another federal agency.

Advocacy recommends that the CFPB evaluate whether this rulemaking is necessary considering the conflicting, overlapping, and duplicative laws. Advocacy further encourages the CFPB to reassess its position on not allowing creditors to consider medical debt in financial decisions. If the CFPB decides to go forward, Advocacy encourages the CFPB to develop some sort of mechanism or understanding to ensure that small entities are not penalized for not including medical debt in decisions regarding a consumer's ability to repay.

VI. The Proposal May Be Harmful to Consumers

In the NPRM, the CFPB asserts that having medical debt on a credit report is detrimental to consumers because it is no indication of a consumer's willingness to pay. It dismisses the argument that the threat of having a bad debt on the credit report provides an incentive to pay. Instead, the CFPB's asserts that entities are not being harmed by the NPRM because the debt is still owed and collectible through litigation.²⁶

Small entity stakeholders have indicated that litigation is expensive for businesses and consumers. Both would incur legal costs. For example, an unpaid \$600 medical debt could cost the consumer thousands of dollars in legal fees to defend the lawsuit. It may also cause stress for the consumer to be sued. To state that litigation is an option is dismissive of the true burden of litigation on businesses and consumers.

VII. The NPRM May Be Unnecessary Because the Industry and the States Are Addressing the Issue

As noted in the preamble, several states and at least one federal agency have also enacted policies that limit the inclusion of medical debt on consumer reports. According to the CFPB, Maine passed a law in 2019 requiring consumer reporting agencies to remove medical debt upon receiving reasonable evidence that the debt has been settled.²⁷ In 2023, Colorado and New York passed laws prohibiting medical debt from appearing on consumers reports.²⁸ Connecticut and Virginia passed similar laws earlier this year. Other states have passed legislation pending signature from their governors.²⁹ In addition, in 2022, the U.S. Department of Veterans Affairs finalized a rule stating that it would report medical debt to consumer reporting agencies only if all other debt collection efforts have been exhausted, the individual is not catastrophically disabled or entitled to free medical care from the VA, and the outstanding debt is over \$25.³⁰

²⁶ *Id.* at 51,710.

²⁷ *Id.* at 51,686.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

This rulemaking could be confusing for small entities that are in states with medical debt collection laws. Advocacy recommends that the CFPB clarify which law is controlling.

Moreover, in 2022 and 2023, the nationwide consumer reporting agencies (NCRAs) announced that starting on July 1, 2022, unpaid medical collections will not appear on a consumer's report for up to one year and paid medical collections will not be included on consumer reports.³¹ In April 2023, the NCRAs announced that medical collections with initial balances below \$500 had been removed from consumer reports.³² The CFPB conducted an analysis of the NCRAs' medical debt changes through June 2023 and found that within the three-month period, the total dollar balances of medical collections on consumer reports fell by 38 percent nationwide.³³ By August 2023, after the voluntary NCRA changes were fully implemented, the CFPB estimated that only five percent of consumers had medical collections on their consumer reports. This was before most of the state-level changes took effect.³⁴

A few months is not enough time to discern whether a new policy is successful. Rather than going forward with the rulemaking, Advocacy encourages the CFPB to allow sufficient time to ascertain whether the NCRAs' changes will address the problem before finalizing the rulemaking.

In addition, the information garnered could provide insight into the potential economic impact of changes on small entities. For example, one small entity told Advocacy that in the one-year period since the \$500 medical credit reporting change, the dollars collected decreased by \$369,637, while the payroll costs for the first quarter of the year increased by 16 percent. That type of change is significant for a small entity.

VIII. The Implementation Date Is Unfeasible

The SERs addressed the implementation date during the SBREFA discussions. At that time, the SERs stated that a 60-day implementation timeframe was unreasonable. SERs generally stated that the proposals under consideration, if adopted, would require significant changes in terms of FCRA compliance. They also stated that it was challenging to provide a suggested implementation timeframe given the lack of detail in some of the proposals under consideration, but that a period of at least several years would be needed.³⁵

As noted above, Advocacy met with stakeholders to discuss the NPRM. Small entities would need to obtain legal advice, train employees, and take additional steps to comply with the requirements of the proposal. Based on past experiences, the stakeholders believe that it could take 18-20 months to comply with the rulemaking.

³¹ *Id.* at 51699.

³² *Id.*

³³ *Id.* at 51686.

³⁴ *Id.* at 51699.

³⁵ Panel Report, *supra* note 12, at 40.

IX. CFPB Should Consider and Adopt Small Business Alternatives

Advocacy encourages the CFPB to give full consideration to the alternatives provided throughout this letter, including maintaining the status quo until the CFPB can ascertain the effectiveness of state laws and the NCRAs' actions. Advocacy asserts that the CFPB should also consider achieving the intended outcomes through enforcement actions rather than a regulatory action. A regulatory action impacts all small businesses operating in the field. Advocacy encourages the CFPB to consider using enforcement actions on businesses that provide inaccurate information rather than requiring small businesses in the industry to seek legal counsel and incur training and other costs to address a problem they may not be contributing towards.

X. The Proposed Rulemaking May Increase the Cost of Credit for Small Entities

In the IRFA, the CFPB preliminarily concludes that the costs of credit for small creditors and small reporting agencies would not be impacted by the proposed rule.³⁶ This conclusion is concerning because the SERs during the SBRFA panel stated that the rulemaking could impact the cost of credit for small entities. As noted in the panel report:

Two debt collector small entity representatives stated that the medical debt collection proposals under consideration could cause creditors to increase their minimum credit scores for obtaining credit as consumers' credit scores increase (*i.e.*, credit score creep), their cost-of-living factors, or both. They stated that this would decrease small entities' access to, or increase their cost to obtain, credit, which would make it harder or more expensive to expand their businesses, buy supplies, or support their employees.

One small entity representative stated that, depending on what the CFPB requires regarding the FCRA's written instructions of the consumer permissible purpose, it could slow down their process of getting approved for a small business loan because creditors lending to small businesses check the personal credit of the business owner and may rely on the owner's written authorization to do so. The small entity representative noted that this could cause problems for small businesses that need to obtain credit quickly.³⁷

At Advocacy's roundtable, the stakeholders reiterated their concerns about the impact that the proposed rule may have on the costs of credit for small entities. If lenders have less information, there may be higher defaults. As a result, access to credit may be strained.

³⁶ 89 Fed. Reg. at 51,717.

³⁷ Panel Report, *supra* note 12, at 43.

XI. The Agencies Should Provide Clear Guidance to Assist Small Entities with Compliance

Given the requirements of the proposed rulemaking, providing clear guidance for complying with the agency's rulemaking will be helpful to small entities and eliminate confusion. Small entities may lack resources to assist them in understanding regulatory requirements and performing the necessary actions to achieve compliance. Advocacy encourages the agency to provide guidance to assist small entities in complying with the requirements of the rulemaking.

V. Conclusion

In conclusion, Advocacy recommends that the CFPB postpone this rulemaking until it has had enough time to assess the impact of the NCRAs' actions and the state laws. If that is not feasible, Advocacy recommends that the CFPB:

- provide information about the economic impact of the NPRM on small entities,
- clarify the sections of the proposed rule that are confusing,
- address the conflict of laws,
- allow sufficient time to ascertain whether the NCRAs' changes and state laws will address the problem before finalizing the rulemaking.
- consider less costly alternatives,
- provide information about the increase in the cost of credit for small entities,
- extend the implementation date, and
- provide a compliance guide

Thank you for the opportunity to comment on this important proposal. If you have any questions or require additional information, please contact me or Assistant Chief Counsel Jennifer A. Smith at (202) 205-6943 or by email at Jennifer.Smith@sba.gov.

Sincerely,

/s/

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Jennifer A. Smith
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

Copy to: Richard L. Revesz
Administrator Office of Information and Regulatory Affairs
Office of Management and Budget