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

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

Re: ACA International, the Association of Credit & Collection Professionals, ("ACA") Comment regarding the Small Business Review Panel for the Fair Credit Reporting Act Proposal (the "Proposal")

Dear Director Chopra and Bureau Staff:

I. Background About ACA International

ACA International is the leading trade association for credit and collection professionals. Founded in 1939, and with offices in Washington, D.C. and Minneapolis, Minnesota, ACA represents approximately 1,700 members, including credit grantors, third-party collection agencies, asset buyers, attorneys, and vendor affiliates in an industry that employs more than 150,000 employees worldwide.

ACA members include the smallest of businesses that operate within a limited geographic range of a single state, and the largest of publicly held, multinational corporations that operate in every state. The majority of ACA-member debt collection companies, however, are small businesses. According to recent ACA member data, 35% of ACA members are 10 employees or fewer, 56% of ACA members are 25 employees or fewer, and 70% of ACA members are 100 employees or fewer.

As part of the process of attempting to recover outstanding payments, ACA members are an extension of every community's businesses. ACA members work with these businesses, large and small, to obtain payment for the goods and services already received by consumers. In years past, the combined effort of ACA members has resulted in the annual recovery of billions of dollars – dollars that are returned to and reinvested by businesses and dollars that would otherwise constitute losses on the financial statements of those businesses. Without an effective collection process, the economic viability of these businesses and, by extension, the American economy in general, is threatened. Recovering rightfully-owed consumer debt enables organizations to survive, helps prevent job losses, keeps credit, goods, and services available, and reduces the need for tax increases to cover governmental budget shortfalls.

An academic study about the impact of debt collection confirms the basic economic reality that losses from uncollected debts are paid for by the consumers who meet their credit obligations:

> In a competitive market, losses from uncollected debts are passed on to other consumers in the form of higher prices and restricted access to credit; thus, excessive forbearance from collecting debts is economically inefficient. Again, as noted, collection activity influences on both the supply and the demand of consumer credit. Although lax collection efforts will increase the demand for credit by consumers, the higher losses associated with lax collection efforts will increase the costs of lending and thus raise the price and reduce the supply of lending to all consumers, especially higher-risk borrowers.[1]

In short, consumer harm can result in several ways when unpaid debt is not addressed, and ACA members work to help consumers understand their financial situation and what can be done to address it and improve it.

ACA members play a critical role in protecting both consumers and lenders. ACA members work with consumers to resolve consumers' debts, which in turn saves every American household,

[1] Todd Zywicki, *The Law of Economics of Consumer Debt Collection and its Regulation*, 28 Loy. L. Rev. 187 (2016).

on average, more than $700, year after year.[2] The accounts receivable management ("ARM") industry is instrumental in keeping America's credit-based economy functioning with access to credit at the lowest possible cost. For example, in 2018 the ARM industry returned over $90 billion to creditors for goods and services they had provided to their customers.[3] And in turn, the ARM industry's collections benefit all consumers by lowering the costs of goods and services—especially when rising prices are impacting consumers' quality of life throughout the country.

ACA members also follow comprehensive compliance policies and high ethical standards to ensure consumers are treated fairly. The Association contributes to this end goal by providing timely industry-sponsored education as well as compliance certifications. In short, ACA members are committed to assisting consumers as they work together to resolve their financial obligations, all in accord with the Collector's Pledge that all consumers are treated with dignity and respect.

In the past two years, the CFPB has undertaken a misguided public relations campaign to target the ARM industry's compliant and beneficial collection activities, including most recently, through a proposal to make sweeping changes to the Fair Credit Reporting Act ("FCRA"). The Proposal, which includes, among other things, a directive to remove all medical debt from credit reports, would result in negative unintended consequences for medical providers throughout the country. Despite ACA and other stakeholders' participation in this SBREFA process, the CFPB appears to have a pre-determined outcome that it intends to move forward with the Proposal, despite concerns raised by creditors, credit reporting agencies ("CRAs"), and the debt collection industry all providing evidence of significant disruptions in the market, as well as harm to consumers and small businesses if the CFPB moves forward.

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[2] https://kaulkin.com/survey-says-arm-industry-returns-90-1-billion-to-the-economy/
[3] *Id.*

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

The Proposal will have significant negative impacts and will violate existing law:

- The Proposal conflicts with language in the FCRA concerning the definitions of consumer report and consumer reporting agency;
- The CFPB lacks authority to rewrite laws passed by Congress that are unambiguous by their plain terms;
- The data analysis supporting the Proposal has serious methodological defects and did not consider data that reflects the current state of the industry or the critical economic impacts of medical debt reporting;
- The Proposal will create overly burdensome costs to small businesses, which will likely result in the reduction of consumer choice, increased upfront costs and costs overall, and less access for patients to critical care services. This Proposal will increase the cost and availability of credit for ACA members, as well as their medical provider clients since this fundamentally changes the law and will make it harder to collect payment for medical bills. Stymieing collections and changing the credit reporting process, will hurt both clients and their third-party collection agencies' bottom lines.
- The Proposal fails to consider, and has done no research, on less expensive alternatives that avoid the significant constitutional problems and reduce monetary impacts on small businesses, consumers, and governments.
- By the CFPB's own admission, medical debt information is less predictive, not "not predictive". Thus, underwriters will have less information to make credit determinations if the CFPB moves forward with its goal to remove all medical debt from credit reports, and credit will be extended in situations when consumers do not have the ability to repay. As such, the host of negative consequences that the CFPB itself has outlined in its ability to repay test in mortgage[4], and other rules when creditors do not have accurate information will come into play. Similar to the factors of the 2008 financial crisis, which led to the creation of the CFPB, lenders will be operating with blind spots and overlooking debt and legal obligations for consumers who are seeking credit.
- Medical providers and their third-party collection agency partners will be forced to sue more consumers to collect for unpaid medical care. If the CFPB removes the incentive to maintain good credit, consumers will have no reason to pay their medical bills, which will force stakeholders to turn to litigation as their only legal remedy sooner and more often.
- To ensure clear and consistent interpretation, it is important that the CFPB create a definition of medical debt that ties the medical debt to the entity to which the debt

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[4] 12 C.F.R § 1026 (2023).

is owed. For example, there are significant nuances between surprise medical expenses from emergency room visits and elective or preventive procedures, and health-related items like Advil and Band-Aids routinely purchased at places like Target. To avoid such an overbroad interpretation, and to provide clarity on what is being referred to as "medical debt," we respectfully ask for a clear set of definitions of "medical debt" that differentiates between emergency services and other types of incurred health care related debt.

- Even for medical providers and collection agencies that do not credit report, we have data which highlights that the "message behind the message" that you do not have to pay medical debt, has already harmed providers and their collection agency partners. This will lead to a variety of consequences including the need for more cash-upfront payments and an increase in medical providers turning directly to litigation to seek to recover payment. The economic analysis showing this and anecdotal support will be provided in comments.
- The Affordable Care Act requires that nonprofit hospitals establish "charity care"—essentially financial assistance policies—for patients unable to cover their expenses. IRS Regulation 501(r) already addresses extraordinary collection activities. For providers in many states, ACA members have seen the threshold at 200% or 300% of the Federal Poverty Level as the starting point before any copays or deductibles need to be paid to a non-profit provider. Since there are already many programs and laws in place to help consumers that truly cannot afford medical debt, the CFPB's efforts are more likely to encourage people that can pay their debt not to address it. This may not benefit them since hospitals or medical providers can take legal action, or in the case of non-emergency care, not provide care.

Please find attached with this letter a discussion and analysis of the Proposal along with data and supportive materials.

Scott Purcell
CEO
ACA International

Attachments (1)

Comment of ACA International

Small Business Review Panel for the Fair Credit Reporting Act Proposal

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COMMENTS

I. THE CFPB LACKS LEGAL AUTHORITY TO ISSUE RULES IN THIS AREA

A. The CFPB Can Only Regulate When the Statute is Ambiguous

Like any administrative agency, the Consumer Financial Protection Bureau ("CFPB" or the "Bureau") must act within the scope of authority Congress delegated to it by statute. A court may ignore a regulation promulgated through notice and comment if it does not earn deference.[5] Issues surrounding judicial deference to agency interpretations of statutes enacted by Congress are guided by the *Chevron* doctrine.

Under the *Chevron* analysis, first set forth by the Supreme Court in 1984, courts review agency rules by looking at the rule in two distinct steps. First, a reviewing court must determine whether the meaning of the statute addressing the precise issue before the court is clear. If the statutory text is clear, then that is the end of the matter; the court and the agency must give effect to the unambiguously expressed intent of Congress.[6] Only when the statute is silent or unclear on the issue can a court move on to step two.

Further, the CFPB's rulemaking must comply with the Administrative Procedure Act ("APA"),[7] which requires a reviewing court to set aside agency action under certain conditions, including when agency rulemaking is arbitrary or capricious.[8] When applying the arbitrary and capricious standard, courts generally focus on: (1) whether the rulemaking record supports the factual conclusions upon which the rule is based; (2) the rationality or reasonableness of the policy conclusions underlying the rule; and (3) the extent to which the agency has adequately articulated the basis for its conclusions. Reviewing courts' interpretations of the terms "arbitrary and

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[5] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
[6] *Id.* at 843 n.9 (*Chevron* instructs courts at step one to employ all of the traditional tools of statutory interpretation first).
[7] *See generally* 5 U.S.C §§ 551-559.
[8] 5 U.S.C. § 706.

capricious" have changed over time. Indeed, the Supreme Court has recently certified for review the question of whether a court must defer to an agency of an ambiguous statute at all.[9] Based on the current composition of the Supreme Court, it is likely that they will significantly narrow agency authority to interpret statutes, particularly where a statute is silent on a particular issue.

Any rulemaking the CFPB engages in to implement a new rule or modify an existing rule faces two primary statutory requirements. First, the rule must conform to the authority set forth in the Consumer Financial Protection Act ("CFPA"). Second, there must be a "concise general statement of [the amendment's] basis and purpose,"[10] reflecting rational and reasonable policy conclusions in the rulemaking record to support the change and thus avoid being overturned as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[11] An agency's interpretation is most likely to receive deference when "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies."[12]

Here, the CFPB attempts to wade into an area of law whose statutory text is clear and whose Congressional intent is unambiguous. Moreover, the current regulatory scheme governing consumer reporting agencies ("CRAs") is not highly technical or complex, and the CFPB's attempt to rewrite the governing regulations is not in line with sound policy or law. For the foregoing reasons, the CFPB lacks authority to issue rules in this area.

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[9] *Loper Bright Enterprises v. Raimondo*, 143 S. Ct. 2429 (2023).
[10] 5 U.S.C. § 553.
[11] 5 U.S.C. § 706(2)(A).
[12] *Chevron*, 467 U.S. at 865.

1. The FCRA Language Considered by the Bureau is Not Ambiguous

a. *Definitions of Consumer Report and CRA*

Section 603(d) of the Fair Credit Reporting Act ("FCRA") defines the term "consumer report" as, any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other permissible purpose authorized under FCRA section 604.[13]

The term "consumer reporting agency" is also defined under the FCRA as any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.[14]

Congress enacted the subchapters containing these definitions to protect consumers from having inaccurate information concerning them circulated to lending institutions by consumer reporting agencies,[15] and used great care in constructing the definitions of "consumer report" and "consumer reporting agency." The definitions of these terms are clear and unambiguous, and key

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[13] 15 U.S.C. 1681a(d).
[14] 15 U.S.C. 1681a(f).
[15] *Nikou v. INB Nat. Bank*, 638 N.E.2d 448, 453 (Ind. Ct. App. 1994) ("The purpose of the FCRA is to protect consumers from having inaccurate information concerning them circulated to lending institutions by consumer reporting agencies.").

to the Congressional intent of preventing consumers from being unjustly damaged by inaccurate credit information. To the extent that the CFPB attempts to change these key terms, it oversteps its statutory authority under the *Chevron* doctrine. As noted, under *Chevron*¸ if Congress has delegated authority to an agency to decide a particular question—that is, if *Chevron* applies—a court will determine whether Congress directly addressed the precise issue before the court. Where the statute is clear on its face with respect to the issue before the court, the court will defer to the statutory text rather than the agency interpretation. Here, the statute defines both "consumer report" and "consumer reporting agency" clearly and with specificity. Therefore, any attempt by the CFPB to rewrite these definitions goes beyond its statutory authority.

b. *Data Brokers*

With respect to the CFPB's Proposal addressing the application of the FCRA to data brokers, the CFPB lacks authority to regulate in this area. One of the CFPB's proposals currently under consideration would provide that a data broker that sells certain types of consumer data would be a "consumer reporting agency." The CFPB is also considering other interpretations determining when and how data brokers are or would be consumer reporting agencies furnishing consumer reports.

As noted above, both "consumer reporting agency" and "consumer report" are defined terms under the FCRA, and while the CFPB is authorized to implement the FCRA through rulemaking under Regulation V,[16] only Congress may revise defined terms under the FCRA.

A review of the plain language makes clear that a data broker simply does not fall within the statutory definition of a CRA. Data brokers are individuals or companies that specialize in

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[16] 12 CFR § 1022.1-1022.142.

collecting personal data (such as income, ethnicity, political beliefs, or geolocation data) or data about companies, mostly from public records, and selling or licensing such information to third parties for a variety of uses. Many times data is utilized for marketing purposes to understand consumer preferences. Sources, which are usually internet-based since the 1990s, may include census and electoral roll records, social networking sites, and court reports. Unlike a consumer reporting agency, as defined in the FCRA, data brokers do not "evaluate" consumer credit information. They simply aggregate it from primarily public sources as a matter of convenience for their clients. Moreover, this aggregating function and subsequent sale of data to clients is not for the purpose of preparing or furnishing consumer reports to third parties. Critically, data brokers do not analyze the data they collect or use it to generate a prediction of any particular consumer's creditworthiness. Thus, as consumer reporting agency has been narrowly defined by Congress, data brokers simply do not fit the statutory definition.

Indeed, the CFPB was recently reminded of its function when it unsuccessfully tried to expand the definition of "applicant" under the Equal Credit Opportunity Act[17] ("ECOA"), which was struck down in the *Townstone Mortgage* case.[18]

Also notable, the CFPB recently suggested in the March 2023 request for information ("RFI") that many data brokers who act as "consumer reporting agencies" under the FRCA nevertheless disclaim FCRA coverage.[19] The arbitrary and capricious standard under the APA assesses the rationality or reasonableness of the policy conclusions underlying the rule, and here,

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[17] 15 U.S.C. 1691 *et seq*.

[18] *Bureau of Consumer Fin. Prot. v. Townstone Fin., Inc*., No. 20-cv-4176, 2023, LEXIS 18405, at * 2 (N.D. Ill. Feb. 3, 2023) (Appeal filed April 4, 2023).

[19] 88 FR 16951.

a reviewing court would very likely conclude that expanding upon Congressionally defined terms in this way does not comply with the APA.

c. *Assembling or Evaluating*

The CFPB's consideration of providing a more "bright-line" definition of when a data broker's activities fall within the meaning of "assembling" and "evaluating" in the definition of "consumer reporting agency" is beyond the scope of the CFPB's authority for the same reasons discussed above. Again, the definition of "consumer reporting agency" is clear and unambiguous, and Congress took great care in crafting this definition.

The phrases "assembling" and "evaluating" are clear and unambiguous. In the context of Congress' definition of a consumer reporting agency, they plainly mean that a person or company regularly "assembles or evaluates" consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. Read, as it must be, with the Congressional definition of a consumer report, it is clear precisely what activities constitute assembling and evaluating for the purpose of the statute. Thus, any assembly or evaluation of consumer data that does not "bear[ ] on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other permissible purpose authorized under FCRA section 604" does not bring a person within the ambit of the consumer reporting agency definition. Thus, the Bureau's proposed bright line rule is a regulatory overreach.

If Congress had wanted to specify certain activities constituting "assembling" or "evaluating" or otherwise define these terms, it is likely it would have done so. Indeed, every word

within a statute is there for a purpose and should be given due significance. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[20]

d. *Credit Header Data*

The CFPB's Proposal to clarify the extent to which credit header data constitutes a consumer report is similarly improper. "Credit header data" includes certain consumer-identifying data such as an individual's name, date of birth, and Social Security number. The CFPB's consideration of the proposal to include "credit header data" in the FCRA's definition of what constitutes a "consumer report" is impermissible for the same reasons discussed above, including but not limited to, the fact that the legislature has thoroughly defined "consumer report" and adding language into the statute where the legislature declined to do so, is beyond the scope of the CFPB's statutory authority.

As discussed above, Congress has explicitly defined a consumer report. Critically, to be a consumer report, the information conveyed must "bear[ ] on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other permissible purpose authorized under FCRA section 604." Credit header data, standing alone, does none of these things. In fact, as discussed more below, credit header data is used most often to

[20] *Russello v. United States*, 464 U.S. 16, 23 (1983).

verify consumer identities and prevent fraud. The Bureau's proposed inclusion of credit header data in the definition of a "consumer report" runs afoul of Congress' already clear definition.

Additionally, there are significant policy concerns with this Proposal. As it stands, the FCRA has established requirements for how a creditor or other furnisher of information to a credit bureau must respond to direct and indirect disputes involving credit report information appearing on an individual's credit report. The FCRA also requires that any attempt to access a consumer's credit report be made with a "permissible purpose." By broadening the definition of consumer report to include "credit header data," the CFPB will create substantial confusion as to many financial institutions' compliance obligations and will likely call into question certain customary procedures.

2. The Proposal would have Negative Consequences that Outweigh its Benefits

Credit header information is routinely used by banks to verify a consumer's identity in order to complete a variety of transactions, as well as to determine whether certain account-level information can be legally shared with an individual purporting to be the consumer. Furthermore, this credit header data is integral to most banks' current methods of fraud prevention. By subjecting such routine information to the FCRA's requirements, the CFPB will substantially hinder banks' routine identity verification and fraud prevention practices. Indeed, subjecting credit header data to the FCRA could have the unintended consequence of aiding would-be identity thieves. If – during the time sensitive initial investigations into whether a consumer is the victim of identity theft – a bank must "proactively identity a 'permissible purpose'" before accessing an individual's credit header data, the fraudster could have additional time to successfully complete any fraudulent transaction. Additionally, credit header data is already protected and regulated under the Gramm-

Leach-Bliley Act ("GLBA")[21] and Regulation P[22], so expanding the FCRA to cover such information is arbitrary, unnecessary, and beyond the permissible scope of the APA.

We note also that when Congress initially drafted the FCRA, the same information that is contained in credit headers—name, address, and phone number—were publicly available through printed telephone books. It has historically been the case that this information is freely available unless a consumer expressly opts-out of sharing it. It is no surprise that the FCRA text already takes the same approach. FCRA §1681b(e) already has in place provisions to allow consumers to opt-out of credit header sharing for marketing purposes.[23] The Bureau's Proposal would negate this carefully crafted provision and would be unlikely to receive deference as a result.

3. The Economic Data Illustrates that Broadening of these Definitions would have Significantly Detrimental Impact on the Small Businesses

As the economic analysis detailed below explains, the CFPB has failed to conduct a valid analysis of the consequences that will result from the definitional changes in the Bureau's Proposal. For example, Dr. Andrew Nigrinis, in discussing the proposed expansion of the "consumer report" definition, states, "[t]his overbroad definition could limit marketers' ability to use basic level of consumer information for targeting ads.

In sum, the CFPB's consideration of this Proposal would have far-reaching impacts across multiple systems. And when an agency interprets legal requirements that apply broadly across agencies, a reviewing court will not defer to the agency's interpretation.[24] Please see attached economic analysis for supporting information.

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[21] Pub. L. No. 106-102 (1999).
[22] 12 CFR § 1016.
[23] FCRA §1681b(e) (CRA can't sell firm offer lists for credit or insurance if consumer opts-out of being on those lists; CRA must have a system to allow opt-outs).
[24] *See Chevron*, 467 U.S. at 842–44, 865.

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

1. CFPB Authority under the Dodd-Frank Act

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") in response to consumer abuses in mortgages, credit cards, and other financial products. The Dodd-Frank Act made substantial changes to many of the statutes in the Consumer Protection Act and established in Title X, the Consumer Financial Protection Bureau. The Dodd-Frank Act assigns to the CFPB some of the rulemaking and enforcement authority that the FTC and banking regulators previously held. It also grants the CFPB rulemaking authority regarding unfair, deceptive, or abusive practices.

Notably, the language in the CFPB's Enabling Act grants it the authority to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."[25] The CFPB's jurisdiction is thus limited to "financial products" and "financial services."

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

- Extending credit and servicing loans;
- Extending or brokering leases;
- Providing real estate settlement services;
- Engaging in deposit-taking or funding custodial activities;
- Selling, issuing, or providing stored value cards or payment instruments;
- Check cashing, check collection, or check guaranty services;

[25] 12 U.S.C. § 5491(a).

- Providing payments or other financial data processing products or services;
- Providing financial advisory services;
- Collecting, maintaining, or providing consumer report information or other account information;
- Debt collection related to consumer financial products or services;
- Products or services permissible for a bank or financial holding company to offer that will impact consumers.

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

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

a. *Case Law Limiting Scope of Authority*

In addition to the CFPB's enabling statute, the APA, and *Chevron*, the CFPB's rulemaking and enforcement authority is also limited by case law. It is well settled that "the words of a statute

must be read in their context and with a view to their place in the overall statutory scheme."[26] Sweeping grants of regulatory authority are rarely accomplished through "vague terms" or "subtle device[s],"[27] and courts must "presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies."[28] Recognizing these fundamental principles, the United States District Court for the Eastern District of Texas ruled earlier this year that the CFPB exceeded its statutory authority to regulate unfair acts or practices by updating its rules to direct examiners to scrutinize companies for discrimination and for how well companies introspected about statistical disparities in data concerning business practices.[29] Notably, the Court came to this conclusion despite Congress directing the CFPB to ensure that "consumers are protected (1) from unfair, deceptive, or abusive acts and practices and (2) from discrimination."[30] In coming to this conclusion, the Court reasoned that the issue was one of major economic and political significance and permitting the CFPB to rule in this area "would have large implications for the financial-services industry."[31]

The Proposal under consideration now bears a striking similarity to that discussed above. Indeed, while Congress has granted the CFPB rulemaking and enforcement authority over financial products and services, it has clearly demarcated what these categories entail. The Proposal changes go far beyond this statutory boundary. Moreover, the Proposal, which considers adding to, or changing statutory definitions under the FCRA, would have major economic

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[26] *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989).
[27] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).
[28] *United States Telecom Assn. v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing *en banc*).
[29] *Chamber of Com. of United States of Am. v. Consumer Fin. Prot. Bureau*, No. 6:22-CV-00381, 2023 WL 5835951 (E.D. Tex. Sept. 8, 2023).
[30] *Id.* at 18.
[31] *Id.* at 8.

implications as discussed above, and in situations such as these, courts must presume that Congress intends to make such major policy decisions itself.

The CFPB's rulemaking authority has also been clarified in another recent case involving a statute that the CFPB administers. In *Consumer Finance Protection Bureau v. The Mortgage Law Group, LLP,* the United States District Court for the Western District of Wisconsin, ruled that the Bureau's regulations requiring attorneys to comply with certain state professional conduct rules were invalid because the rulemaking was in excess of the CFPB's authority.[32] Specifically, the court found that the CFPB's interpretation of the regulating statute was not subject to deference under *Chevron* and was arbitrary and capricious because Congress never intended the CFPB to address issues related to attorney conduct and attorney-client relationships.[33] The Court reasoned that the CFPB's authority under the CFPA and the Omnibus Act, as clarified by the Credit Card Act, gave the CFPB rulemaking authority only with respect to unfair or deceptive mortgage loan practices, and an attorney's violation of a state rule of professional conduct regarding client trust accounts does not automatically equate to an unfair or deceptive mortgage loan practice.[34]

This case is instructive, because once again, the CFPB is attempting to regulate outside of its Congressionally proscribed bounds. The Proposal goes far beyond the scope of mere debt collection and attempts to regulate the healthcare system. Since the CFPB refused during the SBREFA process to define medical debt, it is also impossible to know the extent to which this Proposal impacts certain medical providers. However, it is certainly clear that it does, and the CFPB does not have the unfettered authority to create definitions in this area to impact any certain

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[32] *Consumer Fin. Prot. Bureau v. The Mortg. L. Grp.*, LLP, 157 F. Supp. 3d 813, 820 (W.D. Wis. 2016), *aff'd in part sub nom. Consumer Fin. Prot. Bureau v. Consumer First Legal Grp., LLC*, 6 F.4th 694 (7th Cir. 2021)
[33] *Id.* at 824–25.
[34] *Id.*

type of medical provider or part of the medical system, however it deems appropriate. This Proposal is outside the CFPB's jurisdiction, and if challenged, it is highly unlikely that the CFPB's interpretation would not be subject to *Chevron* analysis.

Finally, in another recent case involving the CFPB's regulatory authority, the United States District Court for the Northern District of Illinois, dismissed with prejudice the Complaint filed by the CFPB, and held that the plain language of the ECOA does not prohibit discrimination against prospective applicants. The Complaint filed by the CFPB alleged that Townstone Financial, Inc., a nonbank retail-mortgage creditor and broker, had engaged in discriminatory acts or practices in violation of the ECOA.[35] The Court summarized the allegations as follows: "The CFPB alleges that Townstone's acts and practices would discourage African-American prospective applicants, as well as prospective applicants in majority- and high-African-American neighborhoods in the Chicago MSA from seeking credit."[36] The Court then applied *Chevron* to determine whether the CFPB's allegation of discrimination against "prospective applicants" was permissible under the ECOA. Indeed, upon applying the first step of the *Chevron* analysis, the Court found that "Congress has directly and unambiguously spoken on the issue at hand and [that ECOA] only prohibits discrimination against applicants".[37] In granting Townstone's motion to dismiss, the court reasoned that the plain text of the ECOA applies to "applicants," which the ECOA "clearly and unambiguously defines as a person who applies to a creditor for credit" – and not to "prospective applicants." Given this, the court was not required to move on to the second step of the *Chevron* analysis and consider the CFPB's interpretation of the statute.[38]

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[35] *Townstone,* LEXIS 18405 at * 7.
[36] *Id.*
[37] *Id.*
[38] *Id.*

Again, this case is instructive to the matter at issue here. As discussed, the CFPB is attempting to regulate an area of the FCRA that has been thoroughly prescribed by Congress, and moreover, is considering expanding upon current definitions under the Act. This case makes clear, that where Congress has explicitly and unambiguously spoken on the issue at hand, the CFPB's interpretation and expansion, is not entitled to deference.

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

The CFPB does not have the authority, expertise, or proper tools to regulate the medical, healthcare, and insurance industries and cannot do so through Regulation V. When Congress passed the FCRA, it did so with a narrow and explicit prerogative: to promote fair and accurate credit reporting.[39] It did not intend for the Act to be used to regulate non-financial products and services simply because they are purchased on credit.

Financial services and products play a very limited role in the healthcare and medical services industries and the CFPB has a correspondingly limited authority to regulate or make policies in those fields. In fact, the CFPB has already acknowledged that it lacks authority to regulate within the medical industry by specifically *excluding* medical debt from its definition of "large market" participants in the consumer debt collection market.[40] While promulgating regulations of large market participants, the CFPB stated that it has authority to regulate the debt collection market because that "is a market for financial products and services under the Act" but

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[39] *See e.g.*, 3 Fair Credit Reporting Bill, 115 Cong. Rec. S2410-11 (daily ed. Jan. 31, 1969) ("Credit reporting agencies are absolutely essential in today's credit economy. . .my objective in introducing the fair credit reporting bill is to correct certain abuses which have occurred within the industry and to insure that the credit information system is responsive to the needs of consumers as well as creditors.").
[40] 12 C.F.R. § 1090.105

that debt arising from medical expenses should be excluded because it is "unrelated to consumer financial products or services."[41]

While a consumer may use a financial product to pay for medical care, and debt incurred for that care may be reported to a CRA, payment providers and credit agencies have no role in the underlying transaction that gives rise to the consumer's obligation to pay for that transaction. Determinations of when, how, and at what price a consumer may purchase medical goods or services is entirely outside the purview of the CFPB. And this is not unique to the healthcare industry. The CFPB plays no bigger role in determining what healthcare services a consumer receives than it does what pair of shoes that consumer chooses to buy, even if each is purchased on credit. And if that consumer defaults on both debts, the result will be the same—a $2,000 debt collection tradeline will be reported in the same manner and have the same effect on a consumer's credit whether that debt was from a trip to the ER or the purchase of Manolo Blahniks. In short, the statutory laws that Congress has authorized the CFPB to affect through rulemaking were not intended to create broader policy. Attempts do to so exceed the CFPB's statutory authority.

Similarly, and as further detailed below, in many of its public statements, the CFPB takes aim at complex insurance coverage related to healthcare. It is true insurance coverage is a nuanced and complicated process. That is why there are certain Congressional Committees and agencies such as the U.S. Departments of Health and Human Services ("HHS"),[42] Labor ("DOL"),[43] and the Treasury,[44] that are tasked with creating laws and regulations surrounding insurance.[45] In fact,

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[41] 77 FR 9597.
[42] 42 U.S.C. § 3501 *et. seq*.
[43] 29 U.S.C. § 551 *et seq*.
[44] 31 U.S.C. § 301 *et. seq*.
[45] *See e.g.*, 26 U.S.C. §§ 9801–9834 (regulating group health plans and assigning enforcement and regulation to the IRS); 42 U.S.C. § 300gg (regulating insurance requirements including limiting cost-sharing and assigning enforcement and regulation to HHS); 42 U.S.C. 1320f (directing HHS to establish a Drug Price Negotiation Program).

Congress recently passed the No Surprises Act to address some of these issues.[46] Unfortunately, the "research" and data that the CFPB cites for its interest in this issue was collected years before this sweeping law that already addresses many of the issues the CFPB raises about the healthcare system.

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

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

The CFPB does not have the authority to unilaterally determine what types of consumer debt can be reported and used by creditors. The FCRA grants the CFPB the authority to "prescribe such regulations as may be necessary and appropriate to administer and carry out the purposes of [the FCRA]".[47] The stated purpose of the FCRA is to create rules and procedure for credit reporting

[46] Pub.L. 116–260, the Consolidated Appropriations Act of 2021.
[47] 15 U.S.C. 1681(s)(e)(1).

that balance the need for access to complete and accurate credit reports with the consumer's interest in privacy and fair access to credit products.[48] Congress did not delegate how to strike this balance to the CFPB. Rather it enacted a law that that makes consumer information broadly reportable, with the exception of specifically enumerated categories of protected information.

The CFPB asserts that it has authorization to prohibit reporting or use of medical debt to lower the burden of healthcare costs because the FCRA already limits the use of medical information. This is a misreading of the statute. The CFPB's Proposal states its proposed rulemaking is necessary because: (1) "[m]edical debt collection tradelines appearing on consumer reports can have negative consequences for consumers, including impacting consumers' ability to obtain credit (or to obtain it at favorable rates) after experiencing, for example, a medical emergency"[49] and (2) that medical debt collection tradelines appearing on consumer reports "can also be used as leverage by collectors to coerce consumers to pay sometimes spurious or false unpaid medical bills."[50] But these concerns have no specific tie to medical debt: any consumer with a high amount of consumer debt on their credit report will have more difficulty obtaining new credit; and any debt tradeline can be used as leverage for repayment by a creditor. Indeed, that credit reporting allows creditors to limit their risk by not lending to or imposing higher rates on people with a large amount of debt are features, not bugs, of the credit reporting system created by the FCRA.

As ACA pointed out, and as the Wall Street Journal published,[51]

> In "Credit Reports Remove Some Old Medical Debt" (Personal Journal, July 12), the Consumer Financial Protection Bureau's John McNamara is reported as saying

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[48] 15 U.S.C. 1681(b); (*See also* Fair Credit Reporting Bill, 115 Cong. Rec. S2410-11 (daily ed. Jan. 31, 1969).
[49] Small Business Advisory Review Panel for Consumer Reporting Rulemaking Outline of Proposals and Alternatives Under Consideration ("Rulemaking Outline") at 17-18.
[50] *Id*. at 18.
[51] https://www.acainternational.org/news/the-wall-street-journal-publishes-acas-response-to-cfpb-medical-debt-credit-reporting-comments/

> that debt collectors will delete medical debts when consumers question them because they have little faith in their accuracy. That isn't true.
>
> Collection agencies work with reputable healthcare providers to ensure accurate billing. ACA International is the association of credit and collection professionals. Members use comprehensive compliance programs to ensure that only legally owed debts are reported. We acknowledge healthcare's complexity, including complicated insurance. ACA members have strong controls to respond to legitimate disputes and mitigate errors.
>
> CFPB's claim that inaccurate amounts are reported as a coercive measure is, again, false. The CFPB hasn't provided any data supporting this allegation. The free market has no incentive for such illegal behavior. If this were common practice, healthcare providers would stop working with collection agencies, and we'd incur significant legal liability. There's no evidence either has come to pass.
>
> Arbitrary changes hurt patients. Delaying reporting to one year enables insurance companies to deny claims for untimely filing. This, and not reporting debts under $500, negatively affects healthcare providers' revenue, resulting in reduced access to care for the low-income as providers move to more upfront payments. Congress didn't provide for unelected CFPB staff to make healthcare-policy decisions; it's a slippery slope. Americans deserve greater access to affordable healthcare, not less.

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

2. Congress has Explicitly Spoken about Limits on Medical Debt Reporting

In contrast to the Bureau's *ultra vires* proposals, Congress' concerns regarding the furnishing and use of medical information are much narrower: first, is a privacy concern—medical data is sensitive, and the specifics of a consumer's healthcare needs as reflected by the medical services they receive or medications and devices they purchase should not be publicly available. Second, and related, is a concern that personal medical information could be improperly used as the basis for employment or credit decisions. Based on these concerns, Congress included in the FCRA a section titled "protection of medical information" setting out how and when medical

information may be obtained and used in connection with credit decisions. Section 1681(g)(2), governing use of medical information by creditors states that:

> Except as permitted pursuant to paragraph (3)(C) or regulations prescribed under paragraph (5)(A), a creditor shall not obtain or use medical information (*other than medical information treated in the manner required under section 1681c(a)(6) of this title*) pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit. (emphasis added).

The "manner required under section 1681c(a)(6)" is that the information must be "restricted or reported using 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."[52] Thus, the FCRA *allows* creditors to obtain and use medical information—including medical debt—to make credit determinations so long as that information is not reported in a way that would allow the creditor to obtain information about the consumer's specific medical treatment or condition. And this distinction makes sense, as there is no practical way to prevent creditors from obtaining or using medical information. For example, many consumers pay for medical services with a credit card. When that credit card balance is reported, a creditor has no way of knowing if that debt is medical or not, and the distinction makes no difference to the impact that that debt will have on the consumer's ability to obtain additional credit.

Finally, that Congress only intended to delegate to the CFPB the authority to regulate reporting of medical debt to the extent required to protect the privacy of consumers need not be inferred—it is explicitly stated. Section 1681b(g)(5) grants the CFPB the authority to promulgate rules to *permit* creditors to obtain or use medical information that would otherwise be prohibited

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[52] 15 USC § 1681c(a)(6).

under Section 1681b(g)(2) as is necessary "to protect legitimate operational, transactional, risk, consumer, and other needs. . . consistent with _the intent of paragraph (2) to restrict the use of medical information for inappropriate purposes_." (emphasis added). Notably, Congress does not grant the CFPB authority to further limit the use of medical information at all. Instead, it authorizes the CFPB to allow *more* medical information to be reported. And it clearly does not authorize the CFPB to regulate any specific industry or to reduce the burden of debt on consumers—it authorizes the CFPB to create regulations necessary to facilitate complete and accurate credit reporting.

Just within the past month, several Democratic members of Congress who voiced support for the CFPB's efforts in this area, introduced legislation seeking to make statutory changes to achieve the goal of the CFPB. This begs the question why advocates for the CFPB's work in Congress, would feel the need to introduce legislation at the same time this SBREFA process is happening, making a statutory change, if they truly believed the CFPB is on solid legal footing to move forward as is. As Congresswomen Katie Porter (D-CA) states, her bill, "demonstrates Congress' support for the CFPB using its existing authority to put these principles into federal regulations, and would cement these principles into law."[53] Here Porter makes the important distinction between the actual law and her support for regulations. It is clear, by the timing and content of this legislation, that the CFPB knows what its legal limitations are, and is attempting to garner partisan support from friends in Congress to catch up with its attempts to go beyond its authority.

In sum, prohibiting creditors from using or obtaining information regarding medical debt is entirely inconsistent with the FCRA. Congress has clearly stated that the Act is intended to set

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[53] "Rep. Porter, Sen. Merkley Reintroduce Bill to Protect Americans From Medical Debt" (Oct. 20, 2023) https://www.merkley.senate.gov/rep-porter-sen-merkley-reintroduce-bill-to-protect-americans-from-medical-debt/.

a procedure for fair and accurate credit reporting. This intent forecloses the possibility that the CFPB also intended to allow the CFPB to use credit reporting as a tool to effect policy changes in healthcare or any other non-financial industry.

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

Congress already did the work that the CFPB proposes concerning medical debt. As discussed above, Congress prohibits reporting of medical information that could allow third parties to determine what type of medical product or service the consumer received at 15 U.S.C. 1681(b). This statutory texts reflects the stated policy goal of protecting privacy. But also implicitly allows medical debt reporting. Also in 15 U.S.C. 1681(c), Congress specifically excludes a narrow category of medical debt. That is, CRAs may not report medical debt owed by veterans for medical services received more than a year before the report was created.[54] Again, this reflects a legislative policy determination that veterans should not have accurate medical debt reported, but that this protection does not apply to other categories of consumers.

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

The Bureau's Proposal raises a major question concerning the balance between accurate credit reporting, consumer privacy, and fairness. It did so by specifically enumerating what types

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[54] 15 USC § 1681c(a)(6).

of information are exempt from reporting. The FCRA does not delegate to the CFPB the authority to unilaterally upend this balance by deciding without any mandate or guidance from Congress that medical debt—or any other category of consumer debt—is uniquely harmful to consumers. Those decisions are inherently legislative; the FCRA does not have any indication that Congress intended to delegate them to the CFPB.

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

4. The FCRA does Not Authorize the CFPB to Prevent the Reporting of Accurate Information about Credit and doing so Defies the FCRA's Stated Purpose

The very first line of the FCRA is a Congressional finding that "the banking system is dependent upon fair and accurate credit reporting."[55] "Accurate" credit reporting is that which correctly identifies the transactions, accounts, and debts of the consumer. A report that does not reflect significant debts owed by a consumer is, by definition, inaccurate. By finding that the banking system depends on accurate reporting, Congress has expressed its intent to create a system

[55] 15 USC §1681(a)(1).

under which all valid debts, including those incurred for medical expenses, appear on a consumer's credit report. While it is arguably not "fair" that consumers are burdened with medical debt in the first instance, that is not the fairness that Congress contemplates or intended to address through the FCRA. Our banking system does not "depend" on a credit reporting system that only reports debts incurred out of choice rather than necessity. Rather, it depends on creditors having access to the information necessary to accurately predict the risk associated in lending to a particular individual. Ability to pay, amount of debt, past payment history, and history of default are essential to that prediction regardless of how the debt was incurred.

A procedure that prevents agencies from accurately reporting the amount of debt owed by a consumer and prevents lenders from issuing credit based on an accurate assessment of a consumer's finances neither meets the needs of commerce for consumer credit nor results in a system that is fair and equitable to consumers. The stated purpose of the FCRA is to "require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit. . . in a manner which is fair and equitable to the consumer. . . and proper utilization of such information."[56]. If creditors are not able to accurately assess the default risk of consumers, the result will be (1) consumers will be allowed to take out more credit than they can repay, resulting in default or bankruptcy and (2) creditors will increase the cost of credit for all consumers to account for the increased risk in lending. Neither of these outcomes benefits consumers.

The CFPB twists language in the statute and incorrectly states that Congress, "has raised concerns with the presence of medical debt information on credit reports." In fact, the CFPB

[56] 15 USC §1681(b).

incorrectly added the term "debt" and "debt collection" to a statutory provision that states, "medical information." Here the CFPB is literally rewriting the statute to try to concoct a twisted argument about medical debt credit reporting, that is clearly not backed by the legislative history or Congressional intent.

5. Rulemaking Authority about Medical Payment and Cost Lies with Other Federal Agencies

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

Indeed, Congress has squarely delegated the authority to make policy related to healthcare costs and spending to other agencies. As mentioned above, the recently passed No Surprises Act aims to reduce burdens by helping consumers understand healthcare costs in advance of care to minimize unforeseen medical bills. The No Surprises Act delegated interpretive and rulemaking authority to the HHS, DOL, and the Treasury.[57]

Congress, through its work in the No Surprises Act, makes several points clear: (1) it believes that legislation is needed to make sweeping changes in this market, not that agencies have

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[57] *See* 87 FR 52618 (final rules implementing the No Surprises Act issued by the Internal Revenue Service, the Employee Benefits Security Administration, and the Health and Human Services Department).

unfettered unilateral authority; (2) it in no place in the legislation discusses debt collection, so did not identify that market as part of the problem;[58] and (3) it identified certain agencies to address these issues and specifically did not include the CFPB. Unless and until Congress acts, nothing changes their directives on these issues.

The Affordable Care Act,[59] which contains comprehensive legislations aimed to reduce the cost of healthcare, streamline insurance claims, and increase access to quality medical care delegates rulemaking authority primarily to the Department of Health and Human Services, but also to several other federal agencies, yet does not delegate any regulatory authority to the CFPB.[60] Indeed, the Affordable Care Act specifically legislates requirements for the reporting and collection of medical debt but delegated the authority to interpret and enforce this provision to the IRS, *not* the CFPB.[61] The fact that Congress has repeatedly determined that the CFPB is not an appropriate agency and/or does not have the appropriate powers and authority to implement healthcare policy shows that Congress did not intend to grant the CFPB the authority to do so, either under the FCRA or any other financial regulation.

6. <u>The CFPB Cannot Issue a Rule Suppressing Medical Debt under the Major Questions Doctrine</u>

The CFPB clearly lacks the authority to make a rule that suppresses the reporting or furnishing of information about medical debts. The FCRA does not grant the CFPB broad discretion to dictate the types of information on consumer reports.[62] Nor did it provide the CFPB

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[58] *See generally*, Pub.L. 116–260, the Consolidated Appropriations Act of 2021. The text of the Act focuses on front-end billing and not collections.
[59] Pub. L. 111-148 (2010).
[60] *See generally*, Id.
[61] *See* Pub. L. 111-148 § 9007.
[62] *Supra* 22.

specific authority over medical debt.[63] The FCRA statutory text already imposes restrictions and limits on medical debt reporting and the statutory text both expressly and impliedly allows reporting of medical debt.[64] Finally, Congress has granted federal agencies other than the CFPB authority over major questions of healthcare policy.[65]

A rule requiring the suppression of accurate information about medical debts—paid or unpaid—would not survive analysis under the major questions doctrine. Under the major questions doctrine, the Supreme Court has rejected agency claims of regulatory authority when: (1) the underlying claim of authority concerns an issue of "vast 'economic and political significance;'" and (2) Congress has not clearly empowered the agency with authority over the issue.[66] The Supreme Court has explained that, in general, courts interpret statutory language "in [its] context and with a view to [its] place in the overall statutory scheme."[67] In cases where there is something extraordinary about the "history and breadth of the authority" an agency asserts or the "economic and political significance" of that assertion, however, the Court indicated courts should "hesitate before concluding that Congress meant to confer such authority."[68]

The Court has used the doctrine to reject agency claims of regulatory authority, including in regard to:

- the Internal Revenue Service's ("IRS's") decision that a federal health care exchange is "an exchange established by the State" for purposes of determining eligibility for tax credits (*King v. Burwell*, 576 U.S. 473 (2015)),

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[63] *Id.*
[64] *Supra* 27.
[65] *Supra* 28.
[66] *Util. Air Regul. Grp. (UARG) v. EPA*, 573 U.S. 302, 324 (2014).
[67] *FDA v. Brown & Williamson Tobacco Corp*., 529 U. S. 120, 133 (2000)
[68] *West Virginia v. EPA*, 142 S. Ct. 2587, 2607–2608 (2022).

- the Centers for Disease Control and Prevention's ("CDC's") nationwide eviction moratorium (*Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (per curiam)),
- the Federal Communication Commission's ("FCC's") waiver of a tariff requirement for certain common carriers under its statutory authority to "modify" such requirement (*MCI Telecomms. Corp. v. AT&T Co*., 512 U.S. 218 (1994)).

The CFPB's claim to authority over medical debt reporting is even more spurious than these provided examples.

D. **The CFPB's Funding Structure May be Unconstitutional**

The CFPB should not proceed with the requested rulemaking while the constitutionality of its funding structure is in dispute. One year ago, the Fifth Circuit stuck down an otherwise valid rule on the basis that the CFPB's funding structure violates the Appropriations Clause.[69] The CFPB's appeal of the Fifth Circuit ruling is currently under consideration by the Supreme Court, and the same potentially unconstitutional funding scheme is still in place today. The CFPB should not continue promulgating rules while its constitutionality, and thus the validity of those rules, remains an open question.

1. *The Fifth Circuit Finds the CFPB's Funding is Unconstitutional*

In October 2022, the Fifth Circuit held that the CFPB's funding structure violates the Appropriations Clause and struck down the Pay Day Lending Rule because it was a product of that unconstitutional funding scheme.[70] In determining that the CFPB's funding violates the Appropriations Clause, the Fifth Circuit first explained that Congress' control over money in the

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[69] *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616, 643 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 978, (2023), and *cert. denied sub nom.,* 143 S. Ct. 981, (2023).
[70] *Id*.

Treasury limits all powers of the other two branches. That is, no action by the other branches may permit disbursements from the Treasury unless supported by an appropriation. [71] Thus, the Appropriations Clause is more than a restraint on the executive and judiciary--it also "affirmatively obligates Congress to use" its "power over fiscal matters" to preserve the separation of powers and individual liberty.[72]

The court then identified two provisions of the Bureau Fund that show Congress abdicated this duty. First, is what the Fifth Circuit described as the Bureau's "self-actualizing, perpetual funding mechanism."[73] Rather than receive annual appropriations, Congress enabled the CFPB to requisition its own funding from the Federal Reserve. The Fifth Circuit held that, by allowing the CFPB to requisition its own funds, Congress abdicated oversight or control over the CFPB budget.[74] The second problematic feature of the Fund is the form Congress chose to give it. The CFPB Fund is not a Treasury account, but a separate account at the Federal Reserve Bank. It is thus "off the books."[75] The court held that the effect of this structure—both how the CFPB gets its funds and where they are kept—is "a double insulation from Congress's purse strings."[76] The court surmised that by creating funding with no oversight, Congress had abdicated its constitutional obligation to regularly appropriate money. Thus, the "Bureau's funding apparatus cannot be reconciled with the Appropriations Clause and the clause's underpinning, the constitutional separation of powers."[77]

[71] *Id*. at 637
[72] *Id*.
[73] *Id*. at 638.
[74] *Id*.
[75] *Id.* at 639.
[76] *Id*.
[77] *Id*. at 642

After determining that the CFPB's funding scheme is unconstitutional, the Fifth Circuit turned to the appropriate remedy. The Fifth Circuit acknowledged that the CFPB undoubtedly had lawful authority to promulgate the Pay Day Lending Rule. Despite having lawful authority, the court reasoned that because "the funding employed by the Bureau to promulgate the [rule] was wholly drawn through the agency's unconstitutional funding scheme" the rule could not survive.[78]

2. *The Question of Constitutionality is Currently Under Review*

The CFPB appealed the Fifth Circuit Ruling to the Supreme Court, who granted cert. The Court heard oral arguments October 3, 2023. The questions before the Court are: (1) if the Fifth Circuit erred in holding that the CFPB's funding structure violates the appropriations clause of the Constitution; and (2) if the Fifth Circuit erred in vacating a regulation promulgated at a time when the Bureau was receiving such funding. A ruling on the issue will likely be issued by the end of this term and will resolve all doubt over the constitutionality of the CFPB's operations.

Until this question is resolved, it is inappropriate for the CFPB to continue promulgating rules. The CFPB is still entirely dependent on the same funding structure that has been held to violate the Appropriations Clause. This means that any rule promulgated may be subject to reversal. Accordingly, the CFPB should cease the current rulemaking until either the Fifth Circuit decision is overturned, or Congress institutes a new funding scheme.

II. THE PROPOSAL WILL HARM SMALL BUSINESSES AND CONSUMERS

Apart from the legal deficiencies and constitutional infirmities discussed above, the Proposal as currently contemplated, will cause substantial harm to both businesses and consumers. For purposes of this comment letter, ACA focuses on the Bureau's proposed definitional changes

[78] *Id*. at 643.

to the FCRA, as well as its targeting of medical debt reporting. Specific examples of this harm are outlined in responses to the CFPB's questions below.

Various portions of the Proposal lack clarity, which will undoubtedly lead to confusion about who is covered by the FCRA on a going forward basis and what any given company's precise compliance obligations consist of. This uncertainty will create significant compliance burdens, increased costs (which will likely be passed onto consumers), as well as regulatory and litigation risk. Additionally, the prohibition of medical debt reporting will cause significant harms to small businesses, medical and healthcare providers, and consumers. As discussed below, the type of transactions covered by the Bureau's interpretation of the phrase "medical information" will certainly create sweeping and unintended negative consequences in all credit markets. This in turn will harm many small businesses, as well as consumers.

A. **The Proposal Undermines the Purpose of the FCRA**

As detailed above, Congress enacted the FCRA to ensure fair and accurate credit reporting.[79] This is important because accurate and complete credit reporting facilitates the efficient functioning of credit markets. Those who have consistently repaid their debts and have sufficient income to meet their liabilities qualify for ongoing credit. And those who have a poor history of repayment behaviors or simply lack sufficient income to accommodate their various debt obligations will be offered less credit or on more stringent terms.

The proposal, as currently contemplated, runs afoul of the FCRA's guiding purpose. Specifically, the Proposal arbitrarily assumes, without sufficient evidence, that one type of debt, medical debt, is nonpredictive of consumer risk. Without any supporting data, the Bureau takes

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[79] 15 U.S.C. § 1681.

the position that the reporting of medical debt harms consumers and prevents them from obtaining credit to which they would otherwise be entitled to. The Bureau then proposes that medical debt tradelines should be removed entirely from consumer reports.

As a threshold matter, the Bureau's determination that medical debt should be afforded less protections and different treatment than other types of debt is arbitrary and capricious, not to mention likely unconstitutional. As discussed more below, the Bureau's Proposal relies on a skewed reading of data that is nearly ten years old and fails to consider any of the recent regulations that have been implemented to address the Bureau's perceived failings of the healthcare system. And even that arguably obsolete data acknowledges that medical debt information has some predictive value of credit risk. But the Bureau ignores this and takes the unsupported position that medical debt data has no value in credit risk predictions. On the contrary, medical debt data, like any other debt obligation financial data is critical to the determination of a consumer's capacity to take on more debt and repay that debt in a timely and consistent manner. Thus, the removal of medical debt information from consumer reports will directly contravene the stated purpose of the FCRA and its goal of ensuring fair and accurate credit reporting.

Interestingly, the CFPB's efforts on medical debt, directly conflict with some of its other recent efforts on issues like Buy Now Pay Later ("BNPL"). The CFPB states in this regard,[80]

> Until recently, few BNPL lenders furnished information about consumers to the nationwide consumer reporting companies (NCRCs). This lack of furnishing could have downstream effects on consumers and the credit reporting system. It could be bad for BNPL borrowers who pay on time and may be seeking to build credit, since they may not benefit from the impact that timely payments may have on credit reports and credit scores. It may also impact both BNPL lenders and non-BNPL lenders seeking to understand how much debt a prospective borrower is carrying.

[80] https://www.consumerfinance.gov/about-us/blog/by-now-pay-later-and-credit-reporting/

Here the CFPB acknowledges the problems when lenders do not have a full picture of a consumer's credit portfolio. Indeed, here the CFPB seems concerned about consumers who pay on time and fulfill their legal obligations.

However, in the case of medical debt, the CFPB has not studied or addressed how consumers who address their payment obligations will be impacted. This seems irresponsible to not work to protect all consumers, including those who do pay their debts, and to create one-size fits all sweeping regulations focusing on a small minority of consumers who do not qualify for assistance, and truly cannot afford to pay. For those consumers that truly cannot afford to pay, there are a host of public policy objectives to help them. However, starting at the back end of the process will not solve the larger problem of unaffordable healthcare for some, and instead will harm many other consumers, under the CFPB's same line of reasoning for BNPL. As the *Wall Street Journal* correctly points out[81], "Last week the CFPB announced a rule-making to remove medical debt from credit reports. The agency invokes sympathetic stories of sick patients with large medical bills, but the rule isn't necessary to help them and its perverse incentives will hurt others."

1. Fair and Accurate Credit Reporting

Our entire financial market depends on accurate credit reporting. This is because when a potential lender or creditor evaluates whether to extend credit to any particular person, they must have a complete picture of the applicant's financial profile. Certainly, this inquiry considers an individual's borrowing and repayment behaviors. But, critically, it also shows what liabilities that individual already has. If a consumer report omits certain information, then potential creditors are

[81] Wall Street Journal Editorial Board, "Another Round of Debt Forgiveness," (Sep. 25, 2023).

left without the information they need to assess repayment and delinquency risk. The Bureau takes the position that medical debt is less, or even non-predictive of consumer risk. However, the reality is that medical debt, like any other type of consumer debt, must be considered when evaluating the creditworthiness of any particular applicant.

For example, if a consumer has $24,000 in medical debt that they are supposed to be paying in monthly installments of $1,000 per month, this information is absolutely critical to other potential lenders. If the same consumer goes to a dealership to purchase a new vehicle, the lender will be able to see that any financing it offers should account for that existing $1,000 per month liability. However, under the Proposal, this medical debt obligation would be invisible to the dealership lender. The result would be that the lender may be willing to extend more credit than the consumer can actually afford, because the lender does not know about the prior obligation. If the consumer then took on the additional debt for a vehicle, they could easily become over leveraged. Now, the lender is at risk of non-repayment, and the consumer is at heightened risk of delinquency across all their financial obligations. All of this is due to having inaccurate and incomplete information.

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

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

1. <u>Incomplete Credit Data will Result in a Credit Crunch</u>

When lenders and creditors are faced with incomplete credit data, their risk increases. This then translates to more stringent underwriting standards and subsequent reductions in lending activity. And those that are hurt the most are consumers and small businesses.

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

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

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

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

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

Multiple commentators during the SBREFA process explained that the Proposal, even as vague as it is right now, will create significant harms to small businesses. As a threshold matter, the Proposal is unclear on who and what types of businesses will be covered by the expansive definitions of consumer reports and consumer reporting agencies. Additionally, some of the coverage will be triggered by conduct outside of the particular businesses' control. For example, one SER commented that third-party use of certain information would be the ultimate determining factor of whether the provider of such information was a credit reporting agency. Data brokers and furnishers cannot guarantee that the third parties to which they provide information will use it in a narrowly defined way. At most, they can state their expectations via contract and then sue for breach of contract if the third party uses such information beyond the permissible purpose outlined in the contract. But a private breach of contract action will not save a company that is determined to be a CRA by the CFPB's broad language. The practical effect is that nearly every business will

need to assume that they could be considered a CRA at any point in time, and thus must comport with the compliance obligations of a CRA.

The CFPB in its Proposal fails to consider the “Pintos” effect, that there are many debt types where the consumer didn't apply for a loan, so won't meet the definition of permissible purpose under the FCRA. An example of this is payment of a fine for a Driving Under the Influence violation. Today non-FCRA data can be used to identify a new phone or address for a consumer with this type of debt, to seek payment. If this is considered FCRA data and harder to use, it will hurt small municipalities, and their communities, in a significant way.

The Proposal is also deficient because it lacks the clarity necessary for companies to understand the scope of the proposed rules. For example, multiple SERs commented that the Proposal is unclear regarding what constitutes medical debt. Does medical debt include veterinarian services? Does it include dental or eye care? Does it include counseling and therapy? Would the prohibition against medical debt tradelines apply to consumers who finance cosmetic procedures? And what about consumers who use credit cards to pay for medical care and devices like OTC medications, bandages, or a trip to the dermatologist? The Proposal includes no indication of who and what is covered, leading to regulatory risk and a situation where small businesses will be forced to accept the costs of compliance “just in case.”

1. Compliance with the Proposal will be Unduly Expensive

Given the nonspecific nature of the Proposal, as well as uncertainty about who it covers, it is difficult for companies to ascertain the full scale of their compliance costs at this time. However, what is clear is that the sweeping coverage and regulatory changes contained in the Proposal will be significant and will harm many small businesses. One category of small businesses that stand to lose the most are those providing medical and health care. Doctors, dentists, physical therapists,

etc. will undoubtedly suffer severe consequences under the CFPB's Proposal. However, given the broad language in the current Proposal, essentially any lender, creditor, debt collector, data broker, and anyone who shares or uses consumer data, could be significantly impacted.

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

For ACA's members, the cost has already been demonstrated as shown in the attached economic analysis, and is expected to compounded substantially. As the CFPB has acknowledged, nearly 93% of companies in the debt collection industry fall within the definition of a "small business." Thus, it cannot be overstated that the Bureau's current Proposal will have extremely detrimental effects for nearly the entire debt collection industry and those that they serve, including but not limited to doctors and other healthcare providers.

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

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

The compliance burden is not the only part of the proposal that will harm small businesses. The practical effects of the medical debt tradeline prohibition will also create significant financial harms to small businesses, some of which have not been included in the SBREFA process. For example, as discussed in the economic analysis below, medical providers have already seen a marked reduction in successful collection efforts based on the CFPB's public opinion that medical debt should not be reflected in consumer reports. As multiple SER commentators noted, many consumers believe that if a debt is not reflected on their report, they don't have to pay it. And even for those that do understand that they still have a financial obligation to repay, there is absolutely no incentive to pay their medical debts if it will not go on their consumer report and impact their

future eligibility for and access to credit. The result is that medical providers, who have become creditors by nature of allowing consumers to finance their healthcare procedures, are put into a position where there is no incentive for consumers to actually pay their bills. Critically, medical and healthcare providers were not invited to participate in the SBREFA panel and therefore, the CFPB has failed to include input from potentially the most important stakeholders, who will be affected most directly by this Proposal. Not only does the CFPB's arbitrary singling out of medical debt place our healthcare professionals in second class status, but the long-term results will be deleterious to consumers, the very people that the Bureau claims to be protecting.

E. **The Proposal Will Harm Consumers**

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

1. <u>Lack of Access to Credit for Critical Care</u>

When medical debt is eliminated from consumer reports, many consumers believe that it is not owed. And for those that understand they still have a debt liability outstanding, there is no incentive to pay it. The result is that many medical providers will see a marked decrease in their collection efforts. While many healthcare providers currently allow their patients to finance services, this option will be eliminated in favor of pre-payment. If doctors and other healthcare workers are unable to collect payment after services have been rendered, they will undoubtedly stop offering financing options and will only provide services to those who can pay for them beforehand. This means that those consumers who cannot afford the out-of-pocket costs for care

will be forced to use high-cost financing methods like credit cards, or in the worst case, forego medical treatment altogether. This predictably will hurt consumers generally, but will harm traditionally underserved communities like minorities and rural people the most. While affluent consumers may be frustrated by the lack of convenience offered through financing options, they will still be able to get the care they need by paying for it upfront. However, for those who do not have the means to pay for an entire procedure upfront, they will be denied access to care. And then, what may have been a small or preventable issue, could grow into a life-threatening emergency, where the individual is forced into emergent care at the ER. Not only is this person's health more at risk, but the cost of care has increased significantly. And because hospitals are not able to turn away life threatening emergencies, those providers are forced to absorb even higher costs of care (which otherwise could have been prevented), that are then passed onto society in the form of higher healthcare costs generally. Contrary to the Bureau's stated goal of reducing some of the healthcare burdens, the result of the Proposal will exacerbate the issues that already exist in the healthcare industry.

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

In addition to care denial caused by lack of credit and financing options, the Proposal and its associated costs, will also harm consumers by eliminating their physical access to healthcare. In many communities, including those in rural areas, there is a dearth of healthcare access already. Small towns and disadvantaged communities are less likely to have large medical facilities, including hospitals. They are also less likely to have specialists in critical areas like oncology. It is not uncommon for these locations to only be served by small medical providers. If the cost of compliance becomes too great, these small businesses will be forced to close or merge with a large company, leading to further market consolidation. The closure of these practices will mean reduced

access for consumers. Consumers will now be forced to drive excessive distances to reach care. While this may be a matter of convenience for those who have the luxury of time, it could mean life or death for others. It is easy to see how having to drive 45 minutes to reach a hospital could be too long for some healthcare emergencies. Alternatively, if the medical need is great enough to warrant flight for life, the consumer is then saddled with excessive costs for that emergency transport. Even for those small businesses and providers that remain in a community, they may have insufficient staff or funding to be open more than a few days a week. Again, consumers are the ultimate losers in this situation.

3. Absence of Certain Liabilities Paints an Incomplete Picture for Lenders Leading to Risk of Consumers Over -leveraging Themselves with Debt that Lenders Did Not Know About

Finally, consumers will also be hurt by a system that allows them to overleverage themselves. When any type of creditor evaluates the creditworthiness of a potential borrower, they are not just looking at repayment history and spending behaviors. They are also looking to understand the totality of a consumer's financial liabilities. If a monthly payment obligation is not reflected in a consumer report, the debt-to-income ratio will be artificially deflated.

For example, if a consumer has medical debt of $50,000 dollars that they are paying in monthly installments of $1,500 per month, this significantly impacts their ability to take on new debt. If this consumer applies for a mortgage, it is critically important for the mortgage lender to know the actual financial liabilities of the consumer. If the lender cannot see, and is therefore unaware, of the $1,500 monthly payment obligation, the lender may approve the consumer for more than they can afford to pay on a monthly basis. As a threshold matter, this will make it impossible for creditors like mortgage lenders to comply with their ability-to-repay ("ATR")

obligations under the Truth in Lending Act and Regulation Z.[82] As previewed in the legal analysis section above, the CFPB cannot promulgate rules in a way that makes compliance with other legal obligations impossible.

Moreover, the above example illustrates the very real risk that lenders will unknowingly permit consumers to overleverage themselves and enter a risky financial situation where they simply cannot meet their ongoing debt obligations. This in turn will harm consumers by increasing their delinquency and default risks, which will then hurt their credit scores. Some may be forced into bankruptcy when it becomes clear that they cannot meet their repayment obligations. Additionally, consumers will face increased litigation risks, and the increased costs and time associated with responding to a lawsuit.

III. RESPONSES TO SPECIFIC QUESTIONS POSED IN THE PROPOSAL

General Response to Questions Concerning Data Brokers

Data brokers and aggregators can be a resource to obtain publicly available information about consumers that can help debt collectors learn more about where they may live and work, and their contact information. Impeding the ability to find and use publicly available information about consumers through these tools, by adding unnecessary compliance burdens and CRA coverage to data brokers, would make it harder to collect and ultimately lead to an increased cost of credit for all.

For example, debt buyers, when looking to purchase a portfolio are asked to provide:

- Age of debt: Ask when the debt was incurred and how long it has been since a payment was made.
- Source of debt: Consider how and where the debt was incurred.
- Type of debt: Ask what type of credit product, i.e. credit card, loan, bad check, etc. the paper is for.
- Proof of debt: Some form of proof that the debtor owes the money is necessary.

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[82] 12 CFR § 1026.

- Location of debtors: The location of the debtor will give the buyer an idea of collectability of the account.
- Location of the creditor: The distance between the creditor and the debtor will provide an idea of the amount of work already done to collect the amount.
- History of work on the account: Ask what efforts have already been made to collect on the account.
- Information contained in the account: The amount of information contained in the account is an important asset in valuing the account. In some states, such as New York, not having certain information on an account may make it uncollectable.
- Percent of social security numbers available: A social security number aids in location and asset searches.
- Accounting and operational standards: Understanding the seller's accounting and operational standards is important.

Data brokers can often offer this service to buyers. Here, again, if data brokers in this space are considered CRAs, it would be more complex to use them and would ultimately raise prices and costs associated with debt buying. This would eventually lead to increased prices and costs for all consumers and credit providers.

General Response About Questions Related to Credit Header Data

Debt collectors are already subject to a plethora of state and federal regulations that ensure privacy and protect Personally Identifiable Information ("PII"). Subjecting credit header data to yet another layer of privacy restrictions and compliance would make it extremely complex and burdensome to use it. This would ultimately make it harder to find contact information for consumers who owe debt, which will lead to an increase in going straight to litigation, and also increase the cost of credit.

The GLBA already imposes obligations on financial institutions regarding disclosures of a consumer's non-public personal information. Specifically, it requires certain disclosures to consumers at the time of establishing a "customer relationship. The GLBA also already requires customers to be provided the opportunity to opt out of the sharing of this information with third parties if the financial institution does or plans to share such information. Debt collectors also

already have heightened requirements related to third-party disclosures under the Fair Debt Collection Practices Act ("FDCPA") and Regulation F.

General Response about Questions Related to Permissible Purpose

A consumer reporting agency may only furnish a consumer report to an individual that has a permissible purpose to obtain the information. Section 604 of the FCRA prescribes the purposes for which consumer reports may be furnished by a consumer reporting agency. Under § 604, a consumer reporting agency may furnish a consumer report to a person who "intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer…" Case law uniformly agrees "collection of an account" is equivalent to the collection of a debt. Thus, it is well settled that a debt collector has a permissible purpose to obtain a consumer report for the purpose of collecting a consumer's debt.

In *Pintos v. Pacific Creditors Ass'n*,[83] the U.S. Court of Appeals for the Ninth Circuit issued held that debt collection is not a permissible purpose for pulling a consumer report unless the debt arose from a credit transaction. In *Pintos*, the consumer's vehicle was towed and impounded due to the vehicle's lack of registration. The vehicle was later sold, but the sale price of the vehicle was not sufficient to cover the outstanding towing and impound charges. This deficiency balance was transferred to a collection agency. As part of its attempts to collect the debt, the collection agency obtained a copy of the consumer's credit report. The Ninth Circuit held that the debt collector lacked a permissible purpose to obtain the consumer's credit report because the debt at issue did not arise from a credit transaction. Rather, the consumer in *Pintos* incurred

[83] 504 F.3d 792 (9th Cir. 2007).

the debt involuntarily. The Ninth Circuit later withdrew its original opinion in *Pintos v. Pacific Creditors Ass'n* and filed a superseding opinion.[84] In its new ruling, the Ninth Circuit essentially confirmed its original holding that the consumer was not involved in a voluntary credit transaction. The court found to qualify under § 604(a), a credit transaction must satisfy two conditions: (1) the credit transaction must "involve" the consumer; and (2) the transaction must involve the extension or review of credit or the collection of an account. Turning to the dictionary's two meanings of the word "involve," the court clarified a consumer "is 'involved' in a credit transaction for purposes of § 604(a)(3)(A) where he or she is 'draw[n] in as a participant' in the transaction, but not where she is 'oblige[d] to become associated' with the transaction." As the consumer did not participate in obtaining credit, the court concluded she was not involved with a credit transaction. The Ninth Circuit clarified its ruling only applied to the permissible purpose relating to the use of the information "in connection with a credit transaction involving the consumer." The debt collector could argue another permissible purpose existed under § 604 that allowed the collector to obtain the consumer's credit report. Currently, no other federal courts of appeal outside the Ninth Circuit have considered the permissible purpose issues addressed *Pintos*.

As noted above, the CFPB fails to consider the "Pintos" effect, that there are many debt types where the consumer didn't apply for a loan, so will not meet the definition of permissible purpose under the FCRA. An example of this is payment of a fine for a Driving Under the Influence violation. Today non-FCRA data can be used to identify a new phone or address for a consumer with this type of debt, to seek payment. If this is considered FCRA data and harder to use, it will hurt small municipalities, and their communities, in a significant way. The CFPB's actions in this

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[84] *Pintos v. Pac. Creditors Ass'n*, 565 F.3d 1106 (9th Cir. 2009), *opinion amended and superseded on denial of reh'g*, 605 F.3d 665 (9th Cir. 2010).

area fail to consider the sweeping and many problematic impacts of limiting the use of publicly available information. It is impossible to even describe or quantify the many intended, or unintended consequences, that could result in this area if the CFPB proceeds.

General Response about Questions Related to Disputes

Debt collectors do not differentiate between legal and factual disputes. This would be impossible to do because it would require collectors to make legal determinations, which could result in the unauthorized practice of law. However, under the FDCPA, consumers have the ability to dispute a debt orally or in writing. A disputed debt must be marked as disputed in a debt collector's records, and if the debt is subsequently reported to a CRA, the report must reflect the dispute. If a consumer disputes a debt in writing and within thirty days of receiving the validation notice, a debt collector must send verification of the debt to the consumer before continuing collection activity. Under Regulation F, if a debt collector furnishes information to CRAs, the debt collector also has additional compliance obligations under the FCRA if a consumer disputes a debt. Despite rhetoric from the CFPB not acknowledging this, the law already prohibits a debt collector from communicating to any person credit information, which the debt collector knows or should know to be false, including the failure to communicate that a debt is disputed. Therefore, if a debt collector reports the debt to a CRA, either method of dispute requires the debt collector to mark the account as disputed on the consumer's credit report when initially reporting the debt.

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

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

Response to Medical Debt Questions

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

- Credit reporting is only one small piece of the collections process. So from that standpoint, this question does not make sense.
- If medical debt collection information was prohibited from being used on consumer reports, providers will likely turn to litigation efforts sooner to collect on owed debts.

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

- The CFPB's own research says it is less predictive, not non-predictive. Even though some credit reporting agencies have given less weight to medical debt, they still consider it. Thus, any lender providing credit and relying on credit scores is using this information. The CFPB does not appear to have studied this issue at all, and it is too soon to determine how the CRA change related to debts under $500 will impact lending.

- If medical debt tradelines have no value in identifying risk, then the market would not use the information. As will be shown later (Section 2014 Model Critique), the CFPB's own research shows that medical tradelines are informative in assessing a potential consumer's risk. However, given that there is no obligation to use credit report data, if medical debt had no value in assessing risks, then good risks, having depressed credit scores due to medical debts, were being offered bad terms of financing. Enterprising firms would be incentivized to identify this mispriced risk and offer better terms of financing. The business stealing effect is real, powerful and works to discipline markets. By removing medical tradelines, the CFPB is removing valuable information for the pricing of risk.
- In the CFPB's 2023 report on medical debt, it stated that "The FHFA has further announced that it will implement FICO 10T and VantageScore 4.0 as the credit scores that Fannie Mae and Freddie Mac will use as thresholds for screening for loans. These credit scores underweight or do not include medical collections, unlike the credit score models that FHFA-backed loans have historically used for screening-in decisions." Recently, numerous housing organizations, creditors, and lawmakers on both sides of the aisle criticized the rollout and implementation of these changes. Similar to what is happening now, many stakeholders were not actively engaged in the FHFA process or fully understanding the changes, and now when it is too late, they are realizing the many cost burdens and other issues associated with tinkering with credit scores and modeling.

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

- Learning about a financial obligation on their credit report may be the first time a consumer realizes they need to address this issue with their insurance company, or act to avoid future litigation. Taking away this option for learning about financial obligations, means more consumers will be surprised when the first time they become aware of a debt is after they are served with a lawsuit, that they will need to immediately spend additional resources on to respond. They also may miss important insurance deadlines and be forced to pay out of pocket for medical care that could have been covered by insurance or charity care.
- Many physician practices already have written into their managed care contracts that if a bill is not submitted to the insurance company within six months (or a specified time period) from the date of service, the insurance company does not have to pay that bill.
- Healthcare Financial Management Association ("HFMA") and ACA International, in 2020, jointly published the 2nd edition of Best Practices for Resolution of Medical Accounts with input from consumer groups and providers. These Best Practices further enhanced controls over credit reporting, and purposefully arrived at 120 days from the date of first discharge billing as an appropriate time for credit reporting to ensure accuracy in the final adjusted amounts as well as for the consumer to file a claim with the payer if needed. The 180-day wait time was already a problem.

A. **Rural and Impoverished Areas**

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

- As discussed above, there are already many legal requirements and protections related to disputes. If an insurance company should be paying and it is disputed, there is already a mechanism and legal requirements in place to address that.
- At a higher level, this seems like a problem with insurance companies that should be fixed on the front end through, not on the back end, by adding even more complexity to the credit reporting process.

Responses to High Level Questions Related to the Entire Proposal

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

- As detailed more fully in the comment letters provided by SBREFA panelists, Jennifer Whipple and Jack Brown, the changes required by different firms for operations, products, and services will be numerous and costly.
- There would be significant costs associated with making compliance changes, including rewriting policies and procedures, employee training, and system updates. If ultimately it became more difficult to collect, and there was a need for an increase in litigation, hiring attorneys and retaining law firms would be a significant costs increase.

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

- As noted, we estimate that the $480 billion currently paid in co-pays and deductibles now has been put at risk, in addition to what will not be collected as bad debt as outlined in the economic analysis attached.
- The Bureau's Proposal would essentially make medical debt payment voluntary. The economic consequences of this will be massive and cannot even be quantified in the short time frame provided for comments.
- For many ACA members and creditors, adding or expanding legal programs would be a significant cost. Hiring in-house or outside law firms, and the cost of litigation may be approximately a million dollars a year, and much more for businesses with larger volumes of healthcare debt.

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

- The Proposal would have massive and sweeping implications for the credit based economy that are impossible to quantify in the short time period provided by the CFPB. However, the attached economic analysis provides important information about the likely problems all market participants will face.

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

- The No Surprises Act went into effect on January 1, 2022, which will reduce the level of emergency services costs and out-of-network insurance bills. This will reduce the easier to challenge medical tradelines that may be driving the Bureau's observed results. The No Surprises Act and Regulation F have already reduced the level of medical debt tradelines

on credit reports. Both of these just recently went into effect. We suggest the CFPB wait and study this issue to determine if there is a problem before moving forward.

- Regulation F just went into effect and already addresses many of the concerns outlined by the CFPB. If there are issues in Regulation F that need to be fixed, that would be appropriate after a standard five year review of regulations that is common among federal agencies.

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

- See attached economic analysis.

Q. Are there any statutes or regulations with which your firm must comply that may duplicate, overlap, or conflict with the proposal under consideration? What challenges or costs would your firm anticipate in complying with any such statutes or regulations and the CFPB's proposal under consideration?

- The FDCPA, the FCRA, GLBA, the Health Insurance Portability and Accountability Act, several other privacy laws, and many state laws already address the CFPB's concerns related to reporting of inaccurate information and protecting consumer privacy. Duplicative regulations create a number of compliance burdens including rewriting policies and procedures, employee training, and system updates. If ultimately it became more difficult to collect, and there was a need for an increase in litigation, hiring attorneys and retaining law firms would be a significant costs increase.

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

- All of the outlined compliance and costs burdens are exacerbated for small businesses who have fewer staff members, and less in-house legal counsel. In some instances very specific client bases will be disproportionally impacted, and fewer resources will be available to devote to duplicative compliance requirements.

B. **Other Questions Related to Impact, Implementation and Costs**

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

- At least three years. This is a massive change, so small entities will need as much time as possible, and could go out of business regardless of what the timeframe is.

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

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

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

- See attached economic analysis.

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

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

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

- Yes, see attached economic analysis.

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

During the SBREFA panel, the CFPB on multiple occasions was not able to provide specifics or to define aspects of the Proposal that were needed to give a conclusory response to estimates about the full impact on small businesses. Specifically, not knowing how the CFPB defines medical debt, makes it nearly impossible to respond to a number of questions the CFPB poses. Since multiple stakeholder have indicated that the Proposal could have a sweeping impact on the healthcare market, insurance coverage, and the larger economy, it is essential for the CFPB to solicit more comprehensive feedback from a variety of stakeholders before moving forward. As fully outlined in our comment, the CFPB also does not have the legal authority to proceed on its Proposal. At the very least, the CFPB should hold another Small Business Review Panel with more complete information and participants, or alternatively issue an Advanced Notice of Proposed Rulemaking, to allow stakeholders to understand and comment on the CFPB's policy making goals.

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

Separately attached, please see economic analysis provided by Dr. Andrew Rodrigo Nigrinis, a former enforcement economist at the CFPB.