Submitted Via Regulations.gov

November 23, 2022

Rulemaking Petitions Docket
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552

Re: Response to Petition for Rulemaking - NCLC, et al. to "Ban Medical Debts from Credit Reports" (Document ID CFPB-2022-0067-0001).

Dear Director Chopra:

On behalf of the Association of Credit and Collection Professionals ("ACA International" or "Association"), I am writing in response to the National Consumer Law Center's ("NCLC") petition for a Consumer Financial Protection Bureau ("CFPB") rulemaking to "Ban Medical Debt from Credit Reports."

ACA International represents approximately 1,800 members, including credit grantors, third-party collection agencies, asset buyers, attorneys, and vendor affiliates, in an industry that employs more than 133,000 people worldwide. Most ACA International member debt collection companies are small businesses. The debt collection workforce is ethnically diverse, and 70% of employees are women.

I. Background about ACA International

ACA International members play a critical role in protecting both consumers and lenders. ACA International members work with consumers to resolve consumers' debts, which in turn saves every American household, on average, more than $700, year after year. 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. 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 International 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 International 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 recent months, the CFPB has undertaken a misguided campaign to target the ARM industry's compliant and beneficial collection activities. The NCLC petition, and the larger CFPB goal to remove all medical debt from credit reports, would result in negative unintended consequences for medical providers throughout the country. Unfortunately, CFPB leadership has not engaged in meaningful conversations with all stakeholders in the healthcare market, the ARM industry, or with the many other small businesses impacted by its ideological goals. Other than a targeted assembly of anecdotal information from select groups, most of the involved stakeholders have been shut out of the process. ACA has repeatedly sought an open and transparent process but instead has learned about major policy changes through press releases and tweets, issued after the fact.

II. The CFPB Lacks the Legal Authority to Issue Rules in this Area

In its petition, the NCLC mistakenly contends that the CFPB has regulatory authority to unilaterally prohibit medical debts from appearing on credit reports. The NCLC incorrectly relies on the Fair Credit Reporting Act's ("FCRA") Section 621(e) grant of authority to "prescribe regulations as may be necessary or appropriate to administer and carry out the purposes and objectives of [the FCRA]."[1] The NCLC contends that one of the objectives of the FCRA is that credit reporting "meet the needs of commerce . . . in a manner which is fair and equitable to the consumer," 15 U.S.C. 1681(b), and from this contends that "[r]emoving medical debts from appearing in credit reports furthers the objective of treating consumers fairly and equitably."[2]

This argument is wrong and without legal support.

If the CFPB was capable of unilaterally undertaking such sweeping action under the pretext of "treating consumers [just non-paying consumers] fairly and equitably," there would be no limit on the CFPB's ability to write and rewrite any law or regulation. This of course is not constitutional. Article I, Section I, of the U.S. Constitution grants lawmaking authority to Congress, not independent agencies, and nothing in the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") delegates Congress's authority to the CFPB to unilaterally rewrite the FCRA or its associated rules just because the agency supposedly deems the changes to be fair and equitable. Such determinations are for Congress to make via debated and agreed upon legislation that in turn is signed into law by the President.

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[1] Letter from NCLC, et al., to The Hon. Rohit Chopra, Director of the CFPB, Request for Rulemaking to Ban Medical Debt from Credit Reports, 3 (Sept. 26, 2022) http://bit.ly/3WPmAND (hereinafter "NCLC Petition"); 15 U.S.C. § 1681s(e)(1).

[2] NCLC Petition at 3.

As the U.S. Supreme Court has said, the FCRA,

> "regulates the creation and the use of 'consumer report[s]' by 'consumer reporting agencies' for certain specific purposes, including credit transactions, insurance, licensing, consumer-initiated business transactions, and employment."[3]

When Congress enacted the FCRA it expressly noted that the "banking system is dependent upon fair and *accurate* reporting" as "inaccurate credit reports directly impair the efficiency of the banks system." 15 U.S.C. § 1681(a)(1) (emphasis added).

To that end, FCRA put into place an "elaborate mechanism . . . for investigating and evaluating the credit worthiness [and] credit capacity" of consumers in which "reporting agencies have assumed a vital role in assembling and evaluating consumer credit." *Id.* at § 1681(a)(2)–(3). The text of FCRA also set out what information a credit report can and cannot contain. *See id.* at § 1681c (excluding from consumer reports, for example, Title 11 bankruptcy actions; civil suits, judgments, and records of arrest that antedate the report by more than seven years or for which the statute of limitations has expired; paid tax liens that antedate the report by more than seven years). It is important to note that Section 1681c *does* address medical debt, but only with respect to information related to a *veteran's* medical debt. *Id.* at § 1681c(7). Congress chose *not* to expand this limited medical debt exception beyond a very tailored group of affected persons.

Furthermore, the Dodd-Frank Act makes clear that the CFPB's jurisdiction is limited to **financial products and services**. *See* 12 U.S.C. § 5491. Medical debt, which by definition follows the rendering of medical care, which is not a consumer financial product. Accordingly, the NCLC's request that the CFPB single out medical debt from all other types of debt to exclude from credit reporting goes well beyond the CFPB's jurisdictional limits as established by Congress in Title X of the Dodd-Frank Act. *See* 12 U.S.C. §§ 5491–5603. Repercussions from CFPB impermissible action targeting this area would negatively reverberate through the medical care industry and result in negative impacts on healthcare access, as well as impact insurance coverage.

Congress did not give the CFPB authority to dramatically alter the long-standing credit reporting landscape by allowing it to unilaterally decide which products or services can be credit reported. If it had, the CFPB would possess unfettered ability to alter the credit reporting process and the billing practices of any profession, product offering, or other area it sets its sights on, and unilaterally deems appropriate.

ACA also notes that Larger Participants in the consumer debt collection market include persons with more than $10 million in annual receipts resulting from relevant consumer debt collection activities (except for receipts that result from collecting debts that were originally owed to a medical provider). The CFPB made this decision in 2012 after the CFPB solicited feedback through the notice and comment process and in accordance with the Administrative Procedures Act ("APA") before finalizing a rule. Against this established backdrop, it is without question that the CFPB's actions and attempted actions regarding medical issues conflicts with the established prior determinations about the CFPB's reach into this market. This underscores why arbitrary sweeping authority is not afforded

[3] *Spokeo, Inc. v. Robins*, 578 U.S. 330, 334 (2016) (footnotes omitted).

to the CFPB to engage in policymaking in the health care market, especially engaging in actions that dramatically altering the credit reporting process.

Unfortunately, rather than conducting legal and statistical research (involving all stakeholders), the CFPB has all but requested that states pass laws limiting or eliminating the reporting of medical debts. This tactic runs afoul of the preemption provision Congress included in the FCRA. In a July 2022 interpretative rule, the CFPB asserted that "FCRA's express preemption provisions have a narrow and targeted scope,"[4] This assertion was made despite the clear case law and statutory text that conflict with this assertion, highlighting the political nature of the CFPB's interest in this issue. With this flawed reasoning in mind, CFPB summarily concluded that, "States . . . retain substantial flexibility to pass laws involving consumer reporting to reflect emerging problems affecting their local economies and citizens."[5] The CFPB then tied this bold assertion directly to state laws impacting medical debt reporting:

> For example, if a State law were to forbid consumer reporting agencies from including information about medical debt . . . in a consumer report (or from including such information for a certain period of time), such a law would generally not be preempted. Likewise, if a State law were to prohibit furnishers from furnishing such information to consumer reporting agencies, such a law would also not generally be preempted.[6]

Of course, the CFPB's "interpretative rule" cannot constitutionally rewrite and overrule the preemptive scope of the FCRA. Rather, the statute's express language, as interpreted by federal courts, prevails and controls. The CFPB's unfounded position would serve to eviscerate the preemption provision Congress set out in the FCRA.

The NCLC next mistakenly contends that FCRA somehow provides the CFPB with rulemaking authority concerning medical information. It claims,

> [The FCRA] prohibits creditors from considering medical information under Section 604(g)(2), 15 U.S.C. § 168b(g)(2), unless the use is permitted by regulations issued by the CFPB under Section 604(g)(5), 15 U.S.C. § 168b(g)(5). The current regulations, which were promulgated by the banking regulators in 2005, do allow the use of medical debt information. Regulation V, 12 C.F.R. § 1022.30(d). However, the CFPB could remove this provision from Regulation V and instead prohibit the inclusion of medical debt in credit reports, given that it is not necessary for credit underwriting.[7]

The NCLC's reasoning in this regard is also seriously flawed.

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[4] The Fair Credit Reporting Act's Limited Preemption of State Laws, 87 Fed. Reg. 41042 (July 11, 2022).
[5] *Id.*
[6] *Id.*
[7] NCLC Petition at 3.

Congress never provided the CFPB authority to circumvent the express preemption provision Congress set out in the FCRA. The proposed changes to Regulation V are outside the scope of CFPB's authority because what the NCLC is actually proposing is not rulemaking, it is an unconstitutional rewrite of the law, not an interpretation of it. It is without question that the NCLC proposal conflicts with the accuracy and integrity mission of the FCRA to ensure that credit reporting agencies have correct and timely information.[8] Congress stressed the importance of the fact that, "the banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system," and that credit reporting should be done with "impartiality". 15 U.S.C.A. § 1681.

If a person has unpaid obligations, even in the unfortunate circumstance where that consumer truly cannot afford to pay, that is exactly the type of accurate information a potential credit grantor or existing creditor reviewing that person's ability to pay needs to know about for their own protection. The NCLC's arguments to the contrary represent a wholesale rejection of what Congress enacted. Moreover, NCLC's arguments misunderstand the many consumer protections that are in place, including accurate reporting, to help borrowers.

Their suggested actions are inconsistent with additional existing laws, as well as the safety and soundness requirements of financial institutions, and if carried out would force countless businesses and financial institutions into a state of uncertainty and confusion. As an example, the Credit Repair Organization Act (CROA) prohibits persons from advising any consumer to make a statement that is misleading to a credit reporting agency or a creditor about their creditworthiness. Specifically, CROA's text provides that "[n]o person may make any statement, or counsel or advise any consumer to make any statement, which is untrue or misleading . . . with respect to any consumer's credit worthiness, credit standing, or credit capacity," to credit reporting agencies or certain creditors. 15 U.S.C. § 1679b(a)(1).

The NCLC's suggested course of action would create violations of the CROA by (a) causing credit information furnishers to mislead credit reporting agencies by omitting true and relevant information with respect to consumer's credit worthiness; and (b) causing consumers with suppressed credit report information to mislead creditors when they apply for credit. Hiding accurate information from credit reports is not the answer to problems with the healthcare system, and instead create a slippery slope where non-elected regulators can unilaterally choose which professions should be paid for their work, and which should not. Congress and the Constitution do not allow for these types of arbitrary decisions. The FCRA as enacted was clear that all consumers and providers (including medical providers) and community lending institutions, need accurate information free from impartial political bias.

III. There are Several Legal Requirements For a Legislative Rulemaking

a. The Public (i.e., the Entire Public) Should be Afforded the Opportunity for Notice and Comment

[8] 15 U.S.C.A. § 1681.

The CFPB is not authorized to engage in rulemaking in this area. However, even if it were allowed to engage in rulemaking here, it must do so in compliance with the APA. The APA requires the CFPB to provide impacted entities with an opportunity to voice their concerns that understandably stem from such legal and policy matters. Moreover, before undertaking such actions, the CFPB must publish a "[g]eneral notice of proposed rulemaking" in the Federal Register, 5 U.S.C. § 553(b), and "give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments," *Id.* at § 553(c). And while § 553, exempts "interpretative rules" and "general statements of policy" from the notice-and-comment process, *Id.* at § 553(b)(3)(A), attempted reliance on this limited "exemption" is inapplicable here. In other words, simply "labeling" a substantive statutory change as an "interpretation" to avoid the notice and comment requirements -- is not permissible.[9]

The CFPB's authorizing statute mandates that it must consider certain factors "in prescribing a rule." 12 U.S.C. § 5512(b)(2). Those factors include: "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services" and "the impact of proposed rules on covered persons . . . [and] consumers in rural areas." *Id.* At § 5512(b)(2)(A). And the U.S. Supreme Court has plainly stated that an "agency action is lawful only if it rests 'on a consideration of the relevant factors.'"[10] Thus, agencies, including the CFPB, cannot promulgate rules without giving express consideration to the factors in their respective authorizing statutes. If an agency promulgates a rule without discussing the factors Congress directed it to consider, private parties will challenge the validity of the rule under *State Farm*, as "an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem."[11] And courts will vacate the rule if they find that the agency in fact failed to consider a statutory factor.[12]

The Regulatory Flexibility Act ("RFA") also provides that "[w]henever an agency is required . . . to publish general notice of proposed rulemaking for any proposed rule . . . the agency shall prepare and make available for public comment an initial regulatory flexibility analysis." 5 U.S.C. §603(a). "Such analysis shall describe the impact of the proposed rule on small entities." *Id.* Through this provision of the RFA, Congress purposefully created the mechanism for an agency to conduct the required cost/benefit analysis, as well as other checks, precisely to ensure what an agency is doing is not in fact harming the broader public, small businesses, and the economy. Creating regulations without going through the required notice-and-comment process is not only legally impermissible, it is also bad policy. Uninformed policymaking undertaken in a closed bubble in Washington, D.C. will lead to bad outcomes for all stakeholders, including consumers and medical providers throughout the country.

b. Small Businesses Cannot be Ignored

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[9] *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000).
[10] *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)); *see also Catskill Mountain Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 522 (2d Cir. 2017).
[11] *State Farm*, 463 U.S. at 43.
[12] *See id.* at 57 (striking down a legislative rule because the Department of Transportation "failed to supply the requisite 'reasoned analysis.'").

If the CFPB attempts to move forward in a rulemaking in this area, it must initiate its efforts through the Small Business Regulatory Enforcement Fairness Act ("SBREFA") process. *See* 5 U.S.C § 609. There is no question that a substantial number of small entities will be negatively impacted by eliminating their ability to list true and accurate past due medical debt on credit reports. The majority of ACA International members are small businesses and would be impacted by the NCLC's proposal. NCLC's proposed actions would also impact a broader coalition of small entities: ACA's small business clients in the healthcare space, small community financial institutions lenders, and all small businesses relying on accurate credit information to extend goods and services. Congress recently reminded the CFPB it must follow established requirements when considering issuing rules impacting small businesses, highlighting that there are several steps the CFPB must take when a substantial number of small entities are impacted.[13] If an agency fails to engage in this required regulatory flexibility analysis, direct harm to small businesses follows, and the agency has not complied with its SBREFA requirements. *See* 5 U.S.C. § 604(a)(2)–(6).

IV. The CFPB Should Not be Engaging in Any Rulemaking Until Questions about its Constitutional Structure are Resolved.

As the CFPB is aware, based on its now pending appeal to U.S. Supreme Court, the U.S. Court of Appeals for the Fifth Circuit very recently ruled in *Community Financial Services Association of America Ltd.* v. *CFPB,* 5th Cir., No. 21-50826, Opinion 10/19/22 that the CFPB's independent funding mechanism is unconstitutional. The *CFSA* court held that the CFPB's "double-insulated" funding violates the U.S. Constitution's Appropriations Clause, as well as the separation of powers principles on which it is based. Earlier this month, the CFPB filed its petition for certiorari with the Supreme Court to review this ruling since the *CFSA* decisions held that "without its unconstitutional funding, the Bureau lacked any other means to promulgate the [payday] rule." The CFPB in its brief acknowledges that the ambiguity, "threatens to inflict immense legal and practical harms on the CFPB, consumers, and the Nation's financial sector."

The *CFSA* court also held that the plaintiffs, "were thus harmed by the Bureau's improper use of unappropriated funds to engage in the rulemaking," entitling them to "a rewinding of [the Bureau's] action." Given the holdings in Community Financial that directly and constitutionally undercut the legitimacy of the CFPB, all of which are heading to the U.S. Supreme Court, it is imprudent for the CFPB to not engage in further rulemaking until the Community Financial case is finally resolved. If the CFPB were to move forward during this time of great uncertainty, significant judicial, consumer, and financial service market participant resources will be wasted, which is not beneficial to anyone. The CFPB in its petition alludes to the lack of clarity surrounding its authority for rulemaking acknowledging, "the gravity of those consequences and the uncertainty that the court of appeals' decision has already created."

V. A Large Swath of Policy and Practical Concerns Will Result if Medical Debt Credit Reporting is Eliminated as Proposed.

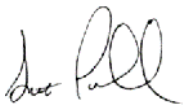
[13] Letter from Blaine Luetkemeyer, House Committee on Small Business Ranking Member, and Roger Williams, House Committee on Small Business Vice Ranking Member, to the Hon. Rohit Chopra, Consumer Financial Protection Bureau Director (Oct. 24, 2022) http://bit.ly/3fRUVek.

As ACA International has outlined in earlier letters to the CFPB and Congress,[14] it is concerning that CFPB leadership repeatedly fails to address the myriad of unintended consequences that result from its actions, including those that will flow from NCLC's proposed course of action. What NCLC is proposing is a direct assault on the marketplace. Creditors enter into contracts/agreements to provide goods and services expecting to get paid. Part of that expectation is that unpaid debts can be reported to the credit bureaus, as specifically allowed by the FCRA. The NCLC, however, is asking the CFPB to re-write those agreements and the FCRA, after those debts are incurred. This is unfair to small businesses and medical providers throughout the country, all of whom rely on the ability to be compensated for services rendered.

Creating a new health care system through the credit reporting process, which essentially is what NCLC is attempting to do, is not the answer. The NCLC petition is based on assumptions and anecdotes. NCLC, like the CFPB, provides no credible evidence to support its underlying assumption that consumers carrying medical debt provides no predictive value for existing and future creditors. Simply put, both the NCLC and the CFPB are willfully overlooking the harmful, negative, and unintended consequences that will flow from NCLC's proposals, both for consumers and medical providers.

In sum, the NCLC proposal is unconstitutional and in conflict with existing federal laws and regulations. And if it were constitutional to even consider, all of the requirements for rulemaking must be followed as outlined above.

Thank you for your attention and due consideration. Please let me know if you have any questions.



Scott Purcell
Chief Executive Officer
On behalf of ACA International

[14] *See* Letter from Scott Purcell, ACA International Chief Executive Officer, to the Hon. Rohit Chopra, Consumer Financial Protection Bureau Director (Sept. 30, 2022) http://bit.ly/3NWF1Mf; Letter from Scott Purcell, ACA International Chief Executive Officer, to Chuck Schumer, United States Senate Majority Leader, et al (Sept. 8, 2022) http://bit.ly/3toNjDa.