December 13, 2022

Chairman Sherrod Brown
Senate Committee on Banking, Housing and Urban Affairs
Washington, D.C. 20515

Ranking Member Pat Toomey
Senate Committee on Banking, Housing and Urban Affairs
Washington, D.C. 20515

Dear Chairman Brown and Ranking Member Toomey,

On behalf of ACA International, the Association of Credit and Collection Professionals (ACA), I am writing regarding your hearing titled, "The Consumer Financial Protection Bureau's Semi-Annual Report to Congress." ACA 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 member debt collection companies, however, are small businesses. The debt collection workforce is ethnically diverse and 70% of employees are women.

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 targeted the work of the ARM industry in several ways. One of the Bureau's apparent objectives is to completely remove any reference to outstanding medical debts from all credit reports. This goal, if achieved, will result in negative consequences to consumers and harm medical providers throughout the country as they are grappling with reduced revenues and increase patient demand. Unfortunately, the CFPB has not engaged in meaningful conversations with stakeholders in the health care market beyond targeted collection of anecdotal information from select groups. An open and transparent process concerning the medical debt credit reporting changes the CFPB is pushing would have allowed stakeholders to bring to the table the unintended and harmful consequences that will now result from cherry picking certain payment obligations to exclude from the long-established credit reporting system.

There are also serious concerns about the CFPB's interpretive rule issued as an advisory opinion on "junk fees" in the debt collection market. There is existing judicial precedent that supports the use of these convenience fees, and they are very common for modern payment processing. Yet, the CFPB issued an advisory opinion without first engaging in a transparent and deliberative process with all stakeholders to understand the consumer choice associated with these fees. There was no effort to try to understand benefits of why they are sometimes used in payment processing. As the industry grapples with this advisory opinion, it is disappointing that there could have been notice and opportunity for discussion before sweeping changes were made.

ACA urges Congress to consider the following concerns.

I. Legal Requirements

a. The Public Should be Afforded the Opportunity for Notice and Comment

ACA would like to remind the CFPB of laws and requirements Congress has enacted to avoid some of the negative unintended consequences of the bureau's actions highlighted in this letter. The Administrative Procedure Act ("APA"), for example, requires that before undertaking certain actions, federal agencies 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," 5 U.S.C. 553(c). Section 553, however, exempts "interpretative rules" and "general statements of policy" from the notice-and-comment process. 5 U.S.C. § 553(b)(3)(A). Nevertheless, labeling a substantive change to a rule as an interpretation simply to avoid the notice and comment requirements is not permissible. *See Appalachian Power Co. v. EPA,* 208 F.3d 1015, 1024 (D.C. Cir. 2000).

The Regulatory Flexibility Act ("RFA") 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. Congress intentionally created the RFA to incorporate the opportunity for an agency to understand cost benefit analysis, and other checks, to ensure what an agency is doing is not in fact harming the broader public, small businesses, and the economy. The Bureau has found many creative ways to avoid engaging in RFA analysis. Instead, it has used anecdotes and pre-determined outcomes from a small group in Washington, D.C., in place of the statistical analysis and data that financial service providers and participants around the country typically provide and discuss in the public comment

process to ensure decision making is informed and measured. Creating regulations without going through the notice-and-comment process is not only legally impermissible, but is also bad policy, and leads to bad outcomes for all stakeholders, including consumers.

b. Small Businesses Should not be Ignored

This is also true when the CFPB skirts Small Business Regulatory Enforcement Fairness Act ("SBREFA"), Pub Law No. 104-121, requirements. *See* 5 U.S.C § 609. The SBREFA process gives smaller providers an opportunity to have a voice in effectuating outcomes. If an agency fails to create a review panel when so required, there is direct harm to small businesses. *See* 5 U.S.C. § 604(a). The CFPB has discussed promoting competition and opposing antitrust violations, but its actions say otherwise. It has engaged in a number of actions including in the medical debt credit reporting space and in issuing its advisory opinion for convenience fees, without the input of small businesses that are impacted.

Director Chopra has unabashedly publicly favored certain groups, and has ignored the concerns raised about unintended consequences about a number of Bureau actions from the ARM industry, which is mostly made up of small businesses. Despite the lack of dialogue with stakeholders, the CFPB director continues to make a number of public pronouncements about debt collection. Avoiding APA requirements and the SBREFA process has kept small financial services companies on the sidelines and without a voice in the discussion, while the CFPB continues to move forward creating policies outside the scope of the rulemaking process. This will also likely lead to more consolidation and thus, less competition in direct conflict with the CFPB's stated priorities. Furthermore, it sends a clear message that the CFPB cares about the opinions of the largest Wall Street companies but not smaller businesses impacted by its work in the ARM and medical industries.

c. Coordination with Attorneys General Should be Fair and Reasonable

This spring, the CFPB issued an interpretative rule "to provide further clarity regarding the scope of state enforcement." According to the interpretive rule, Section 1042 of the Consumer Financial Protection Act ("CFPA") allows the CFPB to authorize state attorneys general to independently enforce federal consumer financial laws, regulations, and bureau consent orders. The message the CFPB has clearly been sending, and actions it has taken, have resulted in numerous instances of duplicative actions from the bureau and state attorneys general. Members of Congress recently pointed out that, "It is clear that state attorneys general may enforce the CFPA in cases where the CFPB has not. But the statute does not allow for a state attorney general to become a party to an existing CFPB enforcement action. It is therefore inappropriate for the CFPB to recruit a state attorney general that is not otherwise investigating a company, to pursue enforcement as a means of intimidation."[1]

---

1 See Rohit Chopra, Prepared Remarks of Director Rohit Chopra on New CFPB Medical Debt Report, CFPB (Mar. 1, 2022), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-director-rohit-chopra-on-new-cfpbmedical-debt-report/ ("[W]e will be assessing whether it is appropriate for unpaid medical billing data to be included on credit reports altogether.").

When bad actors are engaging in abusive behavior, ACA supports targeted efforts to eliminate illegal activity. However, seeking to intimidate or over burden legitimate businesses by engaging in time and resource draining duplication with the states is not a good use of anyone's resources. When businesses are spending time dealing with duplicative supervision or enforcement actions, they are not innovating and focusing on solving consumer problems. Congress created the CFPB to protect consumers, not to rally states to work in concert with them to target certain disfavored industries or businesses.

d. CFPB Actions Surrounding Medical Debt

Director Chopra and other leaders in the CFPB have delivered public remarks that appear to encourage credit monitoring organizations to not report unpaid medical debt. In March 2022, the three nationwide credit reporting agencies ("NCRAs") announced significant changes to the medical debt credit reporting process. They announced that, effective July 1, 2022, paid medical debt will no longer be included on consumer credit reports. In addition, the time period before unpaid medical debt would appear on a consumer's report will be increased from six months to one year, and in the first half of 2023, Equifax, Experian, and TransUnion will also no longer include medical collection debt under at least $500 on credit reports. Compounding this explosive action, in August 2022, VantageScore announced that it will exclude all medical billing that is sent to collections in its credit scoring model, making no differentiation between medically necessary *and* voluntary medical debt.

In the wake of these actions, the CFPB has taken credit for the NCRAs' behavior in public forums such as previous congressional testimony, and has even made misleading bombastic public statements supporting the NCRAs' actions with claims such as that the ARM industry reports inaccurate amounts of medical debt to credit reporting agencies as a coercive measure to force payments. This harmful rhetoric about the industry leading consumers to believe that medical providers and the collections agencies that work with them are out to harm them serves no benefit. Consumers who do not engage to understand their options to pay their medical bills may miss deadlines to receive insurance coverage and may not learn about other opportunities they have for payment. Cutting off the conversation about outstanding obligations with consumers, and demonizing providers and the ARM industry, will not only ultimately lead to increased costs and less available medical care, it may also prompt fear of the whole medical system for consumers.

II. Concerns with Public Statements and Jurisdiction

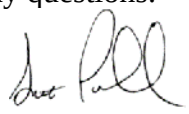
Looking at all of these actions together, it is apparent that the CFPB is working to change the scope of the medical debt credit reporting process without going through APA rulemaking. This is perhaps because the CFPB does not have jurisdiction over medical issues since Congress in the Dodd-Frank Act provided them jurisdiction over consumer financial products and services, *see* 15 U.S.C. § 5491. Currently, credit monitoring organizations are under no legal onus to ignore a consumer's medical debt simply because it is valued under $500. Practically speaking, however, new requirements from the NCRAs and statements from the CFPB seem to create such an obligation. In that sense, by urging the organizations to ignore such debt, the CFPB and NCRAs are pressuring compliance without

actually taking a final agency action. In light of the complexity of the health care system in the U.S., expansive policymaking should consider health care access issues, insurance coverage and payment issues, as well as economic issues on the back end of the process. The CFPB has not done that. In a recent letter to the CFPB, ACA outlined the legal infirmities in their approach to medical debt credit reporting.[1]

It is disappointing that the CFPB's rhetoric is essentially urging consumers to take actions related to their medical debt that conflict with other laws and guidance. Moreover, there are several unintended negative consequences for consumers that will result from the CFPB's actions. As a result of CFPB actions, creditors considering extending additional credit to consumers will no longer see a complete picture of their applicant's already outstanding debts. Instead, lenders and credit grantors will rely on an underwriting process that no longer includes all of the debts already owed by an applicant, thereby creating blind spots in the credit reporting system that has always been used to issue new credit. What will be missing will be outstanding obligations, that are indeed still owed, and debts that providers now will be forced to collect through the courts resulting in needless judgments against consumers. Even worse, low-income Americans will have less access to care as providers react to their reduced cash-flow from this move by requiring cash payments up-front for co-pays and deductibles for non-emergency procedures.

In sum, CFPB leadership still has not addressed unintended consequences raised by the ARM industry related to medical debt credit reporting, the Consumer Advisory Board does not have even a single revenue cycle specialist, the CFPB is not seeking public feedback on its actions related to debt collection, and much of the data the CFPB is relying on is anecdotal, and not scientifically rigorous. Yet, the CFPB continues to push policy proposals outside of the notice and comment process it is required to follow when creating new standards. This is harmful to consumers, particularly the millions of consumers who have been misled by CFPB into thinking that the health care industry and those supporting their work through collection efforts are actively working to harm them. This policymaking done in a vacuum will undoubtedly lead to worse outcomes for consumers, less access to affordable health care, and increased costs for all consumers.

Thank you for your attention to the concerns of the ARM industry. Please let me know if you have any questions.



Scott Purcell
Chief Executive Officer
ACA International

[1] See ACA Response to NCLC Petition for Rulemaking for Medical Debt, https://policymakers.acainternational.org/wp-content/uploads/2022/11/aca-response-to-nclc-petition-cfpb-November2022-final.pdf (Nov. 23, 2022).