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: Small Entity Representative Jennifer Whipple's Comment to CFPB regarding the Small Business Review Panel regarding the Fair Credit Reporting Act Proposal (the "Proposal")

Dear Director Chopra and Bureau Staff:

I. Background About Myself and ACA International

My name is Jennifer Whipple, and I am the owner of a woman-owned collection agency in Missoula, Montana. Our small agency provides valuable services to many individuals, businesses, and government entities across the great state of Montana, and beyond. My grandfather, Gilbert Koch, the founder of Collection Bureau Services, Inc. ("CBSI") always said, "Treat consumers with respect, you never know when you will meet them again as potential customers." My father learned the business from him and, in turn, has passed his expertise on to me. Today, I am proud to be the third generation of CBSI and to be representing our industry as a small entity representative ("SER") for collection agencies. My business is a local, family-owned and operated agency in Montana. As a local agency we understand the needs of Montana businesses and consumers alike. Over the years we've found that our clients appreciate our willingness to work with consumers and also our understanding that a consumer may need

additional flexibility on a specific account. At CBSI, we prioritize excellence in employee training and compliance with all state and federal laws. Our agency is accredited, and our staff maintains certification through ACA International, the trade association for credit and collection professionals.

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 people worldwide.

ACA members include the smallest of businesses which 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, reduces the need for tax increases to cover governmental budget shortfalls, and keeps credit, goods, and services available to consumers.

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, 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

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[1] Todd Zywicki, The Law of Economics of Consumer Debt Collection and its Regulation, 28 Loy. L. Rev. 187 (2016).
[2] https://kaulkin.com/survey-says-arm-industry-returns-90-1-billion-to-the-economy/
[3] *Id.*

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.

I'm honored to serve as the current Treasurer of ACA International for 2023-2024. My agency, CBSI, provides debt collection and billing work for many medical providers here in rural Montana, as well as government, utility, and a multitude other private businesses who provide service to our Montana consumers. I am committed to our clients, the ARM industry, and the work that we do to help every American consumer keep costs low in our economy by returning monies to healthcare, government, and every other industry too. My background in our industry starts earlier than most, in 2001, when I was a sophomore in high school I started working in the business. Today, I am the president of our company with a staff of 22. I take such pride in being an employer in Montana and for being the one to carry on the legacy of my father and grandfather.

In my tenure with CBSI, I've helped create many policies and procedures to ensure that clients are listing accounts that are accurate, consumers are receiving statements that are accurate, agents on calls are providing information that is accurate, and credit reporting is accurate. Accuracy is key in our industry, and my agency and the agencies who are part of ACA International work hard every day to make certain accurate information is received and presented in every segment of our businesses. I have studied, received training, and provided training on Confidentiality, HIPAA, 501(r), FDCPA, GLBA, FCRA, Identity Theft, Red Flags, Accuracy & Integrity, Bankruptcy, and more. I even traveled to attend a town hall in 2021 so that you, Director Chopra, would finally have the opportunity to meet an actual member of the industry. I attended the town hall to discuss rural banking in Montana, to provide insight about my agency, and to answer any questions you have in-person.

Throughout the SBREFA process, I learned that the CFPB was presenting high-level and vague ideas about medical debt credit reporting, data brokers, permissible purpose, and legitimate business need. It was nearly impossible for me to accurately quantify some of the information requested because of the "vague" and "high-level" concepts the CFPB staff spoke of. My understanding of the process was to provide direct feedback and information on the impact on my business or industry based on the Proposal. I cannot do this with a "vague" Proposal. Some of my most basic questions were difficult for the staff members to answer, such as what the definition of medical debt is in the Proposal. This Proposal makes sweeping changes that will have a significant impact on our entire American economy. It is my personal and professional belief that this Proposal was presented prematurely and the CFPB must withdraw it. The CFPB must take time to seek substantive feedback, study the issue in a meaningful way, and reconsider if this is the best course of action for America. I have serious concerns that this will do more harm than good for American consumers and the economy as a whole.

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

In addition to the serious policy concerns associated with this Proposal, it will violate existing law:

- The Proposal will create overly burdensome costs to my business and other businesses in the collections industry. This will likely result in the reduction of consumer choice, increased upfront costs for medical care and other products and services, and less access to medical services in rural Montana. 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.
- 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 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. The CFPB, an agency

with unlimited funding resources, should not come up with "vague" ideas and hypothesis, and then place the burden on the back of small rural businesses like mine to come up with the research and alternatives to refute unresearched ideas and undefined concepts.

- 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 is owed. 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 and daily goods and services.
- By the CFPB's own admission, medical debt information is less predictive, not "not predictive". Thus, underwriters in Montana 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.
- Medical providers and their third-party collection agency partners will need to consider changes to their collection practices for unpaid medical care including litigation, denial of care, or pulling out of a market all together. In Montana, if medical providers leave or consolidate, patients may be left traveling hundreds of miles for medical care.
- 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.

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

Jennifer Whipple
President
Collection Bureau Services

Attachments (1)

Comments of Jennifer Whipple to Small Business Review Panel for the Fair Credit Reporting Act Proposal

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COMMENTS

I. THE PROPOSAL WILL HARM SMALL BUSINESSES AND CONSUMERS

The Proposal as currently contemplated, will cause substantial harm to both businesses and consumers. This harm will initially be economic, but will causes changes in the medical and healthcare markets that could ultimately harm the health and well-being of all Americans. These harms will be borne most by small businesses and Americans in rural areas.

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 that may be 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. Outlined below, I discuss some of the specific harms to my business from what can be determined based on the "high-level" and "vague" ideas presented from the CFPB.

II. 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.[4]

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[4] *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

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.[5] 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"),[6] which requires a reviewing court to set aside agency action under certain conditions, including when agency rulemaking is arbitrary or capricious.[7] 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 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.[8] 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

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[5] *Id.* at 843 n.9 (*Chevron* instructs courts at step one to employ all of the traditional tools of statutory interpretation first).
[6] *See generally* 5 U.S.C §§ 551-559.
[7] 5 U.S.C. § 706.
[8] *Loper Bright Enterprises v. Raimondo*, 143 S. Ct. 2429 (2023).

the Consumer Financial Protection Act ("CFPA"). Second, there must be a "concise general statement of [the amendment's] basis and purpose,"[9] 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."[10] 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."[11]

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.

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

[9] 5 U.S.C. § 553.
[10] 5 U.S.C. § 706(2)(A).
[11] *Chevron*, 467 U.S. at 865..

purposes; (B) employment purposes; or (C) any other permissible purpose authorized under FCRA section 604.[12]

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.[13]

Congress enacted the subchapters containing these definitions to protect consumers from having inaccurate information concerning them circulated to lending institutions by consumer reporting agencies,[14] 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 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.

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[12] 15 U.S.C. 1681a(d).
[13] 15 U.S.C. 1681a(f).
[14] *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.").

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,[15] 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 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 have since the 1990s been internet-based, 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

[15] 12 CFR § 1022.1-1022.142.

consumer's creditworthiness or permissible purpose. Thus, as consumer reporting agency has been 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[16] ("ECOA"), which was struck down in the *Townstone Mortgage* case.[17]

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.[18] The arbitrary and capricious standard under the APA assesses the rationality or reasonableness of the policy conclusions underlying the rule, and here, 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 with a permissible purpose.

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[16] 15 U.S.C. 1691 *et seq*.

[17] *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).

[18] 88 FR 16951.

Marketing is not a permissible purpose. 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."[19]

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

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

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 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. <u>The Proposal would have Negative Consequences that Outweigh its Benefits</u>

Credit header information is routinely used by financial institutions 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 institutions' 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")[20] and Regulation P[21], so expanding the FCRA to cover such information is arbitrary and unnecessary.

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.[22] 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

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[20] Pub. L. No. 106-102 (1999)
[21] 12 CFR § 1016
[22] 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).

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 levels 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.[23] A full economic analysis of the CFPB's Proposal is attached.[24]

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

[23] *See Chevron*, 467 U.S. at 842–44, 865.
[24] Nigrinis, Dr. Andrew Rodrigo, Economic Analysis of the Consumer Financial Protection Bureau's FCRA Rule Proposals (Nov. 6, 2023).

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;
- 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.

[25] 12 U.S.C. § 5491(a).

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 consumer 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 were "protected (1) from

[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, 4682001).
[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)

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 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

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[30] *Id.* at 18.
[31] *Id.* at 8.
[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.

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 to the medical debt aspects of the Proposal 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 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

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

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]

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 the 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

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[37] *Id.*
[38] *Id.*
[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.”).

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

While a consumer may obtain a medical service prior to payment, and debt incurred for that care may be reported to a CRA later by a debt collector, collectors and credit agencies have no role in the underlying transaction that gives rise to the consumer's obligation to pay for the medical services received. 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 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

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[40] 12 C.F.R. § 1090.105
[41] 77 FR 9597.

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, 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 that 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. The FCRA Does Not Grant the CFPB Discretion to Exempt Medical Debt From Credit Reporting

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

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[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).
[46] Pub.L. 116–260, the Consolidated Appropriations Act of 2021.

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 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.

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[47] 15 U.S.C. 1681(s)(e)(1).
[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.

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."[51] 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

[51] 15 USC § 1681c(a)(6).

that would allow the creditor to obtain information about the consumer's specific medical treatment or condition.

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 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.

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 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 text 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.[52] This reflects a legislative policy determination that veterans should not have accurate medical debt reported outside narrow parameters, but importantly, Congress determined that this protection does not apply to other categories of consumers.

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 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

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[52] 15 USC § 1681c(a)(6).

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."[53] "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 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

[53] 15 USC §1681(a)(1).

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."[54]. 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.

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.[55]

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[54] 15 USC §1681(b).
[55] *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).

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 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;[56] 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,[57] 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.[58] 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.[59] 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. The CFPB Cannot Issue a Rule Suppressing Medical Debt under the Major Questions Doctrine

The CFPB clearly lacks the authority to make a rule that suppresses the reporting or furnishing of accurate information about medical debts. The FCRA does not grant the CFPB broad discretion to dictate the types of information on consumer reports.[60] Nor did it provide the CFPB

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[56] *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.
[57] Pub. L. 111-148 (2010).
[58] *See generally*, *Id.*
[59] *See* Pub. L. 111-148 § 9007.
[60] *Supra* 22.

specific authority over medical debt.[61] 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.[62] Finally, Congress has granted federal agencies other than the CFPB authority over major questions of healthcare policy.[63]

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.[64] 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."[65] 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."[66]

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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[61] *Id.*
[62] *Supra* 27.
[63] *Supra* 28.
[64] *Util. Air Regul. Grp. (UARG) v. EPA*, 573 U.S. 302, 324 (2014).
[65] *FDA v. Brown & Williamson Tobacco Corp.*, 529 .S. 12, 133 (2000).
[66] *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 Proposal Undermines the Purpose of the FCRA**

As detailed above, Congress enacted the FCRA to ensure fair and accurate credit reporting.[67] 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. With only weak and aged supporting data, the Bureau takes 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

[67] 15 U.S.C. § 1681.

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.

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 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.

Medical debt must be transparently reported because it is a major driver of bankruptcies. In 2019, authors contributing to an article in the American Journal of Public Health performed a

study of consumers filing bankruptcy.[68] In that year, 530,000 people reported falling into bankruptcy annually due partly to medical bills and time away from work. This was 66.5 percent of all bankruptcies that year. The Bureau's Proposal to exclude from credit reports the very debts that drive a majority of personal bankruptcies creates a myriad of problems.

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.

Consider also the total impact on the credit reporting system if the types of accounts that drive 63% of bankruptcies are not reported. This could mean that a consumer has a 700+ credit score immediately before filing for bankruptcy protection. This scenario need only occur a few times to a few creditors before faith in credit scoring models is entirely lost.

E. 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.

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[68] David U. Himmelstein, Robert M. Lawless, Deborah Thorne, Pamela Foohey, Steffie Woolhandler, "Medical Bankruptcy: Still Common Despite the Affordable Care Act", American Journal of Public Health 109, no. 3 (March 1, 2019): pp. 431-433.

1. Incomplete Credit Data will Result in a Credit Crunch

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.

F. 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.

G. **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 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. <u>Medical Providers will Lose Revenue</u>

One category of small businesses that stand to lose the most from the Proposal are those providing medical and health care. Doctors, dentists, physical therapists, etc. will undoubtedly suffer severe consequences under the CFPB's Proposal.

For example, 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.[69] 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 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.

[69] See, Andrew Nigrinis Report, attached.

The result is that medical providers, who have become creditors by nature of allowing consumers to receive healthcare in advance of payment, 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.

2. Compliance Costs will be Heavy

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.

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.

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.

3. <u>The Proposal will Result in the Reduction or Elimination of Small Businesses</u>

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.

4. 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.

5. Lack of Access to Care in Rural Montana

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 receive services prior to payment, 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 services in advance and will only provide services to those who can pay for them beforehand. In a rural area like mine, this could create dire consequences in which consumers are not seeking and receiving preventative care. Furthermore, 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, forgo medical treatment all together.

While affluent consumers in Montana 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. In a rural area like Montana, this may mean traveling dozens, or even hundreds of miles.

As a result, 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.

6. 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 Montana, there is a dearth of healthcare access already. It is not uncommon for certain towns 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. Unfortunately, we are already seeing this happen in Montana, even without this change, and the CFPB's Proposal will exacerbate it. Eagle Ambulance stopped providing emergency medical services in Granite County, Montana in July 2023. According to the public article, reimbursement and payment were the main factors.[70] The increased closure of these practices will mean reduced access for consumers.

As mentioned, 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. A likely result in rural areas like Montana is that a sick or injured person must drive 45 minutes or more to receive care. If the medical need is great enough to warrant

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[70] "Eagle Ambulance to Stop Emergency Medical Services in Granite Co." NBC Montana (July 13, 2023) https://nbcmontana.com/news/local/eagle-ambulance-to-stop-emergency-medical-services-in-granite-co.

ambulance services or an air lift, 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.

7. Absence of Certain Liabilities Paints an Incomplete Picture for Lenders Leading to Risk of Consumers Overleveraging 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 payment obligation is not reflected in a consumer report, the debt-to-income ratio will be artificially deflated.

III. RESPONSES TO SPECIFIC QUESTIONS POSED IN THE PROPOSAL

A. 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 a consumer may live and work, and their contact information. Impeding the ability to 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.

B. 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 an increase in the cost of credit when less debt is collected.

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.

C. **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 and practical mechanisms to address it if it happens.

D. 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.
- I anticipate increased call campaigns. Under CFPB's Regulation F, it is possible to make seven calls in seven days. Many agencies, like mine, are currently way under that limitation because we use a variety of tools to connect with consumers. Limiting options that have proven successful in delivering needed information to consumers will result in a focus on only calling, or only litigating. It can be expected that there would be an increase in both calls and litigation.
- I also expect a reduction of settlement options to consumers. Due to increased costs of collection and reduction in remedies under the proposal, healthcare clients and agencies would reduce offerings for discounts and settlements.

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 when comparing medical debt to other debt, the medical debt is slightly less predictive, not non-predictive. However, as mentioned in the attached economic analysis, the CFPB's conclusion about medical debt might be based on confounding factors and not causal.
- Even though some CRAs have given less weight to medical debt, they still consider it. Thus, any lender providing credit and relying on credit scores is currently using this information. The CFPB does not appear to have studied this issue at all.
- A large majority of bankruptcies are caused by medical debt; any creditor who wishes to avoid lending to a person about to file bankruptcy should want to be aware of medical tradelines.
- Creditors may use medical debt collection information on credit reports to ascertain those who pay, and those who do not pay their debts. The CFPB needs to study this issue to also determine if consumers lose positive benefits when they pay their medical debt, compared to others who choose not to pay.

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, or act before a provider drops them as a patient in their practice. 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 to. 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. This is known as denial for missing timely filing.
- Consumers who want to pay but moved and lost the notice have historically used credit reports to locate such balances and creditors. These consumers may not remember or locate the information before they are dropped by their provider for nonpayment. This could lead to embarrassment or hardship that the consumer does not want.
- 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.
- As an alternative, adopting a rule to remove a debt once it is paid in full could provide consumer benefits.
- If the Bureau believes that this piece of its Proposal is meant as a solution to medical billing or insurance denial issues, a back-end approach is not a solution to a front-end concern.

This is why as outlined it is problematic when the CFPB wades into issues not under its jurisdiction and without a full picture of the healthcare spectrum.

E. **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 in place for debt collectors 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.
- Mass generic disputes are a problem. They refer to uninformative or generic form letters that appear to originate from consumers, but are actually mailed in bulk by consumer law firms or credit repair companies to debt collection agencies. This tactic includes sending multiple letters disputing information on a consumer's credit report that is often accurately reported. The intended outcome of this tactic is to encourage collection agencies who furnish credit information to either delete all of the consumer's trade lines or report them as "disputed," even in cases where there is no basis for a dispute. Furthermore, this approach is used to inundate collection agencies with disputes expecting that the data furnisher will be overwhelmed by the volume of disputes and fail to appropriately respond. As a consequence of this failure to respond, the credit information provider can then be targeted with an FDCPA or FCRA lawsuit. The practice is harmful to both collection agencies and consumers.
- At a higher level, many of the problems voiced by the CFPB seem like problems with insurance companies that should be fixed on the front end, not on the back end, by adding even more complexity to the credit reporting process. If the Bureau believes that this piece

of its Proposal is meant as a solution to insurance denial issues, a back-end approach is not a solution to a front-end concern. This is also beyond the scope of the CFPB. Many of the complaints the CFPB references related to medical debt are actually in fact related to insurance denials.

F. **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?

- Again, this is an approximation because the CFPB has not provided clear definitions or specifics in many areas. However, I would expect to increase staff by approximately 10%, which would equate to more than $100,000 per year.
- One particular cost arises from the Ninth Circuit Pintos decision. *Pintos v. Pacific Creditors Ass'n*, 605 F.3d 665 (9th Cir. 2009). This case says that collectors do not have a permissible purpose to acquire consumer reports as a result of involuntary transactions, like debts arising from parking or traffic tickets. Any collection agency with a "government" client must be aware of issue. The cost of training for collection for government clients would increase exponentially. Information would be severely limited by *Pintos* under FCRA, and the Proposal would now put even public information that is sold/purchased also under the FCRA. As just one example, I would need to create a training program to increase the amount of information a police officer enters into its system at traffic stops, and in instances of other law violation. This would also have other outcomes further down the line, such as increasing the time of each traffic stop, potentially increasing the need for additional public safety officers in America. This is just one example, so you can imagine how this impacts a variety of debts and processes when severely limiting public information.

- There would be significant costs associated with making compliance changes, including rewriting policies and procedures, re-negotiating contracts with all medical clients, 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 also be a significant cost increase.
- I also anticipate having to hire additional staff to make more phone calls and send more letters.

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.

- We want to again point out that since the CFPB has been unclear on definitions, it is impossible to give an accurate estimate. As discussed in the attached economic analysis, it is expected that there would be a drop of 10 percent or more in collections, which equates to hundreds of thousands of dollars even for a smaller agency like mine, varying on how things are defined.
- 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?

- Without the ability to credit report medical debt (in a meaningful way), it would be difficult to get consumers to pay or resolve their bills when they were paid by the insurance companies directly. When the insurance company sends a check to a consumer, they don't always use that money to pay the provider.
- In an environment where employment hiring is extremely challenging, it would be severely difficult to increase my staff by 10% within a short time period. I am concerned about attrition in current staff, by having limited resources due to loss of ability to collect. I would need ample time to prepare my company and my clients for such a large change.
- This would fundamentally change the relationship of clarity of information to consumers and creditors, charge-offs would be increased, and available information would be restricted.
- System Changes and compliance update costs.
- New legal costs.

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.

- If there are issues in Regulation F that need to be fixed, that is under the CFPB's jurisdiction, unlike medical debt or healthcare policy. Regulation F just recently went into effect, so the CFPB should give the market several years to see how it has changed things, as is standard for many new regulations.

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?

- Reduction in funds to government entities at the state and federal levels. Increased need for funds out of the general budget.
- Financial institutions currently have a "cost of living factor" in their lending decisions. The financial institution I met with in Montana told me it would likely increase its "cost of living factor" to account for this change. Should that happen, there is an unintended consequence for consumers who do not have medical debt in that they will have to have higher earnings for the same loan amount, thus reducing their access to credit.
- Consumers who pay an out-of-pocket premium on health insurance may choose to no longer carry health insurance if medical debt is no longer credit-reported. Even for individuals who qualify for Medicaid, they may not see the value of taking the time to apply any longer if there is no impact on their credit score. The unintended consequence may be a large reduction in insurance dollars to Montana hospital systems, leading to a reduction in services or staff available to our Montana consumers (those who do pay their medical debts included). Worst case, hospital or provider closures in our rural communities, where it can be more than 100 miles to the next available facility.

- The social costs of litigation will be increased and borne by consumers. As more debt collectors and health care providers turn to the legal system, the consumers the Bureau's rule was intended to benefit will be forced to pay for litigation and court expenses.
- If there is no litigation over medical debts, then the Bureau's Proposal would make medical debt payment voluntary. Given that litigation is expensive for all parties (including debt collectors), if litigation is never used as a substitute for the loss of credit reporting, the result would be a voluntary payment system. Some consumers will pay their debts, as there are strong cultural norms for honoring debts. But this would quickly unravel the medical debt market. If health providers cannot expect to be paid for services rendered (even if it is just a deductible or co-payment), they will react to protect themselves. One option could be to raise prices to account for losses due to uncollectable medical debt. Another option would be to refuse seeing patients who require financing. Alternatively, they could require collateral or reject financing for patients whose credit scores are below a certain threshold. It's realistic to expect some mixture of these options to unfold in the market. All these scenarios are inefficient and bad for consumers.

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.

G. **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.

Q. For each of the proposals under consideration above, do you expect that your firm would restrict or eliminate any product or service offerings to comply with the rule? If so, how would the proposals impact those products or services?

- My agency would be looking at removing its offering of a Public Record Bulletin.
- My agency would look at the cost/benefit of certain medical and governmental debt and could restrict certain accounts or balances from acceptance to our listing process.

Q. For each of the proposals under consideration above, please provide information, data, and/or estimates of impacts to your firm's business operations and revenue, including to both current operations and revenues and to future operations and revenues that could potentially be lost.

- See attached economic analysis for a scientific discussion of potential costs impacts.

Q. What other, additional impacts do you think might occur that have not been covered above?

- Impact to the consumers in rural Montana who rely on access to credit for tires, propane, and buy-here, pay-here auto programs. Without the ability to differentiate consumers, these industries will change who can utilize these services on credit, having a large impact in Montana and throughout the United States.
- Black Market impact. Access to credit will likely be reduced, leading consumers to the black market for healthcare items.
- Consumers preparing for Bankruptcy- someone with substantial medical debt who is preparing for bankruptcy, may show a 700 credit score. This person could be least

sophisticated and roused into purchasing a boat, car, or item that they do not need and then filing bankruptcy on said items, increasing the cost to all Americans by default.

- The CFPB will harm more consumers than it will 'help'. If medical items are removed from credit reports for financial lending decisions, then lenders will statistically be discriminating against those who actually are 800 credit scores, this would degrade the credit score and make everyone an 800, those who really are 800 will pay a 'tax' for those who aren't.

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.

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

- Yes, see attached economic analysis for a scientific discussion of estimated costs.

IV. THE BUREAU MUST BEGIN ANEW TO DRAFT A RULE THAT IS SUPPORTED BY DATA, RELIABLE STUDIES, AND ADDRESSES THE STATUTORY MANDATE

In closing, I do not believe the CFPB has the solution in this Proposal. The issues described in the consumer reporting rulemaking have many factors that require attention in developing healthcare policy solutions. Unfortunately, that is not under the CFPB's jurisdiction and it would be extremely dangerous for the health of Americans if the Bureau attempts to make changes without looking at the larger picture and policy questions.

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 economist within the CFPB's Office of Enforcement.