ACA

INTERNATIONAL

March 7, 2024

Chairman Patrick McHenry
House Financial Services Committee
Washington, D.C. 20510

Ranking Member Maxine Waters
House Financial Services Committee
Washington, D.C. 20510

Chairman Andy Barr
Subcommittee on Financial Institutions
and Monetary Policy
Washington, D.C. 20510

Ranking Member Bill Foster
Subcommittee on Financial Institutions
and Monetary Policy
Washington, D.C. 20510

Dear Chairmen McHenry and Barr, Ranking Members Waters and Foster:

On behalf of ACA International, the Association of Credit and Collection Professionals ("ACA International" or "ACA"), I am writing regarding your hearing concerning Politicized Financial Regulation and its Impact on Consumer Credit and Community Development. 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 125,000 people worldwide. Most ACA member debt collection companies, however, are small businesses. The debt collection workforce is ethnically diverse, and 70% of employees are women. According to recent ACA member data, 35% of ACA members have 10 employees or fewer, 56% of ACA members have 25 employees or fewer, and 70% of ACA members have 100 employees or fewer.

Background about ACA International

ACA International members play a critical role in protecting both consumers and lenders. ACA International members work with consumers to resolve their debts, which in turn saves every American household, on average, more than $700, year after year. The accounts receivable management ("ARM") industry is instrumental in keeping America's credit-based economy functioning with access to credit at the lowest possible cost. For example, in 2018, the ARM industry returned over $90 billion to creditors for goods and services they had provided to their customers. And in turn, the ARM industry's collections benefit all consumers by lowering the costs of goods and services—especially when rising prices are impacting consumers' quality of life throughout the country.

ACA International members also follow comprehensive compliance policies and high ethical standards to ensure consumers are treated fairly. ACA International contributes to this end goal by providing timely industry-sponsored education as well as compliance certifications. In short, ACA

International members are committed to assisting consumers as they work together to resolve their financial obligations, all in accord with the Collector's Pledge that all consumers are treated with dignity and respect.[1]

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

Accordingly, the ACA urges Congress to consider the following concerns:

I. CFPB Actions Surrounding Medical Debt

The Proposal includes sweeping changes to the process of medical debt credit reporting and the use of information related to the nonpayment of medical debt for underwriting purposes. Additionally, it also includes sweeping changes to the definitions of data brokers and CRAs and their ability to utilize the data they gather. Small-business participants in the SBREFA process were given a matter of a few weeks to analyze and provide substantive feedback on broad open-ended proposals missing key information, such as how the CFPB plans to define the medical debt that can no longer be included on consumers' credit reports. During the process, the CFPB admitted it was putting forth "vague" ideas and would fill in the details later. As such, the CFPB clearly acknowledges that the SBREFA process, which Congress mandates to measure the impact of regulations on small businesses, is something they look at as a check-the-box exercise in which participants do not need time and sufficient information to submit their comments.

As fully outlined in ACA's comments on the Proposal, the CFPB does not have the legal authority to rewrite the FCRA and eliminate only certain types of debt from credit reports.

Interestingly, Members of Congress who voiced support for the CFPB's efforts in this area introduced the Medical Debt Relief Act legislation, seeking to make statutory changes to achieve the same goal of the bureau related to medical debt credit reporting and the FCRA. This begs the question of why advocates in Congress, in support of the CFPB's work, would feel the need to introduce legislation and make statutory changes if they truly believed the CFPB was on solid legal footing to move forward. As Congresswoman Katie Porter (D-CA) states, her bill "demonstrates Congress' support for the CFPB using its existing authority to put these principles into federal regulations and would cement these principles into law." Here, Porter makes the important distinction between the actual law and her support for regulations. It is clear, based on the timing and content of this legislation, that the CFPB knows what its legal limitations are and is attempting to play catch up in its efforts to go beyond their Congressionally delegated authority.

ACA's Comments Outline the following Concerns:

[1] https://www.acainternational.org/about/.

- The Proposal will have significant negative impacts and will violate existing law.
- The Proposal conflicts with language in the FCRA concerning the definitions of consumer report and consumer reporting agency.
- The CFPB lacks authority to rewrite laws passed by Congress that are unambiguous by their plain terms.
- The data analysis supporting the Proposal has serious methodological defects and did not consider data that reflects the current state of the industry or the critical economic impacts of medical debt reporting.
- The Proposal will create overly burdensome costs for small businesses that will likely result in reduced consumer choice, increased upfront costs and costs overall, and less access to critical care services for patients. This Proposal will increase the cost and availability of credit for ACA members, as well as their medical provider clients and patients, since this fundamentally changes the law and will make it harder to collect payment for medical bills. Stymieing collections and changing the credit reporting process will hurt both medical providers' and their third-party collection agencies' bottom lines. The tough choices available to providers to shore up those economic hits ultimately harm patients and can impede their access to quality healthcare.
- The Proposal fails to consider and includes no research on less expensive alternatives that avoid significant constitutional problems and reduce monetary impacts on small businesses, consumers, and governments.
- By the CFPB's own admission, medical debt information is less predictive, not "not predictive." Thus, underwriters will have less information to make credit determinations if the CFPB moves forward with its goal to remove all medical debt from credit reports, and credit will be extended in situations when consumers do not have the ability to repay. As such, the host of negative consequences that the CFPB itself has outlined in its ability-to-repay test for mortgages and other rules when creditors do not have accurate information will come into play in the marketplace. Similar to the factors of the 2008 financial crisis, which led to the creation of the CFPB, lenders will be operating with blind spots and overlooking debt and legal obligations for consumers seeking credit.
- Medical providers and their third-party collection agency partners will be forced to sue more consumers to collect for unpaid medical care. If the CFPB removes the incentive to maintain good credit, consumers will have significantly less reason to pay their medical bills, which will force stakeholders to turn to litigation sooner and more often as their only legal remedy for payment.
- 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 (12 C.F.R Section 1026 (2023)) is owed. For example, there are significant nuances between surprise medical expenses as a result of emergency room visits, elective or preventive procedures, and health-related items like Advil and Band-Aids routinely purchased at places like Target. To avoid such an overbroad interpretation and to provide clarity on what is being referred to as "medical debt," ACA respectfully asks for a clear set of definitions of "medical debt" that differentiates between emergency services and other types of costs that lead to health care-related debt.
- Even for medical providers and collection agencies that do not credit report, we have data that highlights that the "message behind the message" that you do not have to pay medical debt has already harmed providers and their collection agency partners. This will lead to a variety of consequences, including the need for more cash-upfront payments and an increase in medical providers turning directly to litigation to seek to recover payment. The economic analysis showing this data and anecdotal support will be provided in comments.

- The Affordable Care Act requires that nonprofit hospitals establish "charity care"—essentially financial assistance policies—for patients unable to cover their expenses. IRS Regulation 501(r) already addresses extraordinary collection activities. For providers in many states, ACA members have seen the threshold at 200% or 300% of the Federal Poverty Level as the starting point before any copays or deductibles need to be paid to a non-profit provider. Since there are already many programs and laws in place to help consumers who truly cannot afford medical debt, the CFPB's efforts are more likely to encourage people who can pay their debt not to address it. This may further harm those consumers because hospitals or medical providers can take legal action, or in the case of non-emergency care, not provide those services. Please find attached to this letter a discussion and analysis of the Proposal, along with data and supportive materials.
- ACA also notes that Larger Participants in the consumer debt collection market include persons with more than $10 million in annual receipts resulting from relevant consumer debt collection activities (except for receipts that result from collecting debts that were originally owed to a medical provider). The CFPB made this decision in 2012 for the debt collection industry after the CFPB solicited feedback through the notice and comment process and in accordance with the APA before finalizing a rule. At the time, it established a test based on "annual receipts" to assess whether a nonbank-covered person engaging in consumer debt collection is a larger participant in this market. The CFPB's current interest in medical issues conflicts with past determinations in this market, highlighting why arbitrary new authority to engage in policymaking in the medical space by using the credit reporting process should not be left to the whim of each new CFPB director. The CFPB has also made conflicting statements about what its authority is over medical providers, and whether the United States Department of Health and Human Services is the actual agency with jurisdiction over medical policymaking.

ACA provides further evidence of the likely negative impact the CFPB's actions would have on patients, including increased costs, the need for more upfront payments, a temptation to forego health insurance (which was also noted by the Wall Street Journal [see Sept. 25, 2023], including the risk of raising insurance rates for everyone else), and a likely increase in litigation from hospitals and collection agencies in its comments. The comments also discuss how medical providers in rural and underserved areas will be disproportionately impacted.

SER Feedback

Jennifer Whipple, president of Collection Bureau Services Inc., and Jack Brown, president of Gulf Coast Collection Bureau, served as small entity representatives to submit their feedback on the outline of FCRA proposals, showing the bureau the impact they would have in rural areas, on consumers' access to credit, and on the affordability of health care.

Whipple runs an agency with a staff of 22 in Missoula, Montana, which serves both consumers and businesses, including medical providers. She said in her comments[2] to the bureau that the rural and underserved areas in Montana, as well as the economy as a whole, will be negatively impacted. Brown outlined the many problems the Proposal will cause for medical providers in Florida and throughout the country in his comments.[3]

[2] https://policymakers.acainternational.org/wp-content/uploads/2023/11/CFPB-SBREFA-ACAInternational-JenniferWhipple-Comment-LetterNovember2023.pdf
[3] https://policymakers.acainternational.org/wp-content/uploads/2023/11/CFPB-SBREFA-ACAInternational-JackBrown-

Economic View

Economic analysis[4] of the Proposal by Dr. Andrew Rodrigo Nigrinis, a former Enforcement Economist at the CFPB who worked on over 70 cases during his six-year tenure, shows the bureau has yet to study whether providers will react by refusing to provide credit and cutting consumers off from health services, or by raising prices on all consumers and hurting everyone. He outlines why providers may also end up requesting cash in advance for co-pays and deductibles, ultimately hurting low-income community members who can't afford to pay those all at once and reducing their access to health care.

Nigrinis' review of proposed changes to the regulatory framework of the FCRA shows that the CFPB needs to do a meaningful analysis of the effects on consumers, lenders, small businesses, or the broader market that relies on credit reporting. He states that the unintended consequence would be the loss of predictive information on credit reports, which may result in more lending of the type that precipitated the financial crises that resulted in the formation of the CFPB. Nigrinis adds that the CFPB should have provided an analysis of the impact this rule will have on health care providers that are small businesses.

II. CFPB Actions Surrounding Arbitration

On September 14, 2023, the American Association for Justice (AAJ), the National Association of Consumer Advocates (NACA), Public Citizen, Public Justice, the National Consumer Law Center (on behalf of its low-income clients), the Consumer Federation of America (CFA), the UC Berkeley Center for Consumer Law & Economic Justice, Americans for Financial Reform, and Better Markets, Inc. petitioned the CFPB to issue a rule "that would allow the consumer to make a meaningful choice on whether to use arbitration after a dispute arises." In addition to this Petition, the CFPB also proposed a Notice of Proposed Rulemaking ("NPRM") to require certain supervised nonbank-covered entities that use form contract provisions that effect a waiver or limitation of certain consumer rights with respect to the offering or provision of consumer financial products and services to report information about their use of such contract terms and conditions to a publicly available bureau registry.

Both of these actions seek to impose a chilling effect on private sector utilization of arbitration agreements, despite the fact that (i) the U.S Supreme Court (the "Supreme Court") has established a clear precedent permitting arbitration between individuals and/or entities, and in doing so, favoring an individual or entity's autonomy to enter into such agreements over state laws that restrict the use of arbitration,[5] and (ii) Congress has repeatedly indicated through bipartisan actions its intention of supporting an individual and/or entity's autonomy to enter into arbitration agreements, including, most notably, when Congress disapproved of the CFPB's 2017 arbitration rule in accordance with the Administrative Procedure Act. Banning the use of arbitration would circumvent established Supreme Court precedent as well as congressional intent and, in doing so, violate the separation of powers, among other constitutional concerns.

The Supreme Court has long recognized the value of arbitration as a medium for dispute resolution and, through its jurisprudence, has held that states and localities must treat arbitration agreements or

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[4] Dr-Andrew-Nigrinis-Comments-on-SBREFA-of-FCRA-rule-proposals-FINAL-Signed.pdf (acainternational.org)

[5] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

clauses no different than other contracts.[6] In fact, Section 2 of the Federal Arbitration Act (the "FAA") provides that arbitration agreements are "valid, irrevocable, and enforceable."[7] Specifically, Section 2 of the FAA sets forth (i) an enforcement mandate whereby "agreements to arbitrate [between two or more parties are deemed] enforceable as a matter of federal law" and (ii) a savings clause that allows for the "invalidation of arbitration clauses on grounds applicable to any contract."[8] Taken together, the Supreme Court has interpreted this framework to prohibit the invalidation of arbitration agreements pursuant to "legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[9] In applying this principle to instances where state laws have sought to limit the use or constitutionality of arbitration clauses in valid contracts, the Supreme Court has affirmed the validity of arbitration agreements in accordance with the terms and conditions contained therein and, in doing so, prohibited or otherwise restricted state laws that seek to infringe on private parties' use of arbitration agreements.[10]

For example, in *Concepcion,* customers brought a class action lawsuit against AT&T Mobility LLC in federal district court, following which AT&T Mobility LLC moved to compel arbitration based on the arbitration clause contained within the applicable provider-customer contract.[11] The lower court held that (i) the arbitration clause was unconscionable and therefore unenforceable under California law, and (ii) the FAA did not preempt California law governing unconscionability.[12] On appeal, the Supreme Court reversed this order by holding that the FAA preempts "State-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."[13] Time and time again, the Supreme Court has found that in enacting the FAA, Congress expressly enacted a framework designed to permit parties to enter into arbitrations as an alternative to litigation, and therefore, courts were bound by "the FAA's command to place [arbitration] agreements on an equal footing with all other contracts."[14]

Further, Congress has taken several legislative actions favoring the use of arbitration agreements in the ordinary course of business or, in certain situations, enacted specific carve-outs where use thereof would be prohibited. The FAA, as originally enacted by Congress, included specific carve-outs for contracts for the employment of seamen, railroad employees, or other classes of workers engaged in foreign or interstate commerce.[15] Most notably, in 2017, Congress invoked its statutory authority under the Congressional Review Act to disapprove of the CFPB's rule that prohibited arbitration clauses in consumer finance contracts that barred class actions, among other things.[16] In addition, in 2022, Congress passed and President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which rendered invalid and unenforceable, at the claimant's option, arbitration agreements with respect to a case related to a sexual assault or sexual harassment dispute, among other things.[17] This legislative history indicates that Congress, over decades, has consistently

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[6] *Concepcion*, 563 U.S. at 344; *Volt Info. Scis., Inc*. v. *Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)
[7] 9 U.S.C. § 2
[8] *See Viking River Cruises, Inc. v. Moriana,* 142 S. Ct. 1906, 1917 (2022) (citing 9 U.S.C. § 2).
[9] *Kindred Nursing Ctrs. Ltd. v. Clark,* 137 S. Ct. 1421, 1426 (2017)
[10] *Concepcion,* 563 U.S. at 344*; Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).
[11] *See id.* at 344-345.
[12] *See Id.*
[13] *See Id.*
[14] *Kindred Nursing Ctrs*., 137 S. Ct. at 1429.
[15] 9 U.S.C. § 2.
[16] Joint resolution (H.J. Res. 111) providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by Bureau of Consumer Financial Protection relating to ''Arbitration Agreements.''
[17] 9 U.S.C. § 402.

favored the use of arbitration agreements in various contracts, and in the event certain situations arise in which Congress has found that exceptions should be made to the FAA, it has passed legislation doing so in accordance with the legislative process. Importantly, when given the opportunity to do so by the CFPB, it declined.

Despite clear Supreme Court jurisprudence and congressional intent that has favored the use of arbitration agreements and expressly found that arbitration agreements should be treated by courts and legislatures on equal footing as other valid contract provisions, the CFPB's NPRM and the Petition seek to circumvent both judicial scrutiny and legislative procedure by requiring a registry of terms and conditions that will have the effect of inviting significant scrutiny to the entities using such terms and conditions and therefore disincentive them from continuing to use such provisions in form contracts utilized in the ordinary course of business. In fact, the CFPB admitted that forcing entities to engage in policy shifts with respect to the use of arbitration agreements and other covered terms and conditions is a key rationale behind issuance the of the NPRM. Its NPRM notes, "Depending on the competitive environment that firms face, they may choose to adjust their use of such terms and conditions, weighing the cost associated with a risk of losing trust with their customers or potential customers against the value they believe those terms and conditions to provide."[18] Because Congress and the Supreme Court have uniformly found in favor of the use of arbitration agreements and expressly found that state laws restricting the use of arbitration agreements are preempted by the FAA, the CFPB does not have the statutory authority to use its regulatory power to force entities to engage in significant policy shifts.

That power lies with Congress, and you have already spoken on this issue.

The Congressional Review Act Prohibits the CFPB from Issuing a Substantially Similar Rule

As noted above, Congress expressly spoke on this issue in 2017 when it passed a joint resolution under the Congressional Review Act disapproving of the CFPB's rule that placed restrictions on the use of arbitration agreements.[19] Under the Congressional Review Act, a federal agency is prohibited from issuing a new rule that is substantially the same as the disapproved rule unless Congress thereafter specifically authorizes the new rule.[20] There is significant evidence indicating that the provisions of the Petition and the CFPB's NPRM are substantially similar to that of the CFPB's 2017 rule regarding arbitration, such that the NPRM would be in violation of the Congressional Review Act. In the Petition, there is little to no additional mention of the 2017 disapproval. Specifically, it in no way addresses how the CFPB could legally move forward relying on an outdated study from 2015 that Congress already voted against, and it in no way addresses how the CFPB could overcome the fact that this action is substantially similar to the arbitration rule, which was already struck down.

As such, the CFPB should not move forward with this Petition or its NPRM.

III. The CFPB Should Not be Deputizing States to Target Disfavored Industries or Engaging in Egregious Activity Related to Market Monitoring and Supervision.

Last year, the CFPB issued an interpretative rule "to provide further clarity regarding the scope of state enforcement." According to the interpretive rule, Section 1042 of the Consumer Financial

[18] NPRM at 6962.
[19] Joint resolution (H.J. Res. 111) providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by Bureau of Consumer Financial Protection relating to ''Arbitration Agreements.''
[20] 5 USC § 801(b).

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

Additionally, industry participants have reported intrusive and burdensome requests from the CFPB related to their interest in "market monitoring." This includes asking businesses to take time out of their everyday work to respond to burdensome questions, calls, and inquiries, despite no history of problems or consumer harm. These fishing expectations often appear to be for the purpose of intimidating and burdening highly compliant ACA members, in the hopes of finding a needle in a haystack that the CFPB can later use to make claims about widespread consumer harm.

When bad actors are engaging in abusive behavior, ACA supports targeted efforts to eliminate illegal activity. However, engaging in time- and resource-draining regulatory activity without the backing of data-driven research and ample time for stakeholder comments is not a good use of anyone's resources, and ultimately, those costs are passed on to consumers. Congress created the CFPB to protect consumers, not to target certain disfavored industries or businesses, without due process.

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

Scott Purcell
Chief Executive Officer
ACA International