U.S. Chamber of Commerce

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Comment Intake — NPRM FCRA Medical Debt Information
Docket No. CFPB-2024-0023
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Prohibition on Creditors and Consumer Reporting Agencies Concerning Medical Information (Regulation V)

To Whom It May Concern:

The U.S. Chamber of Commerce Center for Capital Markets Competitiveness ("Chamber") appreciates the opportunity to comment on the Consumer Financial Protection Bureau ("CFPB") Proposed Rule on Prohibition on Creditors and Consumer Reporting Agencies Concerning Medical Information (Regulation V) (the "Proposed Rule").[1] The Chamber believes the CFPB lacks the authority to finalize the proposal, seeks to override direct statutory language enacted by Congress, and, if finalized, the proposal would harm consumers and endanger the safety and soundness of the financial sector. Accordingly, we believe the Proposed Rule should be withdrawn.

We are concerned by the CFPB's proposal to substantially restrict creditors' ability to obtain and use financial information related to medical debts for credit eligibility determinations. The Chamber is also concerned by the Proposed Rule's limitations on the circumstances under which consumer reporting agencies ("CRAs") are permitted to report medical debt information to creditors in connection with credit eligibility determinations. The CFPB believes that these changes would "help ensure that medical information does not unjustly damage credit scores" and "help keep debt collectors from coercing payments for inaccurate or false medical bills."[2] But the CFPB fails to consider the significant negative consequences that the Proposed Rule

[1] *See* CFPB, *Proposed Rule; Prohibition on Creditors and Consumer Reporting Agencies Concerning Medical Information (Regulation V)*, 89 Fed. Reg. 51,682 (June 18, 2024), https://www.govinfo.gov/content/pkg/FR-2024-06-18/pdf/2024-13208.pdf (hereinafter "*Proposed Rule*").

[2] *See* CFPB, *CFPB Proposes to Ban Medical Bills from Credit Reports* (June 11, 2024), https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-to-ban-medical-bills-from-credit-reports/#:~:text=Then%20in%20March%202022%2C%20the,data%20on%20unpaid%20medical%20bills

would cause, including higher borrowing costs and reduced access to credit for consumers, and a higher likelihood of default given lenders would be prohibited from considering information about medical debt.

The CFPB's Proposed Rule has failed to acknowledge the benefits of extending credit based on risk and a consumer's ability to repay. The Chamber released a report in 2021 finding that recent calls for removing risk-based pricing in favor of a uniform pricing system will hurt, not help, underserved communities, the credit invisible, and consumers with subprime credit.[3] Risk-based pricing expands access to credit. It also protects consumers by helping ensure borrowers are not offered loans they will be unable to repay. Further, risk-based pricing promotes safety and soundness by limiting the default rate in a financial institution's loan portfolio. Failing to account for all relevant aspects of a consumer's debt profile, including medical debts, would undermine the risk-based pricing system by eliminating a key factor that enables creditors to overcome the adverse information problem when underwriting loans for consumers. The Proposed Rule would lead to more consumers being approved for loans at terms they will not be able to afford to repay, harming consumers who are already struggling with debt.

The Chamber stands ready to work with the Biden Administration and Congress on these important questions related to the cost of medical care, medical billing, and outstanding medical debt. In developing policy proposals in the complex and consequential field of medical care and medical insurance, it will be critical that relevant agencies choose the right tools for the task at hand. To the extent that policymakers believe there are issues about the amount or fairness of medical debt, or how billing is undertaken, those issues should be addressed within the medical care system by the appropriate authorities—these issues are not the purview of the CFPB.

The CFPB should not use the Fair Credit Reporting Act ("FCRA"), or any other consumer financial services regulation, to indirectly address downstream concerns with medical billing that are outside of its jurisdiction. The CFPB cannot—and this proposal would not—make medical care more affordable by removing information from the credit reporting system. In particular, the FCRA is intended to protect consumers from decisions based on inaccurate credit information. It is not a medical billing statute and cannot be used to try to address concerns about the downstream effects of medical costs. Doing so will not help consumers, but instead will do more harm than good within the consumer financial services market.

[3] N. D. Pham & M. Donovan, *The Economics of Risk-Based Pricing for Historically Underserved Consumers in the United States* (Spring 2021), https://www.centerforcapitalmarkets.com/wp-content/uploads/2021/04/CCMC_RBP_v11-2.pdf.

The CFPB likewise should not—as it proposes here—claim authority not provided by Congress to determine what information should be included on a consumer report based on its "predictive" value. The CFPB compounds this lack of legal authority by building its views on a flawed factual foundation. The CFPB has sought to create a false narrative about medical debt, stating that medical bills "have little to no predictive value when it comes to repaying other loans,"[4] while elsewhere acknowledging that "consumers with medical collections are more likely to become seriously delinquent than consumers without medical collections."[5] Furthermore, the data set the CFPB relies on to assert that medical debts are less predictive of serious delinquency than other types of debts is outdated and its study utilizes a flawed methodology.

Nor may the CFPB subvert clear statutory language passed by Congress and reinvent the role of state law under the FCRA. In the Proposed Rule, the CFPB misdescribes the relationship between the FCRA and state law. The CFPB incorrectly asserts that state laws regarding the types of information that can be conveyed on a consumer report are not preempted under the FCRA. But the FCRA expressly preempts state laws that seek to regulate information included in consumer reports.[6] Further, the Proposed Rule could be interpreted as the CFPB asserting a violation of state law is a violation of the FCRA. The CFPB does not have this authority with regard to state law.

The CFPB should change course in this rulemaking. The key question is whether medical debt bears on the creditworthiness of consumers. The answer is clear: medical financial information is one of many factors that reflects creditworthiness and helpfully informs credit decisions. As evidenced in a recent speech by the CFPB's General Counsel, the CFPB simply believes that medical debt should not be part of credit underwriting as a policy matter regarding whether medical debt is "fair."[7] Yet, in that same speech, the CFPB's General Counsel acknowledges the impact of medical debt on creditworthiness: "A quarter of those owe more than

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[4] *See* CFPB, *CFPB Proposes to Ban Medical Bills from Credit Reports* (June 11, 2024), https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-to-ban-medical-bills-from-credit-reports/#:~:text=Then%20in%20March%202022%2C%20the,data%20on%20unpaid%20medical%20bills.

[5] *Proposed Rule* at 51,706.

[6] 15 U.S.C. § 1681t(b)(1)(E).

[7] S. Frotman, *Prepared Remarks of Seth Frotman, General Counsel and Senior Advisor to the Director, at New Jersey Citizen Action Education Fund's 14th Annual Financial Justice Summit* (Oct. 4, 2023), https://www.consumerfinance.gov/about-us/newsroom/new-jersey-citizen-action-education-funds-14th-annual-financial-justice-summit/.

five thousand dollars, and one in five don't expect to ever be able to pay it off."[8] If the CFPB is concerned about the ability to repay existing medical debt, should it not also be concerned about a consumer taking on additional debt? Despite the impact that medical debt information has on consumer creditworthiness, the CFPB has proposed to prohibit the use of medical debt information in credit reporting and the underwriting of consumer credit. This is a mistake.

The CFPB should withdraw the Proposed Rule, and instead focus its resources on issues actually under its purview. For example, the CFPB could focus on addressing unscrupulous activity undertaken by credit repair organizations that misrepresent to consumers they can remove adverse, yet accurate, information from their credit reports. Such actions would concretely help consumers without the unintended consequences the Proposed Rule would create.

If the CFPB decides to proceed we would ask the agency to consider the following points in determining whether to proceed with the Proposed Rule:

- If the CFPB proceeds with the Proposed Rule, it should further clarify certain provisions.
- The Proposed Rule would have unintended negative consequences for consumers.
- The CFPB lacks the legal authority and factual support necessary to promulgate the Proposed Rule.
- The FCRA preempts state law and is not intended to work "alongside" state law.

I. If the CFPB proceeds with the Proposed Rule, it should further clarify certain provisions.

While the Chamber firmly believes that the CFPB should not proceed with the Proposed Rule, if the Bureau does move forward, it should affirmatively exclude medical debt owed to a third-party lender from the definition of medical debt information and explain how the rule would apply in the context of ability to repay (and ability to pay) requirements in other laws and regulations.

The Proposed Rule sets forth a new definition of "medical debt information." Medical information is defined under the FCRA as "'[i]nformation or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer' that relates to, among other things, '[t]he payment for the provision

[8] *Id.*

of health care to an individual.'''[9] With regard to ''[t]he payment for the provision of health care to an individual''—i.e., the subset of ''medical information'' concerning debt—the CFPB has preliminarily interpreted the FCRA section 603(i) to mean that medical information about a consumer's debt must relate to a debt the consumer owes, or at one time owed (for example, in the case of paid medical debt), directly to a health care provider or to the health care provider's agent or assignee.[10] With that interpretation, the Proposed Rule defines "medical debt information" as "medical information that pertains to a debt owed by a consumer to a person whose primary business is providing medical services, products, or devices (e.g., a medical or health care provider), or to the person's agent or assignee, for the provision of such medical services, products, or devices."[11] The CFPB further states that "medical debt would not include a debt owed to a third-party lender (including a medical credit card issuer whose products are offered specifically for the payment of medical services or general purpose credit card issuer)."[12]

Any further broadening of the definition to include third-party lenders would result in debts that are not connected to the provision of health care being removed from credit reports and would adversely affect the ability of a lender to avoid over extension of credit. In addition, any further broadening of the definition would contradict the definition of medical information under the FCRA.

The proposed definition of medical debt information is appropriate given the operational challenges that could arise if the definition is expanded to include additional creditors. For example, broadening the definition to include third-party lenders and creditors, such as home equity lenders or credit card issuers, would require these third parties to be able to identify medical charges and recalculate multiple essential fields (such as current balance, credit limit, amount past due, and actual payment amount) to remove the "medical debt" charges. Moreover, even if third parties could reasonably identify those charges from merchant category codes or other indicia, it would require these creditors to maintain two sets of records- one that reflects the customer's complete furnishing data elements and another that recalculates these fields to remove any "medical debt" charges. Even if this were feasible, it would introduce significant operational risks and likely result in consumer confusion regarding differences between periodic statements or loan agreements and consumer reports.

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[9] *Proposed Rule* at 51,690 (quoting 15 U.S.C. § 1681a(i)).
[10] *Id.*
[11] *Id.* at 51,691.
[12] *Id.* at 51,690.

The CFPB should affirmatively state in any final rule that the definition does not include medical payment products, credit cards, or other open-end credit, such as home equity lines. The CFPB should also clarify, either in a final rule or commentary, that "a person whose primary business is providing medical services, products, or devices" does not include persons who also provide a significant amount of non-medical services, products, or devices, for example, pharmacies with a large portion of business devoted to non-medical services, products, or devices, such as groceries, home goods, and convenience items.

The CFPB must also clarify how lenders can comply with credit underwriting requirements, including ability to repay (and ability to pay) analysis requirements, under other applicable laws and regulations if the Proposed Rule is finalized. This clarity is necessary for creditors to understand how to comply with applicable laws, as well as how to ensure consumers will be able to repay obligations and lenders can adhere to safety and soundness principles. Removing information relevant to a lender's determination of a consumer's credit risk and ability to repay creates a risk to the consumer that the lender will provide an over extension of credit. By removing certain credit attributes such as medical debt from the credit reporting system because the CFPB deems them "less predictive," the CFPB would create a real risk that lenders would be unable to meet their consumer protection obligations or safety and soundness requirements. This would be particularly concerning should the CFPB take an expansive view and consider additional forms of consumer debt to be less reliable or "predictive."

In the Proposed Rule, the CFPB includes an example of a consumer who provides unsolicited medical information on an application. The CFPB specifies that "a creditor or card issuer is not permitted to obtain or use any medical information from a CRA to comply with the ability-to-repay rule under § 1026.43(c) of this chapter for closed-end mortgages, the repayment ability rule under § 1026.34(a)(4) of this chapter for open-end, high-cost mortgages, or the ability-to-pay rule under § 1026.51(a) of this chapter for open-end (not home-secured) credit card accounts, *because the creditor or card issuer can comply with those rules using information provided by the consumer.*"[13] This example, and the Proposed Rule generally, do not appear to address how creditors can comply with ability to repay requirements when a consumer does not voluntarily disclose medical information. The CFPB also leaves unclear how creditors can comply with ability to repay requirements enforced by other regulators, such as requirements for originating government-insured or -guaranteed loans.

[13] *Id.* at 51,736 (emphasis added).

The Proposed Rule also leaves unclear a creditor's obligations with respect to verifying and using certain information in ability to repay analyses. To clarify the extent to which a creditor may or must verify medical debt information, the proposal should clearly confirm that creditors are permitted to verify unsolicited medical debt information using reliable third-party records that are not the credit report. Further, the CFPB should also clarify that creditors are not required to independently verify, and can consider, debts listed on a consumer report that do not contain any indica of being medical debts. Any final rule should clearly state that a creditor that considers a consumer's FICO score or a report of credit report attributes that could encompass medical debt does not violate the proposed prohibition on obtaining or using medical debt for credit eligibility determinations.

The CFPB should also clarify that medical information provided in connection with an application for credit is "unsolicited" and may be used by the creditor even if the information is identified as "disability" income. Regulation V states that a creditor does not obtain medical information in violation of the prohibition if it obtains medical information without specifically requesting it.[14] The proposal provides examples of unsolicited medical information—such as a consumer responding to a "general question" or volunteering the information as part of a conversation with a loan officer. However, there are other foreseeable circumstances in which such information may be provided. For example, when originating closed-end loans, most creditors use the 1003 Uniform Residential Loan Application Form, which prompts consumers to list income from other sources including "disability income."

II. The Proposed Rule would have unintended negative consequences for consumers.

The CFPB lacks the expertise or authority necessary to address the US healthcare system and the complexities related to medical costs impacting health care providers, health insurance companies, and consumers. Nonetheless, the CFPB seeks to take on these policy issues indirectly by contorting the FCRA to its own designs. But this approach will have significant unintended negative consequences for consumers. Specifically, the Proposed Rule will result in consumers with significant amounts of medical debt being offered credit at terms they cannot afford. To mitigate this risk of loss, lenders will have no choice but to increase rates and fees for all consumers. Resulting uncertainty in the credit market in turn may result in increased demand by medical providers for upfront payment, increased litigation by medical providers and debt collectors seeking to collect payment, reduced access to credit, and an increase in credit costs.

[14] 12 C.F.R. § 1022.30(c)(1).

Creditors make decisions about the terms of credit offered to consumers based on a full picture of the consumer's financial circumstances. Financial information related to medical debt is a part of that picture. Removing a creditor's ability to consider legitimate, accurate medical financial information hinders a creditor's ability to ensure that a consumer is able to repay credit at the specified terms. Denying creditors the ability to consider a potentially significant source of debt contradicts the principles the CFPB was founded upon following the 2007-2008 financial crisis and the CFPB's own regulations. As the CFPB noted in its Ability-to-Repay and Qualified Mortgage Standards rule under Regulation Z, "[d]uring the years preceding the mortgage crisis, too many mortgages were made to consumers without regard to the consumer's ability to repay the loans. Loose underwriting practices by some creditors—including failure to verify the consumer's income or debts . . . contributed to a mortgage crisis that led to the nation's most serious recession since the Great Depression."[15] The Proposed Rule disregards these lessons.

Creditors need accurate and complete information to make the best credit decisions. Risk-based pricing based on a consumer's full credit history benefits consumers, especially minority and low-income households.[16] Conversely, creditors who are deprived of information about any debt—including medical debt—will unknowingly offer consumers credit at terms that they cannot afford. By preventing creditors from having access to medical debt information, the Proposed Rule would stop them from seeing the full picture of a consumer's financial health. This will not help consumers. Rather, the Proposed Rule will significantly increase the possibility that such consumers will be pushed underwater financially. The number of consumers who default on their credit would increase as a result of the Proposed Rule.. Notably, medical debt is the leading cause of personal bankruptcy[17]—an important factor that creditors need to consider when evaluating credit terms. For consumers, medical debt is a concrete factor in their economic outlook. Even if failing to pay a medical debt will not impact a consumer's credit report, failing to pay a legitimate medical debt may not be a viable option for some consumers, particularly for consumers who are still receiving or anticipate needing future care from the medical provider who owns the debt.

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[15] CFPB, *Final Rule; Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z)*, 78 Fed. Reg. 6,408, 6,408 (Jan. 30, 2013), https://www.govinfo.gov/content/pkg/FR-2013-01-30/pdf/2013-00736.pdf.

[16] CCMC, *The Economic Benefits of Risk-Based Pricing for Historically Underserved Consumers in the United States* (2021), https://www.uschamber.com/assets/documents/CCMC_RBP_v11-2.pdf.

[17] J. Bedayn, AP News, *States confront medical debt that's bankrupting millions* (April 12, 2023), https://apnews.com/article/medical-debt-legislation-2a4f2fab7e2c58a68ac4541b8309c7aa.

Blinding creditors to these factors will only make it harder for them to predict creditworthiness. Ultimately, the CFPB wants to remove a piece of the equation creditors use to make underwriting decisions. However, even if removing medical debt information results in an increase in credit scores as the CFPB predicts,[18] the result would be credit scores that are falsely inflated, less accurate, and less useful to creditors in making credit decisions. These credit decisions are not limited to the decision to extend credit—they also include the terms at which rate credit is offered. If consumers FICO scores increase as a result of the Proposed Rule, many consumer may be offered credit at terms that do not accurately reflect appropriate credit risk profiles, resulting in more defaults. The CFPB fails to fully address these impacts in its cost benefit analysis of the Proposed Rule.

The CFPB also neglects to conduct a sufficient cost benefit analysis to address secondary impacts to consumers. The Proposed Rule could decrease the likelihood that consumers pay their medical bills in some circumstances since unpaid medical bills will not directly impact a consumer's credit score or eligibility for future credit. More unpaid bills and bills going to collections could increase costs for medical providers, and in turn result in higher charges for healthcare to all consumers, including those who do pay. Medical providers, recognizing potential impacts of the Proposed Rule, may more often require up-front payment for non-emergency medical services. A consumer who does not have the up-front payment amount at hand may put off necessary preventative services or the purchase of medical devices. The same consumer may have been able to receive the service or purchase the device given an opportunity to pay in smaller amounts over time. Alternatively, a consumer may pay the full amount of a service up front if required by the provider but experience a loss of funds needed for other necessary expenses. Medical providers and debt collectors may also become more likely to sue consumers with unpaid medical bills if fewer consumers are incentivized to pay under the terms to which they have agreed, leading to adverse consequences for consumers like liens and wage garnishment.

The CFPB also fails to consider that the cost of credit could increase for all consumers in response to the Proposed Rule. If creditors are unable to consider medical debts when underwriting credit, there would be higher risk of default.

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[18] *See* CFPB, *CFPB Proposes to Ban Medical Bills from Credit Reports* (June 11, 2024), https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-to-ban-medical-bills-from-credit-reports/#:~:text=Then%20in%20March%202022%2C%20the,data%20on%20unpaid%20medical%20bills. We note that the CFPB's conclusion that credit scores will increase by twenty points on average assumes that credit scoring models will not be impacted by the Proposed Rule, which is unlikely. Credit scoring models will likely be readjusted to compensate for the lack of available information regarding medical debts.

Creditors may need to take this risk into account when pricing products in a way that maintains the safety and soundness of the institution. Because creditors would likely be blind to the risk that consumers may have significant medical debt, creditors may need to raise rates and fees across product lines in order to mitigate this potential risk. Faced with unknown risks, creditors may also curtail lending, reducing consumer access to credit products.

The CFPB fails to appropriately consider the considerable costs that would be imposed on medical providers and their capacity to treat patients. According to one study, "68% of net revenues [of medical providers] are uncompensated for" and unless "hospitals and healthcare providers can recoup a larger portion of uncompensated revenues, their ability to invest in equipment, provide necessary services and maintain rural facilities may be severely impaired."[19] These challenges are especially acute for healthcare systems in small and rural communities.[20] And a recent report found the following with respect to the Proposed Rule: "Medical providers would suffer a loss of income from non-payment of services. The loss in the first year is estimated to be $24 billion. The estimated range for the losses over time ranges from $82 billion to $655 billion."[21] The CFPB acknowledges the risk of higher costs and/or reduced coverage—at least for rural medical providers—but makes no effort to study them despite stating it is participating in a whole of government approach to addressing medical debt.[22]

The Proposed Rule may have other unintended consequences for consumers' financial health that the agency must study before finalizing the rule. For example, healthcare providers may be more likely to ask for upfront payment before providing non-emergency medical care. This has become increasingly common as medical providers struggle to collect on bills and could be exacerbated by the CFPB's proposal given it would disincentive consumers likelihood of payment since it reduces consequences to consumers for nonpayment of medical bills.[23]

The CFPB should withdraw the Proposed Rule given these significant potential negative consequences and refocus its attention elsewhere, leaving issues with

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[19] Georgetown University McDonough School of Business, Business for Impact, *The Casualties of Medical Debt: Sicker Consumers and Sick Hospitals* 28 (2023), https://businessforimpact.georgetown.edu/wp-content/uploads/2023/11/2023-Annual-Medical-Debt-Report_Digital_103023.pdf.

[20] *Id.*

[21] A. R. Nigrinis, ACA International, *Economic Analysis of the Consumer Financial Protection Bureau's Prohibition on Creditors and Consumer Reporting Agencies Concerning Medical Information (Regulation V)* (July 2024), https://policymakers.acainternational.org/wp-content/uploads/2024/07/AndrewNigrinisEconomicAnalysis-CFPB-FCRA-NPRM-July2024.pdf.

[22] *Proposed Rule* at 51,713.

[23] M. Evans, *Hospitals Are Refusing to Do Surgeries Unless You Pay in Full First* (May 9, 2024), https://www.wsj.com/health/healthcare/hospitals-pay-before-treatment-patients-c477e2d6.

medical billing to other agencies with relevant authorities. Moreover, the CFPB should not go further, in future rulemakings, down the slippery slope of restricting information that may appear on consumer reports. For example, the CFPB certainly should not build on the Proposed Rule as precedent to prohibit or limit information about student loan debt, auto loan debt, or even mortgage debt. Such further limitations could compound the issues with the Proposed Rule and result in a substantial increase in the debt consumers are unable to repay, reversing decades of progress on ability to repay requirements.

III. The CFPB lacks the legal authority and factual support necessary to promulgate the Proposed Rule.

The FCRA does not authorize the CFPB to decide what information may be included on a consumer report based on that information's supposed "predictive value." Further, the CFPB is not a safety and soundness regulator and does not have the authority to determine whether a loan is "safe" or "profitable," as it asserts under the Proposed Rule. In addition, the CFPB's analytical support for the Proposed Rule is flawed and insufficient to justify the Bureau's dramatic change in position from when it adopted Regulation V a decade ago.

a. The Bureau lacks authority under the FCRA to issue the Proposed Rule.

The FCRA does not authorize the Bureau to decide what information may be included on a credit report based on its "predictive value." To this end, CFPB Director Rohit Chopra has testified before Congress the CFPB does not have the authority to establish a government-run credit bureau or establish a credit scoring model.[24] Likewise, the CFPB does not have the authority under the FCRA to mandate what information should or should not be included on a credit report based on its predictive value. Nor is the CFPB authorized to take actions designed to "help to increase credit scores and loan approvals," as the Proposed Rule was designed to do.[25] The Proposed Rule would not change the underlying creditworthiness of borrowers. Promulgating regulations designed to increase credit scores by blinding creditors to legitimate debt will only make credit scores less predictive and less reliable, and accordingly, less useful to creditors as a way to manage risk and ensure consumers can repay credit.

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[24] *See* US Senate Committee on Banking, Housing, and Urban Affairs, *Nominations of The Honorable Gary Gensler and The Honorable Rohit Chopra, Questions for The Honorable Rohit Chopra, of the District of Columbia, to be Director, Bureau of Consumer Financial Protection* 12, 36-37 (March 8, 2021), https://www.banking.senate.gov/imo/media/doc/Chopra%20Resp%20to%20QFRs%203-2-211.pdf.

[25] *See* CFPB, *CFPB Proposes to Ban Medical Bills from Credit Reports* (June 11, 2024), https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-to-ban-medical-bills-from-credit-reports/#:~:text=Then%20in%20March%202022%2C%20the,data%20on%20unpaid%20medical%20bills

The design of credit scoring models and credit decisions instead should be left to the private market.

The FCRA gives the CFPB the authority to "prescribe regulations that permit transactions [that allow creditors to use medical information in connection with a determination of a consumer's credit eligibility] that are determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs . . . consistent with the intent of [the limitation] to restrict the use of medical information for inappropriate purposes."[26] While the FCRA prohibits the use of medical information for inappropriate purposes, the use of medical debt information to determine credit eligibility is appropriate and, as explained in detail above, necessary to protect consumers and limit risk with respect to extending credit. The CFPB's unjustified assertion that medical debt information has less predictive value than other types of debt information does not justify prohibiting creditors from using medical debt information in credit eligibility determinations. The CFPB's assertion of its authority in issuing the Proposed Rule is incorrect, and even if it were reasonable, is not the best interpretation under the FCRA. Accordingly, any final rule will be overturned by a court if challenged.[27]

Similarly, the CFPB does not have the authority to determine whether an extension of credit is "safe" or "profitable." In support of the Proposed Rule, the CFPB claims in its Press Release that 22,000 additional "safe" mortgages could be originated every year under the Proposed Rule.[28] Regardless of the CFPB's determination, any mortgages made under the Proposed Rule that could not be made with information about a consumer's medical debt will be inherently riskier. Yet, the CFPB uses an analysis with at least two deficient premises. First, the CFPB assumes the credit scores of these consumers will improve – yet the CFPB does not control the scoring models and can only make inferences about the inputs, weights, and methodologies for determining a particular credit score. Second, the CFPB assumes lenders will treat credit scores that are not prohibited from including information about medical debt the same as credit scores that are permitted from including information about medical debt. However, lenders may choose to issue fewer mortgages, or they may choose to charge a higher interest rate which could cause consumers to seek fewer mortgages.

Simply put, the CFPB is not a safety and soundness regulator. It does not have the authority or expertise to determine whether a loan is safe or profitable. Authority regarding the safety and soundness of financial institutions belongs to the prudential

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[26] U.S.C. 1681b(g)(5)(A)).
[27] *Loper Bright Enters. v. Raimondo*, No. 22-4751, 2024 WL 3208360, *16 (U.S. June 28, 2024).
[28] *Id.*

banking regulators—the very regulators who originally promulgated the exception permitting creditors to consider medical financial information when underwriting credit. Those regulators were correct when they determined that creditors need information about all of a consumer's obligations, including medical debt, to safely underwrite credit in a way that so that the consumer has a reasonable likelihood of the ability to repay and that does not jeopardize the safety and soundness of creditors.

Notably, although the CFPB states it consulted with the federal prudential banking regulators regarding the proposal, "consulting" does not mean that the banking regulators agreed with the CFPB's findings or even had the opportunity to fully review them. We would request that the CFPB transparently disclose these consultations and encourage the prudential banking regulators to file their own comments explaining their views on the CFPB's findings. This will also assist commentors to better assess the viability of the Proposed Rule.

b. The CFPB does not provide supporting materials sufficient to justify its reversal of twenty years of policy.

The CFPB does not adequately support its reversal of twenty years of rulemaking developed by multiple agencies. The Regulation V provision that the CFPB seeks to eliminate through the Proposed Rule was issued by five agencies responsible for implementing the FCRA at the time: the Office of the Comptroller of the Currency ("OCC"), the Federal Reserve System (the "Board"), the Federal Deposit Insurance Corporation ("FDIC"), the Office of Thrift Supervision ("OTS"), and the National Credit Union Administration ("NCUA") (the "Agencies").[29] Inexplicably, in the Proposed Rule, the CFPB states that the prudential regulators did not provide evidence or reasoning sufficient to support the creation of the medical information regulations.[30] Yet the CFPB even quotes the Agencies' reasoning in the Proposed Rule—that the provision "strikes a balance between permitting creditors to obtain and use certain medical information about consumers when necessary and appropriate to satisfy prudent underwriting criteria and to ensure that credit is extended in a safe and sound manner, while restricting the use of medical information for inappropriate purposes."[31] The Agencies further explained that they believed the financial information exception

[29] OCC, Board, FDIC, OTS, and NCUA, *Final Rules; Fair Credit Reporting Medical Information Regulations*, 70 Fed. Reg. 70,664 (Nov. 22, 2005), https://www.occ.gov/news-issuances/federal-register/2005/70fr70664.pdf.
[30] *Proposed Rule* at 51,688.
[31] *Id.* at 51,687 (quoting OCC, Board, FDIC, OTS, and NCUA, *Notice of Proposed Rulemaking; Fair Credit Reporting Medical Information Regulations*, 69 Fed. Reg. 23,380, 23,384 (Apr. 28, 2024) (hereinafter "*Exception NPRM*").

is "necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (including administrative verification purposes), and are consistent with the congressional intent to restrict the use of medical information for inappropriate purposes."[32] The CFPB has not adequately explained the differences that exist today that justify overturning the reasoning of the Agencies, which have vast knowledge and responsibility for the safety and soundness of the financial system. With the Proposed Rule, the CFPB appears to be performing a legislative function to serve its own policy goals, rather than implementing the FCRA.

The CFPB itself has recently recognized that healthcare expenses are an important monthly cost for consumers that can impact their ability to repay other obligations. As recently as 2023, the CFPB stated that medical debt is appropriate to consider when underwriting credit. In a Complaint filed against Credit Acceptance Corporation ("CAC"), the CFPB alleged "CAC does not consider—or even require dealers to ask about—the borrower's recurring debt obligations, rent or mortgage payment, or any of the other necessary expenses an individual incurs each month, including the cost of food, *healthcare* [emphasis added], or childcare."[33] The CFPB found that this conduct meant CAC did not appropriately calculate a consumer's ability to repay in full the loans it offered. This practice, according to the CFPB, was abusive[34] and was "[s]etting borrowers up to fail."[35] The CFPB cannot have it both ways—it cannot penalize creditors for failing to consider medical debt information when underwriting loans yet prohibit creditors from considering such information.

The CFPB fails to identify adequate support for its assertions that medical debt is "less predictive" of a consumer's serious delinquency than other forms of financial information. The CFPB's quantitative analysis about the "predictive" value of medical debt relies on outdated information. Further, the study the CFPB relied upon qualifies its findings by specifying that medical debt may only be "*less* predictive" than non-medical debt. The study did not find that medical debt entirely lacked any predictive value, nor did the study determine that consumers could repay credit at terms offered without considering any medical debt. The CFPB also points to the voluntary decision by the three largest credit bureaus to remove medical debt under $500 from credit reports as indicative of the predictiveness of medical debt. However, this voluntarily act by the credit bureaus is not informative about the predictiveness of medical debt.

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[32] *Exception NPRM* at 23,382.
[33] *See CFPB v. Credit Acceptance Corp.*, Case No. 23 Civ. 0038, Complaint ¶ 30 (SDNY Jan. 4, 2023).
[34] *Id.* at ¶ 186.
[35] CFPB, *CFPB and New York Attorney General Sue Credit Acceptance for Hiding Auto Loan Costs, Setting Borrowers Up to Fail* (Jan. 4, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-new-york-attorney-general-sue-credit-acceptance-for-hiding-auto-loan-costs-setting-borrowers-up-to-fail/.

The credit bureaus did not specify that they removed such medical debts from consumer reports due to a lack of predictive value. Even medical debts under $500 may have some predictive value, and, regardless, medical debts of larger amounts, such as debts in the thousands of dollars, certainly may impact a consumer's ability to repay other credit obligations.

The CFPB asserts that medical debt information is less predictive of a consumer's credit risk, yet also states consumer credit scores will rise by twenty points, on average, due to the removal of medical debt information from credit reports.[36] Credit scoring models are based on the predictiveness of credit information. By asserting credit scores will increase so significantly in response to the Proposed Rule, the CFPB is also acknowledging that medical debt information holds significant predictive value.

IV. The FCRA preempts state law on and is not intended to work "alongside" state-level efforts.

The CFPB incorrectly suggests that the Proposed Rule could "operate alongside Federal and state-level efforts to increase consumer protections around medical debt consumer reporting."[37] But the FCRA expressly preempts state laws that seek to regulate information included in consumer reports.[38] The plain statutory language of the FCRA provides that "[n]o requirement or prohibition may be imposed under the laws of any State . . . with respect to any subject matter regulated under . . . section 1681c of this title, relating to information contained in consumer reports."[39] These words have broad scope. The statutory history of the FCRA's preemption provisions further supports the conclusion that the FCRA preempts any state law regulating the information contained in consumer reports. Originally, the FCRA had narrow preemption provisions, permitting states to enact consumer-reporting laws so long as those laws did not conflict with any provisions of the FCRA. In 1996, Congress amended the FCRA to add Section 1681t(b), a "strong preemption provision,"[40] designed to ensure "uniform, national standards" in credit reporting.[41] This provision remains in law and, by its clear terms, bars states from enacting laws that regulate

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[36] *See* CFPB, *CFPB Proposes to Ban Medical Bills from Credit Reports* (June 11, 2024), https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-to-ban-medical-bills-from-credit-reports/#:~:text=Then%20in%20March%202022%2C%20the,data%20on%20unpaid%20medical%20bills.

[37] *Proposed Rule* at 51,695.

[38] 15 U.S.C. § 1681t(b)(1)(E).

[39] *Id.*

[40] *Ross v. FDIC*, 625 F.3d 808, 813 (4th Cir. 2010).

[41] *CDIA v. King*, 678 F.3d 898, 901 (10th Cir. 2012).

what information may or may not be included in consumer reports. Through the FCRA "Congress set out to create uniform, national standards in the area of credit reporting."[42] The Proposed Rule's "incorporation" of state law would undermine this uniformity by opening the door for a patchwork of conflicting state regulations.

Further, the Proposed Rule could be interpreted as the CFPB asserting that it can enforce state laws restricting the provision of medical debt information in consumer reports. Specifically, the Proposed Rule provides that a CRA may only provide medical debt information if "the [CRA] is not otherwise prohibited . . . including by a State law." We are concerned that the implication of this language is that under the Proposed Rule, if finalized, a CRA would purportedly be subject to the FCRA's private right of action if it provides medical debt information in violation of state laws that restrict medical debt information in ways that differ from Regulation V.

The CFPB lacks the authority to enforce state law and cannot shoehorn the FCRA's private right of action into state law. Under separation of powers principles, the federal government is not the enforcer of state laws.[43] By extension, certainly, the CFPB, an agency of the federal government, may not grant itself authority to become an enforcer of state laws by rulemaking. Nor may the CFPB create a private right of action from the violation of a state law or assert that a violation of a state law would be a violation of the FCRA.[44] Such actions are clearly unconstitutional.

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We thank you for your consideration of these comments and would be happy to discuss these issues further.

Sincerely,

Bill Hulse
Senior Vice President
Center for Capital Markets Competitiveness

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[42] *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 901 (10th Cir. 2012); *see also* S. Rep. No. 108-166, 108th Cong., 1st Sess. (Oct. 17, 2003) (noting that the FCRA "sought to establish uniform standards in key areas" including "the contents of consumer reports").
[43] *Kraushaar v. Flanigan*, 45 F.3d 1040, 1048 (7th Cir. 1995) ("A violation of a state statute is not a per se violation of the federal Constitution. The federal government is not the enforcer of state law.").
[44] *Archie Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988) ("[T]o treat a violation of state law as a violation of the Constitution is to make the federal government the enforcer of state law").

U.S. Chamber of Commerce