

August 12, 2024

Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street NW Washington, DC 20552

RE: PROHIBITION ON CREDITORS AND CONSUMER REPORTING AGENCIES CONCERNING MEDICAL INFORMATION (REGULATION V) DOCKET NO. CFPB-2024-0023, RIN 3170-AA54

Director Chopra,

The Independent Community Bankers of America (ICBA)¹ appreciates the opportunity to respond to the Consumer Financial Protection Bureau's ("CFPB") proposal to amend the Fair Credit Reporting Act ("FCRA") regulations. The proposed rule would, if finalized, prohibit creditors from using medical financial information (including information about medical debt) in connection with credit eligibility determinations and limit the circumstances under which consumer reporting agencies ("CRA") are permitted to provide medical debt information to creditors in connection with credit eligibility determinations.

While medical debt is a growing concern, especially for those that are un- or under-insured, being informed of a consumer's total debt obligation is a basic component of prudent underwriting. And in turn, that information is only valuable so long as it is accurate. It is therefore understandable that the CFPB wants to increase the accuracy of credit reports, but ICBA has three main concerns about the Bureau's approach to increasing accuracy:

1. The Bureau does not have the statutory discretion to eliminate the use of *all* medical debt from consumer reports, as this administration has broadly suggested in press releases and public statements.²

¹ The Independent Community Bankers of America® has one mission: to create and promote an environment where community banks flourish. We power the potential of the nation's community banks through effective advocacy, education, and innovation. As local and trusted sources of credit, America's community banks leverage their relationship-based business model and innovative offerings to channel deposits into the neighborhoods they serve, creating jobs, fostering economic prosperity, and fueling their customers' financial goals and dreams. For more information, visit ICBA's website at www.icba.org.

² See White House Press Release, "FACT SHEET: Vice President Harris Announces Proposal to Prohibit Medical Bills from Being Included on Credit Reports and Calls on States and Localities to Take Further Actions to Reduce Medical Debt," available at <https://www.whitehouse.gov/briefing-room/statements-releases/2024/06/11/fact-sheet-vice-president-harris-announces-proposal-to-prohibit-medical-bills-from-being-included-on-credit-reports-and-calls-on-states-and-localities-to-take-further-actions-to-reduce-medical-debt/>; and "CFPB Proposes to Ban Medical Bills from Credit Reports," available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-to-ban-medical-bills-from-credit-reports/>.

2. While the Bureau ostensibly justifies the proposal by citing its concern for accurate credit reports, arguing that credit reports are rife with inaccurate medical debt tradelines, the obvious consequence of this proposal will be the opposite. This proposal would *increase* the inaccuracy of credit reports by mandating the removal of accurate information.
3. Beyond diminishing the accuracy and the utility of credit reports, this proposal would also hinder community bank efforts to comply with other regulatory requirements. The proposal conflicts with other Bureau requirements, such as determining a consumer's debt-to-income ("DTI") ratio or assessing a borrower's ability to repay ("ATR").

Statutory Discretion is Misplaced

The inclusion of medical debt in credit reports is expressly contemplated and permitted by statute, so long as the information is restricted or coded. The medical information 'exception' that the Bureau proposes to remove is a regulatory-based exception, first promulgated by the federal banking agencies in 2005. The agencies issued the regulatory exception to permit creditors to obtain or use medical information in crediting decisions when it was necessary and appropriate to protect legitimate operational, transactional, or risk needs. Congress permitted the financial information exception under 604(g)(5)(A) so long as the federal banking agencies determined that an exception be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs, and consistent with the congressional intent to restrict the use of medical information for inappropriate purposes.

While the federal banking agencies first promulgated the financial information exception in 2005, the Bureau's proposal would remove that exception. The CFPB, now with primary regulatory authority over the FCRA, has preliminarily determined that the financial information exception to the creditor prohibition is neither warranted nor consistent with the FACT Act's purpose of protecting the privacy of consumers' medical information. As such, the brunt of the Bureau's proposal is focused on the 604(g)(5)(A) exception, providing discussion and rationale as to why the exception is no longer warranted.

However, the regulatory exception is separate and distinct from the statutory exception, and the statutory language does not indicate that the Bureau has the authority to supersede that exception. Under section 604(g)(1)(C), a consumer reporting agency may not furnish a consumer report that contains medical information about a consumer **unless "the information to be furnished pertains solely to transactions, accounts, or balances relating to debts arising from the receipt of medical services, products, or devices, where such information [...] is restricted or reported using codes that do not identify, or do not provide information sufficient to infer, the specific provider or the nature of such services, products, or devices."**

In addition to explicitly permitting CRAs to include coded medical information in consumer reports, the statute also permits creditors to use credit reports that contain such information. While Congressional language does place a general prohibition on creditors' ability to obtain and consider medical debt information, section 604(g)(2) provides a statutory exception to the general prohibition.

Under section 604(g)(2), creditors are generally prohibited from using medical information, “**except** as permitted pursuant to paragraph 3(c),” which discusses how medical information must be coded or restricted in order to be included in a credit report.

This statutory language is clear. Congressional intent need not be analyzed or surmised. Creditors and financial institutions are explicitly permitted to receive, and CRAs are permitted to report, medical debt information so long as it is coded or restricted. It is misleading for Bureau press releases to broadcast that medical debt will be removed from credit reports when it is proposing to eliminate only the regulatory exception, while having no authority to remove the statutory exception that continues to permit coded information in credit reports.

Increased Inaccuracy, Decreased Utility

The goal of the Bureau should be to increase accuracy in credit reports. While the Bureau contends that medical debt records have a high propensity of errors and inaccuracies, this proposed rule is an overcorrection that will uniformly remove accurate information along with inaccurate information.

A better solution would be tailored to remedy the underlying problem that leads to the high levels of inaccuracies. Accurate information leads to increased efficacy of credit reports, ensuring that people are rewarded for good credit behavior and disincentivized from poor credit behavior.

Without the ability to accurately distinguish “low” credit risk from “high,” all consumers will be charged the same rate. This would effectively penalize consumers that have worked to prudently limit their debt burden and repay their debt in a timely manner. In remarks delivered during a field hearing on credit reporting, former CFPB Director Cordray supported this sentiment, noting, “consumers can instantly access credit because lenders everywhere can look to credit scores to provide a uniform benchmark for assessing risk. Conversely, credit reporting may also help reinforce consumer incentives to avoid falling behind on payments, or not paying back loans at all.”³

At the time, Director Cordray focused on three priorities of focus: accuracy of the information received by the credit reporting companies, accuracy in assembling and maintaining that information, and the processes that govern error resolution. While the Bureau contends that credit reports are rife with inaccurate medical debt tradelines, the best solution is to address the cause of those inaccuracies, as Director Cordray prioritized in 2015. Instead the Bureau’s solution is to make credit reports *more* inaccurate by prohibiting the inclusion of medical debt, regardless of its accuracy or validity.

Conflict with Federal Consumer Protection Laws

While the Bureau continues to have long-standing concerns about the usefulness of medical debt collections tradeline information in predicting a consumer’s creditworthiness, the fact remains that the inclusion of medical debt in a consumer’s credit report adds relevant information about that consumer’s ability to repay a loan. This information is critical for community banks’ ability to comply with certain federal regulations, including the Truth in Lending Act (“TILA”) and Regulation Z, which generally prohibit

³ <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-by-richard-cordray-on-credit-reporting/>

creditors from making mortgage loans unless they make a reasonable and good faith determination that the consumer will have the ability to repay the loan. Determining a consumer's ability to repay is designed to protect the consumer. If a consumer is too heavily indebted relative to their income, then he or she should not incur further debts that would inhibit their ability to pay back the loan. All debts that are owed, regardless of type or class, affects a consumer's cashflow and ability to repay. In an era where the Bureau is trying to add more transparency in transactions and credit scores (such as in the buy now, pay later interpretive rule), this proposal cuts in the opposite direction.⁴

Further, failing to understand the full financial situation of the borrower and constraints on cashflow poses certain safety and soundness risks. Obfuscating the total debt liability of a consumer would pose a risk to community banks' ability to accurately underwrite that borrower. A borrower's debt-to-income is a critical risk factor when underwriting loans. A consumer that has a higher debt-to-income ratio is simply a higher credit risk and should be priced at a rate to reflect that risk.

Conclusion

ICBA supports efforts to increase the accuracy of credit reports. Accurate data increase the beneficial aspects of credit reporting for consumers, including broader access to credit. Without accurate credit reports, lending would be limited to consumers that already have an established relationship with a creditor, greatly limiting the percentage of consumers that can access mainstream credit products.

Separate from the issue of whether the Bureau has statutory authority to prohibit CRAs from including medical debt in credit reports, ICBA believes that this proposal is a misguided effort to achieve the laudable policy goal of accuracy, and will unfortunately result in more inaccuracies and a more limited understanding of a consumer's credit debt obligations. Therefore, we respectfully recommend that the CFPB not finalize this rule as proposed.

Sincerely,

/s/

Michael Emancipator
Senior Vice President, Senior Regulatory Counsel

⁴ Director Chopra remarks, "Mortgage lenders and auto lenders have raised concerns to me that the growth of Buy Now, Pay Later with no associated credit reporting makes it more challenging to know whether a borrower can afford a mortgage or auto loan.", available at <https://www.consumerfinance.gov/about-us/newsroom/director-chopras-prepared-remarks-on-the-release-of-the-cfpbs-buy-now-pay-later-report/>