



November 6, 2023

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

RE: FCRA Proposals and Alternatives Under Consideration

Dear Director Chopra:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU) and the Credit Union National Association (CUNA), we are writing in response to the Consumer Financial Protection Bureau's (CFPB or Bureau) Outline of Proposals and Alternatives Under Consideration for the Small Business Advisory Review Panel for Consumer Reporting Rulemaking ("the Outline"). NAFCU and CUNA advocate for America's not-for-profit credit unions that, in turn, serve 138 million consumers with personal and small business financial services products. We appreciate the opportunity for our member credit unions to participate on the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 Panel as Small Entity Representatives (SERs) and for the opportunity to comment on the proposals during the SBREFA process. This Outline describes proposals that have the potential to dramatically increase the scope of the Fair Credit Reporting Act (FCRA) to establish new responsibilities for credit unions that do not align with Congress's intent in passing the FCRA and would create massive litigation risk, operational burdens, and other challenges.

The CFPB has skirted its statutory obligations by initiating this rulemaking with an inappropriately limited timeline that does not permit the SERs and other interested stakeholders an adequate opportunity to review the Outline and offer meaningful feedback regarding the potential impact on small entities. The Bureau's Outline also lacks the necessary details for SERs to fully comment on the implications and costs of these proposals. Accordingly, the Bureau should consider convening another SBREFA Panel only after releasing a new Outline containing more data and concrete proposals.

General Comments

Congress enacted the FCRA in 1970 as one of the nation's first data privacy laws. Consumer reporting agencies (CRAs) had evolved from a desire for "sound information about the credit

worthiness of consumers.”¹ As a result, Congress raised concerns over the sheer amount of highly personal data that was collected and distributed by these unregulated entities. The bill’s primary sponsor, Senator Proxmire, provided ample description of the intent behind the legislation in the Congressional Record. He stated that the legislation was introduced to “protect consumers against arbitrary, erroneous, and malicious credit information,”² and he further outlined the types of inaccuracies the law was intended to eliminate. The law created requirements for accuracy, permitted consumers to view their own data, and the ability for consumers to dispute inaccurate or incomplete data. A more in-depth analysis of this legislative history is addressed below.

Originally passed to address the lack of regulation of CRAs, amendments to the law later imposed obligations on furnishers, which provide information to the CRAs, and users of consumer reports. If Congress intended to further expand the definition of data brokers and consumer reports, it would act legislatively to do so, as it did in 2003 with the Fair and Accurate Credit Transactions (FACT) Act.³ For example, in October 2023 a bicameral group of Senators and Representatives introduced legislation to amend FCRA Section 605(a) to remove certain medical debt information from consumer reports.⁴ Another example is the Restricting Credit Checks for Employment Decisions Act, introduced in the House in 2019 and 2021, which would remove employment decisions as a permissible purpose from the FCRA.⁵ Although neither of these bills ultimately advanced, this demonstrates that Congress views itself, and not the CFPB, as the appropriate body to be making the types of significant changes contained in this Outline. The Bureau’s efforts to expand the scope of the FCRA as described in this Outline are inappropriate and amount to executive branch legislating.

As a procedural matter, the Bureau is required, under the SBREFA⁶, to conduct a small business review panel before publishing a proposed rule with an Initial Regulatory Flexibility Analysis. The intent of the law is for small businesses to have a voice in the regulatory process and to have an opportunity to communicate the expected impact of an impending rule on these businesses. This is not a mere “check the box” exercise, but the rushed timeline and lack of specificity and detail in the Outline make it impossible for SERs to calculate complete cost estimates, or even reliable estimated ranges, and offer additional insights into the potential impacts of a rulemaking. NAFCU, CUNA, and other stakeholders representing many more small business entities across the country are likewise time-constrained in reviewing the proposals and gathering the necessary

¹ Fair Credit Reporting Bill, 115 Cong. Rec. S2410-11 (daily ed. Jan 31, 1969), as quoted in CFPB Small Business Advisory Review Panel for Consumer Reporting Rulemaking: Outline of Proposals and Alternatives Under Consideration, p. 2.

² 115 Cong. Rec. 2410 (1969) (statement of Senator Proxmire).

³ Pub. L. No. 108–159, 117 Stat. 1952.

⁴ Medical Debt Relief Act of 2023, S.3103, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/senate-bill/3103/text>; Medical Debt Relief Act of 2023, H.R. 6003, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/house-bill/6003/text>.

⁵ H.R.3614, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/house-bill/3614/text>.

⁶ 5 U.S.C. 601, et al.

feedback for the Bureau to conduct a true analysis of the impacts on small entities as required under the SBREFA.

What is clear is that the broad proposals under consideration are certain to create a significant cost and time burden, and in some instances, will require hiring and training additional staff. The panels held by the Bureau asked the SERs to speculate without guidelines and encouraged them to make up their own guidelines and limitations. The SERs were encouraged to develop estimates based on assumptions, to be stated in conjunction with the estimates, or to develop ranges of estimates. Additional speculation and work by the panelists would require significantly additional time and does not excuse the lack of clarity provided by the Bureau. This is unfair and a sweeping misinterpretation of the intent of the law.⁷ NAFCU and CUNA encourage the Bureau to hold a new SBREFA Panel when there are more specific proposals available and the SERs can better estimate the impact and costs on their operations.

Timeline Considerations

The Bureau has set an inordinately short timeline for this SBREFA process that fails to provide the SERs sufficient time or information to properly evaluate what one SER described as “a sea change” to the affected small business entities. The Outline was distributed to the SERs on Friday, September 15, 2023, and was not available for review on the Bureau website until September 21, 2023. The first Pre-Panel Meeting was scheduled only two weeks later, on Monday, October 2, 2023. While the expected government shutdown and participant pushback necessitated a delay to the following week, the notice arrived at 5:30 PM Eastern on Friday, September 29, 2023. Any SER or guest with the foresight to review the information prior to that weekend had already rushed through the material.

Further, subsequent to the Pre-Panel and Panel events, SERs have been given less than three weeks to articulate any written comments they wish to make. Guests have been encouraged to submit comments by October 30, only eleven days after the final Panel meeting closed on October 19, 2023. Moreover, the Bureau requested SERs provide cost estimates as to the impact of the proposed changes. However, cost estimates require more detail than is currently provided in the Outline and time to gather information from internal business units, and the Bureau provided neither in sufficient measure.

The SBREFA requires the CFPB to convene a review panel and report on the comments of the SERs and its findings within 60 days. The CFPB interprets “convene” to mean the initial establishment of the panel instead of the date of the first formal meeting of the panel members.⁸

⁷ See 5 U.S.C. § 607 (“In complying with the provisions of sections 603 and 604 of this title, an agency may provide *either a quantifiable or numerical description* of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.”) (emphasis added).

⁸ U.S. Government Accountability Office Report, CFPB Observations from Small Business Review Panels (Aug. 2016) at 9, <https://www.gao.gov/assets/gao-16-647.pdf>.

On the other hand, the Environmental Protection Agency “convenes” its panels, and starts the 60-day clock only with the first formal meeting of the panel members.⁹ The CFPB’s interpretation of “convene” unnecessarily truncates the timeline for SER participants to actively review the proposals under consideration and offer meaningful feedback. The CFPB should reevaluate the structure of its timeline for SBREFA Panels to conduct a more fair and reasonable process that affords SERs and other stakeholders adequate time to review materials, participate in the process, and provide written comments.

The FCRA Only Requires Factual Issues to be Resolved in Disputes

Legal Disputes

The FCRA requires furnishers and CRAs to investigate the completeness or accuracy of information contained in a credit file when there is a dispute.¹⁰ A consumer may file an FCRA claim against a furnisher for failing to conduct a reasonable investigation if they can prove that the result would have been different, meaning the furnisher would have discovered that the information it reported was inaccurate or incomplete.¹¹ Some courts have previously held that that the plaintiff’s burden is to show a factual inaccuracy rather than a disputed legal question to bring suit against a furnisher under the FCRA.¹² And “[o]nly a court can fully and finally resolve the legal question of a loan’s validity.”¹³ NAFCU, CUNA, and other trade associations have weighed in on the cases cited in this Outline¹⁴ to explain that legal disputes are issues to be resolved by the courts, not the CFPB.

The plain meaning of the text of the FCRA confirms this interpretation. Although the CFPB argues that the FCRA does not distinguish between legal and factual disputes, and therefore furnishers and CRAs must reasonably investigate both, in passing the FCRA Congress intended to protect consumers from bad data that appeared on their credit reports. Fundamentally, the plain meaning of words such as “accuracy,” “information,” “investigate,” and “verify” as used in the FCRA to describe the duties of furnishers in reviewing a consumer’s credit file to determine creditworthiness apply to matters of fact more than to matters of law.

⁹ *Id.*

¹⁰ 15 U.S.C. §§ 1681i(a)(1)(A), 1681s-2(b)(1).

¹¹ See *Felts v. Wells Fargo Bank, N.A.*, 893 F.3d 1305,1313 (11th Cir. 2018).

¹² See *Hunt v. JPMorgan Chase Bank, N.A.*, 770 Fed. Appx. 452, 458 (11th Cir. 2019).

¹³ See *Denan v. Trans Union LLC*, 959 F.3d 290, 295 (7th Cir. 2020).

¹⁴ Br. Amici Curiae of NAFCU, et al., *Holden v. Holiday Inn Club Vacations Inc and Mayer v. Holiday Inn*, Case No. 22-11734 (11th Cir. February 15, 2023),

<https://www.nafcu.org/sites/default/files/Holiday%20Inn%20Amicus%20Brief%2021523.pdf>; Br. Amici Curiae of NAFCU, et al., *Milgram v. JP Morgan Chase*, Case No. 22-10250 (11th Cir. Aug. 9, 2022),

<https://www.nafcu.org/sites/default/files/AS%20FILED%20Amicus%20Brief.pdf>; Br. Amici Curiae of NAFCU, et al., *Sessa v. Trans Union LLC*, Case No. 22-87 (2nd Cir. Aug. 4, 2022), <https://www.nafcu.org/sites/default/files/22-87%20Chamber%20Amicus%20Brief%20AS%20FILED.pdf>.

Additionally, the Congressional Record reflects that the intent of the FCRA was to "protect consumers against arbitrary, erroneous, and malicious credit information."¹⁵ In this Outline, the CFPB cherry-picks quotes from Senatore Proxmire's introduction of the FCRA, ignoring the three primary issues the Senator sought to alleviate through the FCRA:

The main problems can be classified under three main headings: First, the problem of inaccurate or misleading information; second, the problem of irrelevant information; and third, the problem of confidentiality.¹⁶

Senator Proxmire went on to outline the five types of inaccuracies the bill was designed to target: (1) confusion over individuals with similar names; (2) biased information; (3) malicious gossip; (4) computer errors; and (5) incomplete information.¹⁷ All five of these types of inaccuracies are errors of fact; errors that can be proven true or false. In describing the importance of a consumer's right to dispute and correct their credit information, Senator Proxmire says "[w]e certainly would not tolerate a Government agency depriving a citizen of his livelihood or freedom on the basis of unsubstantiated gossip without an opportunity to present his case."¹⁸ That is precisely what the FCRA provides – an opportunity for consumers to challenge the accuracy of facts displayed in their credit reports.

When it comes to legal issues, courts are the best arbiters of those challenges. The CFPB's argument that it would be a burden for courts to distinguish between questions of facts and law is not persuasive, as the courts are most familiar with this exercise and are, in fact, the best body to do so. The Dodd-Frank Wall Street Reform and Consumer Protection (Dodd-Frank) Act also does not grant the CFPB any power to prospectively limit the subject matter jurisdiction of any court to hear a particular type of case or resolve a particular type of question.

Requiring furnishers like credit unions, especially smaller credit unions, to resolve legal disputes would impose an immense burden on those institutions. Credit unions would have to ensure that an attorney is consulted on virtually every dispute to confirm that questions of law are resolved fairly and appropriately. These determinations must also be made quickly – within the 30-day period required under the FCRA and confirmed in Regulation V¹⁹ – which would impose another resource burden, particularly on the smaller institutions participating in this SBREFA process. Although some institutions already routinely consult their in-house attorneys on certain credit disputes, requiring that all legal and factual issues be resolved by furnishers in every instance, instead of relying on the courts, is inappropriate and runs counter to both a plain reading of the FCRA and Congressional intent in passing the FCRA.

¹⁵ 115 Cong. Rec. S1168, S2411 (daily ed. Jan. 31, 1969), <https://www.govinfo.gov/content/pkg/GPO-CRECB-1969-pt2/pdf/GPO-CRECB-1969-pt2-8.pdf>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at S2412.

¹⁹ 15 U.S.C. § 1681i(a)(1); 12 CFR § 1022.43(e)(3).

It is important to highlight that many smaller credit unions do not have an attorney on staff and would consequently have to pay outside counsel to review legal issues in credit report disputes. This would come at a significant cost that is difficult to quantify at this time without further information about the scope of legal issues that might fall within the Bureau's proposal. If the CFPB expects all legal issues to be addressed by furnishers handling direct disputes, then this not only would create an exorbitant expense for smaller credit unions, but also inappropriately abdicate courts' opportunity and duty to consider important legal questions. Additionally, making a determination in this way inhibits advocating for changes to case law or differentiation between fact patterns that may or may not be warranted over time.

Even for those credit unions that do have attorneys on staff, this could lead to confusion as two different in-house attorneys could both reach reasonable, yet conflicting, determinations on an issue. Ultimately, this internal legal review process would lead to several questions that could cause further frustration and confusion, including: (1) What would be necessary to complete an investigation of a legal dispute (e.g., contacting third parties to obtain relevant information)? (2) Should the furnisher only rely on the consumer's description of an issue as controlling? Further complicating this potential investigation process, credit unions do not have subpoena powers or the ability to adequately address any remedies that may be appropriate in a given situation. It is also imperative to recognize that a credit union's conclusion regarding a legal question might give consumers the false impression that the creditor's response is authoritative when, in fact, a credit union's in-house attorney cannot provide valid legal advice to a member of the credit union and the consumer's best course of action might be to retain their own counsel.

Credit unions would be exposed to dramatically increased litigation risk, liability, and potential expenses as plaintiffs' attorneys would find a new, lucrative opportunity to target furnishers' alleged insufficient evaluation of legal issues in credit disputes. This proposal would transform the FCRA's credit reporting structure into a debt-adjudication system where consumers can launch impermissible challenges to the legal validity of their debts disguised as legitimate FCRA claims.²⁰ The Bureau cannot expand the scope of the FCRA in such a manner; instead, Congress must act to make this fundamental change in the types of FCRA claims that can be raised and must be investigated by furnishers.

The CFPB has also not demonstrated through its circulars or other reports that the complaints it is receiving from consumers about credit disputes are specifically related to legal issues that furnishers refuse to resolve. Instead, the most recent report merely explains that the top two most frequently identified issues in complaints were "incorrect information on your report" and

²⁰ See Br. Amici Curiae of NAFCU, et al., *Milgram v. JP Morgan Chase*, Case No. 22-10250, at 12 (11th Cir. Aug. 9, 2022), <https://www.nafcuc.org/sites/default/files/AS%20FILED%20Amicus%20Brief.pdf>.

“problem with a credit reporting company’s investigation into an existing problem”²¹ – neither of which indicate that the disputes at issue involve any legal matters that furnishers are refusing to investigate. Responsible furnishers like credit unions do not avoid their obligations to conduct reasonable investigations of disputes and they rely on consistent policies and procedures for evaluating whether a dispute is frivolous or irrelevant. Should the Bureau decide to pursue such a proposal, it must provide data, analysis, and adequate justification for the need to make this regulatory change to subject furnishers to expanded investigation requirements.

Systemic Issues

Nothing in the FCRA requires furnishers to publicly disclose whether there are systemic issues that are identified as part of an investigation of a credit dispute. The CFPB is therefore not authorized to expand the scope of the FCRA to mandate that furnishers provide notice to consumers that have been impacted by such systemic issues. The CFPB does have and has utilized its enforcement authority in instances where furnishers are not swiftly correcting errors caused by systemic issues. The CFPB should continue to rely on this enforcement authority to monitor for violations and repeat offenders as the Bureau has cited no evidence that this is a widespread issue that must be addressed only through a significant expansion of the intent and scope of the FCRA’s requirements.

Even if the FCRA does provide the CFPB with sufficient flexibility to interpret a requirement for furnishers to inform consumers about systemic issues and an opportunity for consumers to submit credit disputes related to systemic issues, the benefit to consumers does not outweigh the burden this would place on furnishers, particularly smaller financial institutions covered by this SBREFA process. The Outline does not provide basic details about the definition of a systemic issue, the number of occurrences necessary for an issue to be considered a systemic issue, or whether the same definition would apply for CRAs, furnishers, and consumers. The entire process appears unworkable, not merely due to the lack of sufficient detail regarding this and other proposals in the Outline, but also because it is unclear (1) what metrics consumers would use to judge that a dispute is part of a larger systemic issue, (2) how furnishers would then be required to review and confirm that a consumer’s stated dispute is part of a systemic issue, (3) how furnishers would be required to review its disputes and determine that a systemic issue exists, and (4) how to determine who is in the best position to resolve a systemic issue if it results from the use of a shared vendor (e.g., for employment history, several companies may be involved in reporting such information and one company aggregates those reports).

Smaller credit unions would certainly incur increased costs associated with a required investigation and review of whether all disputes are systemic issues as well as potential litigation costs. Responsible furnishers are already reviewing their disputes to evaluate whether a reported

²¹ CFPB, Circular 2022-07, Reasonable investigation of consumer reporting disputes, at 3 (Nov. 2022), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_reasonable-investigation-of-consumer-reporting-disputes_circular-2022-07.pdf.

issue clearly affects multiple individuals. Credit union furnishers work to immediately investigate, address, and correct those issues to fulfill their obligations to provide accurate information under the existing FCRA framework. The potential benefits to consumers of sharing information regarding systemic issues are unclear and likely do not outweigh the burdens this would impose on smaller financial institutions.

The Definition of Data Broker Should be Narrow and Recognize Credit Unions' Existing Regulatory Obligations

The Bureau's Outline defines a "data broker" as any firm that collects, aggregates, sells, resells, licenses, or otherwise shares personal information about consumers with other parties (including both first-party data brokers that interact with consumers directly and third-party data brokers with whom the consumer does not have a direct relationship). This sweeping definition has the potential to limit the use of alternative data to assist more consumers in obtaining credit and expose credit unions to unnecessary and duplicative requirements. The CFPB should narrowly define "data broker" to exclude depository institutions like credit unions that are already subject to FCRA requirements as well as comprehensive federal and state data protection regulations.

Data brokers provide vital information to credit unions and other end users of consumer reports. NAFCU and CUNA have previously outlined the value of this information.²² One of the proposals under consideration by the Bureau is that any data broker that sells certain types of consumer data would be defined as a CRA. Credit unions receive a significant amount of information from data brokers that is not currently classified as consumer reports. This includes sharing information with data brokers regarding consumer addresses within a credit union's field of membership when using software to conduct identity verification and detect fraudulent transactions, or in order to deliver targeted web advertisements.

The CFPB's efforts to subject data brokers to additional regulatory requirements should not impair credit unions' ability to obtain valuable information like credit header data to, for example, verify a consumer's identity. The Federal Trade Commission noted in a statement pre-dating the creation of the CFPB that data brokers are subject to the FCRA only to the extent they are providing consumer reports.²³ Under the FCRA, providers of consumer reports should only be evaluated on their intent to provide information to be used for eligibility, not simply the nature

²² NAFCU Letter to CFPB, Request for Information Regarding Data Brokers and Other Business Practices Involving the Collection and Sale of Consumer Information (Docket No. CFPB-2023-0020) (July 14, 2023), <https://www.nafcu.org/system/files/files/7.14.2023%20Letter%20to%20CFPB%20re%20Data%20Broker%20RFI.pdf>; CUNA Letter to CFPB, Request for Information Regarding Data Brokers and Other Business Practices Involving the Collection and Sale of Consumer Information (Docket No. CFPB-2023-0020) (July 14, 2023), https://news.cuna.org/ext/resources/CUNA%20News/Daily/2023/07-2023/071423_Data-Brokers-RFI-Response.pdf.

²³ "Prepared Statement of the Federal Trade Commission" (May 15, 2005), https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-subcommittee-financial-institutions-and-consumer-credit/050518databrokertestimonyarnes.pdf.

of the data.²⁴ Otherwise, a third party could make the credit union a CRA by violating their contract and passing along the information. The CFPB may not via rulemaking ignore that “intent” element as established by Congress in the FCRA to expand the scope of the law to data brokers.

It is important to note that credit unions’ use and disclosure of identifying information is already comprehensively regulated under the Gramm-Leach-Bliley Act (GLBA) and Regulation P. Under the GLBA, credit unions are only permitted to share a member’s nonpublic personally identifiable information (PII) with third parties under certain exceptions. Various state privacy laws also regulate the use and disclosure of certain PII. Credit unions are committed to member privacy and safeguarding consumers’ financial information.

Credit Headers Should Not be Classified as Consumer Reports

Credit headers provide important information such as names, addresses, birthdates, and Social Security Numbers that is necessary to verify a specific consumer. Credit unions use this information in lawful, responsible ways, including for the prevention of fraud and crime. For example, the FCRA requires that financial institutions verify the identity and addresses of their customers. Under Section 605A(h), verification must be made before extending credit, increasing a credit limit, or adding a card to an account. Therefore, it becomes more time-consuming and cumbersome for furnishers to comply with the requirements of the FCRA without using credit header information to verify a consumer’s identity and other relevant PII. From a security standpoint, it is best practice to minimize the number of times an institution asks a consumer for sensitive information. The more such requests become routine for consumers to receive (e.g., requests to verify their recent addresses, confirm employment history, etc.), the more it normalizes distributing that information, which can easily be abused by bad actors.

In addition, this type of information is required to comply with federal customer identification procedures and customer due diligence rules under the Bank Secrecy Act (BSA). Our members play critical roles in providing the financial services that allow consumers to obtain and manage financial services and improve their financial lives.²⁵ As part of that role, financial institutions seek to prevent fraud, including identity theft that harms consumers and disrupts their lives. Financial institutions also play an important part in preventing money laundering and the financing of terrorism, and crime. Being able to confirm identities is critical – and required by law – to those responsibilities. If this type of information is subjected to the FCRA restrictions, financial institutions such as credit unions will require additional time and cost to verify a person’s identity. In some cases, it may be found that they lack a permissible purpose to obtain that report, and when the access is permissible, they would be subject to burdensome compliance requirements and an increase in compliance, litigation, and financial risks.

²⁴ See 15 U.S.C. §§ 1681a(f), 1681b.

²⁵ Joint Trade Associations Letter to CFPB on Credit Header, (May 2, 2023.) <https://www.aba.com/advocacy/policy-analysis/letter-to-cfpb-on-credit-header>

Harmonization with the Requirements of Section 1033

The CFPB should also take care not to create conflicting or unintended obligations under its Section 1033 rulemaking that then would categorize credit unions as data brokers or data furnishers for sharing consumer information with third parties. Providing certain financial information under Section 1033 should not subject credit unions to the proposals for data brokers, including under the provision that consumer information shared with a user who uses it for a permissible purpose is a “consumer report” as defined under the FCRA. Credit unions that comply with Section 1033 requests to provide information, at a consumer’s request, to a third party, would not be furnishing such information and would not have knowledge of how the data will be used.

Credit unions are already subject to the FCRA’s requirements regarding data accuracy and disputes and the Section 1033 rule should not further increase a credit union’s requirements to address inaccuracies or disputes. Namely, third parties should not be permitted to redirect disputes regarding data accuracy to a data provider instead of performing their own reasonable investigation of an alleged error. Our associations will provide more detailed feedback on the proposed Section 1033 rule in a future comment letter, but we are wary of any conflicts with the requirements of the FCRA and Regulation V as well as other onerous obligations that could subject credit unions to additional regulatory burden and increase legal and compliance risks.

Despite concerns about the potentially broad definition of “data broker,” the Bureau should ensure that entities that fit the “data broker” definition and are not already subject to data security and data privacy requirements are held to similarly stringent requirements. It is important that credit unions and entities handling sensitive consumer financial information operate on a level playing field in terms of data protection.

Creditors Should be Permitted to Continue Using Medical Debt Information as Appropriate

The CFPB should not adjust the exemption adopted by the federal banking agencies, including the National Credit Union Administration (NCUA), to allow creditors to consider medical debt information in credit decisions. Congress intentionally created this exception for the federal banking agencies to determine, based on the oversight of their respective regulated entities, how creditors should responsibly use medical debt information in a manner consistent with the use of any other debt information in determining creditworthiness. The use of medical debt information should be based on a financial institution’s general policies and specific underwriting criteria based on its individual risk appetite. The regulation provides several examples of uses of medical information that are consistent with and inconsistent with the exemption to illustrate how creditors should evaluate medical information in their credit decisions.

Section 411 of the FACT Act amended the FCRA to assist consumers in combatting identity theft, increase the accuracy of consumer reports, and allow consumers greater control regarding the

type and amount of marketing solicitations they receive.²⁶ Following these amendments, section 604(g)(5)(A) of the FCRA requires the Federal Financial Institutions Examination Council agencies to “prescribe regulations that permit transactions that are determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (including administrative verification purposes), consistent with Congressional intent to restrict the use of medical information for inappropriate purposes.”²⁷

The agencies’ regulation (adopted without substantial change as Regulation V)²⁸ provides a comprehensive three-part test that ensures creditors: (1) only use the type of information that is routinely used in making credit eligibility information (e.g., debts, expenses, income, benefits, assets, collateral, or the purpose of the loan, including the use of proceeds); (2) do not use medical information in a manner and to an extent no less favorable than it would use comparable non-medical information; and (3) do not consider the consumer’s physical, mental, or behavioral health, condition or history, type of treatment, or prognosis into account in its credit determination. Accordingly, the Bureau has the authority to determine that a creditor violates the scope of this exemption should it weigh medical debt information more than it would any other comparable debt information in a credit transaction. This protection ensures that consumers’ credit information is reviewed fairly, and medical debt information does not substantially impair their ability to obtain credit. The CFPB should continue to rely on its supervision and enforcement authority to ensure compliance with the requirements of Regulation V.

The CFPB has not provided adequate evidence indicating that considering medical debt in a credit decision is inappropriate or has a disproportionately negative impact on consumers’ ability to obtain credit. It cites its own study, reports of CRAs’ decision to remove minor medical debts from consumer reports, and VantageScore’s decision to no longer include medical debt in the calculation of its credit scores as evidence, but fails to address, for example, the very real impact that medical debts can have on the capacity or ability to repay other debts. The Outline merely indicates that the Bureau is considering proposals to “modify” the regulatory exemption. Without additional detail, it is impossible at this time to provide perspective on the impact minor changes to this exemption would have on credit unions and the 138 million Americans they serve. However, it is clear that the exemption should not be eliminated. Credit unions and other creditors should be permitted to determine based on their internal policies, underwriting criteria, and risk appetite whether to evaluate medical debt in making credit decisions. Some credit unions consider a consumer’s medical debt information as one part of a holistic financial picture, while others do not.

Although there may be some questions regarding the predictive value of medical debt information, the use of medical debt financial information serves an important function for

²⁶ See Fair Credit Reporting Medical Information Regulations, 70 FR 33958 (Nov. 22, 2005).

²⁷ *Id.*

²⁸ 12 CFR 1022.

lenders. Credit unions and other lenders, particularly if they are relying on more manual underwriting processes, must evaluate, to the fullest extent possible, the outstanding monthly debt obligations of a borrower using all available data. The CFPB and banking regulators also continue to encourage lenders to evaluate alternative data (e.g., cash flow data) in making credit decisions.²⁹ The more available data, the easier it is for creditors to evaluate a consumer's ability to repay. For example, the Dodd-Frank Act requires a determination of a consumer's ability to repay a residential mortgage loan based on a consideration of the "consumer's credit history, current income, expected income the consumer is reasonably assured of receiving, current obligations, debt-to-income (DTI) ratio or the residual income the consumer will have after paying non-mortgage debt and mortgage-related obligations."³⁰

A lender cannot fully consider a consumer's current obligations, DTI ratio, or the residual income the consumer will have after paying non-mortgage debt without evaluating a consumer's outstanding medical debt obligations. Therefore, eliminating this exemption permitting creditors to use medical debt could make it more challenging to accurately determine a consumer's DTI ratio. Without an accurate understanding of DTI, consumers are likely to be more negatively impacted as they may be approved for credit that they cannot reasonably afford given their other outstanding debts. This could lead to a higher incidence of defaults across financial institutions – a consequence that would undoubtedly hurt consumers more than the anecdotal negative impacts cited in this Outline.

Restricting medical debt from inclusion in a consumer's history sets a dangerous precedent that the Bureau could, without the authority of Congress, continue to pick and choose which debts are acceptable for inclusion in an ability to repay calculation and which are not. Should student loan debt or eviction notices be the next targets of elimination, lenders will be unable to consider critical information that indicates ability to repay or creditworthiness.

The CFPB Should Provide Covered Data Providers with Ample Time to Implement a Future Proposal

At a minimum, data brokers, CRAs, and furnishers should be given no less than 24 months to implement any final rule. Depending on the contents of the proposed rule, which may expand the definitions of data brokers and consumer reports, and impose legal review requirements on dispute adjudicators, significantly more time may be needed. As outlined throughout this letter, the current specificity of the proposals is insufficient to calculate accurate estimates of cost and efforts required for compliance. Even if the Bureau convenes a second SBREFA Panel to review a more detailed outline of proposals, covered entities will need sufficient time to consult with their internal business units to fully understand the implications of the proposals and develop a

²⁹ See Federal Regulators Issue Joint Statement on the Use of Alternative Data in Credit Underwriting (Dec. 3, 2019), <https://www.consumerfinance.gov/about-us/newsroom/federal-regulators-issue-joint-statement-use-alternative-data-credit-underwriting/>.

³⁰ 15 U.S.C. 1639c(a)(3).

compliance strategy, including making the proper adjustments to their processes and procedures.

Conclusion

NAFCU and CUNA appreciate the opportunity to offer feedback on this Outline for the Bureau's revisions to Regulation V. Fair and accurate credit reporting and the protection of consumers' privacy rights is an important function of our financial system. However, the Bureau's proposals in this Outline represent an unwarranted and vast expansion of the intent and scope of the FCRA to impose additional requirements on credit unions, exposing these community-based, not-for-profit financial institutions to myriad legal and compliance risks, for supposed benefits to consumers that have yet to be quantified. The Outline lacks the detail and specificity necessary for SERs and other stakeholders to offer meaningful feedback at this time. Our associations respectfully request the CFPB issue a new outline and convene a second SBREFA Panel to afford participants the data and information necessary to contemplate the impacts these proposals may have on their institutions. If you have any questions, please do not hesitate to contact us at apetros@nafcu.org and amonterrubio@cuna.coop.

Sincerely,



Ann C. Petros
Vice President of Regulatory Affairs



Alexander Monterrubio
Deputy Chief Advocacy Officer & Managing
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