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# Medical Debt Regulation and Law: Effects on Consumers and Industry

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## I. INTRODUCTION

The United States of America leads the developed world in medical spending.[1] So it is no surprise to find that Americans struggle to keep up with medical debt. The Consumer Financial Protection Bureau ("CFPB" or "Bureau") has sought to understand how this trend has affected Americans' credit scores and ability to access credit.[2] Over the past decade, the CFPB produced a series of studies and reports that culminated in a finalized rule, published in January 2025.[3] The finalized rule accomplishes two victories for the Bureau. First, the rule eliminates an exception in the Fair Credit Reporting Act ("FCRA") that allows creditors to access consumers' medical financial information for credit eligibility determinations.[4] Second, the CFPB has created a definition for "medical debt information" to be implemented under Title 12, Chapter X of the Code of Federal Regulations.[5] The new term "medical debt information" is significant because it ensures that medical debt information includes debts held by third parties and agents of health care providers.[6]

Leading up to the finalization of the rule, the credit industry paid attention to the writing on the wall. By April 2023, TransUnion, Equifax,

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1. *See* Emma Wager et al., *How does health spending in the U.S. compare to other countries?*, PETERSON-KFF (Jan. 23, 2024), https://www.healthsystemtracker.org/chart-collection/health-spending-u-s-compare-countries/ [https://perma.cc/5A7X-3TSR] (showing that while health care costs are growing amongst peer nations, the rate of growth as % of Gross Domestic Product ("GDP") for U.S. medical spending is far outpacing its peers).

2. *See Medical Debt*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/rules-policy/medical-debt/ [https://perma.cc/B7ES-S3MT] (last visited Oct. 30, 2024) (displaying the CFPB's goal to stop unfair medical debt collection and the Bureau's ongoing efforts to accomplish this goal).

3. Prohibition on Creditors and Consumer Reporting Agencies Concerning Medical Information (Regulation V), 90 Fed. Reg. 3276, 3276 (Jan. 14, 2025) (to be codified at 12 C.F.R. pt. 1022) [hereinafter Prohibition Concerning Medical Information] (eliminating an exception that has allowed creditors to conditionally use medical information).

4. *See id.* at 3277 (summarizing the finalized rule's significant effects).

5. *See id.* (dictating where the rule is to be added under 12 C.F.R. § 1022.3(j)).

6. *See id.* at 3292 ("The CFPB explained that it intended, by including agents and assignees in the medical debt information definition, to include medical debt that has been purchased by a debt buyer or that is being collected by a third-party debt collector.").

and Experian—the three major Consumer Reporting Agencies ("CRAs") in America—had eliminated qualified medical debt from consumer reports.[7] The decision to eliminate this type of debt from consumer reports is significant, given that medical debt makes up 58% of all debts that third parties report in collections.[8] In turn, credit score companies[9] adopted new methods for calculating scores for consumers that exclude medical debt that is in collections.[10] Because of this, the voluntary industry changes have already reached many of the consumers affected by medical debt. Now, with a final rule on the matter, the CFPB has codified and broadened the protections offered by the industry via regulation.

The CFPB's rule raises important questions about how its regulatory authority is used and how the CFPB can help consumers with medical debt. To address these questions, it is necessary to understand the scope of the CFPB's authority. The CFPB's rule contemplates the

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7. *See Can Medical Collection Debt Impact Credit Scores?*, EQUIFAX, https://www.equifax.com/personal/education/credit/score/articles/-/learn/can-medical-debt-impact-credit-scores/ [https://perma.cc/3DQW-PWRD] (last visited Aug. 23, 2024) (summarizing that the CRAs have eliminated medical debt from consumer reports that are (1) in collections but below 500 dollars, (2) in collections for less than a year, and (3) any paid in full debts no matter the amount).

8. *See* CONSUMER FIN. PROT. BUREAU, MEDICAL DEBT BURDEN IN THE UNITED STATES 2 (2022) [hereinafter MEDICAL DEBT BURDEN], https://files.consumerfinance.gov/f/documents/cfpb_medical-debt-burden-in-the-united-states_report_2022-03.pdf [https://perma.cc/3JTX-UPT7] (listing the key findings of the report in the report's executive summary).

9. *See generally* Melinda Opperman, *Comparing Credit Scores: FICO Score and Vantage Score*, CREDIT.ORG (Mar. 2024), https://credit.org/blogs/blog-posts/comparing-credit-scores-fico-score-and-vantage-score/ [https://perma.cc/3G2D-N653] (providing an explanation and comparison for the two major credit scores offered to consumers and creditors). Credit score companies are independent entities within the credit industry. *Id*. The two leading credit score companies, FICO and VantageScore, rely on the reports issued by CRAs to offer their score of a consumer's credit worthiness. *Id*. These credit score companies then sell their own findings to creditors to help creditors determine whether to loan to consumers. *Id*.

10. *See Medical Debt and the Changes to VantageScore*, VANTAGESCORE (Aug. 10, 2022), https://www.vantagescore.com/medical-debt-and-the-changes-to-vantagescore/?#gf_10 [https://perma.cc/LW3X-D2VP] (announcing that VantageScore 3.0 and 4.0 will discontinue the use of medical debt in collections within their scoring models); *see also* Tommy Lee, *Medical Collection Removals Have Little Impact on FICO Scores*, FICO BLOG (June 30, 2022), https://www.fico.com/blogs/medical-collection-removals-have-little-impact-fico-scores [https://perma.cc/3G6W-HVDX] (suggesting that the elimination of this data will have an effect on as few as 5 million consumer credit scores, with no change at all for the median credit score when using the FICO® Score 8 from pre-medical collection inclusion to post-medical collection removal).

limits of the effect of its rule change.[11] As this Note will argue, the limits on the effect the CFPB can have on medical debt issues can be traced back to the statutory language that granted the CFPB its regulatory power over CRAs.[12] This Note argues that complementary legislative action—while acknowledged, but not fully explored in the rule[13]—should more thoroughly examine how existing state laws can help bridge the gap in the Bureau's efforts to address medical debt and the burden that such debt has on consumers.

This Note proceeds in four parts. Part II discusses the current medical debt landscape as it affects creditors and consumers.[14] Part III summarizes the relevant legal history of consumer financial regulation and the creation of the CFPB.[15] Part IV analyzes how the limitations of the CFPB's authority are reflected within its rule and what scrutiny the rule will be subject to.[16] Finally, Part V offers an illustration of how existing state laws can intersect with the CFPB's rule to reduce the gap left by the CFPB due to their limitations of authority.[17]

11. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3319 ("[T]he only medical collections that the NCRAs currently include in their consumer reports are those that: (1) are more than one year past due, (2) are for collection amounts greater than $500, and (3) are unpaid, in addition to those that (4) would not violate State laws that restrict or prohibit consumer reporting of medical collections. By August 2023, after the voluntary NCRA changes were fully implemented but before most of the State-level changes took effect, an estimated 5 percent of consumers had medical collections on their consumer reports. The rule removes these remaining medical collections from, and generally prohibits future medical collections from being included in, consumer reports provided to creditors." (footnote omitted)).

12. *See* 12 U.S.C. § 5512(b)(4)(A) (granting the CFPB rulemaking authority over consumer financial law).

13. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3318 ("The impact analysis compares the rule's potential benefits and costs against a baseline in which the CFPB takes no regulatory action. This baseline includes existing Federal and State law and current furnishing practices.").

14. *See infra* Part II.

15. *See infra* Part III.

16. *See infra* Part IV.

17. *See infra* Part V.

## II. MEDICAL DEBT IN AMERICA

Medical debt currently affects 15 million Americans' consumer reports.[18] Over 50% of third-party tradelines[19] that are reported as in collections are classified as medical debt.[20] For comparison, the next closest category of debts owed are the cumulative debts for phone, internet, and TV services, at 15%.[21] This outsized burden of medical debt on consumers amounts to an estimated $49 billion in debt.[22] Though large, this number likely does not represent the full scale of medical debt in America because not all debts are reported to CRAs.[23] Similarly, the CFPB's initial study to determine the scale of the medical debt burden did not capture debts that consumers have transferred to credit cards that prevented debts from being categorized by CRAs properly.[24] Because of the vast scale of medical debt, any issues arising from them have the potential to be significant for consumers.

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18. RYAN SANDLER & ZACHARY BLIZARD, RECENT CHANGES IN MEDICAL COLLECTIONS ON CONSUMER CREDIT RECORDS, CONSUMER FIN. PROT. BUREAU 3–4 (2024), https://files.consumerfinance.gov/f/documents/cfpb_recent-changes-medical-collections-on-consumer-credit-reports_2024-03.pdf [https://perma.cc/UCT7-E247].

19. *See* Ben Luthi, *What Are Tradelines and How Do They Affect You?*, EXPERIAN: REP. ADVICE (May 13, 2024), https://www.experian.com/blogs/ask-experian/what-are-tradelines/ [https://perma.cc/PVY2-HWWZ] ("A tradeline is a term used by credit reporting agencies to describe credit accounts listed on your credit reports. For each credit card, loan and other type of credit account you have, you'll have a separate tradeline that includes key information about the creditor and the debt.").

20. *See* MEDICAL DEBT BURDEN, *supra* note 8, at 2 (explaining how third-party tradelines are unlike other tradelines). Typically, the original issuer of credit will then report this account to the CRAs. *Id.* at 12. The CRAs will then make a corresponding tradeline for this account. *Id.*

21. *Id.* at 2.

22. SANDLER & BLIZARD, *supra* note 18, at 4 n.8.

23. *See* MEDICAL DEBT BURDEN, *supra* note 8, at 6 n.10 ("[T]he estimates may understate the total amount of outstanding medical debt in collections, since not all medical debts are reported to all three national consumer reporting companies.").

24. *See* Michael Karpman et al., *How Many Adults Have Past-Due Medical Bills on Credit Cards?*, URB. INST. 2 (Sept. 2023), https://www.urban.org/research/publication/how-many-adults-have-past-due-medical-bills-credit-cards [https://perma.cc/QET5-8NZ4] (finding that 24% of Americans reported paying some or all of their past due medical debt with a credit card). Comparatively, the study used to support the CFPB's rule proposal is a longitudinal study of de-identified data from a sample of consumer reports provided by one CRA. *See* MEDICAL DEBT BURDEN, *supra* note 8, at 5 n.8 (explaining the source for data used in a CFPB study on medical debt). The data allowed the CFPB to see who reported a tradeline and if the tradeline was from a medical bill. *Id.* at 26. This Note makes the presumption that the study used by the CFPB would not be able to discern if a tradeline, reported by a credit card company as opposed to a medical debt collector, would include debt carried "in hiding" on a credit card account. *Id.*

### *A. Medical Debt Arises Unlike Other Forms of Debt*

Medical debt possesses unique characteristics that set it apart from other forms of consumer debt, leading to a different ethical perspective from regulators like the CFPB.[25] Unlike typical consumer debts, which often stem from discretionary spending, medical debt can arise unexpectedly, particularly in emergencies that are not discretionary.[26] Scholars also point out that access to medical care may be related to one's access to wealth.[27] Still, 15 million Americans incur debt that amounts to $49 billion.[28] The current health care model for much of America boils down to being billed, even if you cannot afford it, or risk not seeking care at all.[29]

Medical debt is also different because patients often agree to financial liability before understanding the extent they may be charged.[30] Due to the relationship between health care providers and insurance providers, consumers may not know how much their care will cost.[31] Patients often allege in lawsuits against their service providers that they

25. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3278 (explaining that what distinguishes medical debt from other forms of debt is the involuntary nature of needing to incur debt only because of one's own unforeseen health circumstances).

26. *See id.* (suggesting that the ethical implications of incurring debt due to a medical emergency are viewed differently than those associated with purchasing consumable goods that individuals have the chance to shop around for but still cannot afford).

27. *See* DARCY MCMAUGHAN ET AL., SOCIOECONOMIC STATUS AND ACCESS TO HEALTHCARE: INTERRELATED DRIVERS FOR HEALTHY AGING, FRONTIERS IN PUB. HEALTH 2 (2020), https://pmc.ncbi.nlm.nih.gov/articles/PMC7314918/ [https://perma.cc/WH2F-NZX3] (showing that evidence indicates a relationship between socioeconomic status and access to health care).

28. *See* SANDLER & BLIZARD, *supra* note 18, at 3, 4 n.8 (providing key findings on a recent update regarding the medical debt landscape in America in June 2023).

29. *See* MEDICAL DEBT BURDEN, *supra* note 8, at 15, 32 (stating that debts affect low-income individuals at disproportionate rates while also finding that people are less likely to choose not to seek health care when they already have medical debt).

30. *See* Preethi Rao et al., *Barriers to Price and Quality Transparency in Health Care Markets*, PUBMED CENT.: NAT'L LIBR. OF MED. (June 30, 2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9242565/ [https://perma.cc/J49H-KBH6] (explaining that a fundamental difference between regular transactions for goods and services and transactions for goods and services provided while receiving health care is the lack of transparency about the bottom line cost for the transaction prior to receiving the good or service); *see also* 45 C.F.R. § 149.610 (2024) (the No Surprises Act which effectively reduces the practice of health care providers billing patients for unexpected out-of-network care).

31. *See generally* Requirements Related to Surprise Billing, 87 Fed. Reg. 52618 (Aug. 26, 2022) (demonstrating how the recent Act passed by Congress, labeled "The No Surprises Act," attempts to limit this issue by preventing health care providers from billing insured patients with services provided by out-of-network health care providers without expressly consenting to such care, for many circumstances).

did not consent to certain treatments or charges.[32] The courts' response to these lawsuits has varied. Chargemasters (a document found online that provides a comprehensive list of the prices for all billable services to a patient)[33] are often the documents relied on by health care providers to inform customers of possible costs associated with care.[34] Patients may contest that chargemasters do not provide sufficient information for consumers to consent to liability, but this argument is typically unsuccessful in court.[35]

These distinctions help to justify why the CFPB is willing to provide a tailored regulatory response for medical debt even though Americans also deal with other kinds of debt.[36]

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32. *See infra* note 35 for the precedential cases relied upon on appeal in North Carolina and the recurrence of similar cases, even twenty years later. *See also CFPB Takes Aim at Double Billing and Inflated Charges in Medical Debt Collection*, CONSUMER FIN. PROT. BUREAU (Oct. 1, 2024), https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-aim-at-double-billing-and-inflated-charges-in-medical-debt-collection/ [https://perma.cc/G4JH-RWQU] (claiming that hospitals have been found engaged in the practice of upcoding patients for costs associated hospital visits).

33. *See* Deb Fournier et al., *Can We Please Stop Fixating on Hospital Chargemasters?*, NAT'L ACAD. FOR STATE HEALTH POL'Y (Jan. 17, 2020), https://nashp.org/can-we-please-stop-fixating-on-hospital-chargemasters/ [https://perma.cc/B8LJ-C4P4] (defining a chargemaster as a summary of all charges a hospital may issue to a patient during a visit for care).

34. *See Price Transparency*, NOVANT HEALTH (July 1, 2024), https://www.novanthealth.org/for-patients/billing--insurance/price-transparency/ [https://perma.cc/AXK4-HQK5] (exemplifying a chargemaster—if one scrolls to the bottom of the page and downloads the csv. file—used to track the cost of medical services depending on a patient's insurer); SIMONE ARVISAIS-ANHALT ET AL., SURVEY OF HOSPITAL CHARGEMASTER TRANSPARENCY 397 (2021), https://pmc.ncbi.nlm.nih.gov/articles/PMC8099486/ [https://perma.cc/4326-YK3M] (concluding that chargemasters are difficult to use to determine the cost of health care bill often not describe how similar charges differ from each other).

35. *See, e.g.*, Shelton v. Duke Univ. Health Sys., Inc., 633 S.E.2d 113, 115–16 (N.C. Ct. App. 2006) (holding that the rates contained in the chargemaster that could have been made available to the patient were necessarily implied by the contract that the plaintiff signed before receiving medical care); Gleason v. Charlotte-Mecklenburg Hosp. Auth., 873 S.E.2d 70 (N.C. Ct. App. 2022) (holding that because the plaintiff had access to the chargemaster document and signed the Consent Form they were obligated to pay their medical bill); Darroux v. Novant Health, Inc., 902 S.E.2d 747 (N.C. Ct. App. 2024) (finding the original plaintiff to have had access to the chargemaster and therefore able to consent to a contract to be liable for all medical charges relating to the care provided).

36. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3278 ("Consumers are rarely informed of the costs of medical treatment in advance, and because of price opacity and an often immediate need for medical care, consumers have little or no ability to 'shop around.' Americans that live in rural communities may also experience limited choices when trying to access health care, which may impact the amount of their medical debt in ways that are not reflective of their other debts." (footnote omitted)).

### *B. Medical Debt is Billed and Processed Unlike Other Debt*

Medical debt follows different past-due reporting processes from those that apply to other consumer debts. Typically, the party that originally furnished credit to a consumer will be the party that reports past due bills to CRAs when they are in collections.[37] But, health care providers often do not furnish medical debt in collections to CRAs.[38] Often, health care providers sell the debt to debt collectors.[39] These debt collectors then furnish the consumer's account to CRAs.[40] One possible reason health care providers may make this decision is to preserve their public image.[41] Health care providers can shield their public image, as well as save the costs and time associated with collections, by engaging third parties to do so.[42]

Once debt reaches this point in their processing, debt collectors have only a handful of mechanisms to enforce payments on the outstanding debts they own. Primarily, debt collectors rely on the threat to a consumer's credit once a debt is reported to CRAs.[43] This practice is

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37. *See* MEDICAL DEBT BURDEN, *supra* note 8, at 26 (stating that most collection tradelines are reported by third-party debt collectors).

38. *See* CONSUMER FIN. PROT. BUREAU, MARKET SNAPSHOT: AN UPDATE ON THIRD-PARTY DEBT COLLECTIONS TRADELINES REPORTING 5 (2023), https://files.consumerfinance.gov/f/documents/cfpb_market-snapshot-third-party-debt-collections-tradelines-reporting_2023-02.pdf [https://perma.cc/4H9P-WWWC] (citing a previous study by the CFPB where it found that medical debts are unlike other debts because they are more often reported by a debt collector as an assignee rather than the original health care provider).

39. *See* 15 U.S.C. § 1692a(6) ("The term 'debt collector' means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."). This Note uses this definition when referring to debt collectors. *Id.*

40. *Id.*

41. *See* Joseph Giuseppe R. Paturzo et al., *Trends in Hospital Lawsuits Filed Against Patients for Unpaid Bills Following Published Research About This Activity*, JAMA NETWORK (Aug. 23, 2021), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2783297 [https://perma.cc/Y2EM-9TXA] (showing that hospitals have previously used the courts as an avenue for debt recoupments). While this note suggests that legislation would be the most effective way to fulfill the policy goal of protecting consumers from unfair practices, this study shows other methods may have similar effects due to the perceived concerns of a hospital's public image, such as media lead awareness campaigns. *Id.*

42. *See id.* ("These findings suggest that research and public health initiatives rooted in media exposure can increase public accountability for hospital billing practices and result in meaningful changes that benefit patients.").

43. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3331 ("To the extent that debt collectors rely primarily on furnishing to induce payment at baseline, the rule

effective because it affects other financial aspects of debtors' lives by reducing their access to credit.[44] Critically, once medical debt reaches consumer credit reports, the issue of medical debt also becomes an issue of consumer financial law.[45]

## III. LEGAL HISTORY OF CONSUMER REPORTING REGULATION

In June 2024, the CFPB proposed a rule that eliminates a regulatory exception to the FCRA that grants creditors access to consumers' medical information, including their medical debt, for credit eligibility determinations.[46] The rule has been described in various ways, often as a ban of medical debt or the removal of medical debt from credit reports.[47]

The Bureau's decision and ability to propose this rule is understood by examining the statutory history that led to the creation of the CFPB. The following part addresses the origin of the statutory prohibition on creditors' access to medical information, the development of a regulatory exception to the statute, and Congress's delegation of authority to the CFPB, used to remove the exception.

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may reduce their profits if the other collections practices are costlier or less effective than furnishing.").

44. *See* MEDICAL DEBT BURDEN, *supra* note 8, at 29 ("Medical debt can have a compounding impact in reducing future access to credit, housing, and employment for populations who already face financial exclusion, including communities of color, low-income individuals, uninsured or underinsured individuals, and those in the South.").

45. *See* 12 U.S.C. § 5512(b)(4)(A) (creating the CFPB's authority).

46. Prohibition Concerning Medical Information, *supra* note 3.

47. *See* Noam Levey, *Biden Administration Announces a Plan for Removing Medical Debt from Credit Reports*, NPR: SHOTS HEALTH NEWS (June 12, 2024), https://www.npr.org/sections/shots-health-news/2024/06/12/nx-s1-4998853/medical-debt-credit-scores-reports-rule [https://perma.cc/9XWT-XPBB] (remarking on how the CFPB's rule on medical debts supports a pledge made by President Biden); *see, e.g.*, Michael A. Mancusi et al., *CFPB Proposes to Ban Medical Debt from Credit Reports*, ARNOLD & PORTER (June 21, 2024), https://www.arnoldporter.com/en/perspectives/advisories/2024/06/cfpb-proposes-to-ban-medical-debt-from-credit-reports [https://perma.cc/3TNF-XZKG] (demonstrating a headline used in an advisory on the rule when it was proposed).

### *A. The Fair Credit Reporting Act*

Congress enacted the FCRA in 1970 to regulate the relationship between creditors, CRAs, and consumers.[48] The FCRA was the first consumer financial privacy statute in the United States.[49] It requires CRAs to "adopt reasonable procedures for meeting the needs of commerce for consumer credit . . . with regard to confidentiality, accuracy, relevancy, and proper utilization of such information . . . ."[50] Relevant to the proposed CFPB rule, the FCRA regulates how and when CRAs can furnish information to creditors.[51]

The FCRA's original regulator and enforcement agency was the Federal Trade Commission ("FTC" or "Commission").[52] Following the FCRA's enactment, a series of amendments apportioned authorities to various federal agencies.[53] In the decades since its enactment, the FCRA has had many amendments passed.[54] Importantly, the CFPB is now the primary regulator of the CRAs, but in doing so, it must consult with the

48. *See* Fair Credit Reporting Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended at 15 U.S.C. §§ 1681–1681x) [hereinafter FCRA] (demonstrating an act passed as part of a series of banking-related Acts).

49. *See* Tiffany George, *50 Years of the FCRA*, FTC BUS. BLOG (Oct. 27, 2020), https://www.ftc.gov/business-guidance/blog/2020/10/50-years-fcra [https://perma.cc/9B4X-K4GJ] (generalizing the context and impact of the FCRA immediately following its enactment and the major amendments passed by the FTC during its time as primary regulator).

50. FCRA § 602(b) ("It is the purpose of this title to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this title.").

51. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3282 ("The FCRA regulates the practices of consumer reporting agencies that collect and compile consumer information into consumer reports for use by creditors, insurance companies, employers, landlords, and other entities in making eligibility decisions affecting consumers. The FCRA also limits the circumstances under which persons, such as creditors, may obtain and use consumer report information from consumer reporting agencies.").

52. *See* Austin H. Krist, *Large-Scale Enforcement of the Fair Credit Reporting Act and the Role of State Attorneys General*, 115 COLUM. L. REV. 2311, 2323 (2015) (asserting that the FTC was the original regulatory and enforcement agency of the FCRA).

53. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3283 ("Congress (through the CFPA) transferred to the CFPB primary regulatory authority for the FCRA.").

54. *See* George, *supra* note 49 (stating instances of amendments to the FCRA).

FTC when proposing a new rule.[55] The Commission, alongside the CFPB, retains the authority to enforce the FCRA.[56]

### *B. The Fair and Accurate Credit Transactions Act ("FACT Act")*

In 2003, Congress amended the FCRA with the FACT Act to improve privacy protections for consumers. Specifically, the FACT Act restricted the sharing of medical information.[57] Relevant to the CFPB's proposed rule, the FACT Act prohibits "obtain[ing] or us[ing] medical information . . . pertaining to a consumer in connection with any determination of the consumer's eligibility . . . for credit."[58] The FCRA provides that "medical information" includes any information made by health care providers, in any form or medium, that relates to the payment for the provision of health care to an individual.[59] The statute severely limited creditors' access to information related to medical debt.[60] Two years after passing the FACT Act, federal bank regulators responded to creditors and CRAs that sought exemption from this restriction by creating a three-part test to determine which medical information creditors could use in credit eligibility determinations.[61]

The three-part test was added to detail when creditors could gain access to qualified medical information.[62] The exception applied if

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55. FCRA § 605(h)(2)(A) ("The Bureau shall, in consultation with the Federal banking agencies, the National Credit Union Administration, and the Federal Trade Commission, prescribe regulations providing guidance regarding reasonable policies and procedures that a user of a consumer report should employ . . . .").

56. FCRA § 621(a)(1) ("The Federal Trade Commission shall be authorized to enforce compliance with the requirements imposed by this title under the Federal Trade Commission Act, with respect to consumer reporting agencies and all other persons subject thereto . . . ." (citation omitted)).

57. *See* Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, sec. 411, § 1681b(g), 117 Stat. 1952, 2000 (providing the language amending the FCRA to provide for protections of consumer's medical information).

58. FCRA § 604(g)(2).

59. *See* FCRA § 603(i) ("The term 'medical information' – (1) means information 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 – . . . (C) the payment for the provision of health care to an individual.").

60. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3283 (explaining the background of why an exception was granted to creditors in the first place).

61. *See* Fair Credit Reporting Medical Information Regulations, 70 Fed. Reg. 70664, 70667 (Nov. 22, 2005) (outlining the conditions required for a creditor to have qualified access to medical information as defined by the federal bank regulatory agencies).

62. *See* 12 C.F.R. § 1022.30(b) (2024) (providing the general requirements to obtain medical information).

> (1) the information is the type of information routinely used in making credit eligibility determinations;
>
> (2) the creditor uses the medical information in a manner and to an extent that is no less favorable than it would use comparable [nonmedical] information; and
>
> (3) the creditor does not take the consumer's physical, mental, or behavioral health, condition or history, type of treatment, or prognosis into account as part of any such determination.[63]

Creditors believed that before making credit determinations, medical information should be available to reduce the risk of making bad loans or over-extending credit to consumers.[64] Whether such a requirement was justified, at that time, is arguable, according to the CFPB's proposal.[65] Until the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), the determination of whether the requirements of the exception were met remained within the authority of various Agencies.[66]

### *C. The Dodd-Frank Act and the Creation of the CFPB*

The Global Financial Crisis of 2008 ("GFC") inspired reform of the banking and financial industries via the Dodd-Frank Act.[67] As part of the Dodd-Frank Act, Congress created the CFPB to protect consumers

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63. *See* § 1022.30(d)(1) (explaining the three conditions necessary for creditors to obtain access to medical information).

64. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3283 ("[T]he 'three-part test 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.'" (quoting 69 Fed. Reg. 23380, 23384 (Apr. 28, 2004))).

65. *See id.* ("Although the Agencies explained the boundaries of their three-part test, and gave responses to commenters on various examples, they did not provide evidence or reasoning to support the main conclusion that an exception from a congressionally created legal requirement was warranted . . . .").

66. *See* § 1022.30(d) (giving a three-part test for permitted exceptions to the FCRA).

67. *See Wall Street Reform: The Dodd-Frank Act*, WHITE HOUSE: PRESIDENT BARACK OBAMA, https://obamawhitehouse.archives.gov/economy/middle-class/dodd-frank-wall-street-reform [https://perma.cc/8WCY-ZBAP] (last visited Feb. 8, 2025) ("These new rules will build a safer, more stable financial system—one that provides a robust foundation for lasting economic growth and job creation.").

from unfair, deceptive, and abusive practices by those in the consumer financial industry.[68]

The Dodd-Frank Act amended the FCRA to transfer power from various agencies to the newly formed Bureau.[69] The statutory scope of the CFPB's power included the power to regulate the FCRA[70] and the authority to issue rules as required for compliance with the FCRA.[71] The Dodd-Frank Act coupled this broad grant of power with explicit statutory language for courts to give deference to the Bureau concerning any determinations of the meaning or interpretation of any provision of a federal consumer financial law.[72] Title X of the Dodd-Frank Act includes as federal consumer financial law (among other discrete circumstances) any rule passed by the CFPB.[73] In summary, the Dodd-Frank Act permits the Bureau to implement and enforce rules to ensure consumers have access to fair, transparent, and competitive consumer financial products.[74] These changes curtailed an era for joint agency rulemaking

68. *See The CFPB*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/about-us/the-bureau/ [https://perma.cc/K7VZ-LFW4] (last updated Dec. 3, 2024) (expressing the purpose and function of the CFPB); Prohibition Concerning Medical Information, *supra* note 3, at 3283 (explaining how power was transferred to the CFPB as part of the Dodd-Frank Act).

69. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3283 ("Congress (through the CFPA) transferred to the CFPB primary regulatory authority for the FCRA. The CFPB restated the Agencies' regulations as an interim final rule, with request for comment, on December 21, 2011. On April 28, 2016, the CFPB finalized the interim final rule without assessing or otherwise reconsidering the policy decisions and justifications that served as the basis for the regulations." (footnotes omitted)).

70. Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, § 1022, 124 Stat. 1376, 1981 (codified at 12 U.S.C. § 5512) (2010).

71. 12 U.S.C. § 5512(b)(4)(A) ("[T]o the extent that a provision of Federal consumer financial law authorizes the Bureau and another Federal agency to issue regulations under that provision of law for purposes of assuring compliance with Federal consumer financial law and any regulations thereunder, the Bureau shall have the exclusive authority to prescribe rules subject to those provisions of law.").

72. § 5512(b)(4)(B) ("[T]he deference that a court affords to the Bureau with respect to a determination by the Bureau regarding the meaning or interpretation of any provision of a Federal consumer financial law shall be applied as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law."). While there are other enumerated circumstances that qualify as consumer financial law, this Note does not give rise to a discussion involving such instances.

73. § 5481(14) ("The term 'Federal consumer financial law' means the provisions of this title, the enumerated consumer laws, the laws for which authorities are transferred under subtitles F and H, and *any rule or order prescribed by the Bureau* under this title . . . ." (emphasis added) (citation omitted)).

74. § 5511(a) ("The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers

authority to determine if it was necessary to give creditors access to consumer medical information for credit determinations.[75]

One of the earliest projects the CFPB undertook was investigating the effect of CRAs having access to medical information under the exception.[76]

## IV. THE FINALIZED RULE

The finalized rule effectuates two major changes for consumers and the credit industry. First, the rule eliminates the agency-created exception to section 604 of the FCRA, which provides creditors access to medical information when making credit eligibility determinations.[77] Second, the rule defines the new phrase "medical debt information" in a way that broadens the applicability of the FCRA's restrictions on reporting medical debt.[78]

Under the rule, a medical debt may be reported to CRAs but creditors will no longer be able to obtain the information for use in the consumer credit determination process.[79] Creditors will be blind to such

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have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.").

75. *See* Fair Credit Reporting Medical Information Regulations, 70 Fed. Reg. 70664, 70667 (Nov. 22, 2005) (explaining the conditions set forth by federal agencies that permitted the exception for access to medical information).

76. *See generally* KENNETH P. BREVOORT & MICHELLE KAMBARA, CONSUMER FIN. PROT. BUREAU, DATA POINT: MEDICAL DEBT AND CREDIT SCORES (2014), https://files.consumerfinance.gov/f/201405_cfpb_report_data-point_medical-debt-credit-scores.pdf [https://perma.cc/D99T-ZBZ2] (beginning its operations in 2011, the CFPB had only existed for 3 years before publishing this report related specifically to the issue of medical debt and consumer reporting).

77. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3317 ("The CFPB anticipates that the rule will enhance consumer privacy by removing the financial information exception at § 1022.30(d) that currently permits creditors to consider medical debt information and medical information about expenses, assets, and collateral, among other types of medical information, in underwriting decisions under certain circumstances.").

78. *See id.* at 3294 (defining the new term); *see also* 12 C.F.R. § 1022 (2024) (incorporating the FRCA under Regulation V). Therefore, the definitions found in 15 U.S.C. § 1681a are incorporated under 12 C.F.R. § 1022.3(j). *Id.*

79. FCRA § 621(a)(1), *supra* note 56; *see also* 12 C.F.R. § 1022.30(e) (2024) (enumerating instances where medical debt information may be obtained). This section grants specific exceptions for *obtaining* and using medical information. *Id.* This differs from the exception that is being removed by *dictating* what circumstances give rise to the sharing of medical information rather than having a three-part test determine *if* a circumstance permits the sharing of medical information. *Compare id.*, *with* Fair Credit Reporting Medical Information Regulations, *supra* note 56. Even still, no circumstance under § 1022.30(e) allows for the medical information to be used to make a credit eligibility determination. § 1022.30(e).

debts, unless a separate exception qualifies the creditor to access the medical information.[80] Obtaining medical information by exception under the former three-part test will no longer occur, leaving only separate exceptions if the consumer consents to turning over their medical information.[81] These exceptions are not for general credit eligibility determinations but instead are for the use of medical debt information to help determine the use of a power of attorney, to determine qualification for special credit programs (at the consumer's request) to the extent required for fraud prevention, and to determine the use of financing specifically for medical products or services.[82]

These alternative exceptions appear to be exhaustive.[83] Should a creditor want to obtain medical debt information for any other purpose, it will have to prove that the information is necessary and appropriate in order to make a credit eligibility determination.[84] The CFPB has not issued a statement clarifying what meets this standard, but has said that medical debt information is not necessary for credit eligibility determinations because the inaccuracy in medical billing reduces the predictive value of medical debt.[85] This suggests that the CFPB will not issue an exception unless medical billing accuracy improves.[86] Even so, the CFPB also suggests that the involuntary nature of how medical

80. *See* § 1022.30(e) (enumerating exceptions).

81. *Id.*

82. *Id.*

83. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3307 ("The result of removing the financial information exception is that a creditor will be prohibited from obtaining or using medical debt information—a subcategory of medical information—in connection with any determination of the consumer's eligibility for credit under the general prohibition in § 1022.30(b), unless a specific exception for obtaining and using medical information in § 1022.30(e) applies to the medical debt information.").

84. *See* FCRA § 604(g)(5)(A) ("The Bureau may, after notice and opportunity for comment, prescribe regulations that . . . are determined to be *necessary and appropriate* to protect *legitimate* operational, transactional, risk, consumer, and other needs . . . ." (emphasis added)).

85. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3296 ("Further, the CFPB noted that the complexity of medical billing, the third-party reimbursement process, and debt collection practices can lead to consumer confusion on payment due dates and amounts owed for medical bills, as well as questions about the accuracy of their bills."). This statement was made within the CFPB's discussion on why it found the sharing of medical debt information to not be necessary or appropriate. *See id.* at 3295–96.

86. *Id.*

services arise—something not likely to change—also is a factor in why obtaining medical debt to make credit determinations is not necessary.[87]

For creditors and CRAs, the termination of the exception will return the use of medical information to what Congress intended when it enacted the FACT Act.[88] Without a regulatory exception, the default rule will be that creditors will not be able to obtain or use medical information in credit eligibility determinations.[89] Although the CFPB's rule eliminates the regulatory exception for creditors to obtain medical debt information, the statutory exception within the FCRA permitting disclosure of medical debt information for insurance and employment purposes will remain.[90] For now, these exceptions will be the only permitted instances of disclosure.[91]

The CFPB's new phrase, "medical debt information," will further assure compliance with the new rule.[92] The term is defined 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 . . . , *or to the person's agent or assignee*, for the provision of such medical services, products, or devices."[93] The term explicitly provides that medical debt information includes medical debts that are not past due or that have been paid.[94]

The broadening of language to include agents or assignees expands the scope of the original prohibition in the FACT Act. The FACT Act originally limited medical information to that information created or

87. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3295 ("First, the CFPB noted that recent research has demonstrated that unlike other types of debt, medical debt often results from an event such as an accident or sudden illness.").

88. *See* Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, sec. 411, § 1681b(g), 117 Stat. 1960, 2000 (prohibiting the use of medical information in general).

89. *See* FCRA § 604(g)(5) (prohibiting the disclosure of medical information for credit determinations unless an exception applies).

90. *See* FCRA § 604(g)(4) ("*Limitation on redisclosure of medical information*. Any person that receives medical information pursuant to paragraph (1) or (3) shall not disclose such information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order."). Paragraphs (1) and (3) permit disclosure under this limitation for employment and insurance activities, respectively. *See* FCRA § 604(g)(1), (3).

91. *See supra* note 85 and accompanying text.

92. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3318 (explaining how the term is intended to ensure compliance with the proposed rule).

93. *Id.* at 3294 (emphasis added).

94. *Id.*

derived from a health care provider.[95] Room is left for agents or assignees to report debts to CRAs in order to circumvent the statutory prohibition.[96] The new term is designed to respond to the practice of allowing debt collectors—who are either agents or assignees of the health care providers—to deal with the burden of recouping debts and reporting debts to CRAs.[97] Now, debt collectors are subject to the same prohibition as health care providers.[98] Therefore, debt collectors will no longer be able to rely on simply reporting medical debt as in collections to CRAs, which in turn pressures consumers to pay back the loans.

### *A. Is the Rule Needed and Who Benefits?*

The CFPB's rule arises in light of consumer complaints.[99] Consumers had trouble rectifying billing errors on bills reported for

95. *See* FCRA § 603(i) ("The term 'medical information' – (1) means information . . . in any form or medium, created by or derived from a health care provider or the consumer . . . .").

96. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3280 (explaining how "debt parking" is practiced by some third parties in an attempt to circumnavigate the rules as currently defined). Without the new term including agents and assignees, the debt collectors used by health care providers may have been able to continue participating in "debt parking" where "[d]ebt collectors would report a debt to a consumer reporting agency, then wait for the consumer to notice the tradeline when, for example, applying for credit." *Id.* The results were most effective when a consumer could decide that paying the debt, possibly without dispute as to any errors, was required in order to access needed credit. *Id.*

97. *See id.* at 3292 ("The CFPB explained that it intended, by including agents and assignees in the medical debt information definition, to include medical debt that has been purchased by a debt buyer or that is being collected by a third-party debt collector.").

98. *Id.*

99. *See id.* at 3279 ("A 2022 review of consumer complaints submitted to the CFPB found that many consumers complaining of disputed debt collection attempts reported first learning of the debt from viewing their consumer report. Consumers expressed concern with inaccurate information leading to a decrease in their credit score.").

collections.[100] The inaccuracies in medical billing[101] hampered decision-making by lenders as well as access to credit by consumers.[102]

As the CFPB considered its response to medical billing errors, the credit industry made its own adjustments.[103] The Bureau's research found that medical debt tends to be less predictive of a consumer's ability to pay back loans than other debt.[104] The CRAs opted to exclude any medical debt in collections that is below $500 from reports issued to creditors.[105] They also adjusted the minimum amount of time a medical debt must be delinquent to be listed on a consumer report from six months to one year.[106] The effect of the CRA led change means that many of the consumers that the CFPB's rule could help have already been helped by the industry change.[107]

Using the CFPB's estimate that 62% of medical debt in collections is below $490,[108] up to 38% of all accounts may remain in

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100. *See id.* at 3296–97 ("Several commenters also flagged that many consumers have difficulty understanding medical bills, navigating insurance appeals, or successfully using the dispute process for errors related to medical debt information on their consumer reports, suggesting that the rate of error may be higher than is known.").

101. *See id.* at 3296 ("[M]ore evidence has come to light showing that information about medical debt is prone to error. The CFPB stated that third-party surveys and complaints received by the CFPB have shown that medical bills commonly contain errors and are frequently disputed by consumers. Further, the CFPB noted that the complexity of medical billing, the third-party reimbursement process, and debt collection practices can lead to consumer confusion on payment due dates and amounts owed for medical bills, as well as questions about the accuracy of their bills." (citation omitted)).

102. *See id.* at 3317 ("When creditors base underwriting decisions on information that is unevenly reported and potentially erroneous, an economic tradeoff arises. Creditors balance the probabilities of making two types of error when deciding whether to lend to consumers. The first type of error occurs when creditors lend to consumers who are unable to repay the loan. The second type of error occurs when creditors choose not to lend to consumers who are able and willing to repay.").

103. *See* EQUIFAX, *supra* note 7 (summarizing the changes implemented by CRAs since 2022).

104. *See* BREVOORT & KAMBARA, *supra* note 76, at 13–14 (reporting that the panel data suggests that consumers who have medical debt on their credit reports either overperform in their delinquency rate relative to the expected value of their credit score or perform roughly consistent with their prior performance).

105. *See* EQUIFAX, *supra* note 7 (eliminating from consumer reports medical debt that was reported at or below $500).

106. *Id.*

107. *Compare* EQUIFAX, *supra* note 7 (summarizing that the CRAs have eliminated medical debt from consumer reports that are (1) in collections but below 500 dollars), *with* MEDICAL DEBT BURDEN, *supra* note 8, at 8 (publishing the finding that 62% of medical collections were under $490).

108. *See* MEDICAL DEBT BURDEN, *supra* note 8, at 8 ("Data from the CFPB's Consumer Credit Panel show that in 2020, the median medical was $310, the mean medical collection was $773, and 62 percent of medical collections were under $490.").

collections because of medical debt remain unaffected by recent industry exclusion of debts below $500.[109] Further changes by industry have reduced the number of unaffected by excluding accounts that have been in collections for less than a year and accounts that have been paid in full.[110] Therefore, the 38% of accounts, held by nearly 5.7 million Americans, is an overinclusive estimate of who will benefit if the proposed rule goes into effect.[111]

The two leading American credit score companies joined the CRAs in welcoming this change. FICO, after finding little to no change in their models when assessing credit scores pre- and post-medical debt exclusion, published a new FICO score that no longer includes medical debt.[112] VantageScore did the same in their scoring models versions 3.0 and after.[113]

Despite these industry changes, the need for the CFPB's rule is twofold: (1) to guarantee that protection from medical debt will be backed by regulation rather than just solely a decision by industry and (2) to ensure the protection reaches the consumers with over $500 of medical debt or accounts more than a year overdue.[114] This period of twilight for consumers, from a period of industry change to a finalized agency rule, could be a welcome change for millions now and in the future.

For consumers, reporting of medical debt led to a reduction in their credit scores.[115] Reduced credit scores limit consumers' ability to

109. This number is reached by deduction from the CFPB's findings. *Id.*

110. *See* EQUIFAX, *supra* note 7 (announcing changes implemented that resulted in many medical debts being removed from Equifax consumer reports).

111. *Id.*

112. *See* Lee, *supra* note 10 (showing no change in the score performance from the removal of medical debt).

113. *See* VANTAGESCORE, *MAJOR CREDIT SCORE NEWS: VantageScore Removes Medical Debt Collection Records From Latest Scoring Models [update]* (Aug. 10, 2022), https://www.vantagescore.com/major-credit-score-news-vantagescore-removes-medical-debt-collection-records-from-latest-scoring-models/ [https://perma.cc/4LRR-YXL7] (predicting likely increases in credit scores of up to nearly 20 points).

114. *See* EQUIFAX, *supra* note 7 (discussing who has been affected by industry changes).

115. *See* BREVOORT & KAMBARA, *supra* note 76, at 9 (citing a study that finds that when medical debt is reported, all else equal, credit scores fall in some cases by 115 points).

access credit.[116] The CFPB expects that, following their rule on medical debt, creditors will extend greater access to credit to consumers.[117]

Inaccurate consumer reports have caused creditors to miss out on offering better rates to consumers or possibly on offering credit to some consumers altogether.[118] The CFPB estimates that by removing medical debt, approximately an additional 21,000 home mortgages may result each year.[119] This figure suggests that the errors in medical debt led to underinclusive mortgage offers due to inclusion of erroneous medical debt in underwriting.[120]

The fact that CRAs have already made changes that overlap with the proposed rule should not diminish the additional benefits consumers will receive from it. Now, the rule allows consumers to dispute inaccurate bills without fear that it will affect their access to credit.[121] Consumers may contest the false bills with their insurance and medical providers, without needing to give up their effort because they decide that it is easier to pay a false bill rather than continuing to fight.[122]

But there are tradeoffs for these protections. An expected issue for both consumers and creditors is that by shifting away from pressuring consumers to pay their bills by affecting their credit scores, now creditors

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116. *See* MEDICAL DEBT BURDEN, *supra* note 8, at 2 ("Past-due medical debt reported to consumer reporting companies can appear on a person's credit reports and lower their credit scores. This may reduce their access to credit and make it harder to find a home or job.").

117. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3318. ("Adjustments to credit scoring models may result in credit being extended to more consumers who are able and willing to repay their credit obligations. This may allow consumers to benefit from increased access to credit and creditors to increase overall revenues.").

118. *Id.*

119. *See id.* at 3336 (assuming that with no change in demand by consumers following the rule change, applications for home mortgages will increase).

120. *See id.* (anticipating that following the rule, which removes medical debts from credit determinations, there will be an increase in qualified home mortgage applications). In this Note, the concept of an underinclusive underwriting process is meant to reflect that a lender would otherwise offer a loan to an applicant were it not for the inclusion of such information as medical debt that includes erroneous debts. *See id*. at 3318 (explaining how adjustments to credit reports as a result of this rule may increase access to credit). The opposite, an overinclusive underwriting process, would be true if an underwriting process does not capture all valid debts, yet still offers a loan to an applicant. *Id.*

121. *See id.* at 3342 ("However, even though there are existing mechanisms for consumers to dispute inaccurate medical bills with health care providers, debt collectors, and consumer reporting agencies, consumers will benefit from not needing to dispute these debts under the rule in order to avoid inaccurate negative information on their credit reports.").

122. *Id.* The way that consumers avoid negative information is to simply pay the debts, even if they are erroneously listed on their credit report, because this is easier than waiting for the existing mechanisms to affect their credit reports. *Id.*

may resort to the courts to recoup debts.[123] While the CFPB has limited data on state court lawsuits,[124] research by other scholars suggests that health care providers and debt collectors may be willing to pursue litigation in courts where default judgment is common.[125]

When health care providers or debt collectors choose not to pursue recoupment through court judgments, the cost of this rule will be passed to the health care providers.[126] What remains for health care providers and collectors in this situation are traditional methods of recovery such as contacting patients through phone, email, or other correspondence, asking them to pay their bills.[127]

Another potential issue for consumers is self-evaluating how their medical debt will affect their ability to repay loans when applying for credit.[128] Creditors have expertise in determining the ability of consumers to pay back loans or, put another way, to manage credit risk.[129] Underwriters and lenders are given guidance from regulatory requirements to assess the individual risk posed by consumers who seek

123. *See id.* at 3329 ("The potential for reductions in revenue due to the rule, as discussed above, may affect how health care providers or debt collectors use other collection mechanisms to collect unpaid medical debt, such as contacting consumers via mail and phone calls, as well as debt collection litigation.").

124. *See id.* ("The CFPB does not have data or information available to estimate the extent to which the rule may affect the use of litigation over medical debts, relative to the baseline. The CFPB requested comment on this issue, particularly data or quantitative estimates of the expected changes in litigation were the rule to go into effect.").

125. *See* BARAK RICHMAN ET AL., HOSPITALS SUING PATIENTS: HOW HOSPITALS USE N.C. COURTS TO COLLECT MEDICAL DEBT 5 (2023), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6961&context=faculty_scholarship [https://perma.cc/7EBP-A77L] (finding that for some hospitals, litigation was used to collect judgments for outstanding debts). The debts in this study were from patients in North Carolina hospitals from 2017-2022 who were brought to court for their medical debt. *Id.* at 2. The average judgment in these decisions (including attorney fees, court fees, and interest) was $16,623. *Id.* at 9–10. Many of the cases filed in district courts were awarded by default. *See id.* at 10 (depicting the cases analyzed in the report).

126. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3329 (considering how costs for health care providers may be managed following the rule).

127. *See id.* (stating what traditional methods of recoupment are still available after the rule takes affect).

128. *See id.* at 3285 ("[T]he CFPB's proposal would undermine the fairness and accuracy of credit reports and have negative impacts on consumers' ability to repair credit scores by making payments on collection tradelines and on creditors' ability to accurately assess creditworthiness—resulting in less- qualified consumers becoming overleveraged and well-qualified consumers experiencing decreased access to credit.").

129. *See, e.g.*, Duties of Creditors Regarding Risk-Based Pricing Rule, 86 Fed. Reg. 51795, 51800 (Sept. 17, 2021) (dictating the requirements for account review for motor vehicle dealers to determine credit risk for loan applicants).

credit, guidance that consumers do not necessarily have.[130] But without access to medical debt information, the burden is passed to the consumer to determine their ability to keep up with their payment obligations, including those not on their credit report. [131]

While these costs to consumers, health care providers, and debt collectors are not exhaustive, they demonstrate the main issues foreseen after the rule goes into effect.[132] The back and forth between costs and benefits represents sentiments expressed by creditors and consumers; because there was disagreement, the CFPB weighed arguments against the rule prior to finalization.[133]

### *B. The CFPB's Authority and Challenges by the New Presidential Administration*

The CFPB's rulemaking authority is limited to issuing regulations to ensure compliance with consumer financial law.[134] The CFPB asserts in its analysis that the source of its authority conforms with the purpose of the FCRA.[135] Part of the FCRA's purpose is the improvement of "consumer confidentiality, accuracy, relevancy, and proper utilization of [consumer report] information."[136] In the wake of

130. *Id.*

131. *See* Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, sec. 411, § 1681b(g), 117 Stat. 1960, 2000 (providing the initial legislation prohibiting creditors to access medical information). Creditors will still make credit determinations, just without this critical information. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3276 ("The CFPB is removing a regulatory exception that had permitted creditors to obtain and use information on medical debts notwithstanding this statutory limitation."). For consumers, because creditors will not be able to adjust for medical debt, the burden will pass to them. *Id*.

132. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3323–44 (explaining within its cost benefit analysis portion of the rule who will be affected by the rule and how).

133. *See, e.g.*, Premium Asset Recovery Corp., Comment Letter on Proposed Rule of Prohibition on Creditors and Consumer Reporting Agencies Concerning Medical Information (Regulation V) (July 31, 2024), https://www.regulations.gov/comment/CFPB-2024-0023-0405 [https://perma.cc/JB97-82SS] (expressing disapproval of the CFPB's rule due to the negative impacts of those in the debt collections business who are seeking repayment of valid debts).

134. *See* 12 U.S.C. § 5512(b)(4)(A) (authorizing the CFPB to issue regulations on federal consumer financial law).

135. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3283 (stating that the FCRA authorizes the CFPB to pass regulations to help carry out the purposes and objectives of the FCRA under section 621(e)).

136. FCRA § 602(b).

*Loper Bright*, where a federal agency's interpretations of law are subject to judicial scrutiny,[137] understanding what the purposes and objectives the FCRA entails is all the more important.

With the degree of error in medical billing,[138] the CFPB argues that its proposed rule is meant to improve the *accuracy* of consumer reports.[139] The rule will lead to the absence of false information, improving accuracy and therefore support the purpose of the FCRA.[140] Critics of the rule claim that the accuracy will not improve all consumer credit reports; while medical billing is prone to error, it is not all consumer reports are erroneous.[141] Valid medical debt will not be included in a consumer's credit report and by way of omission, some inaccuracy will still exist.[142]

There are other ways the CFPB's rule could fit within the purpose of the FCRA. The removal of medical debt information from consumer reports also improves the *relevance* of credit report information. The CFPB found that, except for those in the top 1% of highest total medical debt (in excess of six figures), medical debt provides little relevance for the determination of a consumer's credit given that the majority of medical debt for this group is $490 or less.[143] Yet, for the consumers with

137. *See generally* Loper Bright Enters. v. Raimondo, 144 U.S. 2244, 2273 (2024) (stating that Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority). *See also* Amy Howe, *Supreme Court strikes down Chevron, curtailing power of federal agencies*, SCOTUSBLOG (June 28, 2024, 12:37 PM), https://www.scotusblog.com/2024/06/supreme-court-strikes-down-chevron-curtailing-power-of-federal-agencies/ [https://perma.cc/44DL-H9VW] (positing that the overturning of *Chevron* now puts into question how much deference will be given to agencies and their interpretation of ambiguous laws).

138. *See supra* notes 101–02 and accompanying text.

139. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3317 (stating that the opaqueness of medical billing leads to consumer uncertainty of what is actually owed).

140. *See* FCRA § 602(b) (stating that the purpose of the FCRA is to require CRAs to adopt reasonable procedures that, among other goals, improves the accuracy of information obtained and shared by CRAs).

141. *See* Karin Pollitz & Kaye Pestaina, *Could Consumer Assistance be Helpful to People Facing Medical Debt?*, KFF (July 14, 2022), https://www.kff.org/policy-watch/could-consumer-assistance-be-helpful-to-people-facing-medical-debt/ [https://perma.cc/PJ6Q-9U3F] (finding that, of adults surveyed over a five-year period, 43% reported an error in a medical bill).

142. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3332 (stating that to at least one critic, the complete removal of medical collections from consumer reporting would "degrade the accuracy of consumer reporting" because it removes helpful information when the debt is actually the consumer's debt).

143. *See* MEDICAL DEBT BURDEN, *supra* note 8, at 8 (finding 62% of reported medical debts are below $490).

tens of thousands of dollars of medical debt in collections, one could argue—and some Senators have—that medical debt information is highly relevant to potential creditors because this obscures the consumer's true credit risk.[144] Regardless, the CFPB maintains that this rule improves the relevancy of consumer information for the majority of consumers.

Attacking errors in medical billing is a separate issue from consumer credit reporting and seems to be outside the scope of consumer financial laws as well.[145] Proposing regulations and enforcing proper medical billing does not fall as neatly, or exclusively, within creating federal consumer financial law.[146] Such a regulation may be able to be construed as consumer financial law, but it would also be considered regulation of health care providers themselves.[147] Similarly, eliminating debts may help consumers, but such a rule would be well beyond the purpose of the FCRA, even when considering the developments since its inception.[148] By regulating CRAs directly, the Bureau can be confident that the rule will not fail due to lack of authority to propose such a regulation.[149]

The finalized rule comes at the end of the Biden administration. Whether the rule will fit within the new administration's agenda is unclear. Broadly speaking, the incoming administration appears to be willing to critique virtually all government regulatory actions.[150] There is also evidence that this rule is a specific issue for the chair of the Senate

144. *See generally* Letter from Rep. Patrick McHenry et al., U.S. H. Comm. on Fin. Servs., to Rohit Chopra, Dir., Consumer Fin. Prot. Bureau (Aug. 14, 2024), https://financialservices.house.gov/uploadedfiles/2024-08-14_fsc_letter_to_cfpb_medical_debt_final.pdf [https://perma.cc/LF6Z-LZ7X] (arguing that the removal of medical debt obscures the full default risk of a potential borrower from creditors).

145. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3317 (claiming that complex insurance billing practices are a contributor to errors and confusion concerning medical debt).

146. 12 U.S.C. § 5512(b)(4)(A)

147. *See supra* Part III for discussion on the CFPB's statutory authority to regulate CRAs.

148. *See supra* Part III.A for discussion on the brief history of the FCRA.

149. *See* 12 U.S.C. § 5512(b)(4)(A) (authorizing the CFPB to create federal consumer financial law).

150. *See* Elon Musk & Vivek Ramaswamy, *Elon Musk and Vivek Ramaswamy: The DOGE Plan to Reform Government*, WALL ST. J. (Nov. 20, 2024, 12:33 PM), https://www.wsj.com/opinion/musk-and-ramaswamy-the-doge-plan-to-reform-government-supreme-court-guidance-end-executive-power-grab-fa51c020?st=9M7A13&reflink=article_imessage_share [https://perma.cc/Z2PS-Z7JY] (outlining the role and of the Department of Government Efficiency within the broader Trump administration).

Committee on Banking, Housing, and Urban Affairs ("the Committee").[151] The Committee chair published a letter calling on banking regulators, including the CFPB, to cease all rulemaking activities.[152] Contrarily, the sitting Committee chairman published a letter urging the CFPB to finalize the medical debt rule.[153] Ultimately, the decision was the CFPB's to make; the Director of the CFPB refused to be seen as a "dead fish" despite the demand letter.[154] Director Chopra was true to his word and finalized the rule, leaving Congress left to decide whether to exercise its authority under the Congressional Review Act ("CRA").[155]

The current director of the CFPB may not survive long enough to see such a challenge, after the Trump administration begins. The Supreme Court has clarified that Presidential authority allows for the removal of the CFPB director without cause.[156] Therefore, the decision to finalize the

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151. *See* Press Release, U.S. S. Comm. On Banking, Hous., and Urb. Affrs., Sen. Scott on CFPB's Medical Debt Rule (Jan. 7, 2025) (on file with author), https://www.banking.senate.gov/newsroom/majority/scott-on-cfpbs-medical-debt-rule [https://perma.cc/3JEJ-UPR3] (believing that the CFPB's rule will not sufficiently address the underlying issues of medical debt).

152. *See* Letter from Sen. Tim Scott., U.S. S. Comm. On Banking, Hous., Urb. Affrs., to President Joseph R. Biden (Nov. 17, 2024) (on file with author), https://www.banking.senate.gov/imo/media/doc/rm_scott_letter_to_white_house_on_rulemakings_and_nominations.pdf [https://perma.cc/Z8GE-TFGN] (addressing all federal banking regulators, including director Chopra of the CFPB, to ensure that all current rule making activities are suspended).

153. *See* Letter from Sens. Raphael Warnock & Sherrod Brown, U.S. S., to Rohit Chopra, Dir., Consumer Fin. Prot. Bureau (Dec. 10, 2024) (on file with author), https://www.warnock.senate.gov/wp-content/uploads/2024/12/12.10.2024-LETTER-CFPB-Medical-Debt-Letter.pdf [https://perma.cc/C565-MAEE] ("We write in strong and continued support of the Consumer Financial Protection Bureau's (CFPB or 'the Bureau') proposed rulemaking to remove medical debt from credit reports, prohibit consumer reporting agencies from sharing medical debt information with creditors, and ban lenders from repossessing medical devices, like prosthetics.").

154. Richard J. Andreano, Jr. & John L. Culhane, Jr., *Sen. Scott: CFPB ignoring call to pause rulemaking until Trump takes office*, BALLARD SPAHR: CONSUMER FIN. MONITOR (Dec. 11, 2024), https://www.consumerfinancemonitor.com/2024/12/11/sen-scott-cfpb-ignoring-call-to-pause-rulemaking-until-trump-takes-office/ [https://perma.cc/QNV2-E8ZC] ("Chopra defended the CFPB's current rulemaking. 'We will continue to defend consumers' rights and to hold companies accountable . . . . I don't think it makes sense for the CFPB to be a dead fish['].").

155. *See* 5 U.S.C. § 801(b)(1) ("A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.").

156. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 207 (2020) ("We go on to hold that the CFPB Director's removal protection is severable from the other statutory provisions bearing on the CFPB's authority. The agency may therefore continue to operate, but its Director, in light of our decision, must be removable by the President *at will*.") (emphasis added).

rule and the potential Congressional scrutiny that may follow is something that any new CFPB director could end up reckoning with.[157] If the President chooses to use this authority, any incoming director is likely to reflect the President's agenda of minimizing the activity of regulatory authorities.[158]

To add to the challenges faced by the CFPB's rule, the finalization spurred some members of the credit industry to file a lawsuit attempting to block the rule.[159] The lawsuit alleges that the CFPB does not have the authority to pass a rule that regulates what is included on a credit report.[160]

The rule does discuss the CFPB's authority to pass this type of regulation.[161] Courts will ultimately have to decide whether the CFPB's analysis is correct.[162] It also remains to be seen how the courts will treat the rule given that when boiled down to its simplest function, it is a regulation repealing an exception to a congressional act.[163] In other words, it could be argued that the rule is just returning the status quo

157. *Id.*

158. *See* Musk & Ramaswamy, *supra* note 144 ("DOGE will work with legal experts embedded in government agencies, aided by advanced technology, to apply these rulings to federal regulations enacted by such agencies. DOGE will present this list of regulations to President Trump, who can, by executive action, immediately pause the enforcement of those regulations and initiate the process for review and rescission. This would liberate individuals and businesses from illicit regulations never passed by Congress and stimulate the U.S. economy.").

159. *See* Evan Weinberger, *CFPB's Medical Debt Credit Reporting Ban Faces Industry Suit (2)*, BLOOMBERG L. (Jan. 8, 2025, 12:31 PM), https://news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMTk0LTQ2NDgtZGExNS1hZDk0LTVlZGQyYjI5MDAwMSIsImN0eHQiOiJCTk5XIiwidXVpZCI6InJ6amZsRTVJMVNERUQwVEhScXdBbXc9PXZDWVZFR0lIZDQ1aUNDS3g0ekhtanc9PSIsInRpbWUiOiIxNzM2MzQ3OTY5MDg2Iiwic2lnIjoiOTc5dzc3S0d1TWpNRFpEZ3RhM0s3UEtyNFFrPSIsInYiOiIxIn0=?source=newsletter&item=headline&region=digest&channel=banking-law [https://perma.cc/T3ZY-S7CR] (explaining the basis of a lawsuit filed attempting to block the CFPB's rule on medical debts).

160. *See id.* ("Only Congress has the power to determine whether information can or can't be included in credit reports, the complaint said.").

161. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3316–17 (discussing industry commenters assertions that the CFPB does not have the authority to pass this specific rule).

162. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 369 (2024) (stating that Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority).

163. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3276 ("The FCRA prohibits creditors from considering medical information in credit eligibility determinations. The CFPB is removing a regulatory exception that had permitted creditors to obtain and use information on medical debts notwithstanding this statutory limitation.").

concerning the sharing of medical information for credit determination purposes.[164]

## V. HOW STATE LAWS CAN HELP REDUCE PREDICTED ISSUES FOLLOWING THE CFPB'S RULE

The CFPB's rule on medical debts intervenes to help Americans long after the medical debt was incurred.[165] While the CFPB may not have the authority to intervene in a more meaningful way any sooner in the debt processing timeline,[166] some states have laws in place that help consumers sooner.[167]

States take varying approaches to helping consumers and patients earlier in the billing process. For example, many states dictate who is automatically eligible for "charity care."[168] These programs are often based on a patient's income relative to the federal poverty level ("FPL").[169] For those who still have unpaid debts, some states have

164. *See id.* at 3316 ("Instead, the rule here returns to FCRA section 604(g)(2) the effect it would have had if the Agencies had not adopted the financial information exception.").

165. The rule will benefit a consumer only if the consumer has: (1) incurred a debt in exchange for medical health care services, (2) has not paid the debt in full, (3) has then held the debt long enough that the debt would otherwise be reported to CRAs and obtainable by future and existing creditors. *See* EQUIFAX, *supra* note 7 (reporting changes already implemented by CRAs that prevents a debt from being included on a consumer report). However, other rules and laws are more proactive by intervening at earlier times than this proposed rule to prevent debt from incurring in the first place. *See infra* Part V.A. *See id.* at 3323–44 (analyzing various factors, but not including an analysis of the timing of when intervention occurs, relative to when the consumer experiences stress in the timeline of the transaction).

166. *See supra* Part IV.B for discussion on the CFPB's authoritative limitations to addressing errors in medical billing.

167. *See* MAANASA KONA & VRUDHI RAIMUNGIA, STATE PROTECTIONS AGAINST MEDICAL DEBT: A LOOK AT POLICIES ACROSS THE U.S., THE COMMONWEALTH FUND (2023), https://www.commonwealthfund.org/publications/fund-reports/2023/sep/state-protections-medical-debt-policies-across-us [https://perma.cc/6EB7-U646] (surveying the 50 states and finding that 19 states have existing protections for consumer related to medical debt).

168. *See* Zach Levinson et al., *Hospital Charity Care: How It Works and Why It Matters*, KFF (Nov. 3, 2022), https://www.kff.org/health-costs/issue-brief/hospital-charity-care-how-it-works-and-why-it-matters/ [https://perma.cc/Q7AK-8NN5] (explaining that charity care, also known as financial assistance, is "free or discounted health services provided to persons who meet the organization's eligibility criteria for financial assistance and are unable to pay for all or a portion of the services").

169. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 127405(a)(i)(A) (providing an FPL threshold of 400% or below); 210 ILL. COMP. STAT. 89/10(a)–(b) (2008) (providing ranging threshold limits of 200-300% of FPL); MD. CODE ANN., HEALTH-GEN. § 19-214.1(b)(2(i)–(ii) (offering free or reduced care for patients at or below 200% of FPL).

provided extra protections for consumers to limit debt collections from being overly invasive.[170] The CFPB's rule suggests that it is generally aware that dynamic state laws, such as these, exist but does not discuss how any specific state laws would affect the population the rule helps.[171]

In the following part, this Note explores how existing state laws may intersect with the CFPB's. In contrast to the CFPB's final rule, this section looks at two general types of laws that limit or reduce the instances in which the CFPB's rule applies. Subpart A explains how consumers can avoid having to pay bills at all and as a result, not be subject to bills being reported to CRAs. Subpart B explores state laws that protect consumers from the methods that the CFPB predicts health care providers and debt collectors may use once they can no longer rely on pressuring consumers through access to credit.

### *A. State Laws Targeted at Patient Eligibility for Medical Charges*

The CFPB's rule will help people who have been charged with a medical debt.[172] However, some states currently have programs that would prevent the debt from occurring in the first place.[173] In practice, disclosures of the existence of these laws can—and as some researchers have argued should—occur while patients are still in the hospital.[174] Take as an example Illinois' attempt to address this issue.[175]

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170. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 127425 (requiring easily understandable information for patients to understand their bill charges and restrictions for health care providers and their agents while seeking to collect payment); MD. CODE REGS. § 10.37.10.26 (describing patient rights and obligations and prohibited practices for health care providers while seeking recoupment for charges).

171. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3318 ("The evolving landscape of State laws and consumer reporting practices may change medical collections reporting in the absence of the rule, affecting the baseline.").

172. *See supra* Part IV for discussion on the proposed rule and who it applies to.

173. *See, e.g.*, JENNIFER BOSCO ET AL., MODEL MEDICAL DEBT PROTECTION ACT, NAT'L CONSUMER L. CTR. 18–19 (2024), https://www.nclc.org/images/pdf/medical-debt/model-medical-debt-protection-act-082017.pdf [https://perma.cc/NE2R-5NMB] (surveying the states that currently have discount programs that would reduce or eliminate debts that are chargeable to patients).

174. *Id.* at 21–22 (recommending multiple measures for health care providers to implement for informing patients about hospital financial assistance).

175. *See* CMTY. CATALYST, ILLINOIS: DISCOUNTS, BUT NOT FOR EVERYONE. NEW POLICIES REQUIRE MORE FROM HOSPITALS (2024), https://communitycatalyst.org/wp-content/uploads/2024/05/Illinois-State-Spotlight-Final-May-2024.pdf [https://perma.cc/XZ4T-NGD8] (overviewing the legislative enactment that provides discounts for uninsured patients of Illinois health care providers).

In 2008, Illinois enacted the Hospital Uninsured Patient Discount Plan ("HUPDA").[176] The law protects uninsured patients by limiting how much can be collected.[177] State laws like these are more proactive than the CFPB's proposed rule because they intervene to protect the consumer by making the bill more affordable and denying certain collections practices.[178]

The protection Illinois offers its uninsured residents is a discount in charges for medical care.[179] To determine eligibility for this protection, a resident of Illinois must be (1) uninsured, (2) at or below 600% of the FPL, and (3) the health care charges must be above $150.[180] This law is carefully tailored to help a population of people that is at a higher risk of struggling to pay its medical debt than those who are insured or earn more.[181] HUPDA's careful tailoring does limit its ability to reach other people who are struggling to pay their debts.[182] For instance, even insured patients may still find it difficult to pay all their medical debt and are, by definition, ineligible for the statutory discount.[183] Nonetheless, the protection is a relatively "progressive" law.[184]

Because this law intervenes earlier than the CFPB's rule, consumers who benefit do not have to be concerned about how medical debt may affect their credit. Take, for example, a server working as a typical restaurant employee in Illinois. The restaurant service industry has high rates of employees not covered by health care insurance.[185]

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176. *See* 210 ILL. COMP. STAT. 89 (2008) (demonstrating the uninsured health insurance plan).

177. *See* CMTY. CATALYST, *supra* note 175, at 3 ("HUPDA provides discounts on hospital bills for uninsured patients who apply for the discount and have income up to 600% of the federal poverty level . . . .").

178. *Id.*

179. *See id.* (stating that uninsured patients who have income up to 600% of the FPL are eligible for discounted care).

180. *Id.*

181. *See id.* (claiming that "[m]ost Illinoisans without health insurance have income below 600% of FPL, so most would qualify for discounts on the prices they face in hospitals.").

182. *See id.* (estimating that of the 12.5 million residents of Illinois that approximately 800,000 are uninsured).

183. *See id.* (articulating that only the uninsured are eligible for the benefit).

184. *See id.* (comparing results of an independent compendium surveying state protections for consumers issues related to medical debt).

185. *See* BOWEN GARRETT ET AL., WORKERS WITHOUT HEALTH INSURANCE: WHO ARE THEY AND HOW CAN POLICY REACH THEM, URB. INST. 5, https://www.urban.org/sites/default/files/publication/61271/310244-Workers-Without-Health-Insurance.PDF [https://perma.cc/39XS-CYZQ] (reporting that retail and service industry workers make up the largest distributions of uninsured workers).

Researchers estimate that, for those who are uninsured in Illinois, many are at or below 200% of the FPL.[186] A trip by such an employee to any non-rural hospital that results in a charge of $150 or more is eligible for fully discounted care if they fall below 600% of the FPL.[187] Hospitals are granted a 100% charitable discount for providing such service under HUPDA.[188]

While progressive, the law does have additional income requirements that eligible patients must meet for the discount to apply.[189] The patient must also notice that there is an option on their bill to apply for the discount, rather than the discount to be applied on their behalf.[190] The hospital is incentivized to inform patients of the program because the hospital would be eligible for all costs to be considered as charitable care and thus contribute to state offered tax benefits.[191] Assuming that an applicant meets the criteria set forth, hospitals are left no room within the statute to deny an eligible patient the benefit of the discount.[192]

A law like this reduces the overall problem of errors in medical billing by way of avoiding bills ever reaching collections. Therefore, this type of law addresses two criticisms of the CFPB's rule. First, it compensates health care providers for their services.[193] Second, it avoids

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186. *Id.* at 6 (reporting at the time the study was conducted that 59% of uninsured workers were at or below 200% of the FPL).

187. *See* 210 ILL. COMP. STAT. 89/10(a)(1) (2008) ("A hospital, other than a rural hospital or Critical Access Hospital, shall provide a discount from its charges to any uninsured patient who applies for a discount and has family income of not more than 600% of the federal poverty income guidelines for all medically necessary health care services exceeding $150 in any one inpatient admission or outpatient encounter.").

188. *See id.* at 89/10(a)(2) ("A hospital, other than a rural hospital or Critical Access Hospital, *shall provide a charitable discount of 100% of its charges for all medically necessary health care* services exceeding $150 in any one inpatient admission or outpatient encounter to any uninsured patient who applies for a discount and has family income of *not more than 200% of the federal poverty income guidelines*.") (emphasis added).

189. *See id.* at 89/10(d) ("Each hospital bill, invoice, or other summary of charges to an uninsured patient shall include with it, or on it, a prominent statement that an uninsured patient who meets certain income requirements may qualify for an uninsured discount and information regarding how an uninsured patient may apply for consideration under the hospital's financial assistance policy.").

190. *Id.*

191. *See* Levinson et al., *supra* note 168 ("Federal regulations require that nonprofit hospitals provide some level of charity care and other community benefits as a condition of receiving tax-exempt status.").

192. *See generally* 210 ILL. COMP. STAT. 89/10(a) (providing a clear standard for the threshold of patient eligibility).

193. *See, e.g.*, CONSUMER FIN. PROT. BUREAU, Comment Letter on Proposed Rule of Prohibition on Creditors and Consumer Reporting Agencies Concerning Medical Information (Regulation V), 89 Fed. Reg. 51682 (proposed June 18, 2024),

the alternative practices (such as litigation) that consumers may be subject to if they were issued a bill that they were unable to pay.[194]

The former concern of compensation is expressed by those who have provided health care and have not been compensated.[195] Assuming there is no preference by health care providers for how they are compensated, there is an incentive for a health care provider in Illinois—or any other state with a similar program—to take advantage of the discount. Rather than having to allocate resources for litigation or for traditional recovery methods, healthcare providers could allocate their resources to help staff work with patients to determine accurate billing and eligibility for charitable care.[196] A result of increased applications for financial aid would result in less reported bad debts because of uncompensated care.[197]

Some state laws seem to support this type of proactive effort of health care providers. At the front again, Illinois also requires that any bill sent to patients must clearly inform patients of available financial aid options.[198] Similarly, California's Hospital Fair Pricing Policies focuses on consumer understanding and requires written notices informing patients of charity care policies.[199]

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https://www.regulations.gov/comment/CFPB-2024-0023-0405 [https://perma.cc/JB97-82SS] (expressing disapproval of the CFPBs rule due to the negative impacts of those in the debt collections business who are seeking repayment of valid debts).

194. *See supra* Part IV.A for discussion on the criticisms of the proposed rule.

195. *See supra* note 193 and accompanying text.

196. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3330 ("Health care providers that choose to file more debt collection lawsuits on their own behalf because of the rule may incur a mix of fixed costs and variable litigation costs. Fixed costs of litigation may include the costs of retaining and maintaining relationships with legal providers, as well as hiring additional staff." (citation omitted)).

197. *See RCM Metrics Bad Debt Recovery Rate,* MD CLARITY, https://www.mdclarity.com/rcm-metrics/bad-debt-recovery-rate [https://perma.cc/V9UD-H53G] (stating that to improve bad debt recovery, health care providers should aim for accurate billing by, among other measures, training staff to communicate effectively with patients).

198. *See* 210 ILL. COMP. STAT. 89/10(d) (2008) (listing the requirements for medical bills provided to Illinois patients).

199. *See* CAL. HEALTH & SAFETY CODE § 127405(a)(1)(A), (c) (2010), https://hcai.ca.gov/wp-content/uploads/2020/10/AB-774_FairPricingPolicies.pdf [https://perma.cc/C795-2HXN] (prescribing the requirements for a hospital's charity care policies). For example, the statute provides that "[e]ach *hospital shall maintain an understandable written policy regarding discount payments* for financially qualified patients as well as an understandable written charity care policy." § 127405(a)(1)(A) (emphasis added). Moreover, "[t]he charity care policy shall *state clearly* the eligibility criteria for charity care." § 127405(c) (emphasis added).

While a minority of states overall offer discounts regardless of insurance, some states limit financial aid opportunities to uninsured patients.[200] Such laws are unresponsive to those who have insurance but still have medical debt they struggle to pay off.[201]

### *B. Limiting Collections Practices*

Another form of state-level protections that complement the CFPB's proposed rule is the restriction of collections practices for medical debt. The CFPB's rule will remove the ability for debt collectors to pressure consumers by limiting their access to credit.[202] Collections practices that will remain following the rule's passing include traditional reminders to pay bills; suing patients for outstanding debts (and the legal fees associated with this method of collections);[203] liens on property owned by patients; or garnishing patient wages and pensions.[204] The states that have taken action to restrict collections efforts typically address the more extraordinary collections methods.[205]

In terms of timing, this option occurs later in the debt processing than provisions for discounted medical services.[206] Consumers have

200. *See, e.g.*, BOSCO ET AL., *supra* note 173 (summarizing the requirements for discounted care for patients in states that have such programs).

201. *See* Shelton v. Duke Univ. Health Sys., Inc., 633 S.E.2d 113, 115–16 (N.C. Ct. App. 2006) (deciding against a patient who, despite insurance, sought relief from medical billing within the state court system); *see also* Ladan Ahmadi et al., *End Medical Debt*, THIRD WAY (Jan. 10, 2023), https://www.jstor.org/stable/cf7a1057-9032-3fb9-bf3b-190798d42f6d?seq=15 [https://perma.cc/N2U4-CUCS] (finding that 63% of medical bill indebted adults had to cut back on food spending, 48% used all or most of their savings to pay their bills, 17% ultimately declared bankruptcy, and 1 in 7 reported being denied care following unpaid medical bills).

202. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3280 (explaining the intended effect for how the rule will disallow debt collectors from using "debt parking" to pressure consumers to pay medical debt).

203. *See* RICHMAN ET AL., *supra* note 125 (discussing why health care providers may seek litigation to recover debts owed).

204. *See, e.g.*, BOSCO ET AL., *supra* note 173, at 24–25 (discussing the various methods used by debt collectors that are found to be most extraordinary).

205. *See* KONA & RAIMUNGIA, *supra* note 167 (surveying the 50 states on existing protections for consumers that are related to medical debt and assessing that a minority of states offer consumer protections, often protecting consumer's real property).

206. In the Illinois statute, care is discounted and potentially avoids ever requiring a creditor to create a security interest in the debtor's property, as found in Maryland. MD. CODE REGS. § 10.37.10.26 (A-1)(6). Only if a consumer has medical debt that is then in submitted to collections could a debt collector or health care provider establish a security interest on the property of a consumer, as is permitted in Maryland. *Id. Compare* 210 ILL. COMP. STAT. 89/10(a) ("A hospital, other than a rural hospital or Critical Access Hospital, shall provide a

incurred debt but the methods of collecting these debts may be limited in some states.[207] For instance, Maryland's Hospital Credit and Collection and Financial Assistance Policies demonstrate limitations placed on how debts may be collected.[208]

Maryland law protects residents from hospitals forcing the sale or foreclosure of their primary residences to pay off their outstanding debts.[209] The hospital can maintain a lien on the property, but the hospital cannot *itself* force a sale of the home through foreclosure.[210] As of this writing, a minority of states prohibit collectors from securing court ordered foreclosures for sale of residences to pay off medical debt.[211]

Other practices to collect judgments include wage garnishments, although federal law prohibits garnishments from exceeding 25% of an employee's weekly disposable earnings or the amount that weekly disposable earnings exceeds 30 times the federal minimum hourly wage, whichever is less.[212] The term "disposable earnings" within this context is income that remains after legally required deductions are made.[213] Legal deductions include federal and state taxes, Social Security, and Medicare.[214] In other words, it does not make allowances for the cost of

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discount from its charges to any uninsured patient who applies for a discount and has family income of not more than 600% of the federal poverty income guidelines for all medically necessary health care services exceeding $150 in any one inpatient admission or outpatient encounter."), *with* MD. CODE REGS. § 10.37.10.26 (A-1)(6) (explaining that recovery of debt secured by a lien may only be recovered once the house is sold or foreclosed on by the debtor).

207. *See* KONA & RAIMUNGIA, *supra* note 167 (summarizing protections for consumers).

208. *See* MD. CODE REGS. § 10.37.10.26 (detailing by statute the circumstances for limitation of debt recovery methods).

209. *See* § 10.37.10.26 (A-1)(6) ("A hospital may not force the sale or foreclosure of a patient's primary residence to collect a debt owed on a hospital bill. If a hospital holds a lien on a patient's primary residence, the hospital may maintain its position as a secured creditor with respect to other creditors to whom the patient may owe a debt.").

210. *Id.*

211. *See* Erin C. Fuse Brown, *How to Solve the Medical Debt Crisis*, THE APPEAL (Jan. 12, 2021), https://theappeal.org/the-lab/policy/how-to-solve-the-medical-debt-crisis/ [https://perma.cc/F9KJ-W3QE] (finding, in a 50 state survey, that 9 states prohibit court ordered foreclosure for sales of residences).

212. *See* 29 C.F.R. § 870.10(a) (2024) (stating the conditions that wage garnishments are subject to).

213. *See* Consumer Credit Protection Act, Pub. L. No. 90-321, § 302(b), 82 Stat. 163 (1968) ("The term 'disposable earnings' means that part of the earnings of any individual remaining after the deduction from those earnings of any amount required by law to be withheld.").

214. *See* U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #30: THE FEDERAL WAGE GARNISHMENT LAW, CONSUMER CREDIT PROTECTION ACT'S TITLE III (CCPA) (2024), https://www.dol.gov/agencies/whd/fact-sheets/30-cppa [https://perma.cc/685G-T25F]

housing, food, or other life needs.[215] Therefore, if people are already struggling to pay bills, reducing the disposable income by wage garnishment means that consumers may have to reduce their access to food and other life needs—perhaps even more than they would be already.[216]

The CFPB predicts health care providers and debt collectors may explore these options.[217] While the CFPB acknowledges that collections efforts may turn to the courts,[218] they also admit that it is difficult to predict whether litigation will be productive.[219] In uncertain conditions, it is fair to assume that health care providers and debt collectors will do what works to recover debts and this may vary depending on what protections exist in a jurisdiction.

Although the practices are described as extraordinary by some researchers,[220] even the most progressive state laws can fail to intervene to protect or help consumers. For example, even in California, which has relatively progressive protections for its consumers who require assistance to manage medical debt, there are still many medical debts that do not qualify for protection, often due to not being within the FPL threshold.[221] If a consumer cannot pay, then health care providers must report the care as a bad debt or a loss.[222] There are limits to how much a health care provider can report as bad debts.[223] The difference between unpaid debts and reportable bad debts results in a loss to the health care

(explaining what is included and excluded from the term "disposable earnings" in the context of federal wage garnishment law).

215. *See id.* (explaining what is included in the term disposable earnings and by exclusion, what is not).

216. *See* Ahmadi et al., *supra* note 201 (discussing how a consumer's behavior may alter when deciding how to pay medical debt).

217. *See generally* Prohibition Concerning Medical Information, *supra* note 3, at 3323–44 (explaining within its cost benefit analysis portion of the rule who will be affected by the rule and how).

218. See RICHMAN ET AL., *supra* note 125 (suggesting why courts may seek litigation to collect outstanding debts).

219. *See* Prohibition Concerning Medical Information, *supra* note 3, at 3329 (stating that the CFPB does not have data or information available to estimate how the rule may affect the use of litigation over medical debts).

220. *See* BOSCO, *supra* note 173, at 8–9 (defining and exemplifying "extraordinary" in the context of recoupment efforts taken to recover medical debt).

221. *See* CAL. HEALTH & SAFETY CODE §§ 127400, 127405 (summarizing the financial eligibility requirements for patients to receive discounted care).

222. *See* 210 ILL. COMP. STAT. 89/10(a) (explaining how hospitals may respond to unpaid debts).

223. *See* 42 C.F.R. § 413.89(h) (2024) (determining the percentage of bad debts allowed to be reported relative to cost of care).

provider.[224] Overall, these potential decisions for those in the health care industry are the natural result of stirring up change for such a significant issue.

Any combination of laws that does not sufficiently address this difference will ultimately leave the cost to health care providers, rather than offsetting the loss through the state's tax base.[225]

## VI. CONCLUSION

The changes adopted by the credit industry highlight that the market is beginning to alter how it uses medical debt information. The finalized rule attempts to do so through the authority of the federal government. However, with changing leadership, it is unclear if the federal government will extend the protection granted to many consumers by the CRAs and credit score companies. States can take on this challenge to protect consumers instead. By passing laws such as those that limit collections practices or help discount medical care, the burden of medical debt for consumers can be lessened.

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224. *See Top 25 Hospitals with the Highest Bad Debt Ratios,* DEFINITIVE HEALTHCARE (Nov. 7, 2022), https://www.definitivehc.com/resources/healthcare-insights/top-25-hospitals-highest-bad-debt-ratios [https://perma.cc/B2KX-M34M] ("For hospitals and healthcare systems, bad debt represents patient care charges the patient or payor cannot, or will not, cover. It is part of uncompensated care, which also includes hospital charity care costs for services where no payment is received.").

225. *Id.*

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