National Consumer Law Center

Aug 12, 2024

Via petitions@cfpb.gov
The Honorable Rohit Chopra
Director, Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Requests for Rulemaking under the Equal Credit Opportunity Act to Protect Renters

Dear Director Chopra:

The National Consumer Law Center on behalf of its low-income clients writes to urge you to open rulemaking under the Equal Credit Opportunity Act (ECOA) to extend two important but discrete protections to renters.[1] This letter constitutes our petition to the Consumer Financial Protection Bureau (CFPB) to define residential real estate leases as "credit" and landlords as "creditors" under the ECOA for two limited purposes:

1. For purposes of the adverse action requirement in § 1691(d) of the ECOA.

2. For purposes of the ban against inclusion of medical debt on consumer reports in proposed § 1022.38 of Regulation V, which implements the Fair Credit Reporting Act (FCRA).

The CFPB has strong rulemaking authority under the ECOA to adopt these provisions, which the Seventh Circuit recently reaffirmed, as discussed further below.

[1] These comments were written by Chi Chi Wu, with assistance from April Kuehnhoff and Ariel Nelson. Carolyn Carter provided editorial oversight.

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I. Introduction

As the CFPB knows, many renters have faced significant struggles during and after the COVID-19 pandemic, especially after the eviction moratoria were ended. Rents have skyrocketed, with unaffordability at an all-time high.[2] Evictions now exceed pre-pandemic levels.[3] The supply of rental housing, especially moderately priced housing, is insufficient to meet the needs of renters.[4]

One of the pervasive and abusive barriers to housing that renters face is tenant screening, as described in our report *Digital Denials: How Abuse, Bias, and Lack of Transparency in Tenant Screening Harm Renters*.[5] The problems with tenant screening include:

- The components of tenant screening reports are all highly problematic:
    - criminal records used in these reports are often not predictive, are frequently inaccurate, and undermine state policies to give justice-involved individuals a fair chance at housing.
    - eviction records are plagued with inaccuracies and often incomplete, failing to show cases are dismissed, settled, or that the tenant prevailed.
    - there is no evidence that credit history is relevant to whether a consumer will be a good renter, and credit reports contain unacceptably high error levels.
    - All of these records – criminal, eviction, and credit – exhibit large and troubling racial disparities.[6]
- There is a troubling lack of transparency in tenant screening regarding screening criteria. This is especially harmful when renters apply for and waste money on application fees when they are ineligible for a rental. Except for subsidized housing providers, there is no federal requirement for landlords to provide either their screening criteria in advance or a statement of reasons when they reject an applicant.
- Landlords often fail to consider mitigating information or additional context, such as overcoming personal hardships, extenuating circumstances, and the outcome of criminal or eviction actions. This can be due to heavy reliance on automated scores and recommendations from tenant screening companies, which also means that landlords fail

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[2] Harvard Joint Center for Housing Studies, America's Rental Housing, at 2 (Jan. 2024), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_Americas_Rental_Housing_2024.pdf (noting "historically high rent increases in both 2021 and 2022" and "Unaffordability Has Hit an All-Time High").

[3] Peter Hepburn, Danny Grubbs-Donovan, and Grace Hartle, Princeton Eviction Lab, Preliminary Analysis: Eviction Filing Patterns in 2023, Apr. 22, 2024, https://evictionlab.org/ets-report-2023/ ("In most cities, eviction filings in 2023 were above levels that were normal prior to the COVID-19 pandemic").

[4] National Low Income Housing Coalition, The Gap: A Shortage of Affordable Homes, March 2024, https://nlihc.org/gap.

[5] National Consumer Law Center, Digital Denials: How Abuse, Bias, and Lack of Transparency in Tenant Screening Harm Renters, September 2023, https://www.nclc.org/resources/digital-denials-how-abuse-bias-and-lack-of-transparency-in-tenant-screening-harm-renters/ [hereinafter "Digital Denials"]

[6] U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, Guidance on Application of the Fair Housing Act to the Screening of Applicants for Rental Housing, Apr. 29, 2024, https://www.hud.gov/sites/dfiles/FHEO/documents/FHEO_Guidance_on_Screening_of_Applicants_for_Rental_Housing.pdf.

to consider the underlying information that might flag an error or reveal a mitigating factor.[7]

In prior publications and in our *Digital Denials* report, we set forth a number of recommendations to the CFPB and other regulators.[8] We appreciate that the CFPB has addressed some of these issues, such as prohibiting name-only and insufficiently rigorous matching of criminal and eviction records,[9] requiring tenant screening consumer reporting agencies (CRAs) to provide disposition information, and prohibiting the reporting of sealed and expunged records.[10]

This petition focuses on two of the other issues flagged above: the lack of transparency in rental housing decisions and one element of the unfairness in using credit history for tenant screening purposes.

II. Renters Should Receive a Notice Explaining Why They Were Rejected from Housing

a. Applying the ECOA adverse action notices to rental housing will give renters a better chance to obtain housing and boost HUD efforts to do the same

We urge the CFPB to extend the ECOA adverse action notice requirements to rental housing leases because it will provide much-needed transparency in tenant screening. The ECOA adverse action notices will give tenants critical information as to why they were rejected for rental housing. Learning this information might help improve tenants' chances to be approved for the next rental application by potentially exposing errors in tenant screening reports or weaknesses that they can address ahead of time.

Currently, rental applicants receive an adverse action notice under the FCRA only when a consumer report is involved in the decision to deny them housing.[11] However, that notice does not provide information about the specific reasons for the denial, *e.g.,* that the renter had a low credit score, eviction record, or criminal record.

Another problem involves the fact that, as discussed above, many landlords primarily rely on the scores and recommendations generated by the tenant screening CRAs algorithms. Yet as the

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[7] Digital Denials.

[8] *Id.* at 77-82; National Consumer Law Center, Zombie Record: How Sealed or Expunged Court Records in Tenant & Employment Screening Reports May Illegally Cost People Jobs & Housing, June 2022, https://www.nclc.org/wp-content/uploads/2022/08/IB_Zombie_Records-1.pdf; Ariel Nelson, National Consumer Law Center, Broken Records Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing, Dec. 2019, https://www.nclc.org/wp-content/uploads/2022/09/report-broken-records-redux.pdf.

[9] CFPB, Advisory Opinion on Fair Credit Reporting; Name-Only Matching Procedures, 86 Fed. Reg. 62,468 (Nov. 10, 2021).

[10] CFPB, Advisory Opinion on Fair Credit Reporting; Background Screening, 89 Fed. Reg. 4171, 4174 (Jan. 23, 2024).

[11] 15 U.S.C. § 1681m(a).

CFPB noted, "Renters rarely receive their scores."[12] Furthermore, the FCRA specifically does not require the disclosure of risk scores other than credit scores.[13] In contrast to the FCRA, the ECOA's requirement to disclose the reason for rejection will at a minimum inform the renter that their tenant screening score is low, at least from that particular tenant screening CRA. The CFPB could by regulation require the disclosure of the actual score under the ECOA.

A CFPB rule that covers rental housing as "credit" for purposes of the ECOA's adverse action notice requirements would dovetail with recently released guidance from the Office of Fair Housing and Equal Opportunity (FHEO) of the U.S. Dept. of Housing and Urban Development (HUD). In this guidance, HUD's FHEO stated "Denial letters should contain as much detail as possible as to all reasons for the denial, including the specific standard(s) that the applicant did not meet and how they fell short."[14] A CFPB rule would bolster and strengthen HUD's recommendation, making it binding and mandatory.

In addition, a number of states and municipalities require landlords to disclose the reason(s) for a denial when they reject applicants.[15] A CFPB regulation would work in tandem with these requirements.

As an alternative to a rulemaking under the ECOA, the CFPB could amend Regulation V, which implements the FCRA, to require a statement of reasons for adverse actions involving rental housing or other uses not covered by the ECOA. Section IV of this petition discusses the legal authority for the ECOA option; the legal authority for the Regulation V option is spelled out in our comments on the CFPB's proposed medical debt rule.[16]

b. An NCLC survey found that many renters do not receive information as to why they were rejected from rental housing

Currently, it appears only some private landlords consistently give applicants information about the reasons for rejecting a rental application.[17] NCLC's report *Digital Denials* described results from a survey that included the following question:

"Do landlords disclose their reasons for rejecting an applicant to the applicant?"

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[12] CFPB, Consumer Snapshot: Tenant background checks 20 (Nov. 2022), https://files.consumerfinance.gov/f/documents/cfpb_consumer-snapshot-tenant-background-check_2022-11.pdf.

[13] 15 U.S.C. § 1681g(a)(1)(B).

[14] U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, Guidance on Application of the Fair Housing Act to the Screening of Applicants for Rental Housing, at 13, Apr. 29, 2024, https://www.hud.gov/sites/dfiles/FHEO/documents/FHEO_Guidance_on_Screening_of_Applicants_for_Rental_Housing.pdf.

[15] *See, e.g,* Colorado (Colo. Rev. Stat. § 38-12-904); Minnesota (Minn. Stat. § 504B.173); Oregon (Or. Rev. Stat. § 90.304); Cook County, Illinois (Code of Ordinances of Cook County, Ill., § 42-38); District of Columbia (D.C. Code § 42-3505.10), Philadelphia (Phila. Code chs. 9-810, 9-1108, 9-1121).

[16] NCLC, Comments re CFPB Notice of Proposed Rulemaking re Prohibition on Creditors and Consumer Reporting Agencies Concerning Medical Information (Regulation V), Docket No. CFPB–2024–0023/RIN 3170–AA54, at 21, Aug. 12, 2024, at https://www.nclc.org/resources/nclc-comments-to-cfpb-proposed-to-ban-medical-debts-on-credit-reports/.

[17] Subsidized housing providers are required to provide such information to applicants.

For private housing, respondents reported that landlords disclosed the reasons for rejecting an application only sometimes (40%) or rarely/never (39%). Only 20% of respondents reported that landlords usually/always provided the reasons for a denial.[18]

Some of the respondents provided more details of the problems presented by a lack of disclosure. As set forth in our *Digital Denials* report:[19]

A legal aid attorney from Louisiana reported that:

> We also see very mixed results in the frequency and specificity of disclosures by landlords of reasons for application denials. Sometimes tenants hear nothing back at all, and sometimes they are told a vague explanation verbally (i.e., "your credit is not good enough," or "something came back on your credit"). Often when applicants receive an automatically generated adverse action notice from a tenant screening company, it will include a list of factors that impacted the recommendation or the score provided by the screening company to the landlord. These factors are very vague and provide little guidance to tenants who may have inaccurate or misleading information they would like to dispute (i.e., "Rental History Does Not Meet Property Requirements"). The notices will also sometimes include several factors that "contributed" to the denial, when in reality there was only one factor that excluded the applicant from eligibility for the property, like an eviction record or a debt to a prior landlord. This can lead to confusion and a sense of hopelessness for an applicant who is rejected, rather than providing a roadmap on how to challenge a denial.

A nonprofit attorney from Louisiana reported:

> If there's a reason provided it is usually vague and insufficient for the person to know what the specific issue was - usually just "bad credit" or "something" came back on the report. The denial letters are equally unhelpful and do not state directly or specifically what the issue was that caused denial.

A legal services attorney from Georgia wrote:

> They usually just say that the screening report recommended a denial. They are not usually making an independent determination as to whether that recommendation was proper.

A legal services attorney from North Carolina wrote:

> [T]hey normally just say it because of their rental record but do not provide any other information or detail and their [sic] is no way to dispute the information on the report to get housed. The only option tenant has is to contact the agency that ran the report and try

[18] Digital Denials at 70.

[19] *Id.* at 70-72.

> to dispute the information they provided directly with them. However, by then, the tenant is looking for a new place because the landlord has already told them no. The problem is, each landlord uses a different agency so even if you dispute it with one agency and they correct it, there is no guarantee the next landlord will use that same agency or use a different agency -

A nonprofit attorney from Indiana reported that:

> In my 30 years of doing this, I have only had one client who got this information. In talking to legal services and clinical advocates around the state, only one other attorney had ever seen a written disclosure and she had only seen one in her career.

In some cases, a tenant screening CRA might even be discouraging landlords from disclosing the reason for rejection. A housing advocate from Oregon stated:

> I have noticed that landlords are discouraged by the screening companies for sharing the reason. And when a tenant asks the reason the landlord often claim that they do not have the reason and ask the tenant to contact the screening company to get the reason. Often the tenants are not given information about how to reach the screening company.

A legal services attorney from Georgia reported:

> Even when a tenant asks for it, the landlord often tells them to go directly to the screening company for the report. I've had some landlords even tell a tenant that they are not allowed to share the report with the tenant directly.

This evidence makes clear that there is a widespread practice of providing no information or no useful information to applicants about the reasons their applications were denied. This practice harms applicants for rental housing, and reduces any possibility that the tenant screening system will operate in a self-correcting way with respect to rental housing. By requiring landlords to provide ECOA adverse action notice that include a statement of reasons for a denial, the CFPB would benefit tenants, help ameliorate the housing crisis, and improve the accuracy and integrity of tenant screening.

III. The CFPB Should Prohibit the Use of Medical Debt in Tenant Screening

a. There is no evidence that medical debt is relevant to whether someone will be a good renter

We are thrilled and excited that the CFPB has proposed a rule that would ban medical debt from appearing in credit reports used by creditors. But we urge the CFPB to go further and extend this ban to credit reports used for tenant screening. This crucial step will prevent medical expenses from harming the ability of a renter to obtain decent and affordable housing. The harms of

medical debt on credit reports are discussed at length in NCLC's comments to this proposed rule,[20] and apply just as much to credit reports used for tenant screening.

If medical debt is not a good predictor of creditworthiness, it is even less likely to be predictive of whether someone will be a good tenant. The fact that someone got sick should never be used to keep them from getting a roof over their heads. Yet as we know, credit history is too often used inappropriately by landlords[21] – about 90 percent according to TransUnion.[22] In 2023, NCLC conducted a survey of tenant advocates which found that 84 percent of these advocates had a client who was denied rental housing due to their credit history.[23] And as discussed in Section III.c on pages 10-12 of this petition, a survey of advocates and housing counselors found that a sizable number have observed clients who had medical debt on their credit reports and were denied rental housing.

As one Wisconsin consumer recently recounted in an op-ed piece:

> In 2019 alone, I paid over $11,000 out of pocket for surgery, doctor co-pays, and other medical expenses. This hefty sum was despite having health insurance. While I managed to pay off these debts, they left an indelible mark on my credit report. And due to recurring healthcare needs, I pay an estimated $10,000 out of pocket each year.
>
> Recently, the duplex I had called home for four years was sold, and I was forced to start looking for a new place to live. With a credit score of over 750, a well-paying job, and an impeccable rental history, I felt confident that it would be easy for me to find a new place to live.
>
> Despite my excellent credit score, several prospective landlords raised concerns about my past medical bills. One landlord even told me directly that he was concerned about the likelihood of me getting sick again and not being able to pay rent. I was considered a liability not because of my current financial behavior, but because of my health history.[24]

[20] NCLC, Comments re CFPB Notice of Proposed Rulemaking re Prohibition on Creditors and Consumer Reporting Agencies Concerning Medical Information (Regulation V), Docket No. CFPB–2024–0023/RIN 3170–AA54, Aug. 12, 2024, at https://www.nclc.org/resources/nclc-comments-to-cfpb-proposed-to-ban-medical-debts-on-credit-reports/.

[21] Chi Chi Wu and Ariel Nelson, National Consumer Law Center, Mission Creep: a Primer on Use of Credit Reports & Scores for Non-Credit Purposes, Aug 3, 2022, https://www.nclc.org/resources/mission-creep-a-primer-on-use-of-credit-reports-scores-for-non-credit-purposes/

[22] TransUnion SmartMove, *TransUnion Independent Landlord Survey Insights* (Aug. 7, 2017) (85% of landlords run an eviction report on all applicants and 90% run credit and criminal background checks on all applicants), www.mysmartmove.com/SmartMove/blog/landlord-rental-market-survey-insights-infographic.page

[23] Digital Denials at 54.

[24] Kat Klawes, Opinion: The hidden toll of medical debt on housing and employment in Wisconsin, Up North News, August 5, 2024, https://upnorthnewswi.com/2024/08/05/opinion-medical-debt-in-wisconsin/

b. Prohibiting consideration of medical debt in tenant screening promotes racial and disability justice

Another reason to prohibit the use of medical debt in credit reports used for tenant screening is the disparities by race and disability status. With respect to race, a 2022 NCLC report documented how 27.9 percent of Black households were saddled with medical debt compared to 17.2 percent of white non-Hispanic households.[25] Even after the removal of many medical debts with the NCRAs' voluntary charges, racial disparities persist. The CFPB's April 2024 report found that Black and Latino consumers were more likely to have medical debts remaining after the voluntary changes.[26] A recently released data tool from the Urban Institute[27] shows similar racial disparities.[28]

Another disparately impacted protected class are consumers with disabilities, who are more than twice as likely as those without disabilities to have medical debt. Based on the Census Bureau's 2021 Survey of Income and Program Participation (SIPP), 13 percent of consumers with disability have medical debt versus 6 percent of those without a disability.[29]

These disparities with respect to protected classes implicate the Fair Housing Act. Indeed, the U.S. Dept. of Housing and Urban Development recently released guidance noting the "significant and recognized limitations of credit scores as a predictor of likelihood to pay rent."[30] The guidance cautioned that, given the disparities in credit scores for protected classes such as race and disability, "overreliance on credit history poses a significant risk of having an unjustified discriminatory effect based on race or other protected characteristics."[31] Part of that unjustified discriminatory effect is how medical debt disproportionately harms communities of color and consumers with disabilities.

Given that the ECOA is an anti-discrimination statute, it is especially appropriate to prohibit the consideration of medical debt, with its significant disparities by race and disability. This is

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[25] Berneta Haynes, National Consumer Law Center, The Racial Health and Wealth Gap: Impact of Medical Debt on Black Families, at 2, March 8, 2022, https://www.nclc.org/resources/the-racial-health-and-wealth-gap/.

[26] CFPB, Recent Changes in Medical Collections on Consumer Credit Records, March 2024, ttps://files.consumerfinance.gov/f/documents/cfpb_recent-changes-medical-collections-on-consumer-credit-reports_2024-03.pdf

[27] Urban Institute, The Changing Medical Debt Landscape in the United States, July 20, 2024, https://apps.urban.org/features/medical-debt-over-time/.

[28] NCLC, Comments re CFPB Notice of Proposed Rulemaking re Prohibition on Creditors and Consumer Reporting Agencies Concerning Medical Information (Regulation V), Docket No. CFPB–2024–0023/RIN 3170–AA54, at 4-5, Aug. 12, 2024, https://www.nclc.org/resources/nclc-comments-to-cfpb-proposed-to-ban-medical-debts-on-credit-reports/ (discussing racial disparities).

[29] Shameek Rakshit, Peterson-KFF Health System Tracker, The burden of medical debt in the United States, Feb. 12, 2024, https://www.healthsystemtracker.org/brief/the-burden-of-medical-debt-in-the-united-states/ (analyzing 2021 SIPP data).

[30] U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, Guidance on Application of the Fair Housing Act to the Screening of Applicants for Rental Housing, at 16, Apr. 29, 2024, https://www.hud.gov/sites/dfiles/FHEO/documents/FHEO_Guidance_on_Screening_of_Applicants_for_Rental_Housing.pdf.

[31] *Id.*

especially true given that medical debt is not predictive and thus there is no "legitimate business justification" for its use in either credit granting or tenant screening.[32]

c. NCLC Survey: Whether medical debt keeps tenants out of housing

In July 2024, NCLC conducted a survey about the impact of medical debts included in credit reports on renters seeking housing. The survey was sent to members of several listservs focused on consumer, housing counseling, medical debt, and elder issues.

We received 57 responses from 25 states, but one respondent did not answer Question One and another respondent did not answer Question Two, so only 56 responses were counted for each question. The majority of responses (74%) were received from housing counselors. We also received a number of responses from legal services attorneys (18%). The remaining respondents included a Resource Navigator, an Executive Director, a Program Director, and a Regional Property Manager for a nonprofit housing provider.

The survey asked respondents the following questions:

> *Question One: Have you ever represented a client that you knew had medical debt on their credit report whose application for private housing was denied? (emphasis added)*
>
> *Question Two: Have you ever represented a client that you knew had medical debt on their credit report whose application for subsidized housing was denied? (emphasis added)*

For private housing, a significant minority (39%) of respondents replied Yes to Question One. With respect to Question Two regarding subsidized housing, about one-quarter (23%) of respondents replied Yes.

Table 1: Survey Respondent that Have Represented a Client with Medical Debt on Credit Report Whose Application for Private Housing Was Denied (n=56)

	Percent
Yes	39
No	50
Other	10

[32] National Consumer Law Center, Credit Discrimination, § 4.3 (8th ed. 2022), updated at www.nclc.org/library (discussing the ECOA's disparate impact standard).

Table 2: Survey Respondent that Have Represented a Client with Medical Debt on Credit Report Whose Application for Subsidized Housing Was Denied (n=56)

	Percent
Yes	23
No	64
Other	13

Many of the "Other" responses involved respondents who did not know or were unsure whether their clients had medical debts on their credit reports, likely because the respondents were not looking for it or were only aware that clients were rejected due to their credit reports or scores.

The survey also gave respondents the opportunity to give narrative responses. For private housing, some of the narratives included:

> "This is INCREDIBLY common"
> - Housing counselor from North Carolina

> "I am a current housing advocate. However, before I became an advocate, I was a property manager for private, multi-family housing. I accepted potential residents' applications and I saw where the only negative issues they had on their credit report was medical debt that had gone in to collections. These applicants had stellar rental histories, stable income, and were ideal candidates for housing. However, because of the number and amount of medical debt in collections, the third party credit reporting system marked them as 'fail.'"
> - Housing counselor from Georgia

> "A private landlord told my past client that because their medical/collection debt on their credit report exceeded $2,000, that they would have to pay it down to $2,000 or less before they could approve them for his rental property."
> - Housing counselor from Maryland

> "Again, there are so many clients I've served who have been denied private housing due to medical debt on a credit report that it became routine and still very frustrating."
> - Housing counselor from North Carolina

For subsidized housing, narratives included:

> "It was a large part of her debt. Due to this her score was too low to pass the screening criteria for tenancy."
> - Housing counselor from California

"Our resident management system includes bad debt from medical bills when running a credit check.

- Regional property manager for nonprofit housing provider in Nevada

"I have had dozens of senior homeowners who were seeking subsidized housing because they were losing their home to foreclosure but couldn't qualify because of medical debt."

- Housing counselor from North Carolina

In conclusion, it appears that a sizable minority of survey respondents have observed medical debt presenting a barrier to tenants in the private rental housing market. Medical debt also appears to be an issue to securing subsidized housing. While only a minority of survey respondents observed the issue, it was widespread enough to be reported by 25 advocates and counselors in 18 states.[33] This provides an indication that medical debt presenting a barrier to rental housing occurs on a meaningful and troubling basis. For this reason, the CFPB should prohibit consideration of medical debt in tenant screening

IV. The CPPB Has Legal Authority to Define Rental Leases As "Credit"

The CFPB could extend the ban on medical debt in credit reports either: (a) in the proposed new section, 12 C.F.R. § 1022.38, in Regulation V itself or (b) by treating rental housing leases as "credit" under the ECOA for the limited purposes of application to this proposed section. The CFPB has solid legal authority to do either. We discuss the former option in our comments on the proposed FCRA rule;[34] this petition discusses the legal authority for the latter option.

a. The CFPB has broad authority under the ECOA

The CFPB has ample regulatory authority to define rental housing as "credit" under the ECOA for limited purposes. This authority remains strong even after the Supreme Court's decision in *Loper Bright v. Raimando*.[35]

In one of the first federal appellate decisions after *Loper Bright*, the Seventh Circuit interpreted the ECOA's grant of rulemaking authority to the CFPB in *CFPB v. Townstone*. The ECOA's language states:

> The Bureau shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain but are not limited to such classifications, differentiation, or

[33] Ten respondents reported that they had represented clients with medical debt on their credit reports whose application for housing was denied for both private and subsidized housing. Thirteen respondents said they had represented clients with this issue for private housing only. Two respondents said they had represented clients with this issue for subsidized housing only.

[34] NCLC, Comments re CFPB Notice of Proposed Rulemaking re Prohibition on Creditors and Consumer Reporting Agencies Concerning Medical Information (Regulation V), Docket No. CFPB–2024–0023/RIN 3170–AA54, at 21-22. Aug. 12, 2024, https://www.nclc.org/resources/nclc-comments-to-cfpb-proposed-to-ban-medical-debts-on-credit-reports/.

[35] Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024).

> other provision, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.[36]

The Seventh Circuit noted that this language was modeled on the similar provision in the Truth in Lending Act (TILA).[37] The TILA regulatory authority provision was the subject of the Supreme Court's decision in *Ford Motor Co. v. Milhollin*,[38] which held that courts should defer to the Federal Reserve's interpretation of TILA unless "demonstrably irrational.[39] *Milhollin* predates *Chevron v. NRDC*, was reaffirmed by the Supreme Court in 2004,[40] and the Supreme Court left the decision untouched in *Loper Bright*.

The Seventh Circuit in *Townstone* went on to state:

> Congress vested the Board (and later the Bureau) with the authority to issue regulations *"necessary or proper to effectuate the purposes of this title"* or *"to prevent circumvention or evasion thereof."* 15 U.S.C. § 1691b(a). In endowing the Board with authority to prevent *"circumvention or evasion,"* Congress indicated that the ECOA must be construed broadly to effectuate its purpose of ending discrimination in credit applications.[41]

The Seventh Circuit also cautioned against reading provisions "in a crabbed fashion that frustrates the obvious statutorily articulated purpose of the statute."[42]

The purpose of the ECOA is to address financial discrimination in the marketplace. Congress designed the adverse action requirement to fulfill the dual goals of consumer protection and education.[43] The Senate report for the ECOA amendments stated that the provision:

> fulfills a broader need: rejected credit applicants will now be able to learn where and how their credit status is deficient and this information should have a pervasive and valuable educational benefit. Instead of being told only that they do not meet a particular creditor's standards, consumers particularly should benefit from knowing, for example, that the reason for the denial is their short residence in the area, or their recent change of employment, or their already over-extended financial situation. In those cases in which the creditor may have acted on misinformation or inadequate information, the statement of reasons gives the applicant a chance to rectify the mistake.[44]

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[36] 15 U.S.C. § 1691b(a).

[37] Consumer Fin. Prot. Bureau v. Townstone Fin., Inc., 2024 WL 3370023, at *3 (7th Cir. July 11, 2024).

[38] 444 U.S. 555, 100 S. Ct. 790, 63 L. Ed. 2d 22 (1980).

[39] Id. at 565.

[40] Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 124 S. Ct. 1741, 158 L. Ed. 2d 450 (2004).

[41] 2024 WL 3370023, at *5 (emphasis added).

[42] *Id.*

[43] Fischl v. Gen. Motors Acceptance Corp., 708 F.2d 143, 146 (5th Cir. 1983).

[44] S. Rep. No. 94-589 (1976), reprinted in 1976 U.S.C.A.A.N. 403, 406.

Applying the adverse action requirement to rental housing leases would effectuate the purposes of the ECOA. Providing adverse action notices that include a statement of reasons would have "a pervasive and valuable educational benefit." If a landlord "may have acted on misinformation or inadequate information, the statement of reasons gives the applicant a chance to rectify the mistake."

One provision of the ECOA not discussed in *Townstone* but worth noting is § 1691a(g), which states:

> Any reference to any requirement imposed under this subchapter or any provision thereof includes reference to the regulations of the Bureau under this subchapter or the provision thereof in question.

This paragraph is *in addition* to the ECOA's general grant of rulemaking authority in § 1691b. It is also worth noting that § 1691a is the section that sets forth the definitions in ECOA, including the definitions of "credit" and "creditor." Section 1691a(g) gives the CFPB specific authority to interpret the definitions in § 1691a. It is the sort of provision that the Supreme Court described in *Loper Bright v. Raimondo* that "expressly delegate[ ] to an agency the authority to give meaning to a particular statutory term. . . . [or] empower an agency to prescribe rules to fill up the details of a statutory scheme.[45] Judicial review of such interpretations, according to the Supreme Court, is limited to whether the agency has acted within the bounds of the authority and engaged in reasoned decisionmaking. If the answer is yes, the court should not substitute its own judgment or interpretation in this instance. As discussed below, treating rental housing leases as "credit" and landlords as "creditors" is a reasonable interpretation of the ECOA.

b. Including rental leases in the scope of the ECOA is a reasonable interpretation of the Act

Extending the terms "credit" and "creditor" to rental housing leases and landlords for purposes of the adverse action notice requirement and the medical debt credit reporting ban would constitute a reasonable interpretation of the ECOA. While, as discussed below, one Circuit and a few District Courts have held differently, that should not be an impediment because, as discussed in the previous section, the CFPB has the solid statutory authority to issue a contrary interpretation.

Most leases are for a fixed term of at least several months,[46] often one year. This means the landlord is providing the property or services for the entire term of the lease, but only receiving payment in monthly installments. This fits the description of "purchas[ing] property or services and defer[ring] payment therefor."[47] And if the tenant terminates the tenancy before the end of the lease term, they often can be held liable for the rent for the remainder of the term, subject to

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[45] Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 2263 (2024) (internal citations and quotations omitted).
[46] Olivia O'Brien, apartments.com, The Different Types of Rental Lease Agreements, https://www.apartments.com/blog/the-different-types-of-rental-lease-agreements ("A fixed-term lease is the most traditional lease. They're called fixed term because tenants and landlords are agreeing to abide by the lease for a fixed amount of time, normally six to 14 months.")
[47] 15 U.S.C. § 1691a(d).

the landlord's duty to mitigate the damages.[48] As discussed below, landlords frequently pursue renters for this amount.[49]

It is true that a landlord has the right to evict a renter if the rent is not paid, but that is not determinative of the status of rent as "credit." After all, a mortgage lender has the right to foreclose if the mortgage is not paid. Many states prohibit displacement of a tenant until the eviction process is complete; during that time the tenant has the "right" to services while deferring payment, which is another way a tenancy can be considered credit. Similarly, states often have a grace period after rent is due during which the landlord cannot charge a late fee or begin eviction proceedings, which also could be considered credit.

Covering landlords as "creditors" also finds support in the Red Flag Clarification Act of 2010.[50] That Act added § 1681m(e)(4) to the FCRA, which was intended to exclude professionals, such as lawyers or health care providers, who bill their clients after services are rendered and would otherwise be considered "creditors" under the ECOA, and thus the FCRA.[51] The exclusion of lawyers and doctors from the term "creditors" under § 1681m(e) implies that such entities ARE creditors for purposes of rest of FCRA, and thus ECOA, demonstrating the very broad scope of the term.[52]

We recognize that the Seventh Circuit in *Laramore v. Richie Realty Management Company*[53] and several other courts[54] have held that rental housing leases did not constitute "credit" under the ECOA. However, an earlier decision from the Northern District of Illinois reached the opposite conclusion.[55] The fact that courts could differ on this issue means that it is a reasonable interpretation of the ECOA to extend its scope to rental housing leases, especially because these

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[48] Anne O'Connell, State Laws on When a Landlord Must Rerent After a Tenant Breaks a Lease, Nolo.com, updated April 11, 2024, https://www.nolo.com/legal-encyclopedia/landlords-duty-to-rerent-when-a-tenant-breaks-a-lease.html.

[49] *See* Digital Denials at 60-61; April Kuehnhoff, et al., Unfair Debts With No Way Out: Consumers Share Their Experiences With Rental Debt Collectors, at 6, Oct. 7, 2022, https://www.nclc.org/wp-content/uploads/2022/10/UnfairDebts-Rpt.pdf.

[50] Pub. L. No. 111-319 (2010), codified at 15 U.S.C. § 1681m(e)(4).

[51] National Consumer Law Center, Fair Credit Reporting, § 9.2.7.2.2 (10th ed. 2022), updated at www.nclc.org/library.

[52] Also note that subparagraph (A)(i) of § 1681m(e)(4) provides that a "creditor" under the ECOA is still consider a creditor even for this narrowed definition for the Red Flag rules if it "(i) obtains or uses consumer reports, directly or indirectly, in connection with a credit transaction." Thus, Congress believed that a strong indicator that an entity is a "creditor" under the FCRA is whether an entity uses consumer reports, which landlords certainly do use.

[53] 397 F.3d 544 (7th Cir. 2005).

[54] *See, e.g.*, Olli v. Waypoint Homes, Inc., 104 F. Supp. 3d 1012, 1014–1015 (N.D. Cal. 2015).

[55] Ferguson v. Park City Mobile Homes, 1989 WL 111916 (N.D. Ill. Sept. 15, 1989).

leases would constitute credit for two very limited purposes. Furthermore, courts have held that other types of leases, such as consumer leases[56] and cellular phone service,[57] constitute credit.

In holding that rental leases were not credit, courts have viewed rental housing leases as essentially pay-as-you-go transactions. For example, the Seventh Circuit relied on the idea that "The typical residential lease involves a contemporaneous exchange of consideration—the tenant pays rent to the landlord on the first of each month for the right to continue to occupy the premises for the coming month. *A tenant's responsibility to pay the total amount of rent due does not arise at the moment the lease is signed.*"[58] A California District Court held that "residential leases do not create a debt for the entire term, but rather involve the contemporaneous exchange of consideration for a future use, month by month."[59]

But as discussed above, many landlords consider the entire amount of a lease to be owed by the renter, and more importantly, will pursue the renter for unpaid rent if the tenant vacates the unit before the end of the lease. The tremendous number of rental debt items on credit reports is a strong indicator of this phenomenon. The CFPB found that there are about 4.55 million rental debt items on credit reports.[60] With 44 million renter households in the US,[61] this is potentially 1 in 10 households. As we noted in *Digital Denials*:

> The number of third-party debt collectors collecting rental debt has increased dramatically. According to a report commissioned by TransUnion, "[t]he most significant change" in the type of debt collected by third-party debt collectors during 2022 was in tenant-related debt "given the end of the eviction moratorium." The report found that 33% of the 113 third-party debt collection companies surveyed collected "tenant/landlord or rental debt" in 2022, compared to just 7% in 2021, 5% in 2020, and 8% in 2019.[62]

This increase in the collection of rental debt is a development that post-dates the *Laramore* decision. While the Seventh Circuit in *Laramore* did note that it was dealing with term leases

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[56] Brothers v. First Leasing, 724 F.2d 789 (9th Cir.1984). The Ninth Circuit in *Brothers* relied heavily on the fact that consumer leases are regulated under the Consumer Leasing Act, which like the ECOA is part of the Consumer Credit Protection Act. *Id.* at 794-796. And the court noted "Prospective lessors run extensive credit checks on consumer lease applicants just as they do in the case of credit sales applicant." *Id.* at 794. Similarly, landlords run both credit checks as well as use tenant screening reports. Both types of reports are, of course, regulated under the Fair Credit Reporting Act, which is also part of the CCPA.

[57] Williams v. AT & T Wireless Servs., Inc., 5 F. Supp. 2d 1142, 1145 (W.D. Wash. 1998). *Cf.* Murray v. New Cingular Wireless Servs., Inc., 432 F. Supp. 2d 788, 791 (N.D. Ill. 2006), aff'd, 523 F.3d 719 (7th Cir. 2008)(offer of "free" phone conditioned on cellular service is credit; distinguishing *Laramore*).

[58] Laramore v. Richie Realty Mgmt. Co., 397 F.3d 544, 547 (7th Cir. 2005)(emphasis added).

[59] Olli v. Waypoint Homes, Inc., 104 F. Supp. 3d at 1015 (N.D. Cal. 2015).

[60] CFPB, Market Snapshot: An Update on Third-Party Debt Collections Tradelines Reporting, Feb. 2023, at 16, https://files.consumerfinance.gov/f/documents/cfpb_market-snapshot-third-party-debt-collections-tradelines-reporting_2023-02.pdf (showing that rental debt collection items comprise 2.6% of debt collection tradelines), *id.* at 18 (175 million debt collection tradelines). Multiplying 175 million by 0.026 is 4.55 million.

[61] U.S. Census Bureau, Housing Inventory Estimate: Renter Occupied Housing Units in the United States [ERNTOCCUSQ176N], retrieved from FRED, Federal Reserve Bank of St. Louis; https://fred.stlouisfed.org/series/ERNTOCCUSQ176N, May 16, 2023.

[62] Digital Denials at 61 (citations omitted).

involving monthly payments,[63] the court appears not to have considered a situation where the tenant vacated before the end of the lease term. The fact that landlords not only treat renters as owing debts for the entire term of the lease, but will seek to collect those amounts, means that leases should be treated as the landlord granting tenants the right to incur debt and pay in monthly installments, which meets the definition of "credit" as the right "to incur debts and defer its payment."

Finally, the Seventh Circuit in *Laramore* relied in part on an interpretation by the Federal Reserve Board that the ECOA did *not* cover residential leases, finding the interpretation to be persuasive.[64] Since the CFPB has now taken over the role of interpreting the ECOA from the Federal Reserve, the Bureau's interpretation should similarly receive persuasive weight, if based on a reasoned analysis. Concluding that rental housing leases should be considered "credit" would be more than reasonable because (1) contrary to the Seventh Circuit's decision in *Laramore*, landlords consider the entire amount of rent for the lease term to be owed by the tenant, not just the rent for the months that the tenant actually resided in the unit, and are increasingly placing the amounts for collection plus credit reporting; and (2) the policy considerations arising out of the rental housing affordability and availability in the U.S. have become compelling.

* * * *

We appreciate the CFPB's numerous initiatives to protect consumers, such as the proposed rule to prohibit creditors from considering medical debts and prohibit the inclusion of medical debts in credit reports used by creditors. We encourage the CFPB to continue these efforts by extending those medical debt protections to reports used for tenant screening purposes and to require the provision of ECOA adverse action notices to renters. Please also consider this a petition for rulemaking under Section 553(e) of the Administrative Procedure Act.

If you have any questions about these comments, please contact Chi Chi Wu at cwu@nclc.org. Thank you for your consideration.

Respectfully submitted,

National Consumer Law Center (on behalf of its low-income clients)

[63] Laramore v. Richie Realty Mgmt. Co., 397 F.3d at 547, n. 2.
[64] *Id.* at 547-548.