

Disaster-Related Credit Reporting Options

Research Brief

MAY 2020

As economic damage from the Covid-19 pandemic continues to spread, declining credit scores could make it harder for consumers and small businesses to access the credit they need to ride out and rebuild from the crisis. Although Congress adopted new protections in March, stakeholders are deeply divided over whether additional action will be needed in the face of what may be a protracted and uneven recovery.

This Research Brief is the first in a series of publications intended to facilitate post-pandemic adjustments to credit scoring and underwriting models to support an inclusive and rapid recovery process. The series will build on several reports that FinRegLab published in the past year evaluating the potential for new data sources to augment traditional models to increase access to credit for underserved populations and reduce losses and costs for lenders.¹

This edition analyzes the current options under consideration for disaster-related credit reporting, as well as providing related historical and market context. To date debates are focusing on three primary ways to try to mitigate impacts on consumers:

- » **Historical approach:** For consumers who reach out to their lenders or servicers, use existing codes and reporting guidance under the industry's Metro 2® data standard to note that the consumer has been affected by a disaster and/or that a forbearance or deferral has been put in place.
- » **CARES Act requirement:** For consumers who request and obtain a forbearance or deferral, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)² requires that their account be reported as having the same status (e.g., current or delinquency level) as it did before the pandemic so long as the consumer is complying with the terms of the accommodation.
- » **Suppression options:** Prohibit negative data from being added to consumer reports for several months, either across the board or upon request by individual consumers.

Like other policy decisions concerning the pandemic, assessing these options has enormous urgency because of their potential impact on the quality—speed, breadth and fairness—of our economic recovery over the months and years to come. But the analysis requires careful attention to how data standards are defined and implemented, and is further complicated by the fact that credit scoring and underwriting models can take dozens of factors into account and may vary as to whether and how particular elements are considered.

It is also critical to consider not just immediate effects under existing models, but also how regulatory changes could interact with already unprecedented levels of uncertainty to shape how industry uses consumer report information and scoring models going forward. Even in the absence of substantial changes to economic conditions, data elements, or regulatory requirements, routine updates to credit scoring and underwriting models typically take industry several years to develop and implement, and negative information takes 7 to 10 years to roll off of individuals' reports.³ Accordingly, the decisions made on these issues within a matter of weeks will affect how companies adjust their models during and after the pandemic recovery and the financial health of borrowers and lenders for years to come.

Background

Metrics on the economic impact of the Covid-19 pandemic have already matched or exceeded records set during the 2008 financial crisis, and many are continuing to worsen. The U.S. economy shrank 4.8% in the first quarter of 2020, and by the end of April unemployment rates reached 14.7% overall and 16% to 19% among women, African-American, and Hispanic/Latino workers.⁴ Consumer spending, which drives nearly two-thirds of the nation's economic activity, posted its steepest monthly decline in 60 years in March and is expected to show even bigger drops for April.⁵ And though about half of states are beginning to loosen pandemic restrictions in an attempt to restart business activities, concerns are growing that volatility in infection rates and other factors could substantially complicate and prolong the recovery process.⁶ Internationally, the pandemic is already shaping up to be the worst economic shock since the Great Depression.⁷

As incomes plummet and economic uncertainty increases,⁸ consumers are seeking accommodations on credit and other major expenses at an unprecedented rate. Mortgage forbearance requests increased by nearly 100 times baseline levels between early March and late April, and the total number of loans in forbearance stood at 7.54% by early May.⁹ Auto forbearance rates reached 7.5% for the industry as a whole in late April and as high as 25% for some individual lenders; credit card and private student loan forbearances appear to be lower but also increasing.¹⁰ Surveys suggest that one in four renters did not pay their full rent in April, and a variety of utility companies suspended service shut offs and began waiving late fees for distressed customers in March.¹¹

Thanks both to these short-term accommodations and to government stimulus spending, increases in delinquency rates have been relatively modest so far. The economic downturn is also not yet fully manifesting on consumer and small business credit reports. Because many companies report payment information to credit bureaus on a batch basis, a bill that was due on March 30 will not be reported as 30 days delinquent until some time in May at the earliest.

But the terms on which companies are granting short-term relief vary widely outside of the mortgage and student loan industries, large portions of which were subjected to baseline requirements under the CARES Act.¹² Lenders are scrambling to assess likely losses in outstanding loans, recalibrate capital and lending standards, and adapt underwriting models to reflect current economic conditions and future uncertainty. While federal regulators have urged them to work with distressed borrowers, there are limits to how much individual lenders can absorb in terms of delayed or waived revenue—particularly non-banks that are not subject to capital requirements—and concerns among banks about meeting safety and soundness expectations.¹³ As a result, growing numbers of lenders are lowering limits and closing credit card accounts, halting the processing of applications for home equity lines of credit, setting prices at levels that make it impracticable for homeowners to use cash-out refinances to access their equity, and tightening credit standards for regular refinancings. By one model mortgage credit has tightened 25% since the outbreak of the virus.¹⁴

Along with growing uncertainty about the extent of additional short-term federal support after initial stimulus funds and savings are exhausted, these market developments are fueling concerns that serious long-term delinquencies, substantial declines in credit scores, and tightening loan standards will make it hard for applicants to access credit to bridge until the economic recovery can spread broadly across all sectors. Although Congress adopted one measure to address disaster-related credit reporting in March as discussed below, consumer advocates and some policymakers argue that much stronger action is needed in the near future to protect consumers from score declines due to events beyond their control.

The decisions made in the consumer reporting system could also have important implications for small business owners because lenders often check personal credit reports and scores in the process of underwriting commercial credit.¹⁵ Commercial credit reports and scores that focus on businesses' payment histories rather than their owners' could also be affected by pandemic-related economic disruptions, though they have not been a focus of extensive policy debates to date.¹⁶ Accordingly, this report concentrates on the consumer reporting context. FinRegLab is publishing a separate research note on ways that data and technology can facilitate the application process for small business owners and independent contractors seeking federal stimulus funds under the Payroll Protection Program, other federal loans, and credit more generally.¹⁷

Short-Term Policy Options for Credit Reporting

As discussed in FinRegLab's previous reports,¹⁸ U.S. consumer credit markets are heavily dependent on credit reports derived from three nationwide consumer reporting agencies (NCRAs)—Equifax, Experian, and TransUnion—which each maintain files on more than 200 million U.S. residents. These reports often in turn serve as the basis for calculating credit scores that group applicants into bands based on the groups' predicted relative likelihood of default. Some sources estimate that third-party credit scores from models developed by the Fair Isaac Corporation (FICO) and NCRA joint venture VantageScore are used in more than 90% of underwriting decisions for mortgages, credit cards, and auto loans.¹⁹ The third-party credit scoring models are proprietary, but FICO reports that 35% of its scores depend on payment history, 30% on amounts owed, 15% on the length of credit history, and 10% each on new credit and credit mix. VantageScore reports that total credit usage, balance, and

available credit are most influential in its most recent model, followed in descending order by credit mix and experience, payments history, age of credit history, and new accounts.

Individual lenders vary both as to how heavily they rely on NCRA reports and third-party scores and as to the specific ways that they factor the information into their credit approval and pricing decisions. For instance, lender models may include not only third-party scores but also attributes from the underlying credit reports and/or proprietary scores that they have built internally. And because credit scoring ranges and distributions fluctuate over time according to economic conditions, lenders may recalibrate how they evaluate scores during downturns even in the absence of scoring model or regulatory changes.

Debates about negative impacts on third-party credit scores from the pandemic have largely focused on payment history, given that a single account that is more than 30 days past due can reduce scores by 40 to 100 points.²⁰ However, other factors could also affect scores. For example, depending on individual consumers' circumstances, credit utilization might rise in times of economic distress or fall in response to greater uncertainty and reduced opportunities to make certain types of expenditures. "Hard" inquiries where a consumer report is pulled in connection with an application for new credit can also cause shifts in credit scores. In the 2008 financial crisis, these factors led initially to increases in the number of consumers in the very lowest and highest parts of the credit score spectrum, followed by a later shift toward the lower middle as longer-term effects played out.²¹

In assessing mitigation options, it is helpful to start with the existing system that governs reporting to the three NCRAs. Although the federal Fair Credit Reporting Act (FCRA) establishes various general requirements for the consumer reporting system as a whole, outside of certain narrow topics the law and its regulations do not dictate the content or formatting of data contained in consumer reports.²² Rather, creditors and other companies furnish information to the NCRAs pursuant to a voluntarily adopted data standard called Metro 2.²³

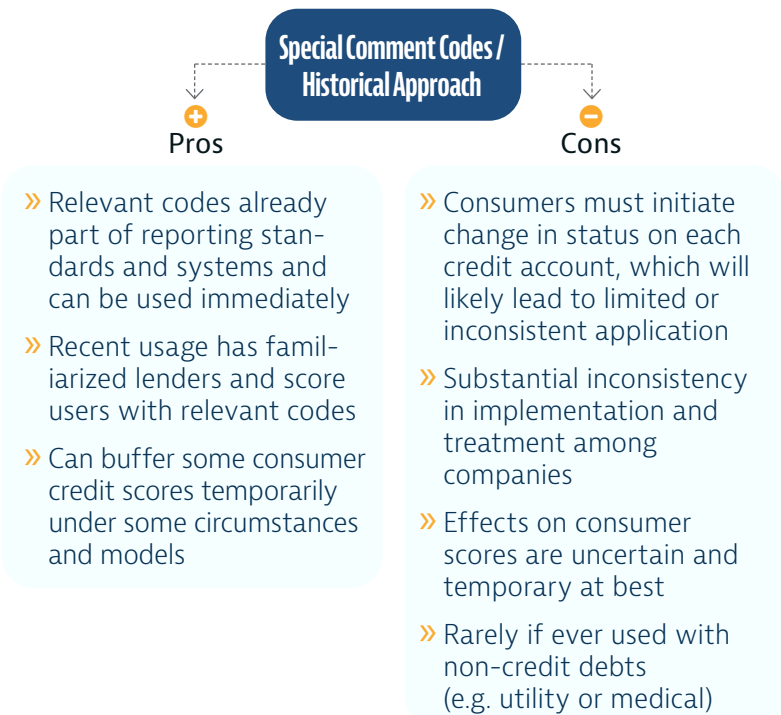
Special Comment Codes/Historical Approach

Overview. The fact that a particular consumer has been affected by natural or other declared disaster is usually reflected in one of three ways under the Metro 2 standard. First, the system provides an option to use "special comment codes" to further explain the status of an account, in addition to core fields that are considered mandatory for reporting on a regular basis, such as the amount due, current or delinquent status, and credit limits. Two of the special comment codes are frequently used in disaster situations: "AW" for affected by a natural or declared disaster and "CP" for situations in which a forbearance plan is put in place. A third alternative is to report a particular account (often called a tradeline) as deferred by entering "D" as a character in a field called "terms frequency." Furnishers also frequently enter a "D" character in a third field called "payment history profile," though the character is also used there in connection with bankruptcies and certain other non-disaster situations in which no payment history is available for the particular month.²⁴ For all three options, industry standards also provide guidance on how to provide consistent reporting for several other relevant fields, such as account status and amount due.

Stakeholders we interviewed indicated that for any of these options to be put in place, consumers must typically call the creditor or loan servicer for each separate account to explain their circumstances and work out a forbearance or deferral agreement for the latter two categories.²⁵ However, there are reports in connection with the pandemic that at least three mortgage servicers have placed “CP” codes on consumers’ tradelines when they have called to inquire about forbearance options but not actually requested a plan, or even in the absence of calls from consumers.²⁶ And while industry standards address how the coding should work in the special comment code field and other relevant fields, they leave it to individual creditors to decide whether further explanation through use of the special comment codes is warranted in the first instance, which particular code is most appropriate (generally only one comment code is allowed at a time), any requirements for proof of hardship, and when circumstances have changed sufficiently to justify changing or removing a particular code. There are also some specialized reporting practices in particular credit markets.²⁷

To the extent that industry standards create firm expectations for particular situations, the consequences of acting inconsistently with those benchmarks varies depending on the circumstances. Industry stakeholders have indicated that they do not believe that failing to use the special comment codes would be valid grounds for a customer dispute because they are not mandated fields, but that a furnisher would have an obligation under the FCRA to investigate and correct information if it had reported a forbearance when no plan was in place or failed to report deferrals.²⁸ And while furnishers have a general duty under the FCRA to establish and implement reasonable policies and procedures for implementing federal guidelines regarding the “accuracy and integrity” of the information they report, regulators and courts have not generally treated inconsistencies with Metro 2 standards in itself to be legal violations.²⁹

Another important feature with regard to the special comment codes is that the data format does not capture the date that the code was placed on an account and the date that it was lifted. Instead, the codes are simply there or not there as credit information is updated each month. Accordingly, creditors who pull reports reflecting an AW or CP flag cannot tell from the flag itself how long the disaster or forbearance has been affecting the consumer’s finances, and creditors who pull a report at some date after one of those codes has been removed will not be able to tell that it was once in place unless they have access to historical snapshots of data from the relevant time periods. However, any “D” codes will still be visible in the terms frequency and payment history profile fields for the months in which they were in place.



THE INTERSECTION BETWEEN METRO 2 STANDARDS AND FCRA REQUIREMENTS

Furnishing is a voluntary activity in the U.S. reporting system, and the FCRA did not originally regulate furnisher activities. Amendments in 1996 and 2003 extended some legal obligations to furnishers, but many are enforceable only by regulators instead of by individual consumers in court.³⁰ Proposals to impose new burdens on furnishers through either industry or regulatory standards often trigger debates about whether companies will simply choose to stop providing information, though many furnishers use reporting as a way to incentivize consumers to pay past debts and are heavy users of consumer reports in their own right.

Rules implementing the obligation to maintain reasonable policies and procedures regarding the accuracy and integrity of information took effect in 2010.³¹ Accuracy focuses on whether the reported information correctly identifies the appropriate consumer, reflects the account's terms and liability, and reflects the consumer's performance with respect to the account. Integrity focuses on whether the information is substantiated by the furnisher's records, is in a form that minimizes the chance that it will be reflected inaccurately in a consumer report, and contains information in the furnisher's possession that federal regulators have determined would be "materially misleading" for purposes of evaluating creditworthiness and other specified traits if it was omitted from the consumer's report.

To date, the only specific item that has been identified as materially misleading if it was omitted is the consumer's credit limit, which is critical for determining consumers' credit utilization rates. More generally, the federal guidelines that furnishers must consider in developing their policies and procedures state that furnishers should address the use of "standard data reporting formats and standard procedures for compiling and furnishing data, where feasible."

Inconsistencies with Metro 2 standards have not generally been treated as FCRA violations in their own right, although they are often cited as part of broader cases about accuracy and integrity issues. For example, the Consumer Financial Protection Bureau and California Attorney General have sued student loan servicer Navient for failing to maintain reasonable policies and procedures, alleging among other things a failure to use the codes designated in Metro 2 guidance for discharge of loans due to disability caused students' reports to appear as if they had defaulted on their loans. The CFPB has brought a few other enforcement cases in which failure to follow Metro 2 standards played a role.³²

Consumer reporting agencies also have an obligation under the FCRA to follow "reasonable procedures to assure maximum possible accuracy of the information" in preparing consumer reports.³³ They perform some types of monitoring for data errors, but stakeholders disagree as to the extent of their obligations in working with furnishers with regard to general Metro 2 compliance. Concerns about prompting furnishers to stop reporting are raised in connection with industry standards as well as regulatory requirements; for instance, they are one of the reasons that the original Metro standard was not formally retired when Metro 2 was adopted. Instead, it was dropped nearly two decades later after several state attorneys general brought enforcement actions.³⁴

Various industry stakeholders report that use of the special comment codes has become more common in response to events such as Hurricane Katrina (2005) and Hurricane Harvey (2017). But there can be substantial variation among the 15,000 creditors that furnish information to the three NCRAs, and practices are continuing to evolve.³⁵ For example, a study by the Consumer Financial Protection Bureau after Hurricane Harvey in 2017 found that lenders in the Houston Metropolitan Statistical Area (MSA) were far more likely to use the disaster code than what the report called a "deferral" code.³⁶ While a relatively small number of lenders used disaster codes overall—roughly 7% in auto, 16% in mortgage, 15% in student, and 6% in credit cards—firms with larger shares of certain

lending markets tended to use the disaster code more frequently. In particular, auto and mortgage lenders with market shares of 18.5% and 35.9%, respectively, used the codes for more than half of their borrowers in the MSA. In contrast, almost no student or credit card lenders used the codes for more than 50% of their borrowers.³⁷ In 2020, in contrast, stakeholders report that forbearance and deferral codes seem to be used more frequently in the mortgage and student lending industries.³⁸

Model developers also differ in their treatment of the information in light of the limitations on historical data regarding when the special comment codes are added or deleted from a particular tradeline. In particular, VantageScore made a decision in developing the 3.0 and 4.0 editions of its models to ignore negative payment history for the affected tradeline during the months in which only a disaster code is in effect. As a result, consumers may experience a temporary change in their credit scores because delinquencies that occurred prior to the occurrence of a disaster are temporarily ignored by the scoring model. Where codes reflect a forbearance or deferral, however, the scoring models do not take the deferred balance into account for purposes of credit utilization calculations, but do not change their treatment of past payment history. Thus, scores may shift in either direction. FICO made a decision not to take this approach. Its models do not change based on whether a special comment code is in place, but FICO does account for situations where a “D” code is reflected in the payment history profile field. Accordingly, the two scoring systems are most different in their treatment of accounts for which only a disaster code (AW) is in place without use of the “D” characters to reflect deferrals or forbearance.

Individual lenders who have developed their own proprietary credit scoring models or who build data from consumer reports directly into their underwriting models may also vary in whether and how they treat the codes or related fields. Although the special comment codes are often described by industry stakeholders as a way to work with consumers in distress, there are no specific industry or regulatory standards addressing how they should be treated by users of consumer reports. In connection with the pandemic, there are reports that some lenders are rejecting consumers for mortgage refinance applications because they have CP or AW codes on one or more accounts, even if they are in fact making full payments.³⁹

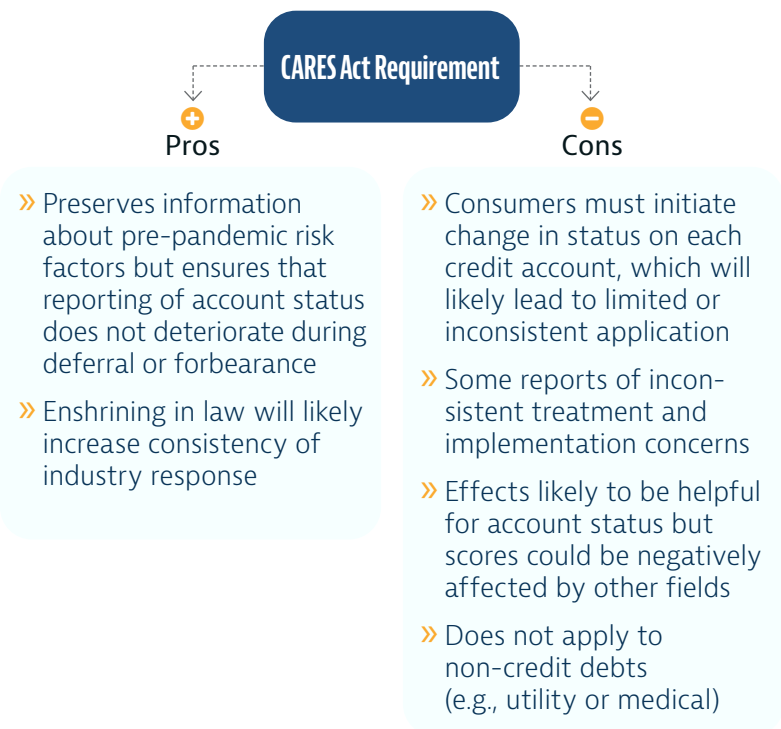
Given inconsistency in the implementation and treatment of the special comment codes, it is perhaps not surprising that evidence about their impacts on consumers’ credit scores is unclear. The CFPB report found in the aftermath of Hurricane Harvey that the fraction of tradelines in Houston MSA with disaster flags increased from 0% in August 2017 to 5% in September to 10.4% in October and November, and then declined steadily to 1.2% by April 2018. Consumers who had at least one account flagged with a disaster code tended to have substantially higher balances and delinquency rates and somewhat lower credit scores prior to the hurricane than consumers whose accounts were never flagged. After the hurricane, default rates for consumers with AW flags dropped below the rates for consumers without flags for a few months, but then rose above the rate for the non-flagged group. Credit scores for both groups improved modestly over several months after the hurricane, particularly for consumers in the bottom 5th percentile of distribution, but the non-flagged group saw larger gains.⁴⁰ Another report by the Urban Institute tracking credit scores and other indicators of financial health in areas affected by natural disasters found that negative impacts on scores often lingered for multiple years and questioned based on the CFPB report whether better industry coordination and regulatory guidance were needed to ensure that flags were not removed too early.⁴¹

Policy debates. In light of this background, relying primarily on the special comment codes and/or deferral characters to mitigate impacts of the pandemic on consumer reports and scores poses several concerns. For example, consumer advocates criticize options that are dependent on individual consumers and furnishers to execute because of the risk of process breakdowns, for instance if a consumer is too ill or busy to call in to initiate the process, if creditors' help lines are overwhelmed or they are unwilling to work with consumers, or if creditors simply fail to execute the coding properly for the special comment field and various related data elements. At the same time, reports that some servicers are preemptively placing CP codes on accounts for consumers who are not in fact in forbearance plans and that some lenders are rejecting mortgage refinance applications from consumers with CP or AW codes have raised concerns that overuse of the codes could work to consumers' disadvantage.

Even aside from the reports that some lenders may be beginning to treat the codes as negative indicators, there are unanswered questions about how much the special comment codes actually help consumers both in the short and long run, given that companies do not treat the codes consistently and that the codes disappear from consumer reports entirely once the creditors stop reporting them. As a result, depending on how the codes are used, they might mask prior negative payment history while they are in place and do not provide explanatory value once they are removed. Indeed, depending on how creditors are reporting related fields, consumers' scores might change in unexpected ways after the codes are deleted because of how scoring models account for information that was previously being disregarded.

CARES Act Requirement

Overview. The CARES Act requirement does not focus on the special comment codes but rather focuses on reporting about the account status on credit obligations for consumers who are affected by the Covid-19 disease during the covered period defined by the law. For consumers who were current going into the pandemic and who obtain an "accommodation" from their creditor or servicer, the law requires that the account continue to be reported as current for so long as the consumer remains in compliance with the accommodation. Similarly, for consumers who were already at a specified level of delinquency (such as 30 or 60 days), their accounts will continue to be reported at that same delinquency level for so long



as they remain in compliance with their accommodation. However, if the consumer is able to cure the delinquency during the pandemic, the account status would be upgraded accordingly.⁴²

An accommodation is defined under the law to include an agreement to defer one or more payments, make partial payments, forbear any delinquent amounts, modify a loan or contract, or any other assistance or relief granted to a consumer who is affected by the Covid-19 pandemic during the covered period. The covered period extends from January 31, 2020, until 120 days after the end of the national emergency declared by the President on March 13, 2020. The law does not specify criteria or process requirements for determining whether a particular consumer is affected by the disease.⁴³ The requirement is enforceable by federal and state agencies under the Fair Credit Reporting Act.⁴⁴

Since the law's passage, the three NCRAs, the Consumer Data Industry Association, and other industry organizations are providing webinars, FAQs, and other educational materials focusing on both CARES Act compliance and using the codes for disaster, forbearance, and deferral during the pandemic in order to provide more fulsome information on consumers' status.⁴⁵ However, the recent reports that some lenders are rejecting mortgage refinance applications based on CP codes has caused concerns as creating potential tension with the intent of the legislation. Some stakeholders have reported that furnishers may have more implementation challenges for already delinquent consumers because their computer systems are not designed to freeze a particular delinquency status in place. There is also widespread agreement about the need for training and education programs, particularly as lenders may be hiring new customer service staff in light of higher call volumes.

Policy debates. Industry stakeholders are still in the process of analyzing the impact of the CARES Act approach on scoring models, which is complicated by the fact that models may take into account several dozen fields. Given the importance of account status to credit scoring models, they believe it will substantially reduce the chance that consumers' scores are negatively impacted by pandemic disruptions, although recent reports suggest that some consumers have experienced score declines in connection with forbearances.⁴⁶

Even prior to these reports, consumer advocates and some other stakeholders worried that the CARES Act was insufficient, in some cases describing it as doing "little to nothing" at a practical level.⁴⁷ Given that a single delinquency can substantially damage credit scores, critics argue that there is still too much risk of process breakdowns either because consumers or companies are simply overwhelmed or because particular companies are unwilling to work with consumers in the first instance. Although the CARES Act mandated automatic forbearances on most federal student loans until the end of September and gave consumers with federally backed mortgages the right to obtain forbearances for up to a year if they are facing financial hardships due to the pandemic, stakeholders report there are still substantial consistency challenges in connection with mortgage implementation and parts of those markets that are not covered by the law.⁴⁸ Regulatory requirements and industry practices in dealing with accommodation requests are also substantially less standardized in other markets. Advocates worry that consumers will not be able to obtain accommodations that trigger the CARES Act requirements in the first instance, or that any such assistance will expire long before they can restabilize their finances. In addition, because the law is focused specifically on credit obligations, it does not provide assistance with regard to reporting of utility accounts, medical debts, eviction-related records from courts, or other non-credit information.

Suppression options

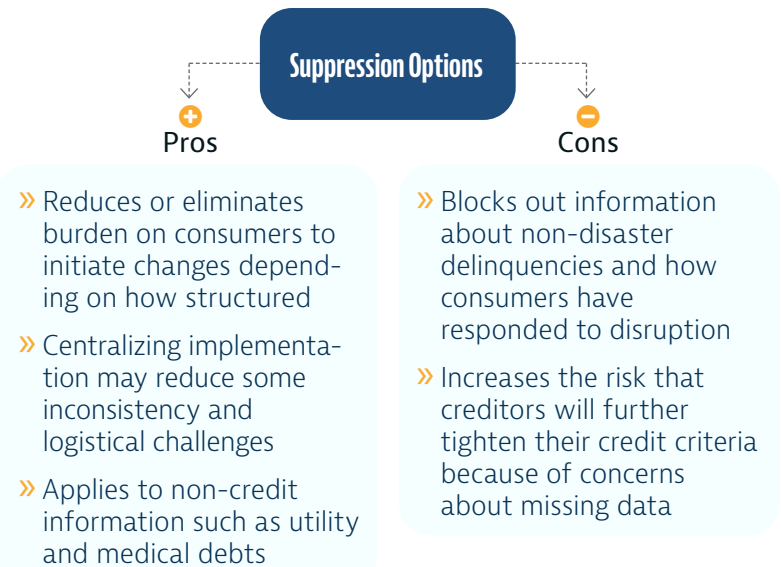
Overview. In light of the disadvantages of the previous two options, consumer advocates and some policy-makers have pushed for a more categorical approach that would prohibit inclusion of negative information in consumer reports altogether. Such an approach could be structured in different ways, but the primary focus of debate at the federal level has been S. 3508 (Schatz & Brown) and H.R. 6321 (Waters & Sherman). Both bills were introduced prior to the CARES Act and would apply not only to financial hardships from the Covid-19 pandemic but to future major disasters.

The bills would bar any person (not just creditors) from furnishing to consumer reporting agencies any “adverse item of information that was the result of any action or inaction” that occurs during a designated disaster period.⁴⁹ Consumer reporting agencies would in turn be required to exclude any such information from the reports that they provide to end users. In addition to the categorical bans during the designated periods, individual consumers could block adverse information for an additional 270 days by filing a request with the Consumer Financial Protection Bureau that would then

trigger obligations by consumer reporting agencies to delete the affected adverse information from their consumer reports. Consumers would be subject to the penalty of perjury in submitting the request but would not have to provide affirmative evidence of economic hardship.

The bills do not generally define what types of information would constitute “adverse item[s] ... that [were] the result of any action or inaction,” although the Fair Credit Reporting Act already uses the term “adverse item of information” as part of a list that includes bankruptcy, accounts placed for collection or charged off, tax liens, arrest records, and criminal convictions.⁵⁰ Designated disaster periods would last at least 120 days, which means that a consumer who requests a 270-day extension would be able to block adverse information for at least 13 months.⁵¹

The House bill also contains a provision that would prohibit companies that create and implement credit scoring models from treating the absence, omission, or deletion of information pursuant to its provisions as a negative factor or variable. It would also prohibit the same companies from revising existing scoring models or implementing new models during the Covid-19 emergency period or a covered major disaster period that would identify a significant percentage of consumers as being less creditworthy when compared to the previous model. “Significant percentage” is not defined in the legislation. The House bill would also ban reporting of medical debts with respect to medical expenses relating to treatments arising from Covid-19 or a major disaster, regardless of when the expenses are incurred.



Both bills would be enforceable both by state and federal agencies and against consumer reporting agencies through private lawsuits. Several state governors have also endorsed the concept of no negative reporting during the pandemic, and a few legislatures have adopted or are considering bills on the same topic.⁵² The most ambitious of the bills focus on options that would allow consumers to contact consumer reporting agencies to place a single alert on their entire report, rather than calling each furnisher individually, and would then prohibit the relevant CRA from providing adverse information that is a result of the pandemic to lenders or other credit report users and/or prohibit users from treating adverse information in a negative way for credit scoring or other purposes. However, state legislation on the issue may be preempted by the Fair Credit Reporting Act.⁵³

Policy debates. Proponents of suppression like it because it depends substantially less on individual consumers and furnishers to trigger and implement its protections. In this respect, it stands in contrast to the options discussed above because it would still provide benefits to consumers who are too ill or busy to call their creditors or who are working with lenders who are uncooperative or overwhelmed. Core aspects of implementation would be performed by a relatively limited number of consumer reporting agencies that have an independent obligation to exclude and/or delete adverse information instead of relying solely on furnishers to effectuate the legislation. While implementation may still be challenging for the CRAs in monitoring and processing incoming data flows,⁵⁴ some industry stakeholders have suggested that some furnishers would have difficulty turning off reporting of negative information absent substantial reprogramming of their systems. Because furnishing data is voluntary, there is some concern that some companies might choose to stop reporting altogether rather than make systems changes.

In addition to the potential logistical advantages of centralizing implementation, proponents also believe that a more categorical approach could reduce the risk that lenders and/or investors would apply negative assumptions to affected consumers as compared to narrower interventions. Particularly in the context of the pandemic, given both the breadth of the systemic impacts and the depth of the effects on particular sectors and populations, they argue that a broader approach is potentially more fair, more efficient, and more likely to achieve the overall objectives than options that are targeted at the individual borrower or furnisher level.

The very breadth of the approach is what has triggered substantial opposition from many industry stakeholders, however. Unlike existing provisions of the FCRA that address the treatment of medical data and situations involving identity theft, which cover narrower sets of data and contain more specific language outlining the responsibilities of furnishers, consumer reporting agencies, and credit report users,⁵⁵ the suppression legislation sweeps much more broadly. For example, one set of concerns focuses on the definition of “adverse item[s] ... that [were] the result of any action or inaction,” and how that definition would apply not only to credit reports by NCRAs but by other types of consumer reporting agencies such as checking account CRAs that report general balance and transaction information. Stakeholders suggest that deciding how to treat information that could affect consumers positively or negatively in different contexts could be both complicated and time-consuming to implement and could have unexpected consequences for both consumers and lenders. They have also suggested that effectively forcing lenders to underwrite based on stale information could make it more difficult for consumers to access credit, as well as creating particular challenges in calculating credit utilization depending on how the legislation was structured. Some

have also suggested that the fact that a consumer has called in to request a deferral or forbearance could potentially be a positive signal relative to consumers who do not affirmatively try to manage their finances.

Critics have also voiced concern that the federal bills would wipe out at least four months of negative information for consumers who are not in fact facing pandemic-related financial hardships and will decrease incentives for consumers to stay current with their obligations. Others have questioned whether a general threat of penalty of perjury is sufficient to eliminate moral hazard with regard to the 270-day extensions and have voiced concerns that credit repair organizations would abuse the process. Proponents of suppression argue that low- to moderate-income consumers who are the most likely to suffer severe economic effects over time are less likely to game the system due to time and other constraints and that creating a regime that requires detailed proof of hardship will be inefficient and unduly burdensome given the unprecedented circumstances.

Beyond these specific concerns, there is deep discomfort with the idea of creating large gaps in large numbers of credit records. Credit scoring models are based on the basic premise that automated analyses of individuals' payment histories and current obligations can yield important insights into their ability and propensity to repay new debts going forward. The system has significant weaknesses and flaws—including reliance on data that does not provide a holistic view of consumers' financial circumstances, disproportionate gaps in data about racial minorities and other underserved groups, and concerns that scoring models do not sufficiently account for differences in default rates that may be driven by historical disadvantages or differences in product terms.⁵⁶ Yet it also allows lenders to perform faster, more sophisticated analyses that can account for substantial variations among applicants in a more objective and consistent fashion than subjective decisionmaking by individual loan officers. A regime that makes coverage even less comprehensive and/or increases moral hazard causes many stakeholders to fear that creditors and/or investors will simply further tighten credit standards because they don't trust credit reporting and scoring systems to provide reliable predictions, which could deprive many deserving consumers of access to credit no matter what their numeric credit scores. Critics are also concerned that providing 9-month extensions under the federal legislation even for consumers who are able to stabilize their finances in less time could make it more difficult for model builders to acquire an accurate picture of how consumer behaviors and risk patterns evolve after immediate hardships have passed for purposes of adjusting credit models going forward.

On a related note, industry stakeholders have expressed particular concern with the provision in the House bill that would prohibit persons that create and implement scoring models from treating the absence, omission, or deletion of information pursuant to its provisions as a negative factor or variable. They believe that such a provision could be complicated in practice to implement and raise potential tensions with safety and soundness requirements and with regulations implementing the Equal Credit Opportunity Act that encourage the adoption of credit scoring models that are "empirically derived [and] demonstrably and statistically sound."⁵⁷ At the very least, stakeholders suggest that extensive agency studies and guidance would be required to help facilitate the process of adjusting credit models to comply with the requirement. Even if the language is interpreted to apply only to third-party scoring models, stakeholders note that individual lenders have to decide how to treat such scores and the underlying information on credit reports when managing portfolio-

level risks and making individual decisions on whether to extend credit and on what terms. This is part of the reason that even routine updates to credit scoring models can take several years to develop and implement. Accordingly, stakeholders suggest that both the suppression of underlying information and the restriction on treating the absence of information as a negative factor could substantially affect the timelines for restabilizing scoring and underwriting models after the immediate crisis.

Market and Policy Considerations

It is too early to gauge how much of an impact the Metro 2 fields and CARES Act requirements are making in pandemic-related credit reporting. As of April 11, credit bureau statistics indicate that the number of consumers with AP, CW, deferral, or loan modification codes on one or more accounts had increased to about 8 percent nationwide, compared to 7 percent in late January.⁵⁸

However, the discussion above makes clear that there is no silver bullet to the debates about how to handle short-term credit reporting concerns in connection with the economic disruption caused by the Covid-19 pandemic. Existing credit scoring models are not built for the unprecedented conditions we now face, and the pandemic could produce long-term changes in the economy, consumer behavior, and various other risk factors that we do not yet understand and cannot predict with certainty. Accordingly, under any scenario reliance on existing credit models is likely to decrease for some time to come. At the same time, any decisions made now about what information feeds into consumer reports and how it is treated by scoring and underwriting models could have substantial impacts on the pace and nature of creditors' adjustments going forward. Thus, it is critical to consider not just the immediate effects but also how particular options could change creditors' broader reliance on consumer reports, credit scoring, and automated underwriting more generally.

As additional data becomes available within the next several weeks, several considerations may be helpful in assessing potential options going forward.

» **The complexity of the system makes precision in evaluating and communicating about particular options both more difficult and more important.** As discussed above, different credit scoring and underwriting models vary as to which broad categories of data and specific fields they consider as well as to how they treat that information. Although third-party credit scores based on credit reports at NCRAs are often a primary focus of policy debates, the broader ecosystem involves thousands of furnishers on one side and thousands of lenders and other users of credit reports and scores on the other. While understanding how different options do or do not affect third-party scores under existing models is a critical question, it does not provide a complete picture. The effectiveness and efficiency of implementing particular options will also depend on the extent to which furnishers must change operations or programming, how lenders react to any changes in third-party scoring models and credit reports, and whether lenders are subject to any restrictions on the treatment or use of particular data in their own underwriting models. This presents substantial challenges both in evaluating different policy options and in communicating with diverse stakeholders and consumers about related impacts.

But failing to do so could increase the risk of unexpected or unintended consequences, distrust, and complaints going forward.

» **To the extent that some stakeholders are drawn to suppression options because of concerns about potential burdens on individual consumers to contact each lender or servicer, there could be other ways to address such issues.**

Although initial problems with call wait times have lessened, consumer advocates remain concerned about successive waves of distressed borrowers.⁵⁹ However, other options could be used to reduce burdens on both consumers and lender call centers.

For example, the National Foundation for Consumer Counselling has worked with its non-profit member agencies to expand use of an existing secured system operated by Peregrin Service Corp. to communicate with multiple creditors at the same time without having to work through call center channels. Under the enhanced system, consumers can reach out to any NFCC member agency to obtain initial advice about their debt; the agency in turn can collect critical data for transmission to Peregrin, which then sorts the information by creditor and communicates on a batch basis within 24 hours of receipt. If creditors are willing to accept the information from Peregrin and to process requests for forbearance, deferral, or other accommodations, this would reduce burdens on consumers and call centers alike. Creditors would then be subject to the CARES Act requirements in how they report any accommodations. While this route is promising, however, its scope is limited to date because credit card companies and other creditors vary as to their processes. Some credit card companies that accept Peregrin communications in connection with debt management plans that were adopted prior to the pandemic are not willing to grant new deferrals or forbearance plans absent a direct request by the consumer. And while Peregrin was already being used by some agencies and unsecured creditors prior to the crisis, some companies are not currently connected with Peregrin to receive communications.

Some state legislation has also focused on giving consumers the ability to file a single alert with a consumer reporting agency to apply to their entire file, rather than on having to communicate with each individual creditor. Similar systems are already used under the FCRA for reports of identity theft and active-duty status for members of the military, and require the NCRAs to notify each other when they receive an alert request.⁶⁰ Industry stakeholders caution that consumer reporting agencies do not have direct relationships with consumers and are not in a position to evaluate or validate reports of financial hardship in the same way that an individual lender may be. However, the fact that there is an infrastructure already in place for similar purposes could facilitate implementation.

» **Addressing concerns about the lack of consistency in underlying accommodation programs and/or government assistance for hardship cases could affect the tenor of credit reporting debates.**

As noted above, the CARES Act created certain baseline requirements for substantial segments of the mortgage and student lending industries, though even in those markets there have been reports of implementation challenges. Whether and how to structure accommodations for non-covered loans (including auto loans, credit cards, and other unsecured loans) has been left to the discretion of individual companies. Lenders appear to vary widely both as to what they will

say publicly about their accommodation programs and as to the underlying length and structures. For example, some credit card companies have announced that they will offer forbearance programs for up to a specified number of payments, while others appear to be making decisions one month at a time, and others simply have stated that borrowers should call them for assistance.⁶¹ As a result, it is unclear how long the CARES Act provisions regarding credit reporting will apply. Evidence of more consistent industry practices and/or regulatory standards about accommodations as well as greater certainty about the extent to which additional government aid will be available to those who face lingering economic hardships could reduce the concerns about serious delinquencies that are fueling the debate about the need for additional credit reporting interventions.

- » **Approaches that temporarily or permanently mask negative information that is not disaster-related present some of the most challenging tradeoffs.** As currently structured, both the special comment code system and federal suppression legislation raise concerns about potentially masking negative payment history that is not in fact related to Covid-19 or other disasters. Given the unprecedented scale of the pandemic's effects and concerns about the prospects of a protracted and uneven recovery, the case for minimizing process burdens on consumers and erring on the side of credit access is particularly strong. At the same time, masking negative history that is not disaster-related also makes it more difficult for lenders to evaluate potential credit risks, even beyond the uncertainty that is inherent in the particular disaster itself. And loans that borrowers cannot in fact afford to repay will have negative consequences for both borrowers and lenders. Accordingly, such options warrant especially careful consideration about potential tradeoffs. While some alternatives may not be practical for immediate implementation due to programming requirements or other considerations, they might permit more careful balancing of interests over time or for future disasters.
- » **Acknowledging and addressing the limitations of current credit reporting, scoring, and underwriting systems will become even more important as the nation strives for a rapid and inclusive recovery.** Given the need to recalibrate existing scoring and underwriting models both in response to immediate economic conditions and to potential longer-term changes in behavior coming out of the pandemic, the crisis could present an opportunity to move the broader system toward adoption of data and practices that will be both more predictive and more inclusive over the long term. For example, some stakeholders report that they are relying more heavily on cash-flow information from bank accounts and other sources in response to the pandemic because it provides a clearer picture of income flows and more timely information about applicant finances than consumer reports. FinRegLab's research suggests that this could have long-term benefits for borrowers and lenders alike, though many lenders are not positioned to begin immediately using to such sources. The pandemic may accelerate some of these transitions, but also present new complications due to time and resource constraints and uncertainty about recovery. Later publications in this series will address some of these broader topics with an eye toward facilitating a rapid, inclusive recovery and more resilient consumer and small business credit sectors.

Endnotes

- ¹ FinRegLab, *The Use of Cash-Flow Data in Credit Underwriting: Market Context & Policy Analysis* (2020) (hereinafter FinRegLab, *Cash-Flow Data Policy Analysis*); FinRegLab, *The Use of Cash-Flow Data in Credit Underwriting: Policy Overview* (2020); FinRegLab, *The Use of Cash-Flow Data in Credit Underwriting: Small Business Spotlight* (2019) (hereinafter FinRegLab, *Small Business Spotlight*); FinRegLab, *The Use of Cash-Flow Data in Credit Underwriting: Empirical Research Findings* (2019).
- ² Pub. L. 116-136, § 4021 (Mar. 27, 2020).
- ³ Third-party credit scoring models are frequently built on at least 24 months of payment history, but take additional time for analysis and production by model developers. Once the companies have rolled out new models, individual lenders have to go through their own processes to validate the models, decide whether to adopt them, and make related adjustments to their internal underwriting and pricing criteria and processes. After the 2008 financial crisis, for example, VantageScore rolled out its first major model update in 2013 and FICO in 2014, and lender implementation took additional time. With regard to information on credit reports, the FCRA prohibits consumer reporting agencies from providing various types of negative payment history after 7 years and bankruptcies after 10 years, although there is an exception for large loans. 15 U.S.C. § 1681c(a)(1)-(5), (b).
- ⁴ Samantha Schmidt, *Women Have Been Hit Hardest by Job Losses in the Pandemic. And It May Only Get Worse*, Wash. Post (May 9, 2020); U.S. Jobs Report Shows Clearest Data Yet on Economic Toll, N.Y. Times (May 8, 2020); Harriet Torry, *U.S. Economy Shrank at 4.8% Pace in First Quarter*, Wall St. J. (Apr. 29, 2020).
- ⁵ Sarah Chaney & Harriet Torry, *Coronavirus Prompts Record Drop in Consumer Spending*, Wall St. J. (Apr. 30, 2020).
- ⁶ Paul Hannon & Saabira Chaudhuri, *Why the Economic Recovery Will Be More of a 'Swoosh' Than V-Shaped*, Wall St. J. (May 11, 2020); Lindsay Dunmir, *'W-Shaped' Recovery May Be Too Optimistic, Fed's Powell Suggests*, Reuters (Apr. 30, 2020); Heather Long, *There's a Growing Possibility of a W-Shaped Economic Recovery — and It's Scary*, Wash. Post (Apr. 22, 2020).
- ⁷ Paul Hannon, *Record Contraction in Eurozone Bodes Ill for Global Economy*, Wall St. J. (Apr. 30, 2020); Jack Ewing & Matina Stevis-Gridneff, *European Slump Is Worst Since World War II, Reports Show*, N.Y. Times (Apr. 30, 2020); Alan Rappeport & Jeanna Smialek, *I.M.F. Predicts Worst Downturn Since the Great Depression*, N.Y. Times (Apr. 14, 2020).
- ⁸ The CARES Act provides supplemental unemployment benefits through July 31, 2020, that are helping to protect some low-income families from income losses. However, substantial numbers of people have not been able to access the funds because of technology breakdowns and other bottlenecks in state application processes. Patrick McGreevy & Kim Christensen, *Californians Battling Unemployment Amid Coronavirus Are Stymied by State Agency's Tech Issues*, L.A. Times (Apr. 27, 2020); Bobby Caina Calvin, *Florida Among Slowest States to Process Unemployment Claims*, abc.com (Apr. 20, 2020); Matthew Haag, *They Filed for Unemployment Last Month. They Haven't Seen a Dime*, N.Y. Times (Apr. 17, 2020).
- ⁹ Mortgage Bankers Association, *Blog, Share of Mortgage Loans in Forbearance Increases to 7.54%* (May 4, 2020); Mortgage Bankers Association, *Blog, Share of Mortgage Loans in Forbearance Increases to 6.99%* (Apr. 27, 2020).
- ¹⁰ Telis Demos, *Auto Loans Are Running on Fumes*, Wall St. J. (Apr. 29, 2020); AnnaMaria Andriotis & Orla McCaffrey, *Millions of Credit-Card Customers Can't Pay Their Bills. Lenders Are Bracing for Impact*, Wall St. J. (Apr. 25, 2020); Susan Tompor, *People Struggling to Pay Bills During Coronavirus Crisis Could Get Hit Again Starting in June*, USA Today (Apr. 24, 2020); Kevin Wack, *Plenty of Takers for Offers to Skip Credit Card, Student Loan Payments*, Am. Banker (Apr. 23, 2020).
- ¹¹ Tompor; Edward Klump & Kristi E. Swartz, *Coronavirus and Electricity: 3 Issues to Watch*, E&E News (Apr. 9, 2020); Nathan Bomey, *How Utility, Phone and Internet Companies Are Giving Consumers a Break During Coronavirus Pandemic*, USA Today (Mar. 16, 2020).
- ¹² Section 4022 of the CARES Act provides consumers who are experiencing a financial hardship directly or indirectly due to the Covid-19 national emergency with a right to request a forbearance of up to 180 days on federally backed mortgage loans such as those that are purchased or securitized by Fannie Mae and Freddie Mac and loans insured, guaranteed, or made by various federal agencies. Consumers must affirm their hardships but other proof is not required, and forbearances can be extended for an additional 180 days at the consumer's request. No extra fees, penalties, or interest may be imposed during the forbearance period. Pub. L. 116-136, § 4022 (Mar. 27, 2020). The CARES Act also provided an automatic forbearance on most federal student loans through September with no accrual of interest. *Id.* § 3513.
- ¹³ The CARES Act and federal regulators have delayed and slightly eased rules on banks in recent weeks to ensure that they can keep lending to households and businesses during the downturn, but there are ongoing broader debates about whether and when to resume the process of implementing heightened capital requirements that began after the last financial crisis. Victoria Guida, *Pandemic-Linked Rollbacks Spark Concern Banks May Shake Off Hated Rules*, Politico (Apr. 9, 2020); Tory Newmyer, *The Finance 202: Banks Win Long-Sought Deregulation in Coronavirus Rescue Package*, Wash. Post (Mar. 26, 2020).

- ¹⁴ Joe Light, Mortgage Lenders Tighten Screws on U.S. Credit in Echo of 2008, Bloomberg (May 8, 2020); Kate Berry, Cash-Out Refis Dry Up as Price Hikes Prove Too Costly, Am. Banker (May 4, 2020); Jennifer Surane, Credit Cards Start Offering Lower Limits Amid U.S. Outbreak, Bloomberg (Apr. 23, 2020); Michael Neal & Laurie Goodman, Blog, The Pandemic is Shrinking the Mortgage Credit Box, Urban Institute (Apr. 17, 2020). One online survey of 1039 credit card holders in late April found that one in four respondents reported having their limits reduced or their accounts closed within 30 days; if extrapolated to the U.S. population as a whole that would represent about 50 million card holders. Matt Schulz, Blog, Nearly 50 Million Cardholders Had Credit Limits Reduced, Card Closed Involuntarily in Past Month, CompareCards by LendingTree (May 4, 2020).
- ¹⁵ FinRegLab, Small Business Spotlight at 7.
- ¹⁶ Crafting solutions for small business credit scoring could also be more complicated because commercial credit reporting and scoring models are substantially less standardized than for personal reports and consumer scoring. *Id.*
- ¹⁷ FinRegLab, Research Note, Payroll Protection Program: Possible Fintech Solutions (2020)(forthcoming).
- ¹⁸ FinRegLab, Cash-Flow Data Policy Analysis at 8-12. See also FinRegLab, Small Business Spotlight at 4-8 for further discussion of the use of consumer credit scores in commercial lending, as well as commercial credit reporting, scoring, and automated underwriting.
- ¹⁹ VantageScore licenses its model to the three NCRAs, so the NCRAs are the producers of the credit scores under its system. Landlords, employers, and various other businesses also rely on consumer credit reports for various other purposes, though the extent to which they rely on NCRAs records and FICO or VantageScore credit scores as compared to more specialized information varies.
- ²⁰ Bob Sullivan, The Simple Chart That Can Explain Why Your Credit Score Dropped, Credit.com (Jan. 13, 2015) (elaborating on information reported in Consumer Financial Protection Bureau, Consumer Credit Reports: A Study of Medical and Non-Medical Collections (2014)). The largest effects tend to be on consumers with the highest scores. The effect of isolated 30- or 60-day delinquencies lessens substantially within about two years, but longer delinquencies or more frequent occurrences can affect scores for up to seven years. Alessandra Malito, A New Nightmare for Furloughed Workers Preventing Damage to Their Credit Scores, MarketWatch.com (Jan. 13, 2019).
- ²¹ Rachel Bell, Blog, FICO Scores Shift During Recession, fico.com (Sept. 19, 2011).
- ²² The FCRA does impose certain limitations on consumer reporting agencies in forwarding negative information and details about medical debts, and affirmatively requires CRAs to provide certain information about bankruptcies, voluntary account closings, and the fact that a consumer has disputed the accuracy of particular information. *Id.* § 1681c. Statutory and regulatory provisions focusing on furnishers are focused primarily on the accuracy of information provided rather on dictating whether particular elements are included, although they are somewhat more prescriptive with regard to situations involving identity theft, disputed information, and a few key elements such as credit limits and dates of delinquency. 15 U.S.C. § 1681s-2; 12 C.F.R. § 1022.42 & app. E, I(b)(2)(iii).
- ²³ Metro 2 was adopted in 1997 but its predecessor was not phased out until 2018. FinRegLab, Cash-Flow Data Policy Analysis at 10.
- ²⁴ See, e.g., Consumer Data Industry Association, Metro 2 Frequently Asked Questions 44, 45, 58. The concepts of forbearance and deferral are related and overlapping, with forbearance used most often in the mortgage context to refer to a particular type of short-term accommodation in which the delayed payments are typically due within a relatively short time after the end of the deferral period. Deferral is typically used in mortgage markets to describe other types of repayment plans, such as situations in which borrowers are allowed to wait until the end of the loan to make the delayed payments, and in other credit markets such as student lending where no payments are due for an extended period. The “D” character is thus often—though not necessarily always—used in conjunction with the special comment codes, as well as in situations where no comment code is applied.
- ²⁵ Creditors could also add a special comment code because they have determined through independent activity that the collateral has been destroyed or is inaccessible due to a natural disaster. However, industry stakeholders indicated in interviews that they believed that applying special comment codes across the board to all consumers in a particular zip code or other broad category in the absence of individualized information could raise concerns under FCRA accuracy requirements. The Metro 2 manual contemplates that an AW code may be used by debt collectors, but not CP codes. Non-creditors that furnish information to the NCRAs are unlikely to use the codes as a practical matter because they generally do not report data until an account has already closed, charged off, and sent to collections.
- ²⁶ Coronavirus Policy: Mortgage Servicers Are Adding Forbearance Remarks on Credit Reports Even for Some Borrowers Not in Forbearance, Negatively Affects Credit Scores and Mortgage Refinancing, Capitol Forum (May 7, 2020) (hereinafter Capitol Forum); see also Kate Berry, CFPB Gets Earful from Consumers about Mortgage Servicers, Am. Banker (May 10, 2020).
- ²⁷ In the mortgage industry, for instance, the government-sponsored entities Fannie Mae and Freddie Mac previously instructed servicers not to report accounts while consumers are in compliance with a disaster-related forbearance plan. See, e.g., Fannie Mae Servicing Guide C-4.1-02 (2018). The GSEs have rescinded that guidance in light of the Cares Act as discussed on page 8.
- ²⁸ 15 U.S.C. § 1681s-2(a)(8), (b); 12 C.F.R. § 1022.43. Furnishers have a duty to investigate disputes filed with them by consumers relating to the consumer's performance or other conduct concerning the account or other relationship with the furnisher, as well as any other information contained in a consumer report regarding the account or other relationship with the furnisher that bears on the consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. 12 C.F.R. §

1022.43(a)(3), (4). Furnishers must also investigate disputes regarding the completeness or accuracy of furnished information that are forwarded to them by consumer reporting agencies. 15 U.S.C. §1681s-2(b).

²⁹ 15 U.S.C. § 1681s-2(a)(e); 12 C.F.R. § 1022.42 & app. E; Andrew M. Smith et al, Fair Credit Reporting Act and Financial Privacy Update—2017, 73 Bus. Lawyer 441, 448-449 (2018); National Consumer Law Center, Fair Credit Reporting vol. 1, § 6.4.2.5 (9th ed. 2017).

³⁰ 15 U.S.C. §1681s-2.

³¹ 12 C.F.R. § 1022.42 & app. E.

³² Complaint, CFPB v. Navient Corp., Case 3:17-cv-00101, ¶¶ 80–83 (M.D. Penn. Jan. 18, 2017); Conditionally Redacted First Amended Complaint, People v. Navient Corporation, Case No. CGC-18-567732 (Cal. Super. Ct. Oct. 16, 2018); Consent Order, In re First Investors, File No. 2014-CFPB-0012, ¶ 3.h (C.F.P.B. Aug. 20, 2014); Consent Order, In re Security Group, Inc., File No. 2018-BCFP-0002 (CFPB June 12, 2018).

³³ 15 U.S.C. § 1681e(b).

³⁴ FinRegLab, Cash-Flow Data Policy Analysis at 10.

³⁵ According to the Consumer Data Information Association, the special comment codes were used after the September 11, 2001, attacks and came into broader use after Hurricane Katrina and other storms. See, e.g., Consumer Data Industry Association, Webinar, Consumers Affected by Natural or Declared Disaster (March 19, 2020).

³⁶ Consumer Financial Protection Bureau, Quarterly Consumer Credit Trends: Natural Disasters and Credit Reporting 3-4 (2018) (hereinafter CFPB, Natural Disasters). It was unclear from the report whether the deferral code referred to the CP special comment code or the D character in other fields. In contrast to the use of disaster codes described in main text on page 4, the number of accounts with deferral codes remained below 5 percent throughout the entire period, with a very slight increase from August to September that returned to pre-hurricane levels by December. *Id.*

³⁷ *Id.* at 5-6.

³⁸ Experian, Webinar, Industry Update: Data Reporting, Regulatory and Credit Insights 17 (Apr. 24, 2020).

³⁹ Capitol Forum. Such treatment raises tensions with the spirit of the CARES Act as discussed further on page 8. However, several factors could be causing lenders to view consumers with such notations on their credit reports as more risky. For example, government sponsored entities Fannie Mae and Freddie Mac historically have refused to purchase loans in forbearance or where the borrower has had serious delinquencies on a previous mortgage loan within the past year. See, e.g., FannieMae Selling Guide B.3-5.3-03 (2020). Although they have begun to purchase some loans in forbearance to support mortgage markets during the pandemic, they have imposed substantial loan level pricing adjustments on some categories and are refusing to purchase others. Berry; Hannah Lang, Cost of GSEs' Mortgage Market Support May Be Too Steep for Lenders, Am. Banker (Apr. 28, 2020).

⁴⁰ CFPB, Natural Disasters at 6-10.

⁴¹ Urban Institute, Insult to Injury: Natural Disasters and Residents' Financial Health 37 (April 2019). The study compared VantageScore statistics in areas that were affected by natural disasters between 2011 and 2014 compared with unaffected areas with similar residents. Negative effects on credit scores were particularly severe in medium sized disasters that were less likely to receive federal emergency funds and in fact doubled between year 1 and year 4. Negative effects from Hurricane Sandy and other large disasters were more modest but still worsened somewhat after year 1. *Id.* at 20.

⁴² Pub. L. 116-136, § 4021 (Mar. 27, 2020). The law does not apply to an account that is so delinquent that it has been charged off by creditors. *Id.*

⁴³ *Id.* In contrast, § 4022 of the Act provides somewhat more specific language to help determine which consumers are entitled to obtain a mortgage forbearance. See note 12.

⁴⁴ The law amends section 623(a)(1) of the Fair Credit Reporting Act (15 U.S.C. § 1681s-2(a)(1)), which is not enforceable by individual consumer lawsuits under 15 U.S.C. § 1681s-2(c). However, it can be enforced by the CFPB, Federal Trade Commission, federal banking regulators, and state officials. 15 U.S.C. § 1681s. State attorneys general from twenty states and Puerto Rico have interpreted a statement by the CFPB in April to suggest that the federal agency will not enforce the CARES Act and have promised to do so themselves. Troutman Sanders, Blog, State AGs to CRAs: If CFPB Won't Enforce CARES Act Requirements, We Will, Lexology (Apr. 29, 2020); Consumer Financial Protection Bureau, Statement on Supervisory and Enforcement Practices Regarding the Fair Credit Reporting Act and Regulation V in Light of the CARES Act (Apr. 1, 2020).

⁴⁵ See, e.g., Experian, Webinar, Industry Update: Data Reporting, Regulatory and Credit Insights 19 (Apr. 24, 2020).

⁴⁶ Capitol Forum.

⁴⁷ See, e.g., National Consumer Law Center, Protecting Credit Reports During the COVID-19 Crisis (April 2020).

- ⁴⁸ Dima Williams, What You Should Know Before You Request Mortgage Forbearance, *Forbes* (May 6, 2020); Andrew Khouri, You Can Skip Mortgage Payments for 6 Months. But Many Fear What Comes After That, *L.A. Times* (Apr. 30, 2020); Zack Friedman, Federal Student Loans for 6 Million People Aren't Covered by the CARES Act, *Forbes* (Apr. 27, 2020). See note 12 for descriptions of the CARES Act provisions.
- ⁴⁹ S. 3508 defines the Covid-19 outbreak period as running from January 31, 2020, until 120 days after enactment or the termination of the public health emergency declared by the Department of Health and Human Services on January 31, 2020, whichever is later. H.R. 6321 would define the Covid-19 outbreak period as running for 120 days after enactment or from the date of enactment until 120 days after the termination of the national emergency declared by the President on March 13, 2020, whichever is later. Future covered major disaster periods would be triggered by a declaration by the President under 42 U.S.C. 5170 and end 120 days after the incident period identified in the declaration. The House bill specifies that the ban on adverse information would only apply to consumers who are residents of affected areas. H.R. 6321, § 112.
- ⁵⁰ 15 U.S.C. § 1681c(a). Other provisions refer to “negative information” in the context of furnishing, which is defined to include delinquencies, late payments, insolvency, or any form of default. Furnishers who provide negative information to consumer reporting agencies are required to provide certain disclosures to consumers. *Id.* § 1681-s(a)(7)(G)(i). The House version would exclude information relating to felony criminal convictions from the ban on adverse information. H.R. 6321, § 112.
- ⁵¹ See note 49 for details.
- ⁵² Several states have touched on credit reporting practices in the process of enacting mortgage-related relief or announcing voluntary agreements with financial institutions. Broader bills have been introduced in New York and New Jersey. Kelly Anne Smith & Mark Henriks, Mortgage Payments Interrupted By COVID-19? The Federal And State Response, *Forbes* (Apr. 20, 2020); National Consumer Law Center, State Action on Coronavirus (Covid-19), nclc.org (visited May 8, 2020); N.Y. Sen. Bill 8118A; N.Y. Assembly Bill 10183; N.J. Assembly Bill 3948; N.J. Assembly Bill 3949.
- ⁵³ 15 U.S.C. § 1681t.
- ⁵⁴ If the system was not dependent on consumers filing a request with the CFPB, some stakeholders have voiced concerns that relying on consumer reporting agencies to receive requests directly would raise substantive and process concerns because CRAs do not generally have direct relationships with consumers. Rather, they suggest that working through furnishers is preferable because the companies already have direct relationships and communications channels with their customers.
- ⁵⁵ See, e.g., 15 U.S.C. §§ 1681a(d)(3), 1681a(i), 1681b(g), 1681c(a)(6), 1681s-2(a)(9) (medical); *id.* §§ 1681a(q), 1681c-1, 1681c-2, 1681m(f), 1681m(g), 1681s-2(a)(6) (identity theft and related topics). Both sets of FCRA provisions have also been the subject of implementing regulations. See 12 C.F.R. §§ 1022.30-32 (medical); *id.* §§ 1022.81-82, 1022.120-129 (identity theft).
- ⁵⁶ FinRegLab, Cash-Flow Data Policy Analysis at 8-15.
- ⁵⁷ 12 C.F.R. § 1002.2(p). Credit scoring models that meet this standard are permitted to use age as a factor in certain limited ways. However, companies may look to the standard even in situations in which they are not seeking to use that factor as a general articulation of best practice.
- ⁵⁸ Experian, Webinar, Industry Update: Data Reporting, Regulatory and Credit Insights 19 (Apr. 24, 2020).
- ⁵⁹ Call wait times of several hours were reported in mid March, but have declined since. Reports in late April have indicated some continuing fluctuations and surges. David Jones, Bank Call Centers Feeling Pressure of COVID-19, atmmarketplace.com (Apr. 28, 2020); Heather Kelly, Press 1 for Frustration: Customers Run into Record Phone Waits as Companies Grapple with Worker Safety, *Wash. Post* (Apr. 15, 2020); Mortgage Bankers Association, Blog, Share of Mortgage Loans in Forbearance Increases to 6.99% (Apr. 27, 2020).
- ⁶⁰ 15 U.S.C. § 1861c-1(a), (c). The laws not only specify process requirements for conveying the alerts to other NCRAs but also prescribe limitations on users of credit reports that contain the alerts in establishing new credit accounts, increasing credit limits, and taking various other actions. However, these restrictions generally do not address how the alerts are treated in scoring or underwriting models, but rather focus on such topics as using reasonable policies and procedures to verify the identity of the consumer applying for credit. *Id.*
- ⁶¹ Sarah Silbert, In Response to the Coronavirus, Credit Card Issuers like Amex and Capital One Are Letting Customers Skip Payments without Interest and More, *Business Insider* (May 1, 2020); Kendall Little, Credit Card Issuers Offer Customer Assistance in Response to Coronavirus, bankrate.com (Apr. 7, 2020).

