

December 10, 2018

Samantha Deshombres
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue., NW
Washington, DC 20529–2140

Re: Comments of 50 Organizations on DHS Notice of Proposed Rulemaking on Public Charge Determinations (DHS Docket No. USCIS–2010–0012)

Dear Ms. Deshombres:

The 50 undersigned consumer, civil rights, economic justice, faith, privacy, and advocacy organizations submit these comments in response to the Department of Homeland Security’s proposed rule drastically expanding the criteria that will be considered to determine whether an immigrant is likely to become a “public charge”.¹ These rules would apply when immigrants apply for an adjustment of status or visa, including visa renewals and applications for legal permanent resident status.

We generally oppose the proposal’s radical expansion of what programs and factors will be considered for the public charge analysis, as it will cause financial stress to immigrants and harm the economic health of their families. As advocates with collectively decades of experience regarding the credit reporting system, we particularly oppose the provision at proposed § 212.22(b)(4)(i)(H), which would require USCIS to consider an immigrant’s “credit history (i.e., credit report) and credit score” in determining whether the immigrant is a public charge. This proposal to use a credit report and score to determine likelihood of public charge status is ill-advised and inappropriate.

1. Credit reports and credit scores are inappropriate measures to determine the likelihood that an immigrant will become a public charge.

Neither credit reports nor credit scores were designed to provide information on whether a consumer is likely to become a public charge or rely on public benefits. The Consumer Financial Protection Bureau has explained that credit scores are specifically designed to measure the likelihood that a borrower will become 90 days late on a credit obligation.² They are not designed for other purposes.

¹ 83 Fed. Reg. 51,114 (Oct. 10, 2018).

² Consumer Financial Protection Bureau, Data Point: Credit Invisibles 7, May 2015, available at http://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf (most credit scoring models built to predict likelihood relative to other borrowers that consumer will become 90 or more days past due in the following two years).

Credit reports and scores do not even contain information about the most relevant indicator of a consumer's financial status – the consumer's earnings or other income.³ A consumer could have a substantial income and yet have a low credit score or negative marks on his/her credit report. In addition, credit scores are actually a very blunt measure. While they can predict the probability that, as a group, low-scoring consumers will have a certain percentage of defaults on credit obligations, they cannot predict if any particular person will actually default on bills. In fact, often the probability is greater that a particular low-scoring person will not default.⁴

Moreover, credit scores are only partly based on the consumer's payment records. While 35% of a score is based on on-time payments, the rest of the score is based on factors such as having low balances on credit cards compared to the credit limit; how many years a consumer has had credit; and having a good "mix" of credit, including a mortgage.⁵ These are factors that disfavor consumers who are new to credit, such as immigrants.

Using credit reports and credit scores is also a terrible idea given that more than one half (52.1%) of negative marks for debt collection items on credit reports consists of medical debts, and one in five consumers with a credit report has a medical collection item in their report.⁶ Many of these debts are not caused by an inability to pay -- the average amount of these debts is \$579 and the median amount is \$207.⁷ Instead, medical bills often end up in collection because of the dysfunctional nature of the healthcare payment system, which leads to delays and confusion that in turn result in bills being sent to debt collectors who often automatically report the debts to credit bureaus.⁸

Furthermore, there is no truth to the common misconception that credit reports and scores are a proxy for "character." A bad credit record is often the result of circumstances beyond a consumer's control, such as a limited period of illness or job loss, from which the consumer may subsequently recover.⁹ Once the consumer has recovered, there is no reason to assume on the basis of historical delinquencies that a consumer who has sufficient income will be a public charge. In the employment context, where credit reports are often used, the practice has been

³ FICO, Understanding FICO Scores 24 (2016), *available at* https://www.myfico.com/Downloads/Files/myFICO_UYFS_Booklet.pdf/

⁴ *See generally* Chi Chi Wu, National Consumer Law Center, Solving the Credit Conundrum: Helping Consumers' Credit Records Impaired by the Foreclosure Crisis and Great Recession 9-12 (Dec. 2013), *available at* www.nclc.org/images/pdf/credit_reports/report-credit-conundrum-2013.pdf.

⁵ FICO, Understanding FICO Scores 14 (2016), *available at* https://www.myfico.com/Downloads/Files/myFICO_UYFS_Booklet.pdf.

⁶ Consumer Financial Protection Bureau, Consumer Credit Reports: A Study of Medical and Non-Medical Collections 5 (Dec. 11, 2014), *available at* https://files.consumerfinance.gov/f/201412_cfpb_reports_consumer-credit-medical-and-non-medical-collections.pdf.

⁷ *Id.*

⁸ *Id.* at 6-7.

⁹ *See generally* Chi Chi Wu, National Consumer Law Center, Solving the Credit Conundrum: Helping Consumers' Credit Records Impaired by the Foreclosure Crisis and Great Recession 9-12 (Dec. 2013), *available at* www.nclc.org/images/pdf/credit_reports/report-credit-conundrum-2013.pdf.

criticized for the fact that no study has ever shown that workers with impaired credit are actually less productive or more inclined toward theft.¹⁰

Finally, it is not true, as DHS has assumed, that credit reports include arrest records.¹¹ Furthermore, the credit bureaus have made changes that have removed the vast majority of lawsuit records.¹²

2. Immigrants are unlikely to have credit histories and credit scores.

Using credit reports and credit scores to determine public charge status is also inappropriate because many immigrants will not even have a credit history for USCIS to consider. While DHS has acknowledged that any immigrant who has not lived in the United States will not have a credit history, this can be true even for immigrants who are within the United States. The Consumer Financial Protection Bureau estimates that 26 million consumers in this country do not have a credit history,¹³ and that this “credit invisibility” impacts recent immigrants.¹⁴

Even when immigrants within the United States do have credit histories, their credit scores are actually artificially low. A Federal Reserve study found immigrants’ credit scores tend to be lower than what their actual repayment behavior on loans turns out to be.¹⁵

3. Credit reports suffer from unacceptable rates of inaccuracy, especially for determining immigration status.

The Federal Trade Commission, which conducted the definitive study on credit reporting errors, found that about 21% of consumers had verified errors in their credit reports, 13% had errors that affected their credit scores, and 5% had serious errors that would cause them to be denied or pay more for credit.¹⁶ These error levels are way too high for credit reports and scores to be used for a purpose as critical as immigration status. Denying 21% or even 5% of immigrants a visa or green card because of erroneous information is unconscionable.

¹⁰ See Amy Traub, *Discredited: Employment Credit Checks Keep Qualified Workers Out of a Job* (2012), available at www.demos.org/discredited-how-employment-credit-checks-keep-qualified-workers-out-job.

¹¹ 83 Fed. Reg. at 51,189.

¹² Consumer Data Industry Association, Statement regarding Equifax, Experian, and TransUnion’s reporting of public records, March 13, 2017, available at https://s3.amazonaws.com/rdcms-cdia/files/production/public/PDFs/FNL.3.13.CDIA_Media_Statement_Liens.pdf.

¹³ See Consumer Financial Protection Bureau, Data Point: Credit Invisibles, May 2015, available at http://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf.

¹⁴ See Press Release, Consumer Financial Protection Bureau, Consumer Financial Protection Bureau Study Finds Consumers in Lower-income Areas are More Likely to Become Credit Visible Due to Negative Records, June 17, 2017, available at <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-study-finds-consumers-lower-income-areas-are-more-likely-become-credit-visible-due-negative-records/>.

¹⁵ Bd. of Governors of the Fed. Reserve System, Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit at S-2 (Aug. 2007) (“Evidence also shows that recent immigrants have somewhat lower credit scores than would be implied by their performance”).

¹⁶ Federal Trade Comm’n Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003 (Dec. 2012).

DHS states it would not consider any error on a credit report, but only if it has been verified by the credit bureau. This proposal does not adequately address the issue of excessively high errors in credit reports. Credit bureaus are notorious for obstinately refusing to correct errors after repeated disputes by consumers, even in the face of obvious evidence that information is inaccurate.¹⁷ Furthermore, many immigrants will face significant barriers in knowledge, language, and resources that will prevent them from even submitting a dispute. They may not even be aware of what a credit report is, the contents of their credit report, or how to access their reports. Credit reports are not available in languages other than English, posing another barrier.¹⁸

4. *Use of credit scores will have a disparate impact on immigrants of color.*

Credit reports and scores reflect stunning racial disparities. Multiple studies have found that African American and Latino communities have lower credit scores as a group than whites (and Asians, when the data is available). A partial list includes:¹⁹

- A 2012 study by the CFPB examining credit scores for about 200,000 consumers found that the median FICO score for consumers in majority minority zip codes was in the 34th percentile, while it was in the 52nd percentile for zip codes with low minority populations.²⁰
- A 2007 Federal Reserve Board report to Congress analyzed 300,000 credit files. While the Federal Reserve's ultimate conclusion was to support credit scoring, its study found significant racial disparities. In one of the two models used by the Federal Reserve, the mean score of African Americans was approximately half that of white non-Hispanics (54.0 out of 100 for white non-Hispanics versus 25.6 for African Americans) with Hispanics fairing only slightly better (38.2).²¹

¹⁷ See National Consumer Law Center, *Fair Credit Reporting* § 4.5.6 (9th ed. 2017), *updated at* www.nclc.org/library; Chi Chi Wu et al., National Consumer Law Center, *Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports* (2009), available at http://www.nclc.org/images/pdf/pr-reports/report-automated_injustice.pdf.

¹⁸ See Consumer and civil rights groups' letter to credit reporting agencies requesting free credit and specialty reports in multiple languages for Wells Fargo customers affected by phantom accounts, Oct. 6, 2016, available at http://www.nclc.org/images/pdf/credit_reports/letter-wf-oct2016.pdf.

¹⁹ A more extensive list of these studies is available in NCLC's policy brief *Past Imperfect: How Credit Scores and Other Analytics "Bake In" and Perpetuate Past Discrimination*, May, 2016, available at http://www.nclc.org/images/pdf/credit_discrimination/Past_Imperfect050616.pdf.

²⁰ Consumer Financial Protection Bureau, *Analysis of Differences Between Consumer- and Creditor-Purchased Credit Scores*, at 18, Sept. 2012.

²¹ Board of Governors of the Federal Reserve System, *Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit* 80-81 (Aug. 2007).

- A 2007 study by the Federal Trade Commission (FTC) on racial disparities in the use of credit scores for auto insurance found substantial racial disparities, with African Americans and Hispanics strongly over-represented in the lowest scoring categories.²²
- A 2006 study from the Brookings Institution found that counties with high minority populations are more likely to have lower average credit scores than predominately white counties. In the counties with a very low typical score (scores of 560 to 619), Brookings found that about 19% of the population is Hispanic and another 28% is African American. On the other hand, the counties that have higher typical credit scores tend to be essentially all-white counties.²³

Communities of color likely have lower credit scores due to centuries of economic and other discrimination, which has created a racial wealth gap that leaves them more vulnerable to financial shocks.²⁴ If DHS uses credit reports and scores, it will be making immigration decisions based on a factor that unequivocally and unfairly disfavors communities of color.

5. *If USCIS makes public charge determinations using credit reports or credit scores, it must comply with the user duties under the FCRA.*

If USCIS uses credit reports or credit scores to make public charge determinations, the agency will be required to comply with the federal Fair Credit Reporting Act (FCRA). The FCRA clearly applies to federal government agencies, as the Act's provisions apply to "persons." "Person," in turn, includes "any individual, partnership, corporation, trust, estate, cooperative, association, *government or governmental subdivision or agency*, or other entity." 15 U.S.C. § 1681a(b)(emphasis added). This definition clearly includes government agencies such as USCIS. Based on this definition, the Seventh Circuit held that the FCRA's applicability to all "persons" waives the federal government's sovereign immunity from lawsuits.²⁵

Under the FCRA, any person who uses a credit report or other "consumer report" must provide a consumer with a written notice if it takes an "adverse action" against that person. 15 U.S.C. § 1681m(a). An "adverse action" includes "a denial of, any license or benefit described in § 1681b(a)(3)(D) of this title [referring to the permissible purpose for eligibility determinations for government licenses or benefits]." 15 U.S.C. § 1681a(k)(1)(B)(iii).

Thus, if USCIS uses credit reports in denying immigrants a visa, green card, or any other benefit, it will be required to provide adverse action notices, even if the credit report or score is only one of several factors that results in a denial. It does not matter if USCIS obtains the report from the consumer (as the Supplementary Information assumes) instead of the credit bureau,

²² Federal Trade Commission, *Credit-Based Insurance Scores: Impacts on Consumers of Automobile Insurance* 3 (July 2007)

²³ Matt Fellowes, Brookings Inst., *Credit Scores, Reports, and Getting Ahead in America* 9-10 (May 2006).

²⁴ See Past Imperfect: How Credit Scores and Other Analytics "Bake In" and Perpetuate Past Discrimination, May, 2016, available at http://www.nclc.org/images/pdf/credit_discrimination/Past_Imperfect050616.pdf.

²⁵ *Bormes v. United States*, 759 F.3d 793 (7th Cir. 2014).

because the adverse action notice requirements apply if an adverse action is taken “based in whole or in part on any information contained in a consumer report.” 15 U.S.C. § 1681m(a).

USCIS also will be required to comply with the FCRA’s rule on the proper disposal of credit reports. 15 U.S.C. § 1681w. USCIS will be required to use reasonable measures to prevent the unauthorized access to credit reporting information by methods such as:

- burning, pulverizing, or shredding papers containing credit report information so that the information cannot be read or reconstructed;
- destroying or erasing electronic files or media containing credit report information so that the information cannot be read or reconstructed; or
- conducting due diligence and hiring a document destruction contractor to dispose of credit report information.

16 C.F.R. §§ 682.1 to 682.5.

Thus, USCIS will be required to bear significant costs and burden in order to use credit reports and scores, even if it is the immigrant who obtains and pays for the actual report and score. This cost and burden will far outweigh the little, if any, benefit that USCIS will derive from reviewing credit reports and scores.

* * * * *

If you have any questions about these comments, please contact Chi Chi Wu (cwu@nclc.org or 617-542-8010)

Respectfully submitted,

National Organizations

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

Allied Progress

Americans for Financial Reform Education Fund

Asset Building Policy Network

Center for Digital Democracy

Center for Democracy & Technology

Center for Responsible Lending

Constitutional Alliance

Consumer Action

Consumer Federation of America

Demos

Impact Fund

Interfaith Center on Corporate Responsibility

LCLAA

Main Street Alliance
NAACP
National Association of Consumer Advocates
National Black Justice Coalition
National Center for Law and Economic Justice
National Consumers League
National Council of Churches
National Fair Housing Alliance
Privacy Times
Prosperity Now
Public Citizen
The Leadership Conference on Civil and Human Rights
UnidosUS (formerly NCLR)
Woodstock Institute
World Privacy Forum

State and Local Organizations

Center for Economic Integrity (Arizona)
California Reinvestment Coalition
East Bay Community Law Center (California)
Equal Justice Society (California)
Housing and Economic Rights Advocates (California)
Media Alliance (California)
Oakland Privacy (California)
Atlanta Legal Aid Society, Inc. (Georgia)
Maryland Consumer Rights Coalition
Health Law Advocates, Inc. (Massachusetts)
Community Service Society of New York
Empire Justice Center (New York)
Her Justice (New York)
Long Island Housing Services, Inc. (New York)
Mobilization for Justice (New York)
New Economy Project (New York)
New York Legal Assistance Group
Media Mobilizing Project (Pennsylvania)
Texas Appleseed
Virginia Poverty Law Center (Virginia)
Tzedek DC, Inc (Washington, DC)