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May 28, 2004

Public Information Room
Office of the Comptroller of the Currency
250 E Street, SW
Mailstop 1-5
Washington, DC 20219
Attention: Docket No. 04-09

Robert E. Feldman, Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
Attention: RIN 1550-AB88

Ms. Jennifer J. Johnson, Secretary
Board of Governors
of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Attention: Docket No. R-1188

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: No. 2004-16

Re: Fair Credit Reporting Medical Information Regulations

Dear Sir or Madam:

The Independent Community Bankers of America (ICBA)¹ appreciates the opportunity to comment on proposed regulations implementing Section 411 of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act).

Background

The FACT Act prohibits a creditor from obtaining or using medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit. Under the FACT Act, the banking agencies are required to create exceptions to this general prohibition and also create exceptions to the restrictions concerning the sharing of medical-related information with affiliates. The banking agencies now are soliciting comment on proposed regulations that provide for these exceptions.

¹The Independent Community Bankers of America represents the largest constituency of community banks of all sizes and charter types in the nation, and is dedicated exclusively to protecting the interests of the community banking industry. ICBA aggregates the power of its members to provide a voice for community banking interests in Washington, resources to enhance community bank education and marketability, and profitability options to help community banks compete in an ever-changing marketplace. For more information, visit ICBA's website at www.icba.org.

Under the proposed regulations, creditors may obtain and use medical information in determining credit eligibility provided that (1) the information relates to debts, expenses, income, benefits, collateral, or the purpose of the loan, including the use of proceeds (2) the creditor uses the information in a manner and to an extent no less favorable than it would use comparable information that is not medical information in a credit transaction, and (3) the creditor does not take the consumer's physical, mental or behavioral health, condition or history, type of history or prognosis into account as part of the credit eligibility. According to the regulators, this three-part test strikes a balance between permitting creditors to obtain and use certain medical information about consumers when necessary and appropriate to satisfy prudent underwriting criteria and to ensure that credit is extended in a safe and sound manner, while restricting the use of medical information for inappropriate purposes.

Under the proposed regulations, banks can also obtain and use medical information in determining credit eligibility under certain specific circumstances such as (1) determining whether the use of a power of attorney or legal representative is necessary and appropriate, (2) to comply with applicable requirements of local, state or federal laws, (3) to the extent such information is included in a consumer report from a consumer reporting agency, and is used for the purpose for which the consumer provided specific written consent; (4) for fraud prevention and detection, (5) for financing medical products or services, or (6) if the consumer requests in writing that the creditor use specific medical information to determine the consumer's eligibility, or continued eligibility, for credit, to accommodate the consumer's particular circumstances.

The proposed rule also says that medical information can be shared with affiliates if (1) the information is shared in connection with the business of insurance or annuities, (2) HIPPA permits the sharing of such information, or (3) the information is disclosed to an affiliate to determine a consumer's eligibility for credit as permitted under the proposed rule.

Exceptions to the General Prohibition on Sharing of Medical Information

As noted above, the proposed regulations contain exceptions to the general prohibition against obtaining or using medical information in connection with credit eligibility determinations. We applaud the banking agencies for recognizing that these exceptions should be created. We agree that the proposed exceptions are necessary and appropriate to protect legitimate operational, transactional, consumer and other needs and are consistent with the congressional intent to restrict the use of medical information for inappropriate purposes.

As part of the general prohibition, the banking agencies have defined "eligibility, or continued eligibility, for credit" as such term is used under the proposed regulations. Under that definition, "eligibility for credit" means "the consumer's qualification or fitness to receive, or continue to receive, credit, including the terms on which credit is offered, primarily for personal, family, or household purposes." We commend the banking agencies for clarifying that "eligibility for credit" must be related to credit for consumer purposes, and not for business purposes. This makes the proposed regulations consistent with the Fair Credit Reporting Act which generally does not apply to business transactions.

Receiving Unsolicited Medical Information

The proposed regulations also contain a rule of construction for receiving unsolicited medical information. Under this rule, a creditor would not be considered to have received medical information in violation of the general prohibition if it receives the information without specifically requesting it and does not use that information in determining whether to extend or continue to extend credit to the consumer, and the terms on which credit is offered or continued. ICBA applauds the banking agencies for exempting medical information that is unsolicited and addressing this issue and urge that it be retained in the final regulations.

Financial Information Exceptions for Using Medical Information

Under the proposed regulations, a bank may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility for credit so long as (1) the information relates to debts, expenses, income, benefits, collateral, or the purpose of the loan, including the use of proceeds; (2) the bank uses the medical information in a manner and to an extent that is no less favorable than it would use comparable information that is not medical information in a credit transaction; and (3) the bank does not take the consumer's physical, mental, or behavioral health, condition or history, type of treatment, or prognosis into account as part of any such determination.

ICBA commends the banking agencies for providing an exception so that banks may use medical information in certain cases when they underwrite loans. We would propose an even broader exception to include other types of information that a bank routinely uses to determine a consumer's credit eligibility such as assets that could be medical in nature. ICBA also applauds the banking agencies for including examples of permissible and impermissible uses of medical information. The examples help to clarify how the proposed regulations will be implemented.

Specific Exceptions for Using Medical Information

ICBA commends the banking agencies for providing specific exceptions for using and obtaining medical information including whether a power of attorney is necessary and appropriate, for purposes of fraud prevention and detection, for the purpose of financing medical products and services, and whenever a consumer requests that medical information be used. However, we object to the fact that a consumer cannot make a request to use medical information by signing a preprinted form. The Supplementary Information states that "this exception would not be met by a form that contains a preprinted description of various types of medical information and the uses to which it might be put. Instead, it contemplates an individualized process in which the consumer informs the creditor about the specific medical information that the consumer would like the creditor to use and for what purpose." Banks rely on preprinted forms for many different purposes including loan applications. It would be burdensome for banks to have to rely on a consent drafted by the consumer in order to take advantage of this exception.

Sharing Medical Information with Affiliates

ICBA also agrees with the exceptions for sharing medical information with affiliates, particularly in connection with the business of insurance or annuities. However, we think that it would be helpful if the regulations provided examples of permissible medical information sharing with affiliates, as they do when they explain the financial information exceptions for obtaining and using medical information.

Conclusion

ICBA generally commends the banking agencies for the proposed medical information regulations, subject to making the changes suggested above. These regulations provide important exceptions for the use of medical information by banks that are consistent with the congressional intent to restrict the use for medical information for inappropriate purposes. If you have questions or need any additional information, please do not hesitate to contact me at 202-659-8111 or at Chris.Cole@icba.org.

Sincerely,



Christopher Cole
Regulatory Counsel