



March 29, 2005

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
Attention: RIN No. 3064-AC81

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

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

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

Becky Baker
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314

Re: Fair Credit Reporting Act Medical Information Regulations

Ladies and Gentlemen:

The National Automobile Dealers Association ("NADA") and the Alliance of Automobile Manufacturers, Inc. (the "Alliance") are very concerned about rules to be promulgated by your Agencies under the Fair Credit Reporting Act ("FCRA"), as amended by Section 411 of the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act").¹ The rules, if adopted as proposed, would provide certain creditors with exceptions to the FCRA's prohibition on obtaining or using medical information for

¹ 15 U.S.C. § 1681c(g). The rules were published for comment at 69 Fed. Reg. 23380 (April 28, 2004).

credit eligibility decisions, but leave significant categories of creditors, such as auto dealers and non-bank auto finance companies, ineligible for those exceptions.²

NADA and the Alliance are nonprofit trade associations representing different segments of the automotive industry. NADA represents approximately 20,000 franchised automobile and truck dealers that sell new and used vehicles and engage in service, repair and parts sales. The members of the Alliance are nine car and light truck manufacturers: BMW Group, DaimlerChrysler Corporation, Ford Motor Company, General Motors Corporation, Mazda North American Operations, Mitsubishi Motors North America, Inc., Porsche Cars North America, Inc., Toyota Motor North America, Inc, and Volkswagen of America, Inc.

One out of every ten jobs in the U.S. is dependent on the automotive industry. No other industry is linked to so much U.S. manufacturing or generates more retail business and employment. Auto dealers account for more than 20% of total U.S. retail sales. Dealers are the principal source of financing for consumers' vehicle purchases, and the "captive" finance company affiliates are a major source of financing for dealers.³

NADA and the Alliance are concerned that auto dealers and finance companies' ability to provide consumer financing may be significantly impaired if the proposed rules are adopted because the rules would not permit auto dealers or finance companies to obtain and use medical information in the same manner as banks and similar creditors under the banking agencies' jurisdiction. For example, creditors within the Agencies' jurisdiction could obtain and consider medical information to determine whether and/or in what amount to extend credit and the risks associated with a transaction. Conversely, creditors' outside the Agencies' jurisdiction, such as auto dealers and finance companies, could not obtain or use the same medical information to make the very same determinations; these creditors would be at a distinct competitive disadvantage, and consumers will suffer as a result.

The comments on the proposals do not adequately explain how the final rules could adversely affect the ability of dealers and auto finance companies to provide financing. For this reason, NADA and the Alliance believe that the Agencies would benefit from a brief description of how auto dealers and finance companies might obtain and use medical information as financial information to determine customers' credit eligibility and thus how the exceptions in the proposed rules need to apply to auto dealers and finance companies' credit transactions.

² *Id.*

³ The term "captive" finance company refers to a subsidiary or affiliate of an automobile manufacturer. The captive auto finance companies purchase about 44% of all the dealers' retail installment sales contracts. Statistics are derived from the Department of Commerce data as well as data compiled by CNW Marketing Research, Inc. and stored at www.cnwbyweb.net (hereinafter referred to as "CNW Data").

Auto Dealers and Finance Companies' Use of Medical Financial Information

Auto dealers offer their customers the convenience of financing the purchase or lease of vehicles on competitive terms. More than 90% of all new vehicle purchases involve some form of financing, and most of that is obtained at a dealership.⁴ Dealers are rarely arrangers of credit.⁵ Instead, the dealer is usually the initial creditor on the retail installment contract with the buyer. The dealer sets the amount financed, annual percentage rate, finance charge, number of payments and other credit terms based upon negotiations with the buyer.⁶

Usually, but not always, the dealer subsequently assigns the contract to a third party. Typically, several different finance sources compete to purchase a dealer's contracts. These include banks, credit unions and non-bank finance companies (including the captive finance companies). Depending upon a buyer's credit-worthiness, the contract may be purchased by a prime or sub-prime creditor. Consumers benefit from the vast array of financing options available at dealerships.

When financing the purchase of a vehicle, a dealer obtains a buyer's credit application, as well as a credit report and a credit score. Although dealers do not seek medical information, buyers may reveal that information during the application process. For example, in listing total debts on a credit application, a buyer may indicate that a particular debt is owed to a hospital, or in specifying a special vehicle, which would serve as collateral for the financing, a buyer may describe a medical condition. In offering a certain monthly payment amount, a dealer permissibly considers a buyer's total debt payments, including medical debts. In assessing which finance source will likely buy the contract, a dealer also permissibly considers a buyer's total debts, again including medical debts. These considerations are critical because, for example, a bank is likely to require a lower debt-to-income ratio than a sub-prime creditor (or sales finance company).

When a dealer offers to sell a retail installment sales contract to a finance source, including a bank or an auto finance company, that finance source also considers the buyer's credit-worthiness. The dealer sends the finance source the consumer's credit application, and the finance source usually obtains a credit report and credit score as well. The finance source considers medical debts listed on the consumer's application in much the same way as does the dealer – to determine the buyer's credit capacity and credit-worthiness.

⁴ The purchase of 92% of new vehicles is financed. *See* CNW Data.

⁵ Arrangers of credit are also creditors under the FCRA because they come within the ECOA Regulation B definition. *See* 15 U.S.C. § 1681a(r)(5); 12 C.F.R. 202.2(l).

⁶ In setting these terms, the dealer also considers the "buy rate" at which an assignee agrees to purchase the contract, as well as the assignee's requirements for purchase (such as minimum down payment amount).

If the exceptions in the proposed regulations apply to auto dealers and finance companies, they may continue current practices and obtain and use medical information for appropriate reasons. Thus, dealers might receive medical information without specifically requesting such information,⁷ but they and the auto finance companies would obtain and use medical information only in accordance with the proposed financial information exceptions.⁸ If dealers and non-bank auto finance companies are unable to obtain and use medical information as it relates to financial information, dealers may be unable to continue to offer their customers the choice and convenience of dealer financing, and a significant segment of the auto finance industry would be unable to make informed determinations of buyers' credit-worthiness.

Agencies' Authority to Issue Rules that Create Exceptions for Non-bank Creditors

NADA and the Alliance believe that the Agencies have the authority to write medical information use exceptions that would apply to auto dealers and finance companies. FACT Act § 411 directs the Agencies to issue rules that would "permit transactions" that might otherwise be precluded by the general prohibition on the use of medical information.⁹ The transactions are to be permitted if they "are determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (and which shall include permitting actions necessary for administrative verification purposes), consistent with the intent of [FCRA §604(g)(2)] to restrict the use of medical information for inappropriate purposes."¹⁰ The criteria for permitting transactions *are not limited* to any particular type of credit transaction or type of creditor involved.¹¹ The language of the statute is clear. Congress expected the exceptions to apply to *all creditors*, including auto dealers and non-bank auto finance companies, not merely to entities within the Agencies' respective jurisdiction.

This interpretation, based upon plain language of Section 411, is supported by the other FACT Act rulemaking provisions. In some instances, Congress provided that one or more agencies may write rules that apply to *all entities* covered by the FCRA, not just

⁷ This would be permitted by proposed rule § __.30(b).

⁸ Dealers and auto finance companies would obtain and use medical information pertaining to a consumer in connection with a determination of the consumer's eligibility for credit under the following circumstances:

1. The information would relate to debts, income, benefits, collateral, or the purpose of the loan [extension of credit], including the proceeds;
2. The dealer would use the medical information in a manner and to an extent that is no less favorable than it would use comparable information in a credit transaction; and
3. The dealer would 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.

See proposed § __.30(c). Such information would only be used to the extent "necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (and which shall include permitting actions necessary for administrative verification purposes)." FCRA § 604(g)(5)(A); 15 USC § 1681c(g)(5)(A).

⁹ FCRA § 604(g)(5)(A); 15 USC § 1681c(g)(5)(A).

¹⁰ *Id.*

¹¹ FCRA § 604(g) applies to all creditors within the FCRA definition. It is not limited to bank and federal credit union creditors.

those within the agencies' jurisdiction.¹² In other cases, where Congress intended to *limit* a federal agency's rule-writing authority to cover those entities within the agency's jurisdiction, it did so explicitly.¹³ Accordingly, if Congress intended to restrict the Agencies' rulemaking authority under section 411 of the FACT Act, that intent would have been expressly stated. Because there is no express restriction, the Agencies' regulations should apply to all creditors.

The FACT Act combinations of rulemaking and enforcement authority are similar to those established in other consumer protection statutes. These statutes are replete with examples of where one federal agency promulgates rules, which are enforced by other agencies.¹⁴ Having one agency create exceptions that apply to creditors subject to another agency's jurisdiction has no effect on the overall regulatory and enforcement authority of either agency. The Agencies' promulgation of regulations applicable to entities under the jurisdiction of other agencies is consistent with the authority granted in various provisions of the FCRA and does not affect the jurisdictional authority of any particular agency.

¹² For example, FACT Act § 311 directs the FTC and the FRB to jointly prescribe rules regarding risk based pricing notices, but leaves enforcement exclusively to the agencies and officials identified § 621. Therefore, those rules would apply to national banks, federal savings associations and federal credit unions even though they are not subject to the enforcement jurisdiction of the Commission or the Board. *See also* FACT Act § 213, which requires the FTC to issue an "enhanced" prescreened opt-out notice which all creditors and insurers will be required to put in prescreened solicitations, and FACT Act § 217(b), which directs the FRB to adopt a model disclosure for all financial institution creditors to use in making the negative information disclosures required under section 217(a).

¹³ *See, e.g.*, FCRA § 615(e) (Federal banking agencies, the National Credit Union Administration, and the Commission directed to prescribe red flag guidelines and regulations "with respect to the entities that are subject to their respective enforcement authority under section 621"); §605(h) (Federal banking agencies, the National Credit Union Administration, and the Commission directed to "jointly, with respect to the entities that are subject to their respective enforcement authority under section 621," prescribe regulations regarding receipt of address discrepancy notice); §621(e) (Federal banking agencies required to jointly prescribe such regulations as necessary to carry out the purposes of the Act and the Board of Governors to prescribe regulations consistent with such joint regulations with respect to bank holding companies and affiliates of such holding companies, and the Board of the National Credit Union Administration given authority to prescribe such regulations as necessary to carry out the purposes of the Act); § 623(e)(1)(B) (Federal banking agencies, the National Credit Union Administration, and the Commission, with respect to the entities subject to their respective enforcement authority under section 621, and in coordination as described in paragraph (2)(A), directed to prescribe regulations regarding accuracy guidelines); §628(a)(1) (Federal banking agencies, the National Credit Union Administration, and the Commission, with respect to the entities subject to their respective enforcement authority under section 621 directed to issue final regulations with respect to disposal of records); § 214(b) (requiring the Federal banking agencies, the National Credit Union Administration, and the Commission, with respect to the entities subject to their respective enforcement authority under section 621, to prescribe regulations to implement section 624 of the Fair Credit Reporting Act).

¹⁴ *See, e.g.*, Children's On-Line Privacy Act (15 U.S.C. §§ 6501-6505); CANSPAM Act (15 U.S.C. §§ 7701-7713); Electronic Funds Transfer Act (15 U.S.C. §§ 1693-1693r); Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f); Expedited Funds Availability Act (12 U.S.C. §§ 4001-4010); Federal Reserve Act (12 U.S.C. §§ 226, *et seq.*); Home Mortgage Disclosure Act (12 U.S.C. §§ 2801 *et seq.*); Truth in Lending Act (15 U.S.C. §§ 1601-1615, 1631-1649, 1661-1665(b), 1666-1667f).

If there were any ambiguity about the Agencies' authority to write exceptions applicable to all creditors, it was eliminated in the comment letter submitted by Representatives Frank and Emanuel, the primary authors of the FACT Act's medical information privacy provisions. These Congressmen unequivocally stated that they never intended for the exceptions in the regulations to be limited to entities under the jurisdiction of the Agencies.¹⁵

If the Agencies do not want to modify the scope of their respective proposed rules to include all creditors, a viable alternative would be to issue an additional rule identical to the five separate agency rules. Such a rule could be housed in Title 16 of the CFR. It would apply to all creditors that are not specifically within the scope of the Agencies' other rules under FACT Act § 411 and would be enforced by the Federal Trade Commission. Representatives Frank and Emanuel suggested this alternative in their comment letter.¹⁶

Although some commenters suggested other alternatives, NADA and the Alliance are concerned that those options will not fill the void for creditors such as auto dealers and auto finance companies. For example, if the final rules are broadened, as has been suggested, to cover those that "arrange credit" on behalf of one of the financial institutions already covered by the exemptions, dealers and auto finance companies might not be eligible for the exceptions. As noted above, dealers are not usually "arrangers of credit," nor are the non-bank finance companies to which they sell their retail installment contracts. Therefore, this suggested compromise solution would leave auto dealers and finance companies subject to the FCRA's medical information prohibitions without benefit of the rules' meaningful exceptions.

Conclusion

For the reasons explained above, NADA and the Alliance respectfully request that the Agencies expand the application of the proposed rules, which include critical financial information exceptions with respect to obtaining and using medical information, by either (1) applying the final rules to all "creditors" subject to the prohibitions in FCRA section 604(g)(2) or (2) issuing a final rule identical to the five agency's rules that would apply to all "creditors" subject to enforcement by the FTC. Either alternative will allow auto dealers and finance companies to continue to offer convenient and competitive financing options to consumers. If, however, the rules are adopted as proposed, these financing options will be placed in jeopardy. The result will not serve the public interest and will be contrary to the clear Congressional intent.

NADA and the Alliance appreciate the Agencies' consideration of these comments. NADA and the Alliance would also appreciate the opportunity to meet with the

¹⁵ See Comment Letter dated June 4, 2004, p. 4.

¹⁶ *Id.*

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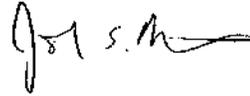
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Agencies' representatives involved in this rulemaking proceeding so that we could further explain the importance of the rules' application to all creditors. If the drafters of these regulations have any questions, please contact Paul Metrey at (703) 821-7040 and John Whatley at (202) 326-5548.

Sincerely yours,



William A. Newman,
Chief Operating Officer
Legal and Regulatory Affairs
National Automobile Dealers Association



John Whatley
Vice President & General Counsel
Alliance of Automobile Manufacturers