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July 11, 2005

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

Office of the Comptroller of the Currency
250 E Street, S.W.
Public Information Room, Mail Stop 1-5
Washington, DC 20219
Attention: Docket No. 05-10

Robert E. Feldman, Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
Attention: RIN 3064-AC81

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, N.W.
Washington, DC 20552
Attention: Docket No. 2005-16

Mary Rupp
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

Re: FACT Act Medical Privacy Interim Final Rule
70 *Federal Register* 33958, June 10, 2005

Dear Sir or Madam:

The American Bankers Association ("ABA") is responding to the requests for comment from the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the National Credit Union Administration (collectively, the "Agencies") on their interim final rule implementing the medical privacy requirements of Section 411 of the Fair and Accurate Credit Transactions Act (the "FACT Act").

The ABA, on behalf of the more than two million men and women who work in the nation's banks, brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership—which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks—makes ABA the largest banking trade association in the country. Our members necessarily obtain and use medical information in the ordinary course of their businesses. Accordingly, this rulemaking is of great importance to them.

Section 411 of the FACT Act does two things. First, it broadly prohibits "creditors" " as defined in Section 702 of the Equal Opportunity Credit Act ("ECOA")[1] from (1) obtaining, or (2) using "medical information"[2] when making initial or continuing evaluations of consumers' eligibility for credit. Second, it restricts the sharing of medical information among financial institution affiliates.

ABA supports the interim final rule and commends the Agencies for their diligence in determining how bankers and other creditors obtain and use medical information in connection with lending determinations. ABA is concerned, however, that the interim final rule does not extend to the full range of financial institution affiliates the exemptions from the prohibition on sharing consumers' medical information with affiliates.

Restrictions on Sharing Medical Information Among Affiliates

With respect to sharing medical information, Section 411 eliminates the current exemption of the Fair Credit Reporting Act that permits sharing information with affiliates that is (1) transaction or experience information or (2) for which the customer has not opted out of sharing. The interim final rule incorporates the following statutory exceptions that permit sharing medical information:

- In connection with the business of insurance or annuities;
- For any purpose permitted without authorization under the Health Insurance Portability and Accountability Act or under the financial institutions exemption from that Act; or
- For any purpose described in Section 502(e) of the Gramm-Leach-Bliley-Act ("GLBA").

[1] Section 702 of the ECOA defines as a "creditor" "any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit." 15 U.S.C. § 1691a(e).

[2] "Medical information" is defined as information or data in any form or medium that is created by or derived from a health care provider or the consumer relating to the (1) past, present, or future physical, mental, or behavioral health or condition of an individual; (2) provision of health care to an individual; or (3) payment for health care services to an individual. Medical information does not include the consumer's age, gender, residence or e-mail address, although other laws may restrict the use of such information.

ABA generally supports this provision. However, we remain concerned about the scope of the interim final rule with respect to the affiliate-sharing provisions because it fails to extend to *all* affiliates of a financial institution, the exceptions that permit sharing for specific purposes. *For example*, although a national bank or its operating subsidiaries may directly share a customer's medical information with its affiliates, the same bank's financial subsidiaries may not share the same information. Consider the following scenario:

If a customer came to a national bank seeking information about insurance products, the bank could share that information (including medical information) with its financial subsidiary selling insurance or its financial subsidiary selling variable annuities, as appropriate. However, if the same customer came directly to the national bank's financial subsidiary selling insurance and a determination was made that a variable annuity was most appropriate, the insurance subsidiary could not share the customer's medical information with its broker-dealer affiliate.

This anomaly is a result of the split jurisdiction among the bank regulators and the Federal Trade Commission ("FTC") in the affiliate-sharing provisions of section 411(b) of FACT Act. The jurisdiction of the banking agencies under section 411(b) is limited to specified institutions under their regulatory jurisdiction.

Thus, in the example above, OCC's provisions in the interim final rule are limited to national banks and their operating subsidiaries. Rather, it is the FTC that has jurisdiction over financial subsidiaries of national banks, and similarly affiliates of bank holding companies. Depending on state law, this same result could obtain in state-chartered banking organizations.

Although it is probable that the GLBA statutory exception covers these situations, to comply with that exception, institutions would have to establish separate customer consent procedures for excluded subsidiaries and affiliates that would not otherwise be applicable. As a result, there could not be uniform procedures for the sharing customer's medical information among all the affiliates of a single financial institution.

This anomaly would appear to be contrary to both Congressional intent and the historical cooperation between the Agencies and the FTC that has permitted uniformity of operations within an integrated financial services organization.

Moreover, in a litigation context, a court could easily be confused by the fact that the banking agencies issued rules and the FTC didn't, resulting in an adverse decision on sharing medical information.

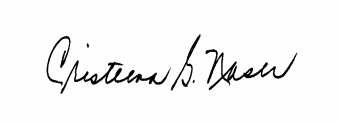
Accordingly, ABA urges the Agencies and the FTC to rectify this situation through rulemaking that will afford all of a financial institution's affiliates the same treatment under the medical privacy rules as their bank counterparts.

Conclusion

In conclusion, ABA supports the interim final rule, but strongly urges the Agencies and the FTC to resolve this last jurisdictional issue.

If you have any questions about the foregoing comments, please do not hesitate to contact the undersigned.

Sincerely,



Cristeena G. Naser

cc: Andrew Smith, Attorney,
Division of Financial Practices
Federal Trade Commission
601 New Jersey Avenue, NW
Washington, DC 20001