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Part II

Department of the Treasury

**Office of the Comptroller of the
Currency**

12 CFR Part 41

Office of Thrift Supervision

12 CFR Part 571

Federal Reserve System

12 CFR Parts 222 and 232

Federal Deposit Insurance Corporation

12 CFR Part 334

National Credit Union Administration

12 CFR Part 717

**Fair Credit Reporting Medical Information
Regulations; Final Rule**

DEPARTMENT OF THE TREASURY**Office of the Comptroller of the Currency****12 CFR Part 41**

[Docket No. 05–18]

RIN 1557–AC85

FEDERAL RESERVE SYSTEM**12 CFR Parts 222 and 232**

[Regulation V and FF; Docket No. R–1188]

FEDERAL DEPOSIT INSURANCE CORPORATION**12 CFR Part 334**

RIN 3064–AC81

DEPARTMENT OF THE TREASURY**Office of Thrift Supervision****12 CFR Part 571**

[No. 2005–49]

RIN 1550–AB88

NATIONAL CREDIT UNION ADMINISTRATION**12 CFR Part 717****Fair Credit Reporting Medical Information Regulations**

AGENCIES: Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); Office of Thrift Supervision, Treasury (OTS); National Credit Union Administration (NCUA).

ACTION: Final rules.

SUMMARY: The OCC, Board, FDIC, OTS, and NCUA (Agencies) are publishing final rules to implement section 411 of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act). The final rules create exceptions to the statute's general prohibition on creditors obtaining or using medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit for all creditors. The exceptions permit creditors to obtain or use medical information in connection with credit eligibility determinations where necessary and appropriate for legitimate purposes, consistent with the Congressional intent to restrict the use of medical information for inappropriate purposes. The final rules also create limited

exceptions to permit affiliates to share medical information with each other without becoming consumer reporting agencies. The final rules are substantially similar to the rules adopted by the Agencies on an interim final basis in June 2005.

DATES: The effective date of the interim final rule published on June 10, 2005 (70 FR 33958) is delayed until April 1, 2006. The amendments in this final rule are effective April 1, 2006.

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SUPPLEMENTARY INFORMATION:**I. Background**

The FACT Act became law on December 4, 2003. Public Law 108–159, 117 Stat. 1952. In general, the FACT Act amends the Fair Credit Reporting Act (FCRA or Act) to enhance the ability of consumers to combat identity theft, increase the accuracy of consumer reports, and allow consumers to exercise greater control regarding the type and amount of marketing solicitations they receive.

Section 411 of the FACT Act generally limits the ability of creditors to obtain

or use medical information in connection with credit eligibility determinations and the ability of consumer reporting agencies to disclose medical information, and restricts the sharing of medical information and other medically related information with affiliates. The FACT Act also revised the definition of “medical information” in section 603(i) of the FCRA to mean information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to the past, present, or future physical, mental, or behavioral health or condition of an individual, the provision of health care to an individual, or the payment for the provision of health care to an individual. The term “medical information” does not include the age or gender of a consumer, demographic information about the consumer, including a consumer's residence address or e-mail address, or any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy.

Section 604(g)(1) of the FCRA restricts the circumstances under which consumer reporting agencies may furnish consumer reports that contain medical information about consumers. This provision is not the subject of the Agencies' rulemaking.

Section 604(g)(2) of the FCRA prohibits creditors from either obtaining or using medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit. The statute contains no prohibition, however, on creditors obtaining or using medical information for other purposes that are not in connection with a determination of the consumer's eligibility, or continued eligibility, for credit. Section 604(g)(5)(A) requires the Agencies to prescribe regulations that permit transactions that are determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (including administrative verification purposes), consistent with Congressional intent to restrict the use of medical information for inappropriate purposes.

Section 603(d)(3) of the FCRA restricts the sharing of medically related information with affiliates if that information meets the definition of “consumer report” in section 603(d)(1) of the FCRA. Specifically, section 603(d)(3) provides that the standard

exclusions from the definition of “consumer report” contained in section 603(d)(2)—such as sharing transaction or experience information among affiliates or sharing other information among affiliates after notice and an opportunity to opt-out—do not apply if medically related information is disclosed to an affiliate. Medically related information includes medical information, as described above, as well as an individualized list or description based on payment transactions for medical products or services, and an aggregate list of identified consumers based on payment transactions for medical products or services.

Section 604(g)(3) of the FCRA provides several exceptions that allow institutions to share medically related information with affiliates in accordance with the standard exclusions that apply to the sharing of non-medically related information.¹ The statute gives the Agencies and the FTC the authority to create additional exceptions by regulation or order.

Section 604(g)(4) of the FCRA provides that any person that receives medical information from an affiliate pursuant to an exception in section 604(g)(3) or from a consumer reporting agency under section 604(g)(1) must not disclose such information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

II. Overview of Comments Received

On April 28, 2004, the Agencies published a notice of proposed rulemaking in the **Federal Register** (69 FR 23380) relating to the medical information provisions of section 411 of the FACT Act. The proposed rules applied to banks, thrifts, Federal credit

¹ The statutory exceptions provide that an institution may share medically related information with an affiliate without having the communication categorically treated as a consumer report if the information is disclosed to an affiliate: (1) In connection with the business of insurance or annuities (including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners, as in effect on January 1, 2003); (2) For any purpose permitted without authorization under the Standards for Individually Identifiable Health Information promulgated by the Department of Health and Human Services (HHS) pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA); (3) For any purpose referred to under section 1179 of HIPAA; (4) For any purpose described in section 502(e) of the Gramm-Leach-Bliley Act; or (5) As otherwise determined to be necessary and appropriate, by regulation or order, by the Federal Trade Commission (FTC), the Agencies, or an applicable State insurance authority. 15 U.S.C. 1681b(g)(3).

unions, and other creditors regulated by one of the Agencies. Most commenters supported the proposed rules, but urged the Agencies to broaden the scope of the rules to apply to all creditors.

On June 10, 2005, the Agencies published interim final rules and a request for public comments in the **Federal Register** (70 FR 33958). The interim final rules created exceptions to the general prohibition against creditors obtaining or using medical information in connection with credit eligibility determinations, as required by section 604(g)(5)(A), to permit transactions necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (including administrative verification purposes), consistent with the intent of Congress to restrict the use of medical information for inappropriate purposes. In response to comments on the proposed rules, the scope of the interim final rules was expanded so that all creditors could rely on the exceptions for obtaining and using medical information in connection with credit eligibility determinations. The interim final rules also created exceptions to the special restrictions in section 603(d)(3) on sharing medically related information with affiliates, as permitted by section 604(g)(3)(C). The Agencies published these rules as interim final rules to give interested parties an opportunity to comment on the expanded scope of the exceptions for obtaining and using medical information in connection with credit eligibility determinations.

Each Agency received the following number of comment letters on the interim final rules: OCC (8), Board (13), FDIC (9), OTS (7), and NCUA (11). Comments were received from industry commenters (including depository institutions, credit card companies, mortgage lenders and other non-bank creditors, and industry trade associations), consumer and community groups, and health privacy advocates. As discussed more fully below, commenters strongly supported the expanded scope of the rules to allow all creditors to rely on the exceptions for obtaining and using medical information in connection with credit eligibility determinations. The comments, and the Agencies' responses to the comments, are discussed in the following section-by-section analysis.

III. Section-by-Section Analysis

Section ____ .3 Definitions

The Agencies received no comments on the definitions of “Act,” “company,” “consumer,” “common ownership or

common corporate control,” “medical information,” or “person” as defined in the interim final rules. These definitions are republished in the final rules without revision.

Affiliate

Section ____ .3(b) of the interim final rules defined “affiliate” to mean any company that is related by common ownership or common corporate control with another company.² The Agencies concluded that this definition of “affiliate” closely tracked the definition contained in section 2 of the FACT Act. The Agencies also concluded that there was no substantive difference between the FACT Act definition of “affiliate” and the definition of “affiliate” in section 509 of the Gramm-Leach-Bliley Act (GLB Act).

One commenter requested use of an alternative definition of “affiliate” that would incorporate certain concepts from California law. Specifically, this commenter suggested revising the definition of “affiliate” to eliminate information sharing restrictions among affiliates that are regulated by the same or similar functional regulators, involved in the same broad line of business, or share a common brand or identity. This commenter maintained that such a definition would reduce costs and allow multiple entity financial institutions to better serve their clients.

The Agencies decline to incorporate into the definition of “affiliate” exceptions for entities regulated by the same or similar functional regulators, entities in the same line of business, or entities that share a common brand or identity. These exceptions were incorporated into a California financial privacy law in August 2003.³ Section 2 of the FACT Act defines the term “affiliate” to mean “persons that are related by common ownership or affiliated by corporate control.”⁴ Congress did not incorporate the exceptions from California law into the definition of “affiliate” when it enacted the FACT Act at the end of 2003. The Agencies believe that the definition of “affiliate” included in the interim final rules better effectuates the intent of Congress than the revision suggested by the commenter. Accordingly, the

² For purposes of the regulation, an “affiliate” includes an operating subsidiary of a bank or savings association, and a credit union service organization that is controlled by a Federal credit union.

³ See Calif. Financial Code § 4053(c).

⁴ Fair and Accurate Credit Transactions Act of 2003, Public Law No. 108-159, § 2, 117 Stat. 1952, 1953 (2003).

definition of “affiliate” is republished without change in the final rules.

Section __.30 Obtaining or Using Medical Information in Connection With a Determination of Eligibility for Credit

Section 411(a) of the FACT Act adds a new section 604(g)(2) to the FCRA. This provision contains a broad limitation on the ability of creditors to either obtain or use medical information in connection with credit eligibility determinations.

A. Scope of Rules on Obtaining or Using Medical Information

The proposed rules would have applied the exceptions to banks, thrifts, and Federal credit unions. Many commenters on the proposal urged the Agencies to expand the scope of the exceptions to apply to all creditors, not just to creditors that are banks, thrifts, or Federal credit unions.

As noted in the supplementary information to the interim final rules, the prohibition in section 604(g)(2) on creditors obtaining or using medical information in connection with credit eligibility determinations applies to all creditors. Under the FCRA, the term “creditor” has the same meaning as in the Equal Credit Opportunity Act (“ECOA”), which defines a “creditor” as 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.⁵ Creditors include depository institutions as well as entities that are neither depository institutions nor affiliates of depository institutions, such as independent finance companies, loan brokers, health care providers, and automobile dealers.

The statute does not contain any specific exceptions to this broad prohibition. Instead, section 604(g)(5) directs the Agencies to prescribe regulations to permit “transactions” in which creditors obtain or use medical information where “necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs consistent with the intent of paragraph (2) to restrict the use of medical information for inappropriate purposes.”⁶

The supplementary information to the interim final rules noted that section 604(g)(5) does not, by its terms, limit the creditors that may rely on exceptions granted by the Agencies. Moreover, that

section, by its terms, applies to “transactions” for which the Agencies determine exceptions are necessary, not to “creditors” that the Agencies determine must be protected by the exceptions. Accordingly, the combined scope of the exceptions adopted pursuant to section 604(g)(5) in the interim final rules is as broad as the prohibition to which it applies, and is available to all creditors.

The interim final action was comprised of six rules. The applicability of the section of each Agency’s rule addressing the prohibition on and exceptions for creditors obtaining or using medical information in connection with credit eligibility determinations was set forth in § __.30(a) and covered transactions in which certain enumerated entities participate as creditors. Under § __.30(a)(2), other entities that participate as creditors in transactions in which an enumerated entity also participates as a creditor would also be subject to that Agency’s rule.

In addition, the interim final action included a separate rule, codified in part 232 of the Board’s chapter of the *Code of Federal Regulations* as Regulation FF (hereafter “separate rule”), which afforded the exceptions to the prohibition against obtaining and using medical information for credit eligibility determinations generally to all creditors, except for creditors that are subject to one of the other Agencies’ rules. This combination of rules established uniform coverage and exceptions for transactions involving any creditor that is subject to the prohibition on obtaining or using medical information in section 411. The separate rule was located in the Board’s chapter of the *Code of Federal Regulations* as a matter of convenience because many creditors are accustomed to looking to the Board’s regulations implementing other statutes, such as the Truth-in-Lending Act and the ECOA.

In the supplementary information to the interim final rules, the Agencies expressed concern that uncertainty about this matter may have led creditors that believed they could not avail themselves of the exceptions not to comment on the appropriateness and details of the exceptions. Therefore, these rules were adopted on an interim final basis to provide interested parties with an opportunity to comment on the expanded scope of the rules.

Most commenters strongly supported the approach taken in the interim final rules to expand the scope of the exceptions to apply to all creditors. None of the commenters objected to the expanded scope of the exceptions.

One commenter expressed concern about enforcement of the rules in the event of potential abuses by non-bank creditors using medical information pursuant to the exceptions and requested that the Agencies and the FTC address this issue. The Agencies will enforce compliance with the final rules against creditors subject to their enforcement authority. The Agencies will coordinate with other agencies to promote compliance with the final rules by all creditors, including through referrals to the relevant enforcement agency where appropriate.

One trade association representing state and Federal credit unions urged the NCUA to reassess its authority to apply its rule to state-chartered credit unions or, alternatively, to seek a legislative solution to provide the NCUA, or state regulators, with rulemaking authority over state-chartered credit unions with regard to medical information. This commenter believed that allowing the NCUA to exercise rulemaking authority with respect to state-chartered credit unions would be more effective than having a separate rule located in the Board’s chapter of the *Code of Federal Regulations* that applies to “all other creditors” because the NCUA works more closely with state-chartered credit unions than the Board does. Finally, this commenter suggested that there was ambiguity regarding the rules and the authority to enforce the rules against state-chartered credit unions.

The NCUA and the other Agencies believe that covering state-chartered credit unions under the separate rule is the most appropriate means for making the exceptions to the general prohibition applicable to those entities. Under section 621(a) of the FCRA, the FTC has enforcement authority over state-chartered credit unions. As noted in the supplementary information to the interim final rule, the separate rule has been located in the Board’s chapter of the *Code of Federal Regulations* as a matter of convenience because many creditors are accustomed to looking to the Board’s regulations implementing other statutes, such as the Truth-in-Lending Act and the Equal Credit Opportunity Act.

Accordingly, the scope of the final rules is identical to the scope of the interim final rules. The final rules consist of the six rules included in the interim final rules. The scope provisions in § __.30(a) of each Agency’s rule and § 232.1(a) of the separate rule are

⁵ 15 U.S.C. 1681a(r)(5) and 1691a(e).

⁶ 15 U.S.C. 1681b(g)(5)(A).

republished without change in the final rules.⁷

In the supplementary information to the interim final rules, the Agencies emphasized the importance of having consistent rules that prescribe exceptions to the prohibitions from obtaining or using medical information in connection with credit eligibility determinations. Thus, in developing the proposed, interim final, and final rules, the Agencies have consulted and coordinated with each other to establish identical rules. The Agencies will consult and coordinate with each other regarding any amendments to the rules for the purpose of assuring, to the extent possible, that the regulations prescribed by each Agency remain consistent and comparable with the regulations prescribed by the other Agencies.

B. General Prohibition on Obtaining or Using Medical Information

Section ____ .30(b)(1) of each Agency's interim final rule and § 232.1(b) of the separate rule incorporated the statute's general rule prohibiting creditors from obtaining or using medical information pertaining to a consumer in connection with any determination of a consumer's eligibility, or continued eligibility, for credit, except as provided in the regulations under subpart D. The Agencies received no comments on these provisions. Section ____ .30(b)(1) of each Agency's rule and § 232.1(b) of the separate rule are republished without change in the final rule.

Section ____ .30(b)(2) of each Agency's interim final rule and § 232.1(c) of the separate rule clarified the meaning of certain terms used in the statutory prohibition and the proposed rule, including "eligibility, or continued eligibility, for credit," "credit," and "creditor." One commenter requested that the Agencies clarify that the definitions of "credit" and "creditor" include the Board's interpretations of these terms pursuant to the Board's Regulation B, which implements the ECOA, and the Board's official staff commentary to Regulation B.⁸

⁷ OTS is making a technical change to the scope provision of its Fair Credit Reporting rule (section 571.1(b)) to make the provision more user-friendly.

⁸ Under Regulation B, the Board defines the term "creditor" to mean a person who, in the ordinary course of business, regularly participates in a credit decision, including setting the terms of the credit, and includes a creditor's assignee, transferee, or subrogee who so participates. A creditor also includes a person, such as a broker, who regularly refers applicants or prospective applicants to creditors, or selects or offers to select creditors to whom requests for credit may be made, for purposes of Regulation B's prohibitions against discrimination and discouragement. A person is not a creditor regarding any violation of the ECOA or Regulation B committed by another creditor unless

As noted in the supplementary information to the interim final rules, section 603(r)(5) of the FCRA provides that the terms "credit" and "creditor" have the same meanings as in section 702 of the ECOA. The interim final rules track the FCRA definitions of "credit" and "creditor." The Board's interpretation of the terms "credit" and "creditor" in Regulation B and the official staff commentary to Regulation B, as appropriate, informs the application of those terms for FCRA purposes.

C. Receiving Unsolicited Medical Information

Section ____ .30(c) of each Agency's interim final rule contained a rule of construction for the receipt of unsolicited medical information. Section 232.2 of the separate rule contained the identical provision. The rule of construction provides that a creditor does not obtain medical information in violation of the prohibition if it receives such information from a consumer, a consumer reporting agency, or any other person in connection with any determination of the consumer's eligibility, or continued eligibility, for credit without specifically requesting medical information. The interim final rules clarified that a creditor that receives unsolicited medical information may use that information in connection with any determination of the consumer's eligibility, or continued eligibility, for credit only to the extent the creditor can rely on one of the exceptions in §§ ____ .30(d) and (e) of each Agency's rule or §§ 232.3 and .4 of the separate rule. The interim final rules also provided examples to illustrate the rule of construction.

One commenter noted that it had previously requested that the provision dealing with receipt of unsolicited medical information should be an exception, rather than a rule of construction. As explained in the supplementary information to the interim final rules, the rule of construction was retained as an interpretation, rather than as an exception, because it interprets the statutory language regarding when a creditor "obtains" medical information in violation of the prohibition. This commenter also noted that it had previously suggested limiting the ability of creditors to indirectly solicit or

the person knew or had reasonable notice of the act, policy, or practice that constituted the violation before becoming involved in the credit transaction. Finally, a creditor does not include a person whose only participation in a credit transaction involves honoring a credit card. See 12 CFR 202.2(1).

encourage the sharing of medical information. As explained in the supplementary information to the interim final rules, the rule of construction uses the phrase "without specifically requesting medical information." The examples make clear that the rule of construction applies when medical information is provided by the consumer in response to a general inquiry that does not specifically request medical information or is provided by the consumer voluntarily on an unsolicited basis.

This commenter also reiterated its previous request that the Agencies require creditors to destroy or eliminate any unsolicited medical information that they receive. As explained in the supplementary information to the interim final rules, the destruction of unsolicited medical information would not be appropriate in circumstances where records must be retained. For example, if unsolicited medical information is obtained by a creditor on a credit application for which adverse action is taken, the creditor generally would be required to retain a copy of the application, including any medical information on the application, for 25 months pursuant to the record retention provisions of Regulation B, which implements the ECOA. Therefore, the Agencies decline to impose a requirement to destroy or eliminate unsolicited medical information. Section ____ .30(c) of each Agency's rule and § 232.2 of the separate rule are republished without change in the final rule.

D. Financial Information Exception for Obtaining and Using Medical Information

Section ____ .30(d) of each Agency's interim final rule contained the financial information exception and examples. Section 232.3 of the separate rule contained the identical provision and examples.⁹ The financial information exception consists of a three-part test. First, the information must be the type of information routinely used in making credit eligibility determinations, such as information relating to debts, expenses, income, benefits, assets, collateral, or the purpose of the loan, including the use of proceeds. Second, the creditor must use the information in a manner and to an extent no less favorable than it would use comparable information

⁹ For simplicity, references and citations to the separate rule have been omitted from the discussion below. For any change made to the provisions of §§ ____ .30(d) and (e), corresponding changes have been made to §§ 232.3 and 232.4 of the separate rule.

that is not medical information in a credit transaction. Third, the creditor must 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 of credit eligibility. The interim final rules also provided examples of the types of information covered by the exception, uses of medical information that are consistent with the exception, and uses of medical information that are not consistent with the exception.

One commenter noted that none of the examples explicitly mention workers' compensation, even though § _____.30(d)(1)(i) and the example in § _____.30(d)(2)(i)(C) appear to cover the use of medical information to determine the likelihood and amount of future medically-based income, including by analogy workers' compensation. This commenter therefore requested a clarification that medically-based income, such as workers' compensation, may be obtained and used under the exception just as disability income.

The Agencies agree that workers' compensation is income that would be covered by the financial information exception so long as it is the type of information routinely used in making credit eligibility determinations. The Agencies have revised the example in § _____.30(d)(2)(i)(C) to add a reference to workers' compensation. Specifically, the example has been revised to read as follows: "The dollar amount and continued eligibility for disability income, workers' compensation income, or other benefits related to health or a medical condition that is relied on as a source of repayment."

The Agencies reiterate their statement in the supplementary information to the interim final rule that the types of information listed as examples of information routinely used in making credit eligibility determinations for purposes of the financial information exception is not an exhaustive list. The fact that a particular type of information is not specifically mentioned in the text of the regulation or the accompanying examples does not mean that such information falls outside the scope of the financial information exception.

Another commenter requested clarification of the example in § _____.30(d)(2)(i)(D) that the provision does not require the identity and contact information for medical debt creditors to be coded when included on credit reports. Sections 604(g)(1) and 605(a)(6) of the FCRA generally require consumer reporting agencies to use codes on consumer reports furnished in connection with credit transactions that

do not identify the specific provider of medical information or the nature of such services, products, or devices to a person other than the consumer, unless the uncoded information is relevant to process or effect the transaction and the consumer provides specific written consent for the furnishing of the uncoded information. The requirement for consumer reporting agencies to code certain information on consumer reports is beyond the scope of this rulemaking. Therefore, the Agencies decline to amend the example in the manner requested.

The Agencies are revising the example in § _____.30(d)(2)(iii)(C) to illustrate a circumstance where a creditor requires the consumer to obtain a debt cancellation contract, debt suspension agreement, or credit insurance product from a "nonaffiliated third party" in order to obtain a loan. This change is designed to avoid confusion with other legal requirements. As noted in the supplementary information to the interim final rules, other laws and regulations, including applicable anti-tying rules and fair lending laws, may prohibit or otherwise restrict a creditor from requiring a consumer to obtain a debt cancellation contract, debt suspension agreement, or credit insurance product in connection with an extension of credit.¹⁰ A discussion of the circumstances prohibited by other laws and regulations is beyond the scope of this rule.

One commenter believed that a sentence in the supplementary information to the interim final rules created a conflict with the financial information exception by implying that the only circumstance where the creditor could legitimately seek medical information was when the consumer is applying to finance a medical procedure. This commenter believed that a conflict was created by the following sentence: "Thus, except where a creditor has a specific application for the financing of medical procedures, a creditor generally would be prohibited from specifically asking for medical information on a credit application." (70 FR 33967.) This commenter requested that the Agencies modify this sentence to state that:

¹⁰For example, banks are prohibited from conditioning an extension of credit on the consumer obtaining some additional credit, property or service from the bank or its affiliate other than a loan, discount, deposit or trust service, see Bank Holding Company Amendments of 1970 § 106(b) (12 U.S.C. 1972); see also 12 CFR 37.3(a) (providing that a national bank may not extend credit nor alter the terms or conditions of an extension of credit conditioned upon the customer entering into a debt cancellation contract or debt suspension agreement with the bank).

"Except where a creditor has a specific application for the financing of medical procedures or has received an application in which income was claimed as deriving from injury or disability, a creditor generally would be prohibited from specifically asking for medical information on a credit application."

The Agencies do not believe that the quoted sentence from the supplementary information to the interim final rules creates a conflict with the financial information exception. The quoted language refers to circumstances in which medical information may be specifically requested on an application. The revision requested by the commenter does not relate to what a creditor may ask on an application, but relates to whether a creditor may use medical information it "has received [on] an application in which income was claimed as deriving from injury or disability." If a consumer lists medically related income on an application, the creditor may use that information in accordance with the exceptions in §§ _____.30(d) and (e). The application, however, should not specifically request the consumer to disclose such medically related income. Of course, the application can ask the consumer to list all sources of income that the consumer would like the creditor to consider. Section _____.30(d) of the final rule is revised as noted above.

E. Specific Exceptions for Obtaining and Using Medical Information

Sections _____.30(e)(1)(i)–(ix) of the interim final rules contained a number of specific exceptions to the general prohibition. Section _____.30(e) of the interim final rules provided examples of certain exceptions. These exceptions allow creditors to obtain and use medical information for a limited number of particular purposes in connection with a determination of the consumer's eligibility, or continued eligibility, for credit. A creditor that obtains medical information pursuant to one of these specific exceptions may not subsequently use the information in connection with determining the consumer's eligibility, or continued eligibility, for credit unless an exception applies. The specific exceptions and examples are republished in each Agency's final rules and the separate rule with a few technical, non-substantive changes.

Determination of power of attorney, legal representative and legal capacity. Section _____.30(e)(1)(i) of the interim final rules contained an exception relating to the use of a power of attorney

or legal representative. This exception permits a creditor to obtain and use medical information in connection with determining the consumer's credit eligibility to determine: (1) Whether the use of a power of attorney or legal representative that is triggered by a medical event or condition is necessary and appropriate; or (2) whether the consumer has the legal capacity to contract when a person seeks to exercise a power of attorney or act as legal representative for a consumer based on an asserted medical event or condition.

One commenter requested that the Agencies broaden the scope of this exception to permit creditors to investigate the mental capacity of a consumer based on a suspicion that the consumer lacks the capacity to contract. This commenter did not believe that an exception to permit an inquiry into the consumer's legal capacity "when a person seeks to exercise a power of attorney or act as a legal representative for a consumer based on an asserted medical event or condition" was broad enough to cover all circumstances where the consumer's legal capacity may be in doubt. This commenter urged the Agencies to clarify that creditors may investigate the mental capacity of a consumer even when there is no power of attorney issue, and that a reasonable suspicion is a sufficient basis to conduct the investigation. Additionally, or in the alternative, this commenter requested clarification that loan denials based on lack of legal mental capacity are not eligibility issues; therefore, no exception is necessary, because use of medical information for this purpose is not subject to the general statutory prohibition. Finally, this commenter did not believe that the terms "medical event" or "condition" were clear for purposes of the power of attorney exception. Specifically, this commenter believed it was unclear how significant the medical event or condition must be, who must make the determination that the medical event or condition has occurred, and whether a suspicion allows the creditor to investigate further.

As noted in the supplementary information to the interim final rules, commenters on the proposal were divided on the need for a broader exception covering powers of attorney and legal capacity. In the interim final rules, the Agencies considered whether to adopt a broader exception, but declined to do so. The Agencies believe that creditors, or their counsel, are qualified to determine whether a power of attorney or legal representative status has been properly invoked based on an

asserted medical condition or event. Creditors generally are not qualified to determine the mental capacity of a consumer. Moreover, permitting creditors to inquire into the mental capacity of consumers based only on a "reasonable suspicion" could result in discrimination against certain consumers and circumvention of the general prohibition. Therefore, the Agencies decline to expand the exception in the manner requested by the commenter.

The Agencies recognized in the supplementary information to the interim final rules that a power of attorney or legal representative status may be used in a variety of circumstances, many of which may have no connection with a determination of a consumer's eligibility, or continued eligibility, for credit. Nevertheless, the Agencies concluded that an exception was necessary because a power of attorney or legal representative status based on an asserted medical condition or event may relate to a credit eligibility determination in certain circumstances. The Agencies do not agree with the commenter that the use of medical information to deny loans based on a lack of mental capacity is not connected with credit eligibility determinations. Accordingly, the Agencies cannot state categorically that medical information used for this purpose is not subject to the general prohibition.

The Agencies believe that the terms "medical event" and "medical condition" are clear. The Agencies note that these terms have been used in a number of other exceptions without objection as to their clarity.

A technical, non-substantive change is made to § ____.30(e)(1)(i) in the final rules. Section ____.30(e)(1)(i) is revised to replace "medical event or condition" with "medical condition or event" for consistency with the exceptions in §§ ____.30(e)(viii) and (ix).

Compliance with applicable law. Section ____.30(e)(1)(ii) of the interim final rules contained an exception to permit a creditor to obtain and use medical information to comply with applicable requirements of local, state, or Federal laws.

One commenter believed that, even when an applicant meets the minimum standard of legal capacity, there may be situations in which the creditor believes that the consumer may not fully understand the nature of the transaction or be able to determine whether it is in his or her best interest. This commenter argued that HOEPA and its borrower's interest and net tangible benefit tests, as well as state anti-flipping laws, could be read to require an evaluation of the

consumer's medical condition.

Therefore, this commenter requested the Agencies to confirm its interpretation that the compliance with applicable laws exception is broad enough to permit creditors to consider medical conditions even though such laws do not specifically require the consideration of medical conditions.

The Agencies acknowledge that it may be necessary to obtain and use medical information to comply with various requirements of local, state, or Federal laws. A discussion of whether specific laws and legal requirements may trigger this exception would involve interpretation of those laws and is beyond the scope of this rulemaking. Section ____.30(e)(1)(ii) is republished without change in the final rules.

Special credit program or credit-related assistance program. Section ____.30(e)(1)(iii) of the interim final rules contained an exception to permit creditors to obtain and use medical information in connection with a determination of the consumer's eligibility, or continued eligibility, for credit, to determine, at the consumer's request, whether the consumer qualifies for a legally permissible special credit program or credit-related assistance program that is: (a) Designed to meet the special needs of consumers with medical conditions and (b) established and administered pursuant to a written plan of the plan sponsor that identifies the class of persons that the program is designed to benefit and sets forth the procedures and standards for extending credit or providing other credit-related assistance under the program. This exception was added in the interim final rules and is modeled after the provisions relating to special purpose credit programs in the ECOA and the Board's Regulation B, 12 CFR part 202. An example of this exception was provided in § ____.30(e)(2). Commenters supported the addition of this exception. Sections ____.30(e)(1)(iii) and (e)(2) are republished without change in the final rules.

Fraud prevention or detection. Section ____.30(e)(1)(iv) of the interim final rules contained an exception for fraud prevention or detection. One commenter reiterated a previous request that the Agencies delete this exception, maintaining that the exception was overly broad and unnecessary.

As explained in the supplementary information to the interim final rules, the fraud prevention or detection exception is available only to the extent necessary to detect or prevent fraud. The Agencies believe that there may be limited circumstances where the use of medical information is necessary for

fraud prevention or detection purposes. For example, given the broad definition of "medical information" and the development of increasingly sophisticated anti-fraud technologies, such as various biometric tools, the Agencies believe it is important to retain the fraud prevention or detection exception so as not to hinder the development of new anti-fraud technologies. Furthermore, the supplementary information to the interim final rules also noted that creditors may not rely on blanket assertions of a fraud prevention or detection purpose to fall within the exception, but must demonstrate the necessity for, and actual use of, medical information to prevent or detect fraud. Section _____.30(e)(1)(iv) is republished without change in the final rules.

Financing medical products or services. Section _____.30(e)(1)(v) of the interim final rules contained an exception for the financing of medical products or services. Section _____.30(e)(3) of the interim final rules provided examples of this exception. The Agencies received no comments on the medical financing exception in the interim final rules. Sections _____.30(e)(1)(v) and (e)(3) are republished without change in the final rules.

Medical accommodation. Section _____.30(e)(1)(vi) of the interim final rules contained an exception for medical accommodations to consumers. This exception applies where the consumer, or the consumer's legal representative, specifically requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit, to accommodate the consumer's particular circumstances, and such request is documented by the creditor. Any such accommodation must be consistent with safe and sound practices. The interim final rules permitted the medical accommodation exception to be triggered by the consumer's oral, electronic, or written request. Moreover, a consumer could make a specific request by responding to a generic inquiry on a credit application that invites the consumer to describe any special circumstances or other information (not limited to medical information) that the consumer would like the creditor to consider in evaluating the consumer's application. Section _____.30(e)(4) of the interim final rules provided examples to illustrate the medical accommodation exception.

One commenter believed that the regulation should clarify that, to meet the medical accommodation exception, the consumer need not be the first to

broach the topic of medical information. This commenter maintained that a creditor should be able to raise the topic in a manner consistent with the prohibition against holding information about a medical condition against the consumer. For example, if negative information from a medical furnisher appeared on a consumer's credit report, this commenter would want the loan officer to be able to explain that the consumer may voluntarily provide an explanation of the underlying medical condition and, if the consumer did so, the creditor could verify that explanation. This commenter also requested the creation of a "safe harbor" provision to permit the use of a consent form (or standard language read over the telephone) to satisfy compliance with the medical accommodation exception. This commenter believed that use of a consent form containing standard language is appropriate once the consumer indicates that he or she wants the creditor to consider medical information to accommodate the consumer.

As explained in the supplementary information to the interim final rules, the medical accommodation exception is triggered by the specific request of the consumer. The example in § _____.30(e)(4)(iii) of the interim final rules and the supplementary information also explained that a consumer may make a specific request by responding to a generic inquiry on a credit application that invites the consumer to describe any special circumstances or other information (not limited to medical information) that the consumer would like the creditor to consider in evaluating the consumer's application. The medical accommodation exception is not triggered until the consumer makes a specific request for an accommodation. Therefore, in the circumstances described by the commenter, the use by a creditor of medical information from a consumer report, such as information about a medical debt, to make a specific inquiry about the consumer's medical condition is not consistent with the financial information exception and is not permitted.

Of course, if a consumer's credit report shows a substantial unpaid debt that has been coded as medical information, the creditor may use that information in a manner and to an extent that is no less favorable than it would use comparable information that is not medical information. For example, if two consumers apply for credit and each has a \$50,000 debt that is 90-days past due, one of which is a coded medical debt and the other which

is a non-medical debt, the creditor may seek an explanation from the consumer with the medical debt about the amount and status of the debt and verify that explanation, provided that the creditor's policies and procedures also require that the creditor seek an explanation from the consumer with the non-medical debt about the amount and status of the debt and verifies that explanation.

The Agencies decline to provide a model consent form that would create a safe harbor for satisfying the medical accommodation exception. In the interim final rules, the Agencies omitted the requirement for a separate signed writing by the consumer that describes the specific medical information and the specific purpose for which it is to be used. Instead, the Agencies chose to adopt a more flexible standard that focuses on the specific request of the consumer for a medical accommodation and the creditor's documentation of that request. Under this approach, the creditor is not restricted to any particular form of documentation of the consumer's request. For example, once a consumer has requested a medical accommodation, a creditor may elect to document a consumer's request by having the consumer complete and sign a standard consent form. Although the example in § _____.30(e)(4)(v) provides that the use of boilerplate language in an application to routinely obtain consumer authorization or consent to obtain and use medical information for credit eligibility determinations does not constitute a specific request for a medical accommodation, nothing in that example prohibits the use of a standard consent form as a means of documentation once the consumer has made a specific request. Because other forms of documentation may also be appropriate, the Agencies do not believe the final rules should specify any particular form of documentation or create a safe harbor for one particular form of documentation. Sections _____.30(e)(1)(vi) and (e)(4) are republished without change in the final rules.

Forbearance. Section _____.30(e)(1)(vii) of the interim final rules contained an exception to the general prohibition for forbearance practices and programs that are triggered by medical events or conditions. Specifically, this exception permits creditors to obtain and use medical information "consistent with safe and sound practices, to determine whether the provisions of a forbearance practice or program that is triggered by a medical event or condition apply to a consumer."

One commenter requested that the rule clarify that the phrase "similar forbearance practice or program" includes informal forbearance practices by creditors. According to the commenter, this clarification would benefit consumers because the creditor would be able to consider medical information in decisions regarding additional credit or debt deferment.

As noted in the supplementary information to the interim final rule, the forbearance exception is flexible enough to cover both formal and informal forbearance practices and programs. Therefore, the Agencies believe that the recommended change is unnecessary.

A technical, non-substantive change is made to § _____.30(e)(1)(vii) in the final rules. Section _____.30(e)(1)(vii) is revised to replace "medical event or condition" with "medical condition or event" for consistency with the exceptions in §§ _____.30(e)(viii) and (ix). In addition, a non-substantive change is made to the example of the forbearance exception in § _____.30(e)(5) by adding a concluding sentence to indicate that the exception would apply in the example presented.

Debt cancellation contracts, debt suspension agreements, or credit insurance products. Section _____.30(e)(1)(viii) of the interim final rules contained an exception for debt cancellation contracts and debt suspension agreements. Section _____.30(e)(1)(ix) of the interim final rules contained an exception for credit insurance products.

These exceptions made clear that creditors may use medical information to underwrite credit insurance, or to underwrite related credit products, such as debt cancellation contracts and debt suspension agreements, if a medical condition or event is a triggering event for the provision of benefits. However, the fact that a consumer is denied these products cannot be used as a subterfuge to consider medical information in making a determination about eligibility or continued eligibility for an underlying loan. Therefore, a creditor may not use medical information about a consumer, such as the fact that the consumer uses a wheelchair, to determine whether the consumer will be required to obtain a debt cancellation contract, debt suspension agreement, or credit insurance product.¹¹ The Agencies received no comments on these two exceptions. Sections _____.30(e)(1)(viii) and (ix) are

republished without change in the final rules.

Additional exceptions requested by commenters. One commenter reiterated a previous request that the final rules exclude from the prohibition on obtaining or using medical information employers, plan administrators, and card issuers that provide flexible spending account programs or healthcare reimbursement account programs that utilize cards with credit features. As noted in the supplementary information to the interim final rules, the Agencies believe that an additional exception that relates to flexible spending programs tied to credit cards is not needed because the commenter's concerns are adequately addressed by the definition of "eligibility, or continued eligibility, for credit" and the existing exceptions.

Section _____.31 Limits on Redisclosure of Information

Section _____.31 of each Agency's interim final rule incorporated the statutory provision regarding the limits on redisclosure of medical information. This section provided that a person receiving medical information about a consumer from a consumer reporting agency or an affiliate is prohibited from disclosing that information to any other person, except as necessary to carry out the purposes for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order. The separate rule did not contain a comparable provision on redisclosure limits because the Agencies' rulemaking authority under section 604(g)(5)(A) of the FCRA does not apply to the statute's redisclosure provision.

The Agencies received one comment on the redisclosure provision. The Agencies have incorporated into this rulemaking the redisclosure provision directly from the statute, without further interpretation. Section _____.31 is therefore republished without change in the final rules.

Section _____.32 Sharing Medical Information With Affiliates

Section _____.32 of the interim final rules addressed the sharing of medically related information with affiliates. Section _____.32(a) of the interim final rules described the institutions to which this section applies. Section _____.32(b) of the interim final rules restated the statutory restriction on sharing medically related information with affiliates. Section _____.32(c) of the interim final rules contained exceptions to the statutory restriction on sharing medically related information with affiliates. The separate rule did not

contain a comparable provision on sharing medically related information with affiliates because the Agencies' rulemaking authority under section 604(g)(5)(A) of the FCRA does not apply to the statute's affiliate sharing provisions.

A number of commenters expressed concern that the separate rule does not address the sharing of medically related information with affiliates. These commenters generally believed that there should be regulatory provisions parallel to those in § _____.32 to create exceptions applicable to all creditors that share medically related information with affiliates. Some of these commenters requested that the Agencies modify the separate rule to incorporate these exceptions. Other commenters recognized the limited regulatory authority of the Agencies with respect to the sharing of medically related information with affiliates and requested that the FTC issue a rule consistent with the provisions of § _____.32. One commenter requested a clarification that creditors not subject to § _____.32 could rely on the statutory exceptions for sharing medically related information with affiliates. Another commenter urged NCUA to encourage the Board to provide guidance to state-chartered credit unions and other creditors on this issue.

Each Agency's authority to create exceptions to permit the sharing of medically related information with affiliates is limited to prescribing rules applicable to entities subject to the jurisdiction of each particular Agency. The FTC has the authority to promulgate rules creating exceptions to the restrictions on sharing medically related information with affiliates for entities subject to the FTC's enforcement authority. The Agencies have forwarded comments on this issue to the FTC for its consideration.

The Agencies note that five of the six exceptions included in § _____.32(c) simply repeat exceptions specifically enumerated in the statute. Any person may rely on the statutory exceptions as appropriate. The only exception not contained in the statute relates to sharing medically related information with an affiliate in connection with a determination of the consumer's eligibility, or continued eligibility, for credit consistent with § _____.30, and is found in § _____.32(c)(5).

In many circumstances where this additional, non-statutory exception would apply, it is likely that one of the exceptions enumerated in the statute would also apply, such as the exception linked to section 502(e) of the GLB Act. For example, if a creditor has an affiliate

¹¹ As noted above, other laws and regulations may prohibit or otherwise restrict a creditor from requiring a consumer to obtain one of these products in connection with an extension of credit.

perform underwriting for loans it originates and the creditor receives an application containing information about medical debts, the creditor may furnish the application, including the medical debt information, to the underwriting affiliate for use in underwriting consistent with the exceptions in § _____.30. This sharing of medical information would be permissible both because it is in connection with a determination of the consumer's credit eligibility consistent with § _____.30 and because the disclosure is necessary to effect, administer, or enforce a transaction requested or authorized by the consumer in accordance with section 502(e) of the GLB Act. Section _____.32 is therefore republished without change in the final rules.

Effective Date

The effective date of the interim final rules, published in the **Federal Register** on June 10, 2005 (70 FR 33958), is delayed until April 1, 2006, the first day of the calendar quarter. The effective date of these final rules published today is also April 1, 2006. These final rules will immediately replace the interim final rules on April 1, 2006, and only these final rules will be in effect on or after April 1, 2006.

One commenter believed that an implementation date should not be set until at least six months after a final determination as to which agency will enforce these rules against state-chartered credit unions and which agency is responsible for providing guidance on information sharing with affiliates of state-chartered credit unions. As noted above, the FCRA clearly provides that the FTC is responsible for enforcing the statute against state-chartered credit unions. Similarly, any regulations on information sharing with affiliates of state-chartered credit unions would have to be issued by the FTC. The Agencies do not believe that any further delay in the effective date is warranted.

V. Regulatory Analysis

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506, *et seq.*) and its implementing regulations at 5 CFR part 1320, including Appendix A.1, the Agencies have reviewed the final rules and determined that they contain no collections of information. The Board made this determination under authority delegated by the Office of Management and Budget.

Regulatory Flexibility Analysis

OCC: Under section 605(b) of the Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if an agency certifies, along with a statement providing the factual basis for such certification, that the rule will not have a significant economic impact on a substantial number of small entities. The Small Business Administration (SBA) has defined "small entities" for banking purposes as a bank or savings institution with assets of \$150 million or less. *See* 13 CFR 121.201.

The OCC published an Initial Regulatory Flexibility Analysis in connection with the April 28, 2004 NPRM. The OCC also certified that there would not be a significant economic impact on a substantial number of small entities in the June 10, 2005 interim final rule. The OCC did not receive any comments relating to significant economic impact upon a substantial number of small entities on either the NPRM or interim final rule.

The final rule implements section 411 of the FACT Act and imposes only minimal economic impact on entities covered by the OCC's final rule. The final rule creates exceptions to the FACT Act's prohibition against national banks obtaining and using a consumer's medical information in connection with credit determinations. Additionally, the final rule implements the FACT Act's restrictions on the sharing of medical information among affiliates and includes exceptions to permit the sharing of medical information in certain circumstances. The final rule applies to all national banks and Federal branches and agencies. The final rule also applies to persons, regardless of asset size, that participate in a credit transaction involving a national bank or Federal Branch or agency that obtain or use medical information in connection with credit determinations. Approximately 1,077 national banks have assets of \$150 million or less. The OCC is unable to estimate the number of persons that may participate in a credit transaction with national banks or Federal branches or agencies. The OCC has determined that the estimated per bank cost of the final rule is not large enough to have a significant economic impact. Therefore, the OCC certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

Board: The Board prepared a regulatory flexibility analysis as required by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) in connection

with the June 10, 2005, interim final rule. The Board received no comments on its regulatory flexibility analysis.

Under section 605(b) of the Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if an agency certifies, along with a statement providing the factual basis for such certification, that the rule will not have a significant economic impact on a substantial number of small entities. Based on the analysis below, the Board certifies that this final rule will not have a significant economic impact on a substantial number of small entities for the reasons stated below.

1. *Statement of the need for and objectives of the final rule.* The FACT Act amends the FCRA and was enacted, in part, for the purpose of protecting consumers' medical information. Section 411 of the FACT Act contains a general prohibition on creditors obtaining or using medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit. Section 411 authorizes the Board, together with the other Agencies, to create exceptions to allow creditors to obtain or use medical information for eligibility purposes where necessary and appropriate to protect legitimate operational, transactional risk, consumer, and other needs, consistent with the Congressional intent to restrict the use of medical information for inappropriate purposes.

Section 411 also limits the ability of an institution to share medical information with its affiliates without becoming a consumer reporting agency, subject to certain exceptions, and restricts the redisclosure of medical information. The statute authorizes the Board to issue regulations to create additional exceptions that are determined to be necessary and appropriate to permit the sharing of medical information among affiliates. The Board is adopting the final rule to create exceptions that permit creditors to obtain and use medical information in credit eligibility determinations, restate the limits on redisclosure, and restate and add to the exceptions that allow sharing among affiliates. The **SUPPLEMENTARY INFORMATION** above and the **SUPPLEMENTARY INFORMATION** to the interim final rule (70 FR 33958) contain information on the objectives of the final rule.

2. *Summary of issues raised by comments in response to the interim final regulatory flexibility analysis.* In accordance with section 3(a) of the

Regulatory Flexibility Act, the Board conducted a regulatory flexibility analysis in connection with the interim final rules. The Board did not receive any comments on its regulatory flexibility analysis.

3. *Description of small entities affected by the proposal.* Each section of the final rule applies to different types of small entities and specifies the types of small entities subject to that section. The final rule will apply, in whole or in part, to banks that are members of the Federal Reserve System (other than national banks) and their subsidiaries, branches and Agencies of foreign banks (other than Federal branches, Federal Agencies, and insured State branches of foreign banks) and their subsidiaries, commercial lending companies owned or controlled by foreign banks, organizations operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.*, and 611 *et seq.*), bank holding companies and affiliates of such holding companies (other than depository institutions and consumer reporting agencies), and creditors that participate in transactions with one of the above-mentioned entities. A separate rule codified in Regulation FF will apply to creditors not otherwise subject to one of the Agency rules. The Board's final rule will apply to the following institutions (numbers approximate): State member banks (932), bank holding companies (5,152), holding company non-bank subsidiaries (2,131), U.S. branches and agencies of foreign banks (289), and Edge and agreement corporations (75), for a subtotal of approximately 8,579 institutions. The Board estimates that over 5,000 of these institutions could be considered small institutions with assets less than \$150 million. The Board is unable to estimate the number of creditors that may participate in transactions with such institutions or the number of other creditors that may be covered by the separate rule codified in Regulation FF.

All small entities that are creditors will be affected by the provision of the final rule that addresses the prohibition on, and exceptions to, creditors obtaining or using medical information in connection with credit eligibility determinations. All small creditors will have to comply with the exceptions if they obtain or use medical information about consumers in connection with any credit eligibility determination.

4. *Recordkeeping, reporting, and compliance requirements.* The final rule requires certain documentation to qualify for some of the specific exceptions, as discussed in the **SUPPLEMENTARY INFORMATION** above and

the **SUPPLEMENTARY INFORMATION** to the interim final rule (70 FR 33958). The final rule contains no reporting or disclosure requirements.

5. *Steps taken to minimize the economic impact on small entities.* The Board solicited comment on how to minimize the economic impact on small entities. The Board did not receive any comments on this issue. By adopting consistent rules and exceptions, the Board and the other Agencies have attempted to minimize the economic impact on small entities.

FDIC: The FDIC prepared a regulatory flexibility analysis as required by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The FDIC received no comments on its analysis.

Under section 605(b) of the Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if an agency certifies, along with a statement providing the factual basis for such certification, that the rule will not have a significant economic impact on a substantial number of small entities. FDIC certified that the interim final rule will not have a significant economic impact on a substantial number of small entities; and upon further analysis, the FDIC certifies that this final rule creating exceptions to the FACT Act's general prohibition on creditors obtaining or using medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit will not have a significant economic impact on small entities.

The Small Business Administration (SBA) has defined "small entities" for banking purposes as a bank or savings institution with assets of \$150 million or less. See 13 CFR 121.201. This final rule, as authorized by section 411 of the FACT Act, creates exceptions to allow creditors to obtain or use medical information for eligibility purposes where necessary and appropriate to protect legitimate operational, transactional risk, consumer, and other needs, consistent with the Congressional intent to restrict the use of medical information for inappropriate purposes. The rule also excludes, in certain situations, medical information shared by a covered entity with an affiliate from the definition of a consumer report in section 603(d) of the FCRA, and addresses the reuse and redisclosure of medical information.

The final rule applies to all state banks insured by the FDIC (other than members of the Federal Reserve System), all insured State branches of

foreign banks, and persons that participate in a credit transaction involving these banks, regardless of their size. Of the approximately 5,250 banks that fall in these categories, approximately 3,368 have assets of \$150 million or less.

OTS: In accordance with section 603(a) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 603(a)), OTS conducted an initial regulatory flexibility analysis in connection with the April 28, 2004 proposed rule. OTS did not receive any comments on its initial regulatory flexibility analysis.

Upon further analysis, OTS certified in accordance with section 605(b) of the RFA (5 U.S.C. 605(b)) that the June 10, 2005 interim final rule would not have a significant economic impact on a substantial number of small entities. OTS received no comments on its certification. OTS makes the same certification for this final rule. The Small Business Administration (SBA) has generally defined small savings institutions for RFA purposes as those with assets of \$150 million or less. 13 CFR 121.201.

This final rule implements section 411 of the FACT Act and imposes only minimal economic impact. Section 571.30 creates exceptions to allow creditors to obtain or use medical information for credit eligibility purposes where necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs, consistent with the Congressional intent to restrict the use of medical information for inappropriate purposes. It applies to any of the following, regardless of size, that participates as a creditor in a transaction: (1) A savings association; (2) a subsidiary owned in whole or in part by a savings association; (3) a savings and loan holding company; (4) a subsidiary of a savings and loan holding company other than a bank or subsidiary of a bank; (5) a service corporation owned in whole or in part by a savings association; or (6) any other person that participates as a creditor in a transaction involving a person described in (1)–(5).

Section 571.31 implements the FACT Act's restrictions on the redisclosure of information. Section 571.32 implements the FACT Act's restrictions on the sharing of medical information among affiliates and includes exceptions to permit the sharing of medical information in certain circumstances. These sections apply to savings associations and federal savings association operating subsidiaries, regardless of size.

As referenced in the Supplementary Information to the interim final rule (70 FR 33958), other laws and regulations, such as the Fair Housing Act, the Americans with Disabilities Act, and OTS's anti-discrimination rules in 12 CFR part 528, also limit or regulate obtaining and using medical information for credit eligibility determinations in a manner that discriminates against persons whose medical condition constitutes a "disability" or "handicap" under those authorities. Other laws, such as the GLB Act, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and other parts of the FCRA, also limit or regulate the use, collection, and sharing of consumer information, including medical information. The industry's preexisting familiarity and compliance with the requirements of these other authorities to the extent applicable is one factor that OTS expects will minimize the economic impact of today's final rule.

NCUA: The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact any regulation may have on a substantial number of small entities. NCUA considers credit unions having less than ten million dollars in assets to be small for purposes of the Regulatory Flexibility Act. NCUA Interpretive Ruling and Policy Statement (IRPS) 87-2, as amended by IRPS 03-2. NCUA conducted an initial regulatory flexibility analysis in connection with the proposed rule and did not receive any comments on it.

NCUA certified that the interim final rule would not have a significant economic impact on a substantial number of small entities and, upon further review, now also certifies that the final rule will not have a significant economic impact on a substantial number of small entities. The final rule applies to all Federal credit unions that obtain or use a consumer's medical information in connection with credit determinations, regardless of credit union size. The final rule creates exceptions to the FACT Act's prohibition against Federal credit unions obtaining and using such information in connection with credit determinations. Additionally, the final rule implements the FACT Act's restrictions on the sharing of medical information among Federal credit union affiliates, credit union service organizations (CUSOs), and includes exceptions to permit the sharing of medical information in certain circumstances.

Small Business Regulatory Enforcement Fairness Act

FDIC: The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (Pub. L. 104-121, 110 Stat. 857) provides generally for agencies to report rules to Congress and for Congress to review these rules. The reporting requirement is triggered in instances where the FDIC issues a final rule as defined by the Administrative Procedure Act (APA) (5 U.S.C. 551, et seq.). Because the FDIC is issuing a final rule as defined by the APA, the FDIC will file the reports required by SBREFA.

NCUA: A SBREFA (Pub. L. 104-121) reporting requirement is also triggered in instances where NCUA issues a final rule as defined by section 551 of the Administrative Procedure Act 5 U.S.C. 551. NCUA is submitting this final rule to the Office of Management and Budget for a determination that this rule is not a major rule for purposes of SBREFA.

OCC and OTS Executive Order 12866 Determination

The OCC and OTS each has determined that its portion of the rule is not a significant regulatory action under Executive Order 12866.

OCC Executive Order 13132 Determination

The OCC has determined that this rule does not have any Federalism implications, as required by Executive Order 13132, because it would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

NCUA Executive Order 13132 Determination

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, the NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. The rule applies only to federally chartered credit unions and would not have substantial direct effects on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The NCUA has determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

OCC and OTS Unfunded Mandates Reform Act of 1995 Determination

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104-4 (Unfunded Mandates Act) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC and OTS each has determined that their respective final rules will not result in expenditures by State, local, and tribal governments, or by the private sector, of \$100 million or more. Accordingly, neither the OCC nor the OTS has prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

NCUA: The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105-277, 112 Stat. 2681 (1998).

Plain Language Requirement

Section 722 of the Gramm-Leach-Bliley Act (GLB Act) (12 U.S.C. 4809), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The proposed rule requested comments on how the rule might be changed to reflect the requirements of GLB Act. No GLB Act comments were received.

List of Subjects

12 CFR Part 41

Banks, banking, Consumer protection, National banks, Reporting and recordkeeping requirements.

12 CFR Part 222

Banks, banking, Consumer protection, Credit, Fair Credit Reporting Act, Holding companies, Privacy, Reporting and recordkeeping requirements, State member banks.

12 CFR Part 232

Consumer protection, Credit, Fair Credit Reporting Act, Privacy, Reporting and recordkeeping requirements.

12 CFR Part 334

Administrative practice and procedure, Bank deposit insurance, Banks, banking, Reporting and recordkeeping requirements, Safety and soundness.

12 CFR Part 571

Consumer protection, Credit, Fair Credit Reporting Act, Privacy, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 717

Consumer protection, Credit unions, Fair credit reporting, Medical information, Privacy, Reporting and recordkeeping requirements.

12 CFR Chapter I**Office of the Comptroller of the Currency****Authority and Issuance**

■ For the reasons set forth in the preamble, the OCC amends Chapter I of Title 12 of the *Code of Federal Regulations* as follows:

PART 41—FAIR CREDIT

■ 1. Revise the authority citation for part 41 to read as follows:

Authority: 12 U.S.C. 1 *et seq.*, 24(Seventh), 93a, 481, 484, and 1818; 15 U.S.C. 1681a, 1681b, 1681s, 1681w, 6801, and 6805.

■ 2. Revise subpart A to read as follows:

Subpart A—General Provisions**§ 41.2 Examples.**

The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part. Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise in this part.

§ 41.3 Definitions.

As used in this part, unless the context requires otherwise:

(a) *Act* means the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*).

(b) *Affiliate* means any company that is related by common ownership or common corporate control with another company.

(c) [Reserved]

(d) *Company* means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(e) *Consumer* means an individual.

(f) [Reserved]

(g) [Reserved]

(h) [Reserved]

(i) *Common ownership or common corporate control* means a relationship between two companies under which:

(1) One company has, with respect to the other company:

(i) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of a company, directly or indirectly, or acting through one or more other persons;

(ii) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of a company; or

(iii) The power to exercise, directly or indirectly, a controlling influence over the management or policies of a company, as the OCC determines; or

(2) Any other person has, with respect to both companies, a relationship described in paragraphs (i)(1)(i)–(i)(1)(iii) of this section.

(j) [Reserved]

(k) *Medical information* means:

(1) Information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to:

(i) The past, present, or future physical, mental, or behavioral health or condition of an individual;

(ii) The provision of health care to an individual; or

(iii) The payment for the provision of health care to an individual.

(2) The term does not include:

(i) The age or gender of a consumer;

(ii) Demographic information about the consumer, including a consumer's residence address or e-mail address;

(iii) Any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy; or

(iv) Information that does not identify a specific consumer.

(l) *Person* means any individual, partnership, corporation, trust, estate cooperative, association, government or governmental subdivision or agency, or other entity.

■ 3. Add subpart D to read as follows:

Subpart D—Medical Information**§ 41.30 Obtaining or using medical information in connection with a determination of eligibility for credit.**

(a) *Scope.* This section applies to:

(1) Any person that participates as a creditor in a transaction and that is a national bank, a Federal branch or agency of a foreign bank, and their respective subsidiaries; or

(2) Any other person that participates as a creditor in a transaction involving a person described in paragraph (a)(1) of this section.

(b) *General prohibition on obtaining or using medical information.* (1) *In general.* A creditor may not obtain or use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit, except as provided in this section.

(2) *Definitions.* (i) *Credit* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(ii) *Creditor* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(iii) *Eligibility, or continued 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. The term does not include:

(A) Any determination of the consumer's qualification or fitness for employment, insurance (other than a credit insurance product), or other non-credit products or services;

(B) Authorizing, processing, or documenting a payment or transaction on behalf of the consumer in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit; or

(C) Maintaining or servicing the consumer's account in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit.

(c) *Rule of construction for obtaining and using unsolicited medical information.* (1) *In general.* A creditor does not obtain medical information in violation of the prohibition if it receives medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit without specifically requesting medical information.

(2) *Use of unsolicited medical information.* A creditor that receives unsolicited medical information in the manner described in paragraph (c)(1) of this section may use that information in connection with any determination of the consumer's eligibility, or continued eligibility, for credit to the extent the creditor can rely on at least one of the exceptions in § 41.30(d) or (e).

(3) *Examples.* A creditor does not obtain medical information in violation of the prohibition if, for example:

(i) In response to a general question regarding a consumer's debts or expenses, the creditor receives

information that the consumer owes a debt to a hospital.

(ii) In a conversation with the creditor's loan officer, the consumer informs the creditor that the consumer has a particular medical condition.

(iii) In connection with a consumer's application for an extension of credit, the creditor requests a consumer report from a consumer reporting agency and receives medical information in the consumer report furnished by the agency even though the creditor did not specifically request medical information from the consumer reporting agency.

(d) *Financial information exception for obtaining and using medical information.* (1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit so long as:

(i) The information is the type of information routinely used in making credit eligibility determinations, such as information relating to debts, expenses, income, benefits, assets, collateral, or the purpose of the loan, including the use of proceeds;

(ii) The creditor 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

(iii) The creditor 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.

(2) *Examples.* (i) *Examples of the types of information routinely used in making credit eligibility determinations.* Paragraph (d)(1)(i) of this section permits a creditor, for example, to obtain and use information about:

(A) The dollar amount, repayment terms, repayment history, and similar information regarding medical debts to calculate, measure, or verify the repayment ability of the consumer, the use of proceeds, or the terms for granting credit;

(B) The value, condition, and lien status of a medical device that may serve as collateral to secure a loan;

(C) The dollar amount and continued eligibility for disability income, workers' compensation income, or other benefits related to health or a medical condition that is relied on as a source of repayment; or

(D) The identity of creditors to whom outstanding medical debts are owed in connection with an application for credit, including but not limited to, a

transaction involving the consolidation of medical debts.

(ii) *Examples of uses of medical information consistent with the exception.* (A) A consumer includes on an application for credit information about two \$20,000 debts. One debt is to a hospital; the other debt is to a retailer. The creditor contacts the hospital and the retailer to verify the amount and payment status of the debts. The creditor learns that both debts are more than 90 days past due. Any two debts of this size that are more than 90 days past due would disqualify the consumer under the creditor's established underwriting criteria. The creditor denies the application on the basis that the consumer has a poor repayment history on outstanding debts. The creditor has used medical information in a manner and to an extent no less favorable than it would use comparable non-medical information.

(B) A consumer indicates on an application for a \$200,000 mortgage loan that she receives \$15,000 in long-term disability income each year from her former employer and has no other income. Annual income of \$15,000, regardless of source, would not be sufficient to support the requested amount of credit. The creditor denies the application on the basis that the projected debt-to-income ratio of the consumer does not meet the creditor's underwriting criteria. The creditor has used medical information in a manner and to an extent that is no less favorable than it would use comparable non-medical information.

(C) A consumer includes on an application for a \$10,000 home equity loan that he has a \$50,000 debt to a medical facility that specializes in treating a potentially terminal disease. The creditor contacts the medical facility to verify the debt and obtain the repayment history and current status of the loan. The creditor learns that the debt is current. The applicant meets the income and other requirements of the creditor's underwriting guidelines. The creditor grants the application. The creditor has used medical information in accordance with the exception.

(iii) *Examples of uses of medical information inconsistent with the exception.* (A) A consumer applies for \$25,000 of credit and includes on the application information about a \$50,000 debt to a hospital. The creditor contacts the hospital to verify the amount and payment status of the debt, and learns that the debt is current and that the consumer has no delinquencies in her repayment history. If the existing debt were instead owed to a retail department store, the creditor would

approve the application and extend credit based on the amount and repayment history of the outstanding debt. The creditor, however, denies the application because the consumer is indebted to a hospital. The creditor has used medical information, here the identity of the medical creditor, in a manner and to an extent that is less favorable than it would use comparable non-medical information.

(B) A consumer meets with a loan officer of a creditor to apply for a mortgage loan. While filling out the loan application, the consumer informs the loan officer orally that she has a potentially terminal disease. The consumer meets the creditor's established requirements for the requested mortgage loan. The loan officer recommends to the credit committee that the consumer be denied credit because the consumer has that disease. The credit committee follows the loan officer's recommendation and denies the application because the consumer has a potentially terminal disease. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis as part of a determination of eligibility or continued eligibility for credit.

(C) A consumer who has an apparent medical condition, such as a consumer who uses a wheelchair or an oxygen tank, meets with a loan officer to apply for a home equity loan. The consumer meets the creditor's established requirements for the requested home equity loan and the creditor typically does not require consumers to obtain a debt cancellation contract, debt suspension agreement, or credit insurance product in connection with such loans. However, based on the consumer's apparent medical condition, the loan officer recommends to the credit committee that credit be extended to the consumer only if the consumer obtains a debt cancellation contract, debt suspension agreement, or credit insurance product from a nonaffiliated third party. The credit committee agrees with the loan officer's recommendation. The loan officer informs the consumer that the consumer must obtain a debt cancellation contract, debt suspension agreement, or credit insurance product from a nonaffiliated third party to qualify for the loan. The consumer obtains one of these products and the creditor approves the loan. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's

physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis in setting conditions on the consumer's eligibility for credit.

(e) *Specific exceptions for obtaining and using medical information.* (1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit:

(i) To determine whether the use of a power of attorney or legal representative that is triggered by a medical condition or event is necessary and appropriate or whether the consumer has the legal capacity to contract when a person seeks to exercise a power of attorney or act as legal representative for a consumer based on an asserted medical condition or event;

(ii) To comply with applicable requirements of local, state, or Federal laws;

(iii) To determine, at the consumer's request, whether the consumer qualifies for a legally permissible special credit program or credit-related assistance program that is:

(A) Designed to meet the special needs of consumers with medical conditions; and

(B) Established and administered pursuant to a written plan that:

(1) Identifies the class of persons that the program is designed to benefit; and

(2) Sets forth the procedures and standards for extending credit or providing other credit-related assistance under the program;

(iv) To the extent necessary for purposes of fraud prevention or detection;

(v) In the case of credit for the purpose of financing medical products or services, to determine and verify the medical purpose of a loan and the use of proceeds;

(vi) Consistent with safe and sound practices, if the consumer or the consumer's legal representative specifically requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit, to accommodate the consumer's particular circumstances, and such request is documented by the creditor;

(vii) Consistent with safe and sound practices, to determine whether the provisions of a forbearance practice or program that is triggered by a medical condition or event apply to a consumer;

(viii) To determine the consumer's eligibility for, the triggering of, or the reactivation of a debt cancellation contract or debt suspension agreement if a medical condition or event is a

triggering event for the provision of benefits under the contract or agreement; or

(ix) To determine the consumer's eligibility for, the triggering of, or the reactivation of a credit insurance product if a medical condition or event is a triggering event for the provision of benefits under the product.

(2) *Example of determining eligibility for a special credit program or credit assistance program.* A not-for-profit organization establishes a credit assistance program pursuant to a written plan that is designed to assist disabled veterans in purchasing homes by subsidizing the down payment for the home purchase mortgage loans of qualifying veterans. The organization works through mortgage lenders and requires mortgage lenders to obtain medical information about the disability of any consumer that seeks to qualify for the program, use that information to verify the consumer's eligibility for the program, and forward that information to the organization. A consumer who is a veteran applies to a creditor for a home purchase mortgage loan. The creditor informs the consumer about the credit assistance program for disabled veterans and the consumer seeks to qualify for the program. Assuming that the program complies with all applicable law, including applicable fair lending laws, the creditor may obtain and use medical information about the medical condition and disability, if any, of the consumer to determine whether the consumer qualifies for the credit assistance program.

(3) *Examples of verifying the medical purpose of the loan or the use of proceeds.* (i) If a consumer applies for \$10,000 of credit for the purpose of financing vision correction surgery, the creditor may verify with the surgeon that the procedure will be performed. If the surgeon reports that surgery will not be performed on the consumer, the creditor may use that medical information to deny the consumer's application for credit, because the loan would not be used for the stated purpose.

(ii) If a consumer applies for \$10,000 of credit for the purpose of financing cosmetic surgery, the creditor may confirm the cost of the procedure with the surgeon. If the surgeon reports that the cost of the procedure is \$5,000, the creditor may use that medical information to offer the consumer only \$5,000 of credit.

(iii) A creditor has an established medical loan program for financing particular elective surgical procedures. The creditor receives a loan application from a consumer requesting \$10,000 of

credit under the established loan program for an elective surgical procedure. The consumer indicates on the application that the purpose of the loan is to finance an elective surgical procedure not eligible for funding under the guidelines of the established loan program. The creditor may deny the consumer's application because the purpose of the loan is not for a particular procedure funded by the established loan program.

(4) *Examples of obtaining and using medical information at the request of the consumer.* (i) If a consumer applies for a loan and specifically requests that the creditor consider the consumer's medical disability at the relevant time as an explanation for adverse payment history information in his credit report, the creditor may consider such medical information in evaluating the consumer's willingness and ability to repay the requested loan to accommodate the consumer's particular circumstances, consistent with safe and sound practices. The creditor may also decline to consider such medical information to accommodate the consumer, but may evaluate the consumer's application in accordance with its otherwise applicable underwriting criteria. The creditor may not deny the consumer's application or otherwise treat the consumer less favorably because the consumer specifically requested a medical accommodation, if the creditor would have extended the credit or treated the consumer more favorably under the creditor's otherwise applicable underwriting criteria.

(ii) If a consumer applies for a loan by telephone and explains that his income has been and will continue to be interrupted on account of a medical condition and that he expects to repay the loan by liquidating assets, the creditor may, but is not required to, evaluate the application using the sale of assets as the primary source of repayment, consistent with safe and sound practices, provided that the creditor documents the consumer's request by recording the oral conversation or making a notation of the request in the consumer's file.

(iii) If a consumer applies for a loan and the application form provides a space where the consumer may provide any other information or special circumstances, whether medical or non-medical, that the consumer would like the creditor to consider in evaluating the consumer's application, the creditor may use medical information provided by the consumer in that space on that application to accommodate the consumer's application for credit,

consistent with safe and sound practices, or may disregard that information.

(iv) If a consumer specifically requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit and provides the creditor with medical information for that purpose, and the creditor determines that it needs additional information regarding the consumer's circumstances, the creditor may request, obtain, and use additional medical information about the consumer as necessary to verify the information provided by the consumer or to determine whether to make an accommodation for the consumer. The consumer may decline to provide additional information, withdraw the request for an accommodation, and have the application considered under the creditor's otherwise applicable underwriting criteria.

(v) If a consumer completes and signs a credit application that is not for medical purpose credit and the application contains boilerplate language that routinely requests medical information from the consumer or that indicates that by applying for credit the consumer authorizes or consents to the creditor obtaining and using medical information in connection with a determination of the consumer's eligibility, or continued eligibility, for credit, the consumer has not specifically requested that the creditor obtain and use medical information to accommodate the consumer's particular circumstances.

(5) *Example of a forbearance practice or program.* After an appropriate safety and soundness review, a creditor institutes a program that allows consumers who are or will be hospitalized to defer payments as needed for up to three months, without penalty, if the credit account has been open for more than one year and has not previously been in default, and the consumer provides confirming documentation at an appropriate time. A consumer is hospitalized and does not pay her bill for a particular month. This consumer has had a credit account with the creditor for more than one year and has not previously been in default. The creditor attempts to contact the consumer and speaks with the consumer's adult child, who is not the consumer's legal representative. The adult child informs the creditor that the consumer is hospitalized and is unable to pay the bill at that time. The creditor defers payments for up to three months, without penalty, for the hospitalized consumer and sends the consumer a

letter confirming this practice and the date on which the next payment will be due. The creditor has obtained and used medical information to determine whether the provisions of a medically-triggered forbearance practice or program apply to a consumer.

§ 41.31 Limits on redisclosure of information.

(a) *Scope.* This section applies to national banks, Federal branches and agencies of foreign banks, and their respective operating subsidiaries.

(b) *Limits on redisclosure.* If a person described in paragraph (a) of this section receives medical information about a consumer from a consumer reporting agency or its affiliate, the person must not disclose that information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

§ 41.32 Sharing medical information with affiliates.

(a) *Scope.* This section applies to national banks, Federal branches and agencies of foreign banks, and their respective operating subsidiaries.

(b) *In general.* The exclusions from the term "consumer report" in section 603(d)(2) of the Act that allow the sharing of information with affiliates do not apply if a person described in paragraph (a) of this section communicates to an affiliate:

- (1) Medical information;
- (2) An individualized list or description based on the payment transactions of the consumer for medical products or services; or
- (3) An aggregate list of identified consumers based on payment transactions for medical products or services.

(c) *Exceptions.* A person described in paragraph (a) may rely on the exclusions from the term "consumer report" in section 603(d)(2) of the Act to communicate the information in paragraph (b) to an affiliate:

(1) In connection with the business of insurance or annuities (including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners, as in effect on January 1, 2003);

(2) For any purpose permitted without authorization under the regulations promulgated by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA);

(3) For any purpose referred to in section 1179 of HIPAA;

(4) For any purpose described in section 502(e) of the Gramm-Leach-Bliley Act;

(5) In connection with a determination of the consumer's eligibility, or continued eligibility, for credit consistent with § 41.30; or

(6) As otherwise permitted by order of the OCC.

Board of Governors of the Federal Reserve System

12 CFR Chapter II

Authority and Issuance

■ For the reasons set forth in the joint preamble, Title 12, Chapter II, of the *Code of Federal Regulations* is amended as follows:

PART 222—FAIR CREDIT REPORTING (REGULATION V)

■ 1. The authority citation for part 222 is revised to read as follows:

Authority: 15 U.S.C. 1681b and 1681s; Secs. 3, 214, and 217, Pub. L. 108–159, 117 Stat. 1952.

■ 2. Amend subpart A to part 222 by adding §§ 222.2 and 222.3 to read as follows:

Subpart A—General Provisions

* * * * *

§ 222.2 Examples.

The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part. Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise in this part.

§ 222.3 Definitions.

As used in this part, unless the context requires otherwise:

(a) *Act* means the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*).

(b) *Affiliate* means any company that is related by common ownership or common corporate control with another company.

(c) [Reserved]

(d) *Company* means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(e) *Consumer* means an individual.

(f) [Reserved]

(g) [Reserved]

(h) [Reserved]

(i) *Common ownership or common corporate control* means a relationship between two companies under which:

(1) One company has, with respect to the other company:

(i) Ownership, control, or power to vote 25 percent or more of the

outstanding shares of any class of voting security of a company, directly or indirectly, or acting through one or more other persons;

(ii) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of a company; or

(iii) The power to exercise, directly or indirectly, a controlling influence over the management or policies of a company, as the Board determines; or

(2) Any other person has, with respect to both companies, a relationship described in paragraphs (i)(1)(i) through (i)(1)(iii) of this section.

(j) [Reserved]

(k) *Medical information* means:

(1) Information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to:

(i) The past, present, or future physical, mental, or behavioral health or condition of an individual;

(ii) The provision of health care to an individual; or

(iii) The payment for the provision of health care to an individual.

(2) The term does not include:

(i) The age or gender of a consumer;

(ii) Demographic information about the consumer, including a consumer's residence address or e-mail address;

(iii) Any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy; or

(iv) Information that does not identify a specific consumer.

(l) *Person* means any individual, partnership, corporation, trust, estate cooperative, association, government or governmental subdivision or agency, or other entity.

■ 3. Subpart D is added to part 222 to read as follows:

Subpart D—Medical Information

§ 222.30 Obtaining or using medical information in connection with a determination of eligibility for credit.

(a) *Scope*. This section applies to

(1) Any of the following that participates as a creditor in a transaction—

(i) A bank that is a member of the Federal Reserve System (other than national banks) and its subsidiaries;

(ii) A branch or Agency of a foreign bank (other than Federal branches, Federal Agencies, and insured State branches of foreign banks) and its subsidiaries;

(iii) A commercial lending company owned or controlled by foreign banks;

(iv) An organization operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.*, and 611 *et seq.*);

(v) A bank holding company and an affiliate of such holding company (other than depository institutions and consumer reporting agencies); or

(2) Any other person that participates as a creditor in a transaction involving a person described in paragraph (a)(1) of this section.

(b) *General prohibition on obtaining or using medical information*. (1) *In general*. A creditor may not obtain or use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit, except as provided in this section.

(2) *Definitions*. (i) *Credit* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(ii) *Creditor* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(iii) *Eligibility, or continued 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. The term does not include:

(A) Any determination of the consumer's qualification or fitness for employment, insurance (other than a credit insurance product), or other non-credit products or services;

(B) Authorizing, processing, or documenting a payment or transaction on behalf of the consumer in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit; or

(C) Maintaining or servicing the consumer's account in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit.

(c) *Rule of construction for obtaining and using unsolicited medical*

information. (1) *In general*. A creditor does not obtain medical information in violation of the prohibition if it receives medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit without specifically requesting medical information.

(2) *Use of unsolicited medical information*. A creditor that receives unsolicited medical information in the manner described in paragraph (c)(1) of this section may use that information in connection with any determination of

the consumer's eligibility, or continued eligibility, for credit to the extent the creditor can rely on at least one of the exceptions in § 222.30(d) or (e).

(3) *Examples*. A creditor does not obtain medical information in violation of the prohibition if, for example:

(i) In response to a general question regarding a consumer's debts or expenses, the creditor receives information that the consumer owes a debt to a hospital.

(ii) In a conversation with the creditor's loan officer, the consumer informs the creditor that the consumer has a particular medical condition.

(iii) In connection with a consumer's application for an extension of credit, the creditor requests a consumer report from a consumer reporting agency and receives medical information in the consumer report furnished by the agency even though the creditor did not specifically request medical information from the consumer reporting agency.

(d) *Financial information exception for obtaining and using medical information*. (1) *In general*. A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit so long as:

(i) The information is the type of information routinely used in making credit eligibility determinations, such as information relating to debts, expenses, income, benefits, assets, collateral, or the purpose of the loan, including the use of proceeds;

(ii) The creditor 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

(iii) The creditor 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.

(2) *Examples*. (i) *Examples of the types of information routinely used in making credit eligibility determinations*. Paragraph (d)(1)(i) of this section permits a creditor, for example, to obtain and use information about:

(A) The dollar amount, repayment terms, repayment history, and similar information regarding medical debts to calculate, measure, or verify the repayment ability of the consumer, the use of proceeds, or the terms for granting credit;

(B) The value, condition, and lien status of a medical device that may serve as collateral to secure a loan;

(C) The dollar amount and continued eligibility for disability income, workers' compensation income, or other benefits related to health or a medical condition that is relied on as a source of repayment; or

(D) The identity of creditors to whom outstanding medical debts are owed in connection with an application for credit, including but not limited to, a transaction involving the consolidation of medical debts.

(ii) *Examples of uses of medical information consistent with the exception.* (A) A consumer includes on an application for credit information about two \$20,000 debts. One debt is to a hospital; the other debt is to a retailer. The creditor contacts the hospital and the retailer to verify the amount and payment status of the debts. The creditor learns that both debts are more than 90 days past due. Any two debts of this size that are more than 90 days past due would disqualify the consumer under the creditor's established underwriting criteria. The creditor denies the application on the basis that the consumer has a poor repayment history on outstanding debts. The creditor has used medical information in a manner and to an extent no less favorable than it would use comparable non-medical information.

(B) A consumer indicates on an application for a \$200,000 mortgage loan that she receives \$15,000 in long-term disability income each year from her former employer and has no other income. Annual income of \$15,000, regardless of source, would not be sufficient to support the requested amount of credit. The creditor denies the application on the basis that the projected debt-to-income ratio of the consumer does not meet the creditor's underwriting criteria. The creditor has used medical information in a manner and to an extent that is no less favorable than it would use comparable non-medical information.

(C) A consumer includes on an application for a \$10,000 home equity loan that he has a \$50,000 debt to a medical facility that specializes in treating a potentially terminal disease. The creditor contacts the medical facility to verify the debt and obtain the repayment history and current status of the loan. The creditor learns that the debt is current. The applicant meets the income and other requirements of the creditor's underwriting guidelines. The creditor grants the application. The creditor has used medical information in accordance with the exception.

(iii) *Examples of uses of medical information inconsistent with the exception.* (A) A consumer applies for

\$25,000 of credit and includes on the application information about a \$50,000 debt to a hospital. The creditor contacts the hospital to verify the amount and payment status of the debt, and learns that the debt is current and that the consumer has no delinquencies in her repayment history. If the existing debt were instead owed to a retail department store, the creditor would approve the application and extend credit based on the amount and repayment history of the outstanding debt. The creditor, however, denies the application because the consumer is indebted to a hospital. The creditor has used medical information, here the identity of the medical creditor, in a manner and to an extent that is less favorable than it would use comparable non-medical information.

(B) A consumer meets with a loan officer of a creditor to apply for a mortgage loan. While filling out the loan application, the consumer informs the loan officer orally that she has a potentially terminal disease. The consumer meets the creditor's established requirements for the requested mortgage loan. The loan officer recommends to the credit committee that the consumer be denied credit because the consumer has that disease. The credit committee follows the loan officer's recommendation and denies the application because the consumer has a potentially terminal disease. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis as part of a determination of eligibility or continued eligibility for credit.

(C) A consumer who has an apparent medical condition, such as a consumer who uses a wheelchair or an oxygen tank, meets with a loan officer to apply for a home equity loan. The consumer meets the creditor's established requirements for the requested home equity loan and the creditor typically does not require consumers to obtain a debt cancellation contract, debt suspension agreement, or credit insurance product in connection with such loans. However, based on the consumer's apparent medical condition, the loan officer recommends to the credit committee that credit be extended to the consumer only if the consumer obtains a debt cancellation contract, debt suspension agreement, or credit insurance product from a nonaffiliated third party. The credit committee agrees with the loan officer's recommendation. The loan officer informs the consumer

that the consumer must obtain a debt cancellation contract, debt suspension agreement, or credit insurance product from a nonaffiliated third party to qualify for the loan. The consumer obtains one of these products and the creditor approves the loan. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis in setting conditions on the consumer's eligibility for credit.

(e) *Specific exceptions for obtaining and using medical information.* (1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit—

(i) To determine whether the use of a power of attorney or legal representative that is triggered by a medical condition or event is necessary and appropriate or whether the consumer has the legal capacity to contract when a person seeks to exercise a power of attorney or act as legal representative for a consumer based on an asserted medical condition or event;

(ii) To comply with applicable requirements of local, state, or Federal laws;

(iii) To determine, at the consumer's request, whether the consumer qualifies for a legally permissible special credit program or credit-related assistance program that is—

(A) Designed to meet the special needs of consumers with medical conditions; and

(B) Established and administered pursuant to a written plan that—

(1) Identifies the class of persons that the program is designed to benefit; and

(2) Sets forth the procedures and standards for extending credit or providing other credit-related assistance under the program;

(iv) To the extent necessary for purposes of fraud prevention or detection;

(v) In the case of credit for the purpose of financing medical products or services, to determine and verify the medical purpose of a loan and the use of proceeds;

(vi) Consistent with safe and sound practices, if the consumer or the consumer's legal representative specifically requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit, to accommodate the consumer's particular circumstances, and such request is documented by the creditor;

(vii) Consistent with safe and sound practices, to determine whether the provisions of a forbearance practice or program that is triggered by a medical condition or event apply to a consumer;

(viii) To determine the consumer's eligibility for, the triggering of, or the reactivation of a debt cancellation contract or debt suspension agreement if a medical condition or event is a triggering event for the provision of benefits under the contract or agreement; or

(ix) To determine the consumer's eligibility for, the triggering of, or the reactivation of a credit insurance product if a medical condition or event is a triggering event for the provision of benefits under the product.

(2) *Example of determining eligibility for a special credit program or credit assistance program.* A not-for-profit organization establishes a credit assistance program pursuant to a written plan that is designed to assist disabled veterans in purchasing homes by subsidizing the down payment for the home purchase mortgage loans of qualifying veterans. The organization works through mortgage lenders and requires mortgage lenders to obtain medical information about the disability of any consumer that seeks to qualify for the program, use that information to verify the consumer's eligibility for the program, and forward that information to the organization. A consumer who is a veteran applies to a creditor for a home purchase mortgage loan. The creditor informs the consumer about the credit assistance program for disabled veterans and the consumer seeks to qualify for the program. Assuming that the program complies with all applicable law, including applicable fair lending laws, the creditor may obtain and use medical information about the medical condition and disability, if any, of the consumer to determine whether the consumer qualifies for the credit assistance program.

(3) *Examples of verifying the medical purpose of the loan or the use of proceeds.* (i) If a consumer applies for \$10,000 of credit for the purpose of financing vision correction surgery, the creditor may verify with the surgeon that the procedure will be performed. If the surgeon reports that surgery will not be performed on the consumer, the creditor may use that medical information to deny the consumer's application for credit, because the loan would not be used for the stated purpose.

(ii) If a consumer applies for \$10,000 of credit for the purpose of financing cosmetic surgery, the creditor may confirm the cost of the procedure with

the surgeon. If the surgeon reports that the cost of the procedure is \$5,000, the creditor may use that medical information to offer the consumer only \$5,000 of credit.

(iii) A creditor has an established medical loan program for financing particular elective surgical procedures. The creditor receives a loan application from a consumer requesting \$10,000 of credit under the established loan program for an elective surgical procedure. The consumer indicates on the application that the purpose of the loan is to finance an elective surgical procedure not eligible for funding under the guidelines of the established loan program. The creditor may deny the consumer's application because the purpose of the loan is not for a particular procedure funded by the established loan program.

(4) *Examples of obtaining and using medical information at the request of the consumer.* (i) If a consumer applies for a loan and specifically requests that the creditor consider the consumer's medical disability at the relevant time as an explanation for adverse payment history information in his credit report, the creditor may consider such medical information in evaluating the consumer's willingness and ability to repay the requested loan to accommodate the consumer's particular circumstances, consistent with safe and sound practices. The creditor may also decline to consider such medical information to accommodate the consumer, but may evaluate the consumer's application in accordance with its otherwise applicable underwriting criteria. The creditor may not deny the consumer's application or otherwise treat the consumer less favorably because the consumer specifically requested a medical accommodation, if the creditor would have extended the credit or treated the consumer more favorably under the creditor's otherwise applicable underwriting criteria.

(ii) If a consumer applies for a loan by telephone and explains that his income has been and will continue to be interrupted on account of a medical condition and that he expects to repay the loan by liquidating assets, the creditor may, but is not required to, evaluate the application using the sale of assets as the primary source of repayment, consistent with safe and sound practices, provided that the creditor documents the consumer's request by recording the oral conversation or making a notation of the request in the consumer's file.

(iii) If a consumer applies for a loan and the application form provides a

space where the consumer may provide any other information or special circumstances, whether medical or non-medical, that the consumer would like the creditor to consider in evaluating the consumer's application, the creditor may use medical information provided by the consumer in that space on that application to accommodate the consumer's application for credit, consistent with safe and sound practices, or may disregard that information.

(iv) If a consumer specifically requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit and provides the creditor with medical information for that purpose, and the creditor determines that it needs additional information regarding the consumer's circumstances, the creditor may request, obtain, and use additional medical information about the consumer as necessary to verify the information provided by the consumer or to determine whether to make an accommodation for the consumer. The consumer may decline to provide additional information, withdraw the request for an accommodation, and have the application considered under the creditor's otherwise applicable underwriting criteria.

(v) If a consumer completes and signs a credit application that is not for medical purpose credit and the application contains boilerplate language that routinely requests medical information from the consumer or that indicates that by applying for credit the consumer authorizes or consents to the creditor obtaining and using medical information in connection with a determination of the consumer's eligibility, or continued eligibility, for credit, the consumer has not specifically requested that the creditor obtain and use medical information to accommodate the consumer's particular circumstances.

(5) *Example of a forbearance practice or program.* After an appropriate safety and soundness review, a creditor institutes a program that allows consumers who are or will be hospitalized to defer payments as needed for up to three months, without penalty, if the credit account has been open for more than one year and has not previously been in default, and the consumer provides confirming documentation at an appropriate time. A consumer is hospitalized and does not pay her bill for a particular month. This consumer has had a credit account with the creditor for more than one year and has not previously been in default.

The creditor attempts to contact the consumer and speaks with the consumer's adult child, who is not the consumer's legal representative. The adult child informs the creditor that the consumer is hospitalized and is unable to pay the bill at that time. The creditor defers payments for up to three months, without penalty, for the hospitalized consumer and sends the consumer a letter confirming this practice and the date on which the next payment will be due. The creditor has obtained and used medical information to determine whether the provisions of a medically-triggered forbearance practice or program apply to a consumer.

§ 222.31 Limits on redisclosure of information.

(a) *Scope.* This section applies to banks that are members of the Federal Reserve System (other than national banks) and their respective operating subsidiaries, branches and agencies of foreign banks (other than Federal branches, Federal Agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, organizations operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.*, and 611 *et seq.*), and bank holding companies and affiliates of such holding companies (other than depository institutions and consumer reporting agencies).

(b) *Limits on redisclosure.* If a person described in paragraph (a) of this section receives medical information about a consumer from a consumer reporting agency or its affiliate, the person must not disclose that information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

§ 222.32 Sharing medical information with affiliates.

(a) *Scope.* This section applies to banks that are members of the Federal Reserve System (other than national banks) and their respective operating subsidiaries, branches and agencies of foreign banks (other than Federal branches, Federal Agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, organizations operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.*, and 611 *et seq.*).

(b) *In general.* The exclusions from the term "consumer report" in section 603(d)(2) of the Act that allow the sharing of information with affiliates do not apply to a person described in

paragraph (a) of this section if that person communicates to an affiliate:

- (1) Medical information;
- (2) An individualized list or description based on the payment transactions of the consumer for medical products or services; or
- (3) An aggregate list of identified consumers based on payment transactions for medical products or services.

(c) *Exceptions.* A person described in paragraph (a) of this section may rely on the exclusions from the term "consumer report" in section 603(d)(2) of the Act to communicate the information in paragraph (b) of this section to an affiliate:

(1) In connection with the business of insurance or annuities (including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners, as in effect on January 1, 2003);

(2) For any purpose permitted without authorization under the regulations promulgated by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA);

(3) For any purpose referred to in section 1179 of HIPAA;

(4) For any purpose described in section 502(e) of the Gramm-Leach-Bliley Act;

(5) In connection with a determination of the consumer's eligibility, or continued eligibility, for credit consistent with § 222.30 of this part; or

(6) As otherwise permitted by order of the Board.

■ 4. A new part 232 is added to read as follows:

PART 232—OBTAINING AND USING MEDICAL INFORMATION IN CONNECTION WITH CREDIT (REGULATION FF)

Sec.

§ 232.1 Scope, General Prohibition and Definitions

§ 232.2 Rule of Construction for Obtaining and Using Unsolicited Medical Information

§ 232.3 Financial Information Exception for Obtaining and Using Medical Information

§ 232.4 Specific Exceptions for Obtaining and Using Medical Information

Authority: 15 U.S.C. 1681b.

§ 232.1 Scope, General Prohibition and Definitions

(a) *Scope.* This part applies to creditors, as defined in paragraph (c)(3) of this section, except for creditors that

are subject to §§ 41.30, 222.30, 334.30, 571.30, or 717.30.

(b) *In general.* A creditor may not obtain or use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit, except as provided in this section.

(c) *Definitions.* (1) *Consumer* means an individual.

(2) *Credit* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(3) *Creditor* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(4) *Eligibility, or continued 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. The term does not include:

(i) Any determination of the consumer's qualification or fitness for employment, insurance (other than a credit insurance product), or other non-credit products or services;

(ii) Authorizing, processing, or documenting a payment or transaction on behalf of the consumer in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit; or

(iii) Maintaining or servicing the consumer's account in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit.

(5) *Medical information* means:

(i) Information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to—

(A) The past, present, or future physical, mental, or behavioral health or condition of an individual;

(B) The provision of health care to an individual; or

(C) The payment for the provision of health care to an individual.

(ii) The term does not include:

(A) The age or gender of a consumer;

(B) Demographic information about the consumer, including a consumer's residence address or e-mail address;

(C) Any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy; or

(D) Information that does not identify a specific consumer.

(6) *Person* means any individual, partnership, corporation, trust, estate cooperative, association, government or governmental subdivision or agency, or other entity.

§ 232.2 Rule of construction for obtaining and using unsolicited medical information.

(a) *In general.* A creditor does not obtain medical information in violation of the prohibition if it receives medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit without specifically requesting medical information.

(b) *Use of unsolicited medical information.* A creditor that receives unsolicited medical information in the manner described in paragraph (a) of this section may use that information in connection with any determination of the consumer's eligibility, or continued eligibility, for credit to the extent the creditor can rely on at least one of the exceptions in § 232.3 or § 232.4.

(c) *Examples.* A creditor does not obtain medical information in violation of the prohibition if, for example:

(1) In response to a general question regarding a consumer's debts or expenses, the creditor receives information that the consumer owes a debt to a hospital.

(2) In a conversation with the creditor's loan officer, the consumer informs the creditor that the consumer has a particular medical condition.

(3) In connection with a consumer's application for an extension of credit, the creditor requests a consumer report from a consumer reporting agency and receives medical information in the consumer report furnished by the agency even though the creditor did not specifically request medical information from the consumer reporting agency.

§ 232.3 Financial information exception for obtaining and using medical information.

(a) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit so long as:

(1) The information is the type of information routinely used in making credit eligibility determinations, such as information relating to debts, expenses, income, benefits, assets, collateral, or the purpose of the loan, including the use of proceeds;

(2) The creditor 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 creditor 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.

(b) *Examples.* (1) *Examples of the types of information routinely used in making credit eligibility determinations.* Paragraph (a)(1) of this section permits a creditor, for example, to obtain and use information about:

(i) The dollar amount, repayment terms, repayment history, and similar information regarding medical debts to calculate, measure, or verify the repayment ability of the consumer, the use of proceeds, or the terms for granting credit;

(ii) The value, condition, and lien status of a medical device that may serve as collateral to secure a loan;

(iii) The dollar amount and continued eligibility for disability income, workers' compensation income, or other benefits related to health or a medical condition that is relied on as a source of repayment; or

(iv) The identity of creditors to whom outstanding medical debts are owed in connection with an application for credit, including but not limited to, a transaction involving the consolidation of medical debts.

(2) *Examples of uses of medical information consistent with the exception.* (i) A consumer includes on an application for credit information about two \$20,000 debts. One debt is to a hospital; the other debt is to a retailer. The creditor contacts the hospital and the retailer to verify the amount and payment status of the debts. The creditor learns that both debts are more than 90 days past due. Any two debts of this size that are more than 90 days past due would disqualify the consumer under the creditor's established underwriting criteria. The creditor denies the application on the basis that the consumer has a poor repayment history on outstanding debts. The creditor has used medical information in a manner and to an extent no less favorable than it would use comparable non-medical information.

(ii) A consumer indicates on an application for a \$200,000 mortgage loan that she receives \$15,000 in long-term disability income each year from her former employer and has no other income. Annual income of \$15,000, regardless of source, would not be sufficient to support the requested amount of credit. The creditor denies the application on the basis that the projected debt-to-income ratio of the consumer does not meet the creditor's underwriting criteria. The creditor has used medical information in a manner and to an extent that is no less favorable than it would use comparable non-medical information.

(iii) A consumer includes on an application for a \$10,000 home equity

loan that he has a \$50,000 debt to a medical facility that specializes in treating a potentially terminal disease. The creditor contacts the medical facility to verify the debt and obtain the repayment history and current status of the loan. The creditor learns that the debt is current. The applicant meets the income and other requirements of the creditor's underwriting guidelines. The creditor grants the application. The creditor has used medical information in accordance with the exception.

(3) *Examples of uses of medical information inconsistent with the exception.* (i) A consumer applies for \$25,000 of credit and includes on the application information about a \$50,000 debt to a hospital. The creditor contacts the hospital to verify the amount and payment status of the debt, and learns that the debt is current and that the consumer has no delinquencies in her repayment history. If the existing debt were instead owed to a retail department store, the creditor would approve the application and extend credit based on the amount and repayment history of the outstanding debt. The creditor, however, denies the application because the consumer is indebted to a hospital. The creditor has used medical information, here the identity of the medical creditor, in a manner and to an extent that is less favorable than it would use comparable non-medical information.

(ii) A consumer meets with a loan officer of a creditor to apply for a mortgage loan. While filling out the loan application, the consumer informs the loan officer orally that she has a potentially terminal disease. The consumer meets the creditor's established requirements for the requested mortgage loan. The loan officer recommends to the credit committee that the consumer be denied credit because the consumer has that disease. The credit committee follows the loan officer's recommendation and denies the application because the consumer has a potentially terminal disease. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis as part of a determination of eligibility or continued eligibility for credit.

(iii) A consumer who has an apparent medical condition, such as a consumer who uses a wheelchair or an oxygen tank, meets with a loan officer to apply for a home equity loan. The consumer meets the creditor's established requirements for the requested home

equity loan and the creditor typically does not require consumers to obtain a debt cancellation contract, debt suspension agreement, or credit insurance product in connection with such loans. However, based on the consumer's apparent medical condition, the loan officer recommends to the credit committee that credit be extended to the consumer only if the consumer obtains a debt cancellation contract, debt suspension agreement, or credit insurance product from a nonaffiliated third party. The credit committee agrees with the loan officer's recommendation. The loan officer informs the consumer that the consumer must obtain a debt cancellation contract, debt suspension agreement, or credit insurance product from a nonaffiliated third party to qualify for the loan. The consumer obtains one of these products and the creditor approves the loan. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis in setting conditions on the consumer's eligibility for credit.

§ 232.4 Specific exceptions for obtaining and using medical information.

(a) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit:

(1) To determine whether the use of a power of attorney or legal representative that is triggered by a medical condition or event is necessary and appropriate or whether the consumer has the legal capacity to contract when a person seeks to exercise a power of attorney or act as legal representative for a consumer based on an asserted medical condition or event;

(2) To comply with applicable requirements of local, state, or Federal laws;

(3) To determine, at the consumer's request, whether the consumer qualifies for a legally permissible special credit program or credit-related assistance program that is—

(i) Designed to meet the special needs of consumers with medical conditions; and

(ii) Established and administered pursuant to a written plan that—

(A) Identifies the class of persons that the program is designed to benefit; and

(B) Sets forth the procedures and standards for extending credit or providing other credit-related assistance under the program;

(4) To the extent necessary for purposes of fraud prevention or detection;

(5) In the case of credit for the purpose of financing medical products or services, to determine and verify the medical purpose of a loan and the use of proceeds;

(6) Consistent with safe and sound practices, if the consumer or the consumer's legal representative specifically requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit, to accommodate the consumer's particular circumstances, and such request is documented by the creditor;

(7) Consistent with safe and sound practices, to determine whether the provisions of a forbearance practice or program that is triggered by a medical condition or event apply to a consumer;

(8) To determine the consumer's eligibility for, the triggering of, or the reactivation of a debt cancellation contract or debt suspension agreement if a medical condition or event is a triggering event for the provision of benefits under the contract or agreement; or

(9) To determine the consumer's eligibility for, the triggering of, or the reactivation of a credit insurance product if a medical condition or event is a triggering event for the provision of benefits under the product.

(b) *Example of determining eligibility for a special credit program or credit assistance program.* A not-for-profit organization establishes a credit assistance program pursuant to a written plan that is designed to assist disabled veterans in purchasing homes by subsidizing the down payment for the home purchase mortgage loans of qualifying veterans. The organization works through mortgage lenders and requires mortgage lenders to obtain medical information about the disability of any consumer that seeks to qualify for the program, use that information to verify the consumer's eligibility for the program, and forward that information to the organization. A consumer who is a veteran applies to a creditor for a home purchase mortgage loan. The creditor informs the consumer about the credit assistance program for disabled veterans and the consumer seeks to qualify for the program. Assuming that the program complies with all applicable law, including applicable fair lending laws, the creditor may obtain and use medical information about the medical condition and disability, if any, of the consumer to determine whether the consumer qualifies for the credit assistance program.

(c) *Examples of verifying the medical purpose of the loan or the use of proceeds.* (1) If a consumer applies for \$10,000 of credit for the purpose of financing vision correction surgery, the creditor may verify with the surgeon that the procedure will be performed. If the surgeon reports that surgery will not be performed on the consumer, the creditor may use that medical information to deny the consumer's application for credit, because the loan would not be used for the stated purpose.

(2) If a consumer applies for \$10,000 of credit for the purpose of financing cosmetic surgery, the creditor may confirm the cost of the procedure with the surgeon. If the surgeon reports that the cost of the procedure is \$5,000, the creditor may use that medical information to offer the consumer only \$5,000 of credit.

(3) A creditor has an established medical loan program for financing particular elective surgical procedures. The creditor receives a loan application from a consumer requesting \$10,000 of credit under the established loan program for an elective surgical procedure. The consumer indicates on the application that the purpose of the loan is to finance an elective surgical procedure not eligible for funding under the guidelines of the established loan program. The creditor may deny the consumer's application because the purpose of the loan is not for a particular procedure funded by the established loan program.

(d) *Examples of obtaining and using medical information at the request of the consumer.* (1) If a consumer applies for a loan and specifically requests that the creditor consider the consumer's medical disability at the relevant time as an explanation for adverse payment history information in his credit report, the creditor may consider such medical information in evaluating the consumer's willingness and ability to repay the requested loan to accommodate the consumer's particular circumstances, consistent with safe and sound practices. The creditor may also decline to consider such medical information to accommodate the consumer, but may evaluate the consumer's application in accordance with its otherwise applicable underwriting criteria. The creditor may not deny the consumer's application or otherwise treat the consumer less favorably because the consumer specifically requested a medical accommodation, if the creditor would have extended the credit or treated the consumer more favorably under the

creditor's otherwise applicable underwriting criteria.

(2) If a consumer applies for a loan by telephone and explains that his income has been and will continue to be interrupted on account of a medical condition and that he expects to repay the loan liquidating assets, the creditor may, but is not required to, evaluate the application using the sale of assets as the primary source of repayment, consistent with safe and sound practices, provided that the creditor documents the consumer's request by recording the oral conversation or making a notation of the request in the consumer's file.

(3) If a consumer applies for a loan and the application form provides a space where the consumer may provide any other information or special circumstances, whether medical or non-medical, that the consumer would like the creditor to consider in evaluating the consumer's application, the creditor may use medical information provided by the consumer in that space on that application to accommodate the consumer's application for credit, consistent with safe and sound practices, or may disregard that information.

(4) If a consumer specifically requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit and provides the creditor with medical information for that purpose, and the creditor determines that it needs additional information regarding the consumer's circumstances, the creditor may request, obtain, and use additional medical information about the consumer as necessary to verify the information provided by the consumer or to determine whether to make an accommodation for the consumer. The consumer may decline to provide additional information, withdraw the request for an accommodation, and have the application considered under the creditor's otherwise applicable underwriting criteria.

(5) If a consumer completes and signs a credit application that is not for medical purpose credit and the application contains boilerplate language that routinely requests medical information from the consumer or that indicates that by applying for credit the consumer authorizes or consents to the creditor obtaining and using medical information in connection with a determination of the consumer's eligibility, or continued eligibility, for credit, the consumer has not specifically requested that the creditor obtain and use medical information to

accommodate the consumer's particular circumstances.

(e) *Example of a forbearance practice or program.* After an appropriate safety and soundness review, a creditor institutes a program that allows consumers who are or will be hospitalized to defer payments as needed for up to three months, without penalty, if the credit account has been open for more than one year and has not previously been in default, and the consumer provides confirming documentation at an appropriate time. A consumer is hospitalized and does not pay her bill for a particular month. This consumer has had a credit account with the creditor for more than one year and has not previously been in default. The creditor attempts to contact the consumer and speaks with the consumer's adult child, who is not the consumer's legal representative. The adult child informs the creditor that the consumer is hospitalized and is unable to pay the bill at that time. The creditor defers payments for up to three months, without penalty, for the hospitalized consumer and sends the consumer a letter confirming this practice and the date on which the next payment will be due. The creditor has obtained and used medical information to determine whether the provisions of a medically-triggered forbearance practice or program apply to a consumer.

Federal Deposit Insurance Corporation

12 CFR Chapter III

Authority and Issuance

■ For the reasons set forth in the joint preamble, the Federal Deposit Insurance Corporation amends part 334 of chapter III of title 12 of the *Code of Federal Regulations* as follows:

PART 334—FAIR CREDIT REPORTING

■ 1. The authority citation for part 334 is revised to read as follows:

Authority: 12 U.S.C. 1819(Tenth) and 1818; 15 U.S.C. 1681b and 1681s.

■ 2. Subpart A is added to part 334 to read as follows:

Subpart A—General Provisions

§ 334.1 [Reserved]

§ 334.2 Examples.

The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part. Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise in this part.

§ 334.3 Definitions.

As used in this part, unless the context requires otherwise:

(a) *Act* means the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*).

(b) *Affiliate* means any company that is related by common ownership or common corporate control with another company.

(c) [Reserved]

(d) *Company* means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(e) *Consumer* means an individual.

(f) [Reserved]

(g) [Reserved]

(h) [Reserved]

(i) *Common ownership or common corporate control* means a relationship between two companies under which:

(1) One company has, with respect to the other company:

(i) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of a company, directly or indirectly, or acting through one or more other persons;

(ii) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of a company; or

(iii) The power to exercise, directly or indirectly, a controlling influence over the management or policies of a company, as the FDIC determines; or

(2) Any other person has, with respect to both companies, a relationship described in paragraphs (i)(1)(i) through (i)(1)(iii) of this section.

(j) [Reserved]

(k) *Medical information* means:

(1) Information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to:

(i) The past, present, or future physical, mental, or behavioral health or condition of an individual;

(ii) The provision of health care to an individual; or

(iii) The payment for the provision of health care to an individual.

(2) The term does not include:

(i) The age or gender of a consumer;

(ii) Demographic information about the consumer, including a consumer's residence address or e-mail address;

(iii) Any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy; or

(iv) Information that does not identify a specific consumer.

(l) *Person* means any individual, partnership, corporation, trust, estate cooperative, association, government or governmental subdivision or agency, or other entity.

■ 3. Subpart D is added to part 334 to read as follows:

Subpart D—Medical Information

§ 334.30 Obtaining or using medical information in connection with a determination of eligibility for credit.

(a) *Scope.* This section applies to:

(1) Any of the following that participates as a creditor in a transaction:

(i) A State bank insured by the FDIC (other than members of the Federal Reserve System);

(ii) An insured State branch of a foreign bank; or

(2) Any other person that participates as a creditor in a transaction involving a person described in paragraph (a)(1) of this section.

(b) *General prohibition on obtaining or using medical information.* (1) *In general.* A creditor may not obtain or use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit, except as provided in this section.

(2) *Definitions.* (i) *Credit* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(ii) *Creditor* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(iii) *Eligibility, or continued 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. The term does not include:

(A) Any determination of the consumer's qualification or fitness for employment, insurance (other than a credit insurance product), or other non-credit products or services;

(B) Authorizing, processing, or documenting a payment or transaction on behalf of the consumer in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit; or

(C) Maintaining or servicing the consumer's account in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit.

(c) *Rule of construction for obtaining and using unsolicited medical information.* (1) *In general.* A creditor does not obtain medical information in violation of the prohibition if it receives

medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit without specifically requesting medical information.

(2) *Use of unsolicited medical information.* A creditor that receives unsolicited medical information in the manner described in paragraph (c)(1) of this section may use that information in connection with any determination of the consumer's eligibility, or continued eligibility, for credit to the extent the creditor can rely on at least one of the exceptions in § 334.30(d) or (e).

(3) *Examples.* A creditor does not obtain medical information in violation of the prohibition if, for example:

(i) In response to a general question regarding a consumer's debts or expenses, the creditor receives information that the consumer owes a debt to a hospital.

(ii) In a conversation with the creditor's loan officer, the consumer informs the creditor that the consumer has a particular medical condition.

(iii) In connection with a consumer's application for an extension of credit, the creditor requests a consumer report from a consumer reporting agency and receives medical information in the consumer report furnished by the agency even though the creditor did not specifically request medical information from the consumer reporting agency.

(d) *Financial information exception for obtaining and using medical information.*

(1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit so long as:

(i) The information is the type of information routinely used in making credit eligibility determinations, such as information relating to debts, expenses, income, benefits, assets, collateral, or the purpose of the loan, including the use of proceeds;

(ii) The creditor 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

(iii) The creditor 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.

(2) *Examples.* (i) *Examples of the types of information routinely used in making credit eligibility determinations.* Paragraph (d)(1)(i) of this section

permits a creditor, for example, to obtain and use information about:

(A) The dollar amount, repayment terms, repayment history, and similar information regarding medical debts to calculate, measure, or verify the repayment ability of the consumer, the use of proceeds, or the terms for granting credit;

(B) The value, condition, and lien status of a medical device that may serve as collateral to secure a loan;

(C) The dollar amount and continued eligibility for disability income, workers' compensation income, or other benefits related to health or a medical condition that is relied on as a source of repayment; or

(D) The identity of creditors to whom outstanding medical debts are owed in connection with an application for credit, including but not limited to, a transaction involving the consolidation of medical debts.

(ii) *Examples of uses of medical information consistent with the exception.* (A) A consumer includes on an application for credit information about two \$20,000 debts. One debt is to a hospital; the other debt is to a retailer. The creditor contacts the hospital and the retailer to verify the amount and payment status of the debts. The creditor learns that both debts are more than 90 days past due. Any two debts of this size that are more than 90 days past due would disqualify the consumer under the creditor's established underwriting criteria. The creditor denies the application on the basis that the consumer has a poor repayment history on outstanding debts. The creditor has used medical information in a manner and to an extent no less favorable than it would use comparable non-medical information.

(B) A consumer indicates on an application for a \$200,000 mortgage loan that she receives \$15,000 in long-term disability income each year from her former employer and has no other income. Annual income of \$15,000, regardless of source, would not be sufficient to support the requested amount of credit. The creditor denies the application on the basis that the projected debt-to-income ratio of the consumer does not meet the creditor's underwriting criteria. The creditor has used medical information in a manner and to an extent that is no less favorable than it would use comparable non-medical information.

(C) A consumer includes on an application for a \$10,000 home equity loan that he has a \$50,000 debt to a medical facility that specializes in treating a potentially terminal disease. The creditor contacts the medical

facility to verify the debt and obtain the repayment history and current status of the loan. The creditor learns that the debt is current. The applicant meets the income and other requirements of the creditor's underwriting guidelines. The creditor grants the application. The creditor has used medical information in accordance with the exception.

(iii) *Examples of uses of medical information inconsistent with the exception.* (A) A consumer applies for \$25,000 of credit and includes on the application information about a \$50,000 debt to a hospital. The creditor contacts the hospital to verify the amount and payment status of the debt, and learns that the debt is current and that the consumer has no delinquencies in her repayment history. If the existing debt were instead owed to a retail department store, the creditor would approve the application and extend credit based on the amount and repayment history of the outstanding debt. The creditor, however, denies the application because the consumer is indebted to a hospital. The creditor has used medical information, here the identity of the medical creditor, in a manner and to an extent that is less favorable than it would use comparable non-medical information.

(B) A consumer meets with a loan officer of a creditor to apply for a mortgage loan. While filling out the loan application, the consumer informs the loan officer orally that she has a potentially terminal disease. The consumer meets the creditor's established requirements for the requested mortgage loan. The loan officer recommends to the credit committee that the consumer be denied credit because the consumer has that disease. The credit committee follows the loan officer's recommendation and denies the application because the consumer has a potentially terminal disease. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis as part of a determination of eligibility or continued eligibility for credit.

(C) A consumer who has an apparent medical condition, such as a consumer who uses a wheelchair or an oxygen tank, meets with a loan officer to apply for a home equity loan. The consumer meets the creditor's established requirements for the requested home equity loan and the creditor typically does not require consumers to obtain a debt cancellation contract, debt suspension agreement, or credit

insurance product in connection with such loans. However, based on the consumer's apparent medical condition, the loan officer recommends to the credit committee that credit be extended to the consumer only if the consumer obtains a debt cancellation contract, debt suspension agreement, or credit insurance product from a nonaffiliated third party. The credit committee agrees with the loan officer's recommendation. The loan officer informs the consumer that the consumer must obtain a debt cancellation contract, debt suspension agreement, or credit insurance product from a nonaffiliated third party to qualify for the loan. The consumer obtains one of these products and the creditor approves the loan. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis in setting conditions on the consumer's eligibility for credit.

(e) *Specific exceptions for obtaining and using medical information.* (1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit:

(i) To determine whether the use of a power of attorney or legal representative that is triggered by a medical condition or event is necessary and appropriate or whether the consumer has the legal capacity to contract when a person seeks to exercise a power of attorney or act as legal representative for a consumer based on an asserted medical condition or event;

(ii) To comply with applicable requirements of local, state, or Federal laws;

(iii) To determine, at the consumer's request, whether the consumer qualifies for a legally permissible special credit program or credit-related assistance program that is:

(A) Designed to meet the special needs of consumers with medical conditions; and

(B) Established and administered pursuant to a written plan that:

(1) Identifies the class of persons that the program is designed to benefit; and

(2) Sets forth the procedures and standards for extending credit or providing other credit-related assistance under the program;

(iv) To the extent necessary for purposes of fraud prevention or detection;

(v) In the case of credit for the purpose of financing medical products or services, to determine and verify the

medical purpose of a loan and the use of proceeds;

(vi) Consistent with safe and sound practices, if the consumer or the consumer's legal representative specifically requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit, to accommodate the consumer's particular circumstances, and such request is documented by the creditor;

(vii) Consistent with safe and sound practices, to determine whether the provisions of a forbearance practice or program that is triggered by a medical condition or event apply to a consumer;

(viii) To determine the consumer's eligibility for, the triggering of, or the reactivation of a debt cancellation contract or debt suspension agreement if a medical condition or event is a triggering event for the provision of benefits under the contract or agreement; or

(ix) To determine the consumer's eligibility for, the triggering of, or the reactivation of a credit insurance product if a medical condition or event is a triggering event for the provision of benefits under the product.

(2) *Example of determining eligibility for a special credit program or credit assistance program.* A not-for-profit organization establishes a credit assistance program pursuant to a written plan that is designed to assist disabled veterans in purchasing homes by subsidizing the down payment for the home purchase mortgage loans of qualifying veterans. The organization works through mortgage lenders and requires mortgage lenders to obtain medical information about the disability of any consumer that seeks to qualify for the program, use that information to verify the consumer's eligibility for the program, and forward that information to the organization. A consumer who is a veteran applies to a creditor for a home purchase mortgage loan. The creditor informs the consumer about the credit assistance program for disabled veterans and the consumer seeks to qualify for the program. Assuming that the program complies with all applicable law, including applicable fair lending laws, the creditor may obtain and use medical information about the medical condition and disability, if any, of the consumer to determine whether the consumer qualifies for the credit assistance program.

(3) *Examples of verifying the medical purpose of the loan or the use of proceeds.* (i) If a consumer applies for \$10,000 of credit for the purpose of financing vision correction surgery, the creditor may verify with the surgeon

that the procedure will be performed. If the surgeon reports that surgery will not be performed on the consumer, the creditor may use that medical information to deny the consumer's application for credit, because the loan would not be used for the stated purpose.

(ii) If a consumer applies for \$10,000 of credit for the purpose of financing cosmetic surgery, the creditor may confirm the cost of the procedure with the surgeon. If the surgeon reports that the cost of the procedure is \$5,000, the creditor may use that medical information to offer the consumer only \$5,000 of credit.

(iii) A creditor has an established medical loan program for financing particular elective surgical procedures. The creditor receives a loan application from a consumer requesting \$10,000 of credit under the established loan program for an elective surgical procedure. The consumer indicates on the application that the purpose of the loan is to finance an elective surgical procedure not eligible for funding under the guidelines of the established loan program. The creditor may deny the consumer's application because the purpose of the loan is not for a particular procedure funded by the established loan program.

(4) *Examples of obtaining and using medical information at the request of the consumer.* (i) If a consumer applies for a loan and specifically requests that the creditor consider the consumer's medical disability at the relevant time as an explanation for adverse payment history information in his credit report, the creditor may consider such medical information in evaluating the consumer's willingness and ability to repay the requested loan to accommodate the consumer's particular circumstances, consistent with safe and sound practices. The creditor may also decline to consider such medical information to accommodate the consumer, but may evaluate the consumer's application in accordance with its otherwise applicable underwriting criteria. The creditor may not deny the consumer's application or otherwise treat the consumer less favorably because the consumer specifically requested a medical accommodation, if the creditor would have extended the credit or treated the consumer more favorably under the creditor's otherwise applicable underwriting criteria.

(ii) If a consumer applies for a loan by telephone and explains that his income has been and will continue to be interrupted on account of a medical condition and that he expects to repay

the loan by liquidating assets, the creditor may, but is not required to, evaluate the application using the sale of assets as the primary source of repayment, consistent with safe and sound practices, provided that the creditor documents the consumer's request by recording the oral conversation or making a notation of the request in the consumer's file.

(iii) If a consumer applies for a loan and the application form provides a space where the consumer may provide any other information or special circumstances, whether medical or non-medical, that the consumer would like the creditor to consider in evaluating the consumer's application, the creditor may use medical information provided by the consumer in that space on that application to accommodate the consumer's application for credit, consistent with safe and sound practices, or may disregard that information.

(iv) If a consumer specifically requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit and provides the creditor with medical information for that purpose, and the creditor determines that it needs additional information regarding the consumer's circumstances, the creditor may request, obtain, and use additional medical information about the consumer as necessary to verify the information provided by the consumer or to determine whether to make an accommodation for the consumer. The consumer may decline to provide additional information, withdraw the request for an accommodation, and have the application considered under the creditor's otherwise applicable underwriting criteria.

(v) If a consumer completes and signs a credit application that is not for medical purpose credit and the application contains boilerplate language that routinely requests medical information from the consumer or that indicates that by applying for credit the consumer authorizes or consents to the creditor obtaining and using medical information in connection with a determination of the consumer's eligibility, or continued eligibility, for credit, the consumer has not specifically requested that the creditor obtain and use medical information to accommodate the consumer's particular circumstances.

(5) *Example of a forbearance practice or program.* After an appropriate safety and soundness review, a creditor institutes a program that allows consumers who are or will be

hospitalized to defer payments as needed for up to three months, without penalty, if the credit account has been open for more than one year and has not previously been in default, and the consumer provides confirming documentation at an appropriate time. A consumer is hospitalized and does not pay her bill for a particular month. This consumer has had a credit account with the creditor for more than one year and has not previously been in default. The creditor attempts to contact the consumer and speaks with the consumer's adult child, who is not the consumer's legal representative. The adult child informs the creditor that the consumer is hospitalized and is unable to pay the bill at that time. The creditor defers payments for up to three months, without penalty, for the hospitalized consumer and sends the consumer a letter confirming this practice and the date on which the next payment will be due. The creditor has obtained and used medical information to determine whether the provisions of a medically-triggered forbearance practice or program apply to a consumer.

§ 334.31 Limits on redisclosure of information.

(a) *Scope.* This section applies to State banks insured by the FDIC (other than members of the Federal Reserve System) and insured State branches of foreign banks.

(b) *Limits on redisclosure.* If a person described in paragraph (a) of this section receives medical information about a consumer from a consumer reporting agency or its affiliate, the person must not disclose that information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

§ 334.32 Sharing medical information with affiliates.

(a) *Scope.* This section applies to State banks insured by the FDIC (other than members of the Federal Reserve System) and insured State branches of foreign banks.

(b) *In general.* The exclusions from the term "consumer report" in section 603(d)(2) of the Act that allow the sharing of information with affiliates do not apply if a person described in paragraph (a) of this section communicates to an affiliate—

(1) Medical information;

(2) An individualized list or description based on the payment transactions of the consumer for medical products or services; or

(3) An aggregate list of identified consumers based on payment transactions for medical products or services.

(c) *Exceptions.* A person described in paragraph (a) of this section may rely on the exclusions from the term "consumer report" in section 603(d)(2) of the Act to communicate the information in paragraph (b) of this section to an affiliate—

(1) In connection with the business of insurance or annuities (including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners, as in effect on January 1, 2003);

(2) For any purpose permitted without authorization under the regulations promulgated by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA);

(3) For any purpose referred to in section 1179 of HIPAA;

(4) For any purpose described in section 502(e) of the Gramm-Leach-Bliley Act;

(5) In connection with a determination of the consumer's eligibility, or continued eligibility, for credit consistent with § 334.30; or

(6) As otherwise permitted by order of the FDIC.

Office of Thrift Supervision

12 CFR Chapter V.

Authority and Issuance

■ For the reasons set forth in the joint preamble, the Office of Thrift Supervision amends chapter V of title 12 of the Code of Federal Regulations as follows:

PART 571—FAIR CREDIT REPORTING

■ 1. The authority citation for part 571 is revised to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1464, 1467a, 1828, 1831p–1, and 1881–1884; 15 U.S.C. 1681b, 1681s, and 1681w; 15 U.S.C. 6801 and 6805(b)(1).

Subpart A—General Provisions

■ 2. Revise § 571.1(b) to read as follows:

§ 571.1 Purpose and Scope.

* * * * *

(b) *Scope.* (1)–(3) [Reserved]

(4) The scope of Subpart D of this part is stated in §§ 571.30(a), 571.31(a), and 571.32(a) of this part.

(5)–(8) [Reserved]

(9) Subpart I of this part applies to savings associations whose deposits are insured by the Federal Deposit

Insurance Corporation (and federal savings association operating subsidiaries in accordance with § 559.3(h)(1) of this chapter).

■ 3. Add § 571.2 to read as follows:

§ 571.2 Examples.

The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part. Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise in this part.

■ 4. Amend § 571.3 by revising the introductory text and paragraphs (a) through (n) to read as follows:

§ 571.3 Definitions.

As used in this part, unless the context requires otherwise:

(a) *Act* means the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*).

(b) *Affiliate* means any company that is related by common ownership or common corporate control with another company.

(c) [Reserved]

(d) *Company* means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(e) *Consumer* means an individual.

(f)–(h) [Reserved]

(i) *Common ownership or common corporate control* means a relationship between two companies under which:

(1) One company has, with respect to the other company:

(i) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of a company, directly or indirectly, or acting through one or more other persons;

(ii) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of a company; or

(iii) The power to exercise, directly or indirectly, a controlling influence over the management or policies of a company, as the OTS determines; or

(2) Any other person has, with respect to both companies, a relationship described in paragraphs (i)(1)(i) through (i)(1)(iii) of this section.

(j) [Reserved]

(k) *Medical information* means:

(1) Information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to—

(i) The past, present, or future physical, mental, or behavioral health or condition of an individual;

(ii) The provision of health care to an individual; or

(iii) The payment for the provision of health care to an individual.

(2) The term does not include:

(i) The age or gender of a consumer;

(ii) Demographic information about the consumer, including a consumer's residence address or e-mail address;

(iii) Any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy; or

(iv) Information that does not identify a specific consumer.

(l) *Person* means any individual, partnership, corporation, trust, estate cooperative, association, government or governmental subdivision or agency, or other entity.

(m)–(n) [Reserved]

* * * * *

■ 5. Add subpart D to part 571 to read as follows:

Subpart D—Medical Information

§ 571.30 Obtaining or using medical information in connection with a determination of eligibility for credit.

(a) *Scope.* This section applies to:

(1) Any of the following that participates as a creditor in a transaction—

(i) A savings association;

(ii) A subsidiary owned in whole or in part by a savings association;

(iii) A savings and loan holding company;

(iv) A subsidiary of a savings and loan holding company other than a bank or subsidiary of a bank; or

(v) A service corporation owned in whole or in part by a savings association; or

(2) Any other person that participates as a creditor in a transaction involving a person described in paragraph (a)(1) of this section.

(b) *General prohibition on obtaining or using medical information.* (1) *In general.* A creditor may not obtain or use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit, except as provided in this section.

(2) *Definitions.* (i) Credit has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(ii) *Creditor* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(iii) *Eligibility, or continued 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. The term does not include:

(A) Any determination of the consumer's qualification or fitness for employment, insurance (other than a credit insurance product), or other non-credit products or services;

(B) Authorizing, processing, or documenting a payment or transaction on behalf of the consumer in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit; or

(C) Maintaining or servicing the consumer's account in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit.

(c) *Rule of construction for obtaining and using unsolicited medical information.* (1) *In general.* A creditor does not obtain medical information in violation of the prohibition if it receives medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit without specifically requesting medical information.

(2) *Use of unsolicited medical information.* A creditor that receives unsolicited medical information in the manner described in paragraph (c)(1) of this section may use that information in connection with any determination of the consumer's eligibility, or continued eligibility, for credit to the extent the creditor can rely on at least one of the exceptions in § 571.30(d) or (e).

(3) *Examples.* A creditor does not obtain medical information in violation of the prohibition if, for example:

(i) In response to a general question regarding a consumer's debts or expenses, the creditor receives information that the consumer owes a debt to a hospital;

(ii) In a conversation with the creditor's loan officer, the consumer informs the creditor that the consumer has a particular medical condition; or

(iii) In connection with a consumer's application for an extension of credit, the creditor requests a consumer report from a consumer reporting agency and receives medical information in the consumer report furnished by the agency even though the creditor did not specifically request medical information from the consumer reporting agency.

(d) *Financial information exception for obtaining and using medical information.* (1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the

consumer's eligibility, or continued eligibility, for credit so long as:

(i) The information is the type of information routinely used in making credit eligibility determinations, such as information relating to debts, expenses, income, benefits, assets, collateral, or the purpose of the loan, including the use of proceeds;

(ii) The creditor 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

(iii) The creditor 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.

(2) *Examples.* (i) *Examples of the types of information routinely used in making credit eligibility determinations.* Paragraph (d)(1)(i) of this section permits a creditor, for example, to obtain and use information about:

(A) The dollar amount, repayment terms, repayment history, and similar information regarding medical debts to calculate, measure, or verify the repayment ability of the consumer, the use of proceeds, or the terms for granting credit;

(B) The value, condition, and lien status of a medical device that may serve as collateral to secure a loan;

(C) The dollar amount and continued eligibility for disability income, workers' compensation income, or other benefits related to health or a medical condition that is relied on as a source of repayment; or

(D) The identity of creditors to whom outstanding medical debts are owed in connection with an application for credit, including but not limited to, a transaction involving the consolidation of medical debts.

(ii) *Examples of uses of medical information consistent with the exception.* (A) A consumer includes on an application for credit information about two \$20,000 debts. One debt is to a hospital; the other debt is to a retailer. The creditor contacts the hospital and the retailer to verify the amount and payment status of the debts. The creditor learns that both debts are more than 90 days past due. Any two debts of this size that are more than 90 days past due would disqualify the consumer under the creditor's established underwriting criteria. The creditor denies the application on the basis that the consumer has a poor repayment history on outstanding debts. The creditor has used medical information in a manner and to an extent no less

favorable than it would use comparable non-medical information.

(B) A consumer indicates on an application for a \$200,000 mortgage loan that she receives \$15,000 in long-term disability income each year from her former employer and has no other income. Annual income of \$15,000, regardless of source, would not be sufficient to support the requested amount of credit. The creditor denies the application on the basis that the projected debt-to-income ratio of the consumer does not meet the creditor's underwriting criteria. The creditor has used medical information in a manner and to an extent that is no less favorable than it would use comparable non-medical information.

(C) A consumer includes on an application for a \$10,000 home equity loan that he has a \$50,000 debt to a medical facility that specializes in treating a potentially terminal disease. The creditor contacts the medical facility to verify the debt and obtain the repayment history and current status of the loan. The creditor learns that the debt is current. The applicant meets the income and other requirements of the creditor's underwriting guidelines. The creditor grants the application. The creditor has used medical information in accordance with the exception.

(iii) *Examples of uses of medical information inconsistent with the exception.* (A) A consumer applies for \$25,000 of credit and includes on the application information about a \$50,000 debt to a hospital. The creditor contacts the hospital to verify the amount and payment status of the debt, and learns that the debt is current and that the consumer has no delinquencies in her repayment history. If the existing debt were instead owed to a retail department store, the creditor would approve the application and extend credit based on the amount and repayment history of the outstanding debt. The creditor, however, denies the application because the consumer is indebted to a hospital. The creditor has used medical information, here the identity of the medical creditor, in a manner and to an extent that is less favorable than it would use comparable non-medical information.

(B) A consumer meets with a loan officer of a creditor to apply for a mortgage loan. While filling out the loan application, the consumer informs the loan officer orally that she has a potentially terminal disease. The consumer meets the creditor's established requirements for the requested mortgage loan. The loan officer recommends to the credit committee that the consumer be denied

credit because the consumer has that disease. The credit committee follows the loan officer's recommendation and denies the application because the consumer has a potentially terminal disease. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis as part of a determination of eligibility or continued eligibility for credit.

(C) A consumer who has an apparent medical condition, such as a consumer who uses a wheelchair or an oxygen tank, meets with a loan officer to apply for a home equity loan. The consumer meets the creditor's established requirements for the requested home equity loan and the creditor typically does not require consumers to obtain a debt cancellation contract, debt suspension agreement, or credit insurance product in connection with such loans. However, based on the consumer's apparent medical condition, the loan officer recommends to the credit committee that credit be extended to the consumer only if the consumer obtains a debt cancellation contract, debt suspension agreement, or credit insurance product from a nonaffiliated third party. The credit committee agrees with the loan officer's recommendation. The loan officer informs the consumer that the consumer must obtain a debt cancellation contract, debt suspension agreement, or credit insurance product from a nonaffiliated third party to qualify for the loan. The consumer obtains one of these products and the creditor approves the loan. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis in setting conditions on the consumer's eligibility for credit.

(e) *Specific exceptions for obtaining and using medical information.* (1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit—

(i) To determine whether the use of a power of attorney or legal representative that is triggered by a medical condition or event is necessary and appropriate or whether the consumer has the legal capacity to contract when a person seeks to exercise a power of attorney or act as legal representative for a consumer based on an asserted medical condition or event;

(ii) To comply with applicable requirements of local, state, or federal laws;

(iii) To determine, at the consumer's request, whether the consumer qualifies for a legally permissible special credit program or credit-related assistance program that is—

(A) Designed to meet the special needs of consumers with medical conditions; and

(B) Established and administered pursuant to a written plan that—

(1) Identifies the class of persons that the program is designed to benefit; and

(2) Sets forth the procedures and standards for extending credit or providing other credit-related assistance under the program;

(iv) To the extent necessary for purposes of fraud prevention or detection;

(v) In the case of credit for the purpose of financing medical products or services, to determine and verify the medical purpose of a loan and the use of proceeds;

(vi) Consistent with safe and sound practices, if the consumer or the consumer's legal representative specifically requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit, to accommodate the consumer's particular circumstances, and such request is documented by the creditor;

(vii) Consistent with safe and sound practices, to determine whether the provisions of a forbearance practice or program that is triggered by a medical condition or event apply to a consumer;

(viii) To determine the consumer's eligibility for, the triggering of, or the reactivation of a debt cancellation contract or debt suspension agreement if a medical condition or event is a triggering event for the provision of benefits under the contract or agreement; or

(ix) To determine the consumer's eligibility for, the triggering of, or the reactivation of a credit insurance product if a medical condition or event is a triggering event for the provision of benefits under the product.

(2) *Example of determining eligibility for a special credit program or credit assistance program.* A not-for-profit organization establishes a credit assistance program pursuant to a written plan that is designed to assist disabled veterans in purchasing homes by subsidizing the down payment for the home purchase mortgage loans of qualifying veterans. The organization works through mortgage lenders and requires mortgage lenders to obtain medical information about the disability

of any consumer that seeks to qualify for the program, use that information to verify the consumer's eligibility for the program, and forward that information to the organization. A consumer who is a veteran applies to a creditor for a home purchase mortgage loan. The creditor informs the consumer about the credit assistance program for disabled veterans and the consumer seeks to qualify for the program. Assuming that the program complies with all applicable law, including applicable fair lending laws, the creditor may obtain and use medical information about the medical condition and disability, if any, of the consumer to determine whether the consumer qualifies for the credit assistance program.

(3) *Examples of verifying the medical purpose of the loan or the use of proceeds.* (i) If a consumer applies for \$10,000 of credit for the purpose of financing vision correction surgery, the creditor may verify with the surgeon that the procedure will be performed. If the surgeon reports that surgery will not be performed on the consumer, the creditor may use that medical information to deny the consumer's application for credit, because the loan would not be used for the stated purpose.

(ii) If a consumer applies for \$10,000 of credit for the purpose of financing cosmetic surgery, the creditor may confirm the cost of the procedure with the surgeon. If the surgeon reports that the cost of the procedure is \$5,000, the creditor may use that medical information to offer the consumer only \$5,000 of credit.

(iii) A creditor has an established medical loan program for financing particular elective surgical procedures. The creditor receives a loan application from a consumer requesting \$10,000 of credit under the established loan program for an elective surgical procedure. The consumer indicates on the application that the purpose of the loan is to finance an elective surgical procedure not eligible for funding under the guidelines of the established loan program. The creditor may deny the consumer's application because the purpose of the loan is not for a particular procedure funded by the established loan program.

(4) *Examples of obtaining and using medical information at the request of the consumer.* (i) If a consumer applies for a loan and specifically requests that the creditor consider the consumer's medical disability at the relevant time as an explanation for adverse payment history information in his credit report, the creditor may consider such medical information in evaluating the

consumer's willingness and ability to repay the requested loan to accommodate the consumer's particular circumstances, consistent with safe and sound practices. The creditor may also decline to consider such medical information to accommodate the consumer, but may evaluate the consumer's application in accordance with its otherwise applicable underwriting criteria. The creditor may not deny the consumer's application or otherwise treat the consumer less favorably because the consumer specifically requested a medical accommodation, if the creditor would have extended the credit or treated the consumer more favorably under the creditor's otherwise applicable underwriting criteria.

(ii) If a consumer applies for a loan by telephone and explains that his income has been and will continue to be interrupted on account of a medical condition and that he expects to repay the loan by liquidating assets, the creditor may, but is not required to, evaluate the application using the sale of assets as the primary source of repayment, consistent with safe and sound practices, provided that the creditor documents the consumer's request by recording the oral conversation or making a notation of the request in the consumer's file.

(iii) If a consumer applies for a loan and the application form provides a space where the consumer may provide any other information or special circumstances, whether medical or non-medical, that the consumer would like the creditor to consider in evaluating the consumer's application, the creditor may use medical information provided by the consumer in that space on that application to accommodate the consumer's application for credit, consistent with safe and sound practices, or may disregard that information.

(iv) If a consumer specifically requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit and provides the creditor with medical information for that purpose, and the creditor determines that it needs additional information regarding the consumer's circumstances, the creditor may request, obtain, and use additional medical information about the consumer as necessary to verify the information provided by the consumer or to determine whether to make an accommodation for the consumer. The consumer may decline to provide additional information, withdraw the request for an accommodation, and have

the application considered under the creditor's otherwise applicable underwriting criteria.

(v) If a consumer completes and signs a credit application that is not for medical purpose credit and the application contains boilerplate language that routinely requests medical information from the consumer or that indicates that by applying for credit the consumer authorizes or consents to the creditor obtaining and using medical information in connection with a determination of the consumer's eligibility, or continued eligibility, for credit, the consumer has not specifically requested that the creditor obtain and use medical information to accommodate the consumer's particular circumstances.

(5) *Example of a forbearance practice or program.* After an appropriate safety and soundness review, a creditor institutes a program that allows consumers who are or will be hospitalized to defer payments as needed for up to three months, without penalty, if the credit account has been open for more than one year and has not previously been in default, and the consumer provides confirming documentation at an appropriate time. A consumer is hospitalized and does not pay her bill for a particular month. This consumer has had a credit account with the creditor for more than one year and has not previously been in default. The creditor attempts to contact the consumer and speaks with the consumer's spouse, who is not the consumer's legal representative. The spouse informs the creditor that the consumer is hospitalized and is unable to pay the bill at that time. The creditor defers payments for up to three months, without penalty, for the hospitalized consumer and sends the consumer a letter confirming this practice and the date on which the next payment will be due. The creditor has obtained and used medical information to determine whether the provisions of a medically-triggered forbearance practice or program apply to a consumer.

§ 571.31 Limits on redisclosure of information.

(a) *Scope.* This section applies to savings associations and federal savings association operating subsidiaries.

(b) *Limits on redisclosure.* If a person described in paragraph (a) of this section receives medical information about a consumer from a consumer reporting agency or its affiliate, the person must not disclose that information to any other person, except as necessary to carry out the purpose for which the information was initially

disclosed, or as otherwise permitted by statute, regulation, or order.

§ 571.32 Sharing medical information with affiliates.

(a) *Scope.* This section applies to savings associations and federal savings association operating subsidiaries.

(b) *In general.* The exclusions from the term "consumer report" in section 603(d)(2) of the Act that allow the sharing of information with affiliates do not apply if a person described in paragraph (a) of this section communicates to an affiliate:

- (1) Medical information;
- (2) An individualized list or description based on the payment transactions of the consumer for medical products or services; or
- (3) An aggregate list of identified consumers based on payment transactions for medical products or services.

(c) *Exceptions.* A person described in paragraph (a) of this section may rely on the exclusions from the term "consumer report" in section 603(d)(2) of the Act to communicate the information in paragraph (b) of this section to an affiliate:

(1) In connection with the business of insurance or annuities (including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners, as in effect on January 1, 2003);

(2) For any purpose permitted without authorization under the regulations promulgated by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA);

(3) For any purpose referred to in section 1179 of HIPAA;

(4) For any purpose described in section 502(e) of the Gramm-Leach-Bliley Act;

(5) In connection with a determination of the consumer's eligibility, or continued eligibility, for credit consistent with § 571.30; or

(6) As otherwise permitted by order of the OTS.

National Credit Union Administration

■ For the reasons set out in the preamble, 12 CFR chapter VII is amended as follows:

PART 717—FAIR CREDIT REPORTING

■ 1. Revise the authority citation for part 717 to read as follows:

Authority: 15 U.S.C. 1681a, 1681b, 1681s, 1681w, 6801 and 6805.

■ 2. Amend part 717 by revising subpart A to read as follows:

Subpart A—General Provisions**§ 717.1 Purpose.**

(a) *Purpose.* The purpose of this part is to establish standards for Federal credit unions regarding consumer report information. In addition, the purpose of this part is to specify the extent to which Federal credit unions may obtain, use or share certain information. This part also contains a number of measures Federal credit unions must take to combat consumer fraud and related crimes, including identity theft.

(b) [Reserved].

§ 717.2 Examples.

The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part. Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise in this part.

§ 717.3 Definitions.

As used in this part, unless the context requires otherwise:

(a) *Act* means the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*).

(b) *Affiliate* means any company that is related by common ownership or common corporate control with another company. For example, an affiliate of a Federal credit union is a credit union service corporation (CUSO), as provided in 12 CFR part 712, that is controlled by the Federal credit union.

(c) [Reserved]

(d) *Company* means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(e) *Consumer* means an individual.

(f) [Reserved]

(g) [Reserved]

(h) [Reserved]

(i) *Common ownership or common corporate control* means a relationship between two companies under which:

(1) One company has, with respect to the other company:

(i) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of a company, directly or indirectly, or acting through one or more other persons;

(ii) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of a company; or

(iii) The power to exercise, directly or indirectly, a controlling influence over the management or policies of a company, as the NCUA determines; or

(iv) *Example.* NCUA will presume a credit union has a controlling influence

over the management or policies of a CUSO, if the CUSO is 67% owned by credit unions.

(2) Any other person has, with respect to both companies, a relationship described in paragraphs (i)(1)(i) through (i)(1)(iii) of this section.

(j) [Reserved]

(k) *Medical information* means:

(1) Information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to:

(i) The past, present, or future physical, mental, or behavioral health or condition of an individual;

(ii) The provision of health care to an individual; or

(iii) The payment for the provision of health care to an individual.

(2) The term does not include:

(i) The age or gender of a consumer;

(ii) Demographic information about the consumer, including a consumer's residence address or e-mail address;

(iii) Any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy; or

(iv) Information that does not identify a specific consumer.

(l) *Person* means any individual, partnership, corporation, trust, estate cooperative, association, government or governmental subdivision or agency, or other entity.

■ 3. Subpart D is added to part 717 to read as follows:

Subpart D—Medical Information**§ 717.30 Obtaining or using medical information in connection with a determination of eligibility for credit.**

(a) *Scope.* This section applies to:

(1) A Federal credit union that participates as a creditor in a transaction; or

(2) Any other person that participates as a creditor in a transaction involving a person described in paragraph (a)(1) of this section.

(b) *General prohibition on obtaining or using medical information.* (1) *In general.* A creditor may not obtain or use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit, except as provided in this section.

(2) *Definitions.* (i) *Credit* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(ii) *Creditor* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(iii) *Eligibility, or continued 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. The term does not include:

(A) Any determination of the consumer's qualification or fitness for employment, insurance (other than a credit insurance product), or other non-credit products or services;

(B) Authorizing, processing, or documenting a payment or transaction on behalf of the consumer in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit; or

(C) Maintaining or servicing the consumer's account in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit.

(c) *Rule of construction for obtaining and using unsolicited medical information.* (1) *In general.* A creditor does not obtain medical information in violation of the prohibition if it receives medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit without specifically requesting medical information.

(2) *Use of unsolicited medical information.* A creditor that receives unsolicited medical information in the manner described in paragraph (c)(1) of this section may use that information in connection with any determination of the consumer's eligibility, or continued eligibility, for credit to the extent the creditor can rely on at least one of the exceptions in § 717.30(d) or (e).

(3) *Examples.* A creditor does not obtain medical information in violation of the prohibition if, for example:

(i) In response to a general question regarding a consumer's debts or expenses, the creditor receives information that the consumer owes a debt to a hospital.

(ii) In a conversation with the creditor's loan officer, the consumer informs the creditor that the consumer has a particular medical condition.

(iii) In connection with a consumer's application for an extension of credit, the creditor requests a consumer report from a consumer reporting agency and receives medical information in the consumer report furnished by the agency even though the creditor did not specifically request medical information from the consumer reporting agency.

(d) *Financial information exception for obtaining and using medical*

information. (1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit so long as:

(i) The information is the type of information routinely used in making credit eligibility determinations, such as information relating to debts, expenses, income, benefits, assets, collateral, or the purpose of the loan, including the use of proceeds;

(ii) The creditor 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

(iii) The creditor 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.

(2) *Examples.* (i) *Examples of the types of information routinely used in making credit eligibility determinations.*

Paragraph (d)(1)(i) of this section permits a creditor, for example, to obtain and use information about:

(A) The dollar amount, repayment terms, repayment history, and similar information regarding medical debts to calculate, measure, or verify the repayment ability of the consumer, the use of proceeds, or the terms for granting credit;

(B) The value, condition, and lien status of a medical device that may serve as collateral to secure a loan;

(C) The dollar amount and continued eligibility for disability income, workers' compensation income, or other benefits related to health or a medical condition that is relied on as a source of repayment; or

(D) The identity of creditors to whom outstanding medical debts are owed in connection with an application for credit, including but not limited to, a transaction involving the consolidation of medical debts.

(ii) *Examples of uses of medical information consistent with the exception.* (A) A consumer includes on an application for credit information about two \$20,000 debts. One debt is to a hospital; the other debt is to a retailer. The creditor contacts the hospital and the retailer to verify the amount and payment status of the debts. The creditor learns that both debts are more than 90 days past due. Any two debts of this size that are more than 90 days past due would disqualify the consumer under the creditor's established underwriting criteria. The creditor denies the application on the basis that

the consumer has a poor repayment history on outstanding debts. The creditor has used medical information in a manner and to an extent no less favorable than it would use comparable non-medical information.

(B) A consumer indicates on an application for a \$200,000 mortgage loan that she receives \$15,000 in long-term disability income each year from her former employer and has no other income. Annual income of \$15,000, regardless of source, would not be sufficient to support the requested amount of credit. The creditor denies the application on the basis that the projected debt-to-income ratio of the consumer does not meet the creditor's underwriting criteria. The creditor has used medical information in a manner and to an extent that is no less favorable than it would use comparable non-medical information.

(C) A consumer includes on an application for a \$10,000 home equity loan that he has a \$50,000 debt to a medical facility that specializes in treating a potentially terminal disease. The creditor contacts the medical facility to verify the debt and obtain the repayment history and current status of the loan. The creditor learns that the debt is current. The applicant meets the income and other requirements of the creditor's underwriting guidelines. The creditor grants the application. The creditor has used medical information in accordance with the exception.

(iii) *Examples of uses of medical information inconsistent with the exception.* (A) A consumer applies for \$25,000 of credit and includes on the application information about a \$50,000 debt to a hospital. The creditor contacts the hospital to verify the amount and payment status of the debt, and learns that the debt is current and that the consumer has no delinquencies in her repayment history. If the existing debt were instead owed to a retail department store, the creditor would approve the application and extend credit based on the amount and repayment history of the outstanding debt. The creditor, however, denies the application because the consumer is indebted to a hospital. The creditor has used medical information, here the identity of the medical creditor, in a manner and to an extent that is less favorable than it would use comparable non-medical information.

(B) A consumer meets with a loan officer of a creditor to apply for a mortgage loan. While filling out the loan application, the consumer informs the loan officer orally that she has a potentially terminal disease. The consumer meets the creditor's

established requirements for the requested mortgage loan. The loan officer recommends to the credit committee that the consumer be denied credit because the consumer has that disease. The credit committee follows the loan officer's recommendation and denies the application because the consumer has a potentially terminal disease. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis as part of a determination of eligibility or continued eligibility for credit.

(C) A consumer who has an apparent medical condition, such as a consumer who uses a wheelchair or an oxygen tank, meets with a loan officer to apply for a home equity loan. The consumer meets the creditor's established requirements for the requested home equity loan and the creditor typically does not require consumers to obtain a debt cancellation contract, debt suspension agreement, or credit insurance product in connection with such loans. However, based on the consumer's apparent medical condition, the loan officer recommends to the credit committee that credit be extended to the consumer only if the consumer obtains a debt cancellation contract, debt suspension agreement, or credit insurance product from a nonaffiliated third party. The credit committee agrees with the loan officer's recommendation. The loan officer informs the consumer that the consumer must obtain a debt cancellation contract, debt suspension agreement, or credit insurance product from a nonaffiliated third party to qualify for the loan. The consumer obtains one of these products and the creditor approves the loan. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis in setting conditions on the consumer's eligibility for credit.

(e) *Specific exceptions for obtaining and using medical information.* (1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit:

(i) To determine whether the use of a power of attorney or legal representative that is triggered by a medical condition or event is necessary and appropriate or whether the consumer has the legal capacity to contract when a person

seeks to exercise a power of attorney or act as legal representative for a consumer based on an asserted medical condition or event;

(ii) To comply with applicable requirements of local, state, or Federal laws;

(iii) To determine, at the consumer's request, whether the consumer qualifies for a legally permissible special credit program or credit-related assistance program that is:

(A) Designed to meet the special needs of consumers with medical conditions; and

(B) Established and administered pursuant to a written plan that:

(1) Identifies the class of persons that the program is designed to benefit; and

(2) Sets forth the procedures and standards for extending credit or providing other credit-related assistance under the program;

(iv) To the extent necessary for purposes of fraud prevention or detection;

(v) In the case of credit for the purpose of financing medical products or services, to determine and verify the medical purpose of a loan and the use of proceeds;

(vi) Consistent with safe and sound practices, if the consumer or the consumer's legal representative specifically requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit, to accommodate the consumer's particular circumstances, and such request is documented by the creditor;

(vii) Consistent with safe and sound practices, to determine whether the provisions of a forbearance practice or program that is triggered by a medical condition or event apply to a consumer;

(viii) To determine the consumer's eligibility for, the triggering of, or the reactivation of a debt cancellation contract or debt suspension agreement if a medical condition or event is a triggering event for the provision of benefits under the contract or agreement; or

(ix) To determine the consumer's eligibility for, the triggering of, or the reactivation of a credit insurance product if a medical condition or event is a triggering event for the provision of benefits under the product.

(2) *Example of determining eligibility for a special credit program or credit assistance program.* A not-for-profit organization establishes a credit assistance program pursuant to a written plan that is designed to assist disabled veterans in purchasing homes by subsidizing the down payment for the home purchase mortgage loans of

qualifying veterans. The organization works through mortgage lenders and requires mortgage lenders to obtain medical information about the disability of any consumer that seeks to qualify for the program, use that information to verify the consumer's eligibility for the program, and forward that information to the organization. A consumer who is a veteran applies to a creditor for a home purchase mortgage loan. The creditor informs the consumer about the credit assistance program for disabled veterans and the consumer seeks to qualify for the program. Assuming that the program complies with all applicable law, including applicable fair lending laws, the creditor may obtain and use medical information about the medical condition and disability, if any, of the consumer to determine whether the consumer qualifies for the credit assistance program.

(3) *Examples of verifying the medical purpose of the loan or the use of proceeds.* (i) If a consumer applies for \$10,000 of credit for the purpose of financing vision correction surgery, the creditor may verify with the surgeon that the procedure will be performed. If the surgeon reports that surgery will not be performed on the consumer, the creditor may use that medical information to deny the consumer's application for credit, because the loan would not be used for the stated purpose.

(ii) If a consumer applies for \$10,000 of credit for the purpose of financing cosmetic surgery, the creditor may confirm the cost of the procedure with the surgeon. If the surgeon reports that the cost of the procedure is \$5,000, the creditor may use that medical information to offer the consumer only \$5,000 of credit.

(iii) A creditor has an established medical loan program for financing particular elective surgical procedures. The creditor receives a loan application from a consumer requesting \$10,000 of credit under the established loan program for an elective surgical procedure. The consumer indicates on the application that the purpose of the loan is to finance an elective surgical procedure not eligible for funding under the guidelines of the established loan program. The creditor may deny the consumer's application because the purpose of the loan is not for a particular procedure funded by the established loan program.

(4) *Examples of obtaining and using medical information at the request of the consumer.* (i) If a consumer applies for a loan and specifically requests that the creditor consider the consumer's medical disability at the relevant time as

an explanation for adverse payment history information in his credit report, the creditor may consider such medical information in evaluating the consumer's willingness and ability to repay the requested loan to accommodate the consumer's particular circumstances, consistent with safe and sound practices. The creditor may also decline to consider such medical information to accommodate the consumer, but may evaluate the consumer's application in accordance with its otherwise applicable underwriting criteria. The creditor may not deny the consumer's application or otherwise treat the consumer less favorably because the consumer specifically requested a medical accommodation, if the creditor would have extended the credit or treated the consumer more favorably under the creditor's otherwise applicable underwriting criteria.

(ii) If a consumer applies for a loan by telephone and explains that his income has been and will continue to be interrupted on account of a medical condition and that he expects to repay the loan by liquidating assets, the creditor may, but is not required to, evaluate the application using the sale of assets as the primary source of repayment, consistent with safe and sound practices, provided that the creditor documents the consumer's request by recording the oral conversation or making a notation of the request in the consumer's file.

(iii) If a consumer applies for a loan and the application form provides a space where the consumer may provide any other information or special circumstances, whether medical or non-medical, that the consumer would like the creditor to consider in evaluating the consumer's application, the creditor may use medical information provided by the consumer in that space on that application to accommodate the consumer's application for credit, consistent with safe and sound practices, or may disregard that information.

(iv) If a consumer specifically requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit and provides the creditor with medical information for that purpose, and the creditor determines that it needs additional information regarding the consumer's circumstances, the creditor may request, obtain, and use additional medical information about the consumer as necessary to verify the information provided by the consumer or to determine whether to make an

accommodation for the consumer. The consumer may decline to provide additional information, withdraw the request for an accommodation, and have the application considered under the creditor's otherwise applicable underwriting criteria.

(v) If a consumer completes and signs a credit application that is not for medical purpose credit and the application contains boilerplate language that routinely requests medical information from the consumer or that indicates that by applying for credit the consumer authorizes or consents to the creditor obtaining and using medical information in connection with a determination of the consumer's eligibility, or continued eligibility, for credit, the consumer has not specifically requested that the creditor obtain and use medical information to accommodate the consumer's particular circumstances.

(5) *Example of a forbearance practice or program.* After an appropriate safety and soundness review, a creditor institutes a program that allows consumers who are or will be hospitalized to defer payments as needed for up to three months, without penalty, if the credit account has been open for more than one year and has not previously been in default, and the consumer provides confirming documentation at an appropriate time. A consumer is hospitalized and does not pay her bill for a particular month. This consumer has had a credit account with the creditor for more than one year and has not previously been in default. The creditor attempts to contact the consumer and speaks with the consumer's adult child, who is not the consumer's legal representative. The adult child informs the creditor that the consumer is hospitalized and is unable to pay the bill at that time. The creditor defers payments for up to three months, without penalty, for the hospitalized

consumer and sends the consumer a letter confirming this practice and the date on which the next payment will be due. The creditor has obtained and used medical information to determine whether the provisions of a medically-triggered forbearance practice or program apply to a consumer.

§ 717.31 Limits on redisclosure of information

(a) *Scope.* This section applies to Federal credit unions.

(b) *Limits on redisclosure.* If a Federal credit union receives medical information about a consumer from a consumer reporting agency or its affiliate, the person must not disclose that information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

§ 717.32 Sharing medical information with affiliates.

(a) *Scope.* This section applies to Federal credit unions.

(b) *In general.* The exclusions from the term "consumer report" in section 603(d)(2) of the Act that allow the sharing of information with affiliates do not apply if a Federal credit union communicates to an affiliate:

(1) Medical information;

(2) An individualized list or description based on the payment transactions of the consumer for medical products or services; or

(3) An aggregate list of identified consumers based on payment transactions for medical products or services.

(c) *Exceptions.* A Federal credit union may rely on the exclusions from the term "consumer report" in section 603(d)(2) of the Act to communicate the information in paragraph (b) to an affiliate:

(1) In connection with the business of insurance or annuities (including the

activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners, as in effect on January 1, 2003);

(2) For any purpose permitted without authorization under the regulations promulgated by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA);

(3) For any purpose referred to in section 1179 of HIPAA;

(4) For any purpose described in section 502(e) of the Gramm-Leach-Bliley Act;

(5) In connection with a determination of the consumer's eligibility, or continued eligibility, for credit consistent with § 717.30; or

(6) As otherwise permitted by order of the NCUA.

Dated: November 8, 2005.

John C. Dugan,
Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System, November 14, 2005.

Robert deV. Frierson,
Deputy Secretary of the Board.

Dated at Washington, DC, this 8th day of November, 2005.

By order of the Board of Directors,
Federal Deposit Insurance Corporation.

Robert E. Feldman,
Executive Secretary.

Dated: November 11, 2005.

By the Office of Thrift Supervision,
John M. Reich,
Director.

By the National Credit Union
Administration Board on November 8, 2005.

Mary F. Rupp,
Secretary of the Board.

[FR Doc. 05-22830 Filed 11-21-05; 8:45 am]

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