



July 8, 2005

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

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

Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429
Re: RIN 3064-AC81

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

Mary Rupp
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, Virginia 22314-3428
Re: 12 CFR Part 717

RE: Fair Credit Reporting Medical Information Regulation:
OCC Docket No. 05-10, RIN 1557 – AC85; Board Docket
No. R-1188; FDIC RIN 3064—AC81; OTS No. 2005-16,
RIN 1550-AB88; NCUA 12 CFR Part 717 (70 Fed. Reg.
33957 [June 10, 2005]).

Dear Sirs and Madams:

The Mortgage Bankers Association (“MBA”) appreciates the opportunity to comment on the interim final rule (the “Final Rule”) of the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of

Thrift Supervision, and National Credit Union Administration (the “Agencies”) concerning Fair Credit Reporting Medical Information. 70 Fed. Reg. 33957 (June 10, 2005). The Final Rule implements provisions of the Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”) designed to limit the sharing and use of information about consumers’ medical history and current health status.

MBA members recognize the particular sensitivity of medical information and are committed to using such information only when it is necessary for prudent loan underwriting and servicing. As was noted during the congressional debate on the FACT Act, the provisions to be implemented by this rule are intended “to protect the medical information of individuals without disrupting access to low-cost credit and the security of information.” 149 Cong. Rec. H12218 (Nov. 21, 2003) (remarks of Rep. Kelly). MBA commends the Agencies for creating exceptions in the Final Rule that will give creditors access to health-related information when they have a legitimate business need for that information, and generally supports the Final Rule.

In particular, MBA strongly supports the expansion of coverage from the Proposed Rule (See 69 Fed. Reg. 23380 [April 28, 2004]). The Agencies have decided to create a separate Federal Reserve Board Regulation FF that makes the exceptions to the prohibition against obtaining and using medical information applicable to creditors that are not subject to the jurisdiction of one of the Agencies. Because the Federal Trade Commission believes that it does not have the authority to issue such exceptions as to the creditors that it regulates, the Agencies’ action in issuing a regulation that does so is essential to establish uniform coverage under Section 411 of the FACT Act.

MBA also strongly supports the decision to allow a reasonable length of time — 270 days — between publication of the Final Rule and the mandatory compliance date. This deadline should also allow the Agencies to make any adjustments in the Final Rule in response to public comments, with enough lead time so that creditors will not have to expend resources in preparing to comply with requirements that ultimately are not imposed.

MBA believes, however, that some improvements still could be made to fulfill the Agencies’ goal of “protect[ing] legitimate operational [and] transactional . . . needs” as well as consumer privacy expectations. See 70 Fed. Reg. 33960 (June 10, 2005). Specifically, MBA requests that the Agencies provide a safe harbor allowing the use of a simple form to clarify a consumer’s consent to the use of medical information, implement changes to the Rules that allow investigation into the mental capacity of the consumer, and clarify that medical information can be used to verify medically-based income such as worker’s compensation.

Safe Harbor Form

The Final Rule creates an exception permitting financial institutions to obtain and use medical information if the consumer has made a request for an accommodation that is documented by the creditor. § 30(e)(1)(vi). The Final Rule allows the consumer or consumer’s representative to request that the creditor consider medical information, orally, electronically, or in writing. The Proposed Rule would have required that the request for accommodation be contained in a separate written document, which would have been cumbersome to implement and could have discouraged consumers from seeking such an accommodation. MBA strongly supports this change.

The Agencies did not, however, provide for a consent form in the regulation as a safe harbor for compliance. Although the Final Rule prohibits the routine use of boilerplate language on an application form to obtain waivers of consumer protections, it does not address situations in which use of form language may be appropriate. See §__.30(e)(4)(v). The Agencies appear to be concerned that boilerplate language attached to loan applications could be used to have consumers routinely waive their FACT Act protections.

While MBA supports the addition of §__.30(e)(4)(v) to clarify the timing and nature of consumer consent, MBA believes that use of a form is appropriate once the consumer has indicated that he or she wants the creditor to take medical information into consideration. It should be possible to use a simple form to document the request for an accommodation and thereby obtain a safe harbor from FCRA violations. Where a request is made over the telephone or on the computer, it should be possible to read the form language to the consumer or send the form by the same electronic means that was used for the request. Once the consumer has reviewed the form, he or she can give informed consent to the consideration of medical information.

Finally, the regulation should clarify that the consumer need not be the first to broach the topic of medical information. 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 provider appears in the consumer's credit file, a loan officer should be able to explain that the consumer may voluntarily provide an explanation of the underlying medical condition, but, if he or she does so, the creditor may verify that explanation.

Power of Attorney/Mental Capacity

MBA and other commenters requested that the regulation clarify that a creditor may investigate the mental capacity of a consumer as directed by certain federal and state laws to verify that the consumer can enter into an enforceable agreement. In response, the Agencies rewrote §__.30(e)(1)(i) to permit use of medical information “[t]o determine 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 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.*” The italicized portions were added by the Final Rule. While MBA appreciates the Agencies' clarification of this exemption, the reworked rule only partially responds to MBA's concerns.

Mental Capacity Issues But No Evidence of Power of Attorney

Most importantly, the exception applies only to the situation where a person applies for a loan on behalf of a consumer and “seeks to exercise a power of attorney or act as legal representative for [that] consumer,” where the person claims, based upon a medical event or condition, that the consumer does not have the legal capacity to enter into a binding contract on his own. §__.30(e)(1)(i). Where the power of attorney is not based upon a medical event or condition, the Supplementary Information to the Final Rule asserts that “creditors should not need to obtain or use medical information.” 70 Fed. Reg. 33968 (June 10, 2005). But there are many other conceivable capacity situations not envisioned by this exception. For example, a creditor may suspect that a consumer applying for a loan without an agent nevertheless lacks the capacity to contract. In such a situation, MBA urges the Agencies to clarify that the creditor may investigate such a suspicion. Otherwise, the loan may not be enforceable and the creditor

may be exposed to liability for unfair or deceptive acts or practices or violations of specific federal and state laws and regulations.

Definitions of "Medical Event" and "Condition"

Second, the definitions of "medical event" or "condition" are not clear for the purposes of the power of attorney exception. In those circumstances where a person claims that a consumer lacks legal capacity, it is unclear how significant the medical event or condition must be, who must make the determination that such medical event or condition has occurred, and whether a suspicion allows the creditor to investigate further. The Agencies should make it clear 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.

Suspected Lack of Full Understanding

Third, even when the 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 loan or be able to determine whether accepting it would be in his or her best interest. For example, many applicable laws and regulations contain "anti-flipping" language that require a creditor to meet a "borrower's interests" or "net tangible benefit" test before refinancing a loan within a given period, generally one year, after origination. See, e.g., 12 C.F.R. § 226.34(a)(3) (Regulation Z provision, implementing the federal Home Ownership and Equity Protection Act, requiring that refinancing of covered loan within one year be in borrower's "interest"). Some of these laws could be read to require an evaluation of the borrower's medical condition as part of the "interests" or "benefits" test. See, e.g., Wisc. Stat. Ann. § 428.203(7) (anti-flipping provision prohibiting refinancing within one year unless in borrower's interest); Wis. Admin. Code s DFI-Bkg § 46.01(2) ("interest of the customer" includes both economic and non-economic circumstances). The Final Rule states that a creditor may consider medical information "[t]o comply with applicable requirements of local, State, or Federal laws." § .30(e)(2). MBA believes that this language is broad enough to include laws that do not specifically mention medical conditions but imply that the creditor may have to consider them in some circumstances, and requests that the Agencies confirm this interpretation. This reading would also apply to general prohibitions in federal and state laws against unfair and deceptive acts or practices, where a failure to consider the borrower's mental condition would be viewed as a violation.

Additionally or in the alternative, the Agencies should clarify that loan denials based upon lack of legal mental capacity are not medical eligibility issues, along the lines of the discussion of power-of-attorney issues in the Supplementary Information, and no exception would be necessary because the use of this medical information would not be subject to the general statutory prohibition. See 70 Fed. Reg. 33968 (June 10, 2005).

Use of Medical Information for Medically-Based Income

In our comments on the Proposed Rule, MBA requested an example be added for the common situation where a creditor is required to collect additional information from physicians when a worker is receiving workers compensation, to verify that the applicant is likely to continue to receive the income "for the foreseeable future." The Agencies addressed these concerns in part

by adding an exception for medical information necessary for special credit programs, and an example. See §__.30(e)(1)(iii) and §__.30(e)(2).

While MBA appreciates the addition of this exception, the Final Rule still does not explicitly state that creditors may consider medical information about individuals claiming medically-based income such as worker's compensation, without obtaining separate consent from the individual. In fact, the Agencies' statements about §__.30(d) have created an apparent conflict. MBA does not want the specific exception created in §__.30(e)(1)(iii) to change the plain meaning of the general rule found in §__.30(d)(1)(i).

Section 30(d)(1)(i) allows the use of medical information if "[t]he 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." This language appears to cover the use of medical information to determine the likelihood and the amount of future medically-based income. An example, §__.30(d)(2)(i)(C), makes clear that a creditor can obtain and use information about "[t]he dollar amount and continued eligibility for disability income or benefits related to health or a medical condition that is relied on as a source of repayment." This example can be interpreted to apply to worker's compensation by analogy. However, neither this example nor the corresponding examples in §__.30(d)(3), Uses of Medical Information Consistent with the Exception, specifically mentions medically-based income or worker's compensation. Therefore, MBA urges the Agencies to clarify that medically-based income such as worker's compensation will receive the same exception as disability income.

This clarification is particularly important in light of the Supplementary Information discussing changes made to §__.30(d), in which the Agencies state that:

"Since creditors generally are prohibited from obtaining medical information in connection with any determination of the consumer's eligibility, or continued eligibility, for credit, a creditor ordinarily would not specifically request medical information on an application, but would obtain such information in response to a generic question on an application about debts, income, and other information routinely used in credit eligibility determinations. 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 Fed. Reg. 33967 (June 10, 2005).

As the Agencies are well aware, statements made in the Supplementary Information are important in interpreting the text of the rules and determining the intent of the drafters. Here, there is an apparent conflict between the text of the Final Rule itself, which appears to permit use of medical information to verify the reliability and duration of medically-based income to the same extent as other income, and the Supplementary Information, which implies that the only circumstance where the creditor can legitimately seek medical information is when the consumer is applying to finance a medical procedure. There should be no ambiguity on this issue. When a consumer requests credit, and the consumer's creditworthiness derives from medically-based income, the creditor must be permitted to independently investigate the circumstances of this income to determine credit eligibility and prevent fraud. It is therefore imperative that the Agencies clarify this statement in the Final Rules. MBA urges the Agencies

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to revise the above statement to make clear that: "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."

With the changes we have proposed in this letter, MBA believes that the Final Rule will do an effective job at achieving Congress' goals in using the FACT Act amendments to provide enhanced protections for consumer medical information. If you would like to discuss this comment letter or request any additional information about the issues MBA has raised here, please contact Mary Jo Sullivan at 202-557-2859.

Thank you for your consideration.

Most sincerely,

A handwritten signature in black ink, reading "Jonathan L. Kempner". The signature is written in a cursive style with a large initial 'J' and a long, sweeping underline.

Jonathan L. Kempner
President and Chief Executive Officer
Mortgage Bankers Association