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American Medical Association

Physicians dedicated to the health of America



May 28, 2004

Office of Thrift Supervision, Treasury (OTS) – Docket Number 2004-16;

Dear Sir:

The American Medical Association (AMA) appreciates the opportunity to provide comments on the “Fair Credit Reporting Medical Information Regulations; Proposed Rule,” Federal Register, Vol. 69, No. 82, April 28, 2004, p. 23380.

The issue of inappropriate access to personal medical information has become a growing concern of physicians and patients as banks and other financial institutions process an increasing number of electronic health care transactions on behalf of physicians, other health care providers and health plans. Maintaining the privacy of identifiable patient information remains a high priority to the AMA. Therefore, it is extremely important that banks and other creditors do not obtain or use medical information in an inappropriate manner.

The AMA appreciates that the agencies, in crafting this proposed rule, have attempted to create narrow exceptions to the general rule in the Fair and Accurate Credit Transactions Act (FACT Act) that prohibits creditors from obtaining and using medical information for the purpose of determining a consumer’s eligibility for credit. This approach is consistent with Congressional intent to restrict the use of medical information for making credit decisions to only those purposes that are truly necessary and appropriate.

Comments on Specific Provisions

Sec .3 Definitions

Eligibility, or Continued Eligibility For Credit

The AMA is very concerned about the exclusion of individual business credit from the coverage under these regulatory protections and believes such an exclusion is unjustified by the language or intent of the FACT Act. The proposed rule defines “eligibility, or continued eligibility for credit” as “the consumer’s qualifications or fitness to receive, or to continue to receive credit, ..., *primarily for personal, family, or household purposes.*” (emphasis added). The phrase we emphasize significantly limits the protections against use of medical information by banks to only consumer credit, leaving banks free to discriminate against individuals seeking business credit on the basis of medical condition.

This limitation on the medical information protections is not authorized and contradicts the plain language of the statute. The FACT Act states “a creditor shall 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.”¹ “Consumer” is defined in the Fair Credit Reporting Act (FCRA) as an “individual.”² Thus, nothing in the FACT Act or the FCRA limits the protections of sec. 604(g)(2) to consumer credit for personal, family or household purposes.

In fact, such a limitation contradicts the FCRA’s definitions of “credit” and “creditor”, which specifically refer to the definitions of those same terms under the Equal Credit Opportunity Act (ECOA).³ The ECOA defines “credit” as “the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.”⁴ The ECOA defines “creditor” in part as “any person who regularly extends, renews, or continues credit.”⁵ Neither definition is limited to consumer credit, and the ECOA clearly applies to individual business credit.

Congress intended that individuals seeking small business credit should be protected under the FACT Act against discrimination on the basis of medical information. The initial bills introduced in both the House and the Senate used a more restrictive definition of “credit” as defined in the Truth in Lending Act, a statute which is limited to consumer credit,⁶ but were later changed to use the definition of credit and creditor under the ECOA. One of the primary reasons for applying the ECOA definition of credit to the FCRA, instead of the TILA definition, was to ensure that all the protection of the FCRA applied to individuals seeking business credit. Therefore, the agencies’ limitation of the protections against use of medical information for small business owners is contrary to Congressional intent. We urge the agencies to broaden the definition of “eligibility, or continued eligibility for credit” consistent with Congressional intent.

Medical Information

The proposed rule appropriately defines “medical information,” consistent with the statutory definition in the FACT Act, as 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 (1) the past, present, or future physical, mental, or behavioral health or condition of an individual; (2) the provision of health care to an individual; or (3) 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

¹ FCRA, § 604(g)(2), 15 U.S.C. 1681b(g)(2).

² FCRA, § 603(c), 15 U.S.C. § 1681a(c).

³ FCRA, § 603(r)(5), 15 U.S.C. § 1681a(r)(5).

⁴ 15 U.S.C. 1691a(d).

⁵ 15 U.S.C. § 1691a(e).

⁶ House Rep. No. 108-263, at 3 (2003) and S.1753, 108th Cong. (2003).

information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer.

The agencies suggest, however, excluding from this definition information related to medical debts that has been coded in accordance with section 604(g)(1)(C) so that it does not reveal the specific identity of the provider or medical service rendered. Yet, the fact that a consumer has medically-related debt constitutes “information that relates to the payment for the provision of health care to an individual,” under the statutory definition. Therefore, removing coded information from the definition would be an inappropriate narrowing of the statutory definition. In addition, it would effectively remove such information from the anti-discrimination protections in proposed section __.30(c). The result would be that creditors would be permitted to treat medical debt differently than non-medical debt, contrary to Congressional intent. We urge the agencies not to exclude medical information that has been coded in accordance with section 604(g)(1)(C) of the FACT Act from the definition.

Sec. __.30(A) General Prohibition on Obtaining or Using Medical Information

The proposed regulation contains a general prohibition on obtaining or using medical information pertaining to a consumer in connection with any determination of the consumer’s eligibility, or continued eligibility, for credit and then creates limited exceptions. This approach is consistent with the Act and Congressional intent that medical information only be obtained and used for credit-related purposes when appropriate and necessary.

The AMA is pleased that the proposed rule would appropriately define “eligibility, or continued eligibility, for credit” as including the terms on which credit is offered. Credit decisions include both whether or not consumers are offered credit and also the terms under which they are offered credit.

Yet, the proposal also would exclude “any determination of whether the provisions of a debt cancellation contract, debt suspension agreement, credit insurance product, or similar forbearance practice or program are triggered.” Wholly excluding debt cancellation contracts and suspension agreements from the definition of “eligibility, or continued eligibility for credit” is an overbroad approach. Creditors should be able to obtain and use medical information for these purposes only when it is appropriate and necessary to do so. Any such exclusion should be limited to obtaining or using medical information of a specific consumer in response to their claim or request.

The agencies indicate in the preamble that they do intend this provision to apply when a particular consumer requests forbearance due to a medical condition, either formally, through the triggering of the provisions of a debt cancellation contract, or informally (such as through an oral request). The provision as written, however, is much broader and would permit creditors to obtain and use medical information where it is not appropriate or necessary to do so. Forbearance procedures and practices may be triggered by events unrelated to medical conditions. The rule should thus permit a creditor to obtain and use

medical information for forbearance procedures only where the triggering event is medically-related.

Additionally, a “credit insurance product” is different from the other listed forbearance practices since it involves a third party insurer as well as the creditor and the consumer. Generally, a consumer purchases credit insurance from the insurer. The consumer informs the insurer, not the creditor, if he or she has a claim against the credit insurance. The insurer then pays the creditor. Therefore, it is unclear why a creditor would have a “legitimate operational, transactional, risk” or other need to obtain and use medical information in these circumstances. Unless such needs are adequately demonstrated, “credit insurance” should be dropped from this provision.

In general, the AMA believes that this provision should be drafted as an exception rather than a rule of construction.

Sec. __.30(b) Receiving Unsolicited Medical Information

The proposed rule includes a rule of construction for receiving unsolicited medical information. Under the rule, a creditor would not obtain medical information for purposes of paragraph __.30(a)(1) [the general prohibition on obtaining and using medical information in connection with any determination of a consumer’s eligibility for credit] if it:

- (i) Receives medical information pertaining to a consumer in connection with any determination of the consumer’s eligibility, or continued eligibility, of credit without specifically requesting medical information; and
- (ii) Does not use that information in determining whether to extend or continue to extend credit to the consumer and the terms on which credit is offered or continued.

The agencies indicate that a creditor should not be in violation of the prohibition on obtaining medical information when the creditor does not specifically ask for or request such information, yet the consumer or other person provides the information to the creditor. This seems fair as long as the provision of information by the consumer is truly voluntary. Therefore, the rule should clarify that “without specifically requesting medical information” means volunteered by the consumer without any pressure, prompting, or solicitation (whether direct or indirect) by the creditor. Any type of direct or indirect solicitation should be expressly prohibited.

In addition, the AMA believes that this provision should be drafted as an exception rather than a rule of construction.

Sec. .30(c) Financial Information Exception

The proposed rule creates a general exception which would permit creditors to obtain and use medical information pertaining to a consumer in connection with a determination of the consumer's eligibility so long as three conditions are met:

- The information relates to debts, expenses, income, benefits collateral, or the purpose of the loan, including the use of proceeds;
- 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
- 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.

This provision essentially permits a creditor to treat medically-related debt and income no less favorably than other debt and income. At the same time, however, this provision prohibits financial institutions from discriminating against the consumer on the basis of underlying medical condition, treatment or prognosis. This generally strikes a reasonable balance between a creditor's need to obtain and evaluate financial information (which may incidentally be medically-related) and the need to protect consumers from discrimination based on their medical condition.

The only time when a creditor may need to specifically request medical information in its initial application for credit would appear to be where credit is requested for the purpose of financing medical products or services. Because a creditor would be permitted to request medically-related financial information under this proposed section, the financial information exception should be limited to those circumstances where the creditor has not initiated the inquiry into medical information. The proposed regulation should be amended to specify that to come within this particular exception, the creditor has not specifically requested medical information in its initial application for credit. This would permit creditors to request generic financial information (e.g., outstanding debts, sources of income) while prohibiting them from specifically requesting information related to medical debt. This approach would incorporate current practice as financial institutions have repeatedly represented that they do not routinely request medical information in their credit application process.

The general approach to this proposed provision should be retained - creditors should be prohibited from treating medically-related debt and income less favorably than other debt and income - and the non-discrimination provisions should be retained. In addition, the title of this subparagraph indicates that it is limited to "financial information," yet the text of the regulation does not expressly include this limitation. This provision should be clarified by including the limitation in the actual text of the rule.

Sec. .30(d)(1)(i) Powers of Attorneys Exception

Proposed exception __.30(d)(1)(i) permits a creditor to obtain and use medical information to determine whether the use of a power of attorney or legal representative is necessary and appropriate. There are only limited circumstances, however, when it may be appropriate for a creditor to obtain and use medical information in relation to powers of attorney or legal representatives. Because powers of attorney can be used in non-medical related circumstances, this exception should be amended so that it is limited to those circumstances where the use of a power of attorney or legal representative is triggered by a medical condition (e.g., mental incapacity) or where there is a legitimate question about the consumer's legal capacity to execute the underlying legal document.

Sec. .30(d)(1)(iii) Exception for Medical Information in Consumer Reports

The agencies have not proposed a separate exception for obtaining and using consumer reports that contain coded medical information 15 U.S.C. Sec. 1681b(g)(1)(C) [section 604(g)(1)(C) of FCRA] because they do not believe that it is necessary to propose a separate exception. Rather, the agencies have requested comments on three alternative theories under which consumer reports with coded medical information can be used and obtained by creditors without a specific exception.

The AMA agrees that there should be no independent exception for consumer reports that contain medical information. Rather, creditors only should be able to obtain and use medical information in consumer reports to the extent that the creditor is able to meet one of the other exceptions to the general prohibition (such as the financial information exception or the credit for medical procedure exception).

This approach is the most appropriate interpretation of the FACT Act. The agencies should adopt this as the general approach to interpreting sections 604(g)(1) and 604(g)(2) of FCRA, regardless of whether the medical information is coded or uncoded.

The prohibition in section 604(g)(2) of FCRA is very broad. The delegation of authority to the agencies makes very clear that exceptions are to be made consistent with Congressional intent to restrict the use of medical information for inappropriate purposes. Thus, it is appropriate to interpret section 604(g)(2) as prohibiting creditors from obtaining and using consumer reports with medical information unless there is another independent exception for doing so.

Legitimate uses of both coded and uncoded medical information for determining a consumer's eligibility for credit appear to be covered by other proposed exceptions. To the extent a consumer report contains financial information that pertains to medical treatment or payment, the information would be covered by the "financial information" exception. To the extent the information is sought for the purpose of financing medical products or services, to determine and verify the purpose(s) for the loan, exception (v) would apply. To the extent the information is provided pursuant to consumer request, it would be covered by the consumer request exception.

This approach is fully consistent with section 604(g)(1) of FCRA, which permits consumer reporting agencies to furnish consumer reports in certain circumstances. This approach would permit consumer reporting agencies to furnish consumer reports that contain medical information either by coding the information or by obtaining a true informed consent. It would likely encourage consumer reporting agencies to code medical information so as not to require consumer consent.

Sec. 30(d)(1)(v) Financing Medical Products or Services

Proposed section __.30(d)(1)(v) would permit a creditor to use and obtain medical information for determining credit eligibility in the specific case of credit for the purpose of financing medical products or services, and only to determine and verify the medical purpose of a loan and the use of proceeds. These limitations are important to ensure that medical information only be used for legitimate purposes. The AMA believes that this approach strikes the appropriate balance between satisfying the legitimate needs of medical finance creditors and the intent of Congress to limit the use of medical information in credit eligibility determinations.

Section __.30(d)(2) contains examples of determining the medical purpose of the loan or the use of proceeds. Example (i) states that it is appropriate for a creditor to confirm the consumer's *medical eligibility* to undergo that procedure with a surgeon. If the surgeon reports that the surgery will not be performed on the consumer, the creditor may use that information to deny the consumer's application for credit, because the loan would not be used for the stated purpose. Yet, the point of the inquiry is to determine whether the patient is going to use the loan proceeds for the stated purpose. Medical eligibility is not the appropriate standard for such an inquiry. Asking whether a patient is medically eligible for a medical procedure would require a response that contains more information than necessary to decide whether to approve a loan. Furthermore, a patient may be medically eligible for, but not undergo, a procedure. The AMA believes that instead of permitting a creditor to confirm medical eligibility, the example should permit the creditor to verify that the procedure is to be performed.

Sec. 30(d)(1)(vi) - Consumer's Request

Proposed exception __.30(d)(1)(vi) provides that a creditor may obtain and use medical information if the consumer (or their legal representative) requests in writing that the creditor use specific medical information for a specific purpose in determining the consumer's eligibility, or continued eligibility, for credit, to accommodate the consumer's particular circumstances. The signed written request must be on a separate document, must describe the specific medical information that the consumer requests the creditor to use and the specific purpose for which the information will be used.

The preamble indicates that this exception is intended to apply when the consumer initiates a request to use medical information for determining eligibility. Specifically, the preamble states:

This exception is designed to accommodate the particular medical condition or circumstances of the individual consumer and is not intended to allow creditors to obtain consent on a routine basis or as part of loan applications or documentation. This exception would not be met by a form that contains a pre-printed description of various types of medical information and the uses to which it might be put. Instead, it contemplates an individualized process in which the consumer informs the creditor about the specific medical information that the consumer would like the creditor to use and for what purpose.

The AMA believes that the intended approach is appropriate. It would ensure that the request to use medical information is voluntary and is initiated by the consumer. As currently written, however, the proposed rule does not reflect this intent. The intent of the agencies should be incorporated in the actual text of the rule. In addition, the rule text should expressly include the example cited in the preamble regarding inappropriate use of a pre-printed form describing various medical information and potential uses.

Sec. .30(e) - Limits on Redisclosure

Proposed paragraph (e) incorporates the statutory provision regarding the limits on redisclosure of medical information. This provision generally provides that a creditor that receives 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 purpose for which the information was initially disclosed.

The phrase in the statute “as otherwise permitted by statute, regulation, or order” is not clear, and the rule should clarify the scope. There are two ways that the phrase could be construed. First, the phrase could allow any activity that is not expressly *prohibited* by statute, regulation, or order. Second, the phrase could allow any activity that is expressly *permitted* by statute, regulation, or order. The second interpretation is the proper reading of the law and should be reflected in the rule. Otherwise, the mere failure of a law to prohibit conduct may be construed by some to allow that conduct.

Sec. .31 - Sharing Medical Information with Affiliates

The FACT Act adds a new section 603(d)(3) to FCRA which restricts the sharing of medical-related information with affiliates if that information meets the definition of “consumer report” in section 603(d)(1) of FCRA. Generally, certain information (such as transaction or experience information) that is shared among affiliates is not considered to be a consumer report under FCRA. New section 603(d)(1) provides, however, that if this information is medical-related information, the affiliate-sharing exception will not apply and the information will be considered to be a consumer report. Medical-related information includes medical information, as defined in the FACT Act, as well as other lists based on payment transactions for medical products and services.

New section 604(g)(3) provides several specific exceptions that allow creditors to disclose medical information to affiliates according to the same rules that apply to other non-medical information. The section also permits the federal banking agencies to determine, by order or regulation, that other exceptions are necessary and appropriate.

Proposed section __.31 generally follows the statutory exceptions relating to when sharing medical-related information with affiliates would not constitute a consumer report. However, the AMA is concerned about the exclusions “(f)or any purpose referred to in section 1179 of HIPAA” and as otherwise permitted by order of the appropriate agency. These exclusions have the potential of creating large loopholes for the sharing of medical information with affiliates

HIPAA amends the Social Security Act by adding section 1179, which provides as follows:

To the extent that an entity is engaged in activities of a financial institution (as defined in section 1101 of the Right to Financial Privacy Act of 1978), or is engaged in authorizing, processing, clearing, settling, billing, transferring, reconciling, or collecting payments, for a financial institution, this part [the Administrative Simplification Provisions of HIPAA], and any standard adopted under this part, shall not apply to the entity with respect to such activities

Section 1101 of the Right to Financial Privacy Act generally defines a “financial institution,” as any office of a bank, savings bank, card issuer, industrial loan company, trust company, savings association, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution.

The U.S. Department of Health and Human Services (HHS) has not taken an official position on whether section 1179 exempts from HIPAA any activity approved by the Office of the Comptroller of the Currency. Yet, the American Bankers Association has taken that position. Should this position prevail, the statutory exception which permits creditors to share medical-related information with affiliates “for any purpose referred to in section 1179 of HIPAA” would essentially give creditors wholesale permission to share medical-related information for any activity. We do not believe that this result was intended by Congress.

The agencies should advise HHS of the potential effect of the interpretation of section 1179 on creditors’ ability to share medical-related information with affiliates. The agencies should also ensure that and official orders with respect to affiliate-sharing are consistent with this rule and with Congressional intent.

Additional Exceptions

In addition to these statutory exceptions, the Agencies have proposed section __.31(b)(5), which would allow creditors to share with affiliates medical-related information in connection with a determination of the consumer’s eligibility for credit consistent with

proposed section __.30. There is no explanation as to why this proposed exception is necessary and appropriate.

The proposed approach is overbroad, and appears inconsistent with the consent requirements in section __.30(d)(1)(vi) of the proposed rule and section 604(g)(1)(B) of FCRA, which were intended to ensure that consumers gave informed consent for the sharing, obtaining and use of their medical information.

Proposed section 30(d)(1)(vi) would permit creditors to obtain and use medical information if the consumer (or the consumer's representative) requests in writing that the creditor use specific medical information for a specific purpose in determining the consumer's eligibility, or continued eligibility, for credit. The request must be signed, describe the specific medical information that the consumer requests the creditor to use and the specific purpose for which the information will be used. This is to ensure that the consumer signs an informed consent that details who is permitted to use the information, what specific information will be used and the purpose for which it will be used.

Similarly, section 604(g)(1)(B) of FCRA permits a consumer reporting agency to furnish a consumer report with uncoded medical information only with the specific written consent of the consumer. Proposed section __.30(d)(1)(iii) provides that creditors would be permitted to obtain and use medical information to the extent such information is included in a consumer report from a consumer reporting agency where the consumer has given consent in accordance with section 604(g)(1)(B) of FCRA. Again, this provision is intended to ensure that the consumer has given informed consent.

These consent processes would be seriously compromised if a creditor could later share the medical information with affiliates without any input from the consumer. We note that specifying in a consent that information may be shared "with affiliates" does not truly inform the consumer of the intended recipients of the information.

Proposed section __.31(b)(5) would become significantly more problematic if the agencies were to weaken the anti-discrimination provisions in section __.30(c) in the final rule. Such an approach would permit creditors to share medical-related information with affiliates and would permit both the creditors and affiliates to discriminate against consumers based on their medical status or treatment. This improper use of medical-related information would be contrary to the intent of the FACT Act.

The AMA believes that proposed section __.31(b)(5) should be deleted. At a minimum, it should be amended to state that the exception does not apply to the extent that the creditor has obtained medical information in a credit report furnished in accordance with 604(g)(1)(B) of FCRA or pursuant to a consumer's request.

Conclusion

The agencies have requested comments on whether, in the final rule, they should create any additional or different exceptions to the general prohibition against obtaining and using medical information for making decisions about a consumer's credit eligibility. We do not have any additional or different exceptions to suggest beyond the comments noted above. If, however, the financial industry requests exceptions for additional or different practices during the comment period, the AMA believes that patients/consumers should be given the opportunity to comment on these proposals prior to finalizing the rule.

The AMA appreciates the opportunity to provide these comments, and we look forward to a final rule that takes these important patient protections into account.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael D. Maves". The signature is written in a cursive, flowing style.

Michael D. Maves, MD, MBA