June 4, 2004

The Honorable Alan Greenspan
Chairman
Board of Governors of the Federal Reserve System
Twentieth Street and Constitution Avenue, NW
Washington, DC 20551

The Honorable John D. Hawke, Jr.
Office of the Comptroller of the Currency
250 E Street, SW
Washington, DC 20219

The Honorable Donald E. Powell
Chairman
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

The Honorable James E. Gilleran
Director
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552

The Honorable Jo Ann Johnson
Chairman
National Credit Union Administration
1775 Duke Street
Alexandria, Virginia 22314

Dear Chairman Greenspan, Comptroller Hawke, Chairman Powell, Director Gilleran and Chairman Johnson:

As the primary authors of the medical information privacy provisions in Section 411 of the Fair and Accurate Credit Transactions Act (FACT Act), we are writing to comment on the joint notice of proposed rulemaking, published in the April 28, 2004, *Federal Register*, implementing several important provisions of this section.

We consider Section 411 one of the most important sections of the FACT Act and one of the most significant consumer privacy provisions enacted by Congress in recent years. Section 411 strictly limits the circumstances in which a credit reporting agency may include sensitive medical information in consumer reports, prohibits the use of medical information in determining eligibility for credit, limits the sharing of medical information among financial affiliates and prohibits any person receiving medical information from using it for any purpose other than that agreed to by the consumer. Section 411 reflects the Financial Services Committee's clear intent to permit disclosure of confidential medical information only were necessary and appropriate to implement transactions requested by the consumer and then only with the consumer's explicit consent.

The proposed rule implements Section 604(g)(2) of the Fair Credit Reporting Act, as added by Section 411(a), that prohibits creditors from obtaining or using medical information pertaining to a consumer in making any determination of the consumer's eligibility, or continued eligibility, for credit. The Committee's intent in adding this prohibition to the legislation was to assure that creditors not use medical information, other than the amount and status of medical-related debt, in any way that results in an inappropriate denial of credit or in a consumer receiving less favorable credit terms based solely upon the sensitive medical information. Creditors should not be in the position of making determinations relating to physical capability or life expectancy that they are clearly not qualified to make.

The Committee did recognize, however, that there may be circumstances in which limited medical information may be required to address legitimate procedural or verification concerns related to a credit transaction requested by a consumer. The Committee's report accompanying H.R. 2622 identified two such examples that had been brought to Members' attention involving use of limited medical information "to confirm the use of loan proceeds in connection with loans to finance a specific medical procedure or device, or to verify a consumer's death or disability in connection with credit-related debt cancellation agreements." The Committee further recognized that other Federal laws and regulations, as well as state insurance laws and regulations, also may permit creditors to obtain or use medical information in specific circumstances. Section 604(g)(5) thus directs the federal financial regulators to jointly prescribe regulations that permit exceptions to this prohibition that they determine to be necessary and appropriate to meet legitimate operational, transactional, risk and other needs of creditors while remaining consistent with Congress' intent to restrict use of medical information for inappropriate purposes.

We believe the proposed rule generally reflects the Committee's intent to broadly restrict the use of medical information in connection with credit decisions, but to permit limited exceptions to address legitimate and necessary underwriting concerns. Where the proposed rule does provide a general exception, it requires that three elements be present for the exception to be operative—(a) the medical information must be related to debts, expenses, income, benefits, collateral, or the purpose of a loan; (b) the creditor must use the information in a manner and to an extent no less favorable than it would use comparable non-medical information; and (c) the creditor must not take the consumer's physical, mental, or behavioral heath, condition or history,

type of treatment, or prognosis into account as part of any determination of credit eligibility. All three conditions are clearly necessary to implement the Committee's intent that sufficient medical information be made available to permit prudent underwriting but not to permit any inappropriate use of sensitive medical information. We urge that all three elements of this exception be retained in the final rule.

While the proposed rule clearly reflects the Committee's intent to limit exceptions permitting use of medical information in credit decisions, we are concerned that the rule may not apply broadly enough to cover the full range of potential credit decisions that the Committee intended to include. We see at least three problems in this regard. It has come to our attention that there are non-bank finance companies that are already widely engaged in making loans to consumers for medical procedures or equipment that would not be covered by the proposed rule. While the prohibition in Section 604(g)(2) applies to the entire universe of creditors, the propose rule would apply the exceptions to only a subgroup of creditors that are supervised by the five federal financial regulatory agencies. Under the propose rule a bank could provide financing to an uninsured individual in need of hip replacement surgery or for a child's orthodontia, but an independent non-bank finance company could not, since the latter would be prohibited from receiving medical information either to document the need for medical assistance or to verify that the loan proceeds were used for medical purposes. This creates the untenable situation where the customer of the non-bank creditor would be denied the loan solely based upon the fact that the creditor cannot obtain or use medical information because it is not directly overseen by one of the five federal regulators.

A similar problem is created by the fact that the rule proposed by the National Credit Union Administration applies only to federally chartered credit unions. This means that over 4000 state chartered credit unions, most of which are subject to federal standards and supervision for purposes of deposit insurance under the National Credit Union Share Insurance Fund, would not be permitted to obtain or use medical information for medical-related lending. The mission of credit unions under federal law is to make available to members "credit for provident purposes." We can think of few actions that better exemplify this mission than assisting members in financing unexpected or uninsured medical expenses. This is the precisely the type of lending the Committee intended the Act to permit and the type of lending NCUA should seek to encourage and facilitate.

A larger potential problem lies in the fact that the proposed rule does not apply to doctors and other individuals and entities that play a critical role in the medical lending process. Section 111 of the FACT Act incorporates the broader definition of "creditor" from the Equal Credit Opportunity Act to expand the meaning of "creditor" for purposes of the Fair Credit Reporting Act to include "any person who regularly arranges for the extension, renewal or continuation of credit." Doctors, medical supply stores and other non-bank entities currently play an important role in making financing available for medical transactions. They are often in the best position to inform consumers of the financing options available to them and to provide the information necessary to document the purpose of a loan or to verify that loan proceeds are appropriately

dispersed. While doctors, medical suppliers and other medical professionals do not make credit eligibility decisions, they act as arrangers of credit by informing consumers of financing options, referring consumers to specific creditors and submitting information and applications on behalf of consumers. A number of banking attorneys interpret Section 604(g)(2) as prohibiting use of medical information in connection with any loan arranged or facilitated by a non-bank entity, even where the actual credit decision is made by a federal bank, thrift or credit union that would otherwise be exempted under the proposed rule. This runs completely counter to the Committee's stated intent that these loans constitute a "necessary and appropriate use of medical information for purposes of this section" and should be permitted in implementing regulations.

We believe that all three problems can be adequately addressed with the addition of a general or common rule that would be identical to the five separate agency rules but apply to all entities and individuals not specifically covered by the proposed agency rules. A general rule would be enforced by the Federal Trade Commission with enforcement authority already provided in Section 621(a) of the Fair Credit Reporting Act. Since the prohibition on obtaining and using medical information in Section 604(g)(2) applies to all creditors, the exceptions in regulation also should apply broadly to all potential creditors.

The requirement for implementing regulations in Section 604(g)(5) was intended to be broad. Unlike other regulatory directives in the FACT Act, including one in a related provision of the same section (Section 604(g)(3)(C))' that limit the agencies' rulemaking authority to the institutions subject to their jurisdiction under Section 621(b) of the FCRA, Section 604(g)(5) does not include any such limitation. It does not restrict the application of any exceptions only to the financial institutions directly supervised by any of the named regulatory agencies, nor does it limit the entities or persons that may rely on the exceptions created by any of the agency rules. we see no restriction on this delegation of authority to prevent the financial regulatory agencies from jointly issuing a general rule applicable to all potential non-bank creditors.

While we believe there is ample legal precedent to allow the financial regulators to write broad rules to cover all entities and individuals involved in a financial procedure or transaction, we recognize that there may be reluctance among several of the agencies to exert regulatory authority beyond the institutions they directly supervise. If consensus cannot be achieved to permit issuance of a general rule under the current wording of Section 604(g)(5), we would urge, at a minimum, that the financial regulatory agencies take the following actions within the context of the current proposed rule.

We urge the agencies to change the scope of their final rules to clarify that doctors, medical clinics, medical suppliers and others who provide referrals or arrange credit for financial institutions are covered by the exceptions in the rule. The prohibition against using medical information in credit decisions should apply only to those who actually make determinations regarding eligibility for credit. This could be done, for example in the OCC's proposed rule, by adding the following language to the end of section 41.1(b)(2): ", and any person that arranges credit for these institutions." This revision would apply the exceptions of the proposed rule to

permit parties that work with financial institutions to continue their crucial role in facilitating the financing needed medical procedures and equipment. The FTC could then enforce the rule and the exceptions against those parties pursuant to its existing authority under Section 621(a) of the Fair Credit Reporting Act (FCRA).

We further urge the National Credit Union Administration to amend the scope of its proposed rule, in section 717.7(b)(2), to apply to all insured credit unions. As noted above, there is nothing in the language of Section 604(g)(5) that restricts NCUA's rulemaking authority for purposes of Section 604(g)(2) only to federally chartered credit unions, nor to any specific rulemaking authority under Title I of the Federal Credit Union Act. NCUA has ample authority under Section 209, and elsewhere in Title II of the Act, to prescribe rules governing the lending practices of all insured credit unions.

Our final comment relates to the proposed exception that would permit a consumer or the consumer's legal representative to request that a creditor use specific medical information for a specific purpose in determining the consumer's eligibility for credit. The proposed rule provides several examples of specific circumstances in which a consumer may choose to have medical information considered as part of a credit application. While these examples were not specifically contemplated by the authors of Section 411, they are consistent with the Committee's broader intent to permit use of private medical information with the consumer's express consent and thus should be accommodated by the regulation.

We are concerned, however, that greater clarification may be needed to assure that this exception is applied only where requests are initiated by the consumer and are clearly beneficial for the consumer. The current exception requires only a signed written document describing the specific medical information the consumer requests the creditor to consider. It may be possible, for example, for a creditor to include among loan application documents a notice or form telling applicants they may request that medical information be considered for purposes of the loan application. While any resulting request would be voluntary, it would not be initiated by the consumer, and may even be misunderstood by some consumers as necessary to apply for the loan. We would urge that additional explanation or examples be provided to clarify this point in the final rule.

BARNEY FRANK

RAHM EMANUEL