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May 28, 2004

Via Electronic Mail

Office of the Comptroller of the Currency
250 E Street, SW
Public Information Room
Mail Stop 1-5
Washington, D.C. 20219

Re: Docket No. 04-09

Jennifer J. Johnson
Secretary of the Board
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, D.C. 20551

Re: Docket No. R-1188

Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429

Re: RIN 3064-AC81

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, D.C. 20552

Re: Docket No. 2004-16

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

Re: Fair Credit Reporting Medical Information Regulations

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Ladies and Gentlemen:

These comments are submitted by the American Council of Life Insurers (“ACLI”) in connection with the Agencies’¹ notice of proposed rulemaking to implement § 411 of the Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”) (69 *Fed. Reg.* 23380) (April 28, 2004). Section 411 of the FACT Act amends the Fair Credit Reporting Act (“FCRA”) to restrict the circumstances under which consumer reporting agencies may furnish consumer reports that contain medical information about consumers. Section 411 also prohibits creditors from obtaining or using medical information pertaining to a consumer in connection with any determination of the consumer’s eligibility or continued eligibility for credit. Finally, § 411 restricts the sharing of medical information and related lists or descriptions with affiliates.

ACLI is the principal trade association of life insurance companies whose 368 member companies account for 69 percent of life insurance premiums, 76 percent of annuity considerations, 53 percent of disability income insurance premiums and 72 percent of long-term care insurance premiums in the United States among legal reserve life insurance companies. ACLI members are also major participants in the pension and reinsurance markets.

As the Agencies are aware, ACLI member companies actively use medical information in connection with the business of insurance and annuities. Continued access to and use of medical information is critical to life insurers’ continued ability to serve and fulfill basic insurance functions for their existing and prospective customers. Section 411 of the FACT Act was carefully crafted by Congress to ensure that insurers’ ability to obtain and use medical information would not be restricted. Accordingly, ACLI and its member companies have a significant interest in the Agencies’ proposed rules.

Generally, ACLI believes that the Agencies’ proposals reflect the intent of Congress in enacting § 411 of the FACT Act. However, as indicated below, ACLI believes that the purpose and scope sections of the proposed rules of the Federal Reserve, the FDIC and the OTS fail to adequately take into account the unique status of insurers. ACLI believes that it is important for the rules of all of the Agencies to address this jurisdictional issue consistently. Specifically, we believe that all the proposed rules should reflect the fact that insurers that are affiliates or subsidiaries of depository institutions and bank holding companies are functionally regulated and therefore are subject to the jurisdiction of state insurance authorities rather than the Agencies. This approach is taken by the OCC and NCUA, but not by the Federal Reserve, FDIC and OTS. We believe that the failure to accurately and consistently reflect the status of insurers could have an adverse effect on the life insurance industry. Accordingly, we urge the Agencies to modify the proposed rules of the Federal Reserve, FDIC and OTS to provide that they do not apply to affiliates or subsidiaries such as insurers that are regulated by another functional regulator.

¹ The term “Agencies” means the Federal Deposit Insurance Corporation (“FDIC”), the Board of Governors of the Federal Reserve System (“Federal Reserve”), the Office of Thrift Supervision (“OTS”), the Office of the Comptroller of the Currency (“OCC”) and the National Credit Union Administration (“NCUA”).

PURPOSE AND SCOPE OF COVERAGE

ACLI is concerned that the purpose and scope sections of the proposed rules of Federal Reserve, FDIC and OTS do not adequately take into account the unique status of insurers as functionally regulated on the state level and subject to the jurisdiction of the state insurance authorities. ACLI is also concerned that the different rules of the Agencies are inconsistent with each other in this respect.

The OCC's proposal provides in Section 41.1(b)(2) that the proposed rule does not apply to subsidiaries of national banks that are functionally regulated as provided in section 5(c)(5) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. § 1844(c)(5)) (the "BHCA"). This section of the BHCA provides that the term "functionally regulated subsidiary" includes any company that (1) is not a bank holding company or a depository institution; (2) is an insurance company, with respect to insurance activities of the insurance company and activities incidental to such insurance activities, and (3) is subject to supervision by a state insurance regulator. 12 U.S.C. § 1844(c)(5)(B)(iv).² Accordingly, the OCC's proposal does not apply to insurers that are subsidiaries of national banks.

The NCUA proposal provides in Section 717.1(b)(2) that the proposed rule is applicable to federal credit unions only.

Section 334.1 of the FDIC's proposal provides that the proposed rule is applicable to banks and their affiliates and subsidiaries, but contains an express exception only for subsidiaries that are persons providing insurance, brokers, dealers, investment advisors or investment companies. Accordingly, the FDIC's proposal would appear to apply to entities that are affiliates of state nonmember banks.

The Federal Reserve's proposal applies to bank holding companies and affiliates of such holding companies. Section 222.1 of the Federal Reserve's proposal provides no general exception for affiliates of such holding companies such as insurers that are functionally regulated. Section 571.1 of the OTS proposal also does not provide an exception for affiliates of saving associations that are functionally regulated.

The administrative enforcement provisions of the FCRA, set forth in FCRA § 621, provide no authority for the OCC, NCUA, FDIC or OTS to enforce the FCRA against insurers that are affiliated with banking organizations, savings associations or federal credit unions. In this regard, FCRA § 621(b)(1)(A) provides that the OCC has enforcement authority with respect to national banks and federal branches and federal agencies of foreign banks only; FCRA § 621(b)(3) and § 621(e)(2) provide that the NCUA possesses enforcement authority and the authority to prescribe regulations only

² The term also includes a broker or dealer registered with the Securities and Exchange Commission, registered investment advisors, investment companies registered under the Investment Company Act of 1940 and a person subject to regulation by the Commodity Futures Trading Commission. 12 U.S.C. § 1844(c)(5)(B)(i), (ii), (iii), and (v).

with regard to federal credit unions; FCRA § 621(b)(1)(C) provides that the FDIC has enforcement authority over banks insured by the FDIC (other than members of the Federal Reserve System) and insured branches of foreign banks; and FCRA § 621(b)(2) and § 621(e)(1) grant the OTS enforcement authority and the authority to prescribe regulations only with respect to insured savings associations. To the extent the proposals of any of these Agencies seek to impose jurisdiction on insurers, they are inconsistent with the administrative enforcement provisions of § 621 of the FCRA (15 U.S.C. § 1681s).

While FCRA § 621(e)(1) authorizes the Federal Reserve to prescribe regulations consistent with the regulations of the other Agencies with respect to bank holding companies and their affiliates, ACLI believes that the Federal Reserve should not exercise such authority with respect to functionally regulated industries such as the insurance industry. The concept of functional regulation is reflected throughout the Gramm-Leach-Bliley Act ("GLBA"). For example, Title V of the GLBA expressly provides that with respect to insurers, the privacy provisions of the GLBA are to be enforced by the State insurance authorities.

ACLI believes that functional regulation is the correct approach in view of the current state regulatory structure in effect for insurers. In addition, while FCRA § 621(e) provides the Federal Reserve authority to prescribe regulations to enforce the FCRA with respect to affiliates of bank holding companies, it does not *require* the Federal Reserve to prescribe such regulations. At the same time, FCRA § 621(e) requires that any regulations prescribed by the Federal Reserve must be *consistent* with the joint regulations of the other banking regulators described in FCRA § 621(b). ACLI believes that the concept of functional regulation suggests that the rules adopted by the Agencies should be consistent and should not apply to persons engaged in providing insurance.

In view of insurers' unique status as functionally regulated on the state level and the administrative enforcement provisions of FCRA § 621 and to achieve consistency among the Agencies' proposals, the ACLI specifically requests that the Federal Reserve, FDIC and OTS adopt the approach taken by the OCC and NCUA that exempt from the proposed rules affiliates and subsidiaries such as insurers that are subject to functional regulation.

DEFINITION OF MEDICAL INFORMATION

The FACT Act definition of the term "medical information" was also carefully considered by Congress at the time the Act was being enacted. The proposed definition of "medical information" contained in the Agencies' proposed rules is virtually identical to the definition of the term contained in the FACT Act. ACLI believes that the definition the Agencies have proposed should be adopted.

GENERAL PROHIBITION

Section 411(a) of the FACT Act amends the FCRA to prohibit creditors from obtaining or using medical information about a consumer in connection with any determination of the consumer's eligibility or continued eligibility for credit. Nothing, however, prohibits the use of medical information for other purposes such as in connection with a determination of a consumer's eligibility for an insurance product. Accordingly, the Agencies' proposed rule would confirm that an insurer is permitted to obtain and use medical information in connection with the business of insurance and annuities.

The general rule prohibits a creditor from obtaining and using medical information in connection with determining a person's eligibility or continued eligibility for credit. The Agencies' proposed rules would clarify that the term "eligibility, or continued eligibility for credit" does not include the consumer's qualification for insurance and certain other products or any determination of whether the provisions of a credit insurance product are triggered. ACLI supports these proposed clarifications that ensure that there will be a bright line between what constitutes permissible and impermissible uses of medical information.

SHARING MEDICAL INFORMATION WITH AFFILIATES

Section 411(b) of the FACT Act amends the FCRA to restrict a company from sharing with affiliates medical information, an individualized list or description based on payment transactions of the consumer for medical products or services, or an aggregate list of identified consumers based on payment transactions of the consumer for medical products or services. Such information, however, may be shared with affiliates in the same manner as nonmedical information if the information is disclosed to an affiliate in connection with the business of insurance or annuities.

The Agencies' proposed rules mirror the provisions of the FACT Act relating to the sharing of medical information with affiliates. The proposed rules provide that a company may rely upon the exceptions from the term "consumer report" if medical information or lists of payment transactions for medical products or services are shared with affiliates in connection with the business of insurance or annuities in accordance with the procedures set forth in the FCRA. The proposed rules also expressly permit sharing of such information or lists with affiliates in accordance with the other statutorily specified exceptions. ACLI believes that it is appropriate for the Agencies' rules to follow similar provisions of the FACT Act. Accordingly, ACLI supports these provisions of the proposed rules.

REDISCLASURE OF INFORMATION

The Agencies' proposed rules also provide that a person may not disclose medical information received from a consumer reporting agency or from an affiliate 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, order or regulation. This provision restates the restriction contained in § 411(a) of the FACT Act. Because medical information is permitted to be shared with a person in connection with the

business of insurance or annuities and as permitted under the other statutorily specified exceptions, this proposed rule should not interfere with the usual and customary flow of medical information between insurers and their affiliates when such information is used for insurance purposes and not in connection with credit decisions. Accordingly, ACLI supports inclusion of the provision in the proposed rule.

CONCLUSION

In view of insurers' unique status as functionally regulated by the state insurance regulators and to achieve consistency among the Agencies' proposals, ACLI strongly urges that the Federal Reserve, FDIC, and OTS adopt the approach taken by the OCC and NCUA to exempt from their proposals affiliates and subsidiaries such as insurers that are subject to functional regulation.

ACLI thanks the Agencies for their consideration of its views.

Sincerely,

A handwritten signature in cursive script, appearing to read "Roberta B. Meyer".

Roberta B. Meyer