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May 28, 2004

Wells Fargo & Company
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Via Electronic Mail

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. 04-09

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552
Attention: Docket No. 2004-16

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

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

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

Re: Notice of Proposed Rulemaking on the Fair Credit Reporting Medical Information Regulations

Ladies and Gentlemen:

Wells Fargo & Company ("Wells Fargo") appreciates the opportunity to comment on the proposed regulations implementing section 411 of the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act") issued by the Board of Governors of the Federal Reserve System (the "Board"), the Office of the Comptroller of the Currency ("OCC"),

Office of Thrift Supervision ("OTS"), the Federal Deposit Insurance Corporation ("FDIC") and the National Credit Union Administration ("NCUA"), (collectively, the "Agencies"). Wells Fargo is one of the country's largest diversified financial services enterprises; our subsidiaries include banks, a consumer finance company, investment advisors, securities broker-dealers, and insurance agents and brokers.

Background

Section 411 of the FACT Act amends the Fair Credit Reporting Act ("FCRA") to provide that a creditor may not obtain or use medical information in connection with any determination of a consumer's eligibility, or continued eligibility, for credit except as permitted by regulations. The Agencies' proposed regulations would grant limited exceptions to allow creditors to obtain or use medical information in those circumstances that the Agencies believe are necessary and appropriate in connection with determinations of consumer eligibility for credit. The regulations also establish when and how creditors would be permitted to share medical information among affiliates.

Wells Fargo generally supports the Agencies' proposed regulations. However, we believe there are some areas in the proposal that should be reconsidered prior to issuing a final rule. We would like to offer the following suggestions which we believe would enhance this proposal. We recommend the following changes and additions:

- Additional clarification is necessary for the definition of medical information, the exceptions to the general prohibition on obtaining and using medical information for credit purposes and the examples illustrating the general rule and exceptions.
- The proposed exceptions have limited application and should be extended to apply to all creditors who would otherwise be subject to the prohibition on obtaining or using medical information.
- There should be a separate exception for debt cancellation contracts and debt suspension agreements.
- The rule of construction which provides a safe harbor for unsolicited medical information is preferable to creating a separate exception to the prohibition.
- Consumer reports containing coded medical information should be excluded from the definition of medical information.
- The requirements for consumer consent to the use of medical information should be less onerous.
- There should be specific exceptions for the use of medical information to authenticate the identity of a borrower and to determine whether the borrower has the legal capacity to enter into a valid credit agreement.
- Redisclosure of medical information should be permitted for purposes covered by the "general" exceptions under GLBA and Regulation P.
- The Agencies should be allowed to draft regulations that are enforced by other agencies.

- The FTC should retain enforcement authority despite the lack of rulemaking power.
- The Agencies should provide sufficient time to implement the final rule.

General comments about the definition of medical information and exceptions

Wells Fargo believes that the definition of medical information needs further clarification. In particular, we believe that the Agencies should clarify that "medical information" must "relate to" or "pertain to" a specific, identifiable consumer. For example, a database of information relating to the repayment behavior of thousands of consumers, none of whom is personally identifiable, should not be deemed to be "medical information." If such information were "medical information," creditors may have difficulty in utilizing such data even for basic analytical purposes that have no bearing or impact on any individual. We do not believe that this was the intent of Congress or the Agencies, and we urge the Agencies to provide a clarification on this issue.

We generally support of the approach taken by the Agencies in the proposed regulations to provide exceptions for financial information, and to provide additional specific exceptions where the use of any type of medical information is necessary or appropriate in connection with an extension of credit. We support the three part test that must be satisfied in order to qualify for the financial information exception. However, we recommend adding a statement to the financial information exception that indicates that the list of items that the medical information is permitted to relate to (*i.e.*, debts, expenses, income, benefits collateral, or the purpose of the loan, including the use of proceeds) is not exclusive. This would cover items that may have been unintentionally omitted by the Agencies.

Wells Fargo favors the use of examples to illustrate the application of the proposed regulations. We support the statement in the proposal that the examples are not exclusive and that compliance with an example provides a safe harbor for compliance with these rules. We recommend that the Agencies provide additional examples based on comments received in order to provide additional clarification of the proposed rules.

The exceptions, as proposed, have too limited application and should be extended to apply to all creditors

The new section 604(g)(5)(A) of FCRA allows the Agencies to grant exceptions that allow creditors to obtain or use medical information as "necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (including actions necessary for administrative verification purposes), consistent with the intent of the statute to restrict the use of medical information for inappropriate purposes." The Agencies have requested comments on whether or not the proposed exceptions adhere to this standard.

Wells Fargo is concerned that the exceptions under section 411 are limited only to those entities over which the Agencies have supervisory jurisdiction. Although each one of the Agencies have proposed virtually identical exceptions to the general prohibition against creditors obtaining or using medical information in connection with credit eligibility determinations, the Agencies' regulations would only apply to those creditors that the Agency views as being subject to its supervisory jurisdiction. This would include those institutions chartered as a bank, savings association or credit union and their affiliates.

As a result of the limitation of the proposed exceptions to banking institutions and their affiliates, only a limited group of creditors would be able to rely on the exceptions. The remaining creditors would be prohibited from obtaining or using medical information in the credit context. The groups most affected would be nonaffiliated business customers and partners of banks, such as mortgage brokers, motor vehicle dealers and medical providers. These entities would be unable to apply the exceptions to their business practices and therefore would be unfairly disadvantaged. Moreover, even banks and other covered institutions would be negatively impacted because they often originate loans through, or purchase loans from, these entities. For example, covered institutions often rely on motor vehicle dealers and mortgage brokers to consider an applicant's capacity to contract and the risks involved with making a loan to an individual. Similarly, medical providers often originate credit with their customers/patients, and then banks and other covered institutions purchase or take security interests in those receivables. Under section 411, these non-covered entities would not be allowed to consider an individual's past, present or future physical, mental, or behavioral heath or condition when reviewing an application and determining the applicant's capacity to enter into a contract. Furthermore, the non-covered entities would not be allowed to take into account any medical debt delinquency that may affect the applicant's credit eligibility.

Wells Fargo believes that exceptions as proposed would not apply to medical providers since they are not under the Agencies' jurisdiction. This could have a significant impact on how medical services are provided to consumers, particularly consumers who have limited access to medical insurance. Medical professionals often take into account a patient's ability to pay when offering treatment options. If the patient does not have insurance, options may be limited absent the patient's ability to finance a procedure. If the medical professionals are unable to inform consumers about certain financing options due to the constraints presented under section 411, patients may make an uninformed decision and not choose to pursue the best available treatment for their ailment.

Wells Fargo does not believe that the statute should limit the availability of the exceptions under section 411 to institutions within the Agencies' jurisdiction. We believe the statute should be read as requiring the Agencies to issue regulations that would apply to **all** creditors who would otherwise be subject to the restriction against obtaining or using medical information for credit determinations. If Congress had

intended to limit the regulations to those creditors in the Agencies' jurisdiction, the statute would be more explicit. Congress has indeed taken this approach on other occasions. For example, there are sections in FCRA where Congress has limited exceptions to the Agencies' enforcement jurisdiction. Section 604(g)(3)(C) specifically provides an exception to the limitations on affiliate sharing of medical information if the information is disclosed "as otherwise determined to be necessary and appropriate, by regulation or order . . . by the Commission, any Federal banking agency or the National Credit Union Administration (with respect to any financial institution subject to the jurisdiction of such agency or Administration under paragraph (1), (2), or (3) of section 621(b))." We urge the Agencies to reconsider this proposal and extend the scope of these regulations and exceptions to apply to all creditors.

There should there be a separate exception for debt cancellation contract and debt suspension agreements

The agencies' proposal requests comment on whether or not there should there be a separate exception to permit creditors to obtain and use medical information in connection with debt cancellation, debt suspension, or credit insurance products, rather than issuing an interpretation that obtaining information necessary to trigger coverage under these products falls outside the determination of credit eligibility.

Debt cancellation contracts ("DCC") and debt suspension agreements ("DSA") often require consideration of medical information as a condition of eligibility. Without an express regulatory exception, the use of medical information in connection with offering a debt cancellation provision in an extension of credit would be prohibited, which would have the effect of prohibiting the product itself where consideration of medical information is a necessary condition of offering the product. Wells Fargo recommends that such contracts and agreements be subject to a specific exception to the prohibition on the use of medical information rather than an interpretation of what constitutes "eligibility for credit."

We believe that the interpretation in the proposed regulation is too narrow. The interpretation in the proposed regulation relates only to the determination of whether a debt cancellation product has been triggered by an event specified in the DCC or DSA. We believe that medical information is an appropriate consideration in these circumstances and also to determine whether an individual is eligible to purchase a DCC or DSA or whether such a contract or agreement should be reactivated.

Creditors that sell DCCs and DSAs often ask health questions as part of the application process. In addition, medical information is necessary for making a reactivation determination after a temporary suspension of a DCC and DSA due to nonpayment. If the borrower answers affirmatively to various health questions, the creditor may decide not to offer the borrower the DCC or DSA. These questions allow creditors to assess the amount of risk they wish to assume under the DCC or DSA. They also permit the creditor to lower the price of the DCC or DSA if appropriate. Without the

ability to ask medical questions in connection with a DCC or DSA, the price of such protection would be higher for all borrowers.

Wells Fargo believes that the proposed interpretation fails to address all circumstances in which medical information may appropriately be considered in connection with a DCC or DSA and creates some legal uncertainty about the application of the regulation to these products. The proposed interpretation creates legal uncertainty because the preamble to the proposed rule provides no rationale for the interpretation. This permits others to question, and perhaps even challenge, the basis for the interpretation. More importantly, the proposed interpretation calls into question the prevailing legal classification of DCCs and DSAs.

To address the issues above, we recommend that proposed Section __.30(d) be revised to include the following specific exception for DCCs and DSAs:

> (d)(1)(viii) To determine the eligibility for, the triggering of, or the reactivation of a debt cancellation contract or debt suspension agreement.

This language eliminates the operational and legal uncertainties associated with the proposed regulation. This proposed language is also consistent with the terms of section 411 of the FACT Act and the legislative history of the Act. New Section 604(g)(5)(A) of the Fair Credit Reporting Act expressly empowers the Agencies to except from the prohibition on the use of medical information transactions that are "necessary and appropriate to protect the legitimate operational, transactional, risk, consumer, and other needs." An exception for determining the eligibility for, the triggering of, and the reactivation of DCCs and DSAs is appropriate based on this authority. Additionally, the House Report accompanying the FACT Act (House Report 108-263) specifically states that the use of medical information in connection with "credit-related debt cancellation agreements" is a "necessary and appropriate use of medical information".

We support the rule of construction which provides a safe harbor for unsolicited medical information

Wells Fargo supports the rule of construction in section __.30(b), which provides a safe harbor for a creditor who obtains medical information without specifically requesting it and does not use the information in connection with an extension of credit. The proposal lists situations where a creditor might unintentionally receive medical information. For instance, a customer may inform a loan officer that the loan is for a medical treatment or a customer will list a hospital or medical provider debt on a credit application.

We agree with the Agencies' interpretation that a creditor in these situations should not be deemed in violation of the prohibition on obtaining and using medical information. Furthermore, we believe that the matter of unsolicited medical information

is better addressed as a rule of construction rather than creating an exception to the general prohibition on the use medical information.

Consumer reports containing coded medical information should be excluded from the definition of medical information

The Agencies have requested comment on how to treat the receipt of consumer reports containing coded medical information in accordance with FCRA section 604(g)(1)(C). We recommend excluding consumer reports containing coded medical information from the definition of "medical information." We believe that it is reasonable to conclude that Congress, by providing the coding option to consumer reporting agencies, did not intend that such information to be included in the medical information which is subject to the prohibitions and restrictions of section 411.

Requirements for consumer consent should be less onerous

The Agencies would permit a creditor to obtain and use medical information in connection with any determination of the consumer's eligibility for credit in certain specified circumstances. Wells Fargo commends the Agencies for creating exceptions for legitimate purposes, such as for fraud prevention or to comply with applicable legal requirements. Wells Fargo is concerned, however, that the Agencies may have unnecessarily limited the ability of a creditor to obtain the consumer's, or the consumer's representative's, request to use medical information. The Proposed Rule would permit a creditor to use medical information only if the consumer (or representative) requests in writing, on a separate form signed by the consumer (or representative), that the creditor use specific medical information for a specific purpose in determining the consumer's eligibility for credit.

We agree with the exception to use medical information pursuant to a consumer's request. However, the Supplementary Information to the Proposed Rule appears to limit the usefulness of this exception by indicating that the consumer's consent cannot be obtained "as part of loan applications or documentation" and that the exception would "not be met by a form that contains a preprinted description of various types of medical information and the uses to which it might be put." The Agencies apparently envision "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." Wells Fargo respectfully suggests that such limitations by the Agencies will limit the ability of consumers to request creditors to take medical hardships into account. Many creditors may not be able to evaluate individualized, handwritten (since the requests apparently cannot be preprinted or part of an application) requests for use of medical information in an efficient manner—and therefore may not honor such requests. This obviously harms consumers in need of unique evaluations based on medical hardships. However, if a creditor can establish forms for use in connection with automated underwriting systems, the creditor may be better prepared to take consumers' health-related hardships into account.

There should be specific exceptions for the use of medical information to authenticate the identify of a consumer or to determine legal competency

While it can be argued that authenticating the identity of a consumer or determining whether the consumer is legally competent to enter into a valid contract are not "determinations of credit eligibility," we believe there ought to be specific exceptions which permit the use of medical information for such purposes. Determining whether someone is mentally competent necessarily involves the use of medical information. Nevertheless it is clearly in the best of interests of consumers that they not be allowed to enter into credit obligations if their competence is in doubt. Likewise, state courts or agencies may request or even require a financial institution to take note of the fact that a customer has been found to be incompetent. Such a notice is intended to protect the customer from ill-advised and, in many cases, fraudulently induced transactions. The final rule should make it clear that such uses of medical information are permitted.

In addition, some authentication techniques, especially those which may come into use in the future as biometric identification improves and expands, may use information that might be construed as "medical information." The final rule should make specifically provide that such use is permissible.

The final rule should permit the redisclosure of medical information for purposes within the "general" exceptions of GLBA and Regulation P

The Proposed Rule states that if a person subject to the scope of the Proposed Rule receives medical information about a consumer from a consumer reporting agency or its affiliate, the creditor 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. This provision is consistent with the statutory language in the FCRA. We urge the Agencies to provide clarification that a person may redisclose medical information for a purpose authorized under Section 502(e) of the Gramm-Leach-Bliley Act ("GLBA") if such disclosure is related to the purpose for which it was obtained. We do not believe the Agencies intend to restrict the redisclosure of medical information to law enforcement, to prevent fraud, or to the person's auditors, accountants, or attorneys, for example. Therefore, we suggest the appropriate clarification be provided.

The Agencies should be allowed to draft regulations that are enforced by other agencies

We believe that the Agencies have the authority to draft rules under section 604(g)(5)(A) of the FCRA that apply to creditors that are outside the scope of the exceptions described in the proposal. Section 604(g)(5)(A) does not limit the persons

that may rely on the exceptions created by any of the Agencies under that provision. Therefore, the exceptions created by the rules of each Agency can apply to all creditors unless the Agencies intentionally limit the scope of the exceptions.

We do not believe that the scope of the exceptions should be limited. All creditors and consumers should benefit from the exceptions proposed by each Agency. All of the Agencies should be empowered to create exceptions that are broadly applied to all creditors. Allowing each Agency to draft separate exceptions should not create conflicts. Although coordination among the Agencies on drafting exceptions would be beneficial, we do not believe that it is necessary or required.

The FTC would retain enforcement authority despite the lack of rulemaking power

Section 621(a) of the FCRA provides that the FTC shall enforce the provisions of the FCRA "with respect to consumer reporting agencies and all other persons subject thereto, except to the extent that enforcement of the requirements imposed under this title is specifically committed to some other governmental agency under subsection (b)." As a result, if an entity has duties under the FCRA, the entity will be under the FTC's enforcement authority, unless specifically covered by another agency under section 621(b). Sections 604(g)(2) and 604(g)(5)(A) do not limit the FTC's general enforcement authority and do not provide an enforcement structure that differs from sections 621(a) and (b). Accordingly, the FTC is required by section 621(a) to enforce compliance with section 604(g)(2) and with regulations providing exceptions to section 604(g)(2) with respect to any creditors under its jurisdiction.

The Agencies should provide an adequate implementation time after the final rule is published

Finally, we believe that an effective date of ninety days after the final rules are issued is not realistic. We believe that because of the personnel and systems changes needed to review existing business practices and comply with these rules, this time period would be burdensome. We urge the Agencies to consider providing creditors at least six months from the publication of final rules to implement these regulations.

Conclusion

Wells Fargo appreciates the Agencies' efforts to draft the proposed rules for section 411 in an expeditious manner. We generally support the Agencies' exceptions to the general rule that a creditor may not obtain or use medical information in connection with any determination of a consumer's eligibility, or continued eligibility, for credit.

However, our main concern is that the scope of the regulations is limited and covers only the entities within the jurisdiction of the Agencies. We believe that there is statutory authority to cover all creditors, and failure to do so would adversely affect both non-covered creditors (*i.e.*, finance companies, mortgage brokers, motor vehicle dealers, and medical providers) and the financial institutions that rely on those sources for loan originations.

If you have any questions regarding the foregoing, please contact me at (415) 396-0940 or mccorkpl@wellsfargo.com.

Sincerely yours,

Peter L. McCorkell