



# COALITION TO IMPLEMENT THE FACT ACT

May 27, 2004

Chief Counsel's Office  
Office of Thrift Supervision  
1700 G Street, NW  
Washington, DC 20552

Re: Docket No. 2004-16

To Whom It May Concern:

This letter is submitted by The Coalition to Implement the FACT Act ("Coalition") in response to the Proposed Rule ("Proposed Rule") published by the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Board of Governors of the Federal Reserve, the Federal Deposit Insurance Corporation, and the National Credit Union Administration ("Agencies") pursuant to Section 411 of the Fair and Accurate Credit Transactions Act ("Act"). The Coalition represents a full range of trade associations and companies that furnish and use consumer information, as well as those who collect and disclose such information. We appreciate this opportunity to provide comments on the Proposed Rule.

### Overview

Congress enacted Section 411 of the Act "to restrict the use of medical information for inappropriate purposes." In so doing, Congress imposed a broad prohibition on a creditor's ability to obtain and use medical information in connection with a determination of a consumer's eligibility, or continued eligibility, for credit. Congress also recognized that there were situations where it is "necessary and appropriate" for a creditor to obtain and use medical information, and therefore directed the Agencies to establish regulations that permit a creditor to obtain and use medical information as "necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs." The Agencies have issued the Proposed Rule to permit a limited number of creditors to obtain and use medical information for these types of purposes. As a general matter, the Coalition commends the Agencies for issuing a Proposed Rule with exceptions that adhere to the congressional intent of Section 411 of the Act to preserve the ability of creditors to obtain and use medical information in those relatively limited circumstances when it is appropriate. Although we believe the Proposed Rule is generally sound, we do have constructive suggestions which we hope the Agencies will consider including in any final rule ("Final Rule").

### The Proposed Rule's Scope of Applicability

The Agencies have each issued a Proposed Rule which is intended to apply only to entities specified by the Agencies. The Coalition is concerned that the Agencies have inappropriately narrowed the scope of applicability of the Proposed Rule, with the perverse result that only certain creditors can obtain and use medical information in situations where the Agencies believe it to be "necessary and appro-

919 18th Street, NW  
Suite 300  
Washington, DC 20006

Jeffrey A. Tassej  
Executive Director  
Phone: 202-464-8815

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appropriate." For example, under the Proposed Rule, creditors such as certain types of finance companies and state-chartered credit unions would appear not to be covered by the Final Rule. Other entities who do not make credit decisions, but who may fall within the definition of "creditor," such as those who arrange for credit, also would not be within the Agencies' stated scope. We believe that such a result would harm consumers and is not supported by the plain language of the Fair Credit Reporting Act ("FCRA").

Many types of lenders have legitimate needs to obtain and use medical information in connection with determining a consumer's eligibility, or continued eligibility, for credit. The Proposed Rule outlines several appropriate circumstances in which a creditor may obtain and/or use medical information. However, the Proposed Rule would apply only to those creditors specified by the Agencies. We are not aware of any justification to not allow other types of creditors to avail themselves of the Final Rule, nor is any basis for this distinction articulated in the Proposed Rule. A consumer benefits greatly when a finance company offers credit for the consumer to obtain laser eye surgery. A consumer benefits greatly when a state-chartered credit union can offer the consumer a loan based on an application that may include positive information about repayment of a debt to a hospital. A consumer benefits greatly when an auto finance company finances his or her vehicle that is modified to include medical equipment, such as a wheelchair lift. A consumer benefits greatly when a doctor can arrange for credit for a consumer's medical procedure. A consumer benefits greatly when an auto dealer can arrange for financing for a car. However, these benefits could be denied needlessly unless the Agencies broaden the scope of the Final Rule to include any type of creditor that is subject to the prohibition provided in Section 411 of the Act.

The Coalition notes that the plain language of the FCRA, as amended by the Act, suggests that the scope of the Final Rule should be broader than has been proposed. Section 604(g)(5)(A) of the FCRA requires the Agencies to "prescribe regulations that permit transactions [involving medical information] that are determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs." The statute does not limit the applicability of such regulations to entities within the Agencies' respective jurisdictions. However, had Congress intended to limit the applicability in this regard, Congress could have done so, as it did explicitly, for example, in Sections 603(g)(3)(C) and 621(e) of the FCRA, and in Section 214(b) of the FACT Act. Therefore, we strongly urge the Agencies to issue a Final Rule that is applicable to all creditors to be enforced by the appropriate Agency or other regulatory agency with the proper jurisdiction.

### Use of Examples

The Proposed Rule contains several examples to illustrate activities that would be consistent with the Proposed Rule, as well as those that would be deemed to violate the Proposed Rule. Furthermore, the Proposed Rule states that examples provided are not exclusive and that compliance with an example, to the

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extent applicable, constitutes compliance with the Proposed Rule. We urge the Agencies to retain these provisions in the Final Rule. The Coalition believes that examples can be useful to creditors in demonstrating how to comply with the Final Rule. Furthermore, a creditor should be permitted to rely on an example as a safe harbor for compliance purposes.

### **Definitions**

The Proposed Rule contains definitions to several terms that will have general applicability to the Proposed Rule as well as future rules issued to implement the FCRA. We believe the Agencies have proposed useful and appropriate definitions, and urge that they be retained with one modification. In particular, the Coalition does not believe it would be appropriate to classify coded "medical" information obtained from a consumer reporting agency as "medical information." Congress has specifically addressed the necessary consumer protections with respect to this type of information received from consumer reporting agencies. To classify such information as "medical information," which would further restrict its use, would appear to be contrary to the congressional intent and would not provide any additional material consumer protections. Therefore, we ask the Agencies to clarify that such coded information is not "medical information."

### **General Prohibition on Obtaining or Using Information**

The Proposed Rule generally prohibits a creditor 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 except as provided in the Proposed Rule. As discussed above, we applaud the Agencies for recognizing that exceptions to this general prohibition should be created.

As part of the general prohibition, the Agencies have provided a definition for "eligibility, or continued eligibility, for credit" as such term is used in the Proposed Rule. Specifically, it means "the consumer's qualification or fitness to receive, or continue to receive, credit, including the terms on which credit is offered, primarily for personal, family, or household purposes." We appreciate the fact that the Agencies have retained the traditional scope of the FCRA by indicating that "eligibility, or continued eligibility, for credit" must be related to credit for consumer purposes, and not for business purposes. The Proposed Rule is therefore consistent with the longstanding interpretations of the FCRA that the statute generally does not apply to business transactions.

The definition of "eligibility, or continued eligibility, for credit" expressly does not include "[a]ny determination of whether the provisions of a debt cancellation contract, debt suspension agreement, credit insurance product, or similar forbearance practice or program ['Debt Cancellation Product'] are triggered." The Coalition is concerned that this exclusion is incomplete. In fact, any issues related to the sale, or provision of, a Debt Cancellation Product should be excluded from the defi-

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inition of "eligibility, or continued eligibility, for credit," not just those related to whether the Debt Cancellation Product is triggered. A more complete exclusion is appropriate because a Debt Cancellation Product is a purchased product and is not necessarily related to the consumer's underlying eligibility for credit.

The Agencies have provided additional exclusions to the definition of "eligibility, or continued eligibility, for credit" which we think are appropriate and should be retained. However, we respectfully request the Agencies to clarify that the exclusions are illustrative examples, and not an exclusive list of items excluded from the definition.

### **Rule of Construction**

The Proposed Rule also includes a "rule of construction" with respect to unsolicited medical information. A creditor, under the Proposed Rule, would not obtain medical information in violation of the general prohibition if it receives such information "without specifically requesting medical information" and the creditor does not use the medical information in determining whether to extend or continue to extend credit to the consumer, and the terms on which credit is offered or continued. We commend the Agencies for recognizing that creditors may receive medical information on an unsolicited basis, and that the Proposed Rule addresses this situation appropriately. We urge that this rule of construction be retained in the Final Rule.

### **Financial Information Exception**

Under the Proposed Rule, a creditor could obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit in certain circumstances. In particular, the information must relate to debts, expenses, income, benefits, collateral, or the purpose of the loan, including the use of proceeds. Furthermore, the creditor can use the medical information in a manner and to an extent that is no less favorable than if it used, in a credit transaction, comparable information that is not medical information. Finally, the creditor may 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.

We applaud the Agencies for providing an exception whereby a creditor may obtain and use information necessary to underwrite a loan, even if such information may be medical in nature. This approach should be retained in the Final Rule. However, we believe the scope of the exception should be expanded to include other types of information that are routinely used in credit underwriting decisions, such as assets, that could also be medical in nature or modified to address a medical condition. This could be accomplished by deleting the limitation provided in § \_\_\_.30(c)(1)(i) altogether, or amending it to state "The information is of the type routinely used in credit eligibility determinations;"

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## **Specific Exceptions**

The Agencies have provided several specific exceptions to the general prohibition on obtaining or using medical information in connection with determining a consumer's eligibility, or continued eligibility, for credit. The Coalition believes that the exceptions provided in § \_\_\_\_.30(d) are appropriate and should be retained in the Final Rule. These exceptions will allow creditors to obtain and use medical information in those relatively few situations when it is necessary and appropriate, such as for fraud prevention or to finance medical procedures.

We are concerned, however, with a provision in the Supplementary Information pertaining to obtaining the consumer's consent to obtain and use medical information. The Supplementary Information suggests that a consumer's consent should be obtained only in exceptional circumstances, and that the consent cannot be "preprinted" for the consumer to sign. We do not believe that restricting the ability to obtain a consumer's consent should be limited to unusual circumstances where the consumer handwrites his or her consent, especially if consent must be obtained using a separate form. Indeed, many loan applications may rely on preprinted forms and automated processing, which could limit the ability to rely on consents drafted by the consumer.

## **Limits on Redisclosure**

According to the Proposed Rule, if a creditor receives medical information about a consumer from a consumer reporting agency or from an affiliate of the creditor, the creditor may not disclose that information to any other person except as necessary to carry out the purpose for which the information was initially disclosed. We generally agree with this prohibition, but believe the limitation should be clarified. In particular, the creditor should be able to redisclose the medical information to regulators, attorneys, accountants, and others for limited purposes, such as fraud prevention. Therefore, the Agencies should clarify that a disclosure that is made for any purpose described in Section 502(e) of the GLBA is a disclosure that is necessary to carry out the purpose for which the information was initially disclosed.

## **Sharing Medical Information with Affiliates**

The term "consumer report" is defined in Section 603(d) of the FCRA. Within that provision is a statutory exclusion from the definition of a "consumer report." Specifically, Section 602(d)(2) excludes from the definition information that would otherwise be a "consumer report" but that is experience and transaction information, a communication of such information among affiliates, or a communication of "other" information among affiliates if the consumer receives a notice and declines to opt out of the sharing among affiliates. The FACT Act added a new paragraph (3) to Section 603(d) to specify that the exclusions provided in Section 603(d)(2) do not apply with respect to information disclosed by an affiliate if the information is

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medical information or certain types of related lists. However, new Section 603(d) (3) does not apply to disclosures in connection with the business of annuities, disclosures for any purpose permitted without authorization under certain regulations issued under the Health Insurance Portability and Accountability Act, or disclosures permitted by the Agencies. The Proposed Rule would permit affiliates to share medical information for any purpose described in Section 502(e) of the GLBA or in connection with a consumer's credit eligibility determination consistent with the Proposed Rule. The Coalition believes these additional exclusions to Section 603(d) (3) are appropriate and should be retained in the Final Rule.

### Conclusion

Again, the coalition appreciates the issuance of a Proposed Rule with exceptions that adhere to the congressional intent of Section 411 of the Act to preserve the ability of creditors to obtain and use medical information in those relatively limited circumstances when it is appropriate, and we appreciate the opportunity to suggest refinements to the Proposed Rule. We again wish to urge the Agencies to give particular consideration to issuing a Final Rule that is applicable to all creditors to be enforced by the appropriate Agency or other regulatory agency with the proper jurisdiction. Thank you for considering our views and please do not hesitate to contact us if we can offer further assistance.

Sincerely,

  
Jeffrey A. Tassey  
Executive Director