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May 28, 2004

Office of the Comptroller of the Currency
250 E Street, S.W.
Public Information Room
Mail Stop 1-5
Washington, DC 20219

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, DC 20429

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

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

RE: **Fair Credit Reporting Medical Information Regulation:
OCC Docket No. 04-09, Board Docket No. R-1188, FDIC
RIN 3064—AC81 OTS RIN 1550-AB88 (69 Fed. Reg.
23380 [April 28, 2004])**

Dear Sirs and Madams:

The Mortgage Bankers Association ("MBA") appreciates the opportunity to comment on the joint proposed rule (the "Proposal") of the Office of the Comptroller of the Currency,

Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of Thrift Supervision, and National Credit Union Administration (the "Agencies") concerning "Fair Credit Reporting Medical Information Regulations" (the "Regulations"). 69 Fed. Reg. 23380 (April 28, 2004). The Proposal implements provisions of the Fair and Accurate Transactions Act of 2003 ("FACTA") designed to limit the sharing and use of information about consumers' medical history and current health status.

MBA members recognize the particular sensitivity of medical information and are committed to using such information only when it is necessary for prudent loan underwriting and servicing. As was noted during the congressional debate on FACTA, the provisions to be implemented by this rule are intended "to protect the medical information of individuals without disrupting access to low[-]cost credit and the security of information." 149 Cong. Rec. H12218 (Nov. 21, 2003) (remarks of Rep. Kelly). MBA commends the Agencies for creating exceptions in the Proposal that will give creditors access to health-related information when they have a legitimate business need for that information, and generally supports the Proposal. We believe, however, that there are some improvements that could be made to fulfill the Agencies' goal of "protect[ing] legitimate operational [and] transactional . . . needs" as well as consumer privacy expectations. See 69 Fed. Reg. 23382 (April 28, 2004).

Request to Use Medical Information: Procedural

A number of our comments concern the implications of the Agencies' exception permitting a financial institution to obtain and use medical information if the consumer has requested such use in writing. See proposed § .30(d)(1)(vi). Because this is likely to be an important way for financial institutions to obtain the medical information that they occasionally need, we think it important that the mechanism for handling this request be made clear. We therefore suggest that the Regulations provide a simple form that can be used to evidence the consumer's request. Proper use of the form should provide a safe harbor from liability under the FCRA. Particularly in a brand-new regulation, such procedural certainty will go a long way towards securing industry compliance.

Request to Use Medical Information: Substantive

The Proposal reflects the Agencies' understanding that a consumer may make a very specific request of the creditor to consider targeted medical information. For example, a consumer whose credit history shows a bankruptcy may provide evidence that a particular illness or injury caused the bankruptcy. Credit policy guidelines commonly allow underwriters to treat a medically-related bankruptcy more favorably than other bankruptcies. The consumer request exception, however, which is the mechanism in the Proposal for conveying medical information of this sort to a creditor, is drafted so narrowly that it could be read to limit the financial institution to obtaining and using only "the specific medical information" which the consumer designates in writing that the financial institution may consider, and no other medical information even if it is potentially relevant.

Putting this power entirely in the hands of the consumer leaves lenders open to potential fraud. To continue with the above example, suppose that the consumer claims that a bankruptcy related to a disability and produces a doctor's statement discussing the disability. It is unclear from the Proposal whether a creditor would then have any right to obtain or consider corroborative information about whether the consumer filed a disability claim or about the disposition of that claim. Applicants should not be allowed to "cherry-pick" by limiting the creditor to obtaining only favorable medical information about them. Therefore, the Regulations should state that, once the consumer has designated specific medical information, the creditor may obtain any other medical information relevant to verifying the accuracy of the medical information provided.

This issue raises the question of what happens if the financial institution and the consumer differ as to how much medical information the financial institution should have to make its credit decision. The financial institution should be able to obtain all of the information it deems necessary to make that decision. The Regulations should make clear that, if a financial institution requests that a consumer provide medical information so that the financial institution can render a credit decision, and if the consumer refuses or provides only a portion of the requested information, then the financial institution can deny credit to the consumer on the grounds that the consumer's application was incomplete, without violating the FCRA.

Mental Capacity

Moving beyond consent-based use of medical information, the Proposal allows creditors to use medical information:

- (i) To determine whether the use of a power of attorney or legal representative is necessary and appropriate;
- (ii) To comply with applicable requirements of local, state, or federal laws; [or]
-
- (iv) For purposes of fraud prevention.

This addresses the situation, recognized by the Agencies, that some states have enacted laws that require consideration of medical information relating to mental capacity to prevent "financial abuse by caregivers." 69 Fed. Reg. at 23386.

MBA believes that the § __.30(d)(1) exceptions should be clarified in several ways to address the mental capacity issue. It is unclear whether the Proposal, as drafted, allows creditors to consider whether the applicant has the mental capacity to enter into a binding contract and create a valid security interest in the property. For example, if an applicant relies on disability income to qualify for the loan, and verification of the income reveals that part or all of the disability relates to a mental disability, many lenders currently require evidence of mental capacity to ensure that the borrower can enter into an enforceable agreement.

Furthermore, even when the applicant meets the minimal standard of legal capacity, there may be situations in which the creditor believes that the consumer may not fully

understand the nature of the loan or be able to determine whether accepting it would be in his or her best interests. As the Agencies recognize, making a loan under these circumstances could violate specific prohibitions against predatory lending, but the rule should also make clear that creditors may also consider such medical information to avoid committing an unfair or deceptive act or practice under federal or state law. As drafted, the Proposal does not even clearly allow a lender to consider information presented by a consumer's relatives that the consumer suffers from a mental disorder that prevents him or her from exercising sound judgment. In those circumstances, if the lender could not consider "medical information," it would be placed in a position where it either violated FCRA or made a loan that could be characterized as "predatory."

Therefore, MBA urges the Agencies to revise the Regulations to state that a creditor may consider information indicating that the applicant may lack the mental capacity to contract or otherwise may be unable to exercise sound judgment in evaluating whether the loan is in his or her best interests. Further, the regulation should state that "applicable requirements of local, state, or federal laws" include prohibitions in federal and state laws against unfair and deceptive acts or practices.

Disability and Workers Compensation Income

The Agencies have recognized in proposed § __.30(c) that creditors must be able to verify medical information when income on which the applicant relies to establish creditworthiness is contingent on a medical condition, such as disability income. Lenders must often collect additional information from physicians when an applicant is receiving workers compensation, to verify that the applicant is likely to continue to receive the income "for the foreseeable future." For example, Department of Veterans' Affairs, Lenders Handbook § 4.02 (July 1, 2000). An example should be added to the Regulations to make clear that it is permissible to obtain and use medical information in this common situation. The Regulations should also clarify that information about the terms of a disability insurance policy, which may be important in underwriting some applicants, such as self-employed borrowers, is not "medical information" and may be freely obtained and used if the applicant relies on it in establishing creditworthiness.

Life Expectancy as a Legitimate Concern of Creditors

Proposed § __.30(c) shows the Agencies' broad understanding that financial institutions may have legitimate reasons for wanting medical information concerning consumers, but it does not specifically authorize consideration of health status in connection with credit products that are tailored to individuals whose life expectancy is limited. For example, although most current reverse mortgage products do not take health status into account, lenders may, in the future, offer reverse mortgage loans outside their normal consumer age cut-offs if a younger person can show that she is terminally ill. This product would be analogous to a viatical settlement of a life insurance policy. In situations of this type, where life expectancy is an essential factor in determining price and eligibility for the credit product, creditors should not be prohibited from using that information in the credit decision. See § __.30(c)(1)(ii).

Continuing advances in medical care concerning slowly progressive, fatal diseases like AIDS and some cancers mean that there will be a continuing, perhaps increasing,

demand for products predicated on a remaining lifespan that is neither very short nor indefinitely long. The Regulations should not stifle innovation, but rather should permit financial institutions to take consumer medical information into account in making credit decisions when the product about which the decision is being made is available only to a class of consumers defined by some aspect of their medical information.

Declining to Consider Medical Information

By the same token, the Agencies understand, and the MBA readily acknowledges, that in the vast majority of instances creditors do not want to obtain information about consumers' medical histories. Such information is generally irrelevant to creditors' decisions and is nothing more than a burden on the credit decision-maker, even if the consumer is convinced of its relevance. The Proposal partially reflects this dynamic with its rule of construction that a financial institution receiving consumer medical information unsolicited does not "obtain" medical information. See § __.30(b). But it would solidify this understanding if the Regulations made clear that a creditor is under no obligation under FCRA to take medical information into account. Although the new FCRA provisions restrict the use of medical information, they do not require its use.

Coded Information

The Agencies request comment on how lenders should be allowed to consider information that has been "coded" by the consumer reporting agency ("CRA") to remove the identity of any medical service provider mentioned in the consumer report, as well as any specific information concerning any medical product, service, or device provided by that service provider. MBA supports the first of the three options suggested for accomplishing this goal — treating coded information as falling outside the definition of "medical information."

The apparent purpose of requiring CRAs to code medical information before reporting it (unless the consumer gives written consent to report uncoded information) is to allow creditors to continue to use information about consumers' payment records with medical providers in the same way that they use other credit history information, without compromising individuals' medical privacy. Therefore, we believe that FCRA, as amended, can be fairly interpreted as excluding coded information from the definition of "medical information."

An interpretation that coded information is "medical information," but that a creditor may use it under an exception, could require lenders that do not consider an individual's health status or history to create special procedures to ensure that their use, or otherwise permissible sharing, of the information falls within the exception. Since the purpose of the coding procedure is to strip the information of any significant health-related content, little purpose would be served by requiring lenders to incur additional expense in identifying relevant exceptions (or, alternatively, disregarding coded information for fear of violating the law).

Using and Sharing Pre-Effective Date Information

Along the same lines, it is important that the Regulations make clear that they apply only to information that is both collected after the implementation date and is used in connection with a credit decision made after the implementation date. Otherwise,

lenders will have to conduct their own "scrub" of credit report information in their files as of the effective date, to make sure that none of the information is subject to the restrictions on use and sharing of "medical information" in the new rules. Clarity on the effective date is particularly important for lenders that maintain common databases under the existing affiliate information-sharing or "joint user" exceptions, since they could otherwise be viewed as impermissibly sharing "medical information."

Effective Date

The Agencies seek comment on whether they should set an effective date for the Regulations (and for the underlying restrictions on obtaining and using medical information) other than the default date specified by the statute, which is 90 days after the final rule is issued. Because of the systems challenges that mortgage lenders face in implementing these and the many other FACTA regulations, 90 days is not an adequate period to come into compliance. Furthermore, the requirement for CRAs to code medical information does not go into effect until March 4, 2005. As noted, the coding requirement should greatly reduce the burden of dealing with medical information for many lenders. Finally, although the Federal Trade Commission ("FTC") has the authority to create exceptions like those proposed in the Regulations, it is not required to do so and has not yet issued a proposal. We assume that the FTC will eventually issue a rule providing similar exceptions to the medical-information requirements for lenders under its jurisdiction. If the Agencies' Regulations make the restrictions on obtaining and using information effective before the FTC exceptions apply, then institutions under FTC jurisdiction will be placed at a severe operational and competitive disadvantage.

For these reasons, we urge the Agencies to set an effective date for these provisions of the latest of (1) March 4, 2005; (2) six months after the final Regulations are issued; or (3) six months after the FTC issues a similar regulation.

Any questions about the foregoing should be addressed to Mary Jo Sullivan at 202-557-2859.

Thank you for your consideration.

Sincerely,



Kurt Pfothauer
Senior Vice President
Government Affairs