

Evans, Sandra E

From: Anna Slomovic [slomovic@epic.org]
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To: regs.comments@ots.treas.gov
Subject: OTS Docket No. 2004-16, Comments on Proposed Fair Credit Reporting Medical Information Regulations

Department of the Treasury, Office of Thrift Supervision
Docket No. 2004-16

Thank you for the opportunity to comment on the Proposed Fair Credit Reporting Medical Information Regulations. These proposed regulations were issued in response to the Fair and Accurate Credit Transactions Act (FACT Act). Electronic Privacy Information Center (EPIC) is submitting these comments on its own behalf and on behalf of individuals and organizations whose names and addresses appear below.

The FACT Act creates new restrictions on the manner in which creditors, such as banks and credit unions, can obtain and use medical information. It does this through amending the Fair Credit Reporting Act (FCRA). Generally, the FACT Act prohibits creditors from obtaining or using medical information about a consumer in connection with deciding whether the consumer is eligible for credit. The Act also directs the federal banking agencies to decide when it is necessary and appropriate for creditors to obtain and use medical information to protect legitimate operational, transactional, risk, consumer, and other needs.

The proposed rule generally prohibits creditors from obtaining and using medical information for deciding whether the consumer is eligible for credit. As directed by Congress, the proposed rule generally creates fairly narrow exceptions to this general prohibition where it is appropriate. We encourage you to continue this framework. It meets Congressional intent to restrict the inappropriate use of medical information for making credit decisions.

Our comments focus on a few areas in the proposed rule that we believe are particularly important.

A. Treatment of Financial Information that Is Related to Medical Debt

The proposed rule generally prohibits a creditor from obtaining and using medical information for making decisions about a consumer's credit eligibility. The rule then makes an exception that allows creditors to obtain and use financial information that happens to be related to medical debts, expenses and income. This provision of the rule permits creditors to obtain and use financial/medical information *only* if they treat the medical information as they would treat other debt information. This provision of the rule also prohibits creditors from taking the consumer's physical, mental, or behavioral health, condition or history, type of treatment, or prognosis into account as part of any such determination.

1. The rule should continue to require creditors to treat medical debt the same as other debt.

We strongly support the rule's requirement that medical debt be treated the same as other debt. This provision, contained in proposed section _____.30(c) permits a creditor to treat medically-related debt and income the same as other debt and income. It also prohibits a creditor from discriminating against the consumer based on their underlying medical condition, treatment, or prognosis.

The primary reason consumers are opposed to creditors' having access to their medical information is the concern that they will be discriminated against on the basis of the information. Congress intended to address these concerns and directed the Agencies to promulgate rule consistent with Congressional intent to restrict the use of medical information for inappropriate purposes.

This proposed provision generally strikes a reasonable balance between a bank's need to obtain and use financial information (which may be medically related) and the need to protect consumers from discrimination based on their medical condition.

We strongly urge you to retain the requirement that creditors treat medically-related debt the same as other debt and the prohibition against discriminating against consumers based on their physical, mental, or behavioral health, condition or history, type of treatment, or prognosis

2. This provision of the rule should be changed so that it only applies when the creditor has not specifically asked for medical information.

The proposed rule is intended to allow a creditor to obtain and use financial information that happens to be medically-related and to protect consumers against discrimination based on their medical information. To accomplish this goal, this part of the rule should state that creditor cannot specifically request medical information in their applications for credit. For example, this would allow an application to ask a consumer to list their debts, but would prohibit an application from asking consumers to specifically list their debts related to medical care or procedures.

This new approach would help achieve Congressional intent that medical information not be obtained and used inappropriately.

B. Consumers' Requests to Use Medical Information

The proposed rule [section __.30(d)(1)(vi)] allows a creditor to obtain and use medical information if the consumer requests in writing that the creditor use specific medical information for a specific purpose in determining the consumer's eligibility, or continued eligibility, for credit, to accommodate the consumer's particular circumstances. According to the banking agencies: This exception is designed to accommodate the particular medical condition or circumstances of the individual consumer and is not intended to allow creditors to obtain consent on a routine basis or as part of loan applications or documentation. This exception would not be met by a form that contains a pre-printed description of various types of medical information and the uses to which it might be put. Instead, it contemplates 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.

We support the banking agencies' stated approach which protects consumers' medical information from inappropriate uses, as directed by Congress. This approach ensures that the request to use medical information is voluntary and is initiated by the consumer. However, this intent is not expressly included in the text of the proposed rule.

Proposed section __.30(d)(1)(vi) should be amended to expressly state that creditors may not request or require consent under this provision on a routine basis or as part of a loan application.

C. Affiliate Sharing Should Be Limited

The FACT Act adds a new section to the FCRA which restricts the sharing of medical-related information with affiliates if that information otherwise meets the definition of "consumer report" under the FCRA. Generally, certain information (such as transaction or experience information) that is shared among affiliates is not considered to be a consumer report under the FCRA. The new section provides, however, that if this information is medical-related information, the affiliate-sharing exception will not apply and the information will be considered to be a consumer report. Medical-related information includes medical information, as defined in the FACT Act, as well as other lists based on payment transactions for medical products and services.

The new section also provides several specific exceptions that allow creditors to disclose medical information to affiliates according to the same rules that apply to other non-medical information. The section also permits the federal banking Agencies to determine, by order or regulation, that other exceptions are necessary and appropriate. In addition to statutory exceptions that permit affiliate sharing of medical information, the Agencies have proposed section __.31(b)(5), which would allow creditors to share with affiliates medical-related information in connection with a determination of the consumer's eligibility for credit consistent with proposed section __.30. There is no explanation as to why the Agencies believe this proposed exception is necessary and appropriate.

We believe that the proposed approach is overbroad, and appears inconsistent with the specific conditions imposed in other provisions or the proposed rule and the FACT Act. Proposed section __.31(b)(5) should be deleted. At a minimum it should be amended to state that the exception does not apply to the extent that the creditors has obtained medical information in a credit report furnished in accordance with 604(g)(1)(B) of FCRA or pursuant to a consumer's request.

D. Additional Comment Period

The banking agencies have asked people to submit comments on whether, in the final rule, they should create any additional or different exceptions to the general prohibition against obtaining and using medical information for making decisions about a consumer's credit eligibility. We believe the fairly narrow exceptions contained in the proposed rule are sufficient to protect legitimate operational, transactional, risk and other needs consistent with Congressional intent.

In Congressional hearings leading up to the passage of the FACT Act, representatives of the industry repeatedly took the position that banks did not request and did not use medical information for consumer credit purposes. There was no substantive discussion of when the use of medical information for consumer credit decisions might be appropriate and necessary. Thus, consumers entered this rule-making procedure with little knowledge of when banks actually use medical information in making credit decisions and whether such use might be appropriate. If the financial industry requests exceptions for additional or different practices during the comment period, it is only fair that consumers be given the opportunity to comment on whether these new exceptions are necessary and appropriate prior to the rule's becoming final.

Anna Slomovic
Sr. Fellow
Electronic Privacy Information Center
1718 Connecticut Ave., NW, Suite 200
Washington, D.C. 20009
Phone: 202.483.1140 ext. 118
Fax: 202.483.1248

Ken McEldowney
Executive Director
CONSUMER ACTION
717 Market Street, Suite 310
San Francisco, CA 94103
Phone: 415.777.9648
Fax: 415.777.5267

Ed Mierzwinski
Consumer Program Director
National Association of State PIRGs (U.S. PIRG)
218 D St SE, Washington, DC 20003
Phone: 202-546-9707 x314
Fax 202-546-2461

Mara Keisling
Executive Director
National Center for Transgender Equality
1325 Massachusetts Ave., NW, Suite 600
Washington, DC 20005
Phone: 202.639.6331
Fax: 202.393.2241

Deborah Pierce
Executive Director
PrivacyActivism

Phone:

415-225-1730

Robert Ellis Smith
Publisher
Privacy Journal
PO Box 28577
Providence RI 02908

Beth Givens, Executive Director
Tena Friery, Research Director
Privacy Rights Clearinghouse
3100 5th Avenue Suite B
San Diego, CA 92103
Phone: 619.298.3396