

# THE FINANCIAL SERVICES ROUNDTABLE



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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

Dear Sir or Madam:

The Financial Services Roundtable<sup>1</sup> (the "Roundtable") 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

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<sup>1</sup> The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Roundtable member companies provide fuel for America's economic engine accounting directly for \$18.3 trillion in managed assets, \$678 billion in revenue, and 2.1 million jobs.

Insurance Corporation (“FDIC”), and the National Credit Union Administration (“NCUA”), (collectively, the “Agencies”).

## **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.

The Roundtable 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. Roundtable member companies would like to offer the following recommendations, which we believe would enhance this proposal.

- 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 (“DCC”) and debt suspension agreements (“DSA”).
- The rule of construction which provides a safe harbor for unsolicited medical information is more favorable than creating a separate exception to the prohibition.
- Consumer reports containing coded medical information should be excluded from the definition of medical information.
- The Agencies should be allowed to draft regulations that are enforced by the other Agencies.
- The FTC would retain enforcement authority despite the lack of rulemaking power.

## **General comments about the definition of medical information and exceptions**

Roundtable member companies believe 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 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 clarification on this issue.

Roundtable members generally support 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 which indicates that the list of items 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, such as assets, that may have been unintentionally omitted by the Agencies. We also recommend adding a specific exception that would allow creditors to determine whether a consumer has the mental capacity to enter into a valid contract.

Roundtable member companies favor 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 on the proposed rules.

### **The proposed exceptions have 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 comment on whether or not the proposed exceptions adhere to this standard.

Roundtable members are concerned that the exceptions under section 411 are limited only to those entities in which the Agencies have jurisdiction. Although each one of the Agencies have proposed almost 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 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. One group seriously affected by this limitation would be nonaffiliated business partners of banks, such as mortgage brokers and motor vehicle dealers. These entities would be unable to apply the exceptions to their business practices and therefore would be disadvantaged. Even banks and other covered institutions would be negatively impacted because they often originate loans through, or purchase loans from, these entities. 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. Under section 411, these non-covered entities would not be allowed to consider an individual's past, present or future physical, mental, or behavioral health 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 account for any medical debt delinquency that may affect the applicant's credit eligibility.

Roundtable members believe that proposed exceptions would also not apply to medical providers since they are not under the Agencies' jurisdiction. We believe this creates serious public policy issues. Not having medical providers included in the scope of the regulations could have a significant impact on how medical services are provided to consumers, particularly consumers who have limited access to medical insurance.

Medical professionals play a crucial role in making financing available for medical transactions. Doctors 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. Doctors do not make the credit eligibility decision, but they are often responsible for informing patients about their financing options and help to facilitate the financing process with financial institutions. 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. The patients harmed the most would be consumers who do not have access to health insurance. Therefore, we believe that doctors and medical providers should fall within the scope of the regulations.

The Roundtable does not believe that the statute should limit the exceptions under section 411 to institutions within the Agencies' jurisdiction. We recommend that the statute 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. We believe if Congress intended to limit the regulations to those creditors in the Agencies' jurisdiction, the statute would be more explicit. Congress has taken this approach on previous occasions. For example, 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. In particular, we urge the Agencies to consider the serious public policy issues that are created by excluding medical providers from the proposed rules.

Alternatively, if the Agencies choose not to apply the exceptions to all creditors, we recommend that the Agencies at least include within the scope of their final rules persons arranging credit on behalf of the entities covered by the proposed rule. We believe it is inappropriate to have stricter standards for arrangers of credit. An exception for a creditor may become nullified by failing to provide the same exception to an arranger of credit. For example, when financing medical related transactions, a provider of medical services serves as a liaison between the lender and the consumer. This provider has no role in determining the consumer’s creditworthiness. The incidental use of medical information is necessary to assist the consumer in obtaining financing. We believe that failing to expand the scope of the exceptions to arrangers of credit would significantly impact these transactions. Therefore, we strongly urge the Agencies to ensure that the exceptions include all entities that work with banking institutions, and their affiliates, to provide financing for medical services and products.

### **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. Roundtable members recommend 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 on 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.

The Roundtable believes that the proposed interpretation fails to address all circumstances in which medical information may 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.

The exception eliminates the operational and legal uncertainties associated with the proposed regulation. This proposed exception 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 “necessary and appropriate use of medical information”.

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

The Roundtable 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 would 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.

However, we note that the proposed construction does not permit a creditor to provide the consumer favorable treatment based on unsolicited medical information. While the proposed rule does not penalize a creditor for receiving unsolicited medical information, it does not allow the creditor to grant credit that may not otherwise be granted. For example, unsolicited medical information may factor favorably in the credit decision in a situation where a consumer is applying for a specific product that is only offered to people with certain medical or behavioral problems. Therefore, we recommend amending section \_\_.30(b)(1)(ii) to read: "Does not use or uses that information favorably in determining whether to extend or continue to extend credit to the consumer and the terms on which credit is offered or continued."

### **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.

We also urge the Agencies to consider providing a safe harbor in the final rule for creditors who inadvertently used uncoded medical information. Many creditors rely on automated systems to review and approve credit applications based on a review of credit reports. We believe that consumer reporting agencies may fail to code medical information properly, especially in the early days of implementing the proposed rule. If consumer reports are not coded properly, creditors (through their systems) may inadvertently rely on this information.

### **The Agencies should be allowed to draft regulations that are enforced by the other Agencies**

We believe that the Agencies should 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 not 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.

We believe that there was an oversight by Congress in excluding the FTC from drafting regulations under section 411 of the FACT Act. We would encourage Congress to cure this defect by passing legislation that gives the FTC the appropriate rulemaking authority.

### **Conclusion**

Roundtable member companies appreciate 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 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.

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 additional time to implement these regulations.

If you have any further questions or comments on this matter, please do not hesitate to contact me or John Beccia at (202) 289-4322.

Sincerely,

*Richard M. Whiting*

Richard M. Whiting  
Executive Director and General Counsel