



GEORGETOWN UNIVERSITY

Health Policy Institute

July 13, 2005

Office of the Comptroller of the Currency
Docket No. 05-10

Board of the Governors of the Federal Reserve System
Docket No. R-1188

Federal Deposit Insurance Corporation
RIN 3064-AC81

Department of Treasury
Office of Thrift Supervision
No. 2005-16

National Credit Union Administration
12 CFR 717

Via e-mail

Re: Comments on Interim Final Rules, Fair Credit Reporting Medical Information Regulations

To Whom It May Concern:

Thank you for the opportunity to comment on the Interim Final Fair Credit Reporting Medical Information Regulations. I have studied issues affecting medical privacy for the last several years and have been actively involved in the process of attempting to ensure that banks and other creditors do not obtain and use medical information inappropriately. This issue has gained particular importance as financial institutions increasingly have access to detailed identifiable medical information through processing health information on behalf of health plans and providers.

The Agencies are to be commended for the interim final rule. In accordance with Congressional mandate, the interim final rule creates fairly narrow exceptions to the Fair and Accurate Credit Transactions Act's (FACT Act) general prohibition against creditors' obtaining and using medical information to determine a consumer's

eligibility for credit. This framework should be retained. The narrowly drawn exceptions further Congressional intent to restrict the use of medical information for making credit decisions to only those purposes that are truly necessary and appropriate.

DEFINITIONS

SEC __.3

Definition of “medical information” should be retained

The interim final rule defines “medical information” as information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to (1) the past, present, or future physical, mental, or behavioral health or condition of an individual; (2) the provision of health care to an individual; or (3) the payment for the provision of health care to an individual. The definition includes coded information.

The Agencies considered, but rejected, excluding coded information from the definition. Including coded information in the definition is appropriate and is not supported by the Act. Excluding coded information from the definition of "medical information" would improperly narrow the statutory definition. Moreover, removing coded information from the definition of “medical information” would effectively remove such information from the anti-discrimination protections afforded in other provisions of the rule.

Recommendation: The interim final rule definition of "medical information" should be retained

GENERAL PROHIBITION ON OBTAINING AND USING MEDICAL INFORMATION IN CONNECTION WITH A DETERMINATION OF ELIGIBILITY FOR CREDIT

SEC. __.30

Sec. __.30(b) General Prohibition

The interim final rule contains a general prohibition on obtaining or using medical information pertaining to a consumer in connection with any determination of the consumer’s eligibility, or continued eligibility, for credit and then creates limited exceptions. This approach is consistent with the Act and Congressional intent that medical information only be obtained and used for credit-related purposes when appropriate and necessary.

Recommendation: The interim final rule strongly supports Congressional intent and should be retained.

Sec. __.30(b)(2) Definition of “eligibility, or continued eligibility, for credit”

Including “terms of credit” in the definition of “eligibility, or continued eligibility, for credit”

The interim final rule appropriately defines “eligibility, or continued eligibility, for credit” as including the terms on which credit is offered. The Act is designed to protect against the inappropriate use of medical

information in credit decisions. This would encompass not only whether consumers are offered credit but also the terms under which they are offered credit. For example, a consumer should not have to pay a higher rate of interest due to their medical condition. Therefore, the terms on which credit is offered are rightly encompassed by the term “eligibility, or continued eligibility for, credit.”

Recommendation: The interim final rule strongly supports Congressional intent and should be retained.

RULE OF CONSTRUCTION FOR RECEIVING UNSOLICITED MEDICAL INFORMATION

SEC. __.30(c)

Proposed Rule of Construction

Sec. __.30(c)(1)

The interim final rule includes a rule of construction for receiving unsolicited medical information. Under the rule, a creditor does not obtain medical information in violation of the prohibition if it receives medical information pertaining to a consumer in connection with any determination of the consumer’s eligibility, or continued eligibility, of credit without specifically requesting medical information. The interim final rule also clarifies that a creditor that receives information in this manner may use that information in connection with any determination of the consumer's eligibility or continued eligibility for credit to the extent that the creditor can rely on at least one of the exceptions listed in __.30(d) or (e). This rule of construction clearly applies to both coded and uncoded medical information in light of the final rule's definition of that term.

The interim final rule is more clearly written than the proposed rule. The separate provisions addressing obtaining unsolicited information and using unsolicited information are an improvement over the rule as originally proposed.

ELIMINATION OF CONSUMER REPORT EXCEPTION

The proposed rule included a separate exception (.30(d)(1)(iii)) that permitted a creditor to obtain and use medical information for determining a consumer’s eligibility for credit to the extent such information is included in a consumer report from a consumer reporting agency, in accordance with 15 U.S.C. Sec. 1681b(g)(1)(B) [section 604(g)(1)(B) of FCRA] and is used for the purpose(s) for which the consumer provided specific written consent. In response to submitted comments, this provision has been eliminated from the final interim rule. The elimination of this provision is appropriate. Other exceptions adequately afford creditors sufficient flexibility with respect to the use of medical information contained in consumer reports, while protecting consumers from improper uses.

Recommendation: The elimination of the consumer report exception should be retained.

FINANCIAL INFORMATION EXCEPTION

SEC. __.30(d)

The interim final rule creates a general “financial information” exception which permits creditors to obtain and use medical information pertaining to a consumer in connection with a determination of the consumer’s eligibility so long as three conditions are met:

- The information is the type of information routinely used in making credit eligibility determinations, such as information relating to debts, expenses, income, benefits, assets, collateral, or the purpose of the loan, including the use of proceeds;
- The creditor uses the medical information in a manner and to an extent that is no less favorable than it would use comparable information that is not medical information in a credit transaction; and
- The creditor does 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.

The interim final rule also provides several examples of conduct which is acceptable and not acceptable under the rule.

This provision essentially permits a creditor to treat medically-related debt and income no less favorably than other debt and income. However, the provision prohibits financial institutions from adversely discriminating against the consumer on the basis of underlying medical condition, treatment or prognosis.

The primary reason consumers are opposed to financial institutions’ 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.

Recommendation: The interim final rule should be retained because it generally strikes a reasonable balance between a creditor’s need to obtain and evaluate financial information (which may incidentally be medically related) and the need to protect consumers from discrimination based on their medical condition.

FINANCIAL INFORMATION EXAMPLES

The proposed examples appropriately illustrate the rule and should be retained.

POWERS OF ATTORNEYS EXCEPTION

SEC. __.30(e)(1)(i)

The Agencies revised the exception in the proposed rule that broadly permitted a creditor to obtain and use medical information to determine whether the use of a power of attorney or legal representative is necessary or appropriate. The interim final rule clarifies that such action is permitted only to determine 1) whether the use power of attorney or legal representation that is triggered by a medical event or condition is necessary or appropriate or 2) whether the consumer has the legal capacity to contract when a person seeks to exercise a power or attorney or act as a legal representative for a consumer based on an asserted medical event or condition.

Recommendation: The interim final rule appropriately clarifies that obtaining and using medical information in relation to a power of attorney or legal representation is only appropriate where such legal capacity is triggered by a medical event and should be retained.

FRAUD PREVENTION AND DETECTION EXCEPTION

SEC. __.30(e)(iv)

The interim final rule clarifies that creditors may obtain and use medical information only "to the extent necessary" for purposes of fraud prevention or detection. This is a significant improvement over the proposed provision which would have permitted a creditor to obtain and use medical information in connection with any determination of the consumer's eligibility, or continued eligibility, for credit for purposes of fraud prevention and detection.

Recommendation: The language limiting obtaining medical information for fraud and abuse purposes only "to the extent necessary" should be retained.

FINANCING MEDICAL PRODUCTS OR SERVICES

SEC. __.30(e)(1)(v)

Interim final rule section __.30(e)(1)(v) permits a creditor to use and obtain medical information for determining credit eligibility in the case of credit for the purpose of financing medical products or services, to determine and verify the medical purpose of a loan and the use of proceeds.

This exception specifically applies to those creditors that finance medical products or services. The provision does not contain broad permission to obtain and use medical information. Rather, it specifically identifies the purposes for which this information can be used and obtained—only for determining and verifying the medical purpose of the loan and the use of the proceeds. These limitations are important to ensure that medical information only be used for legitimate purposes.

This approach strikes the appropriate balance between satisfying the legitimate needs of medical finance creditors and the intent of Congress to limit the use of medical information in credit eligibility determinations.

Recommendation: This interim final rule provision should be retained.

EXAMPLES RELATED TO FINANCING MEDICAL PRODUCTS OR SERVICES

Section __.30(e)(3)

The example of when a creditor may obtain and use medical information for verifying the medical purpose of the loan or use of the proceeds has been revised to clarify that the creditor may verify that the procedure will be performed, as opposed to "confirm[ing] the consumer's medical eligibility" as provided in the proposed rule.

Recommendation: The example, as revised, should be retained.

MEDICAL ACCOMMODATION

SEC. 30(e)(1)(vi)

Final interim rule section __.30(e)(1)(vi) provides that a creditor may obtain and use medical information if the consumer (or their legal representative) specifically requests that the creditor use medical information for a specific purpose in determining the consumer's eligibility, or continued eligibility, for credit, to accommodate the consumer's particular circumstances, and such request is documented by the creditor.

The approach is appropriate and 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.

The new example, .30(e)(4)(v) clarifies that a creditor may not routinely request medical information under this provision.

Recommendations: Retain the interim final rule and the example.

ELIMINATION OF AGENCY ORDER EXCEPTION

Proposed section __.30(d)(1)(vii) would have allowed creditors to obtain and use medical information “As otherwise permitted by order” of the Agencies. This provision is unnecessary and the Agencies have omitted it from the final rule. The Agencies have expressed the intent to make amendments to the rules in consultation and coordination with each other.

Recommendation: This provision should continue to be excluded from the final rule.

CONCLUSION

The interim final rule is generally well-crafted and provides significant new privacy protections for consumers.

Should you have questions about these comments, please do not hesitate to contact me either by e-mail at jlp@georgetown.edu or via telephone at 202-687-4039.

Sincerely,

Joy Pritts, J.D.
Assistant Research Professor
Health Policy Institute