



October 26, 2005

TO: Board of Directors

FROM: William F. Kroener, III
General Counsel

Christopher J. Spoth
Acting Director
Division of Supervision and Consumer Protection

SUBJECT: Final Rule - 12 C.F.R. Part 334
Medical Privacy Regulations under the Fair and Accurate
Credit Transactions Act of 2003¹

I. Introduction and Recommendation

The Fair and Accurate Credit Transactions Act of 2003 (FACT Act) was signed into law on December 4, 2003. The FACT Act requires a number of regulations on a variety of measures covered in the Act. This Board Case recommends approval of a Final Rule on Section 411 of the Act concerning medical privacy. The attached rule takes into account comment letters received in response to the joint Interim Final Rule published in the Federal Register on June 10, 2005. 70 Fed. Reg. 33,958 (June 10, 2005).

In the Interim Final Rule, the FDIC, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Office of Thrift Supervision (the Agencies), and the National Credit Union Administration (NCUA) provided exceptions to Section 411's prohibition on the ability of creditors to obtain and use medical information in credit decisions. The Agencies and NCUA provided additional exceptions to the Section's prohibition on sharing medical information with affiliates. Finally, the Agencies and NCUA provided that a person receiving medical information about a consumer from a consumer reporting agency or an affiliate is prohibited from disclosing that information to any other person, except as necessary to carry out the purposes for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

The FDIC received nine comment letters on the interim final rule. Based on our review of those letters (and three additional letters received by the Federal Reserve), the Agencies and the NCUA have made a limited number of changes to the interim final rule. Comments were received from a variety of industry and community groups, privacy advocates, and health care associations. One change provides further clarification to an example of one of the exceptions to

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the Section 411 prohibitions discussed above. The remaining changes are technical and non-substantive.

The Division of Supervision and Consumer Protection and the Legal Division recommend that the Board approve publication of the final rule in the Federal Register. In addition, we recommend that the Board authorize the Executive Secretary and the General Counsel to make technical, nonsubstantive, conforming changes to the text of the final rule where necessary to ensure that the FDIC and the other Agencies can jointly publish the rule or take such other actions and issue such other documents as they deem necessary or appropriate to fulfill the Board's objectives.

III. Discussion

The interim final rule dealt primarily with two areas of regulation: exceptions to the prohibition on obtaining and using medical information for credit eligibility decisions and exceptions to the restrictions on affiliate sharing of medical information.

A. Obtaining and Using Medical Information for Eligibility for Credit Decisions

Section 411 of the FACT Act stated a general rule that a creditor may not obtain or use a consumer's medical information, as defined in the Act, in connection with a determination of a consumer's eligibility or continued eligibility for credit. The provision itself contained no exceptions to the prohibition. The Agencies and the NCUA were required to publish rules setting forth exceptions "that permit transactions . . . that are determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer and other needs . . ."

Scope of the exceptions

While the prohibition on obtaining and using medical information applies to all creditors, Section 411 did not authorize the Federal Trade Commission (FTC) to write regulations providing exceptions to these prohibitions. In a joint Notice of Proposed Rulemaking (NPR) published in the Federal Register on April 28, 2004, [69 Fed. Reg. 23,380], the Agencies and NCUA only dealt with entities under their respective jurisdictions and did not deal with entities under FTC jurisdiction. The Agencies and NCUA received comments to the NPR expressing a concern that it would not be fair if the exceptions to the statutory prohibition applied to some, but not all, creditors. The interim final addressed this concern in three ways:

- First, each agency's rule covered creditors that participated in a credit transaction with an entity regulated by that agency. For example, the FDIC's rule covers any creditor that participates as a creditor in a transaction with state banks insured by the FDIC (other than members of the Federal Reserve System) or insured State branches of foreign banks. A participating entity may include, for example, a motor vehicle dealer that arranges credit for a state non-member bank.

- Second, the interim final rule included a separate regulation under the Federal Reserve Board's part of the regulations covering creditors not otherwise covered by the individual rules of the Agencies and the NCUA.
- Third, the agencies will consult and coordinate with each other regarding any amendments to the rules to assure, to the extent possible, that the regulations remain consistent with respect to all creditors.

Primarily because the second of these provisions was not presented to the public for comment, the Agencies put out the June, 2005 document as an interim final rule, rather than as a final rule, and accepted comments. Many of the commenters to the interim final rule supported the approach taken in that proposal. No commenter objected to the expanded scope of the exceptions. The scope provisions are unchanged in the Final Rule.

The Creditor-related Exceptions

The interim final rule provided several exceptions that would permit creditors to obtain and use medical information. These exceptions permitted creditors to obtain and use medical information for a variety of limited situations including when the information pertained to debts or other financial considerations, when the customer specifically requests that the creditor use the medical information, when the customer seeks to borrow money to finance a medical procedure, to prevent fraud, or when used to underwrite credit insurance or debt cancellation contracts.

Based on the comments received, the Agencies and the NCUA amended an example to one of the exceptions. That exception, called the financial information exception, permits obtaining and using medical information in credit decisions under a three-part rule. First, the information must be 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. Second, the creditor must use the information in a manner and to an extent no less favorable than it would use comparable information that is not medical information in a credit transaction. Third, the creditor must not take the consumer's physical, mental, or behavioral health, condition or history, type of treatment, or prognosis into account as part of the credit eligibility decision.

One commenter recommended that the final rule explicitly state that creditors may consider medical information about individuals claiming medically-based income, such as workers' compensation, without obtaining consent from the individual. The Agencies agree that workers' compensation is income that would be covered by the financial information exception so long as it is the type of information routinely used in making credit eligibility determinations. The Agencies have revised one of the examples to this exception to add a reference to workers' compensation.

The other amendments to the listed exceptions are technical and non-substantive in nature.

B. Using Medical Information for Affiliate Sharing Purposes

Section 411 also stated a general rule that an affiliate that shares certain medical information could be considered a “consumer reporting agency” under the FCRA. The interim rule covered sharing of “medical information” as defined in the statute (including an individual’s past, present, or future physical, mental or behavioral health; provision of health care to an individual; and payment for health care), as well as certain lists based on payment transactions for medical products or services. As compared to the creditor prohibitions, the statute provided five exceptions to the affiliate-sharing prohibition. Those exceptions included sharing for purposes permitted under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the Gramm-Leach-Bliley Act.

In addition to the statutory exceptions, the interim final rule also contained two additional exceptions. The first exception provides that the special restrictions on sharing the information with affiliates do not apply if the information is disclosed to an affiliate in connection with a determination of the consumer’s eligibility for credit under the exceptions discussed above. The second exception provides that the special restrictions on sharing with affiliates do not apply if otherwise permitted by order of the appropriate agency.

In the attached final rule, the Agencies and NCUA do not make any changes to this Section. Some commenters requested that the Agencies and NCUA create a sixth rule to cover entities under the FTC’s jurisdiction, but, as stated in the preamble, Section 411 provided rule-writing authority for the FTC with respect to affiliate sharing. The Agencies have forwarded comments on this issue to the FTC for its consideration.

C. Redisclosure

The final rule incorporated a provision in Section 411 regarding the limits on redisclosure of medical information. This section provided that a person receiving medical information about a consumer from a consumer reporting agency or an affiliate is prohibited from disclosing that information to any other person, except as necessary to carry out the purposes for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order. After a review of the one relevant comment, the redisclosure provision is republished without change in the final rule.

D. Effective Date.

The Agencies and NCUA changed the effective date for the exceptions to the rules from March 7, 2006 (270 days after the date of publication of the interim final rule in the Federal Register) to April 1, 2006, the first day of the calendar quarter following that prior date.

Attachments

Concur: _____

Jodey Arrington
Chief of Staff to the Chairman