WELLS FARGO

Peter L. McCorkell
Senior Counsel

Law Department
633 Folsom Street
Seventh Floor
San Francisco, CA 94107
415-396-0940
415-975-7863

October 13, 2005

By Electronic Delivery Robert E. Feldman Executive Secretary Federal Deposit Insurance Corporation 550 17th Street, NW Washington, DC 20429 Attention: Comments RIN 3064-AC81	Ms. Jennifer J. Johnson Secretary Board of Governors of the Federal Reserve System 20th Street and Constitution Avenue, NW Washington, DC 20551 Attention: Docket No. R-1188
Public Information Room Office of the Comptroller of the Currency 250 E Street, SW Mail Stop 1-5 Washington, DC 20219 Attention: Docket No. 05-10	Regulation Comments Chief Counsel's Office Office of Thrift Supervision 1700 G Street, NW Washington, DC 20552 Attention: No. 2005-16
Mary Rupp Secretary of the Board National Credit Union Administration 1775 Duke Street Alexandria, VA 22314-3428	

Re: Interim Final Rule—Fair Credit Reporting Medical Information Regulations

Ladies and Gentlemen:

This comment letter is submitted on behalf of Wells Fargo Bank ("Wells Fargo Bank") in response to the request for public comment issued by the Federal Deposit Insurance Corporation, Federal Reserve Board ("Board"), Office of the Comptroller of the Currency ("OCC"), Office of

Federal Deposit Insurance Corporation
Board of Governors of the Federal Reserve System
Office of the Comptroller of the Currency
Office of Thrift Supervision
National Credit Union Administration

October 13, 2005

Thrift Supervision and the National Credit Union Administration ("NCUA") (collectively, the "Agencies") regarding the Interim Fair Credit Reporting Medical Information Regulations ("Interim Final Rule") under the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"). Wells Fargo appreciates the opportunity to comment on this very important matter.

Wells Fargo supports the Agencies in their promulgation of the Interim Final Rule. Wells Fargo believes, however, that a clarification is necessary in order recognize one of the day-to-day realities of the uses of medical information in the provision of financial services to businesses, especially small businesses.

Section 604(g)(2) of the Fair Credit Reporting Act ("FCRA") provides that "[e]xcept as permitted pursuant to paragraph (3)(C) or regulations prescribed under paragraph (5)(A), a creditor shall not obtain or use medical information . . . pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit." Section 604(g)(5)(A) of the FCRA, as added by the FACT Act ("Credit Granting Exceptions"), provides that "[e]ach Federal banking agency and the [NCUA] shall . . . prescribe regulations that permit transactions under paragraph (2) that are determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs." In April of 2004, the Agencies proposed rules to implement sections 604(g)(2) and 604(g)(5)(A). In June of 2005, the Agencies adopted the Interim Final Rule to implement these sections while, at the same time, soliciting comments on the Interim Final Rule.

The Application of the Interim Final Rule to Incapacity Clauses in Loans to Small Businesses Needs to be Clarified

The FCRA, as amended by section 411 of the FACT Act, provides a broad prohibition against creditors obtaining or using medical information in connection with credit eligibility determinations, except as provided by Agency regulations. The Interim Final Rule reiterates the general prohibition against creditors obtaining or using medical information in connection with any determination of a consumer's eligibility for credit, subject to the exceptions in the Interim Final Rule. Wells Fargo strongly supports the exceptions to the broad prohibition set forth in the Interim Final Rule; however, Wells Fargo believes that the Interim Final Rule should be clarified to reflect the day-to-day realities of the uses of medical information in loans to businesses.

Business loans often have one or more principals of the business as a personal obligor on the note either as a guarantor or otherwise. The Federal Trade Commission ("FTC") has recognized that a business transaction in which an individual has accepted personal liability for the business debt as involving the consumer, thus providing a permissible purpose for the lender to obtain a consumer report under section 604(a)(3)(A) of the FCRA. In recognizing the

permissible use of consumer reports of obligors in the business credit setting, the FTC acknowledged the necessity for such information on the consumer. The ability to obtain a consumer report on these individuals raises the specter that the availability of credit to the small business may be viewed as a determination of one or more of the principal's eligibility for credit and, therefore, covered by the limitation in section 604(g)(2) of the FCRA and the Interim Final Rule.

The collectibility of many business loans is affected by the ability of the principals to function in the business. As a result, certain types of business loan agreements typically contain, as one of the events of default, the incapacity or death of an obligor or guarantor. While the Agencies have stated that death of an individual is not, by itself, medical information, incapacity appears to be viewed as medical information.[1] Wells Fargo respectfully requests that the final rule clarify that the use of medical information to determine the capacity or incapacity of an obligor on a business loan would not violate the prohibition on obtaining or using medical information in connection with a determination of eligibility, or continued eligibility, of a consumer for credit because it is used to determine the continued eligibility of the business for credit rather than the continued eligibility of the consumer for credit.

In the alternative, Wells Fargo believes that the Agencies should clarify that such a use falls within the scope of the exception which provides that a creditor may obtain and use medical information pertaining to a consumer in connection with a determination of the consumer's eligibility, or continued eligibility, for credit if "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." The use of medical information to determine the capacity or incapacity of the obligor on a business loan would be used in the same manner as other information, such as the incarceration of a principal of the business affecting the triggering of an event of default under the material adverse change clauses that are also common in small business lending agreements. Accordingly, the use of medical information for this purpose should be viewed as coming within this exception.

Finally, it is important to recognize that these incapacity clauses exist in large numbers of current business loan agreements and that an inability to act on these clauses would materially increase the risk to the lending financial institutions on these loans. Further, going forward, it is important to be able to continue to use these clauses. While more general material adverse change clauses may be viewed as also covering events of incapacity of a principal of the business, the standard of proof under these more general clauses is different. The general language of material adverse change clauses is more likely to lead to litigation and losses to the lending financial institutions, with an attendant tightening in underwriting standards and reduction in the availability of credit to certain businesses, especially small businesses.

---

[1] *See, e.g.,* 12 C.F.R. § 41.30(e)(1)(i).

Federal Deposit Insurance Corporation
Board of Governors of the Federal Reserve System
Office of the Comptroller of the Currency
Office of Thrift Supervision
National Credit Union Administration

October 13, 2005

* * * *

In conclusion, Wells Fargo appreciates the opportunity to comment on this very important topic. If you have any questions concerning these comments, or if we may otherwise be of assistance in connection with this matter, please do not hesitate to contact me, at (415) 396-0940.

Sincerely,

Peter L. McCorkell
Senior Counsel