COMMENTS of the National Consumer Law Center
to the
Office of the Comptroller of the Currency
12 CFR Part 41
Docket No. 05-10

Office of Thrift Supervision
12 CFR 571
No. 2005-16

Federal Reserve System
12 CFR 222 and 232
Docket No. R-1188

Federal Deposit Insurance Corporation
12 CFR 334
RIN 3064-AC81

National Credit Union Administration
12 CFR 717

Interim Final Rule - Fair Credit Reporting Medical Information

The National Consumer Law Center ("NCLC")[1] submits the following comments on behalf of its low income clients, as well as the National Association of Consumer Advocates,[2] regarding the interim final rule implementing the guidelines for the use of medical information under the Fair Credit Reporting Act ("FCRA").[3] This rule creates exceptions to the general prohibition in the FCRA forbidding creditors from obtaining or using medical information in connection with credit eligibility determinations.[4] The FCRA[5] required the federal banking

[1] **The National Consumer Law Center** is a nonprofit organization specializing in consumer credit issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys around the country, representing low-income and elderly individuals, who request our assistance with the analysis of credit transactions to determine appropriate claims and defenses their clients might have. As a result of our daily contact with these practicing attorneys, we have seen numerous examples of invasions of privacy, embarrassment, loss of credit opportunity, employment and other harms that have hurt individual consumers as the result of violations of the Fair Credit Reporting Act. It is from this vantage point – many years of dealing with the abusive transactions thrust upon the less sophisticated and less powerful in our communities – that we supply these comments. *Fair Credit Reporting* (5th ed. 2002) and *Credit Discrimination* (3rd ed. 2002) are two of the eighteen practice treatises that NCLC publishes and annually supplements. These comments were written by Chi Chi Wu, Staff Attorney, and Margot Saunders, Managing Attorney, and are submitted on behalf of the Center's low-income clients.

[2] The **National Association of Consumer Advocates** (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.

[3] § 604(g)(5) of the FCRA, 15 U.S.C. 1681b(g)(5).

[4] § 604(g)(2) of the FCRA, 15 U.S.C. 1681b(g)(2).

regulatory agencies and the National Credit Union Administration ("agencies") to issue regulations strictly governing the limited use of medical information by the financial institutions they regulate in a manner consistent with the consumer protections of the Act, yet allowing appropriate exceptions.

Once again, we applaud the thoughtful and careful manner in which the agencies have crafted the protections and exceptions in the interim final rule. The interim final rule has continued the proposed rule's balanced manner of treating medical information.

In particular, we applaud the Board for deleting the provision in the proposed rule which would have limited the medical information protections to only consumer credit, i.e., credit for "primarily for personal, family, or household purposes."[6] The deletion of this limitation will ensure that this important protection applies to individuals seeking business credit, which is consistent with Congressional intent. Furthermore, it is in the context of credit for sole proprietorships or small businesses where the anti-discrimination provisions for medical conditions may have the most practical effect.

We are pleased that the Board has restructured the use of medical information for forbearance, debt cancellation and credit insurance as *exceptions* instead of *exclusions*.[7] This will ensure that the anti-discrimination purposes of the medical information protections are applied throughout the entire credit transaction process, while allowing narrow exceptions where medical information is necessary and appropriate to a determination. Thus, it is critical to limit the exceptions for these products, as the interim final rule does, to situations only when medical condition is a trigger for the provision of benefits.[8]

We strongly support the prohibition against selectively requiring debt cancellation or credit insurance on the basis of medical condition.[9] We note that such a practice, if the medical condition constitutes a "disability" or "handicap," may also constitute a violation of the Americans with Disabilities Act, the Fair Housing Act (for real-estate related credit), and state anti-discrimination statutes.[10]

We are pleased that the agencies deleted the ability to create exceptions by order, without opportunity for notice and comment.[11] Such an exception would have been contrary to the

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[5] § 604(g)(5).
[6] Proposed __.30 (a)(2)(i), now §__.30(b)(2)(iii).
[7] §___.30(e)(1)(viii) and __.30(e)(1)(ix).
[8] *Id.*
[9] § ___.30(d)(2)(iii)(C).
[10] While the interim final rule prohibits a creditor from selectively requiring credit insurance because of medical condition, a creditor is still permitted to require credit insurance of ALL borrowers and then is permitted to use medical information if one of the triggers for coverage is medically based. §___.30(e)(1)(viii) and __.30(e)(1)(ix). Thus, a creditor could effectively deny credit on the basis of medical condition by requiring credit insurance and then making one of the triggers medically related. However, if the medical condition constitutes a disability or handicap, we believe that this scenario may violate other prohibitions against discriminating against the disabled, such as the FHA, ADA, or state anti-discrimination laws.
[11] Now deleted __30.(d)(1)(vii).

statutory requirements of the FCRA, which require exceptions to the medical information protections to be promulgated using the rulemaking process.[12]

We note that the interim final rule and the exceptions have been broadened to cover all creditors, not just those financial institutions regulated by the federal banking agencies. While such an expansion may be conceptually consistent, we are concerned about enforcement of the potential abuses by non-bank creditors using the exceptions within the interim final rule. We request that the agencies and the Federal Trade Commission address this issue.

Finally, we support the creation of an exception for a special purpose credit program based on medical condition.[13] Such an approach has precedent given its similarity to programs that are permitted under the Equal Credit Opportunity Act.[14]

In sum, we support the interim final rule in its current form as protecting consumers while permitting creditors the flexibility to accommodate medical condition. For more detailed information on our positions, see our May 28, 2004 comments to the proposed rule.[15]

[12] § 604(g)(5)(A).
[13] __.30(e)(1)(iii).
[14] 15 U.S.C. § 1691(c); Regulation B, 12 C.F.R. § 202.8.
[15] National Consumer Law Center, Comments Re: Proposed Fair Credit Reporting Medical Information Regulations, May 28, 2004.