



# Federal Register

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Friday,  
June 10, 2005

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## Part II

### Department of the Treasury Office of the Comptroller of the Currency

12 CFR Part 41

Office of Thrift Supervision

12 CFR Part 571

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### Federal Reserve System

12 CFR Parts 222 and 232

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### Federal Deposit Insurance Corporation

12 CFR Part 334

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### National Credit Union Administration

12 CFR Part 717

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Fair Credit Reporting Medical Information  
Regulations; Interim Final Rule

**DEPARTMENT OF THE TREASURY****Office of the Comptroller of the Currency****12 CFR Part 41**

[Docket No. 05–10]

RIN 1557–AC85

**FEDERAL RESERVE SYSTEM****12 CFR Parts 222 and 232**

[Regulation V and FF; Docket No. R–1188]

**FEDERAL DEPOSIT INSURANCE CORPORATION****12 CFR Part 334**

RIN 3064–AC81

**DEPARTMENT OF THE TREASURY****Office of Thrift Supervision****12 CFR Part 571**

[No. 2005–16]

RIN 1550–AB88

**NATIONAL CREDIT UNION ADMINISTRATION****12 CFR Part 717****Fair Credit Reporting Medical Information Regulations**

**AGENCIES:** Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); Office of Thrift Supervision, Treasury (OTS); National Credit Union Administration (NCUA).

**ACTION:** Interim final rules; request for public comments.

**SUMMARY:** The OCC, Board, FDIC, OTS, and NCUA (Agencies) are publishing interim final rules to implement section 411 of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act). The interim final rules create exceptions to the statute's general prohibition on creditors obtaining or using medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit for all creditors. The exceptions permit creditors to obtain or use medical information in connection with credit eligibility determinations where necessary and appropriate for legitimate purposes, consistent with the Congressional intent to restrict the use of medical information for inappropriate purposes.

The interim final rules also create limited exceptions to permit affiliates to share medical information with each other without becoming consumer reporting agencies.

**DATES:** This interim final rule is effective March 7, 2006. Comments must be received by July 11, 2005.

**ADDRESSES:** Comments should be directed to:

**OCC:** You should include OCC and Docket Number 05–10 in your comment. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *OCC Web Site:* <http://www.occ.treas.gov>. Click on "Contact the OCC," scroll down and click on "Comments on proposed regulations."

- *E-mail Address:* [regs.comments@occ.treas.gov](mailto:regs.comments@occ.treas.gov).

- *Fax:* (202) 874–4448.

- *Mail:* Office of the Comptroller of the Currency, 250 E Street, SW., Mail Stop 1–5, Washington, DC 20219.

- *Hand Delivery/Courier:* 250 E Street, SW., Attn: Public Information Room, Mail Stop 1–5, Washington, DC 20219.

**Instructions:** All submissions received must include the agency name (OCC) and docket number or Regulatory Information Number (RIN) for this rulemaking. In general, OCC will enter all comments received into the docket without change, including any business or personal information that you provide. You may review comments and other related materials by any of the following methods:

- *Viewing Comments Personally:* You may personally inspect and photocopy comments at the OCC's Public Information Room, 250 E Street, SW., Washington, DC. You can make an appointment to inspect comments by calling (202) 874–5043.

- *Viewing Comments Electronically:* You may request e-mail or CD-ROM copies of comments that the OCC has received by contacting the OCC's Public Information Room at [regs.comments@occ.treas.gov](mailto:regs.comments@occ.treas.gov).

- *Docket:* You may also request available background documents and project summaries using the methods described above.

**Board:** You may submit comments, identified by Docket No. R–1188, by any of the following methods:

- *Agency Web Site:* <http://www.federalreserve.gov>. Follow the instructions for submitting comments at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *E-mail:*

[regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov). Include docket number in the subject line of the message.

- *Fax:* 202/452–3819 or 202/452–3102.

- *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm> as submitted, except as necessary for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

**FDIC:** You may submit comments, identified by RIN number by any of the following methods:

- *Agency Web Site:* <http://www.fdic.gov/regulations/laws/federal/propose.html>. Follow instructions for submitting comments on the Agency Web Site.

- *E-Mail:* [Comments@FDIC.gov](mailto:Comments@FDIC.gov). Include the RIN number in the subject line of the message.

- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

- *Hand Delivery/Courier:* Guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

- *Instructions:* All submissions received must include the agency name and RIN for this rulemaking. All comments received will be posted without change to <http://www.fdic.gov/regulations/laws/federal/propose.html> including any personal information provided.

**OTS:** You may submit comments, identified by number 2005–16, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *E-mail Address:*

[regs.comments@ots.treas.gov](mailto:regs.comments@ots.treas.gov). Please include number 2005–16 in the subject line of the message and include your name and telephone number in the message.

- *Fax:* (202) 906–6518.

- *Mail:* Regulation Comments, Chief Counsel's Office, Office of Thrift

Supervision, 1700 G Street, NW., Washington, DC 20552, Attention: No. 2005-16.

- *Hand Delivery/Courier:* Guard's Desk, East Lobby Entrance, 1700 G Street, NW., from 9 a.m. to 4 p.m. on business days, Attention: Regulation Comments, Chief Counsel's Office, Attention: No. 2005-16.

*Instructions:* All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to the OTS Internet Site at <http://www.ots.treas.gov/pagehtml.cfm?catNumber=67&an=1>, including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.ots.treas.gov/pagehtml.cfm?catNumber=67&an=1>. In addition, you may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment for access, call (202) 906-5922, send an e-mail to [public.info@ots.treas.gov](mailto:public.info@ots.treas.gov), or send a facsimile transmission to (202) 906-7755. (Prior notice identifying the materials you will be requesting will assist us in serving you.) We schedule appointments on business days between 10 a.m. and 4 p.m. In most cases, appointments will be available the next business day following the date we receive a request.

*NCUA:* You may submit comments by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *NCUA Web Site:* [http://www.ncua.gov/RegulationsOpinionsLaws/proposed\\_regs/proposed\\_regs.html](http://www.ncua.gov/RegulationsOpinionsLaws/proposed_regs/proposed_regs.html). Follow the instructions for submitting comments.

- *E-mail:* Address to [regcomments@ncua.gov](mailto:regcomments@ncua.gov). Include “[Your name] Comments on Interim Final Rule Part 717, Fair Credit Reporting—Medical Information” in the e-mail subject line.

- *Fax:* (703) 518-6319. Use the subject line described above for e-mail.

- *Mail:* Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.

- *Hand Delivery/Courier:* Address to Mary Rupp, Secretary of the Board, National Credit Union Administration. Deliver to guard station in the lobby of 1775 Duke Street, Alexandria, Virginia

22314-3428, on business days between 8 a.m. and 5 p.m.

All public comments are available on the agency's Web site at <http://www.ncua.gov/RegulationsOpinionsLaws/comments> as submitted, except as may not be possible for technical reasons. Public comments will not be edited to remove any identifying or contact information. Paper copies of comments may be inspected in NCUA's law library, at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9 a.m. and 3 p.m. To make an appointment, call (703) 518-6546 or send an e-mail to [OGCMail@ncua.gov](mailto:OGCMail@ncua.gov).

**FOR FURTHER INFORMATION CONTACT:**

*OCC:* Amy Friend, Assistant Chief Counsel, (202) 874-5200; Michael Bylsma, Director, or Stephen Van Meter, Assistant Director, Community and Consumer Law, (202) 874-5750; Patrick T. Tierney, Senior Attorney, Legislative and Regulatory Activities Division, (202) 874-5090; or Carol Turner, Compliance Specialist, Compliance Department, (202) 874-4858, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

*Board:* David A. Stein, Counsel; Minh-Duc T. Le, Ky Tran-Trong, or Krista P. DeLargy, Senior Attorneys, Division of Consumer and Community Affairs, (202) 452-3667 or (202) 452-2412; or Andrew Miller, Counsel, Legal Division, (202) 452-3428, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551.

*FDIC:* Richard M. Schwartz, Counsel, Legal Division, (202) 898-7424; David Lafleur, Policy Analyst, (202) 898-6569, or Patricia Cashman, Senior Policy Analyst, Division of Supervision and Consumer Protection, (202) 898-6534, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

*OTS:* Elizabeth Baltierra, Program Analyst (Compliance), Compliance Policy, (202) 906-6540; Richard Bennett, Counsel, (202) 906-7409; Judith A. McCormick, Director, Consumer Protection and Specialty Programs, (202) 906-5636, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

*NCUA:* Regina M. Metz, Staff Attorney, Office of General Counsel, (703) 518-6540, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314-3428.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The FACT Act became law on December 4, 2003. Pub. L. 108-159, 117

Stat. 1952. In general, the FACT Act amends the Fair Credit Reporting Act (FCRA or Act) to enhance the ability of consumers to combat identity theft, increase the accuracy of consumer reports, and allow consumers to exercise greater control regarding the type and amount of marketing solicitations they receive. Section 411 of the FACT Act generally limits the ability of creditors to obtain or use medical information in connection with credit eligibility determinations, consumer reporting agencies to disclose medical information, and all persons to share medical information and other medical-related information with affiliates.

Section 411(a) of the FACT Act adds a new section 604(g)(1) to the FCRA to restrict the circumstances under which consumer reporting agencies may furnish consumer reports that contain medical information about consumers. Under section 604(g)(1), a consumer reporting agency may not furnish a consumer report that contains medical information about a consumer unless:

(1) The report is furnished in connection with an insurance transaction, and the consumer affirmatively consents to the furnishing of the report;

(2) The report is furnished for employment purposes or in connection with a credit transaction, the information to be furnished is relevant to process or effect the employment or credit transaction, and the consumer provides specific written consent for the furnishing of the report that describes in clear and conspicuous language the use for which the information will be furnished; or

(3) The information to be furnished pertains solely to transactions, accounts, or balances relating to debts arising from the receipt of medical services, products, or devices, where such information, other than account status or amounts, is restricted or reported using codes that do not identify, or do not provide information sufficient to infer, the specific provider or the nature of such services, products, or devices.

Section 411(c) of the FACT Act revises the definition of “medical information” in section 603(i) to mean 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 the past, present, or future physical, mental, or behavioral health or condition of an individual, the provision of health care to an individual, or the payment for the provision of health care to an individual. The term “medical

information” does not include the age or gender of a consumer, demographic information about the consumer, including a consumer’s residence address or e-mail address, or any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy.

Section 411(a) also amends the FCRA by adding new section 604(g)(2) to prohibit creditors from obtaining or using medical information pertaining to a consumer in connection with any determination of the consumer’s eligibility, or continued eligibility, for credit. Section 604(g)(2) contains two independent prohibitions—a prohibition on obtaining medical information and a prohibition on using medical information. The statute contains no prohibition, however, on creditors obtaining or using medical information other than in connection with a determination of the consumer’s eligibility, or continued eligibility, for credit. For example, section 604(g)(2) does not prohibit a creditor from obtaining medical information in connection with employment purposes. Nevertheless, a creditor that obtains medical information in connection with employment purposes may not subsequently use that information in connection with any determination of the consumer’s eligibility, or continued eligibility, for credit. Section 604(g)(5)(A) requires the Agencies to prescribe regulations that permit transactions that are determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (including administrative verification purposes), consistent with Congressional intent to restrict the use of medical information for inappropriate purposes.

Section 411(b) of the FACT Act adds a new section 603(d)(3) to the FCRA to restrict the sharing of medically related information with affiliates if that information meets the definition of “consumer report” in section 603(d)(1) of the FCRA. Specifically, section 603(d)(3) provides that the standard exclusions from the definition of “consumer report” contained in section 603(d)(2)—such as sharing transaction or experience information among affiliates or sharing other information among affiliates after notice and an opportunity to opt-out—do not apply if medically related information is disclosed to an affiliate. Medically related information includes medical information, as described above, as well as an individualized list or description

based on payment transactions for medical products or services, and an aggregate list of identified consumers based on payment transactions for medical products or services.

Section 604(g)(3), however, provides several exceptions that allow institutions to share medically related information with affiliates in accordance with the standard exclusions that apply to the sharing of non-medically related information.

These exceptions provide that an institution may share medically related information with an affiliate without having the communication categorically treated as a consumer report if the information is disclosed to an affiliate:

(1) In connection with the business of insurance or annuities (including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners, as in effect on January 1, 2003);

(2) For any purpose permitted without authorization under the Standards for Individually Identifiable Health Information promulgated by the Department of Health and Human Services (HHS) pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA);

(3) For any purpose referred to under section 1179 of HIPAA;

(4) For any purpose described in section 502(e) of the Gramm-Leach-Bliley Act; or

(5) As otherwise determined to be necessary and appropriate, by regulation or order, by the Federal Trade Commission (FTC), the Agencies, or an applicable State insurance authority.

Section 604(g)(4), as added by section 411(a)(4) of the FACT Act, also provides that any person that receives medical information from an affiliate pursuant to an exception in section 604(g)(3) or from a consumer reporting agency under section 604(g)(1) must not disclose such information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

## II. Overview of Comments Received

On April 28, 2004, the Agencies published a notice of proposed rulemaking in the **Federal Register** (69 FR 23380) to implement the provisions of section 411 of the FACT Act. The Agencies proposed to create exceptions to the general prohibition against creditors obtaining or using medical information in connection with credit eligibility determinations, as required by section 604(g)(5)(A), to permit

transactions necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (including administrative verification purposes), consistent with the intent of Congress to restrict the use of medical information for inappropriate purposes. In addition, the Agencies proposed to create additional exceptions to the special restrictions in section 603(d)(3) on sharing medically related information with affiliates, as permitted by section 604(g)(3)(C).

Each of the Agencies received up to 40 comment letters in response to the proposal, although many commenters sent copies of the same letter to more than one Agency. Comments were received from a variety of industry commenters, including banks, thrifts, credit unions, credit card companies, mortgage lenders and other non-bank creditors, and industry trade associations. Comments were also received from insurance companies and insurance industry trade associations. Other comments were received from consumer and community groups, privacy advocates, and health care associations. A comment letter was received from two Members of Congress, and another comment letter was received from the Federal Trade Commission.

Most commenters supported the proposed rule. Commenters offered a number of suggested changes, with the most common suggestions including: broadening the scope of coverage to apply to all creditors; broadening the scope of coverage to apply to an individual’s credit eligibility made in connection with business credit; clarifying the definition of “medical information”; implementing the statute by relying primarily on interpretations of the statute rather than exceptions; addressing debt cancellation contracts, debt suspension agreements, and credit insurance products through an exception; and revising the language and scope of various exceptions to the general prohibition on obtaining and using medical information.

The Agencies have modified the proposed rule in light of the comments received. These comments, and the Agencies’ responses to the comments, are discussed in the following section-by-section analysis. As discussed below, the Agencies are adopting these rules as interim final rules so that interested parties may comment on the expanded scope of the exceptions for obtaining and using medical information in connection with credit eligibility determinations.

### III. Section-by-Section Analysis

#### Section \_\_.2 Examples

Section \_\_.2 of the proposal discussed the scope and effect of the examples included in the proposed rule. Commenters supported the provision regarding the scope and effect of examples. Section \_\_.2 is therefore adopted as proposed.

#### Section \_\_.3 Definitions

Section \_\_.3 of the proposal contained definitions for the terms "affiliate" (as well as the related terms "company" and "control"), "consumer," "medical information," and "you." The proposed definition of "you" has not been included in the interim final rule as unnecessary.<sup>1</sup>

#### Affiliate

Several FCRA provisions apply to information sharing with persons "related by common ownership or affiliated by corporate control," "related by common ownership or affiliated by common corporate control," or "affiliated by common ownership or common corporate control." *E.g.*, FCRA, sections 603(d)(2), 615(b)(2), and 624(b)(2). Each of these provisions was enacted as part of the 1996 amendments to the FCRA. Similarly, section 2 of the FACT Act defines the term "affiliate" to mean persons that are related by common ownership or affiliated by corporate control.

Under the proposal, the Agencies proposed to define "affiliate" to mean any company that controls, is controlled by, or is under common control with another company, which is identical to the definition of "affiliate" in section 509 of the GLB Act and the GLB Act privacy regulations. The Agencies received very few comments on the definition of "affiliate" and none that suggested changes to the definition.

In the interim final rules, the Agencies have revised the definition of "affiliate" to track more closely the definition contained in section 2 of the FACT Act. Section \_\_.3(b) of the interim final rules defines "affiliate" to mean any company that is related by common ownership or common corporate control with another company.<sup>2</sup>

The Agencies believe there is no substantive difference between the FACT Act definition of "affiliate" and

the definition of "affiliate" in section 509 of the GLB Act. The Agencies are not aware of any circumstances in which two entities would be affiliates for purposes of the FCRA but not for purposes of the GLB Act privacy rules, or vice versa. Furthermore, even though affiliated entities have had to comply with different formulations of the "affiliate" definition under the FCRA and the GLB Act since 1999, the Agencies are not aware of any compliance difficulties or disputes resulting from the two statutes using somewhat different wording to describe what constitutes an affiliate.

Under the GLB Act privacy rules, the definition of "control" determines whether two or more entities meet the definition of "affiliate."<sup>3</sup> The Agencies included the same definition of "control" in the proposal. The Agencies received no comments on the proposed definition of "control." Accordingly, the Agencies interpret the phrase "related by common ownership or common corporate control" as used in the FACT Act to have the same meaning as "control" in the GLB Act privacy rules. For example, if an individual owns 25 percent of two companies, the companies would be affiliates under both the GLB Act and FCRA definitions. However, the individual would not be considered an affiliate of the companies because the definition of "affiliate" is limited to companies.

For purposes of clarity, the Agencies are revising the defined term from "control" (as in the proposal) to "common ownership or common corporate control" in order to track more closely the terminology used in the FACT Act.<sup>4</sup> In addition, the Agencies believe that certain types of persons, for example, governments or governmental agencies or individuals are not subject to control, as that term is defined in the interim final rules, for purposes of defining an affiliate.

The proposal also included a definition of "company," which was defined to include any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization. Omitted from the definition of "company" are some entities that are "persons" under the FCRA, including estates, cooperatives, and governments or governmental subdivisions or agencies, as well as individuals. The

Agencies received no comments on the proposed definition of "company," which is adopted as proposed.

The interim final rule includes a definition of "person" to reflect that the definition of "affiliate" now refers to a "person" rather than to a "company." The definition of "person" tracks the statutory definition and means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

#### Medical Information

Under the proposed rule, paragraph (k) defined the term "medical information" to mean 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. Proposed paragraph (k) also made clear that the term "medical information" did not include the age or gender of a consumer, demographic information about the consumer, including a consumer's residence address or e-mail address, or any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy. The definition in the proposal tracked the statutory definition of "medical information."

The Agencies requested comment on whether coded information furnished by a consumer reporting agency in accordance with section 604(g)(1)(C) of the FCRA should be deemed to fall outside the definition of "medical information." Industry commenters generally believed that coded information should be excluded from the definition of "medical information" because Congress, by requiring coding by consumer reporting agencies, determined the appropriate protection for this information. Privacy advocates, consumer and community groups, and health care associations urged the Agencies not to exclude coded information from the definition of "medical information" because they believed it would be an inappropriate narrowing of the statutory definition and would effectively remove such information from the anti-discrimination protections of proposed § \_\_.30(c) by allowing creditors to treat medical debts, if coded, differently than non-medical debts. Based on the

<sup>1</sup> The OTS previously added a definition of "you" to § 571.3(o) in connection with its disposal rule. See 69 FR 77610, 77621 (Dec. 28, 2004). That definition remains in the OTS's rule.

<sup>2</sup> For purposes of the regulation, an "affiliate" includes an operating subsidiary of a bank or savings association, and a credit union service organization that is controlled by a Federal credit union.

<sup>3</sup> See 12 CFR 40.3(g), 216.3(g), 332.3(g), 573.3(g), and 716.3(g).

<sup>4</sup> For purposes of the regulation, NCUA presumes that a Federal credit union has a controlling influence over the management or policies of a credit union service organization if it is 67 percent owned by credit unions.

comments received and an analysis of the terms and structure of the FACT Act, the Agencies have determined to treat coded information as “medical information” for purposes of the Agencies’ rules. The statutory definition of “medical information” is quite broad. In addition, the wording of section 604(g)(1) indicates that “medical information about a consumer” includes both coded and uncoded information from a consumer report. How creditors may obtain and use this information is discussed below.

A number of commenters asked the Agencies to clarify that “medical information” must relate or pertain to a specific consumer. Commenters requested this clarification to ensure that creditors can continue to use databases containing aggregate, non-personally identifiable information about consumers to analyze consumer behavior patterns without violating the restrictions on obtaining or using medical information. The FTC recommended that the Agencies clarify that information about collateral is not “medical information” because information about collateral does not pertain to an individual.

The Agencies believe that the statutory definition of “medical information” applies only to information that is associated with a specific consumer because such information must relate to the condition “of an individual” or the provision of health care or payment for the provision of health care “to an individual.” In the interim final rule, the Agencies have clarified that the term “medical information” does not include information that does not identify a specific consumer. Section \_\_.3(k)(2)(iv) contains this clarification. The interim final rule does not categorically exclude information about collateral from the definition of medical information because the relationship between information about collateral and medical information about an individual may depend upon the facts and circumstances.

One commenter asked the Agencies to clarify that information about the death of an individual is not medical information. The Agencies believe that the fact that a consumer is deceased generally is not “medical information.” However, certain information associated with the death of a consumer, such as information about the medical condition that resulted in the consumer’s death, may be medical information.

Creditors are reminded that other laws, such as the Americans with Disabilities Act, the Fair Housing Act (FHA), the GLB Act, the Health

Insurance Portability and Accountability Act (HIPAA), and other parts of the FCRA, may limit or regulate the use, collection, and sharing of consumer information, including medical information. These and other laws, such as the Equal Credit Opportunity Act (ECOA), also may prohibit creditors from using certain information that is excluded from the restrictions on obtaining or using medical information, such as age or gender information, in determining eligibility for credit or for other purposes. The exceptions created by this rule do not override or modify, or in any way limit the responsibility of creditors to comply with all applicable Federal and state fair lending laws. The OTS reminds creditors subject to its rules that they must comply with the requirements of the OTS’s anti-discrimination rules when seeking to obtain and use medical information in reliance on the exceptions in this rule.<sup>5</sup>

#### *Section \_\_.30 Obtaining or Using Medical Information in Connection With a Determination of Eligibility for Credit*

Section 411(a) of the FACT Act adds a new section 604(g)(2) to the FCRA, which contains a broad new limitation on the ability of creditors to either obtain or use medical information in connection with credit eligibility determinations.

#### *A. Scope of Rules on Obtaining or Using Medical Information*

Section 604(g)(2) (as added by section 411 of the FACT Act) prohibits any “creditor” from obtaining or using “medical information” in connection with any determination of the consumer’s eligibility, or continued eligibility, for credit.<sup>6</sup> The definition of “medical information” adopted in the FACT Act broadly includes information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or a consumer that relates to the past, present, or future physical, mental, or behavioral health or condition of an individual, the provision of health care to an individual, or the payment for the provision of health care to an individual.<sup>7</sup> The definition

<sup>5</sup> The OTS’s anti-discrimination regulations are found at 12 CFR part 528.

<sup>6</sup> 15 U.S.C. 1681b(g)(2).

<sup>7</sup> *Id.* at § 1681a(i). “Medical information” does not include the age or gender of a consumer, demographic information about the consumer, including a consumer’s residence address or e-mail address, or any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy. *Id.*

encompasses important financial information about consumers that is typically used in the credit underwriting process, such as information about the payment history and status of medical debts and the amount of a consumer’s disability income.

Section 111 of the FACT Act added a definition of “creditor” to the FCRA that is also very broad and includes any person who regularly extends, renews, or continues credit, any person who regularly arranges for the extension, renewal, or continuation of credit, or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.<sup>8</sup> A “creditor” includes depository institutions as well as entities that are neither depository institutions nor affiliates of depository institutions, such as independent finance companies, loan brokers, health care providers, and automobile dealers. Accordingly, section 604(g)(2) prohibits all creditors from obtaining or using key financial information that is also medical information in the credit underwriting process.

Section 604(g) does not contain any specific statutory exception to this broad prohibition. Instead, section 604(g)(5) directs the Agencies to prescribe regulations to permit “transactions” in which creditors obtain or use medical information that are “necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs consistent with the intent of paragraph (2) to restrict the use of medical information for inappropriate purposes.”<sup>9</sup> Section 604(g)(5) does not by its terms limit the scope of the creditors that may rely on exceptions granted by the Agencies.

Proposed § \_\_.1(b)(2) identified the persons to which the rules relating to obtaining and using medical information in proposed §§ \_\_.30(a)–(d) applied. As proposed, each Agency’s rule and the exceptions created by those rules applied to creditors subject to the regulatory jurisdiction of the respective Agency. The most significant issue raised by commenters in connection with the proposal related to the classes of creditors to which the exceptions to the statutory prohibition in section 604(g)(2) would apply. Many commenters strongly urged the Agencies to make clear that the regulatory exceptions apply to *all* creditors that are subject to the statutory prohibition on

<sup>8</sup> The meaning of “creditor” in the FCRA has the same meaning as in the Equal Credit Opportunity Act (“ECOA”). *Id.* at §§ 1681a(r)(5) and 1691a(e).

<sup>9</sup> *Id.* at § 1681b(g)(5)(A).

obtaining or using medical information, not just bank and thrift creditors and their affiliates and Federal credit unions. Many financial institution creditors indicated that, if the exceptions failed to apply to all creditors, the lending activities of financial institutions would be adversely affected because financial institutions often originate loans through, or purchase loans from, persons that are creditors for purposes of the FCRA but are not financial institutions. In particular, commenters noted that arrangers of credit (which are creditors for purposes of the FCRA) may include doctors and other health care providers that inform consumers of medical financing options and act as a liaison between the consumer and the creditor.

Finally, commenters argued that, without clarification that the classes of creditors that could rely on the Agencies' regulatory exceptions were the same as the classes of creditors subject to the statutory prohibition, a significant number of creditors unaffiliated with banks, thrifts, or Federal credit unions would be in doubt about their ability to obtain and use excepted medical information in the same way and to the same extent as the Agencies' rules allow creditors that are banks, thrifts, Federal credit unions, or affiliates of those institutions to obtain and use the identical information. This result could reduce the availability of credit generally because of the breadth of the statute's definition of medical information. Two Members of Congress who sponsored section 411 of the FACT Act, submitted a comment letter supporting this view and indicating that it was their intention that the exceptions would apply to non-bank finance companies, state-chartered credit unions, and doctors, medical suppliers, and other medical professionals.

The prohibition on creditors obtaining or using medical information in connection with credit eligibility determinations in section 604(g)(2) applies to all creditors. As noted above, section 605(g)(5) does not, by its terms, limit the creditors that may rely on the exceptions granted by the Agencies. Moreover, that section, by its terms, applies to "transactions" for which the Agencies determine exceptions are necessary, not to "creditors" that the Agencies determine must be protected by the exceptions. Accordingly, the combined scope of the exceptions adopted pursuant to section 604(g)(5) in the interim final rules is as broad as the prohibition to which it applies, and is available to all creditors.

The final action is comprised of six rules. The applicability of the section of each Agency's rule addressing the prohibition on and exceptions for creditors obtaining or using medical information in connection with credit eligibility determinations is set forth in § \_\_.30(a) and covers transactions in which certain enumerated entities participate as creditors. Under § \_\_.30(a)(2), other entities that participate as creditors in transactions in which an enumerated entity also participates as a creditor are also subject to that Agency's rule.

In addition, a separate rule, codified in part 232 of the Board's chapter of the *Code of Federal Regulations* (hereafter "separate rule"), affords the exceptions to the prohibition against obtaining and using medical information for credit eligibility determinations generally to all creditors, except for creditors that are subject to one of the other Agencies' rules. This combination of rules establishes uniform coverage and exceptions for transactions involving any creditor that is subject to the prohibition on obtaining or using medical information in section 411. The separate rule has been located in the Board's chapter of the Code of Federal Regulations as a matter of convenience because many creditors are accustomed to looking to the Board's regulations implementing other statutes, such as the Truth-in-Lending Act and the Equal Credit Opportunity Act.

The Agencies believe it is important that rules prescribing exceptions to the prohibitions from obtaining or using medical information in connection with credit eligibility determinations be consistent. Thus, in developing the proposed and interim final rules, the Agencies have consulted and coordinated with each other to establish identical rules. The Agencies will consult and coordinate with each other regarding any amendments to the rules for the purpose of assuring, to the extent possible, that the regulations prescribed by each Agency remain consistent and comparable with the regulations prescribed by the other Agencies.

These rules are being adopted on an interim final basis with a delayed effective date. While a number of commenters urged clarification of the scope of the availability of the exceptions, the Agencies are concerned that uncertainty about this matter may have led creditors that believed they could not avail themselves of the exceptions not to comment on the appropriateness and details of the exceptions.

#### B. General Prohibition on Obtaining or Using Medical Information

Proposed paragraph (a)(1) incorporated the statute's general rule prohibiting creditors from obtaining or using medical information pertaining to a consumer in connection with any determination of a consumer's eligibility, or continued eligibility, for credit, except as provided in the regulations under subpart D. The supplementary information to the proposal noted the consumer's eligibility for credit typically would be determined when an initial decision is made on whether to grant or deny credit to the consumer, but could also include decisions whether to terminate an account or adjust a credit limit following an account review. The Agencies received no comments on this restatement of the statutory prohibition in the proposal. Renumbered paragraph (b)(1) in each Agency's rule and § \_\_.1(b) of the separate rule contain this provision, which is adopted as proposed.

Proposed paragraph (a)(2) clarified the meaning of certain terms used in the statutory prohibition and the proposed rule, including "eligibility, or continued eligibility, for credit," "credit," and "creditor." Commenters had no comments on the definitions of "credit" and "creditor," which tracked the FACT Act's definition of those terms. In the interim final rule, renumbered paragraphs (b)(2)(i) and (ii) of each Agency's rule and § \_\_.1(c)(2) and (3) of the separate rule contain the definitions of "credit" and "creditor," which are adopted as proposed.

The proposed rule interpreted the phrase "eligibility, or continued eligibility, for credit" to mean the consumer's qualification or fitness to receive, or continue to receive, credit, including the terms on which credit is offered, primarily for personal, family, or household purposes. The proposal further clarified that the phrase "eligibility, or continued eligibility, for credit" did not include the following: (1) The consumer's qualification or fitness to be offered employment, insurance products, or other non-credit products or services; (2) a determination of whether the provisions of a debt cancellation contract, debt suspension agreement, credit insurance product, or similar forbearance practice or program are triggered; (3) authorizing, processing, or documenting a payment or transaction on behalf of a consumer in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit; or (4) maintaining or servicing a

consumer's account in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit.

Commenters offered a substantial number of suggestions regarding the meaning of "eligibility, or continued eligibility, for credit." Industry commenters supported limiting the term to credit primarily for personal, family, or household purposes consistent with the traditional scope of the FCRA. Privacy advocates, consumer and community groups, and health care associations, on the other hand, objected to the exclusion of business credit from the general prohibition on obtaining or using medical information. These commenters argued that the proposed limitation to consumer credit conflicted with the FCRA definitions of "credit" and "creditor," which incorporate the ECOA definitions of those terms. Moreover, these commenters noted that Congress initially used the Truth in Lending Act (TILA) definitions of "credit" and "creditor" in the draft FACT Act legislation, but subsequently adopted the ECOA definitions of those terms. ECOA applies to business purpose credit, whereas TILA does not.

The Federal banking agencies (OCC, Board, FDIC, and OTS) have previously taken the position that a creditor has a permissible purpose to obtain a consumer report on a consumer in connection with a business credit transaction under section 604(a)(3)(A) of the FCRA if the consumer is or will be personally liable on the loan, such as in the case of a guarantor, co-signer, or, in most instances, an individual proprietor. An informal FTC staff opinion letter concurred with the banking agencies' position. See Letter from Joel Winston to Julie L. Williams, J. Virgil Mattingly, William F. Kroener, III, and Carolyn Buck, June 22, 2001. A copy of this letter is available from the FTC's Internet Web site at <http://www.ftc.gov/os/statutes/fcra/tatelbaum2.htm>. To ensure consistency with the prior interpretation, the Agencies are deleting the phrase "primarily for personal, family, or household purposes" from the definition of "eligibility, or continued eligibility, for credit." In order for the prohibition in section 604(g)(3) to apply, a creditor must obtain or use medical information about a consumer in connection with a determination of a consumer's eligibility, or continued eligibility, for credit. Accordingly, the general prohibition would apply to business credit if a consumer would be personally liable for repayment of a business loan.

Commenters also pointed to an ambiguity in the proposal: proposed paragraph (a)(2)(i)(A) referred to insurance products while proposed paragraph (a)(2)(i)(B) referred to credit insurance products. To eliminate this ambiguity, the interim final rule has been revised so that renumbered paragraph (b)(2)(iii)(A) of each Agency's rule and section \_\_.1(c)(4)(i) of the separate rule applies to insurance products other than credit insurance products. Additional, non-substantive changes have been made to these paragraphs for clarity.

Commenters made a number of suggestions regarding debt cancellation contracts, debt suspension agreements, and credit insurance products, which were addressed in proposed paragraph (a)(2)(i)(B). Most commenters believed that these contracts, agreements, and products should be addressed through an exception, rather than through an interpretation. In the interim final rule, debt cancellation contracts, debt suspension agreements, and credit insurance products are addressed in two new exceptions, which are discussed below.

Forbearance practices or programs were also addressed in proposed paragraph (a)(2)(i)(B). Most commenters believed that forbearance practices and programs should be addressed through an exception, rather than through an interpretation. In the interim final rule, forbearance practices or programs are addressed in a new exception, which is discussed below.

Under the proposal, the term "eligibility, or continued eligibility, for credit" did not include authorizing, processing, or documenting a payment or transaction on behalf of a consumer in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit. The interim final rule retains this interpretation in paragraph (b)(2)(iii)(B). See also section \_\_.1(c)(4)(ii) of the separate rule. A few commenters asked the Agencies to clarify that over limit transactions or fees and the use of transaction codes fall within this interpretation. Typically, the routine processing of over limit transactions or the imposition of over limit fees would not involve a determination of the consumer's eligibility, or continued eligibility, for credit. If, however, a creditor has medical information about the consumer and uses that information to determine whether or not to raise the consumer's credit limit, such use must fall within an exception in §§ \_\_.30(d) or (e) of each Agency's rule or §§ \_\_.3 or \_\_.4 of the separate rule to be permissible. Similarly, the use of

transaction codes that identify payments to merchants of medical products or services typically would not involve a determination of the consumer's eligibility, or continued eligibility, for credit, unless the creditor uses the medically related codes to make a judgment about whether, and on what terms, to extend credit to the consumer.

Under the proposal, the term "eligibility, or continued eligibility, for credit" did not include maintaining or servicing a consumer's account in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit. The interim final rule retains this interpretation in paragraph (b)(2)(iii)(C) of each Agency's rule. See also section \_\_.1(c)(4)(iii) of the separate rule.

The FTC recommended adding a number of additional interpretations and deleting or revising references suggesting that the proposed interpretations and rule of construction were not statutory interpretations. In the interim final rule, the Agencies have deleted references that may have suggested that the interpretations are not interpretations of the statute. Most of the additional interpretations recommended by the FTC are addressed elsewhere in this preamble.

One FTC suggestion not addressed elsewhere is the recommendation to interpret the statute to permit doctors and other providers of medical goods and services to extend credit to consumers where the credit is incidental to the provision of medical goods or services. The Agencies agree that providers of medical goods and services ordinarily would obtain medical information pertaining to a consumer in connection with rendering medical care, and not in connection with credit eligibility decisions. Moreover, if a provider did not use that medical information in connection with determining the consumer's eligibility to receive credit, then the provider clearly would not violate the prohibition. For example, a doctor who treats a patient before billing the patient for her services, without considering the patient's payment history or other medical information relating to the patient, would not have obtained and used medical information in connection with an eligibility determination for credit.

As discussed above, the definition of medical information is very broad and includes not only the health or condition of an individual, but information relating to the payment for the provision of health care. See section 603(i) of the FCRA (15 U.S.C. 1681a(i)). If a provider uses medical information,

such as a consumer's history of not paying medical bills promptly, in determining whether and on what terms to extend credit to the consumer, then the provider, as a creditor, has used medical information in connection with a credit eligibility determination in contravention of the general prohibition. Thus, the Agencies conclude that an interpretation that excludes incidental credit from the statutory prohibition is not supported by the statute because medical service providers that extend incidental credit may, in some instances, use medical information to determine the consumer's eligibility for such credit.

### C. Receiving Unsolicited Medical Information and Coded and Uncoded Information from a Consumer Reporting Agency

Section \_\_.30(b) of the proposal contained a rule of construction regarding the receipt of unsolicited medical information in recognition of the fact that creditors may receive medical information without specifically asking for it. A creditor may receive unsolicited medical information, for example, when a consumer informs the loan officer that she needs a loan to pay for treatment for a particular medical condition, or when a consumer, in response to a general request on a credit application for information about outstanding debts, lists debts owed to hospitals and doctors for medical services. The Agencies proposed a rule of construction to make clear that a creditor would not violate the prohibition on obtaining medical information if the creditor received medical information without specifically asking for or requesting such information and did not use it.

Commenters generally supported the rule of construction for unsolicited medical information. Industry commenters generally favored a rule of construction over an exception.

In addition, the Agencies solicited comment on how to treat information in consumer reports containing information described in section 604(g)(1) of the FCRA. The Agencies solicited comment on three options for allowing creditors to obtain and use coded information contained in a consumer report pursuant to section 604(g)(1)(C). One approach was to interpret "medical information" to exclude coded information that may be furnished under section 604(g)(1)(C) of the Act. Another approach was to interpret the prohibition on obtaining or using medical information in section 604(g)(2) as qualified by the provisions in section 604(g)(1) that authorize

consumer reporting agencies to furnish consumer reports containing medical information under certain circumstances. A final approach was to require creditors that intend to obtain and use coded medical information in connection with credit eligibility determinations to do so in accordance with the financial information exception in proposed § \_\_.30(c).

Industry commenters generally believed that coded information should be excluded from the definition of "medical information." Privacy advocates, consumer and community groups, and health care associations, on the other hand, maintained that coded information fell within the definition of "medical information" and opposed the creation of a separate consumer report exception as in proposed paragraph (d)(1)(iii). These commenters believed that the other proposed exceptions were sufficient to protect legitimate uses of both coded and uncoded medical information obtained from a consumer report. The FTC urged the Agencies to interpret the general prohibition on creditors obtaining and using medical information in section 604(g)(2) as qualified by the provisions in section 604(g)(1) applicable to consumer reporting agencies that furnish consumer reports containing medical information.

As noted above, the Agencies interpret coded information provided pursuant to section 604(g)(1)(C) as meeting the broad statutory definition of "medical information." Under the interim final rules, a creditor that receives medical information from a consumer reporting agency, whether coded or uncoded, without specifically requesting that information does not obtain medical information in violation of the prohibition. Such information, however, may be used only in accordance with the exceptions contained in renumbered paragraphs 30(d) or (e) of each Agency's rule or §§ \_\_.3 or \_\_.4 of the separate rule.

The proposal also included a separate exception for uncoded medical information furnished by a consumer reporting agency in a consumer report pursuant to section 604(g)(1)(B) in proposed paragraph (d)(1)(iii). The proposed exception has been omitted from the interim final rule as unnecessary. Commenters generally did not support this exception. A number of these commenters believed that the other exceptions were sufficient and that no separate exception should be created for consumer reports. The FTC urged the Agencies to treat coded and uncoded medical information furnished by consumer reporting agencies the

same by interpreting the general statutory prohibition as inapplicable to such information.

The Agencies believe that the exceptions in renumbered paragraphs (d) and (e) of each Agency's rule and in §§ \_\_.3 and \_\_.4 of the separate rule provide creditors sufficient flexibility with respect to the use of medical information contained in consumer reports. The rule of construction for unsolicited medical information adequately protects creditors that receive coded or uncoded medical information in consumer reports furnished by consumer reporting agencies without specifically requesting medical information. If, however, a creditor specifically requests medical information from a consumer reporting agency in connection with a credit eligibility determination, the creditor must meet one of the exceptions in renumbered paragraphs (d) and (e) of each Agency's rule or §§ \_\_.3 and \_\_.4 of the separate rule in order to obtain and use that information.

Renumbered paragraph (c) of the interim final rule adopts the rule of construction for unsolicited medical information with certain revisions. Section \_\_.2 of the separate rule contains the identical provision. The interim final rule provides that a creditor does not *obtain* medical information in violation of the prohibition if it receives such information from a consumer, a consumer reporting agency, or any other person in connection with any determination of the consumer's eligibility, or continued eligibility, for credit without specifically requesting medical information. The rule of construction is retained as an interpretation, rather than as an exception because it interprets the statutory language regarding when a creditor "obtains" medical information in violation of the prohibition.

The introductory language to the rule of construction has been revised for clarity to provide that a creditor does not obtain medical information "in violation of the prohibition" if it meets the specified criteria. In addition, the cross-reference to the general prohibition has been deleted because the rule of construction is an interpretation of the statute.

Proposed paragraph (b)(1)(ii), which prohibited the use of unsolicited medical information, has been deleted because the rule of construction focuses on when a creditor does not obtain medical information in violation of the statute. The Agencies believe that incorporating a use limitation in the rule of construction would be

inconsistent with the exceptions in renumbered paragraphs (d) and (e). Instead, the Agencies have added a new paragraph (c)(2) to clarify that a creditor that receives unsolicited medical information may use that information in connection with any determination of the consumer's eligibility, or continued eligibility, for credit only to the extent the creditor can rely on one of the exceptions in renumbered paragraphs (d) or (e).

The examples of the rule of construction have been moved to renumbered paragraph (c)(3) in the interim final rules and all references to restrictions on the use of unsolicited medical information have been deleted from the examples consistent with the changes discussed above. In addition, paragraph (c)(3)(iii) adds a new example to illustrate how the rule of construction applies to medical information furnished by a consumer reporting agency.

Commenters had several other comments concerning the rule of construction. Privacy advocates, consumer and community groups, and health care associations suggested that the Agencies clarify that the phrase "without specifically requesting medical information" means information obtained voluntarily without any pressure, prompting, or direct or indirect solicitation by the creditor. These commenters also sought an additional requirement that creditors destroy unsolicited medical information as soon as reasonably practicable and suggested making the rule of construction an exception. Some industry commenters suggested that consumers should have the burden of proving that unsolicited medical information was used in a credit eligibility determination because it may be difficult for creditors to prove that unsolicited medical information was not used. Some industry commenters suggested permitting a creditor to use unsolicited medical information in a manner no less favorably than it would use comparable medical information.

The statute does not specifically address the burden of proof to be applied when disputes arise regarding the use of medical information. The Agencies find it unnecessary to address this issue because the interim final rule allows unsolicited medical information to be used as permitted by the exceptions in renumbered paragraphs (d) and (e). The Agencies thus decline to impose on consumers the burden of proving that unsolicited medical information was used in a credit eligibility determination. Furthermore, even if the consumer requests that a

creditor use unsolicited medical information in connection with a credit eligibility determination, the creditor is not required to do so. The phrase "without specifically requesting medical information" along with the examples makes clear that the rule of construction does not apply to medical information obtained through a specific request or solicitation for such information. No further clarification is necessary. The destruction of unsolicited medical information would not be appropriate in many circumstances, thus the Agencies decline to adopt such a rule.

#### D. Financial Information Exception for Obtaining and Using Medical Information

As noted above, section 604(g)(5)(A) of the Act gives the Agencies the authority to prescribe regulations, after notice and opportunity for comment, to permit transactions in which creditors may obtain and use medical information in connection with determinations of credit eligibility that the Agencies determine to be 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. Applying this standard, the Agencies proposed a number of exceptions to the general prohibition on creditors obtaining or using medical information in connection with credit eligibility determinations. The exceptions were contained in proposed paragraphs (c)–(d). In the interim final rule, these exceptions are contained in renumbered paragraphs (d) and (e) of each Agency's rule and in §§ .3 and .4 of the separate rule.

Section .30(c) of the proposal contained the proposed financial information exception. Proposed paragraph (c)(1) provided that a creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit so long as the following three elements were met. First, the information must relate to debts, expenses, income, benefits, 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 any such determination of credit eligibility.

Commenters generally supported the proposed three-part test for the financial information exception. Privacy advocates, consumer and community groups, and health care associations suggested limiting the exception to circumstances where the creditor has not specifically requested medical information on its application for credit, but rather has made a generic request for financial information. These commenters also suggested including the phrase "financial information" in the text of the rule. Industry commenters suggested revising the first prong to apply to a non-exclusive list of information routinely used in the underwriting process. These commenters noted that the Agencies may have unintentionally omitted certain items, such as assets, that should be included in the list. Commenters generally supported the second prong of the test. One commenter suggested that the third prong of the test was inconsistent with and undermined the "no less favorable" principle set forth in the second prong and could prove detrimental to consumers. Another commenter found the three-part test complicated and difficult to implement.

The interim final rule retains the three-part test for the financial information exception, with certain modifications. The Agencies agree with those commenters that believe the better approach is to have a non-exclusive list of types of information that are routinely used in making credit eligibility determinations. The first prong of the test, therefore, has been revised to include all information of the type routinely used in making credit eligibility determinations and provides a non-exclusive list of such types of information (*i.e.*, information relating to debts, expenses, income, benefits, assets, collateral, or the purpose of the loan, including the use of proceeds). The Agencies do not believe it would be helpful to include the words "financial information" in the text of the exception because there is no bright line between financial information and medical information.

The second prong of the test is adopted as proposed. Commenters appeared comfortable with requiring a creditor to use medical information in a manner and to an extent no less favorable than it would use comparable non-medical information in a credit transaction. As noted in the proposal, a creditor may deny credit to the

consumer because the consumer owes a debt to a hospital if the creditor would have denied credit to the consumer if the consumer had owed the same amount of debt with the same payment history to a retailer. Nothing in the rule prevents the creditor from treating information about medical debts (or expenses or income) more favorably than non-medical debts.

The third prong of the test is also adopted as proposed. Other, more narrowly focused exceptions, such as the medical accommodation exception, permit a creditor to take the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis into account in limited circumstances as part of a consumer's credit eligibility determination. For this type of core medical information, the Agencies believe it is appropriate to more strictly limit the circumstances in which creditors may obtain or use this information.

Since creditors generally are prohibited from obtaining medical information in connection with any determination of the consumer's eligibility, or continued eligibility, for credit, a creditor ordinarily would not specifically request medical information on an application, but would obtain such information in response to a generic question on an application about debts, income, and other information routinely used in credit eligibility determinations. Thus, except where a creditor has a specific application for the financing of medical procedures, a creditor generally would be prohibited from specifically asking for medical information on a credit application.

Proposed paragraph (c)(2) provided several non-exclusive examples to illustrate when creditors may obtain and use medical information under the financial information exception. Commenters generally supported the proposed examples. One commenter requested a clarification of the example in proposed paragraph (c)(2)(iii)(B). In that example, a consumer meets with a loan officer of a creditor to apply for a mortgage loan. While filling out the loan application, the consumer informs the loan officer orally that she has a potentially terminal disease. The consumer meets the creditor's established requirements for the requested mortgage loan. The loan officer recommends to the credit committee that the consumer be denied credit because the consumer has that disease. The commenter recommended adding a statement that the bank acted on the loan officer's recommendation and denied the application because the

consumer had a potentially terminal disease to clarify that the creditor, in fact, used medical information in a manner inconsistent with the exception. The Agencies believe this clarification is helpful and, in the interim final rule, have revised the example in renumbered paragraph (d)(2)(iii)(B) of each Agency's rule accordingly. See also section \_\_.3(b)(3)(ii) of the separate rule.

In addition, a new example has been added in paragraph (d)(2)(iii)(C) of each Agency's rule and § \_\_.3(b)(3)(iii) of the separate rule to illustrate that a creditor cannot use a consumer's apparent medical condition as the basis for requiring the consumer to obtain debt cancellation, debt suspension, or credit insurance coverage as a condition for the extension of credit. Even though the use of medical information to determine the consumer's eligibility for a debt cancellation contract, debt suspension agreement, or credit insurance product generally is subject to an exception to the general prohibition pursuant to paragraphs (e)(1)(viii) or (e)(1)(ix), a creditor may not condition an extension of credit to the consumer on the consumer obtaining debt cancellation, debt suspension, or credit insurance coverage based on the consumer's physical, mental, or behavioral health, condition or history, type of treatment, or prognosis.

In addition, the heading of renumbered paragraph (d)(2)(i) has been revised in the interim final rule to reflect changes made to the first prong of the test to encompass the type of information routinely used in making credit eligibility determinations. Non-substantive revisions have also been made to the examples in renumbered paragraphs (d)(2)(ii)(A) and (C) for clarity. Aside from these changes, the examples are adopted as proposed.

#### E. Specific Exceptions for Obtaining and Using Medical Information

Section \_\_.30(d) of the proposal contained a number of specific exceptions to the general prohibition. These exceptions would allow creditors to obtain and use medical information for a limited number of particular purposes in connection with a determination of the consumer's eligibility, or continued eligibility, for credit. A creditor that obtains medical information pursuant to one of these specific exceptions may not subsequently use the information in connection with determining the consumer's eligibility, or continued eligibility, for credit unless an exception applies. In the interim final rule, the specific exceptions are contained in renumbered paragraph (e) of each

Agency's rule. Section \_\_.4 of the separate rule contains the identical exceptions in paragraphs (a)(1)–(9).

*Determination of power of attorney, legal representative and legal capacity.* Proposed paragraph (d)(1)(i) provided that a creditor may obtain and use medical information to determine whether the use of a power of attorney or legal representative is necessary and appropriate. This exception was designed to permit a creditor to verify, in connection with a credit eligibility determination, that the exercise of a power of attorney or legal representative is necessary and appropriate. Some industry commenters suggested that the exception clarify that creditors may obtain and use medical information to determine the consumer's competency or legal capacity to contract. Privacy advocates, consumer and community groups, and health care associations suggested limiting the power of attorney exception to circumstances where a power of attorney is triggered by a medical condition or where there is a legitimate question about the consumer's legal capacity to contract when a person asserts the exercise of a power of attorney or claims to act as a legal representative on behalf of a consumer. The FTC commented that the limited circumstances where medical information may be obtained and used to determine whether a power of attorney is necessary and appropriate would not be in connection with a credit eligibility determination, and therefore should be addressed through an interpretation of the statute, rather than through an exception.

The interim final rule revises the exception for the use of a power of attorney or legal representative. Renumbered paragraph (e)(1)(i) of the interim final rule permits a creditor to obtain and use medical information in connection with determining the consumer's credit eligibility to determine whether the use of a power of attorney or legal representative that is triggered by a medical event or condition is necessary and appropriate or whether the consumer has the legal capacity to contract when a person seeks to exercise a power of attorney or act as legal representative for a consumer based on an asserted medical event or condition. The interim final rule makes two substantive changes in response to the comments received. First, the exception has been narrowed to permit a creditor to obtain and use medical information only when the power of attorney or legal representative is triggered by a medical event or condition. Second, the exception has been revised to permit a creditor to

determine whether the consumer has the legal capacity to contract where a person seeks to exercise a power of attorney or act as a legal representative based on an asserted medical event or condition. This revision is designed to clarify that creditors may obtain and use medical information to verify that the asserted medical event or condition triggering the power of attorney or legal representative has, in fact, occurred and renders the consumer legally incapable of contracting. Where use of a power of attorney or legal representative is triggered by non-medical events or conditions, creditors should not need to obtain or use medical information.

In response to the FTC's comments, the Agencies recognize that a power of attorney or legal representative may be used in a variety of circumstances, many of which have no connection with a determination of a consumer's eligibility, or continued eligibility, for credit. For example, a power of attorney or legal representative may be used in connection with establishing a deposit or other asset account. In those circumstances, the general prohibition on obtaining or using medical information would not apply because the information would not be obtained or used in connection with any determination of the consumer's eligibility, or continued eligibility, for credit. The introductory language to renumbered paragraph (e) of the interim final rules makes clear that the specific exceptions apply to a creditor that "may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit." A creditor that obtains and uses medical information in circumstances not connected with a credit eligibility determination is not subject to the general statutory prohibition and does not have to rely upon the power of attorney or any other exception.

*Compliance with applicable law.* Proposed paragraph (d)(1)(ii) provided an exception to permit a creditor to obtain and use medical information to comply with applicable requirements of local, state, or Federal laws. The Agencies received only a few comments on this proposed exception. One commenter asked the Agencies to clarify that this exception covered laws that prohibit unfair and deceptive acts or practices. The FTC suggested that the financial abuse statutes referenced in the preamble as an example do not involve credit eligibility determinations, and therefore a statutory interpretation was more appropriate than an exception.

In the interim final rule, renumbered paragraph (e)(1)(ii) is adopted as proposed. Although many legal requirements do not have any connection with credit eligibility, other laws may have such a connection. As noted above, a creditor that obtains and uses medical information to comply with applicable laws in circumstances that are not connected with a credit eligibility determination is not subject to the general statutory prohibition and does not have to rely upon the exception. However, the exception is retained to cover those circumstances where it may be needed to protect creditors from inconsistent legal obligations.

*Special credit program or credit-related assistance program.* One commenter suggested that the proposed compliance with applicable laws exception would not be sufficient to permit creditors to obtain and use medical information in connection with special credit or credit-related programs, such as programs established by government-sponsored enterprises. Such programs may require creditors as part of the program requirements to obtain and use medical information in ways not covered by the other exceptions. Consistent with the policy goals established by Congress, the prohibition on creditors obtaining or using medical information should not interfere with the ability of creditors to assist consumers to qualify for beneficial special programs established by government-sponsored enterprises, not-for-profit organizations, or others.

To address this concern, the interim final rule contains a new exception in renumbered paragraph (e)(1)(iii) that permits creditors to obtain and use medical information in connection with a determination of the consumer's eligibility, or continued eligibility, for credit, to determine, at the consumer's request, whether the consumer qualifies for a legally permissible special credit program or credit-related assistance program that is: (a) Designed to meet the special needs of consumers with medical conditions and (b) established and administered pursuant to a written plan of the plan sponsor that identifies the class of persons that the program is designed to benefit and sets forth the procedures and standards for extending credit or providing other credit-related assistance under the program. Because not all potentially eligible consumers may seek to qualify for a special credit or credit assistance program, this exception applies only when the consumer requests to be considered for the program. A creditor, however, may provide consumers with information

about such programs to educate consumers about their options. In addition, any special credit or credit assistance program must meet the requirements of all applicable fair lending laws. The plan sponsor may include a government agency, charitable organization, the creditor, or any other person. This exception is modeled after the provisions relating to special purpose credit programs in the ECOA and the Board's Regulation B, 12 CFR part 202. What programs are permissible and what inquiries to determine medical eligibility are permissible, however, are governed by other laws, including applicable fair lending laws, and are beyond the scope of this rule.

Renumbered paragraph (e)(2) of the interim final rule provides an example to illustrate this exception. In the example, a not-for-profit organization establishes a credit assistance program pursuant to a written plan that is designed to assist disabled veterans purchase homes by subsidizing the down payment for the home purchase mortgage loans of qualifying veterans. The organization works through mortgage lenders and requires mortgage lenders to obtain medical information about the disability of any consumer that seeks to qualify for the program, use that information to verify the consumer's eligibility for the program, and forward that information to the organization. A consumer who is a veteran applies to a creditor for a home purchase mortgage loan. The creditor informs the consumer about the credit assistance program for disabled veterans and the consumer seeks to qualify for the program. The example states that, assuming that the program complies with all applicable law, including applicable fair lending laws, the creditor may obtain and use medical information about the medical condition and disability, if any, of the consumer to determine whether the consumer qualifies for the credit assistance program.

*Fraud prevention or detection.* Proposed paragraph (d)(1)(iv) provided that a creditor may obtain and use medical information for purposes of fraud prevention and detection. Industry commenters supported the proposed exception. Privacy advocates, consumer and community groups, and health care associations believed the proposed exception was overbroad and unnecessary in light of the other exceptions.

The interim final rule retains the fraud prevention or detection exception in renumbered paragraph (e)(1)(iv), although the language has been revised to make clear that the exception is

available only to the extent necessary to prevent or detect fraud. The Agencies anticipate that creditors would find it necessary to obtain and use medical information for purposes of fraud prevention and detection in limited circumstances. Creditors relying on this exception should have the systems in place to demonstrate the necessity for obtaining and using medical information to prevent or detect fraud. Creditors that actually use medical information in legitimate fraud prevention or detection programs should be able to make this demonstration. Blanket assertions of a fraud prevention or detection purpose alone, however, are not sufficient to justify the collection of medical information about consumers under the anti-fraud exception.

*Financing medical products or services.* Proposed paragraph (d)(1)(v) provided that a creditor may obtain and use medical information in connection with credit eligibility determinations 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. As noted in the proposal, certain creditors have established specialized loan programs that finance specific medical procedures, such as vision correction surgery, but not others. In such cases, the creditor may need to obtain and use medical information in connection with determining whether the purpose of the loan is within the scope of the creditor's established loan program. The proposal also provided examples of this exception.

Commenters generally supported the medical financing exception. Several commenters suggested revising the example in proposed paragraph (d)(2)(i) to permit the creditor to verify that the procedure to be financed will be performed, in conformance with the language of the exception, rather than permitting a creditor to confirm the consumer's medical eligibility.

Renumbered paragraph (e)(1)(v) of the interim final rule retains the medical financing exception as proposed. The examples of the medical financing exception have been moved to paragraph (e)(3) in the interim final rule. The example in paragraph (e)(3)(i) of the interim final rule has been revised from the proposal in accordance with the commenters' suggestions.

*Medical accommodation.* Section 30(d)(1)(vi) of the proposal provided that a creditor may obtain and use medical information if the consumer or the consumer's legal representative requested in writing, on a separate document signed by the consumer or

the consumer's legal representative, that the creditor use specific medical information for a specific purpose in determining the consumer's eligibility, or continued eligibility, for credit, to accommodate the consumer's particular circumstances. Under the proposal, the signed, written request had to describe the specific medical information that the consumer requested the creditor to use and the specific purpose for which the information would be used. The proposal contemplated an individualized process in which the consumer would inform the creditor about the specific medical information that the consumer would like the creditor to use and for what purpose. As noted in the preamble to the proposal, this exception was not intended to allow creditors to obtain consent on a routine basis or as a part of loan applications or documentation. The proposal provided examples of the medical accommodation exception.

Commenters had a number of recommendations regarding the medical accommodation exception. Privacy advocates, consumer and community groups, and health care associations suggested that the regulation should explicitly state that creditors may not request medical information or consent to obtain medical information on a routine basis or as part of a loan application. Several commenters also suggested clarifying that the request must be voluntary and initiated by the consumer. In addition, commenters suggested including language in the regulation to clarify that the exception is not met by a form that contains a pre-printed description of various types of medical information and the uses to which it might be put. Some commenters urged the Agencies to add a disposal requirement on creditors that obtain information that is not needed. Consumer and community groups also suggested eliminating the forbearance interpretation, folding that interpretation into the medical accommodation exception, and adding anti-discrimination protections to the provision, similar to the "no less favorable" standard used in renumbered paragraph (d).

Industry commenters generally believed that the medical accommodation was too restrictive. Some industry commenters suggested that the use of pre-printed consent forms or other routine form of consent should be sufficient to trigger the exception. Other commenters suggested that the consumer should be able to request the use of medical information through oral and electronic means, not simply through a signed writing. One

commenter noted that many creditors include a section on their credit applications where the consumer may describe special circumstances or other information that the consumer would like the creditor to consider. This commenter recommended relaxing the requirements of the medical accommodation exception to enable the exception to apply in this circumstance. Another commenter noted that the medical accommodation exception was drafted so narrowly that it may prohibit a creditor from obtaining or using additional medical information to verify or corroborate the facts necessary to support a consumer's medical accommodation request.

In the interim final rule, the medical accommodation exception in renumbered paragraph (e)(1)(vi) has been revised to address commenters' concerns. Paragraph (e)(1)(vi) provides an exception for circumstances where the consumer or the consumer's legal representative specifically requests that the creditor use medical information 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. Any such accommodation must be consistent with safe and sound practices. The requirement for a separate signed writing by the consumer that describes the specific medical information and the specific purpose for which it is to be used has been deleted in the interim final rule. Instead, the interim final rule focuses on the specific request of the consumer and the creditor's documentation of that request. As revised, the interim final rule permits the medical accommodation exception to be triggered by the consumer's oral, electronic, or written request. A consumer may make a specific request by responding to a generic inquiry on a credit application that invites the consumer to describe any special circumstances or other information (not limited to medical information) that the consumer would like the creditor to consider in evaluating the consumer's application. The disposal of records connected with a specific request for a medical accommodation is beyond the scope of this rule and may not be appropriate in certain circumstances.

The proposal contained examples to illustrate the medical accommodation exception. In the interim final rule, the examples have been moved to paragraph (e)(4) and revised and expanded to address commenters' concerns.

By its terms, the medical accommodation exception incorporates a non-discrimination provision, because

a creditor may only use medical information to "accommodate" or favor the consumer's particular circumstances. Using medical information to discriminate against or disadvantage the consumer would not meet the requirements of the exception. Nothing in this rule, however, requires a creditor to consider medical information at the consumer's request or to provide an accommodation to the consumer. Under this rule, a creditor may disregard medical information obtained in connection with a consumer's specific request for an accommodation and evaluate the consumer in accordance with the creditor's otherwise applicable underwriting criteria. Other applicable laws, including applicable fair lending laws, may require creditors to consider such requests in certain circumstances. Consideration of circumstances governed by other applicable laws is beyond the scope of this rule. The example in renumbered paragraph (e)(4)(i) has been revised to clarify the creditor's options when presented with a specific request from a consumer for a medical accommodation.

The example in renumbered paragraph (e)(4)(ii) has been revised to apply to a specific request made by telephone and documented by the creditor. The example in paragraph (e)(4)(iii) is new and illustrates how a specific request may be made by the consumer on a credit application.

A consumer who specifically requests a medical accommodation may not provide sufficient information to enable a creditor to determine whether such an accommodation is warranted. In that case, a creditor may request additional information as necessary to verify or corroborate the information provided or to enable the creditor to determine whether to make a medical accommodation for the consumer's particular circumstances. The consumer at any time may decline to provide further medical information, withdraw the request for an accommodation, and choose to be evaluated according to the creditor's otherwise applicable underwriting criteria. The example in paragraph (e)(4)(iv) is new and illustrates how creditor requests for additional information may be handled.

As noted in the proposal, creditors may not rely on the medical accommodation exception to routinely obtain and use medical information about consumers in connection with credit eligibility determinations. This exception is triggered when the consumer specifically requests an accommodation. The requirement for a specific request from the consumer is

not satisfied by a creditor routinely including boilerplate language in a credit application which indicates that by applying for credit the consumer authorizes or consents to the creditor obtaining and using medical information in connection with credit eligibility determinations. The example in paragraph (e)(4)(v) is new and illustrates that routine requests by creditors do not fall within the exception.

*Forbearance.* In the proposal, forbearance practices and programs were addressed as an interpretation, rather than as an exception. Industry commenters believed that the proposed interpretation was too narrow because it only covered the triggering of forbearance practices and programs. These commenters believed that medical information should be available for use in determining whether to offer forbearance practices or programs to the consumer. Several industry commenters also requested clarification that informal forbearance practices would be covered by this interpretation. Privacy advocates, consumer and community groups, and health care associations suggested limiting the proposed interpretation to forbearance practices and programs triggered by a medically related event.

In the interim final rule, forbearance practices and programs are addressed in a new exception in paragraph (e)(1)(vii). Forbearance practices and programs may be established to address both medical and non-medical events. The exception, however, applies only to forbearance practices and programs that are triggered by medical events or conditions. Accordingly, paragraph (e)(1)(vii) of the interim final rule creates an exception to permit creditors to obtain and use medical information "consistent with safe and sound practices, to determine whether the provisions of a forbearance practice or program that is triggered by a medical event or condition apply to a consumer." This exception is flexible enough to cover both formal and informal forbearance practices and programs. Application of a forbearance practice or program may or may not be based on the request of the consumer. Paragraph (e)(5) provides an example of a forbearance practice or program.

*Debt cancellation contracts, debt suspension agreements, or credit insurance products.* As noted above, the proposal addressed debt cancellation contracts, debt suspension agreements, and credit insurance products through an interpretation. Most commenters believed that it was more appropriate to address these contracts, agreements, and

products through an exception. The FTC, however, recommended that the Agencies continue to address debt cancellation contracts, debt suspension agreements, and credit insurance products through an interpretation. The Agencies believe that the better approach is to create exceptions and, thus, have created two new exceptions in paragraphs (e)(1)(viii) (covering debt cancellation contracts and debt suspension agreements) and (e)(1)(ix) (covering credit insurance products) for the reasons discussed below.

Industry commenters believed that the proposed interpretation was too narrow because it only covered the triggering of debt cancellation contracts, debt suspension agreements, and credit insurance products. These commenters believed that medical information should be available for use in determining the consumer's eligibility for, the triggering of, or the reactivation of those contracts, agreements, or products. Privacy advocates, consumer and community groups, and health care associations believed that the proposed interpretation was too broad because debt cancellation contracts and debt suspension agreements are often triggered by events such as loss of employment or divorce that have no connection with medical information. Privacy advocates, consumer and community groups, and health care associations urged the Agencies to delete credit insurance from the proposed provision, maintaining that creditors typically do not offer credit insurance directly. Industry commenters had various suggestions regarding credit insurance, including creating a separate exception for credit insurance, referencing credit insurance in the preceding paragraph (a)(2)(i)(A) (now paragraph (b)(2)(iii)(A)), or broadening the proposed interpretation to cover eligibility and reactivation determinations.

In the interim final rule, debt cancellation contracts and debt suspension agreements are addressed in one exception (paragraph (e)(1)(viii)) and credit insurance products are addressed in a separate exception (paragraph (e)(1)(ix)) in recognition of the distinct character of those products. See also sections \_\_.4(a)(8) and (9) of the separate rule.

Under this rule, a creditor may not use medical information about a consumer to determine whether the consumer will be required to obtain a debt cancellation contract, debt suspension agreement, or credit insurance product. For example, a consumer who is in a wheelchair cannot be required to obtain credit insurance

because of the consumer's disability. An example in paragraph (d)(2)(iii)(C) of each Agency's rule and in § \_\_.3(b)(3)(iii) of the separate rule illustrates this limitation. Also, a creditor would not violate this particular rule if it requires all consumers who seek a particular type of credit, such as credit to finance the purchase of a home with a small down payment, to obtain credit insurance or a similar product.

The rule makes clear that creditors may use medical information to underwrite credit insurance, or to underwrite related credit products, such as debt cancellation contracts and debt suspension agreements, if a medical condition or event is a triggering event for the provision of benefits. However, denial of these products cannot be used as a subterfuge to consider medical information in making a determination about eligibility or continued eligibility for the underlying loan.

In addition, other laws and regulations, including applicable anti-typing rules and fair lending laws, may prohibit or otherwise restrict a creditor from requiring a consumer to obtain a debt cancellation contract, debt suspension agreement, or credit insurance product in connection with an extension of credit.<sup>10</sup> A discussion of the circumstances prohibited by other laws and regulations is beyond the scope of this rule.

Finally, creditors are reminded that when a creditor offers a consumer a debt cancellation contract, debt suspension agreement, or credit insurance product that is related to a credit product that the consumer obtains or seeks to obtain from the creditor, it may not be clear to the consumer why the creditor is seeking to obtain medical information. As discussed below, creditors generally would be prohibited from specifically asking for medical information on a credit application, except where a creditor has a specific application for the financing of medical procedures. Whether medical information is collected on the credit application or through other means, creditors should make it clear to consumers that the purpose for obtaining medical information relates to debt cancellation

contracts, debt suspension agreements, or credit insurance products, rather than to the credit itself. Moreover, where obtaining those products is voluntary, the consumer should be told that it is not necessary to provide medical information and that the failure to answer medically related questions will have no impact on the credit decision.

*Deleted exceptions and additional exceptions requested by commenters.* Proposed paragraph (d)(1)(iii) provided that a creditor may obtain and use uncoded medical information included in a consumer report furnished by a consumer reporting agency in accordance with section 604(g)(1)(B) of the FCRA, if such information is used for the purpose for which the consumer provided specific written consent. As discussed above, this proposed exception has been eliminated.

Proposed paragraph (d)(1)(vii) provided that a creditor may obtain and use medical information as otherwise permitted by order of the appropriate agency. Privacy advocates, consumer and community groups, and health care associations objected to this provision. The Agencies believe this paragraph is unnecessary and have omitted it from the interim final rule because the Agencies are adopting identical exceptions and, as noted above, intend to make any amendments to the rules in consultation and coordination with each other.

Commenters also requested the creation of a number of additional exceptions for flexible spending programs tied to credit cards, for products tied to a consumer's life expectancy, and to facilitate resolution of direct disputes with consumers. The Agencies believe that additional exceptions are not needed and that commenters' concerns are adequately addressed by the interpretation of "eligibility, or continued eligibility, for credit" and the existing exceptions.

#### *Section \_\_.31 Limits on Redisclosure of Information*

Proposed section \_\_.30(e) incorporated the statutory provision regarding the limits on redisclosure of medical information. In the proposal, this paragraph provided that a person that receives 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.

Some commenters requested clarification of the phrase "as otherwise

permitted by statute, regulation, or order" that is used in the statute and proposed regulation. Other commenters requested clarification that a redisclosure may be made for any purpose described in section 502(e) of the GLB Act. The Agencies believe that the redisclosure language, which was taken directly from the statute, is clear and that no further clarification is necessary.

In the interim final rules, the Agencies are adopting this provision in a new section \_\_.31 in each Agency's rule pursuant to their joint rulemaking authority under section 621(e) of the FCRA. The separate rule does not contain a similar provision on redisclosure limits.

#### *Section \_\_.32 Sharing Medical Information With Affiliates*

Section \_\_.31 of the proposal addressed the sharing of medically related information with affiliates. In the interim final rule, these provisions are contained in section \_\_.32.

Proposed paragraph (a) provided that the standard exclusions from the definition of "consumer report" contained in section 603(d)(2) of the Act—including the exclusions for sharing transaction or experience information among affiliates or sharing other eligibility information among affiliates after notice and an opportunity to opt-out—do not apply if medical information, an individualized list or description based on payment transactions for medical products or services, or an aggregate list or description based on payment transactions for medical products or services is disclosed to an affiliate.

Proposed paragraph (b) provided that the special restrictions on sharing medically related information with affiliates did not apply, and the standard exclusions from the definition of consumer report remained in effect, if the information was disclosed to an affiliate in certain circumstances. The proposal incorporated each of the exceptions enumerated in section 604(g)(3)(A) and (B) of the Act.

The first statutory exception is when medically related information is shared with an affiliate in connection with the business of insurance or annuities (including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners (NAIC), as in effect on January 1, 2003). Some commenters questioned the adequacy of the comment period based on the fact that the NAIC model privacy regulation is

<sup>10</sup>For example, banks are prohibited from conditioning an extension of credit on the consumer obtaining some additional credit, property or service from the bank or its affiliate other than a loan, discount, deposit or trust service, see Bank Holding Company Amendments of 1970 § 106(b) (12 U.S.C. 1972); see also 12 CFR 37.3(a) (providing that a national bank may not extend credit nor alter the terms or conditions of an extension of credit conditioned upon the customer entering into a debt cancellation contract or debt suspension agreement with the bank).

not readily available to the public, but must be purchased from NAIC. The reference to the NAIC model privacy regulation is a statutory reference that the Agencies have incorporated into the regulation. Interested parties may purchase a copy of the NAIC model Privacy of Consumer Financial and Health Information Regulation at <http://www.naic.org>.

The second statutory exception is when medically related information is shared with an affiliate for any purpose permitted without authorization under the Standards for Individually Identifiable Health Information promulgated by the Department of Health and Human Services (HHS) pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA). One commenter asked the Agencies to broaden this exception by deleting the phrase “for any purpose permitted without authorization” and replacing it with a reference to any sharing “as permitted under” the HIPAA regulations issued by HHS. The Agencies find no basis for altering the specific exceptions adopted by Congress. Furthermore, the Agencies note that the special affiliate sharing restrictions do not apply unless the communication of medically related information would otherwise meet the definition of a “consumer report.”

The third statutory exception is when medically related information is shared with an affiliate for any purpose referred to under section 1179 of HIPAA. Section 1179 of HIPAA provides that to the extent that an entity is engaged in activities of a financial institution or is engaged in authorizing, processing, clearing, settling, billing, transferring, reconciling or collecting payments for a financial institution, the HIPAA standards and requirements do not apply to the entity with respect to such activities. Section 1179 also provides as an example of a use or disclosure of information not covered by that statute, the use or disclosure of information for authorizing, processing, clearing, settling, billing, transferring, reconciling, or collection, a payment for, or related to, health care premiums or health care. Some commenters requested that the Agencies contact the Department of Health and Human Services (HHS) to clarify an issue regarding the scope of section 1179. Any consultation with HHS regarding section 1179 of HIPAA would be independent of this rulemaking.

The fourth statutory exception is when medically related information is shared with an affiliate for any purpose described in section 502(e) of the GLB Act. As previously noted in the

proposal, some of the purposes described in section 502(e) of the GLB Act may be germane to the sharing of information among affiliates—for example, sharing with the consent of the consumer, for fraud prevention purposes, or as necessary to effect, administer, or enforce a transaction requested or authorized by the consumer—while other purposes described in section 502(e) are not—for example, sharing information with law enforcement or regulatory authorities.

The fifth exception is not set forth in the statute and provides that the special restrictions on sharing medically related information with affiliates do not apply, and the standard exclusions from the definition of consumer report remain in effect, if the information is disclosed to an affiliate in connection with a determination of the consumer’s eligibility, or continued eligibility, for credit consistent with § \_\_.30 of this subpart. Industry commenters supported this exception. Privacy advocates, consumer and community groups, and health care associations requested the deletion of this exception or, as an alternative, that this exception not apply to uncoded medical information obtained from a consumer reporting agency with the consumer’s specific written consent or to information obtained pursuant to the medical accommodation exception. This exception is adopted as proposed in paragraph (b)(5).

The Agencies continue to believe that it is necessary and appropriate to allow a person to share medically related information with an affiliate in connection with a determination of the consumer’s eligibility, or continued eligibility, for credit consistent with the provisions of § \_\_.30. In response to commenters’ concerns, the Agencies note that the interim final rule permits uncoded medical information from a consumer reporting agency to be used only as permitted by the exceptions in § \_\_.30(d) and (e). Moreover, the medical accommodation exception restricts creditors from routinely obtaining and using medical information because the exception is triggered by a consumer’s specific request. Thus, the Agencies believe that the provisions of § \_\_.30(d) and (e) are sufficient to prevent the inappropriate sharing of medical information with and the inappropriate use of medical information by affiliates.

Finally, the sixth exception provides that the special restrictions on sharing medically related information with affiliates would not apply if otherwise permitted by order of the appropriate agency. This exception incorporates the

authority delegated to the Agencies by the Congress to create exceptions through orders. Privacy advocates, consumer and community groups, and health care associations acknowledged the authority of the Agencies to expand the affiliate-sharing exceptions by order. This exception is adopted as proposed in paragraph (b)(6).

As noted in the proposal, the prohibitions on obtaining or using medical information in § \_\_.30 operate independently from the exceptions that permit the sharing of that information among affiliates in accordance with the provisions of section 603(d)(2) of the Act. For example, if a mortgage lender has obtained and used medical information in accordance with one of the exceptions in § \_\_.30(c) or (d), the mortgage lender may share that information with its credit card affiliate without becoming a consumer reporting agency if one of the exceptions in § \_\_.32(b) applies. However, the credit card affiliate may not obtain or use that information in connection with any determination of the consumer’s eligibility, or continued eligibility, for credit, except to the extent permitted by § \_\_.30.

#### Effective Date and Solicitation of Comments

The statute provides that the final rules shall take effect on the later of 90 days after the rules are issued in final form, or the date specified in the regulations. Commenters believed that the effective date of the final rules should be no sooner than 90 days after the rules are issued in final form, although many commenters requested a longer period before the final rules take effect. Commenters generally believed that the effective date should be synchronized with the statutory prohibition, so that creditors would not be subject to the prohibition on obtaining or using medical information before the effective date of the regulatory exceptions. The interim final rules shall take effect on March 7, 2006, which is 270 days after the date of publication in the **Federal Register**. Comments on the interim final rule must be received by July 11, 2005.

#### V. Regulatory Analysis

##### *Paperwork Reduction Act*

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506, *et seq.*) and its implementing regulations at 5 CFR part 1320, including Appendix A.1, the Agencies have reviewed the interim final rules and determined that they contain no collections of information. The Board

made this determination under authority delegated by the Office of Management and Budget.

#### Regulatory Flexibility Analysis

*OCC:* The OCC received no comment on its Initial Regulatory Flexibility Analysis published in connection with the April 28, 2004, NPRM. Upon further review, the OCC certifies that this interim final rule will not have a significant economic impact on a substantial number of small entities.

Under section 605(b) of the Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if an agency certifies, along with a statement providing the factual basis for such certification, that the rule will not have a significant economic impact on a substantial number of small entities. The OCC has reviewed the impact of this interim final rule on small entities and certifies that it will not have a significant economic impact on a substantial number of small entities.

The Small Business Administration (SBA) has defined "small entities" for banking purposes as a bank or savings institution with assets of \$150 million or less. See 13 CFR 121.201. The interim final rule implements section 411 of the FACT Act and imposes only minimal economic impact on national banks. The interim final rule creates exceptions to the FACT Act's prohibition against national banks obtaining and using a consumer's medical information in connection with credit determinations. Additionally, the interim final rule implements the FACT Act's restrictions on the sharing of medical information among affiliates and includes exceptions to permit the sharing of medical information in certain circumstances. The interim final rule applies to national banks, Federal branches and agencies, their respective subsidiaries, and persons that participate in a credit transaction involving a national bank, Federal Branch or agency, or their respective subsidiaries ("entities") that obtain or use medical information in connection with credit determinations, regardless of their size. However, it is likely that small entities, because of the nature and size of their operations, will encounter fewer instances where they might obtain or use medical information. Therefore, the interim final rule is not expected to result in a significant economic impact for small national entities.

*Board:* The Board has prepared a final regulatory flexibility analysis as required by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

1. *Statement of the need for and objectives of the interim final rule.* The FACT Act amends the FCRA and was enacted, in part, for the purpose of protecting consumers' medical information. Section 411 of the FACT Act contains a general prohibition on creditors obtaining or using medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit. Section 411 authorizes the Board, together with the other Agencies, to create exceptions to allow creditors to obtain or use medical information for eligibility purposes where necessary and appropriate to protect legitimate operational, transactional risk, consumer, and other needs, consistent with the Congressional intent to restrict the use of medical information for inappropriate purposes.

Section 411 also limits the ability of an institution to share medical information with its affiliates without becoming a consumer reporting agency, subject to certain exceptions, and restricts the redisclosure of medical information. The statute authorizes the Board to issue regulations to create additional exceptions that are determined to be necessary and appropriate to permit the sharing of medical information among affiliates. The Board is adopting the interim final rule to create exceptions that permit creditors to obtain and use medical information in credit eligibility determinations, restate the limits on redisclosure, and restate and add to the exceptions that allow sharing among affiliates. The **SUPPLEMENTARY INFORMATION** above contains information on the objectives of the interim final rule.

2. *Summary of issues raised by comments in response to the initial regulatory flexibility analysis.* In accordance with section 3(a) of the Regulatory Flexibility Act, the Board conducted an initial regulatory flexibility analysis in connection with the proposed rule. The Board did not receive any comments on its initial regulatory flexibility analysis.

3. *Description of small entities affected by the proposal.* Each section of the interim final rule applies to different types of small entities and specifies the types of small entities subject to that section. The interim final rule would apply, in whole or in part, to banks that are members of the Federal Reserve System (other than national banks) and their subsidiaries, branches and Agencies of foreign banks (other than Federal branches, Federal Agencies, and insured State branches of foreign banks)

and their subsidiaries, commercial lending companies owned or controlled by foreign banks, organizations operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.*, and 611 *et seq.*), bank holding companies and affiliates of such holding companies (other than depository institutions and consumer reporting agencies), and creditors that participate in a transaction with one of the above-mentioned entities. A separate rule would apply to creditors not otherwise subject to one of the Agency rules. The Board's interim final rule will apply to the following institutions (numbers approximate): State member banks (932), bank holding companies (5,152), holding company non-bank subsidiaries (2,131), U.S. branches and agencies of foreign banks (289), and Edge and agreement corporations (75), for a subtotal of approximately 8,579 institutions. The Board estimates that over 5,000 of these institutions could be considered small institutions with assets less than \$150 million. The Board is unable to estimate the number of creditors that may participate in transactions with such institutions or the number of other creditors that may be covered by the separate rule.

All small entities that are creditors will be affected by the provision of the interim final rule that addresses the prohibition on, and exceptions to, creditors obtaining or using medical information in connection with credit eligibility determinations. All small creditors will have to comply with the exceptions if they obtain or use medical information about consumers in connection with any credit eligibility determination.

4. *Recordkeeping, reporting, and compliance requirements.* The interim final rule requires certain documentation to qualify for some of the specific exceptions, as discussed in the **SUPPLEMENTARY INFORMATION** above. The interim final rule contains no reporting or disclosure requirements.

5. *Steps taken to minimize the economic impact on small entities.* The Board solicited comment on how to minimize the economic impact on small entities. The Board did not receive any comments on this issue. By adopting consistent rules and exceptions, the Board and the other Agencies have attempted to minimize the economic impact on small entities.

*FDIC:* The Agencies received no comments on their initial regulatory flexibility analyses. Upon further analysis, the FDIC certifies that this rule creating exceptions to the FACT Act's general prohibition on creditors obtaining or using medical information

pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit will not have a significant economic impact on small entities. This interim final rule, as authorized by section 411 of the FACT Act, creates exceptions to allow creditors to obtain or use medical information for eligibility purposes where necessary and appropriate to protect legitimate operational, transactional risk, consumer, and other needs, consistent with the Congressional intent to restrict the use of medical information for inappropriate purposes. The rule also excludes, in certain situations, medical information shared by a covered entity with an affiliate from the definition of a consumer report in section 603(d) of the FCRA, and addresses the reuse and redisclosure of medical information.

**OTS:** In accordance with section 603(a) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 603(a)), OTS conducted an initial regulatory flexibility analysis in connection with the April 28, 2004 proposed rule. OTS did not receive any comments on its initial regulatory flexibility analysis.

Upon further analysis, OTS certifies in accordance with section 605(b) of the RFA (5 U.S.C. 605(b)) that this interim final rule will not have a significant economic impact on a substantial number of small entities. The Small Business Administration (SBA) has generally defined small savings institutions for RFA purposes as those with assets of \$150 million or less. 13 CFR 121.201.

This interim final rule implements section 411 of the FACT Act and imposes only minimal economic impact. Section 571.30 creates exceptions to allow creditors to obtain or use medical information for credit eligibility purposes where necessary and appropriate to protect legitimate operational, transactional risk, consumer, and other needs, consistent with the congressional intent to restrict the use of medical information for inappropriate purposes. It applies to all any of the following, regardless of size, that participates as a creditor in a transaction: (1) A savings association; (2) a subsidiary owned in whole or in part by a savings association; (3) a savings and loan holding company; (4) a subsidiary of a savings and loan holding company other than a bank or subsidiary of a bank; (5) a service corporation owned in whole or in part by a savings association; or (6) any other person that participates as a creditor in a transaction involving a person described (1)–(5).

Section 571.31 implements the FACT Act's restrictions on the redisclosure of information. Section 571.32 implements the FACT Act's restrictions on the sharing of medical information among affiliates and includes exceptions to permit the sharing of medical information in certain circumstances. These sections apply to savings associations and Federal savings association operating subsidiaries, regardless of size.

As referenced elsewhere in this **SUPPLEMENTARY INFORMATION**, other laws and regulations, such as the Fair Housing Act, the Americans with Disabilities Act, and OTS's anti-discrimination rules in 12 CFR part 528, also limit or regulate obtaining and using medical information for credit eligibility determinations in a manner that discriminates against persons whose medical condition constitutes a "disability" or "handicap" under those authorities. Other laws, such as the GLB Act, HIPAA, and other parts of the FCRA, also limit or regulate the use, collection, and sharing of consumer information, including medical information. The industry's preexisting familiarity and compliance with the requirements of these other authorities to the extent applicable is one factor that OTS expects will minimize the economic impact of today's interim final rule.

**NCUA:** The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact any regulation may have on a substantial number of small entities. NCUA considers credit unions having less than ten million dollars in assets to be small for purposes of the Regulatory Flexibility Act. NCUA Interpretive Ruling and Policy Statement (IRPS) 87–2, as amended by IRPS 03–2. NCUA conducted an initial regulatory flexibility analysis in connection with the proposed rule and did not receive any comments on it.

Upon further review, NCUA certifies that this interim final rule will not have a significant economic impact on a substantial number of small entities. The interim final rule applies to all Federal credit unions that obtain or use a consumer's medical information in connection with credit determinations, regardless of credit union size. The interim final rule creates exceptions to the FACT Act's prohibition against Federal credit unions obtaining and using such information in connection with credit determinations. Additionally, the interim final rule implements the FACT Act's restrictions on the sharing of medical information among Federal credit union affiliates,

credit union service organizations (CUSOs), and includes exceptions to permit the sharing of medical information in certain circumstances.

#### *FDIC—Small Business Regulatory Enforcement Act*

The Small Business Regulatory Enforcement Act of 1996 (SBREFA) (Pub. L. 104–121, 110 Stat. 857) provides generally for agencies to report rules to Congress and for Congress to review these rules. The reporting requirement is triggered in instances where the FDIC issues a final rule as defined by the Administrative Procedure Act (APA) (5 U.S.C. 55, *et seq.*). Because the FDIC is issuing a final rule as defined by the APA, the FDIC will file the reports required by SBREFA.

#### *OCC and OTS Executive Order 12866 Determination*

The OCC and OTS each has determined that its portion of the rule is not a significant regulatory action under Executive Order 12866.

#### *OCC Executive Order 13132 Determination*

The OCC has determined that this rule does not have any Federalism implications, as required by Executive Order 13132.

#### *NCUA Executive Order 13132 Determination*

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, the NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. The rule applies only to federally chartered credit unions and would not have substantial direct effects on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The NCUA has determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

#### *OCC and OTS Unfunded Mandates Reform Act of 1995 Determination*

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (Unfunded Mandates Act) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal

governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC and OTS each has determined that this rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of \$100 million or more. Accordingly, neither the OCC nor the OTS has prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

*NCUA: The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families*

The NCUA has determined that this rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105–277, 112 Stat. 2681 (1998).

*Plain Language Requirement*

Section 722 of the Gramm-Leach-Bliley Act (GLBA) (12 U.S.C. 4809), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The proposed rule requested comments on how the rule might be changed to reflect the requirements of GLBA. No GLBA comments were received.

**List of Subjects**

*12 CFR Part 41*

Banks, banking, Consumer protection, National banks, Reporting and recordkeeping requirements.

*12 CFR Part 222*

Banks, banking, Consumer protection, Credit, Fair Credit Reporting Act, Holding companies, Privacy, Reporting and recordkeeping requirements, State member banks.

*12 CFR Part 232*

Consumer protection, Credit, Fair Credit Reporting Act, Privacy, Reporting and recordkeeping requirements.

*12 CFR Part 334*

Administrative practice and procedure, Bank deposit insurance, Banks, banking, Reporting and recordkeeping requirements, Safety and soundness.

*12 CFR Part 571*

Consumer protection, Credit, Fair Credit Reporting Act, Privacy, Reporting

and recordkeeping requirements, Savings associations.

*12 CFR Part 717*

Consumer protection, Credit unions, Fair credit reporting, Medical information, Privacy, Reporting and recordkeeping requirements.

**Office of the Comptroller of the Currency**

12 CFR Chapter I.

**Authority and Issuance**

■ For the reasons set forth in the preamble, the OCC amends Chapter I of Title 12 of the Code of Federal Regulations as follows:

**PART 41—FAIR CREDIT**

■ 1. Revise the authority citation for part 41 to read as follows:

**Authority:** 12 U.S.C. 1 *et seq.*, 24(Seventh), 93a, 481, 484, and 1818; 15 U.S.C. 1681a, 1681b, 1681s, 1681w, 6801, and 6805.

■ 2. Revise subpart A to read as follows:

**Subpart A—General Provisions**

**§ 41.2 Examples.**

The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part. Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise in this part.

**§ 41.3 Definitions.**

As used in this part, unless the context requires otherwise:

(a) *Act* means the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*).

(b) *Affiliate* means any company that is related by common ownership or common corporate control with another company.

(c) [Reserved]

(d) *Company* means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(e) *Consumer* means an individual.

(f) [Reserved]

(g) [Reserved]

(h) [Reserved]

(i) *Common ownership or common corporate control* means a relationship between two companies under which:

(1) One company has, with respect to the other company:

(i) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of a company, directly or indirectly, or acting through one or more other persons;

(ii) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of a company; or

(iii) The power to exercise, directly or indirectly, a controlling influence over the management or policies of a company, as the OCC determines; or

(2) Any other person has, with respect to both companies, a relationship described in paragraphs (i)(1)(i)-(i)(1)(iii) of this section.

(j) [Reserved]

(k) *Medical information* means:

(1) 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—

(i) The past, present, or future physical, mental, or behavioral health or condition of an individual;

(ii) The provision of health care to an individual; or

(iii) The payment for the provision of health care to an individual.

(2) The term does not include:

(i) The age or gender of a consumer;

(ii) Demographic information about the consumer, including a consumer's residence address or e-mail address;

(iii) Any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy; or

(iv) Information that does not identify a specific consumer.

(l) *Person* means any individual, partnership, corporation, trust, estate cooperative, association, government or governmental subdivision or agency, or other entity.

■ 3. Add subpart D to read as follows:

**Subpart D—Medical Information**

**§ 41.30 Obtaining or using medical information in connection with a determination of eligibility for credit.**

(a) *Scope.* This section applies to:

(1) Any person that participates as a creditor in a transaction and that is a national bank, a Federal branch or agency of a foreign bank, and their respective subsidiaries; or

(2) Any other person that participates as a creditor in a transaction involving a person described in paragraph (a)(1) of this section.

(b) *General prohibition on obtaining or using medical information.* (1) *In general.* A creditor may 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, except as provided in this section.

(2) *Definitions.* (i) *Credit* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(ii) *Creditor* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(iii) *Eligibility, or continued eligibility, for credit* means the consumer's qualification or fitness to receive, or continue to receive, credit, including the terms on which credit is offered. The term does not include:

(A) Any determination of the consumer's qualification or fitness for employment, insurance (other than a credit insurance product), or other non-credit products or services;

(B) Authorizing, processing, or documenting a payment or transaction on behalf of the consumer in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit; or

(C) Maintaining or servicing the consumer's account in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit.

(c) *Rule of construction for obtaining and using unsolicited medical information.* (1) *In general.* 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, for credit without specifically requesting medical information.

(2) *Use of unsolicited medical information.* A creditor that receives unsolicited medical information in the manner described in paragraph (c)(1) of this section may use that information in connection with any determination of the consumer's eligibility, or continued eligibility, for credit to the extent the creditor can rely on at least one of the exceptions in § 41.30(d) or (e).

(3) *Examples.* A creditor does not obtain medical information in violation of the prohibition if, for example:

(i) In response to a general question regarding a consumer's debts or expenses, the creditor receives information that the consumer owes a debt to a hospital.

(ii) In a conversation with the creditor's loan officer, the consumer informs the creditor that the consumer has a particular medical condition.

(iii) In connection with a consumer's application for an extension of credit, the creditor requests a consumer report from a consumer reporting agency and receives medical information in the

consumer report furnished by the agency even though the creditor did not specifically request medical information from the consumer reporting agency.

(d) *Financial information exception for obtaining and using medical information.* (1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit so long as:

(i) 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;

(ii) 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

(iii) 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.

(2) *Examples.* (i) *Examples of the types of information routinely used in making credit eligibility determinations.* Paragraph (d)(1)(i) of this section permits a creditor, for example, to obtain and use information about:

(A) The dollar amount, repayment terms, repayment history, and similar information regarding medical debts to calculate, measure, or verify the repayment ability of the consumer, the use of proceeds, or the terms for granting credit;

(B) The value, condition, and lien status of a medical device that may serve as collateral to secure a loan;

(C) The dollar amount and continued eligibility for disability income or benefits related to health or a medical condition that is relied on as a source of repayment; or

(D) The identity of creditors to whom outstanding medical debts are owed in connection with an application for credit, including but not limited to, a transaction involving the consolidation of medical debts.

(ii) *Examples of uses of medical information consistent with the exception.* (A) A consumer includes on an application for credit information about two \$20,000 debts. One debt is to a hospital; the other debt is to a retailer. The creditor contacts the hospital and the retailer to verify the amount and payment status of the debts. The creditor learns that both debts are more than 90 days past due. Any two debts

of this size that are more than 90 days past due would disqualify the consumer under the creditor's established underwriting criteria. The creditor denies the application on the basis that the consumer has a poor repayment history on outstanding debts. The creditor has used medical information in a manner and to an extent no less favorable than it would use comparable non-medical information.

(B) A consumer indicates on an application for a \$200,000 mortgage loan that she receives \$15,000 in long-term disability income each year from her former employer and has no other income. Annual income of \$15,000, regardless of source, would not be sufficient to support the requested amount of credit. The creditor denies the application on the basis that the projected debt-to-income ratio of the consumer does not meet the creditor's underwriting criteria. The creditor has used medical information in a manner and to an extent that is no less favorable than it would use comparable non-medical information.

(C) A consumer includes on an application for a \$10,000 home equity loan that he has a \$50,000 debt to a medical facility that specializes in treating a potentially terminal disease. The creditor contacts the medical facility to verify the debt and obtain the repayment history and current status of the loan. The creditor learns that the debt is current. The applicant meets the income and other requirements of the creditor's underwriting guidelines. The creditor grants the application. The creditor has used medical information in accordance with the exception.

(iii) *Examples of uses of medical information inconsistent with the exception.* (A) A consumer applies for \$25,000 of credit and includes on the application information about a \$50,000 debt to a hospital. The creditor contacts the hospital to verify the amount and payment status of the debt, and learns that the debt is current and that the consumer has no delinquencies in her repayment history. If the existing debt were instead owed to a retail department store, the creditor would approve the application and extend credit based on the amount and repayment history of the outstanding debt. The creditor, however, denies the application because the consumer is indebted to a hospital. The creditor has used medical information, here the identity of the medical creditor, in a manner and to an extent that is less favorable than it would use comparable non-medical information.

(B) A consumer meets with a loan officer of a creditor to apply for a

mortgage loan. While filling out the loan application, the consumer informs the loan officer orally that she has a potentially terminal disease. The consumer meets the creditor's established requirements for the requested mortgage loan. The loan officer recommends to the credit committee that the consumer be denied credit because the consumer has that disease. The credit committee follows the loan officer's recommendation and denies the application because the consumer has a potentially terminal disease. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis as part of a determination of eligibility or continued eligibility for credit.

(C) A consumer who has an apparent medical condition, such as a consumer who uses a wheelchair or an oxygen tank, meets with a loan officer to apply for a home equity loan. The consumer meets the creditor's established requirements for the requested home equity loan and the creditor typically does not require consumers to obtain a debt cancellation contract, debt suspension agreement, or credit insurance product in connection with such loans. However, based on the consumer's apparent medical condition, the loan officer recommends to the credit committee that credit be extended to the consumer only if the consumer obtains a debt cancellation contract, debt suspension agreement, or credit insurance product. The credit committee agrees with the loan officer's recommendation. The loan officer informs the consumer that the consumer must obtain a debt cancellation contract, debt suspension agreement, or credit insurance product to qualify for the loan. The consumer obtains one of these products from a third party and the creditor approves the loan. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis in setting conditions on the consumer's eligibility for credit.

(e) *Specific exceptions for obtaining and using medical information.* (1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit—

(i) To determine whether the use of a power of attorney or legal representative

that is triggered by a medical event or condition is necessary and appropriate or whether the consumer has the legal capacity to contract when a person seeks to exercise a power of attorney or act as legal representative for a consumer based on an asserted medical event or condition;

(ii) To comply with applicable requirements of local, State, or Federal laws;

(iii) To determine, at the consumer's request, whether the consumer qualifies for a legally permissible special credit program or credit-related assistance program that is—

(A) Designed to meet the special needs of consumers with medical conditions; and

(B) Established and administered pursuant to a written plan that—

(1) Identifies the class of persons that the program is designed to benefit; and

(2) Sets forth the procedures and standards for extending credit or providing other credit-related assistance under the program.

(iv) To the extent necessary for purposes of fraud prevention or detection;

(v) 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;

(vi) Consistent with safe and sound practices, if the consumer or the consumer's legal representative specifically requests that the creditor use medical information 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;

(vii) Consistent with safe and sound practices, to determine whether the provisions of a forbearance practice or program that is triggered by a medical event or condition apply to a consumer;

(viii) To determine the consumer's eligibility for, the triggering of, or the reactivation of a debt cancellation contract or debt suspension agreement if a medical condition or event is a triggering event for the provision of benefits under the contract or agreement; or

(ix) To determine the consumer's eligibility for, the triggering of, or the reactivation of a credit insurance product if a medical condition or event is a triggering event for the provision of benefits under the product.

(2) *Example of determining eligibility for a special credit program or credit assistance program.* A not-for-profit organization establishes a credit assistance program pursuant to a written

plan that is designed to assist disabled veterans in purchasing homes by subsidizing the down payment for the home purchase mortgage loans of qualifying veterans. The organization works through mortgage lenders and requires mortgage lenders to obtain medical information about the disability of any consumer that seeks to qualify for the program, use that information to verify the consumer's eligibility for the program, and forward that information to the organization. A consumer who is a veteran applies to a creditor for a home purchase mortgage loan. The creditor informs the consumer about the credit assistance program for disabled veterans and the consumer seeks to qualify for the program. Assuming that the program complies with all applicable law, including applicable fair lending laws, the creditor may obtain and use medical information about the medical condition and disability, if any, of the consumer to determine whether the consumer qualifies for the credit assistance program.

(3) *Examples of verifying the medical purpose of the loan or the use of proceeds.* (i) If a consumer applies for \$10,000 of credit for the purpose of financing vision correction surgery, the creditor may verify with the surgeon that the procedure will be performed. If the surgeon reports that surgery will not be performed on the consumer, the creditor may use that medical information to deny the consumer's application for credit, because the loan would not be used for the stated purpose.

(ii) If a consumer applies for \$10,000 of credit for the purpose of financing cosmetic surgery, the creditor may confirm the cost of the procedure with the surgeon. If the surgeon reports that the cost of the procedure is \$5,000, the creditor may use that medical information to offer the consumer only \$5,000 of credit.

(iii) A creditor has an established medical loan program for financing particular elective surgical procedures. The creditor receives a loan application from a consumer requesting \$10,000 of credit under the established loan program for an elective surgical procedure. The consumer indicates on the application that the purpose of the loan is to finance an elective surgical procedure not eligible for funding under the guidelines of the established loan program. The creditor may deny the consumer's application because the purpose of the loan is not for a particular procedure funded by the established loan program.

(4) *Examples of obtaining and using medical information at the request of*

*the consumer.* (i) If a consumer applies for a loan and specifically requests that the creditor consider the consumer's medical disability at the relevant time as an explanation for adverse payment history information in his credit report, the creditor may consider such medical information in evaluating the consumer's willingness and ability to repay the requested loan to accommodate the consumer's particular circumstances, consistent with safe and sound practices. The creditor may also decline to consider such medical information to accommodate the consumer, but may evaluate the consumer's application in accordance with its otherwise applicable underwriting criteria. The creditor may not deny the consumer's application or otherwise treat the consumer less favorably because the consumer specifically requested a medical accommodation, if the creditor would have extended the credit or treated the consumer more favorably under the creditor's otherwise applicable underwriting criteria.

(ii) If a consumer applies for a loan by telephone and explains that his income has been and will continue to be interrupted on account of a medical condition and that he expects to repay the loan by liquidating assets, the creditor may, but is not required to, evaluate the application using the sale of assets as the primary source of repayment, consistent with safe and sound practices, provided that the creditor documents the consumer's request by recording the oral conversation or making a notation of the request in the consumer's file.

(iii) If a consumer applies for a loan and the application form provides a space where the consumer may provide any other information or special circumstances, whether medical or non-medical, that the consumer would like the creditor to consider in evaluating the consumer's application, the creditor may use medical information provided by the consumer in that space on that application to accommodate the consumer's application for credit, consistent with safe and sound practices, or may disregard that information.

(iv) If a consumer specifically requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit and provides the creditor with medical information for that purpose, and the creditor determines that it needs additional information regarding the consumer's circumstances, the creditor may request, obtain, and use additional medical

information about the consumer as necessary to verify the information provided by the consumer or to determine whether to make an accommodation for the consumer. The consumer may decline to provide additional information, withdraw the request for an accommodation, and have the application considered under the creditor's otherwise applicable underwriting criteria.

(v) If a consumer completes and signs a credit application that is not for medical purpose credit and the application contains boilerplate language that routinely requests medical information from the consumer or that indicates that by applying for credit the consumer authorizes or consents to the creditor obtaining and using medical information in connection with a determination of the consumer's eligibility, or continued eligibility, for credit, the consumer has not specifically requested that the creditor obtain and use medical information to accommodate the consumer's particular circumstances.

(5) *Example of a forbearance practice or program.* After an appropriate safety and soundness review, a creditor institutes a program that allows consumers who are or will be hospitalized to defer payments as needed for up to three months, without penalty, if the credit account has been open for more than one year and has not previously been in default, and the consumer provides confirming documentation at an appropriate time. A consumer is hospitalized and does not pay her bill for a particular month. This consumer has had a credit account with the creditor for more than one year and has not previously been in default. The creditor attempts to contact the consumer and speaks with the consumer's adult child, who is not the consumer's legal representative. The adult child informs the creditor that the consumer is hospitalized and is unable to pay the bill at that time. The creditor defers payments for up to three months, without penalty, for the hospitalized consumer and sends the consumer a letter confirming this practice and the date on which the next payment will be due.

#### **§ 41.31 Limits on redisclosure of information.**

(a) *Scope.* This section applies to national banks, Federal branches and agencies of foreign banks, and their respective operating subsidiaries.

(b) *Limits on redisclosure.* If a person described in paragraph (a) of this section receives medical information about a consumer from a consumer

reporting agency or its affiliate, the person must not disclose that information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

#### **§ 41.32 Sharing medical information with affiliates.**

(a) *Scope.* This section applies to national banks, Federal branches and agencies of foreign banks, and their respective operating subsidiaries.

(b) *In general.* The exclusions from the term "consumer report" in section 603(d)(2) of the Act that allow the sharing of information with affiliates do not apply if a person described in paragraph (a) of this section communicates to an affiliate—

- (1) Medical information;
- (2) An individualized list or description based on the payment transactions of the consumer for medical products or services; or
- (3) An aggregate list of identified consumers based on payment transactions for medical products or services.

(c) *Exceptions.* A person described in paragraph (a) may rely on the exclusions from the term "consumer report" in section 603(d)(2) of the Act to communicate the information in paragraph (b) to an affiliate—

(1) In connection with the business of insurance or annuities (including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners, as in effect on January 1, 2003);

(2) For any purpose permitted without authorization under the regulations promulgated by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA);

(3) For any purpose referred to in section 1179 of HIPAA;

(4) For any purpose described in section 502(e) of the Gramm-Leach-Bliley Act;

(5) In connection with a determination of the consumer's eligibility, or continued eligibility, for credit consistent with § 41.30; or

(6) As otherwise permitted by order of the OCC.

#### **Board of Governors of the Federal Reserve System**

12 CFR Chapter II.

#### *Authority and Issuance*

■ For the reasons set forth in the joint preamble, title 12, chapter II, of the Code

of Federal Regulations is amended as follows:

**PART 222—FAIR CREDIT REPORTING (REGULATION V)**

■ 1. The authority citation for part 222 is revised to read as follows:

**Authority:** 15 U.S.C. 1681b and 1681s; Secs. 3, 214, and 217, Pub. L. 108–159, 117 Stat. 1952.

**Subpart A—General Provisions**

■ 2. Amend subpart A to part 222 by adding §§222.2 and 222.3 to read as follows:

**§ 222.2 Examples.**

The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part. Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise in this part.

**§ 222.3 Definitions.**

As used in this part, unless the context requires otherwise:

(a) *Act* means the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*).

(b) *Affiliate* means any company that is related by common ownership or common corporate control with another company.

(c) [Reserved]

(d) *Company* means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(e) *Consumer* means an individual.

(f) [Reserved]

(g) [Reserved]

(h) [Reserved]

(i) *Common ownership or common corporate control* means a relationship between two companies under which:

(1) One company has, with respect to the other company:

(i) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of a company, directly or indirectly, or acting through one or more other persons;

(ii) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of a company; or

(iii) The power to exercise, directly or indirectly, a controlling influence over the management or policies of a company, as the Board determines; or

(2) Any other person has, with respect to both companies, a relationship described in paragraphs (i)(1)(i)–(i)(1)(iii) of this section.

(j) [Reserved]

(k) *Medical information* means:

(1) 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—

(i) The past, present, or future physical, mental, or behavioral health or condition of an individual;

(ii) The provision of health care to an individual; or

(iii) The payment for the provision of health care to an individual.

(2) The term does not include:

(i) The age or gender of a consumer;

(ii) Demographic information about the consumer, including a consumer's residence address or e-mail address;

(iii) Any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy; or

(iv) Information that does not identify a specific consumer.

(l) *Person* means any individual, partnership, corporation, trust, estate cooperative, association, government or governmental subdivision or agency, or other entity.

■ 3. Subpart D is added to part 222 to read as follows:

**Subpart D—Medical Information**

Sec.

222.30 Obtaining or using medical information in connection with a determination of eligibility for credit.

222.31 Limits on redisclosure of information.

222.32 Sharing medical information with affiliates.

**Subpart D—Medical Information**

**§ 222.30 Obtaining or using medical information in connection with a determination of eligibility for credit.**

(a) *Scope.* This section applies to

(1) Any of the following that participates as a creditor in a transaction—

(i) A bank that is a member of the Federal Reserve System (other than national banks) and its subsidiaries;

(ii) A branch or Agency of a foreign bank (other than Federal branches, Federal Agencies, and insured State branches of foreign banks) and its subsidiaries;

(iii) A commercial lending company owned or controlled by foreign banks;

(iv) An organization operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.*, and 611 *et seq.*);

(v) A bank holding company and an affiliate of such holding company (other

than depository institutions and consumer reporting agencies); or

(2) Any other person that participates as a creditor in a transaction involving a person described in paragraph (a)(1) of this section.

(b) *General prohibition on obtaining or using medical information.* (1) *In general.* A creditor may 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, except as provided in this section.

(2) *Definitions.* (i) *Credit* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(ii) *Creditor* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(iii) *Eligibility, or continued eligibility, for credit* means the consumer's qualification or fitness to receive, or continue to receive, credit, including the terms on which credit is offered. The term does not include:

(A) Any determination of the consumer's qualification or fitness for employment, insurance (other than a credit insurance product), or other non-credit products or services;

(B) Authorizing, processing, or documenting a payment or transaction on behalf of the consumer in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit; or

(C) Maintaining or servicing the consumer's account in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit.

(c) *Rule of construction for obtaining and using unsolicited medical information.* (1) *In general.* 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, for credit without specifically requesting medical information.

(2) *Use of unsolicited medical information.* A creditor that receives unsolicited medical information in the manner described in paragraph (c)(1) of this section may use that information in connection with any determination of the consumer's eligibility, or continued eligibility, for credit to the extent the creditor can rely on at least one of the exceptions in § 222.30(d) or (e).

(3) *Examples.* A creditor does not obtain medical information in violation of the prohibition if, for example:

(i) In response to a general question regarding a consumer's debts or expenses, the creditor receives information that the consumer owes a debt to a hospital.

(ii) In a conversation with the creditor's loan officer, the consumer informs the creditor that the consumer has a particular medical condition.

(iii) In connection with a consumer's application for an extension of credit, the creditor requests a consumer report from a consumer reporting agency and receives medical information in the consumer report furnished by the agency even though the creditor did not specifically request medical information from the consumer reporting agency.

(d) *Financial information exception for obtaining and using medical information.* (1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit so long as:

(i) 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;

(ii) 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

(iii) 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.

(2) *Examples.* (i) *Examples of the types of information routinely used in making credit eligibility determinations.* Paragraph (d)(1)(i) of this section permits a creditor, for example, to obtain and use information about:

(A) The dollar amount, repayment terms, repayment history, and similar information regarding medical debts to calculate, measure, or verify the repayment ability of the consumer, the use of proceeds, or the terms for granting credit;

(B) The value, condition, and lien status of a medical device that may serve as collateral to secure a loan;

(C) The dollar amount and continued eligibility for disability income or benefits related to health or a medical condition that is relied on as a source of repayment; or

(D) The identity of creditors to whom outstanding medical debts are owed in connection with an application for

credit, including but not limited to, a transaction involving the consolidation of medical debts.

(ii) *Examples of uses of medical information consistent with the exception.* (A) A consumer includes on an application for credit information about two \$20,000 debts. One debt is to a hospital; the other debt is to a retailer. The creditor contacts the hospital and the retailer to verify the amount and payment status of the debts. The creditor learns that both debts are more than 90 days past due. Any two debts of this size that are more than 90 days past due would disqualify the consumer under the creditor's established underwriting criteria. The creditor denies the application on the basis that the consumer has a poor repayment history on outstanding debts. The creditor has used medical information in a manner and to an extent no less favorable than it would use comparable non-medical information.

(B) A consumer indicates on an application for a \$200,000 mortgage loan that she receives \$15,000 in long-term disability income each year from her former employer and has no other income. Annual income of \$15,000, regardless of source, would not be sufficient to support the requested amount of credit. The creditor denies the application on the basis that the projected debt-to-income ratio of the consumer does not meet the creditor's underwriting criteria. The creditor has used medical information in a manner and to an extent that is no less favorable than it would use comparable non-medical information.

(C) A consumer includes on an application for a \$10,000 home equity loan that he has a \$50,000 debt to a medical facility that specializes in treating a potentially terminal disease. The creditor contacts the medical facility to verify the debt and obtain the repayment history and current status of the loan. The creditor learns that the debt is current. The applicant meets the income and other requirements of the creditor's underwriting guidelines. The creditor grants the application. The creditor has used medical information in accordance with the exception.

(iii) *Examples of uses of medical information inconsistent with the exception.* (A) A consumer applies for \$25,000 of credit and includes on the application information about a \$50,000 debt to a hospital. The creditor contacts the hospital to verify the amount and payment status of the debt, and learns that the debt is current and that the consumer has no delinquencies in her repayment history. If the existing debt were instead owed to a retail

department store, the creditor would approve the application and extend credit based on the amount and repayment history of the outstanding debt. The creditor, however, denies the application because the consumer is indebted to a hospital. The creditor has used medical information, here the identity of the medical creditor, in a manner and to an extent that is less favorable than it would use comparable non-medical information.

(B) A consumer meets with a loan officer of a creditor to apply for a mortgage loan. While filling out the loan application, the consumer informs the loan officer orally that she has a potentially terminal disease. The consumer meets the creditor's established requirements for the requested mortgage loan. The loan officer recommends to the credit committee that the consumer be denied credit because the consumer has that disease. The credit committee follows the loan officer's recommendation and denies the application because the consumer has a potentially terminal disease. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis as part of a determination of eligibility or continued eligibility for credit.

(C) A consumer who has an apparent medical condition, such as a consumer who uses a wheelchair or an oxygen tank, meets with a loan officer to apply for a home equity loan. The consumer meets the creditor's established requirements for the requested home equity loan and the creditor typically does not require consumers to obtain a debt cancellation contract, debt suspension agreement, or credit insurance product in connection with such loans. However, based on the consumer's apparent medical condition, the loan officer recommends to the credit committee that credit be extended to the consumer only if the consumer obtains a debt cancellation contract, debt suspension agreement, or credit insurance product. The credit committee agrees with the loan officer's recommendation. The loan officer informs the consumer that the consumer must obtain a debt cancellation contract, debt suspension agreement, or credit insurance product to qualify for the loan. The consumer obtains one of these products from a third party and the creditor approves the loan. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's

physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis in setting conditions on the consumer's eligibility for credit.

(e) *Specific exceptions for obtaining and using medical information.* (1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit—

(i) To determine whether the use of a power of attorney or legal representative that is triggered by a medical event or condition is necessary and appropriate or whether the consumer has the legal capacity to contract when a person seeks to exercise a power of attorney or act as legal representative for a consumer based on an asserted medical event or condition;

(ii) To comply with applicable requirements of local, State, or Federal laws;

(iii) To determine, at the consumer's request, whether the consumer qualifies for a legally permissible special credit program or credit-related assistance program that is—

(A) Designed to meet the special needs of consumers with medical conditions; and

(B) Established and administered pursuant to a written plan that—

(1) Identifies the class of persons that the program is designed to benefit; and

(2) Sets forth the procedures and standards for extending credit or providing other credit-related assistance under the program.

(iv) To the extent necessary for purposes of fraud prevention or detection;

(v) 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;

(vi) Consistent with safe and sound practices, if the consumer or the consumer's legal representative specifically requests that the creditor use medical information 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;

(vii) Consistent with safe and sound practices, to determine whether the provisions of a forbearance practice or program that is triggered by a medical event or condition apply to a consumer;

(viii) To determine the consumer's eligibility for, the triggering of, or the reactivation of a debt cancellation contract or debt suspension agreement if a medical condition or event is a

triggering event for the provision of benefits under the contract or agreement; or

(ix) To determine the consumer's eligibility for, the triggering of, or the reactivation of a credit insurance product if a medical condition or event is a triggering event for the provision of benefits under the product.

(2) *Example of determining eligibility for a special credit program or credit assistance program.* A not-for-profit organization establishes a credit assistance program pursuant to a written plan that is designed to assist disabled veterans in purchasing homes by subsidizing the down payment for the home purchase mortgage loans of qualifying veterans. The organization works through mortgage lenders and requires mortgage lenders to obtain medical information about the disability of any consumer that seeks to qualify for the program, and forward that information to the organization. A consumer who is a veteran applies to a creditor for a home purchase mortgage loan. The creditor informs the consumer about the credit assistance program for disabled veterans and the consumer seeks to qualify for the program. Assuming that the program complies with all applicable law, including applicable fair lending laws, the creditor may obtain and use medical information about the medical condition and disability, if any, of the consumer to determine whether the consumer qualifies for the credit assistance program.

(3) *Examples of verifying the medical purpose of the loan or the use of proceeds.* (i) If a consumer applies for \$10,000 of credit for the purpose of financing vision correction surgery, the creditor may verify with the surgeon that the procedure will be performed. If the surgeon reports that surgery will not be performed on the consumer, the creditor may use that medical information to deny the consumer's application for credit, because the loan would not be used for the stated purpose.

(ii) If a consumer applies for \$10,000 of credit for the purpose of financing cosmetic surgery, the creditor may confirm the cost of the procedure with the surgeon. If the surgeon reports that the cost of the procedure is \$5,000, the creditor may use that medical information to offer the consumer only \$5,000 of credit.

(iii) A creditor has an established medical loan program for financing particular elective surgical procedures. The creditor receives a loan application from a consumer requesting \$10,000 of

credit under the established loan program for an elective surgical procedure. The consumer indicates on the application that the purpose of the loan is to finance an elective surgical procedure not eligible for funding under the guidelines of the established loan program. The creditor may deny the consumer's application because the purpose of the loan is not for a particular procedure funded by the established loan program.

(4) *Examples of obtaining and using medical information at the request of the consumer.* (i) If a consumer applies for a loan and specifically requests that the creditor consider the consumer's medical disability at the relevant time as an explanation for adverse payment history information in his credit report, the creditor may consider such medical information in evaluating the consumer's willingness and ability to repay the requested loan to accommodate the consumer's particular circumstances, consistent with safe and sound practices. The creditor may also decline to consider such medical information to accommodate the consumer, but may evaluate the consumer's application in accordance with its otherwise applicable underwriting criteria. The creditor may not deny the consumer's application or otherwise treat the consumer less favorably because the consumer specifically requested a medical accommodation, if the creditor would have extended the credit or treated the consumer more favorably under the creditor's otherwise applicable underwriting criteria.

(ii) If a consumer applies for a loan by telephone and explains that his income has been and will continue to be interrupted on account of a medical condition and that he expects to repay the loan by liquidating assets, the creditor may, but is not required to, evaluate the application using the sale of assets as the primary source of repayment, consistent with safe and sound practices, provided that the creditor documents the consumer's request by recording the oral conversation or making a notation of the request in the consumer's file.

(iii) If a consumer applies for a loan and the application form provides a space where the consumer may provide any other information or special circumstances, whether medical or non-medical, that the consumer would like the creditor to consider in evaluating the consumer's application, the creditor may use medical information provided by the consumer in that space on that application to accommodate the consumer's application for credit,

consistent with safe and sound practices, or may disregard that information.

(iv) If a consumer specifically requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit and provides the creditor with medical information for that purpose, and the creditor determines that it needs additional information regarding the consumer's circumstances, the creditor may request, obtain, and use additional medical information about the consumer as necessary to verify the information provided by the consumer or to determine whether to make an accommodation for the consumer. The consumer may decline to provide additional information, withdraw the request for an accommodation, and have the application considered under the creditor's otherwise applicable underwriting criteria.

(v) If a consumer completes and signs a credit application that is not for medical purpose credit and the application contains boilerplate language that routinely requests medical information from the consumer or that indicates that by applying for credit the consumer authorizes or consents to the creditor obtaining and using medical information in connection with a determination of the consumer's eligibility, or continued eligibility, for credit, the consumer has not specifically requested that the creditor obtain and use medical information to accommodate the consumer's particular circumstances.

(5) *Example of a forbearance practice or program.* After an appropriate safety and soundness review, a creditor institutes a program that allows consumers who are or will be hospitalized to defer payments as needed for up to three months, without penalty, if the credit account has been open for more than one year and has not previously been in default, and the consumer provides confirming documentation at an appropriate time. A consumer is hospitalized and does not pay her bill for a particular month. This consumer has had a credit account with the creditor for more than one year and has not previously been in default. The creditor attempts to contact the consumer and speaks with the consumer's adult child, who is not the consumer's legal representative. The adult child informs the creditor that the consumer is hospitalized and is unable to pay the bill at that time. The creditor defers payments for up to three months, without penalty, for the hospitalized consumer and sends the consumer a

letter confirming this practice and the date on which the next payment will be due.

#### **§ 222.31 Limits on redisclosure of information.**

(a) *Scope.* This section applies to banks that are members of the Federal Reserve System (other than national banks) and their respective operating subsidiaries, branches and agencies of foreign banks (other than Federal branches, Federal Agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, organizations operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.*, and 611 *et seq.*), and bank holding companies and affiliates of such holding companies (other than depository institutions and consumer reporting agencies).

(b) *Limits on redisclosure.* If a person described in paragraph (a) of this section receives medical information about a consumer from a consumer reporting agency or its affiliate, the person must not disclose that information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

#### **§ 222.32 Sharing medical information with affiliates.**

(a) *Scope.* This section applies to banks that are members of the Federal Reserve System (other than national banks) and their respective operating subsidiaries, branches and agencies of foreign banks (other than Federal branches, Federal Agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, organizations operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.*, and 611 *et seq.*).

(b) *In general.* The exclusions from the term "consumer report" in section 603(d)(2) of the Act that allow the sharing of information with affiliates do not apply to a person described in paragraph (a) of this section if that person communicates to an affiliate—

- (1) Medical information;
- (2) An individualized list or description based on the payment transactions of the consumer for medical products or services; or
- (3) An aggregate list of identified consumers based on payment transactions for medical products or services.

(c) *Exceptions.* A person described in paragraph (a) of this section may rely on the exclusions from the term "consumer

report" in section 603(d)(2) of the Act to communicate the information in paragraph (b) of this section to an affiliate—

(1) In connection with the business of insurance or annuities (including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners, as in effect on January 1, 2003);

(2) For any purpose permitted without authorization under the regulations promulgated by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA);

(3) For any purpose referred to in section 1179 of HIPAA;

(4) For any purpose described in section 502(e) of the Gramm-Leach-Bliley Act;

(5) In connection with a determination of the consumer's eligibility, or continued eligibility, for credit consistent with § 222.30 of this part; or

(6) As otherwise permitted by order of the Board.

■ 4. A new part 232 is added to read as follows:

### **PART 232—OBTAINING AND USING MEDICAL INFORMATION IN CONNECTION WITH CREDIT (REGULATION FF)**

Sec.

232.1 Scope, general prohibition and definitions.

232.2 Rule of construction for obtaining and using unsolicited medical information.

232.3 Financial information exception for obtaining and using medical information.

232.4 Specific exceptions for obtaining and using medical information.

*Authority:* 15 U.S.C. 1681b.

#### **§ 232.1 Scope, general prohibition and definitions.**

(a) *Scope.* This part applies to creditors, as defined in paragraph (c)(3) of this section, except for creditors that are subject to §§ 41.30, 222.30, 334.30, 571.30, or 717.30.

(b) *In general.* A creditor may 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, except as provided in this section.

(c) *Definitions.* (1) *Consumer* means an individual.

(2) *Credit* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(3) *Creditor* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(4) *Eligibility, or continued eligibility, for credit* means the consumer's qualification or fitness to receive, or continue to receive, credit, including the terms on which credit is offered. The term does not include:

(i) Any determination of the consumer's qualification or fitness for employment, insurance (other than a credit insurance product), or other non-credit products or services;

(ii) Authorizing, processing, or documenting a payment or transaction on behalf of the consumer in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit; or

(iii) Maintaining or servicing the consumer's account in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit.

(5) *Medical information* means:

(i) 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—

(A) The past, present, or future physical, mental, or behavioral health or condition of an individual;

(B) The provision of health care to an individual; or

(C) The payment for the provision of health care to an individual.

(ii) The term does not include:

(A) The age or gender of a consumer;

(B) Demographic information about the consumer, including a consumer's residence address or e-mail address;

(C) Any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy; or

(D) Information that does not identify a specific consumer.

(6) *Person* means any individual, partnership, corporation, trust, estate cooperative, association, government or governmental subdivision or agency, or other entity.

**§ 232.2 Rule of construction for obtaining and using unsolicited medical information.**

(a) *In general.* 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, for credit without specifically requesting medical information.

(b) *Use of unsolicited medical information.* A creditor that receives

unsolicited medical information in the manner described in paragraph (a) of this section may use that information in connection with any determination of the consumer's eligibility, or continued eligibility, for credit to the extent the creditor can rely on at least one of the exceptions in § 232.3 or § 232.4.

(c) *Examples.* A creditor does not obtain medical information in violation of the prohibition if, for example:

(1) In response to a general question regarding a consumer's debts or expenses, the creditor receives information that the consumer owes a debt to a hospital.

(2) In a conversation with the creditor's loan officer, the consumer informs the creditor that the consumer has a particular medical condition.

(3) In connection with a consumer's application for an extension of credit, the creditor requests a consumer report from a consumer reporting agency and receives medical information in the consumer report furnished by the agency even though the creditor did not specifically request medical information from the consumer reporting agency.

**§ 232.3 Financial information exception for obtaining and using medical information.**

(a) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit so long as:

(1) 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;

(2) 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

(3) 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.

(b) *Examples of the types of information routinely used in making credit eligibility determinations.* Paragraph (a)(1) of this section permits a creditor, for example, to obtain and use information about:

(i) The dollar amount, repayment terms, repayment history, and similar information regarding medical debts to calculate, measure, or verify the repayment ability of the consumer, the

use of proceeds, or the terms for granting credit;

(ii) The value, condition, and lien status of a medical device that may serve as collateral to secure a loan;

(iii) The dollar amount and continued eligibility for disability income or benefits related to health or a medical condition that is relied on as a source of repayment; or

(iv) The identity of creditors to whom outstanding medical debts are owed in connection with an application for credit, including but not limited to, a transaction involving the consolidation of medical debts.

(2) *Examples of uses of medical information consistent with the exception.* (i) A consumer includes on an application for credit information about two \$20,000 debts. One debt is to a hospital; the other debt is to a retailer. The creditor contacts the hospital and the retailer to verify the amount and payment status of the debts. The creditor learns that both debts are more than 90 days past due. Any two debts of this size that are more than 90 days past due would disqualify the consumer under the creditor's established underwriting criteria. The creditor denies the application on the basis that the consumer has a poor repayment history on outstanding debts. The creditor has used medical information in a manner and to an extent no less favorable than it would use comparable non-medical information.

(ii) A consumer indicates on an application for a \$200,000 mortgage loan that she receives \$15,000 in long-term disability income each year from her former employer and has no other income. Annual income of \$15,000, regardless of source, would not be sufficient to support the requested amount of credit. The creditor denies the application on the basis that the projected debt-to-income ratio of the consumer does not meet the creditor's underwriting criteria. The creditor has used medical information in a manner and to an extent that is no less favorable than it would use comparable non-medical information.

(iii) A consumer includes on an application for a \$10,000 home equity loan that he has a \$50,000 debt to a medical facility that specializes in treating a potentially terminal disease. The creditor contacts the medical facility to verify the debt and obtain the repayment history and current status of the loan. The creditor learns that the debt is current. The applicant meets the income and other requirements of the creditor's underwriting guidelines. The creditor grants the application. The

creditor has used medical information in accordance with the exception.

(3) *Examples of uses of medical information inconsistent with the exception.* (i) A consumer applies for \$25,000 of credit and includes on the application information about a \$50,000 debt to a hospital. The creditor contacts the hospital to verify the amount and payment status of the debt, and learns that the debt is current and that the consumer has no delinquencies in her repayment history. If the existing debt were instead owed to a retail department store, the creditor would approve the application and extend credit based on the amount and repayment history of the outstanding debt. The creditor, however, denies the application because the consumer is indebted to a hospital. The creditor has used medical information, here the identity of the medical creditor, in a manner and to an extent that is less favorable than it would use comparable non-medical information.

(ii) A consumer meets with a loan officer of a creditor to apply for a mortgage loan. While filling out the loan application, the consumer informs the loan officer orally that she has a potentially terminal disease. The consumer meets the creditor's established requirements for the requested mortgage loan. The loan officer recommends to the credit committee that the consumer be denied credit because the consumer has that disease. The credit committee follows the loan officer's recommendation and denies the application because the consumer has a potentially terminal disease. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis as part of a determination of eligibility or continued eligibility for credit.

(iii) A consumer who has an apparent medical condition, such as a consumer who uses a wheelchair or an oxygen tank, meets with a loan officer to apply for a home equity loan. The consumer meets the creditor's established requirements for the requested home equity loan and the creditor typically does not require consumers to obtain a debt cancellation contract, debt suspension agreement, or credit insurance product in connection with such loans. However, based on the consumer's apparent medical condition, the loan officer recommends to the credit committee that credit be extended to the consumer only if the consumer obtains a debt cancellation contract,

debt suspension agreement, or credit insurance product. The credit committee agrees with the loan officer's recommendation. The loan officer informs the consumer that the consumer must obtain a debt cancellation contract, debt suspension agreement, or credit insurance product to qualify for the loan. The consumer obtains one of these products from a third party and the creditor approves the loan. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis in setting conditions on the consumer's eligibility for credit.

#### **§ 232.4 Specific exceptions for obtaining and using medical information.**

(a) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit—

(1) To determine whether the use of a power of attorney or legal representative that is triggered by a medical event or condition is necessary and appropriate or whether the consumer has the legal capacity to contract when a person seeks to exercise a power of attorney or act as legal representative for a consumer based on an asserted medical event or condition;

(2) To comply with applicable requirements of local, State, or Federal laws;

(3) To determine, at the consumer's request, whether the consumer qualifies for a legally permissible special credit program or credit-related assistance program that is—

(i) Designed to meet the special needs of consumers with medical conditions; and

(ii) Established and administered pursuant to a written plan that—

(A) Identifies the class of persons that the program is designed to benefit; and

(B) Sets forth the procedures and standards for extending credit or providing other credit-related assistance under the program.

(4) To the extent necessary for purposes of fraud prevention or detection;

(5) 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;

(6) Consistent with safe and sound practices, if the consumer or the consumer's legal representative specifically requests that the creditor use medical information 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;

(7) Consistent with safe and sound practices, to determine whether the provisions of a forbearance practice or program that is triggered by a medical event or condition apply to a consumer;

(8) To determine the consumer's eligibility for, the triggering of, or the reactivation of a debt cancellation contract or debt suspension agreement if a medical condition or event is a triggering event for the provision of benefits under the contract or agreement; or

(9) To determine the consumer's eligibility for, the triggering of, or the reactivation of a credit insurance product if a medical condition or event is a triggering event for the provision of benefits under the product.

(b) *Example of determining eligibility for a special credit program or credit assistance program.* A not-for-profit organization establishes a credit assistance program pursuant to a written plan that is designed to assist disabled veterans in purchasing homes by subsidizing the down payment for the home purchase mortgage loans of qualifying veterans. The organization works through mortgage lenders and requires mortgage lenders to obtain medical information about the disability of any consumer that seeks to qualify for the program, use that information to verify the consumer's eligibility for the program, and forward that information to the organization. A consumer who is a veteran applies to a creditor for a home purchase mortgage loan. The creditor informs the consumer about the credit assistance program for disabled veterans and the consumer seeks to qualify for the program. Assuming that the program complies with all applicable law, including applicable fair lending laws, the creditor may obtain and use medical information about the medical condition and disability, if any, of the consumer to determine whether the consumer qualifies for the credit assistance program.

(c) *Examples of verifying the medical purpose of the loan or the use of proceeds.* (1) If a consumer applies for \$10,000 of credit for the purpose of financing vision correction surgery, the creditor may verify with the surgeon that the procedure will be performed. If the surgeon reports that surgery will not be performed on the consumer, the creditor may use that medical information to deny the consumer's application for credit, because the loan

would not be used for the stated purpose.

(2) If a consumer applies for \$10,000 of credit for the purpose of financing cosmetic surgery, the creditor may confirm the cost of the procedure with the surgeon. If the surgeon reports that the cost of the procedure is \$5,000, the creditor may use that medical information to offer the consumer only \$5,000 of credit.

(3) A creditor has an established medical loan program for financing particular elective surgical procedures. The creditor receives a loan application from a consumer requesting \$10,000 of credit under the established loan program for an elective surgical procedure. The consumer indicates on the application that the purpose of the loan is to finance an elective surgical procedure not eligible for funding under the guidelines of the established loan program. The creditor may deny the consumer's application because the purpose of the loan is not for a particular procedure funded by the established loan program.

(d) *Examples of obtaining and using medical information at the request of the consumer.* (1) If a consumer applies for a loan and specifically requests that the creditor consider the consumer's medical disability at the relevant time as an explanation for adverse payment history information in his credit report, the creditor may consider such medical information in evaluating the consumer's willingness and ability to repay the requested loan to accommodate the consumer's particular circumstances, consistent with safe and sound practices. The creditor may also decline to consider such medical information to accommodate the consumer, but may evaluate the consumer's application in accordance with its otherwise applicable underwriting criteria. The creditor may not deny the consumer's application or otherwise treat the consumer less favorably because the consumer specifically requested a medical accommodation, if the creditor would have extended the credit or treated the consumer more favorably under the creditor's otherwise applicable underwriting criteria.

(2) If a consumer applies for a loan by telephone and explains that his income has been and will continue to be interrupted on account of a medical condition and that he expects to repay the loan liquidating assets, the creditor may, but is not required to, evaluate the application using the sale of assets as the primary source of repayment, consistent with safe and sound practices, provided that the creditor

documents the consumer's request by recording the oral conversation or making a notation of the request in the consumer's file.

(3) If a consumer applies for a loan and the application form provides a space where the consumer may provide any other information or special circumstances, whether medical or non-medical, that the consumer would like the creditor to consider in evaluating the consumer's application, the creditor may use medical information provided by the consumer in that space on that application to accommodate the consumer's application for credit, consistent with safe and sound practices, or may disregard that information.

(4) If a consumer specifically requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit and provides the creditor with medical information for that purpose, and the creditor determines that it needs additional information regarding the consumer's circumstances, the creditor may request, obtain, and use additional medical information about the consumer as necessary to verify the information provided by the consumer or to determine whether to make an accommodation for the consumer. The consumer may decline to provide additional information, withdraw the request for an accommodation, and have the application considered under the creditor's otherwise applicable underwriting criteria.

(5) If a consumer completes and signs a credit application that is not for medical purpose credit and the application contains boilerplate language that routinely requests medical information from the consumer or that indicates that by applying for credit the consumer authorizes or consents to the creditor obtaining and using medical information in connection with a determination of the consumer's eligibility, or continued eligibility, for credit, the consumer has not specifically requested that the creditor obtain and use medical information to accommodate the consumer's particular circumstances.

(e) *Example of a forbearance practice or program.* After an appropriate safety and soundness review, a creditor institutes a program that allows consumers who are or will be hospitalized to defer payments as needed for up to three months, without penalty, if the credit account has been open for more than one year and has not previously been in default, and the consumer provides confirming

documentation at an appropriate time. A consumer is hospitalized and does not pay her bill for a particular month. This consumer has had a credit account with the creditor for more than one year and has not previously been in default. The creditor attempts to contact the consumer and speaks with the consumer's adult child, who is not the consumer's legal representative. The adult child informs the creditor that the consumer is hospitalized and is unable to pay the bill at that time. The creditor defers payments for up to three months, without penalty, for the hospitalized consumer and sends the consumer a letter confirming this practice and the date on which the next payment will be due.

## Federal Deposit Insurance Corporation

12 CFR Chapter III.

### Authority and Issuance

■ For the reasons set forth in the joint preamble, the Federal Deposit Insurance Corporation amends part 334 of chapter III of title 12 of the Code of Federal Regulations as follows:

## PART 334—FAIR CREDIT REPORTING

■ 1. The authority citation for part 334 is revised to read as follows:

**Authority:** 12 U.S.C. 1819 (Tenth) and 1818; 15 U.S.C. 1681b and 1681s.

■ 2. Subpart A is added to part 334 to read as follows:

### Subpart A—General Provisions

Sec.

334.1 [Reserved]

334.2 Examples.

334.3 Definitions.

### Subpart A—General Provisions

§ 334.1 [Reserved]

§ 334.2 Examples.

The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part. Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise in this part.

§ 334.3 Definitions.

As used in this part, unless the context requires otherwise:

(a) *Act* means the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*).

(b) *Affiliate* means any company that is related by common ownership or common corporate control with another company.

(c) [Reserved]

(d) *Company* means any corporation, limited liability company, business

trust, general or limited partnership, association, or similar organization.

(e) *Consumer* means an individual.

(f) [Reserved]

(g) [Reserved]

(h) [Reserved]

(i) *Common ownership or common corporate control* means a relationship between two companies under which:

(1) One company has, with respect to the other company:

(i) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of a company, directly or indirectly, or acting through one or more other persons;

(ii) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of a company; or

(iii) The power to exercise, directly or indirectly, a controlling influence over the management or policies of a company, as the FDIC determines; or

(2) Any other person has, with respect to both companies, a relationship described in paragraphs (i)(1)(i)–(i)(1)(iii) of this section.

(j) [Reserved]

(k) *Medical information* means:

(1) 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—

(i) The past, present, or future physical, mental, or behavioral health or condition of an individual;

(ii) The provision of health care to an individual; or

(iii) The payment for the provision of health care to an individual.

(2) The term does not include:

(i) The age or gender of a consumer;

(ii) Demographic information about the consumer, including a consumer's residence address or e-mail address;

(iii) Any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy; or

(iv) Information that does not identify a specific consumer.

(l) *Person* means any individual, partnership, corporation, trust, estate cooperative, association, government or governmental subdivision or agency, or other entity.

■ 3. Subpart D is added to part 334 to read as follows:

#### Subpart D—Medical Information

##### § 334.30 Obtaining or using medical information in connection with a determination of eligibility for credit.

(a) *Scope*. This section applies to:

(1) Any of the following that participates as a creditor in a transaction—

(i) A State bank insured by the FDIC (other than members of the Federal Reserve System);

(ii) An insured State branch of a foreign bank; or

(2) Any other person that participates as a creditor in a transaction involving a person described in paragraph (a)(1) of this section.

(b) *General prohibition on obtaining or using medical information*. (1) *In general*. A creditor may 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, except as provided in this section.

(2) *Definitions*. (i) *Credit* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(ii) *Creditor* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(iii) *Eligibility, or continued eligibility, for credit* means the consumer's qualification or fitness to receive, or continue to receive, credit, including the terms on which credit is offered. The term does not include:

(A) Any determination of the consumer's qualification or fitness for employment, insurance (other than a credit insurance product), or other non-credit products or services;

(B) Authorizing, processing, or documenting a payment or transaction on behalf of the consumer in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit; or

(C) Maintaining or servicing the consumer's account in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit.

(c) *Rule of construction for obtaining and using unsolicited medical information*. (1) *In general*. 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, for credit without specifically requesting medical information.

(2) *Use of unsolicited medical information*. A creditor that receives

unsolicited medical information in the manner described in paragraph (c)(1) of this section may use that information in connection with any determination of the consumer's eligibility, or continued eligibility, for credit to the extent the creditor can rely on at least one of the exceptions in § 334.30(d) or (e).

(3) *Examples*. A creditor does not obtain medical information in violation of the prohibition if, for example:

(i) In response to a general question regarding a consumer's debts or expenses, the creditor receives information that the consumer owes a debt to a hospital.

(ii) In a conversation with the creditor's loan officer, the consumer informs the creditor that the consumer has a particular medical condition.

(iii) In connection with a consumer's application for an extension of credit, the creditor requests a consumer report from a consumer reporting agency and receives medical information in the consumer report furnished by the agency even though the creditor did not specifically request medical information from the consumer reporting agency.

(d) *Financial information exception for obtaining and using medical information*. (1) *In general*. A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit so long as:

(i) 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;

(ii) 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

(iii) 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.

(2) *Examples of the types of information routinely used in making credit eligibility determinations*. Paragraph (d)(1)(i) of this section permits a creditor, for example, to obtain and use information about:

(A) The dollar amount, repayment terms, repayment history, and similar information regarding medical debts to calculate, measure, or verify the repayment ability of the consumer, the use of proceeds, or the terms for granting credit;

(B) The value, condition, and lien status of a medical device that may serve as collateral to secure a loan;

(C) The dollar amount and continued eligibility for disability income or benefits related to health or a medical condition that is relied on as a source of repayment; or

(D) The identity of creditors to whom outstanding medical debts are owed in connection with an application for credit, including but not limited to, a transaction involving the consolidation of medical debts.

(ii) *Examples of uses of medical information consistent with the exception.* (A) A consumer includes on an application for credit information about two \$20,000 debts. One debt is to a hospital; the other debt is to a retailer. The creditor contacts the hospital and the retailer to verify the amount and payment status of the debts. The creditor learns that both debts are more than 90 days past due. Any two debts of this size that are more than 90 days past due would disqualify the consumer under the creditor's established underwriting criteria. The creditor denies the application on the basis that the consumer has a poor repayment history on outstanding debts. The creditor has used medical information in a manner and to an extent no less favorable than it would use comparable non-medical information.

(B) A consumer indicates on an application for a \$200,000 mortgage loan that she receives \$15,000 in long-term disability income each year from her former employer and has no other income. Annual income of \$15,000, regardless of source, would not be sufficient to support the requested amount of credit. The creditor denies the application on the basis that the projected debt-to-income ratio of the consumer does not meet the creditor's underwriting criteria. The creditor has used medical information in a manner and to an extent that is no less favorable than it would use comparable non-medical information.

(C) A consumer includes on an application for a \$10,000 home equity loan that he has a \$50,000 debt to a medical facility that specializes in treating a potentially terminal disease. The creditor contacts the medical facility to verify the debt and obtain the repayment history and current status of the loan. The creditor learns that the debt is current. The applicant meets the income and other requirements of the creditor's underwriting guidelines. The creditor grants the application. The creditor has used medical information in accordance with the exception.

(iii) *Examples of uses of medical information inconsistent with the exception.* (A) A consumer applies for \$25,000 of credit and includes on the application information about a \$50,000 debt to a hospital. The creditor contacts the hospital to verify the amount and payment status of the debt, and learns that the debt is current and that the consumer has no delinquencies in her repayment history. If the existing debt were instead owed to a retail department store, the creditor would approve the application and extend credit based on the amount and repayment history of the outstanding debt. The creditor, however, denies the application because the consumer is indebted to a hospital. The creditor has used medical information, here the identity of the medical creditor, in a manner and to an extent that is less favorable than it would use comparable non-medical information.

(B) A consumer meets with a loan officer of a creditor to apply for a mortgage loan. While filling out the loan application, the consumer informs the loan officer orally that she has a potentially terminal disease. The consumer meets the creditor's established requirements for the requested mortgage loan. The loan officer recommends to the credit committee that the consumer be denied credit because the consumer has that disease. The credit committee follows the loan officer's recommendation and denies the application because the consumer has a potentially terminal disease. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis as part of a determination of eligibility or continued eligibility for credit.

(C) A consumer who has an apparent medical condition, such as a consumer who uses a wheelchair or an oxygen tank, meets with a loan officer to apply for a home equity loan. The consumer meets the creditor's established requirements for the requested home equity loan and the creditor typically does not require consumers to obtain a debt cancellation contract, debt suspension agreement, or credit insurance product in connection with such loans. However, based on the consumer's apparent medical condition, the loan officer recommends to the credit committee that credit be extended to the consumer only if the consumer obtains a debt cancellation contract, debt suspension agreement, or credit insurance product. The credit

committee agrees with the loan officer's recommendation. The loan officer informs the consumer that the consumer must obtain a debt cancellation contract, debt suspension agreement, or credit insurance product to qualify for the loan. The consumer obtains one of these products from a third party and the creditor approves the loan. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis in setting conditions on the consumer's eligibility for credit.

(e) *Specific exceptions for obtaining and using medical information.* (1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit—

(i) To determine whether the use of a power of attorney or legal representative that is triggered by a medical event or condition is necessary and appropriate or whether the consumer has the legal capacity to contract when a person seeks to exercise a power of attorney or act as legal representative for a consumer based on an asserted medical event or condition;

(ii) To comply with applicable requirements of local, State, or Federal laws;

(iii) To determine, at the consumer's request, whether the consumer qualifies for a legally permissible special credit program or credit-related assistance program that is—

(A) Designed to meet the special needs of consumers with medical conditions; and

(B) Established and administered pursuant to a written plan that—

(1) Identifies the class of persons that the program is designed to benefit; and

(2) Sets forth the procedures and standards for extending credit or providing other credit-related assistance under the program.

(iv) To the extent necessary for purposes of fraud prevention or detection;

(v) 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;

(vi) Consistent with safe and sound practices, if the consumer or the consumer's legal representative specifically requests that the creditor use medical information 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;

(vii) Consistent with safe and sound practices, to determine whether the provisions of a forbearance practice or program that is triggered by a medical event or condition apply to a consumer;

(viii) To determine the consumer's eligibility for, the triggering of, or the reactivation of a debt cancellation contract or debt suspension agreement if a medical condition or event is a triggering event for the provision of benefits under the contract or agreement; or

(ix) To determine the consumer's eligibility for, the triggering of, or the reactivation of a credit insurance product if a medical condition or event is a triggering event for the provision of benefits under the product.

(2) *Example of determining eligibility for a special credit program or credit assistance program.* A not-for-profit organization establishes a credit assistance program pursuant to a written plan that is designed to assist disabled veterans in purchasing homes by subsidizing the down payment for the home purchase mortgage loans of qualifying veterans. The organization works through mortgage lenders and requires mortgage lenders to obtain medical information about the disability of any consumer that seeks to qualify for the program, use that information to verify the consumer's eligibility for the program, and forward that information to the organization. A consumer who is a veteran applies to a creditor for a home purchase mortgage loan. The creditor informs the consumer about the credit assistance program for disabled veterans and the consumer seeks to qualify for the program. Assuming that the program complies with all applicable law, including applicable fair lending laws, the creditor may obtain and use medical information about the medical condition and disability, if any, of the consumer to determine whether the consumer qualifies for the credit assistance program.

(3) *Examples of verifying the medical purpose of the loan or the use of proceeds.* (i) If a consumer applies for \$10,000 of credit for the purpose of financing vision correction surgery, the creditor may verify with the surgeon that the procedure will be performed. If the surgeon reports that surgery will not be performed on the consumer, the creditor may use that medical information to deny the consumer's application for credit, because the loan would not be used for the stated purpose.

(ii) If a consumer applies for \$10,000 of credit for the purpose of financing

cosmetic surgery, the creditor may confirm the cost of the procedure with the surgeon. If the surgeon reports that the cost of the procedure is \$5,000, the creditor may use that medical information to offer the consumer only \$5,000 of credit.

(iii) A creditor has an established medical loan program for financing particular elective surgical procedures. The creditor receives a loan application from a consumer requesting \$10,000 of credit under the established loan program for an elective surgical procedure. The consumer indicates on the application that the purpose of the loan is to finance an elective surgical procedure not eligible for funding under the guidelines of the established loan program. The creditor may deny the consumer's application because the purpose of the loan is not for a particular procedure funded by the established loan program.

(4) *Examples of obtaining and using medical information at the request of the consumer.* (i) If a consumer applies for a loan and specifically requests that the creditor consider the consumer's medical disability at the relevant time as an explanation for adverse payment history information in his credit report, the creditor may consider such medical information in evaluating the consumer's willingness and ability to repay the requested loan to accommodate the consumer's particular circumstances, consistent with safe and sound practices. The creditor may also decline to consider such medical information to accommodate the consumer, but may evaluate the consumer's application in accordance with its otherwise applicable underwriting criteria. The creditor may not deny the consumer's application or otherwise treat the consumer less favorably because the consumer specifically requested a medical accommodation, if the creditor would have extended the credit or treated the consumer more favorably under the creditor's otherwise applicable underwriting criteria.

(ii) If a consumer applies for a loan by telephone and explains that his income has been and will continue to be interrupted on account of a medical condition and that he expects to repay the loan by liquidating assets, the creditor may, but is not required to, evaluate the application using the sale of assets as the primary source of repayment, consistent with safe and sound practices, provided that the creditor documents the consumer's request by recording the oral conversation or making a notation of the request in the consumer's file.

(iii) If a consumer applies for a loan and the application form provides a space where the consumer may provide any other information or special circumstances, whether medical or non-medical, that the consumer would like the creditor to consider in evaluating the consumer's application, the creditor may use medical information provided by the consumer in that space on that application to accommodate the consumer's application for credit, consistent with safe and sound practices, or may disregard that information.

(iv) If a consumer specifically requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit and provides the creditor with medical information for that purpose, and the creditor determines that it needs additional information regarding the consumer's circumstances, the creditor may request, obtain, and use additional medical information about the consumer as necessary to verify the information provided by the consumer or to determine whether to make an accommodation for the consumer. The consumer may decline to provide additional information, withdraw the request for an accommodation, and have the application considered under the creditor's otherwise applicable underwriting criteria.

(v) If a consumer completes and signs a credit application that is not for medical purpose credit and the application contains boilerplate language that routinely requests medical information from the consumer or that indicates that by applying for credit the consumer authorizes or consents to the creditor obtaining and using medical information in connection with a determination of the consumer's eligibility, or continued eligibility, for credit, the consumer has not specifically requested that the creditor obtain and use medical information to accommodate the consumer's particular circumstances.

(5) *Example of a forbearance practice or program.* After an appropriate safety and soundness review, a creditor institutes a program that allows consumers who are or will be hospitalized to defer payments as needed for up to three months, without penalty, if the credit account has been open for more than one year and has not previously been in default, and the consumer provides confirming documentation at an appropriate time. A consumer is hospitalized and does not pay her bill for a particular month. This consumer has had a credit account

with the creditor for more than one year and has not previously been in default. The creditor attempts to contact the consumer and speaks with the consumer's adult child, who is not the consumer's legal representative. The adult child informs the creditor that the consumer is hospitalized and is unable to pay the bill at that time. The creditor defers payments for up to three months, without penalty, for the hospitalized consumer and sends the consumer a letter confirming this practice and the date on which the next payment will be due.

**§ 334.31 Limits on redisclosure of information.**

(a) *Scope.* This section applies to State banks insured by the FDIC (other than members of the Federal Reserve System) and insured State branches of foreign banks.

(b) *Limits on redisclosure.* If a person described in paragraph (a) of this section receives medical information about a consumer from a consumer reporting agency or its affiliate, the person must not disclose that information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

**§ 334.32 Sharing medical information with affiliates.**

(a) *Scope.* This section applies to State banks insured by the FDIC (other than members of the Federal Reserve System) and insured State branches of foreign banks.

(b) *In general.* The exclusions from the term "consumer report" in section 603(d)(2) of the Act that allow the sharing of information with affiliates do not apply if a person described in paragraph (a) of this section communicates to an affiliate—

- (1) Medical information;
- (2) An individualized list or description based on the payment transactions of the consumer for medical products or services; or
- (3) An aggregate list of identified consumers based on payment transactions for medical products or services.

(c) *Exceptions.* A person described in paragraph (a) of this section may rely on the exclusions from the term "consumer report" in section 603(d)(2) of the Act to communicate the information in paragraph (b) of this section to an affiliate—

(1) In connection with the business of insurance or annuities (including the activities described in section 18B of the model Privacy of Consumer Financial

and Health Information Regulation issued by the National Association of Insurance Commissioners, as in effect on January 1, 2003);

(2) For any purpose permitted without authorization under the regulations promulgated by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA);

(3) For any purpose referred to in section 1179 of HIPAA;

(4) For any purpose described in section 502(e) of the Gramm-Leach-Bliley Act;

(5) In connection with a determination of the consumer's eligibility, or continued eligibility, for credit consistent with § 334.30; or

(6) As otherwise permitted by order of the FDIC.

**Office of Thrift Supervision**

12 CFR Chapter V.

*Authority and Issuance*

■ For the reasons set forth in the joint preamble, the Office of Thrift Supervision amends chapter V of title 12 of the Code of Federal Regulations as follows:

**PART 571—FAIR CREDIT REPORTING**

■ 1. The authority citation for part 571 is revised to read as follows:

*Authority:* 12 U.S.C. 1462a, 1463, 1464, 1467a, 1828, 1831p–1, and 1881–1884; 15 U.S.C. 1681b, 1681s, and 1681w; 15 U.S.C. 6801 and 6805(b)(1).

**Subpart A—General Provisions**

■ 2. Revise § 571.1(b)(2) to read as follows:

**§ 571.1 Purpose and Scope.**

\* \* \* \* \*

(b) \* \* \*

(2) *Scope in general.* Except as otherwise provided in this part, this part applies to savings associations whose deposits are insured by the Federal Deposit Insurance Corporation (and Federal savings association operating subsidiaries in accordance with § 559.3(h)(1) of this chapter).

■ 3. Add § 571.2 to read as follows:

**§ 571.2 Examples.**

The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part. Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise in this part.

■ 4. Amend § 571.3 by revising the introductory text and paragraphs (a) through (n) to read as follows:

**§ 571.3 Definitions.**

As used in this part, unless the context requires otherwise:

(a) *Act* means the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*).

(b) *Affiliate* means any company that is related by common ownership or common corporate control with another company.

(c) [Reserved]

(d) *Company* means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(e) *Consumer* means an individual.

(f)–(h) [Reserved]

(i) *Common ownership or common corporate control* means a relationship between two companies under which:

(1) One company has, with respect to the other company:

(i) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of a company, directly or indirectly, or acting through one or more other persons;

(ii) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of a company; or

(iii) The power to exercise, directly or indirectly, a controlling influence over the management or policies of a company, as the OTS determines; or

(2) Any other person has, with respect to both companies, a relationship described in paragraphs (i)(1)(i)–(i)(1)(iii) of this section.

(j) [Reserved]

(k) *Medical information* means:

(1) 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—

(i) The past, present, or future physical, mental, or behavioral health or condition of an individual;

(ii) The provision of health care to an individual; or

(iii) The payment for the provision of health care to an individual.

(2) The term does not include:

(i) The age or gender of a consumer;

(ii) Demographic information about the consumer, including a consumer's residence address or e-mail address;

(iii) Any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy; or

(iv) Information that does not identify a specific consumer.

(l) *Person* means any individual, partnership, corporation, trust, estate

cooperative, association, government or governmental subdivision or agency, or other entity.

(m)–(n) [Reserved]

\* \* \* \* \*

■ 5. Add subpart D to part 571 to read as follows:

#### Subpart D—Medical Information

##### § 571.30 Obtaining or using medical information in connection with a determination of eligibility for credit.

(a) *Scope.* This section applies to:

(1) Any of the following that participates as a creditor in a transaction—

- (i) A savings association;
- (ii) A subsidiary owned in whole or in part by a savings association;
- (iii) A savings and loan holding company;
- (iv) A subsidiary of a savings and loan holding company other than a bank or subsidiary of a bank; or
- (v) A service corporation owned in whole or in part by a savings association; or

(2) Any other person that participates as a creditor in a transaction involving a person described in paragraph (a)(1) of this section.

(b) *General prohibition on obtaining or using medical information.* (1) *In general.* A creditor may 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, except as provided in this section.

(2) *Definitions.* (i) *Credit* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(ii) *Creditor* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(iii) *Eligibility, or continued eligibility, for credit* means the consumer's qualification or fitness to receive, or continue to receive, credit, including the terms on which credit is offered. The term does not include:

(A) Any determination of the consumer's qualification or fitness for employment, insurance (other than a credit insurance product), or other non-credit products or services;

(B) Authorizing, processing, or documenting a payment or transaction on behalf of the consumer in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit; or

(C) Maintaining or servicing the consumer's account in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit.

(c) *Rule of construction for obtaining and using unsolicited medical information.* (1) *In general.* 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, for credit without specifically requesting medical information.

(2) *Use of unsolicited medical information.* A creditor that receives unsolicited medical information in the manner described in paragraph (c)(1) of this section may use that information in connection with any determination of the consumer's eligibility, or continued eligibility, for credit to the extent the creditor can rely on at least one of the exceptions in § 571.30(d) or (e).

(3) *Examples.* A creditor does not obtain medical information in violation of the prohibition if, for example:

(i) In response to a general question regarding a consumer's debts or expenses, the creditor receives information that the consumer owes a debt to a hospital;

(ii) In a conversation with the creditor's loan officer, the consumer informs the creditor that the consumer has a particular medical condition; or

(iii) In connection with a consumer's application for an extension of credit, the creditor requests a consumer report from a consumer reporting agency and receives medical information in the consumer report furnished by the agency even though the creditor did not specifically request medical information from the consumer reporting agency.

(d) *Financial information exception for obtaining and using medical information.* (1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit so long as:

(i) 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;

(ii) 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

(iii) 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.

(2) *Examples.* (i) *Examples of the types of information routinely used in making credit eligibility determinations.* Paragraph (d)(1)(i) of this section permits a creditor, for example, to obtain and use information about:

(A) The dollar amount, repayment terms, repayment history, and similar information regarding medical debts to calculate, measure, or verify the repayment ability of the consumer, the use of proceeds, or the terms for granting credit;

(B) The value, condition, and lien status of a medical device that may serve as collateral to secure a loan;

(C) The dollar amount and continued eligibility for disability income or benefits related to health or a medical condition that is relied on as a source of repayment; or

(D) The identity of creditors to whom outstanding medical debts are owed in connection with an application for credit, including but not limited to, a transaction involving the consolidation of medical debts.

(ii) *Examples of uses of medical information consistent with the exception.* (A) A consumer includes on an application for credit information about two \$20,000 debts. One debt is to a hospital; the other debt is to a retailer. The creditor contacts the hospital and the retailer to verify the amount and payment status of the debts. The creditor learns that both debts are more than 90 days past due. Any two debts of this size that are more than 90 days past due would disqualify the consumer under the creditor's established underwriting criteria. The creditor denies the application on the basis that the consumer has a poor repayment history on outstanding debts. The creditor has used medical information in a manner and to an extent no less favorable than it would use comparable non-medical information.

(B) A consumer indicates on an application for a \$200,000 mortgage loan that she receives \$15,000 in long-term disability income each year from her former employer and has no other income. Annual income of \$15,000, regardless of source, would not be sufficient to support the requested amount of credit. The creditor denies the application on the basis that the projected debt-to-income ratio of the consumer does not meet the creditor's underwriting criteria. The creditor has used medical information in a manner and to an extent that is no less favorable than it would use comparable non-medical information.

(C) A consumer includes on an application for a \$10,000 home equity loan that he has a \$50,000 debt to a

medical facility that specializes in treating a potentially terminal disease. The creditor contacts the medical facility to verify the debt and obtain the repayment history and current status of the loan. The creditor learns that the debt is current. The applicant meets the income and other requirements of the creditor's underwriting guidelines. The creditor grants the application. The creditor has used medical information in accordance with the exception.

(iii) *Examples of uses of medical information inconsistent with the exception.* (A) A consumer applies for \$25,000 of credit and includes on the application information about a \$50,000 debt to a hospital. The creditor contacts the hospital to verify the amount and payment status of the debt, and learns that the debt is current and that the consumer has no delinquencies in her repayment history. If the existing debt were instead owed to a retail department store, the creditor would approve the application and extend credit based on the amount and repayment history of the outstanding debt. The creditor, however, denies the application because the consumer is indebted to a hospital. The creditor has used medical information, here the identity of the medical creditor, in a manner and to an extent that is less favorable than it would use comparable non-medical information.

(B) A consumer meets with a loan officer of a creditor to apply for a mortgage loan. While filling out the loan application, the consumer informs the loan officer orally that she has a potentially terminal disease. The consumer meets the creditor's established requirements for the requested mortgage loan. The loan officer recommends to the credit committee that the consumer be denied credit because the consumer has that disease. The credit committee follows the loan officer's recommendation and denies the application because the consumer has a potentially terminal disease. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis as part of a determination of eligibility or continued eligibility for credit.

(C) A consumer who has an apparent medical condition, such as a consumer who uses a wheelchair or an oxygen tank, meets with a loan officer to apply for a home equity loan. The consumer meets the creditor's established requirements for the requested home equity loan and the creditor typically

does not require consumers to obtain a debt cancellation contract, debt suspension agreement, or credit insurance product in connection with such loans. However, based on the consumer's apparent medical condition, the loan officer recommends to the credit committee that credit be extended to the consumer only if the consumer obtains a debt cancellation contract, debt suspension agreement, or credit insurance product. The credit committee agrees with the loan officer's recommendation. The loan officer informs the consumer that the consumer must obtain a debt cancellation contract, debt suspension agreement, or credit insurance product to qualify for the loan. The consumer obtains one of these products from a third party and the creditor approves the loan. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis in setting conditions on the consumer's eligibility for credit.

(e) *Specific exceptions for obtaining and using medical information.* (1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit—

(i) To determine whether the use of a power of attorney or legal representative that is triggered by a medical event or condition is necessary and appropriate or whether the consumer has the legal capacity to contract when a person seeks to exercise a power of attorney or act as legal representative for a consumer based on an asserted medical event or condition;

(ii) To comply with applicable requirements of local, State, or Federal laws;

(iii) To determine, at the consumer's request, whether the consumer qualifies for a legally permissible special credit program or credit-related assistance program that is—

(A) Designed to meet the special needs of consumers with medical conditions; and

(B) Established and administered pursuant to a written plan that—

(1) Identifies the class of persons that the program is designed to benefit; and

(2) Sets forth the procedures and standards for extending credit or providing other credit-related assistance under the program.

(iv) To the extent necessary for purposes of fraud prevention or detection;

(v) 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;

(vi) Consistent with safe and sound practices, if the consumer or the consumer's legal representative specifically requests that the creditor use medical information 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;

(vii) Consistent with safe and sound practices, to determine whether the provisions of a forbearance practice or program that is triggered by a medical event or condition apply to a consumer;

(viii) To determine the consumer's eligibility for, the triggering of, or the reactivation of a debt cancellation contract or debt suspension agreement if a medical condition or event is a triggering event for the provision of benefits under the contract or agreement; or

(ix) To determine the consumer's eligibility for, the triggering of, or the reactivation of a credit insurance product if a medical condition or event is a triggering event for the provision of benefits under the product.

(2) *Example of determining eligibility for a special credit program or credit assistance program.* A not-for-profit organization establishes a credit assistance program pursuant to a written plan that is designed to assist disabled veterans in purchasing homes by subsidizing the down payment for the home purchase mortgage loans of qualifying veterans. The organization works through mortgage lenders and requires mortgage lenders to obtain medical information about the disability of any consumer that seeks to qualify for the program, use that information to verify the consumer's eligibility for the program, and forward that information to the organization. A consumer who is a veteran applies to a creditor for a home purchase mortgage loan. The creditor informs the consumer about the credit assistance program for disabled veterans and the consumer seeks to qualify for the program. Assuming that the program complies with all applicable law, including applicable fair lending laws, the creditor may obtain and use medical information about the medical condition and disability, if any, of the consumer to determine whether the consumer qualifies for the credit assistance program.

(3) *Examples of verifying the medical purpose of the loan or the use of proceeds.* (i) If a consumer applies for

\$10,000 of credit for the purpose of financing vision correction surgery, the creditor may verify with the surgeon that the procedure will be performed. If the surgeon reports that surgery will not be performed on the consumer, the creditor may use that medical information to deny the consumer's application for credit, because the loan would not be used for the stated purpose.

(ii) If a consumer applies for \$10,000 of credit for the purpose of financing cosmetic surgery, the creditor may confirm the cost of the procedure with the surgeon. If the surgeon reports that the cost of the procedure is \$5,000, the creditor may use that medical information to offer the consumer only \$5,000 of credit.

(iii) A creditor has an established medical loan program for financing particular elective surgical procedures. The creditor receives a loan application from a consumer requesting \$10,000 of credit under the established loan program for an elective surgical procedure. The consumer indicates on the application that the purpose of the loan is to finance an elective surgical procedure not eligible for funding under the guidelines of the established loan program. The creditor may deny the consumer's application because the purpose of the loan is not for a particular procedure funded by the established loan program.

(4) *Examples of obtaining and using medical information at the request of the consumer.* (i) If a consumer applies for a loan and specifically requests that the creditor consider the consumer's medical disability at the relevant time as an explanation for adverse payment history information in his credit report, the creditor may consider such medical information in evaluating the consumer's willingness and ability to repay the requested loan to accommodate the consumer's particular circumstances, consistent with safe and sound practices. The creditor may also decline to consider such medical information to accommodate the consumer, but may evaluate the consumer's application in accordance with its otherwise applicable underwriting criteria. The creditor may not deny the consumer's application or otherwise treat the consumer less favorably because the consumer specifically requested a medical accommodation, if the creditor would have extended the credit or treated the consumer more favorably under the creditor's otherwise applicable underwriting criteria.

(ii) If a consumer applies for a loan by telephone and explains that his income

has been and will continue to be interrupted on account of a medical condition and that he expects to repay the loan by liquidating assets, the creditor may, but is not required to, evaluate the application using the sale of assets as the primary source of repayment, consistent with safe and sound practices, provided that the creditor documents the consumer's request by recording the oral conversation or making a notation of the request in the consumer's file.

(iii) If a consumer applies for a loan and the application form provides a space where the consumer may provide any other information or special circumstances, whether medical or non-medical, that the consumer would like the creditor to consider in evaluating the consumer's application, the creditor may use medical information provided by the consumer in that space on that application to accommodate the consumer's application for credit, consistent with safe and sound practices, or may disregard that information.

(iv) If a consumer specifically requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit and provides the creditor with medical information for that purpose, and the creditor determines that it needs additional information regarding the consumer's circumstances, the creditor may request, obtain, and use additional medical information about the consumer as necessary to verify the information provided by the consumer or to determine whether to make an accommodation for the consumer. The consumer may decline to provide additional information, withdraw the request for an accommodation, and have the application considered under the creditor's otherwise applicable underwriting criteria.

(v) If a consumer completes and signs a credit application that is not for medical purpose credit and the application contains boilerplate language that routinely requests medical information from the consumer or that indicates that by applying for credit the consumer authorizes or consents to the creditor obtaining and using medical information in connection with a determination of the consumer's eligibility, or continued eligibility, for credit, the consumer has not specifically requested that the creditor obtain and use medical information to accommodate the consumer's particular circumstances.

(5) *Example of a forbearance practice or program.* After an appropriate safety

and soundness review, a creditor institutes a program that allows consumers who are or will be hospitalized to defer payments as needed for up to three months, without penalty, if the credit account has been open for more than one year and has not previously been in default, and the consumer provides confirming documentation at an appropriate time. A consumer is hospitalized and does not pay her bill for a particular month. This consumer has had a credit account with the creditor for more than one year and has not previously been in default. The creditor attempts to contact the consumer and speaks with the consumer's spouse, who is not the consumer's legal representative. The spouse informs the creditor that the consumer is hospitalized and is unable to pay the bill at that time. The creditor defers payments for up to three months, without penalty, for the hospitalized consumer and sends the consumer a letter confirming this practice and the date on which the next payment will be due.

#### **§ 571.31 Limits on redisclosure of information.**

(a) *Scope.* This section applies to savings associations and federal savings association operating subsidiaries.

(b) *Limits on redisclosure.* If a person described in paragraph (a) of this section receives medical information about a consumer from a consumer reporting agency or its affiliate, the person must not disclose that information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

#### **§ 571.32 Sharing medical information with affiliates.**

(a) *Scope.* This section applies to savings associations and Federal savings association operating subsidiaries.

(b) *In general.* The exclusions from the term "consumer report" in section 603(d)(2) of the Act that allow the sharing of information with affiliates do not apply if a person described in paragraph (a) of this section communicates to an affiliate—

- (1) Medical information;
- (2) An individualized list or description based on the payment transactions of the consumer for medical products or services; or
- (3) An aggregate list of identified consumers based on payment transactions for medical products or services.

(c) *Exceptions.* A person described in paragraph (a) of this section may rely on

the exclusions from the term "consumer report" in section 603(d)(2) of the Act to communicate the information in paragraph (b) of this section to an affiliate—

(1) In connection with the business of insurance or annuities (including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners, as in effect on January 1, 2003);

(2) For any purpose permitted without authorization under the regulations promulgated by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA);

(3) For any purpose referred to in section 1179 of HIPAA;

(4) For any purpose described in section 502(e) of the Gramm-Leach-Bliley Act;

(5) In connection with a determination of the consumer's eligibility, or continued eligibility, for credit consistent with § 571.30; or

(6) As otherwise permitted by order of the OTS.

#### National Credit Union Administration

■ For the reasons set out in the preamble, 12 CFR chapter VII is amended as follows:

#### PART 717—FAIR CREDIT REPORTING

■ 1. Revise the authority citation for part 717 to read as follows:

**Authority:** 15 U.S.C. 1681a, 1681b, 1681s, 1681w, 6801 and 6805.

■ 2. Amend part 717 by revising subpart A to read as follows:

#### Subpart A—General Provisions

Sec.

717.1 Purpose.

717.2 Examples.

717.3 Definitions.

#### Subpart A—General Provisions

##### § 717.1 Purpose.

(a) *Purpose.* The purpose of this part is to establish standards for Federal credit unions regarding consumer report information. In addition, the purpose of this part is to specify the extent to which Federal credit unions may obtain, use or share certain information. This part also contains a number of measures Federal credit unions must take to combat consumer fraud and related crimes, including identity theft.

(b) [Reserved]

##### § 717.2 Examples.

The examples in this part are not exclusive. Compliance with an example,

to the extent applicable, constitutes compliance with this part. Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise in this part.

##### § 717.3 Definitions.

As used in this part, unless the context requires otherwise:

(a) *Act* means the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*).

(b) *Affiliate* means any company that is related by common ownership or common corporate control with another company. For example, an affiliate of a Federal credit union is a credit union service corporation (CUSO), as provided in 12 CFR part 712, that is controlled by the Federal credit union.

(c) [Reserved]

(d) *Company* means any corporation, limited liability company, business trust, general or limited partnership, association, or similar organization.

(e) *Consumer* means an individual.

(f) [Reserved]

(g) [Reserved]

(h) [Reserved]

(i) *Common ownership or common corporate control* means a relationship between two companies under which:

(1) One company has, with respect to the other company:

(i) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of a company, directly or indirectly, or acting through one or more other persons;

(ii) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of a company; or

(iii) The power to exercise, directly or indirectly, a controlling influence over the management or policies of a company, as the NCUA determines; or

(iv) Example. NCUA will presume a credit union has a controlling influence over the management or policies of a CUSO, if the CUSO is 67% owned by credit unions.

(2) Any other person has, with respect to both companies, a relationship described in paragraphs (i)(1)(i)–(i)(1)(iii) of this section.

(j) [Reserved]

(k) *Medical information* means:

(l) 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—

(i) The past, present, or future physical, mental, or behavioral health or condition of an individual;

(ii) The provision of health care to an individual; or

(iii) The payment for the provision of health care to an individual.

(2) The term does not include:

(i) The age or gender of a consumer;

(ii) Demographic information about the consumer, including a consumer's residence address or e-mail address;

(iii) Any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy; or

(iv) Information that does not identify a specific consumer.

(l) *Person* means any individual, partnership, corporation, trust, estate cooperative, association, government or governmental subdivision or agency, or other entity.

■ 3. Subpart D is added to part 717 to read as follows:

#### Subpart D—Medical Information

##### § 717.30 Obtaining or using medical information in connection with a determination of eligibility for credit.

(a) *Scope.* This section applies to:

(1) A Federal credit union that participates as a creditor in a transaction; or

(2) Any other person that participates as a creditor in a transaction involving a person described in paragraph (1).

(b) *General prohibition on obtaining or using medical information.* (1) *In general.* A creditor may 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, except as provided in this section.

(2) *Definitions.* (i) *Credit* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(ii) *Creditor* has the same meaning as in section 702 of the Equal Credit Opportunity Act, 15 U.S.C. 1691a.

(iii) *Eligibility, or continued eligibility, for credit* means the consumer's qualification or fitness to receive, or continue to receive, credit, including the terms on which credit is offered. The term does not include:

(A) Any determination of the consumer's qualification or fitness for employment, insurance (other than a credit insurance product), or other non-credit products or services;

(B) Authorizing, processing, or documenting a payment or transaction on behalf of the consumer in a manner that does not involve a determination of the consumer's eligibility, or continued eligibility, for credit; or

(C) Maintaining or servicing the consumer's account in a manner that

does not involve a determination of the consumer's eligibility, or continued eligibility, for credit.

(c) *Rule of construction for obtaining and using unsolicited medical information.* (1) *In general.* 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, for credit without specifically requesting medical information.

(2) *Use of unsolicited medical information.* A creditor that receives unsolicited medical information in the manner described in paragraph (1) may use that information in connection with any determination of the consumer's eligibility, or continued eligibility, for credit to the extent the creditor can rely on at least one of the exceptions in § 717.30(d) or (e).

(3) *Examples.* A creditor does not obtain medical information in violation of the prohibition if, for example:

(i) In response to a general question regarding a consumer's debts or expenses, the creditor receives information that the consumer owes a debt to a hospital.

(ii) In a conversation with the creditor's loan officer, the consumer informs the creditor that the consumer has a particular medical condition.

(iii) In connection with a consumer's application for an extension of credit, the creditor requests a consumer report from a consumer reporting agency and receives medical information in the consumer report furnished by the agency even though the creditor did not specifically request medical information from the consumer reporting agency.

(d) *Financial information exception for obtaining and using medical information.*

(1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit so long as:

(i) 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;

(ii) 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

(iii) 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.

(2) *Examples.* (i) *Examples of the types of information routinely used in making credit eligibility determinations.* Paragraph (d)(1)(i) of this section permits a creditor, for example, to obtain and use information about:

(A) The dollar amount, repayment terms, repayment history, and similar information regarding medical debts to calculate, measure, or verify the repayment ability of the consumer, the use of proceeds, or the terms for granting credit;

(B) The value, condition, and lien status of a medical device that may serve as collateral to secure a loan;

(C) The dollar amount and continued eligibility for disability income or benefits related to health or a medical condition that is relied on as a source of repayment; or

(D) The identity of creditors to whom outstanding medical debts are owed in connection with an application for credit, including but not limited to, a transaction involving the consolidation of medical debts.

(ii) *Examples of uses of medical information consistent with the exception.* (A) A consumer includes on an application for credit information about two \$20,000 debts. One debt is to a hospital; the other debt is to a retailer. The creditor contacts the hospital and the retailer to verify the amount and payment status of the debts. The creditor learns that both debts are more than 90 days past due. Any two debts of this size that are more than 90 days past due would disqualify the consumer under the creditor's established underwriting criteria. The creditor denies the application on the basis that the consumer has a poor repayment history on outstanding debts. The creditor has used medical information in a manner and to an extent no less favorable than it would use comparable non-medical information.

(B) A consumer indicates on an application for a \$200,000 mortgage loan that she receives \$15,000 in long-term disability income each year from her former employer and has no other income. Annual income of \$15,000, regardless of source, would not be sufficient to support the requested amount of credit. The creditor denies the application on the basis that the projected debt-to-income ratio of the consumer does not meet the creditor's underwriting criteria. The creditor has used medical information in a manner and to an extent that is no less favorable

than it would use comparable non-medical information.

(C) A consumer includes on an application for a \$10,000 home equity loan that he has a \$50,000 debt to a medical facility that specializes in treating a potentially terminal disease. The creditor contacts the medical facility to verify the debt and obtain the repayment history and current status of the loan. The creditor learns that the debt is current. The applicant meets the income and other requirements of the creditor's underwriting guidelines. The creditor grants the application. The creditor has used medical information in accordance with the exception.

(iii) *Examples of uses of medical information inconsistent with the exception.* (A) A consumer applies for \$25,000 of credit and includes on the application information about a \$50,000 debt to a hospital. The creditor contacts the hospital to verify the amount and payment status of the debt, and learns that the debt is current and that the consumer has no delinquencies in her repayment history. If the existing debt were instead owed to a retail department store, the creditor would approve the application and extend credit based on the amount and repayment history of the outstanding debt. The creditor, however, denies the application because the consumer is indebted to a hospital. The creditor has used medical information, here the identity of the medical creditor, in a manner and to an extent that is less favorable than it would use comparable non-medical information.

(B) A consumer meets with a loan officer of a creditor to apply for a mortgage loan. While filling out the loan application, the consumer informs the loan officer orally that she has a potentially terminal disease. The consumer meets the creditor's established requirements for the requested mortgage loan. The loan officer recommends to the credit committee that the consumer be denied credit because the consumer has that disease. The credit committee follows the loan officer's recommendation and denies the application because the consumer has a potentially terminal disease. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis as part of a determination of eligibility or continued eligibility for credit.

(C) A consumer who has an apparent medical condition, such as a consumer who uses a wheelchair or an oxygen

tank, meets with a loan officer to apply for a home equity loan. The consumer meets the creditor's established requirements for the requested home equity loan and the creditor typically does not require consumers to obtain a debt cancellation contract, debt suspension agreement, or credit insurance product in connection with such loans. However, based on the consumer's apparent medical condition, the loan officer recommends to the credit committee that credit be extended to the consumer only if the consumer obtains a debt cancellation contract, debt suspension agreement, or credit insurance product. The credit committee agrees with the loan officer's recommendation. The loan officer informs the consumer that the consumer must obtain a debt cancellation contract, debt suspension agreement, or credit insurance product to qualify for the loan. The consumer obtains one of these products from a third party and the creditor approves the loan. The creditor has used medical information in a manner inconsistent with the exception by taking into account the consumer's physical, mental, or behavioral health, condition, or history, type of treatment, or prognosis in setting conditions on the consumer's eligibility for credit.

(e) *Specific exceptions for obtaining and using medical information.* (1) *In general.* A creditor may obtain and use medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit—

(i) To determine whether the use of a power of attorney or legal representative that is triggered by a medical event or condition is necessary and appropriate or whether the consumer has the legal capacity to contract when a person seeks to exercise a power of attorney or act as legal representative for a consumer based on an asserted medical event or condition;

(ii) To comply with applicable requirements of local, State, or Federal laws;

(iii) To determine, at the consumer's request, whether the consumer qualifies for a legally permissible special credit program or credit-related assistance program that is—

(A) Designed to meet the special needs of consumers with medical conditions; and

(B) Established and administered pursuant to a written plan that—

(1) Identifies the class of persons that the program is designed to benefit; and

(2) Sets forth the procedures and standards for extending credit or

providing other credit-related assistance under the program.

(iv) To the extent necessary for purposes of fraud prevention or detection;

(v) 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;

(vi) Consistent with safe and sound practices, if the consumer or the consumer's legal representative specifically requests that the creditor use medical information 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;

(vii) Consistent with safe and sound practices, to determine whether the provisions of a forbearance practice or program that is triggered by a medical event or condition apply to a consumer;

(viii) To determine the consumer's eligibility for, the triggering of, or the reactivation of a debt cancellation contract or debt suspension agreement if a medical condition or event is a triggering event for the provision of benefits under the contract or agreement; or

(ix) To determine the consumer's eligibility for, the triggering of, or the reactivation of a credit insurance product if a medical condition or event is a triggering event for the provision of benefits under the product.

(2) *Example of determining eligibility for a special credit program or credit assistance program.* A not-for-profit organization establishes a credit assistance program pursuant to a written plan that is designed to assist disabled veterans in purchasing homes by subsidizing the down payment for the home purchase mortgage loans of qualifying veterans. The organization works through mortgage lenders and requires mortgage lenders to obtain medical information about the disability of any consumer that seeks to qualify for the program, use that information to verify the consumer's eligibility for the program, and forward that information to the organization. A consumer who is a veteran applies to a creditor for a home purchase mortgage loan. The creditor informs the consumer about the credit assistance program for disabled veterans and the consumer seeks to qualify for the program. Assuming that the program complies with all applicable law, including applicable fair lending laws, the creditor may obtain and use medical information about the medical condition and disability, if any, of the consumer to determine whether

the consumer qualifies for the credit assistance program.

(3) *Examples of verifying the medical purpose of the loan or the use of proceeds.* (i) If a consumer applies for \$10,000 of credit for the purpose of financing vision correction surgery, the creditor may verify with the surgeon that the procedure will be performed. If the surgeon reports that surgery will not be performed on the consumer, the creditor may use that medical information to deny the consumer's application for credit, because the loan would not be used for the stated purpose.

(ii) If a consumer applies for \$10,000 of credit for the purpose of financing cosmetic surgery, the creditor may confirm the cost of the procedure with the surgeon. If the surgeon reports that the cost of the procedure is \$5,000, the creditor may use that medical information to offer the consumer only \$5,000 of credit.

(iii) A creditor has an established medical loan program for financing particular elective surgical procedures. The creditor receives a loan application from a consumer requesting \$10,000 of credit under the established loan program for an elective surgical procedure. The consumer indicates on the application that the purpose of the loan is to finance an elective surgical procedure not eligible for funding under the guidelines of the established loan program. The creditor may deny the consumer's application because the purpose of the loan is not for a particular procedure funded by the established loan program.

(4) *Examples of obtaining and using medical information at the request of the consumer.* (i) If a consumer applies for a loan and specifically requests that the creditor consider the consumer's medical disability at the relevant time as an explanation for adverse payment history information in his credit report, the creditor may consider such medical information in evaluating the consumer's willingness and ability to repay the requested loan to accommodate the consumer's particular circumstances, consistent with safe and sound practices. The creditor may also decline to consider such medical information to accommodate the consumer, but may evaluate the consumer's application in accordance with its otherwise applicable underwriting criteria. The creditor may not deny the consumer's application or otherwise treat the consumer less favorably because the consumer specifically requested a medical accommodation, if the creditor would have extended the credit or treated the

consumer more favorably under the creditor's otherwise applicable underwriting criteria.

(ii) If a consumer applies for a loan by telephone and explains that his income has been and will continue to be interrupted on account of a medical condition and that he expects to repay the loan by liquidating assets, the creditor may, but is not required to, evaluate the application using the sale of assets as the primary source of repayment, consistent with safe and sound practices, provided that the creditor documents the consumer's request by recording the oral conversation or making a notation of the request in the consumer's file.

(iii) If a consumer applies for a loan and the application form provides a space where the consumer may provide any other information or special circumstances, whether medical or non-medical, that the consumer would like the creditor to consider in evaluating the consumer's application, the creditor may use medical information provided by the consumer in that space on that application to accommodate the consumer's application for credit, consistent with safe and sound practices, or may disregard that information.

(iv) If a consumer specifically requests that the creditor use medical information in determining the consumer's eligibility, or continued eligibility, for credit and provides the creditor with medical information for that purpose, and the creditor determines that it needs additional information regarding the consumer's circumstances, the creditor may request, obtain, and use additional medical information about the consumer as necessary to verify the information provided by the consumer or to determine whether to make an accommodation for the consumer. The consumer may decline to provide additional information, withdraw the request for an accommodation, and have the application considered under the creditor's otherwise applicable underwriting criteria.

(v) If a consumer completes and signs a credit application that is not for medical purpose credit and the application contains boilerplate language that routinely requests medical information from the consumer or that indicates that by applying for credit the consumer authorizes or consents to the creditor obtaining and using medical information in connection with a determination of the consumer's eligibility, or continued eligibility, for

credit, the consumer has not specifically requested that the creditor obtain and use medical information to accommodate the consumer's particular circumstances.

(5) *Example of a forbearance practice or program.* After an appropriate safety and soundness review, a creditor institutes a program that allows consumers who are or will be hospitalized to defer payments as needed for up to three months, without penalty, if the credit account has been open for more than one year and has not previously been in default, and the consumer provides confirming documentation at an appropriate time. A consumer is hospitalized and does not pay her bill for a particular month. This consumer has had a credit account with the creditor for more than one year and has not previously been in default. The creditor attempts to contact the consumer and speaks with the consumer's adult child, who is not the consumer's legal representative. The adult child informs the creditor that the consumer is hospitalized and is unable to pay the bill at that time. The creditor defers payments for up to three months, without penalty, for the hospitalized consumer and sends the consumer a letter confirming this practice and the date on which the next payment will be due.

**§ 717.31 Limits on redisclosure of information.**

(a) *Scope.* This section applies to Federal credit unions.

(b) *Limits on redisclosure.* If a Federal credit union receives medical information about a consumer from a consumer reporting agency or its affiliate, the person must not disclose that information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

**§ 717.32 Sharing medical information with affiliates.**

(a) *Scope.* This section applies to Federal credit unions.

(b) *In general.* The exclusions from the term "consumer report" in section 603(d)(2) of the Act that allow the sharing of information with affiliates do not apply if a Federal credit union communicates to an affiliate—

- (1) Medical information;
- (2) An individualized list or description based on the payment transactions of the consumer for medical products or services; or

(3) An aggregate list of identified consumers based on payment transactions for medical products or services.

(c) *Exceptions.* A Federal credit union may rely on the exclusions from the term "consumer report" in section 603(d)(2) of the Act to communicate the information in paragraph (b) to an affiliate—

(1) In connection with the business of insurance or annuities (including the activities described in section 18B of the model Privacy of Consumer Financial and Health Information Regulation issued by the National Association of Insurance Commissioners, as in effect on January 1, 2003);

(2) For any purpose permitted without authorization under the regulations promulgated by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA);

(3) For any purpose referred to in section 1179 of HIPAA;

(4) For any purpose described in section 502(e) of the Gramm-Leach-Bliley Act;

(5) In connection with a determination of the consumer's eligibility, or continued eligibility, for credit consistent with § 717.30; or

(6) As otherwise permitted by order of the NCUA.

By order of the Board of Governors of the Federal Reserve System, June 2, 2005.

**Jennifer J. Johnson,**  
*Secretary of the Board.*

Dated: May 25, 2005.

**Julie L. Williams,**  
*Acting Comptroller of the Currency.*

Dated at Washington, DC, this 16th day of May, 2005.

By order of the Board of Directors,  
Federal Deposit Insurance Corporation.

**Robert E. Feldman,**  
*Executive Secretary.*

Dated: May 19, 2005.

By the Office of Thrift Supervision,  
**Richard M. Riccobono,**  
*Acting Director.*

By the National Credit Union  
Administration Board on June 1, 2005.

**Mary F. Rupp,**  
*Secretary of the Board.*

[FR Doc. 05-11356 Filed 6-9-05; 8:45 am]

BILLING CODE 4810-33-P, 6210-01-P, 6714-10-P,  
6720-01-P, 7535-01-P