May 28, 2004

Office of the Comptroller of the Currency
250 E Street, S.W.
Public Information Room
Mail Stop 1-5
Washington, D.C. 20219
Re: Docket No. 04-09

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552
Attention: No. 2004-xx
Re: Docket No. 2004-16

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551
Re: Docket No. R-1188

Becky Baker
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, Virginia 22314-3428
Re: 12 CFR Part 717

Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429
Re: RIN 3064-AC81

Dear Sir or Madam:

On behalf of the American Bankers Insurance Association and an informal coalition of depository institutions and insurers that either offer or administer debt cancellation contracts (DCCs) and debt suspension agreements (DSAs), we appreciate the opportunity to comment on the proposed regulations implementing section 411 of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act).

This comment letter primarily addresses the treatment of DCCs and DSAs under the proposed regulation. As explained in detail below, we respectfully recommend that such contracts and agreements be subject to a specific exception to the prohibition on the use of medical information rather than an interpretation of what constitutes "eligibility for credit." Such an exception not only is consistent with the FACT Act and the legislative history of the Act, but also eliminates the operational and legal uncertainties associated with the proposed regulation.

Treatment of DCCs and DSAs

Our Proposed Exception

The proposed regulation interprets the phrase "eligibility, or continued eligibility, for credit" to exclude determinations of whether provisions of a DCC or DSA are triggered. In

effect, this permits creditors to consider medical information when deciding whether or not a borrower is eligible for the protection afforded by a DCC or DSA. Such an exclusion is particularly important in the case of DCCs and DSAs that have triggering events related to the health of a borrower. Many DCCs and DSAs provide credit protection in the event that a borrower becomes disabled or dies. Access to medical information in that context is necessary and appropriate to the operation of the DCC and DSA. Without such information, it would be impossible to determine whether or not a borrower was entitled to receive the protection promised in the DCC or DSA.

On the other hand, the proposed interpretation fails to address all circumstances in which medical information may be considered in connection with a DCC or DSA and creates some legal uncertainty regarding the application of the regulation to these products. Therefore, we respectfully recommend that proposed Section __.30(d) be revised to include the following specific exception for DCCs and DSAs:

> (d)(1)(viii) To determine the eligibility for, the triggering of, or the reactivation of a debt cancellation contract or debt suspension agreement.

The Interpretation in the Proposed Regulation is Too Narrow

Our proposed exception is broader than the interpretation contained in the proposed regulation. The interpretation in the proposed regulation relates only to the determination of whether a DCC or DSA has been triggered by an event specified in the DCC or DSA. While, as noted above, medical information is a necessary and appropriate consideration in such circumstances, medical information also is necessary and appropriate in determining whether an individual is eligible to purchase a DCC or DSA and whether such a contract or agreement should be reactivated.

Creditors that sell DCCs and DSAs that include triggering events related to the death or disability of a borrower frequently ask simple "health" questions as part of the application process. Depending upon a borrower's response to a question, the creditor may decide not to offer the borrower the DCC or DSA. Such questions are a necessary and appropriate part of the sale of a DCC or DSA because they give a creditor some control over the amount of risk they assume under the DCC or DSA. They also permit the creditor to lower the price of the DCC or DSA. Absent the ability to ask medical questions in connection with offering a DCC or DSA that includes death or disability protection, the price of such protection would, in many cases, be higher for all borrowers.

Additionally, most DCCs and DSAs provide for the temporary suspension and reactivation of the protection provided by the products if a borrower falls behind in the payments due on the extension of credit associated with the DCC and DSA and then brings those payments current. Just as medical information is necessary and appropriate in determining the initial eligibility for a borrower, it is equally necessary and appropriate in making a reactivation determination.

The Interpretation in the Proposed Regulation Creates Legal Uncertainty

Our proposed exception avoids the legal uncertainty created by the proposed interpretation. The proposed interpretation creates legal uncertainty because the preamble to the proposed rule provides no rationale for the interpretation. This permits others to question, and even challenge, the basis for the interpretation. More importantly, the proposed interpretation calls into question the prevailing legal classification of DCCs and DSAs. The prevailing legal view of DCCs and DSAs is that such contracts and agreements are nothing more than a term of an extension of credit. This treatment of DCCs and DSAs is reflected in a debt cancellation regulation issued by the Office of the Comptroller of the Currency[1], an interpretation issued by the Chief Counsel of the Office of Thrift Supervision[2], and a regulation issued by the National Credit Union Administration[3]. An interpretation that a borrower's eligibility for credit does not include a determination of whether the provisions of a DCC or DSA are triggered could be read by state insurance regulators to suggest that DCCs and DSAs are somehow separate and distinct from the credit transaction. While presumably unintended, such an outcome would be contrary to the rationale upon which the existing DCC and DSA regulations and interpretation, cited above, are based.

The Terms and Legislative History of the FACT Act Support Our Proposed Exception

Our proposed exception is consistent with the terms of Section 411 of the FACT Act. New Section 604(g)(5)(A) of the Fair Credit Reporting Act (as added by Section 411) expressly empowers the federal banking agencies and the National Credit Union Administration to except from the prohibition on the use of medical information transactions that are "necessary and appropriate to protect the legitimate operational, transactional, risk, consumer, and other needs." An exception for determining the eligibility for, the triggering of, and the reactivation of DCCs and DSAs falls within the ambit of this authority. As noted above, the consideration of medical information in such contexts is necessary and appropriate to the ability to provide borrowers with promised protection (triggering and reactivation), and control the risk and price of DCCs and DSAs (eligibility).

Our proposed exception also is supported by the legislative history accompanying the FACT Act. The House Report accompanying the Act (House Report 108-263) specifically states that the use of medical information in connection with "credit-related debt cancellation agreements" is "necessary and appropriate use of medical information":

> The Committee recognizes that there are limited circumstances in which a creditor may require medical information in determining a consumer's eligibility or continued eligibility for credit, for example, to confirm the use of loan proceeds in connection with loans to finance a specific medical procedure or device, or to verify a consumer's death or disability in connection with credit-related debt cancellation agreements, and considers the limited use of medical information in these circumstances and any similar circumstances the financial regulators may identify, to be a necessary and appropriate use of medical information for purposes of this section. (at page 53)

[1] 12 CFR Part 37.
[2] Letter from Carolyn Lieberman, Acting Chief Counsel dated September 15, 1993.
[3] 12 CFR 721.3(g).

While the foregoing statement is limited to the verification of a death or disability, a section-by-section analysis of the Act introduced in the Congressional Record of December 8, 2003 by the Chairman of the House Financial Services Committee and the Chairman of the Financial Institutions and Consumer Credit Subcommittee (who was an original sponsor of the House version of the Act) indicates that Congress did not intend any part of a DCC or DSA transaction to be subject to the prohibition on the use of medical information:

> The Federal banking agencies and the NCUA are directed to prescribe regulations that are necessary and appropriate to protect legitimate business needs with respect to the use of medical information in the credit granting process, including allowing appropriate sharing for verifying certain transactions *as well as for debt cancellation contracts, debt suspension agreements, and credit insurance that are not generally intended to be restricted by this provision.* (at page E2518) emphasis added

Treatment of Credit Insurance

The proposed interpretation of the phrase "eligibility, or continued eligibility, for credit" applies not only to DCCs and DSAs, but also to credit insurance. We respectfully recommend that the regulation be revised to include a specific exception for credit insurance.

Technically, it is our opinion that Section 411(a) of the FACT Act does not apply to credit insurance. Section 411(a) applies to credit products, and, unlike DCCs and DSAs, credit insurance is not a credit product; it is an insurance product. Nonetheless, the legislative history cited above suggests that Section 411(a) may apply to credit insurance. Therefore, we urge that the regulation remove any doubt regarding the impact of Section 411(a) and specifically except credit insurance from the scope of the regulation. The rationale for such an exception is identical to the rationale for the exception for DCCs and DSAs. Credit insurance frequently is associated with the death and disability of a borrower, and consideration of the medical information related to the borrower is necessary and appropriate to the operation of credit insurance.

Conclusion

In conclusion, we urge the establishment of a specific exception for all aspects of DCC and DSA transactions. Such an exception not only is consistent with the FACT Act and the legislative history of the Act, but also eliminates the operational and legal uncertainties associated with the proposed regulation. We also urge that the regulation include a specific exception for credit insurance. We appreciate the opportunity to provide these comments.

Sincerely,

James C. Sivon
Barnett & Sivon, P.C.

James T. McIntyre
McIntyre Law Firm, PLLC

Beth L. Climo
Executive Director
American Bankers Insurance Association