

Medical Information Protection under FACTA

During November 2005, the federal banking agencies finalized rules governing medical information protections under the Fair and Accurate Credit Transactions Act of 2003 (FACTA). The final rules became effective April 1, 2006, and govern lending practices related to obtaining and using medical information. As mortgage lenders, you may encounter situations where an applicant volunteers protected medical information, or where medical information appears in credit or other underwriting reports. Be sure to comply with the new FACTA provisions when obtaining or using medical information in credit transactions.

Medical information defined

Under the final rule, "medical information" includes 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.

Creditors are prohibited from obtaining or using any medical information pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit. However, a creditor does not "obtain medical information" in violation of FACTA if an applicant voluntarily provides it or if medical information appears in credit reports. A creditor receiving unsolicited medical information may not use that information in determining the applicant's eligibility for credit, UNLESS the medical information is used under one of the exceptions contained in the final rule.

Exceptions

Creditors may obtain and use medical information about a consumer in connection with determining the consumer's eligibility, or continued eligibility, for credit, provided that:

- The information is the type 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;
- 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
- 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.

To illustrate allowable exceptions to the prohibition on obtaining and using medical information: A consumer discloses information on an application relating to two \$20,000 debts. One debt is to a hospital; the other 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. Based on the creditor's underwriting standards, any two debts of this size that are more than 90 days past due would disqualify the applicant for credit. The creditor denies the application on the basis that the consumer has a poor payment history on outstanding debts. In this situation, the creditor has used medical information in a manner and to an extent no less favorably than it has used non-medical information.

Another example of allowable use of medical information: A consumer indicates on an application for a \$200,000 mortgage 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 the source, would not be sufficient to support the amount of credit requested. 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.

To illustrate use of medical information that is INCONSISTENT with the allowable exceptions: A consumer meets with a creditor to apply for a mortgage loan. While completing the application, the consumer informs the loan officer that she has a potentially terminal disease. The consumer meets the creditor's established underwriting requirements for the mortgage loan requested. However, the creditor denies the application because of the consumer's potentially terminal disease. In this situation, the creditor has used medical information in a manner inconsistent with the allowable exceptions by taking into account the consumer's physical, mental or behavioral health, condition or history, type of treatment or prognosis as part of the determination of eligibility for credit.

Limits on redisclosure

Creditors are further limited on disclosing medical information received from a consumer, a credit reporting agency, or an affiliate. Creditors may 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 law. However, medical information may be shared with a creditor's affiliates, if it is shared:

- In connection with the business of insurance or annuities;
- For any purposes permitted under the Department of Health and Human Services' Health Insurance Portability and Accountability Act of 1996 (HIPAA);
- For any purpose under section 502(e) of the Gramm-Leach-Bliley Act (collection and sharing of consumer nonpublic personal information in accordance with the Privacy regulation);
- In connection with a determination of the consumer's eligibility, or continued eligibility, for credit; or
- As otherwise permitted by order of the creditor's federal regulator.

The full text of the final rule may be found at:

<http://www.fdic.gov/news/news/financial/2005/fil12105.html>. For assistance with questions about the FACTA rules regarding obtaining and using medical information, contact IBA's compliance department at 800-532-1423 or 515-286-4300.