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MEMORANDUM

November 24, 2003

To Our Clients and Friends

Re: Affiliate Information Sharing Provisions of the FACT Act

Congress has passed the Fair and Accurate Credit Transaction Act of 2003 (the “FACT Act”) which, among other things, permanently extends the provisions of the Fair Credit Reporting Act which pre-empt state laws on affiliate information sharing. The legislation is expected to be signed by the President shortly. Regulations implementing the new provisions become effective within 15 months after date of enactment.

In addition to extending the pre-emption for affiliate sharing, the legislation imposes the following requirements on the use of information obtained from an affiliate.

GENERAL RESTRICTION

1. Any person who receives information from an affiliate that would otherwise be a consumer report¹ may not use the information to make a solicitation for marketing purposes unless:
 - It is clearly, conspicuously and concisely disclosed that the information may be shared among affiliates for purposes of making such solicitations, and
 - The consumer is given an opportunity and a simple method to prohibit the solicitation (i.e., “opt-out”).

¹ Generally, such information will include transaction and experience information, and information that bears on a consumer’s eligibility for credit, insurance or employment.

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Note that the opt-out requirement applies only to the use of information by the affiliate. There is no restriction on the sharing of consumer information among affiliates. Accordingly, consumer information may continue to be placed into common databases and may be used for purposes other than solicitations by other affiliates.

In addition, a company may use information to send a solicitation if the information was received prior to the date on which compliance with regulations promulgated by the agencies implementing the FACT Act is required.

A “solicitation” is the marketing of a product or service initiated by a person to a particular consumer that is intended to encourage the purchase of a product or service. It does not include communications directed at the general public, nor those determined not to be solicitations by the agencies’ regulations.

OPT-OUT FORM

2. The opt-out form must provide the consumer with the opportunity to Opt-out from all solicitations from affiliates. However, there is no requirement that consumers be given an opportunity to opt-out from solicitations from the company that provided information about its customers to its affiliates.
3. The opt-out form may permit consumers to choose different options when deciding whether or not to opt-out. Accordingly, a company may permit consumers to select the types of affiliates and information from which they wish to opt-out, as well as to select how solicitations may be delivered.
4. A consumer’s opt-out is to continue in effect for at least 5 years from the date the opt-out is received by a company, or until revoked by the consumer. When the opt-out expires, a company may not use the consumer’s information until it has provided the consumer with the notice and opportunity to extend the opt-out for at least 5 years.
5. Notices may be sent with any other notice required under any other law, and any other notice that is equivalent to the notice required under this section of the FACT Act may be used to satisfy this requirement as well.

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EXEMPTIONS

6. A company is not subject to the above requirements if it:
 - Uses information to make a solicitation for marketing purposes to a consumer with whom the company has a pre-existing business relationship.
 - Uses information to perform services on behalf of another affiliate, provided that the affiliate is otherwise permitted to send the solicitation on its own behalf.
 - Uses information in response to a communication initiated by the consumer.
 - Uses information in response to solicitations authorized or requested by the consumer.
 - Uses information to facilitate communications with a consumer in connection with an employee benefit program administered by the company.
 - Uses information if compliance with the opt-out requirement would prevent the company from complying with state insurance laws relating to unfair discrimination.

7. A pre-existing business relationship is a relationship between a company (or the company's licensed agent) and a consumer based upon:
 - A financial contract which is in force.
 - The purchase, rental or lease by the consumer of the company's goods or services during the 18-month period immediately preceding the date the solicitation is sent.
 - A financial transaction (including an active account, policy in force, or other continuing relationship) between the person and a consumer during the 18-month period immediately preceding the date the solicitation is sent.
 - An inquiry or application by the consumer regarding a product or service during the 3-month period immediately preceding the date the solicitation is sent.
 - Any other pre-existing customer relationship as defined in the agencies' implementing regulations.

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REGULATIONS

8. Regulations implementing the above provisions, which also are to provide specific guidance and standards, are required to be promulgated by the federal banking agencies (Comptroller of the Currency, Federal Reserve Board, Office of Thrift Supervision, Federal Deposit Insurance Corporation and National Credit Union Administration), the Federal Trade Commission (“FTC”) and the Securities and Exchange Commission for entities subject to their respective jurisdictions. Interestingly, because the insurance industry is not generally subject to the jurisdiction of the FTC, it appears that there is no agency that has authority to promulgate rules for insurers and licensed agents.

The agencies are to consult and coordinate to the extent possible so that their rules are consistent and comparable.

EFFECTIVE DATES

9. The agencies are required to adopt rules in final form within 9 months after the date of enactment of the FACT Act.
10. The rules become effective within 6 months after they are adopted in final form.

PRE-EMPTION

11. The provisions relating to use of information obtained from affiliates also pre-empt state laws relating to the use of such information.

STUDY ON INFORMATION SHARING

12. The federal banking agencies and the FTC are to jointly conduct regular studies on consumer information sharing practices by financial institutions with their affiliates. The FACT Act indicates specific areas the study is to consider, including purposes for sharing and the types of information shared with affiliates. The agencies are also to make recommendations for legislative or regulatory action.
13. The first report is to be submitted within 3 years after date of enactment of the FACT Act, and subsequent reports are due every three years thereafter.

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A copy of the conference report that contains the text of the legislation can be found at www.schwartzandballen.com/WhatsNew.htm.

If you have any questions concerning, please call Gilbert Schwartz, Robert Ballen or Tom Fox at (202) 776-0700.