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M E M O R A N D U M

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To Our Clients and Friends

Re: Provisions of the FACT Act Relating to Furnishers of Information

The President signed into law today the Fair and Accurate Credit Transactions Act of 2003 (the "FACT Act"), which in addition to making permanent the provisions of the Fair Credit Reporting Act ("FCRA") that pre-empt state laws on affiliate information sharing, modifies existing requirements on persons who furnish information regarding consumers to consumer reporting agencies ("CRAs"). Furnishers of information to CRAs ("furnishers") will now be subject to the following obligations.

IDENTITY THEFT INFORMATION

- A furnisher must establish reasonable procedures to respond to notifications from a CRA that information has been blocked as a result of identity theft and to prevent the information from being refurnished to others.
- If a consumer submits an identity theft report to a furnisher stating that information maintained by the furnisher resulted from identity theft, the furnisher may not provide the information to a CRA unless the furnisher subsequently knows or is informed by the consumer that the information is correct.
- The FACT Act permanently preempts any state law that regulates the duties of furnishers upon receiving notice of identity theft-related information.

FINANCIAL INSTITUTION OBLIGATIONS

- A financial institution that furnishes negative information to a CRA regarding credit it extended to a consumer must provide clear, conspicuous, written notice to the consumer prior to or within 30 days after furnishing the negative information to the CRA.
- “Negative information” is information concerning a customer’s delinquencies, late payments, insolvency or any form of default.
- After providing the required notice, the financial institution may furnish additional negative information to a CRA with respect to the same customer without providing an additional notice.
- The notice may not be included in the initial disclosures required under the Truth in Lending Act. The notice may be included with a notice of default, a billing statement or other material provided to the consumer.
- The Federal Reserve Board is to prescribe a brief model notice (up to 30 words) within six months of enactment of the FACT Act. The model notice is not required to be used, but if used, it will constitute compliance with the notice requirement.
- A financial institution is not liable for its failure to provide a notice if it maintains reasonable policies and procedures to comply with this provision of the FACT Act or if the financial institution reasonably believes it is prohibited by law from contacting the consumer.

ENHANCING THE ACCURACY AND INTEGRITY OF INFORMATION

- The federal banking agencies and the Federal Trade Commission (“FTC”) are to establish guidelines for use by furnishers regarding the accuracy and integrity of information that furnishers provide to CRAs, and prescribe regulations requiring furnishers to establish reasonable policies and procedures for implementing the guidelines.
- A furnisher may not provide information to a CRA if the furnisher knows or has reasonable cause to believe that the information is inaccurate; that is, the furnisher has specific knowledge, other than solely through allegations by the consumer, that would cause a reasonable person to have substantial doubts about the accuracy of the information.

RESOLVING CONSUMER DISPUTES

- The federal banking agencies and the FTC are required to jointly prescribe regulations identifying the circumstances under which a furnisher will be required to reinvestigate a dispute regarding the accuracy of information in a consumer report based on the direct request of a consumer.
- After receiving a notice of dispute, the furnisher must:
 - conduct an investigation regarding the disputed information;
 - review all relevant information provided by the consumer;
 - complete the investigation and report the results to the consumer in the same time period in which a CRA would if the consumer had disputed the information with the CRA (generally 30 days); and
 - if it determines the information is inaccurate, notify each CRA to whom the person furnished the information and provide any necessary corrections.
- A furnisher need not investigate if the furnisher reasonably determines the dispute is frivolous or irrelevant, in which case it must notify the consumer within five business days of the reasons for such determination and identify any additional information needed from the consumer to investigate the disputed information.
- If after reinvestigation a furnisher finds an item of information to be inaccurate, incomplete or unable to be verified, for purposes of reporting to a CRA the furnisher must modify, delete or permanently block the information.

FURNISHER LIABILITY EXCEPTION

- A furnisher who provides information to a CRA regarding a delinquent account placed for collection or charged-off, must, within 90 days, notify the CRA of the date of delinquency on the account. The FACT Act clarifies what furnishers may report as the date of delinquency.
- No private right of action generally will exist against a furnisher with respect to accuracy of the information provided by the furnisher or red flags, which are circumstances indicating possible identity theft. These provisions are to be exclusively enforced by the federal agencies and officials and state officials identified in the FACT Act.

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STUDY

- The Federal Reserve and the FTC are to jointly study the extent to which and the manner in which CRAs and furnishers are complying with the procedures, time lines and requirements of the FCRA for the prompt investigation and resolution of disputes regarding the accuracy of consumer information provided to CRAs.

A copy of the FACT Act can be found at www.schwartzandballen.com/Whats_New.htm.

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