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**M E M O R A N D U M**

December 3, 2003

To Our Clients and Friends

Re: Medical Information Provisions of the FACT Act

The Fair and Accurate Credit Transactions Act of 2003 (the “FACT Act”) permanently extends the provisions of the Fair Credit Reporting Act (“FCRA”) which are due to expire at the end of 2003 and provides additional consumer protections relating to identity theft. The legislation also imposes requirements on the use and disclosure of medical information by financial institutions and contains requirements for the confidentiality of medical contact information.

**PROTECTION OF MEDICAL INFORMATION**

Title IV of the FACT Act establishes the following limitations on the use and sharing of medical information.

- A consumer reporting agency (“CRA”) generally may not furnish a consumer report containing medical information about a consumer in connection with a credit or insurance transaction or for employment purposes, unless:
  - the consumer report is furnished in connection with an insurance transaction and the consumer affirmatively consents to the furnishing of the report;
  - the report is furnished for employment purposes or in connection with a credit transaction and (1) the information is relevant to process or effect the employment or transaction, and (2) the consumer provides specific written consent, describing in clear and conspicuous language the use for which the information will be furnished; or
  - the information (other than account status or amounts) (1) pertains solely to transactions, accounts, or balances relating to debts arising from the receipt of medical services, products or devices and (2) the

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information is restricted or reported using codes that do not identify or provide information sufficient to infer the identity of the provider or nature of the services, products or devices.

- A creditor may not obtain or use a consumer's medical information in connection with a determination of a consumer's eligibility for credit, except as permitted under regulations or orders prescribed by the federal banking agencies for operational, transactional, and other necessary and appropriate reasons. The agencies' regulations are to be issued within six months of enactment of the FACT Act.

### **EXCEPTIONS**

Information or communication of information will not be treated as a consumer report if it is disclosed:

- in connection with the business of insurance or annuities;
- for a purpose generally permitted under HIPAA or federal regulations promulgated thereunder; or
- as otherwise determined to be necessary and appropriate by the Federal Trade Commission, a federal banking agency, or a state insurance authority.

Accordingly, a company should be permitted to disclose and use information that falls within the above exceptions.

### **DISCLOSURE OF MEDICAL INFORMATION TO AFFILIATES**

Except for information disclosed pursuant to the exceptions provided above, information shared among affiliates will be considered a consumer report if it is:

- medical information, or
- an individualized list or description, or an aggregate list of identified consumers based on the consumers' payment transactions for medical products or services.

A person who receives medical information may not disclose it for any purpose other than to carry out the purpose for which it was disclosed, or as otherwise permitted by law.

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### **DEFINITION OF “MEDICAL INFORMATION”**

The term “medical information” means information created by or derived from a health care provider or a consumer relating to:

- the past, present, or behavioral health or condition of an individual;
- the provision of health care to an individual; or
- payment for the provision of health care to an individual.

Medical information does not include the age, gender, or demographic information about the consumer, or any other information that does not relate to the consumer’s health, including the existence or value of an insurance policy.

The above provisions take effect 180 days after enactment of the FACT Act, which is expected December 4<sup>th</sup>. However, the provision described above regarding creditors takes effect on the later of 90 days after issuance of regulations by the federal banking agencies or on the date specified in such regulations.

### **CONFIDENTIALITY OF MEDICAL CONTACT INFORMATION IN CONSUMER REPORTS**

A person whose primary business is providing medical services, products or devices, and who furnishes medical information to a CRA must notify the CRA that it is a furnisher of medical information. A CRA may not make a consumer report available if it contains the name, address, telephone number of a medical information furnisher unless the information is restricted or reported using codes that do not identify the name of the provider or the services, products or devices acquired by the consumer. However, a consumer report containing such information may be provided to an insurance company for a purpose relating to the business of insurance (other than property or casualty insurance). This section takes effect 15 months after the date of enactment of the FACT Act.

A copy of the FACT Act can be found at [www.schwartzandballen.com/Whats\\_New.htm](http://www.schwartzandballen.com/Whats_New.htm).

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