

SCHWARTZ & BALLEN LLP
1990 M STREET, N.W. • SUITE 500
WASHINGTON, DC 20036-3465
WWW.SCHWARTZANDBALLEN.COM

TELEPHONE
(202) 776-0700

FACSIMILE
(202) 776-0720

MEMORANDUM

August 20, 2009

To Our Clients and Friends

Re: SEC FACT Act Rules on Use of Customer Information for Marketing Purposes

The Securities and Exchange Commission (the “Commission”) has adopted final rules implementing provisions of the Fair and Accurate Credit Transactions Act (“FACT Act”) which limit a company’s use of certain information received from an affiliate for marketing purposes. The rules apply to broker-dealers, investment advisors, investment companies, and transfer agents registered with the Commission. Compliance with the rules is required by January 1, 2010.

DISCUSSION

Section 214 of the FACT Act amended the Fair Credit Reporting Act to provide consumers the ability to restrict a company from making marketing solicitations to them using certain information obtained from affiliates. The Federal banking agencies and the Federal Trade Commission had previously adopted rules implementing this provision. The Commission’s affiliate-marketing rules prohibit a company from using certain information received from an affiliate, such as information regarding the consumer’s transactions or experiences with the affiliate, to make marketing solicitations to the consumer unless the potential use has been disclosed to the consumer, the consumer has been provided an opportunity to opt out from receiving solicitations and the consumer has not opted out from such use. The rules mirror rules previously adopted by the other agencies.

The Commission’s rules provide the following:

- The marketing notice may be provided by any affiliate that has or previously had a pre-existing business relationship with the consumer.

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- There is no restriction on “constructive sharing.” Accordingly, a company may market an affiliate’s products and services to its own customers.
- Marketing notices must be delivered electronically or in writing, not orally. However, a pre-existing business relationship may be established orally.
- The rules describe conditions under which a service provider for both the company and its affiliate would be acting for the company rather than for the affiliate.
- The rules provide model forms that satisfy the requirement that the marketing notice be clear, conspicuous and concise.
- Examples are presented as guidance for application of the rules. However, compliance with an example does not necessarily constitute compliance with the rules.

A copy of the Commission’s final rules can be found on our website at http://www.schwartzandballen.com/whats_new.html.

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