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MEMORANDUM

February 24, 2004

To Our Clients and Friends

Re: FACT Act: Prohibition Against Circumventing Treatment
As A Nationwide Consumer Reporting Agency

As mandated by The Fair and Accurate Credit Transactions Act of 2003 (the “FACT Act”) (Pub. L. No. 108-159), the Federal Trade Commission (“FTC”) has issued an interim final rule to prevent consumer reporting agencies (“CRAs”) from avoiding treatment as nationwide consumer reporting agencies.¹ The interim final rule is effective March 3rd. Comments are due by April 23rd.

RESPONSIBILITIES OF NATIONWIDE CRAS

Under the Fair Credit Reporting Act (“FCRA”) nationwide CRAs are subject to special obligations in addition to those placed on all CRAs. Specifically, they are required to:

- Participate in a joint opt-out notification system for prescreened credit or insurance offers;
- Maintain a toll-free telephone number during normal business hours with personnel accessible to consumers who have received their file disclosures; and,
- Utilize an automated system through which furnishers of information may report reinvestigation results.

The FACT Act adds to these obligations by requiring nationwide CRAs to:

¹ The FCRA defines nationwide CRAs as consumer reporting agencies that “regularly engage [] in the practice of assembling or evaluating, and maintaining, for the purpose of furnishing consumer reports to third parties bearing on a consumer’s credit worthiness, credit standing, or credit capacity” both public record information and “credit account information from persons who furnish that information regularly and in the ordinary course of business” regarding consumers residing nationwide. 15 U.S.C. §1681 a(p)

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- Place fraud alerts in consumer files and communicate such alerts to other nationwide CRAs;
- Provide free file disclosures once annually upon request through a centralized source; and
- Participate in a process of a consumer complaint sharing and review.

The purpose of the FTC's rule is to prevent a CRA from circumventing or evading treatment as a nationwide CRA and thus avoid the obligations that the FCRA and the FACT Act impose on nationwide CRAs.

INTERIM FINAL RULE

The interim final rule states that a consumer reporting agency shall not circumvent or evade treatment as a nationwide consumer reporting agency *by any means*, including:

- Corporate organization, reorganization, structure, or restructuring, including merger, acquisition, dissolution, divestiture, or asset sale; or
- Maintaining or merging public record and credit account information in a manner that is substantially equivalent to that described in paragraphs (1) and (2) of section 603(p) of the FCRA.

The FTC provides examples of conduct that would, and would not, comply with the rule. The FTC cautions that these examples are illustrative, not exhaustive. Examples of actions the FTC would consider to be evasions of the rule are the reorganizations of an existing CRA's operations by data type or by regional operations.

This language of the rule is similar to that contained in the FACT Act except that the FTC has broadened the language in the Act by adding the words "by any means" and by including organization and structuring as prohibited conduct for circumventing or evading treatment as a nationwide CRA. Thus, newly formed consumer reporting agencies, as well as existing CRAs, are covered by the rule.

The interim final rule can be found at http://www.schwartzandballen.com/whats_new.html.

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