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**MEMORANDUM**

November 25, 2003

To Our Clients and Friends

Re: Fair and Accurate Credit Transactions Act of 2003 (H.R. 2622)

Congress has passed the Fair and Accurate Credit Transactions Act of 2003 (the "FACT Act"), which extends the preemptions of state law contained in the Fair Credit Reporting Act ("FCRA") that are scheduled to expire at the end of the year, and provides consumers with additional protections against identity theft. It is anticipated that the President will sign the legislation in the near future. Following are the key provisions of the FACT Act.

**National Standards.** The FACT Act permanently extends the federal preemption provisions of the FCRA to provide uniform national consumer protection standards, including provisions relating to identity theft, information sharing among affiliates, and risk-based pricing notices.

**Affiliate Sharing.**<sup>1</sup> A person who receives from an affiliate information that would otherwise constitute a consumer report may not use the information to make a solicitation for marketing purposes to a consumer about its products or services, unless (1) it discloses that the information may be shared among such persons for the purpose of making solicitations, and (2) the consumer is provided an opportunity to opt out from receiving such solicitations. A consumer may be offered different options regarding the types of entities and information covered, and the methods of delivering solicitations the consumer may elect to prohibit.

The consumer's election to opt out of solicitations will be effective for at least five years, unless the consumer revokes it. After five years, a person may not make a solicitation for marketing purposes to the consumer unless the person provides the

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<sup>1</sup> Our memorandum of November 24, 2003, presents a more complete description of the affiliate sharing provisions of the FACT Act. It can be found at [www.schwartzandballen.com/Whats\\_New.html](http://www.schwartzandballen.com/Whats_New.html).

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consumer with a notice and opportunity to extend the opt out period for another five years.

This requirement does not apply (1) to a person that has a pre-existing business relationship with the consumer; (2) to a person using the information to perform services on behalf of an affiliate, if the affiliate itself is permitted to send the solicitation; (3) to a person using information in response to a consumer's request or communication; or (4) if compliance with this section would prevent compliance with state insurance laws pertaining to unfair discrimination.

A "pre-existing business relationship" is a relationship between a person (or the person's licensed agent) and a consumer based on (1) a financial contract that is in force between them; (2) the purchase, rental or lease by the consumer of the person's goods or services, or a financial transaction during the 18-month period preceding the date on which the consumer is sent a solicitation; (3) an inquiry or application by the consumer during the 3-month period preceding the date on which the consumer is sent a solicitation; or (4) any other pre-existing customer relationship defined in the regulations.

### **Requirement of Financial Institutions to Disclose Negative Information.**

A financial institution that extends credit and furnishes negative information to a national consumer reporting agency ("CRA") regarding credit extended to a consumer must provide to the consumer notice in writing of the furnishing of such negative information. "Negative information" is information regarding a customer's delinquencies, late payments, insolvency or default.

The notice must be provided to the consumer no later than 30 days after furnishing the information to the CRA. The notice may not be provided with the initial disclosures under the Truth in Lending Act. After providing notice to the consumer, the financial institution may then furnish other negative information to a CRA with respect to the same transaction, extension of credit or account, without providing the consumer with another notice. The Act provides a safe harbor for financial institutions that maintain reasonable policies and procedures, or reasonably believed the institution was prohibited by law from contacting the consumer.

**Risk-Based Pricing Notice.** A person who uses a consumer report in connection with the provision of credit to a consumer on material terms that are materially less favorable than the most favorable terms available from or through that person to a substantial proportion of consumers, must provide an oral, written or electronic notice to the consumer. The notice may be provided at the time the application is made or during communication of approval of the credit. A notice need not be provided if a consumer applied for specific material terms and was granted those terms, or if the person provides a notice in connection with adverse action under

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the FCRA. A person shall not be liable if the person maintained reasonable policies and procedures to comply with this section. The Federal Reserve Board and Federal Trade Commission (“FTC”) are to adopt rules to implement this requirement. In addition, the private right of action provisions of the FCRA do not apply to this section. The provision also pre-empts state laws relating to this subject.

**Fraud Alerts.** If a consumer claims to be or suspects that he or she is about to become a victim of fraud or identity theft, upon the consumer’s request, a national CRA must: (1) include a fraud alert in the consumer’s file for at least 90 days, and provide it to any requester along with any credit score generated using the file; (2) refer the fraud alert information to other national CRAs; and (3) inform the consumer that he or she may request a free copy of the file and, if requested, provide it and all other required disclosures within three business days without charge.

A consumer may extend the alert for seven years upon submitting evidence of identity theft to the CRA. In the case of an extended fraud alert, a consumer may request the CRA to (1) continue to maintain a fraud alert in the consumer’s file; (2) exclude the consumer from lists for prescreened offers of credit or insurance for five years from the date of the request; (3) refer the fraud alert information to other CRAs; (4) disclose that the consumer may request two free copies of the file during the next 12 months; and (5) provide all disclosures required under the FCRA within three business days without charge. The legislation also permits a consumer who is on active military duty to request a CRA to include in the consumer’s file an alert to the effect that the consumer is on active military duty.

A user of a consumer report that contains a fraud alert or active duty alert may not extend credit to a consumer unless the user makes use of reasonable policies to verify the identity of the consumer. This may include calling the consumer at the telephone number contained in the credit file to verify the consumer’s identity.

**Truncation.** A person who accepts credit or debit cards may not print more than the last five digits of the card number or expiration date on any receipt given to the cardholder at the point of sale or transaction. Additionally, a consumer may request that the first five digits of the consumer’s social security number not be provided when providing the consumer’s file to the consumer. This does not affect the ability of CRAs to disclose social security numbers to users of consumer reports.

**Red Flags.** The FACT Act directs the federal banking agencies and the FTC to identify “red flags,” or patterns indicative of identity theft, and to require insured depository institutions to institute policies and procedures to identify possible risks to customers and to the institution. Red flags include when a transaction occurs on an account that has been inactive for more than two years.

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**Rights of Identity Theft Victims.** The FTC, in consultation with the federal banking agencies, is to prepare a model summary on how to remedy the effects of fraud or identity theft. CRAs must provide such a summary to identity theft victims, in addition to informing other CRAs about fraud alerts received from consumers. Businesses must also provide records of unauthorized transactions involving identity theft to victims or law enforcement officials.

**Blocking Information Resulting From Identity Theft.** CRAs must block reporting of information a consumer identifies as resulting from identity theft, within four business days of receipt of the request, and notify the furnisher of the information of the block. Information need not be blocked if the CRA reasonably determines that there was a material misrepresentation by the consumer.

**Reconciling Addresses.** CRAs must notify a requester of a consumer report if the address of the consumer submitted by the requester differs substantially from the address in the consumer's file.

**Preventing Repollution.** A person may not furnish information to a CRA that a consumer identified as resulting from identity theft, unless the furnisher knows the information is correct. A person may also not sell, transfer or place for collection a debt that the person has been notified resulted from identity theft.

**Access to Credit Report and Credit Scores.** Consumers may request one free copy of their credit report from a CRA in any 12-month period, as well as their credit scores. The CRA is required to inform the consumer of the score, the range of scores, and up to four key factors that adversely affect the credit score. A mortgage lender is required to provide the consumer with the credit score that it used in connection with processing the consumer's application.

**Accuracy of Information and Consumer Disputes.** CRAs must investigate consumer complaints about the accuracy or completeness of the consumer's credit report, promptly correct any inaccuracy or incompleteness, and notify the furnisher of the information that the information has been modified or deleted. A furnisher of information may not furnish information that it knows or has reasonable cause to believe is inaccurate, and must modify, delete or permanently block any information found to be inaccurate, incomplete or unverifiable after receiving notice from a CRA. No reinvestigation is required, however, if the request involves a dispute that is frivolous or irrelevant. A consumer does not have a private right of action against a furnisher of information with respect to accuracy of the information provided by the furnisher.

The federal banking agencies and the FTC are to promulgate regulations regarding guidelines for furnishers of information to CRAs concerning procedures for

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ensuring the accuracy and integrity of the information and identifying circumstances under which a furnisher will be required to reinvestigate disputed information after receiving a request from a consumer.

The FTC is to transmit any complaints received by it regarding incomplete or inaccurate information to the appropriate CRA. The CRA must review the complaint to determine if the CRA's legal obligations have been met, provide regular reports to the FTC regarding the determination made or action taken after review and maintain records of the disposition of each complaint for a reasonable period of time.

**Prescreened Offers.** A consumer must be provided a simple and easy method for notifying a CRA of the consumer's election to opt out of receiving prescreened offers of credit or insurance, as defined by the regulations, including the address and toll-free telephone number of the CRA's notification system. The consumer's election is effective for five years.

**Medical Information.** CRAs may provide a consumer report containing medical information only if: (1) it is for insurance purposes and the consumer consents; (2) it is for employment purposes or a credit transaction, the information is needed to process or effect the transaction, and the consumer provides specific written consent; or (3) it relates to transactions, accounts, or debts from medical services, products or devices and the information is coded so as not identify the provider or nature of treatment. A creditor may not use medical information about a consumer unless such use is determined to be necessary and appropriate under regulations adopted by the FTC, the federal banking agencies or state insurance authorities. A CRA may not furnish a consumer report containing the name, address and telephone number of a furnisher of medical information, unless the information is protected using codes, or unless the consumer report is to be used for a purpose relating to the business of insurance (other than property or casualty).

Medical information is not a consumer report if disclosed (1) in connection with the business of insurance or annuities, (2) as permitted by federal regulations or HIPAA, or (3) as determined to be necessary and appropriate by the FTC, a federal banking agency or state insurance authority. The Act defines "medical information" to include information about a person's past, present or future health, the provision of health care to a person and healthcare payment information. It does not include age, gender or demographic information about the consumer.

**Credit and Insurance Scores Study.** The FTC and Federal Reserve Board, in consultation with the Department of Housing and Urban Development, are to conduct a study on the effects of the use of credit scores and credit-based insurance scores on the availability and affordability of financial products, including loans and property and casualty insurance, the connection between such scores and the

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quantifiable risks and losses experienced by businesses, and the extent to which use of credit scores impacts the availability and affordability of credit and insurance by geography, income, ethnicity, race, color, religion, national origin, age, sex, marital status or creed.

**Disposal of Records.** The federal banking agencies, the FTC, and the Securities and Exchange Commission are to issue regulations requiring any person who maintains consumer information or a compilation derived from consumer reports to properly dispose of such information. The agencies are to ensure that the regulations are consistent with the information security safeguard provisions contained in the Gramm-Leach-Bliley Act. The agencies may also exempt any person or class of persons as they deem appropriate.

**Statute of Limitations.** The FACT Act provides a statute of limitations for breach of the FCRA of the earlier of two years from the date of discovery of the violation by the plaintiff, or five years after the violation occurred.

**Financial Literacy and Education Commission.** The FACT Act establishes the Financial Literacy and Education Commission, comprised of various federal government agency representatives, to improve the financial literacy and education of the public through the development of a national strategy for promoting these goals.

The text of the legislation 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.