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**MEMORANDUM**

June 11, 2004

To Our Clients and Friends

Re: FACT Act: FTC's Proposed Rule on Affiliate Marketing

Section 214 of the Fair and Accurate Credit Transactions Act of 2003 (the "FACT Act") provides consumers with the ability to restrict companies from using certain information obtained from affiliates to make solicitations. The FACT Act also requires the Federal Trade Commission ("FTC"), the Federal banking agencies and the Securities and Exchange Commission to prescribe regulations to implement § 214. The FTC is the first agency to propose a rule to implement § 214. Comments are due by July 20, 2004. The other agencies are expected to propose rules in the near future.

**AFFILIATE MARKETING RULE**

The FTC's proposal requires a company to provide consumers with the opportunity to prohibit the company's affiliates from using information that would otherwise be a consumer report and which was received from the company to make solicitations to the consumers. The notice and opportunity to opt-out must be provided by the company with which the consumer does business, by its agent or in one or more corporate names of the affiliate group. The following exceptions are provided in § 214 and in the proposed rule:

- making or sending marketing solicitations to a consumer with whom the affiliate has a pre-existing business relationship;<sup>1</sup>

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<sup>1</sup> "Pre-existing business relationship" means a relationship between a person and a consumer based on a financial contract between the person and consumer, the purchase, rental or lease by the consumer of goods or services within an 18-month period or an inquiry or application by the consumer within a three month period regarding a product or service.

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- facilitating communications to an individual whom the affiliate has provided employee benefits or other services arising out of a current employment relationship;
- performing services on behalf of an affiliate. This exception does not permit an affiliate to make solicitations on its own behalf or on behalf of another affiliate if the consumer has otherwise opted out from such solicitations;
- responding to a communication initiated by the consumer;
- responding to an affirmative authorization or request by the consumer; and
- if compliance with the provision would prevent the affiliate from complying with provisions of state insurance laws relating to unfair discrimination.

The opt-out notice must be clear, conspicuous and concise. The FTC has provided model forms that may be used by financial institutions. The notice must:

- accurately disclose that a consumer may elect to limit the affiliate from using eligibility information;
- disclose that the consumer's election to opt-out will last for a period of at least five years and that the period may be extended once expired; and
- provide consumers a reasonable and simple method to opt-out, which may be by mail, telephone or electronic means.

The proposed rule allows companies to consolidate the notice with any other notice or disclosure required to be issued under provisions of law, including notices required under the Gramm-Leach-Bliley Act or the Fair Credit Reporting Act. The proposed rule requires companies to provide consumers with a reasonable opportunity following the delivery of the opt-out notice to opt-out before making or sending solicitations.

The FTC indicates that the rule will be effective six months after it is adopted, which is expected in September.

The proposed rule can be found at [http://www.schwartzandballen.com/whats\\_new.html](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.

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