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MEMORANDUM

May 17, 2005

To Our Clients and Friends

Re: FACT Act: Interim Final Rule on Medical Privacy

As required by the Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”), the Comptroller of the Currency, Federal Deposit Insurance Corporation, Federal Reserve Board, Office of Thrift Supervision and National Credit Union Administration (the “Agencies”) have agreed to issue an interim final rule that provides exceptions to the prohibition against creditors’ obtaining or using medical information in connection with determining a consumer’s eligibility, or continued eligibility, for credit. The rule also provides exceptions from the prohibition against sharing medical information with affiliates. The Federal Reserve Board’s rule will apply the exceptions to creditors that are not depository institutions.

Comments on the interim final rule are due 30 days after publication in the Federal Register. The rule will be effective nine months after publication.

EXCEPTIONS

Section 411 of the FACT Act generally prohibits a creditor from obtaining or using a consumer’s medical information in connection with determining the consumer’s eligibility, or continued eligibility, for credit. The Agencies, however, are required to adopt rules that permit the use of medical information for transactions as necessary and appropriate. Accordingly, the Agencies adopted the following exceptions:

A creditor may obtain and use medical information if:

- *all* information is of the type routinely used in making credit eligibility determinations;
- the medical information is used in the same manner and to an extent no less favorable than comparable, non-medical information the

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- creditor would use in a credit transaction; and
- the creditor must not take into account the consumer's physical, mental, or behavioral health, condition or history, treatment or prognosis.

A creditor may also obtain and use medical information:

- To determine whether the use of a power of attorney or legal representative is necessary and appropriate;
- To comply with local, state or federal law;
- To determine whether the consumer qualifies for a special credit program, or credit-related assistance program;
- To the extent necessary for fraud prevention or detection;
- In the case of credit for financing medical products or services, to determine and verify the medical purpose and use of proceeds;
- If the consumer requests that the creditor use medical information to accommodate the consumer's particular circumstances and the creditor documents the request;
- To determine whether provisions of a forbearance practice or program that is triggered by a medical condition apply to the consumer; or
- To determine the consumer's eligibility for or triggering of (1) a debt cancellation contract or debt suspension agreement, or (2) a credit insurance product.

SHARING MEDICAL INFORMATION WITH AFFILIATES

The FACT Act permits a person to share medical information with an affiliate if (1) the information is shared in connection with the business of insurance or annuities; (2) the information is shared for any purpose permitted under HIPAA or the federal regulations promulgated thereunder; or (3) the information is shared for any purpose described under § 502(e) of the Gramm-Leach-Bliley Act. The interim final rule adds two exceptions: (1) if the information is disclosed to an affiliate in connection with a determination of the consumer's eligibility, or continued eligibility, for credit under one of the general exceptions described above, or (2) as permitted by order of the appropriate government agency.

A copy of the interim final rule can be found on our web site 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.