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**MEMORANDUM**

May 10, 2006

To Our Clients and Friends

Re: FACT Act Proposed Rule on Identity Theft Red Flags

The Federal banking agencies and the Federal Trade Commission are about to announce proposed guidelines for financial institutions that identify “red flags” indicating the possible existence of identity theft, proposed regulations requiring financial institutions to establish policies for implementing the guidelines, including requiring credit and debit card issuers to assess the validity of a request for an address change, and proposed regulations that require users of consumer reports to employ certain policies upon receiving a notice of a discrepancy in a consumer’s address. The proposals are required under Sections 114 and 315 of the Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”).<sup>1</sup> Comments are due 60 days after publication in the Federal Register.

The proposed regulations adopt a risk-based approach, requiring that financial institutions and creditors have a written identity theft prevention program appropriate to the size and complexity of the entity and the nature and scope of its activities with flexibility to address changing identity theft risks. An institution’s program must:

- Identify and evaluate the red flags specified in the guidelines
- Implement reasonable policies and procedures to prevent and mitigate identity theft in connection with new or existing accounts
- Require staff training on program requirements
- Require oversight of service provider arrangements
- Require approval and ongoing oversight by the board of directors

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<sup>1</sup> Section 114 requires the agencies to jointly issue guidelines for financial institutions and creditors regarding identity theft with respect to customers. The guidelines are to identify patterns, practices and specific forms of activity that indicate the possible existence of identity theft. Section 315 requires the agencies to jointly adopt rules providing guidance for institutions to follow in the event that a consumer reporting agency informs the institution of an address discrepancy relating to a consumer for whom the institution has requested a consumer report.

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The proposed guidelines on identity theft detection, prevention and mitigation set forth the following red flags that may indicate potential identity theft:

- Account application or existing-account information from a consumer reporting agency (e.g., fraud or active duty alerts or notice of address discrepancy included on consumer report, activity inconsistent with usual activity)
- Documentary identification (e.g., identification documents appear to be altered; information provided that is inconsistent with other documents)
- Personal information (e.g., comparison to external sources shows inconsistencies; information associated with known fraudulent activity)
- Address changes (e.g., change of address followed by request for new, additional or replacement items; mail undeliverable but activity in account)
- Anomalous use of the account (e.g., account use consistent with fraud patterns)
- Notice from customers or others regarding customer accounts (e.g., notice of unauthorized charges, fraudulent account openings, or non-receipt of account statements or returned e-mails)
- Other red flags (e.g., employee of the financial institution is added as authorized user of an account; attempts to access an account by unauthorized users are detected)

Credit and debit card issuers will be required to establish reasonable policies and procedures to assess the validity of a change of address where shortly thereafter the issuer receives a request for an additional or replacement card. A card issuer may not issue another card without first notifying the cardholder at the former address and providing a means to report incorrect address changes or using another method to assess the validity of the change of address.

Financial institution users of consumer reports that receive notices of address discrepancies from consumer reporting agencies must have reasonable procedures to form a reasonable belief of the consumer's identity. The user also must have reasonable policies and procedures in place in order to furnish the consumer's address which the user has reasonably confirmed is accurate to the consumer reporting agency.

A copy of the notice of proposal can be found on our web site 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, Tom Fox or Heidi Wicker at (202) 776-0700.