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**MEMORANDUM**

October 16, 2007

To Our Clients and Friends

Re: FACT Act: Final Rule on Affiliate Marketing

The Federal Deposit Insurance Corporation (“FDIC”) has finalized its rule implementing § 214 of the Fair and Accurate Credit Transactions Act of 2003 (the “FACT Act”), which provides consumers with the ability to restrict companies from using certain information obtained from affiliates to make marketing solicitations. The other Federal banking agencies, the Federal Trade Commission and the Securities and Exchange Commission (the “Agencies”) are expected to adopt identical rules in the near future. Companies must comply with the rule by October 1, 2008.

The final rule generally follows the language of the proposed rule. However, the Agencies did not adopt the proposed restriction on “constructive sharing.” Accordingly, no opt-out notice is required if a company sends an affiliate’s marketing materials to its own customers.

**NOTICE AND OPPORTUNITY TO OPT OUT**

Section 214 of the FACT Act amends § 624 of the Fair Credit Reporting Act (“FCRA”) to provide that a company that receives from an affiliate information that would otherwise constitute a consumer report may not use the information to solicit a consumer until the customer is notified that the information is being shared, the consumer is provided a reasonable opportunity to prohibit the affiliate from making the solicitation and the consumer has not opted out.

The final rule provides that a company with the relationship with the consumer is to provide the required notice to consumers if it provides information to affiliates. The rule, however, permits opt-out notices to be given by any affiliate that has a pre-existing business relationship with the consumer or as part of a joint notice from two or more affiliates.

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The notice requirement does not apply if the person using the information has a pre-existing business relationship with the consumer. A “pre-existing business relationship” is a relationship between a person (or a person’s licensed agent) and a consumer that is based on:

- a financial contract between the person and consumer that is in force on the date the solicitation is sent;
- the purchase, rental or lease by the consumer of the person’s goods or services or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between that person and the consumer within an 18-month period prior to the date the solicitation is sent; or
- an inquiry or application by the consumer regarding a product or service offered by that person within a three-month period prior to the date the solicitation is sent.

The final rule provides examples of pre-existing business relationships as well as examples of where no pre-existing business relationship is created.

### **EXCEPTIONS**

The requirement to give notice and an opportunity to opt out does not apply to a company’s use of information received from another affiliate:

- to make a solicitation to a consumer with whom the company has a pre-existing business relationship;
- to facilitate communications to an individual for whose benefit the company provides employee benefits or other services arising out of a current employment relationship;
- to perform services on behalf of an affiliate. This exception, however, does not permit a company to make or send a solicitation on its own behalf or on behalf of another affiliate if the company or other affiliate would not otherwise be permitted to make or send the solicitation as a result of the consumer’s having opted out;
- in response to a communication about the company’s products and services initiated by the consumer;
- in response to an authorization or request by the consumer to receive the solicitation; and
- if compliance with the provision would prevent compliance with provisions of state insurance laws relating to unfair discrimination.

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### **CONTENTS OF OPT OUT NOTICE**

The rule provides that the opt-out notice must be clear, conspicuous and concise. The notice must accurately disclose the name of the companies providing the notice as well as certain specified information. The rule contains model forms that may be used to satisfy the notice requirement.

A notice may be combined with other required disclosures to be provided under other provisions of law, including notices required under the privacy provisions of the Gramm-Leach-Bliley Act.

### **OPPORTUNITY AND METHODS OF OPTING OUT**

A company must provide the consumer with a reasonable opportunity to opt out following the delivery of an opt-out notice before an affiliate may make or send solicitations to the consumer. While the rule does not establish a mandatory waiting period, the examples presented indicate that providing the consumer with 30 days in which to respond is regarded as a reasonable period.

The rule includes examples of methods that represent reasonable and simple methods for consumers to opt out. These include designating check-off boxes on an opt-out form, including a reply form and self-addressed envelope together with the opt-out notice, providing an electronic means to opt out, such as an electronic form on a website, and providing a toll-free telephone number. The rule indicates that it is not reasonable to require a consumer to write a letter.

A consumer's opt out must be effective for at least five years, after which the company is required to provide the consumer with an extension notice. However, a company may treat a consumer's opt out as permanent.

The final 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.