

SCHWARTZ & BALLEN LLP
1990 M STREET, N.W. • SUITE 500
WASHINGTON, DC 20036-3465
(202) 776-0700

FACSIMILE
(202) 776-0720

www.schwartzandballen.com

MEMORANDUM

April 7, 2004

To Our Clients and Friends

Re: FACT Act: Proposed Joint Agency Rule on Medical Information

The Fair and Accurate Credit Transactions Act of 2003 (the “FACT Act”) (Pub. L. No. 108-159) prohibits creditors from obtaining or using medical information pertaining to a consumer in connection with any determination of the consumer’s eligibility, or continued eligibility, for credit. As mandated under the FACT Act, the Office of the Comptroller of the Currency, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Office of the Thrift Supervision, and the National Credit Union Administration (the “Agencies”) are about to issue a proposed rule to: 1) create exceptions to this general prohibition on obtaining or using medical information to protect legitimate operational, transactional, risk, consumer and other needs and 2) create additional exceptions to the restrictions contained in the FACT Act on sharing medical-related information with affiliates. It is anticipated that comments on the proposed rule will be due 30 days after publication in the *Federal Register*.

EXCEPTIONS TO PROHIBITION ON OBTAINING OR USING MEDICAL INFORMATION

The proposed rule provides the following exceptions:

- A creditor may obtain and use medical information in determining credit eligibility provided the following three elements are met:
 - The information relates to debts, expenses, income, benefits, collateral, or the purpose of the loan, including the use of proceeds;
 - The creditor uses the information in a manner and to an extent no less favorable than it would use comparable information that is not medical information in a credit transaction; and

SCHWARTZ & BALLEN LLP

- The creditor does not take the consumer's physical, mental, or behavioral health, condition or history, type of treatment, or prognosis into account as part of any determination of credit eligibility.
- In addition, a creditor may obtain and use medical information in any determination of credit eligibility in these specific circumstances:
 - To determine whether the use of a power of attorney or legal representative is necessary and appropriate;
 - To comply with applicable requirements of local, state or federal laws.
 - When such information is included in a consumer report from a consumer reporting agency as permitted under FCRA and is used for the purpose for which the consumer provided specific written consent;
 - For fraud prevention and detection;
 - In financing medical products or services, to determine and verify the medical purpose of a loan and the use of proceeds;
 - If the consumer or the consumer's legal representative requests in writing, on a separate form signed by the consumer or the consumer's legal representative that the creditor use specific medical information in determining credit eligibility to accommodate the consumer's particular circumstances. The request must describe the specific medical information that the consumer requests the creditor to use and the specific purpose for which the information will be used; or
 - As otherwise permitted by order of the agency.
- A creditor does not violate the prohibition on obtaining medical information when the creditor receives medical information without specifically requesting it and does not use this information in determining eligibility, or continued eligibility, for credit.

The proposed rule contains examples of many of these exceptions.

The Agencies also clarify that the phrase "eligibility, or continued eligibility, for credit" does not include:

- the consumer's qualification or fitness to be offered employment, insurance products, or other non-credit products or services;
- any determination of whether the provisions of a debt cancellation contract, debt suspension agreement, credit insurance product or similar forbearance practice or program is triggered;
- authorizing, processing or documenting a payment or transaction on behalf of a consumer in a manner that does not involve a determination of credit eligibility; and

SCHWARTZ & BALLEN LLP

- maintaining or servicing a consumer's account in a manner that does not involve a determination of credit eligibility.

SHARING MEDICAL INFORMATION WITH AFFILIATES

The FACT Act stipulates that information shared among affiliates will be considered a consumer report, and thus subject to reporting requirements under FCRA, if it is medical information or an individualized or aggregate list or description based on payment transactions for medical products or services except when:

- the information is shared with an affiliate in connection with the business of insurance or annuities;
- the information is shared with an affiliate for any purpose permitted under HIPPA or federal regulations promulgated thereunder; or
- the information is shared with an affiliate for any purpose described in section 502(e) of the Gramm-Leach-Bliley Act ("GLB Act.")

To these exceptions, the proposed rule adds two other:

- if the information is disclosed to an affiliate in connection with a determination of the consumer's eligibility, or continued eligibility for credit, as contained in the proposed rule; or
- as otherwise permitted by order of the agency.

DEFINITIONS

"Affiliate" – The proposed rule modifies the definition contained in the FACT Act and defines affiliate to mean any company that controls, is controlled by, or is under common control with another company. The proposed definition is identical to the definition of affiliate in the GLB Act.

"Medical Information" – The proposed rule uses the definition contained in the FACT Act. Medical information means information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to (1) past, present, or future physical, mental, or behavioral health or condition of an individual' (2) the provision of health care to an individual' or (3) the payment for the provision of health care to an individual. It does not include the age or gender of a consumer nor demographic information about the consumer

The proposed rule can be found 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.