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MEMORANDUM

November 17, 2005

To Our Clients and Friends

Re: FACT Act: Final Rule on Medical Privacy

The Federal financial institution regulatory agencies¹ have finalized rules under the Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”) to create exceptions to the statutory prohibition against obtaining or using medical information in connection with credit eligibility determinations. The final rules are substantially the same as the interim final rules issued by the Agencies in June 2005 and will be effective April 1, 2006.

Under section 411 of the FACT Act, creditors are prohibited from obtaining or using medical information in connection with determining a consumer’s eligibility, or continued eligibility, for credit. However, the Agencies are authorized to create exceptions to the general prohibition where necessary and appropriate for legitimate purposes. In addition to providing exceptions to the general prohibition on creditors’ obtaining or using medical information in connection with determining a consumer’s eligibility, or continued eligibility, for credit, the rule also creates exceptions to permit affiliates to share medical information with each other without becoming consumer reporting agencies. The Federal Reserve Board’s rule will apply the exceptions to creditors that are not depository institutions.

EXCEPTIONS

The Agencies adopted the following exceptions from the general prohibition:

A creditor may obtain and use medical information if:

¹ The Comptroller of the Currency, Federal Deposit Insurance Corporation, Federal Reserve Board, Office of Thrift Supervision and National Credit Union Administration (the “Agencies”).

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- the information is the type routinely used in making credit eligibility determinations (e.g., relates to debts, income, expenses or use of proceeds);
- the information is used in the same manner and to an extent no less favorable than comparable, non-medical information would be used in a credit transaction; and
- the creditor does 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 that is triggered by a medical condition or event is necessary and appropriate;
- To comply with requirements of local, state or federal law;
- To determine whether the consumer qualifies for a special credit program or credit-related assistance program;
- 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 or event 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.

The rules provide examples of circumstances under which medical information can be used by creditors in connection with extending credit. Medical information received from a consumer reporting agency must not be disclosed to any other person except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by law.

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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 Agencies' rules add 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 Agencies' rules 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.