

SCHWARTZ & BALLELLP
1990 M STREET, N.W. • SUITE 500
WASHINGTON, DC 20036-3465

(202) 776-0700

FACSIMILE
(202) 776-0720

www.schwartzandballen.com

MEMORANDUM

November 1, 2004

To Our Clients and Friends

Re: FACT Act: FTC Final Rules on Identity
Theft, Active Duty Alerts and Proof of Identity

The Federal Trade Commission (“FTC”) has issued final rules under the Fair and Accurate Credit Transactions Act of 2003 (the “FACT Act”) and the Fair Credit Reporting Act (“FCRA”) to establish definitions for the terms “identity theft” and “identity theft report,” to determine the duration of an “active duty alert,” and to determine what constitutes “appropriate proof of identity.” The rules will take effect December 1, 2004.

DEFINITIONS OF “IDENTITY THEFT” AND “IDENTITY THEFT REPORT”

One of the principal purposes of the FACT Act was to combat identity theft by establishing additional protections for consumers who may be victims of that crime. The FACT Act defines “identity theft” as “a fraud committed using the identifying information of another person,” and authorizes the FTC to further define the term. The FTC is expanding the definition to include attempts to commit fraud. In addition, to promote consistency with existing law the term “identifying information” will have the same meaning as the term “means of identification” in the Federal criminal code.¹ Because “means of identification” in the Federal criminal statute includes credit card and debit card numbers, the unauthorized use of a consumer’s credit or debit card will be viewed as identity theft under the FTC’s rules.

Under the FACT Act, customers can use an identity theft report to block information resulting from identity theft from their consumer reports and to prevent information furnishers from refurnishing such information. The FTC’s final rules will define the term “identity theft report” to mean a report:

¹ 18 U.S.C. § 1028(d)(7).

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- that alleges identity theft with as much specificity as the consumer can provide
- that is a copy of a valid official report filed by the consumer with a federal, state or local law enforcement agency
- the filing of which subjects the person filing the report to criminal penalties if the information in the report is false
- that may include additional information reasonably requested by information furnishers or consumer reporting agencies (“CRAs”) for the purpose of determining the validity of the alleged identity theft

DURATION OF ACTIVE DUTY ALERTS

Under the FACT Act, consumers on active military duty may place an active duty alert in their consumer reports maintained by CRAs. The active duty alert remains in the consumer’s file for at least 12 months. Although the FACT Act authorized the FTC to extend the duration, the FTC decided to maintain the effective period for active duty alerts at 12 months.

APPROPRIATE PROOF OF IDENTITY

The FCRA requires the FTC to determine what constitutes appropriate proof of identity for placing or removing fraud and active duty alerts, requests by consumers to block fraudulent information and requests by consumers to truncate social security numbers on file disclosures. The FTC has determined that CRAs shall develop and implement reasonable requirements for what information consumers must provide to constitute appropriate proof of identity. Examples of information that CRAs may reasonably request include:

- obtaining the consumer’s full name, address, social security number and date of birth
- obtaining additional proof of identity, such as a copy of a government-issued identification or utility bill
- asking the consumer to answer questions for which only the consumer might be expected to know the answers

A copy of the FTC’s final 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.