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**MEMORANDUM**

August 21, 2003

To Our Clients and Friends

Re: FTC's Advisory Opinion on the Applicability of the Telemarketing Sales Rule to Telemarketers Acting on Behalf of Insurers

The Federal Trade Commission ("FTC") was recently asked to clarify that the Telemarketing Sales Rule ("TSR") does not apply to the telemarketing of insurance products by third-party telemarketers because the activity is exempted by the McCarran-Ferguson Act. The FTC refused to provide a blanket exemption for the business of insurance. Rather, the FTC indicated that the determination of the applicability of the TSR under such circumstances depends upon the specific facts presented.

The FTC stated that there are two types of exemptions from the TSR – one based on the status of the entity and one based on the activity being undertaken. The TSR does not apply to specific types of entities, such as banks and credit unions, but when such an entity hires a third party to telemarket on its behalf, the third party is not exempt unless it itself is one of the type of entities exempted from the TSR. Under the second type of exemption, the activity is exempt from the FTC's jurisdiction. In this regard, the McCarran-Ferguson Act exempts from the FTC's jurisdiction activities that constitute "the business of insurance," regardless of who performs them, but only to the extent that these activities are regulated by state law.<sup>1</sup>

If an activity constitutes the business of insurance, it must then be determined if the activity is regulated by state law and if the state regulation was enacted for the purpose of regulating the business of insurance. It is also necessary to ascertain

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<sup>1</sup> To determine whether an activity constitutes the "business of insurance," the FTC makes reference to the three-part factual inquiry established by the U.S. Supreme Court in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 199, 129 (1982).

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whether the practice in question is regulated by the state in which the practice has its impact and whether such states are able to exert local control through their own provisions, instrumentalities and processes.

If the telemarketing activity passes the above tests, the activity is exempt from the TSR. Whether the telemarketing is done by third-party call centers or by an insurance company is not determinative. The decisive issues are whether the activity constitutes “the business of insurance” and whether it is regulated by state law. In order to make a specific determination of the TSR applicability to a particular situation, the FTC indicated that it would need additional information, including the nature of the product offered, the states in which it is sold and the extent of state regulation in those states.

The FTC’s opinion can be found at [www.schwartzandballen.com/whats\\_new.html](http://www.schwartzandballen.com/whats_new.html)

If you have any questions concerning the FTC advisory opinion, please call Gilbert Schwartz, Robert Ballen or Tom Fox at (202) 776-0700.