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**MEMORANDUM**

August 12, 2004

To Our Clients and Friends

Re: CAN-SPAM Act: FTC Notice of Proposed Rulemaking

The Federal Trade Commission (“FTC”) is requesting public comment on a proposed rule to implement the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the “CAN-SPAM Act”).<sup>1</sup> Because the Act requires the FTC to adopt a final rule by December 16, 2004, the comment period is brief. Comments are due by September 13<sup>th</sup>.

**COMMERCIAL AND TRANSACTIONAL E-MAIL MESSAGES**

The CAN-SPAM Act provides that a “commercial e-mail message” is an electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service, including content on an Internet website operated for a commercial purpose. Every commercial e-mail message is required (1) to clearly and conspicuously indicate that the message is an advertisement or solicitation; and (2) to provide recipients with an opportunity to opt out from receiving additional commercial e-mail messages from the company.

However, there is no requirement that an opt-out be provided for “transactional or relationship messages.”<sup>2</sup> Indeed, providing an opt-out in connection

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<sup>1</sup> Our previous memoranda discussing the CAN-SPAM Act can be found at <http://www.schwartzandballen.com/privacy.html>.

<sup>2</sup> A “transactional or relationship message” is an electronic mail message the primary purpose of which is (1) to facilitate, complete or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender of the message; (2) to provide notification about a change in terms, features or account information; or (3) to deliver goods or services, including product updates.

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with a transactional or relationship message may thwart the ability of companies to continue to transact business electronically with customers who opt out.

### THE FTC'S PROPOSED DEFINITION

The CAN-SPAM Act requires the FTC to issue regulations by December 16, 2004, defining the relevant criteria to facilitate the determination of the primary purpose of an e-mail message. The FTC states that the determination of whether the primary purpose of an e-mail message is commercial should focus on what the message's recipient would reasonably interpret the primary purpose to be. Accordingly, the FTC has proposed the following criteria for determining whether the primary purpose of an e-mail message is commercial:

- The primary purpose is commercial if the e-mail message contains only content that advertises or promotes a product or service.
- The primary purpose is commercial if the e-mail message contains content that advertises or promotes a product or service and transactional information, and :
  - a recipient reasonably interpreting the subject line of the e-mail message would likely conclude that the message advertises or promotes a product or service; or
  - the transactional content does not appear at or near the beginning of the message.
- The primary purpose is commercial if the e-mail message contains content that advertises or promotes a product or service and other material that is not transactional in nature, and
  - a recipient reasonably interpreting the subject line of the e-mail message would likely conclude that the message advertises or promotes a product or service; or
  - a recipient reasonably interpreting the body of the message would likely conclude that the message's primary purpose is to advertise or promote a product or service.

If the above criteria are adopted, the FTC's rule would likely bring many more e-mail messages within the scope of the CAN-SPAM Act's requirements.

A copy of the FTC's proposed rule can be found on our web site 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.