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M E M O R A N D U M

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To Our Clients and Friends

Re: The CAN-SPAM Act of 2003

INTRODUCTION

Congress has passed S. 877, the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the “CAN-SPAM Act”). The Act generally requires senders of commercial e-mail messages to provide recipients with an opportunity to opt-out from receiving additional e-mails from the sender. It also imposes civil penalties on persons who violate its provisions. The Act is effective January 1, 2004 and will preempt state laws that regulate the use of e-mail to send commercial messages.

The CAN-SPAM Act is intended primarily for persons who send commercial e-mail messages containing materially false header information,¹ send commercial e-mails with the intent to mislead or deceive recipients as to their origin, or access computers without authorization with the intent to send multiple commercial e-mails through the computer. However, the Act also imposes certain obligations on legitimate users of commercial e-mail. The following presents a summary of the significant provisions of the Act.

REQUIREMENTS ON SENDERS OF COMMERCIAL E-MAIL

- A “commercial electronic mail message” is an e-mail message, the primary purpose of which is the commercial advertisement or promotion of a commercial product or service. The term includes content on an Internet website operated for a commercial purpose.

¹ “Header information” is the source, destination and routing information, including the originating domain name and e-mail address.

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- A person may not send a commercial e-mail message, or a transactional or relationship message,² that contains header information that is materially false or misleading.
- A person may not send a commercial e-mail if the person knows that the subject heading of the message would be likely to mislead a recipient about the contents or subject matter of the message.
- A person who sends a commercial e-mail message must include a functioning return e-mail address or other Internet-based mechanism that the recipient can use to reply or opt-out from future commercial e-mail messages from the sender.³ The sender has ten days to process a recipient's request to opt-out from receiving future commercial e-mail from the sender.
- The Act prohibits sending commercial e-mail to anyone who has opted-out from receiving such messages, unless the recipient consents to receive such messages subsequent to the opt-out request. In addition, a sender may not transfer the e-mail address of a person who has opted-out from receiving commercial e-mail from the sender.
- A commercial e-mail must:
 - clearly and conspicuously indicate that the message is an advertisement or solicitation, unless the recipient has given prior affirmative consent to receipt of the message;
 - provide clear and conspicuous notice of the opportunity for the recipient to opt-out from receiving further commercial e-mail from the sender; and
 - provide the physical postal address of the sender.
- No person may promote, or allow the promotion of, its business or its goods or services in a commercial e-mail which contains false or misleading header information if the person (1) knows or should have

² An e-mail that involves a transactional or relationship message is not a "commercial e-mail message." Transactional or relationship messages include e-mails which are sent primarily (1) to facilitate, complete or confirm a commercial transaction which the sender and recipient had entered into previously, (2) to provide notification about a change in terms or account information, or (3) to deliver goods or services, including product updates.

³ A sender does not violate this requirement if its opt-out mechanism is unexpectedly and temporarily unable to receive messages or process requests due to a technical problem beyond the sender's control as long as the problem is corrected within a reasonable time period.

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known that the goods or services were being promoted in the message; (2) received or expected to receive economic benefit from such promotion; and (3) took no reasonable action to prevent the transmission, or detect the transmission and report it to the Federal Trade Commission (“FTC”).

CRIMINAL PROHIBITIONS REGARDING COMMERCIAL E-MAILS

The CAN-SPAM Act makes it a criminal offense:

- To access a computer without authorization and intentionally initiate multiple⁴ commercial e-mails through that computer;
- To relay multiple commercial e-mails with the intent to deceive or mislead recipients or any Internet service provider as to the origin of the e-mails;
- To materially falsify header information in multiple commercial e-mails;
- To register for e-mail or online user accounts or domain names using information that materially falsifies the registrant’s identity; or
- To falsely represent oneself as the registrant of Internet protocol addresses and intentionally send multiple commercial e-mail from such addresses.

The Act provides substantial fines and possible imprisonment for violations of the above criminal provisions.

REGULATIONS AND ENFORCEMENT

The FTC may issue regulations to implement provisions of the Act. In addition, the FTC is authorized to enforce the civil provisions of the Act. However, violations involving depository institutions, securities firms and insurers are enforced by the federal banking agencies, the Securities and Exchange Commission and state insurance authorities respectively. The FTC may enforce the Act against an entity engaged in the business of insurance if a state insurance authority determines not to take enforcement action.

In addition, a state agency or attorney general may bring a civil action against a violator of the Act in federal court on behalf of its residents. Remedies for violations of the Act include injunctive relief, costs and attorney fees, and monetary

⁴ “Multiple commercial e-mails” means more than 100 e-mails sent during a 24 hour period, more than 1,000 e-mails sent during a 30 day period, or more than 10,000 e-mails sent during a one year period.

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damages. Civil actions may also be brought in federal court by an Internet service provider who is damaged as a result of a violation of the Act. The Act does not provide a private right of action for consumers.

PREEMPTION

The Act supersedes any state or local law or regulation that expressly regulates the sending of commercial e-mail, except those state laws prohibiting false or deceptive commercial e-mail, or those laws that are not specific to e-mail including trespass, contract or tort law, and other state laws to the extent that such laws relate to acts of fraud or computer crime. The Act also does not affect the lawfulness or unlawfulness of an Internet service provider's policy of declining to transmit or handle certain types of e-mail messages.

DO-NOT-E-MAIL REGISTRY

The FTC is authorized to establish and implement a nationwide Do-Not-E-Mail registry no earlier than nine months after enactment. The FTC is to submit a report to Congress (1) analyzing the effectiveness and enforcement of the Act and any need to modify it; (2) setting forth a system to reward those who supply information about violations of the Act; and (3) providing a plan requiring commercial e-mail to be identifiable from its subject line, including the possibility of requiring the use of "ADV" in the subject line.

CELL PHONE DO NOT CALL REGULATIONS

In consultation with the FTC, the Federal Communications Commission is to promulgate rules to protect consumers from receiving unauthorized commercial messages on their cell phones, and permit consumers to opt-out of receiving future commercial messages from the initiator on their cell phones.

The CAN-SPAM Act can be found at http://www.schwartzandballen.com/whats_new.html.

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