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**MEMORANDUM**

February 21, 2005

To Our Clients and Friends

Re: FCC Clarification on Established Business Relationships and Do Not Call Rule

The Federal Communications Commission (“FCC”) has clarified its do not call rule to expand the scope of the exception for telephone solicitations made to consumers with whom the caller has an established business relationship.<sup>1</sup> The FCC's rule will now consider a company to have an established business relationship with a consumer if the consumer has an account or insurance policy with a financial institution or insurance company, even though no transactions took place in connection with the account or policy within the previous 18 months. However, telephone solicitations by intermediaries such as insurance agents and mortgage brokers will continue to be restricted to 18 months after the last transaction between the intermediary and the consumer even if the policy or account remains in force beyond that date. The FCC also took the opportunity to clarify that telephone calls to consumers based upon referrals from third parties are not permitted if the consumers' telephone numbers are on the national do not call registry.

**BACKGROUND**

The FCC's national do not call rule generally prohibits a telemarketer from calling a person whose telephone number is on the national do not call registry. Over 80 million telephone numbers are now listed on the national do not call registry administered by the Federal Trade Commission (“FTC”). The FCC's rule is applicable to all industries, including banking, securities and insurance.<sup>2</sup> At the time it adopted its do not call rule, the FCC provided that a company could solicit a consumer whose telephone number was on the national do not call registry if the company had an “established business relationship” with the consumer.

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<sup>1</sup> For a description of the FCC's do not call rule, please see our memorandum of August 1, 2003, which can be found at [http://www.schwartzandballen.com/MemoDocs\\_2003/FCC%20DNC%20\\_8-1-03\\_.pdf](http://www.schwartzandballen.com/MemoDocs_2003/FCC%20DNC%20_8-1-03_.pdf).

<sup>2</sup> The FTC has adopted a similar do not call rule. However, the FTC's rule does not generally apply to the banking, securities and insurance industries.

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An established business relationship is a relationship based upon a transaction that took place between the company and the consumer within the previous 18 months, or within three months of an inquiry, application or request by the consumer.

Because the definition might be construed narrowly, the American Council of Life Insurers (“ACLI”) requested the FCC to clarify that an established business relationship exists between a consumer and an insurer so long as a policy is in force between the company and the person, even if a transaction has not occurred between the parties or there has been no account activity within the previous 18 months. The ACLI contended that an established business relationship should exist for the life of the policy.

The FCC agreed that a unique relationship exists between consumers and entities that enter into financial contracts. The FCC noted that under the FACT Act a pre-existing business relationship includes a financial contract which is in force between the consumer and a company. Accordingly, the FCC clarified its rule to provide that an established business relationship exists with respect to bank accounts, credit cards, loans, insurance policies and mortgages even if the consumer has not conducted any transactions in the account within the previous 18 months. If the policy has terminated or the account is closed, the financial institution will have an additional 18 months from that date to telemarket the consumer. The FCC noted, however, that companies will continue to have to abide by a customer's request to be placed upon a company-specific do not call list, which would prevent the company from calling the consumer despite the existence of an established business relationship.

The FCC also clarified that intermediaries such as insurance agents and mortgage brokers may call consumers with whom they have arranged a policy or mortgage for 18 months from the date the original transaction is completed. Brokers and agents are not permitted, under the FCC's view, to continue to solicit consumers for the life of the policy or loan.

A copy of the FCC's clarification 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.