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MEMORANDUM

December 16, 2004

To Our Clients and Friends

Re: CAN-SPAM Act: FTC Final Rule Defining Commercial E-Mail

The Federal Trade Commission (“FTC”) has adopted a final rule as to what constitutes the primary purpose of an e-mail message for purposes of defining a commercial e-mail message under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the “CAN-SPAM Act”). The final rule, which is similar to the FTC’s August proposal,¹ is effective February 18, 2005.

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.

There is no requirement that an opt-out be provided for “transactional or relationship messages.”² Indeed, providing an opt-out in connection with a transactional or relationship message could undermine the ability of companies to continue to transact business electronically with customers who opt out.

¹ Our memoranda discussing the FTC’s proposed rule can be found at http://www.schwartzandballen.com/recent_memoranda.html

² 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.

THE FTC'S DEFINITION OF PRIMARY PURPOSE

In August, the FTC proposed criteria for determining whether the primary purpose of an e-mail message is commercial. After considering the comments, the FTC has adopted the following criteria:

- The primary purpose of an e-mail message is commercial if the message consists exclusively of the commercial advertisement or promotion of a commercial product or service.
- The primary purpose of an e-mail message is commercial if the message contains both the commercial advertisement or promotion of a commercial product or service as well as transactional or relationship content, and:
 - a recipient reasonably interpreting the subject line of the e-mail message would likely conclude that the message contains the commercial advertisement or promotion of a commercial product or service; or
 - the transactional or relationship content does not appear, in whole or substantial part, at the beginning of the message.
- The primary purpose of an e-mail message is commercial if the e-mail message contains both the commercial advertisement or promotion of a commercial product or service as well as other content that is not transactional or relationship content, and
 - a recipient reasonably interpreting the subject line of the e-mail message would likely conclude that the message contains the commercial advertisement or promotion of a commercial product or service; or
 - a recipient reasonably interpreting the body of the message would likely conclude that the message's primary purpose is the commercial advertisement or promotion of a commercial product or service.
- The primary purpose of an e-mail message is transactional or relationship if the e-mail message consists exclusively of transactional or relationship content.

Accordingly, the primary purpose of an e-mail message may be regarded as commercial if the subject line advertises or promotes a commercial product or service or if the message contains a substantial amount of advertising or promotional material.

SCHWARTZ & BALLEEN LLP

A copy of the FTC's final rule 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.