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MEMORANDUM

May 16, 2005

To Our Clients and Friends

Re: FTC Proposed Rule Clarifying and Modifying CAN-SPAM

The Federal Trade Commission (“FTC”) has published a notice of proposed rulemaking under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM”).

This notice of proposed rulemaking follows the advance notice of proposed rulemaking published on March 11, 2004.

In the notice, the FTC proposes to define several terms including “person” and “sender” and discusses the definition of “transactional or relationship message” and the FTC’s views on how CAN-SPAM applies to certain e-mail marketing, such as forward-to-a-friend e-mails. Comments on the proposed rule are due by June 27, 2005.

Specifically, the FTC has proposed to:

- *Add a definition of the term “person”* to clarify that it is not limited to a natural person, but includes an individual, group, unincorporated association, limited partnership, corporation, or other business entity.
- *Limit the definition of “sender”* to address scenarios where a single e-mail message contains advertisements from multiple persons. Under this proposal, only one of several persons whose products or services are advertised or promoted in an e-mail message would be the “sender” if that person: (1) initiated the message, and (2) (a) was the only person who controlled the content of the message, (b) determined the e-mail addresses to which it would be sent, or (c) was identified in the “from” line as the sender.

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- *Add a definition of “valid physical postal address”* to clarify that Post Office boxes and private mailboxes established pursuant to United States Postal Service Regulations are “valid physical addresses.”
- *Shorten Opt-Out Processing Time* that a sender has to honor a recipient’s opt-out request to three days. Currently, the FTC allows ten days. As a related matter, the FTC also requests comment on the role of third party marketers in processing opt-out requests.
- *Clarify that a recipient may not be required to pay a fee*, provide information other than his or her e-mail address and opt-out preferences, or take any steps other than sending a reply e-mail message or visiting a single Internet web page to submit a valid opt-out request.

With respect to the definition of “transactional or relationship message” the FTC decided not to propose modifications at this time. However, the FTC requests comment on whether situations involving “transactional or relationship messages” from any entity acting on behalf of a sender, such as when an insurance company uses agents to sell policies, would present opportunities for evasion of CAN-SPAM.

The FTC also specifically requests comments on the following, among other provisions:

- Whether opt-out obligations should be extended to third-party list providers.
- Whether the FTC should adopt a “safe harbor” with respect to opt-out and other obligations for companies whose products or services are advertised by affiliates or other third parties.
- Whether debt collection e-mails should be considered “commercial.”
- Under what circumstances should an e-mail sent to effectuate or complete a negotiation be considered a “transactional or relationship message.”
- Whether the definition of “transactional or relationship message” should be modified to include “business relationship messages,” which are individualized messages that are sent from one employee of a company to an individual recipient.
- Whether messages from an association or membership entity to lapsed members should be considered transactional or relationship and whether such messages should be considered “commercial” when they advertise or promote the membership entity.

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- Whether there should be time limits on the duration of opt-out requests.

A copy of the proposed 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.