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M E M O R A N D U M

September 26, 2003

To Our Clients and Friends

Re: California's SB 27

INTRODUCTION

The State of California recently enacted SB 27 (the "Act") to better inform customers about disclosure of their personal information to direct marketers and thus enable them to make an educated choice of whether to opt-in or opt-out of disclosure.¹ The Act does not prevent businesses from disclosing personal information to third parties for purposes of direct marketing.² Certain businesses and activities are exempt from the Act's requirements. Most notably, financial institutions that are subject to the California Financial Information Privacy Act ("SB 1") and that comply with SB 1's requirements are exempt. The Act becomes effective on January 1, 2005.

DISCUSSION

Disclosure Requirements

Upon a customer's request, a business that has an established business relationship with the customer, that has disclosed the customer's personal information to third parties within the preceding calendar year, and that knows or reasonably should know that the third party used the information for direct marketing purposes, must

¹ SB 27, 2003-2004 Leg., Reg. Sess. (Cal. 2003) (to be codified at Cal. Civ. Code § 1798.83-.84).

² Personal information that is used to solicit or induce an individual to purchase, rent, lease or exchange products, goods, property or services via mail, telephone, or electronic mail is used for direct marketing purposes. A business that receives consideration in exchange for the information does so for direct marketing purposes. Direct marketing purposes do not include (1) soliciting contributions for a tax exempt charity, (2) communicating about or soliciting contributions for a government or political purpose, (3) a third party obtaining ownership of accounts that contain the information, or (4) a third party receiving the information through a single transaction and the information is disclosed in order to carry out the transaction.

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provide certain information to the customer.³ A customer may make a request via written or electronic mail, or if the business so chooses, via a toll-free telephone or facsimile number. The business must then respond, at no charge to the customer, either in writing or via electronic mail, with (1) a list of the categories of personal information detailed below that were disclosed to third parties during the preceding calendar year, and (2) the names and addresses of third parties that received the information. If the nature of the third party's business cannot be determined from its name, examples of the products or services marketed must also be provided. Businesses with fewer than 20 full- or part-time employees are exempt from the Act.

The following are the categories of personal information that must be disclosed to the customer:

- Name, address and telephone number
- E-mail address
- Age or date of birth
- Names, e-mail or other addresses, number, and age or gender of children
- Height and weight
- Race, religion, and occupation
- Education
- Political party affiliation
- Medical condition, drugs, therapies, or medical products or equipment used
- Kind of product the customer purchased, leased, or rented
- Real property purchased, leased, or rented
- Kind of service provided
- Social security, bank account, credit card, or debit card number
- Bank or investment account, debit card, or credit card balance
- Payment history
- Information pertaining to creditworthiness, assets, income, or liabilities

If a list, description, or grouping of customer names or addresses was derived from the above categories and, when it was disclosed to a third party, the third party could determine the personal information from which the list was derived, the categories used to derive the list are considered personal information and must be disclosed.

³ A customer is a resident of California who supplies personal information to a business with which the person has an established business relationship primarily for personal, family, or household purposes. An established business relationship is an ongoing relationship formed by voluntary, two-way communication, to purchase, rent or lease property, an interest in property or a product or service, whether or not consideration is exchanged. A relationship will be considered an established business relationship if the customer purchased, rented, or leased property or purchased a product or service from the business within the previous 18 months.

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Contact Information Requirements

A business must designate a mailing or electronic mail address, or a toll-free telephone or fax number at which it will receive customer requests as contact points. Additionally, a business must choose one of the following options for notifying customers about its privacy policy:

- Notify its agents and managers who supervise employees who have regular contact with customers of the designated contact points or means to obtain them, and instruct the employees to provide the contact points to customers who ask about the business' privacy policies or compliance with the Act.
- Add a link on the business' web site home page to a page entitled "Your Privacy Rights," in a format specified by the Act that distinguishes the link from the rest of the page, or add those words to an existing home page link to the business' privacy policy, in the same style and size as the existing link.
 - If the business adds the phrase "Your California Privacy Rights" to an existing privacy policy link, and the first page describes a customer's rights under the Act and provides the requisite contact points, the business is not required to respond to requests that are not received at the contact points.
 - If the business does not have a link to its privacy policy on its home page or does not have a privacy policy, and thus chooses to link to a page entitled "Your Privacy Rights," the first page of the link should describe the customer's rights under the Act and provide the contact points for customer requests.
- Provide the required contact points, or means to obtain them, at every place of business in California where the business or its agents have regular contact with customers.

Timing and Form of Response to Customer

A business must respond to a customer's request within 30 days. If a customer sends the request to an address or number not designated as a contact point, the Act requires that the business respond within a reasonable time under the circumstances, but no later than 150 days after the date the request was received. However, the business need not reply if it adds the "Your California Privacy Rights" link to its web page, described above, and the request is sent to different contact points than specified. A business may provide the information required by the Act in a standardized format and does not have to provide information about particular individuals. A business does not have to respond to requests from a customer more than once per year.

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Satisfaction of the Act's Requirements

If a business is subject to the privacy provisions of the Gramm-Leach-Bliley Act, which requires disclosure of a financial institution's privacy policy at the initiation of a customer relationship and annually thereafter, that disclosure may be used to satisfy the Act's requirements, provided that the disclosure complies with the Act as well.

The Act provides reduced compliance requirements for a business that is required to comply with the Act but that discloses in its privacy policy that it will not disclose personal information to third parties for direct marketing unless the customer first opts-in to disclosure, or that it will not reveal the information if the customer opts-out of disclosure to third parties for direct marketing purposes. Such businesses need only notify the customer of the ability to opt-in or opt-out to prevent disclosure and provide a cost-free means to do so.

DISCLOSURES NOT SUBJECT TO THE ACT

Certain disclosures are not subject to the Act. These include servicing arrangements not involving direct marketing by a third party, marketing the business' own products and services to existing customers, and information from public records that is not directly revealed by the customer, regarding right, title, or interests in real property.

Disclosures pursuant to written agreements for joint offerings also are not subject to the Act and are not considered to be disclosures if the product or service (1) is one provided by at least one of the businesses that is a party to the agreement; (2) is jointly offered, endorsed, or sponsored by the businesses that disclose and receive personal information and those businesses are identified for the customer; and (3) the agreement states that the third party receiving the information is required to maintain its confidentiality and may not use or disclose the information for any purpose other than to carry out the joint offering.

The Act generally does not apply to disclosures of transaction and experience information to or from consumer reporting agencies or to disclosures between a licensed agent and principal if necessary to complete, effectuate, administer, or enforce transactions between them, if the information is used to market to existing customers with whom both the licensed agent and principal have established business relationships.

ENTITIES EXEMPT FROM THE ACT

Affiliated Third Parties With Same Brand Name

The Act exempts affiliated third parties with the same brand name for direct marketing purposes from providing a list of the categories of information disclosed, unless the information falls within one of the categories listed below. However, such

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businesses must still provide the names and addresses of all third parties to which the information was disclosed in the preceding calendar year or may satisfy this requirement by providing the customer with the overall number of affiliated companies that share the same brand name.

If the information disclosed to affiliated third parties with same brand name for direct marketing purposes falls into one of the categories listed below, a business shall inform the customer of the categories disclosed, the names and addresses of the third parties to which the information was disclosed, and the nature of the third parties' businesses if it is not obvious from their names:

- Number, age, and gender of children
- E-mail or other addresses of children
- Height and weight
- Race and religion
- Telephone number
- Medical condition or drugs, therapies, or medical products or equipment used
- Social security number
- Bank account, credit card, and debit card number
- Bank or investment account, debit card, or credit card balance

If a list, description, or grouping of customer names or addresses is derived from any of the above categories and, when it is disclosed to an affiliated third party with the same brand name, the third party could determine the personal information from which the list was derived, the categories used to derive the list are considered personal information and must be disclosed to a requesting customer.

REMEDIES

Customers injured by violations of the Act can bring civil actions for damages. A business that violates, has violated, or proposes to violate the Act, can be enjoined. Customers cannot waive their rights under the Act.

A customer can recover a civil penalty of up to \$500 per violation. However, if the violation was done willfully, intentionally, or recklessly, a customer can recover a penalty of up to \$3,000 per violation. A business can assert as a complete defense to any action that it provided the information alleged to have been untimely, incomplete, or inaccurate to customers within 90 days after it knows of its failure to correctly provide the information. However, if the violation was willful, intentional, or reckless, however, compliance within 90 days is no defense. Plaintiffs can also recover attorney's fees and costs. Further, the Act provides that any rights or remedies available under it are in addition to each other and any others available under law.

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The text of the 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.