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M E M O R A N D U M

October 31, 2003

To Our Clients and Friends

Re: California SB 186, Unsolicited Commercial E-mail Advertising

The State of California has enacted Senate Bill 186 (“SB 186”), which imposes broad limitations on the sending of unsolicited commercial electronic mail (“e-mail”) advertisements by entities conducting business in California. SB 186 becomes effective January 1, 2004.

PROHIBITIONS

SB 186 provides that a person located in California may not initiate or advertise in unsolicited commercial e-mail advertisements, and a person not located in California may not initiate or advertise in unsolicited commercial e-mail advertisements sent to a California e-mail address.

A “California e-mail address” is (1) an e-mail address furnished by an e-mail service provider that sends bills for the e-mail address to a California mailing address, (2) an e-mail address ordinarily accessed from a computer located in California, or (3) an e-mail address furnished to a California resident.

“Commercial e-mail advertisements” are e-mail messages initiated for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit. An e-mail is not an “unsolicited commercial e-mail advertisement” if the recipient provided direct consent to receive advertisements from the advertiser or if the recipient has a preexisting or current business relationship with the advertiser.

Unsolicited commercial e-mail may be sent to a recipient that has a “preexisting or current business relationship” with the advertiser. Such a relationship exists if the recipient made an inquiry and provided an e-mail address or made an application, purchase, or transaction relating to the advertiser’s products and services. The advertiser must provide a recipient with whom it has an established business relationship an

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opportunity to “opt-out” of receiving further e-mails by calling a toll-free telephone number or sending an e-mail to the advertiser to unsubscribe.¹

SB 186 also makes it unlawful for any person to collect e-mail addresses posted on the Internet, use an e-mail address obtained via automated means, or use scripts or other automated means to register for multiple e-mail accounts if the purpose is to initiate or advertise in an unsolicited commercial e-mail advertisement to a California e-mail address or from California.

The legislation prohibits a person from advertising using a commercial e-mail advertisement either sent from California or sent to a California e-mail address if the commercial e-mail advertisement contains, or is accompanied by, a third party’s domain name without permission; includes falsified, misrepresented, obscured, or forged header information; or has a subject line a person knows would be likely to mislead a recipient about a material fact regarding the contents or subject matter of the message.

REMEDIES

A recipient of an unsolicited commercial e-mail advertisement, an e-mail service provider, or the Attorney General of California may bring an action against a violator for (1) actual damages, (2) liquidated damages of \$1,000 for each unsolicited commercial e-mail advertisement, up to a maximum of \$1 million dollars per incident, and (3) reasonable attorney’s fees and costs. An “incident” is a single transmission or delivery to a single recipient or multiple recipients of unsolicited commercial e-mail advertisements containing substantially similar content.

The court must reduce the liquidated damages recoverable if it finds the defendant implemented with due care practices and procedures reasonably designed to effectively prevent unsolicited commercial e-mail advertisements from being sent in violation of SB 186. In such case, the liquidated damages may not exceed \$100 per unsolicited commercial e-mail advertisement, up to a maximum of \$100,000 per incident.

PROHIBITION ON USE OF A SERVICE PROVIDER’S EQUIPMENT

No person may use or cause to be used its e-mail service provider’s equipment located in California if such use would violate the e-mail service provider’s policy prohibiting or restricting the use of its service or equipment for initiating unsolicited e-mail advertisements. A person also may not use or cause to be used an e-mail service provider’s equipment located in California by initiating an unsolicited e-mail advertisement to the service provider’s registered users in violation of such policy.

¹ A provider of a free e-mail service that sends commercial e-mail advertisements to recipients of the service does not have to comply with the opt-out requirements.

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In addition to any other available remedies, the e-mail service provider may bring an action against a person who violates its policy on unsolicited e-mail advertisements for the greater of either actual monetary losses or liquidated damages of \$50 per e-mail initiated or delivered in violation of this section, up to a maximum of \$25,000 per day, plus attorney's fees. An e-mail service provider must establish that the violator had actual notice of both the policy on unsolicited e-mail advertisements and that the violator's unsolicited e-mail advertisements would use or cause to be used the e-mail service provider's equipment located in California. If an e-mail service provider brings an action under this section, it cannot also bring an action as described in the "Remedies" section above, and vice versa.

The text of SB 186 can be found 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.