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MEMORANDUM

March 11, 2004

To Our Clients and Friends

Re: CAN-SPAM Act: FTC Advance Notice of Proposed Rulemaking

The Federal Trade Commission (“FTC”) has issued an advance notice of proposed rulemaking requesting public comment on five areas of mandatory and discretionary rulemaking of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the “CAN-SPAM Act”) as well as on four reports the FTC must file with Congress. Comments on the “National Do Not E-Mail” Registry report are due March 31. Comments on the other rulemakings and reports are due April 12.

MANDATORY RULEMAKING

The CAN-SPAM Act imposes certain requirements on senders of e-mail messages, the primary purpose of which is the commercial advertisement or promotion of a product or service. An e-mail message that is a “transactional or relationship message” is generally not subject to the limitations of the act. The CAN-SPAM Act requires the FTC to issue regulations defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message. The regulation defining an e-mail message’s “primary purpose,” therefore, will assist senders of e-mail in determining when an e-mail message constitutes a commercial electronic mail message and thus, is subject to the CAN-SPAM Act.

In defining these criteria the FTC is seeking comment on such issues as whether an e-mail’s commercial advertisement or promotion must be more important than all of the e-mail’s other purposes; if the identity of the sender affects the e-mail’s primary purpose; if the “net impression” standard used by the FTC in other areas should be applied here; and if the financial aspects of an e-mail should be considered.

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DISCRETIONARY RULEMAKINGS

Transactional or Relationship Messages

The CAN-SPAM Act designates five broad categories of messages as transactional or relationship messages¹ and excludes them from the definition of “commercial e-mail messages”. The FTC is requesting comment on whether, due to technological changes and practices, modifications to, or clarifications of, these categories should be made. The FTC is also seeking comment on whether the categories specified in the act should continue to be excluded from treatment as commercial e-mail messages and whether there are other categories of messages that should be included in the definition of transactional or relationship messages.

10-Business Day Period for Processing Opt-Out Requests

Under the CAN-SPAM Act, senders of commercial e-mail messages must stop sending e-mail to a recipient within 10 business days after receiving a recipient’s opt-out request. The FTC is requesting comment on whether this 10-business day requirement is reasonable or whether it should be modified given the interests of recipients of commercial e-mails and the burdens imposed on senders of lawful commercial e-mail.

Additional Aggravated Violations

The CAN-SPAM Act provides for increased statutory damages for those senders engaging in an aggravated violation while violating another provision of the CAN-SPAM Act. Four practices are currently defined in the Act as aggravated violations, including e-mail address harvesting and dictionary attacks. The FTC is requesting comment on whether other practices should be considered aggravated violations because they are contributing substantially to the proliferation of unlawful commercial e-mail messages.

¹ “Transactional relationship messages” are those whose primary purpose is to (i) facilitate, complete or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender; (ii) provide warranty, product recall or safety or security with respect to a commercial product of service used or purchased by the recipient; (iii) provide specified types information for an ongoing commercial relationship involving the ongoing purchases or use by the recipient of products or services offered the sender; (iv) provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or (v) deliver goods or services that the recipient is entitled to received under the terms of a transaction that the recipient previously agreed to enter into with the sender.

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Implementation of CAN-SPAM ACT Provisions Generally

The FTC is requesting comment on any other regulations it should issue to help implement the provisions of the CAN-SPAM Act. Specifically, the FTC is asking for comments on whether it should issue rules clarifying:

- the legal obligations of initiators and recipients of commercial e-mail messages that induce recipients to forward the message to friends and acquaintances (“forward-to-a-friend” scenarios);
- the legal obligations of multiple senders of a single e-mail (e.g., a message that promotes a conference but also includes ads from companies sponsoring the conference);
- what constitutes a physical address (i.e., are post office boxes “physical addresses); and
- what information may or may not be disclosed in the “from” line of an e-mail message.

REPORTS TO CONGRESS

National Do Not E-Mail Registry Report

The FTC is seeking comment on such issues as what concerns exist with respect to the establishment of such a registry, whether such a registry is an effective method of controlling spam and how such a registry could be structured.

System for Rewarding Those Who Supply Information About CAN-SPAM Violations

The FTC is seeking comment on such issues as what kind of information would be useful for enforcement, how would the first person to identify a violator be determined and what effect would such a reward system have on ISPs.

Study of the Effects of the CAN-SPAM Act

The FTC is seeking comment on such questions as what measures of effectiveness should be considered, how to conduct an analysis of the extent that e-mail originates or is sent through facilities in foreign countries and how to conduct an analysis and recommend options for protecting consumers, including children, from obscene e-mail.

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Study of Subject Line Labeling

The FTC is seeking comments on the effectiveness of labeling all unsolicited non-adult commercial e-mail as “ADV” in the subject line and whether the FTC should recommend this type of labeling.

The *Federal Register* notice 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.