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**MEMORANDUM**

April 13, 2011

To Our Clients and Friends

Re: Senators Kerry and McCain Introduce Sweeping Privacy Legislation

Senators Kerry and McCain have introduced the “Commercial Privacy Bill of Rights Act of 2011” (the “Act”), which establishes a framework for how companies may use certain personal information.

The Act applies to entities subject to the jurisdiction of the Federal Trade Commission (“FTC”), common carriers and non-profit organizations.<sup>1</sup> The FTC is directed to issue rules to require covered entities to implement security measures to protect personal information they collect and maintain. In addition, the FTC is to adopt rules that require covered entities to provide individuals:

- Notice of their practices and purposes regarding the collection, use, transfer and storage of personal information
- The ability to opt-out for any unauthorized use<sup>2</sup> of personal information as well as for use by third parties for behavioral advertising or marketing
- The opportunity to opt-in for any collection of sensitive personally identifiable information<sup>3</sup>
- The ability to access and correct information, or to request the company to not use or transfer the person’s information

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<sup>1</sup> Accordingly, banks, savings and loan associations and federal credit unions are not subject to the Act.

<sup>2</sup> Unauthorized use means use for a purpose not authorized by the individual, with exceptions for use to process transactions, as required by law and certain other purposes.

<sup>3</sup> Sensitive information includes personal information that carries a significant risk of economic or physical harm if disclosed without authorization, or information related to the person’s medical condition, health record or religious affiliation.

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A company subject to the Act may collect only as much information as reasonably necessary to process or enforce a transaction or deliver a service. In general, such information may be maintained only as long as is necessary to deliver the service or as required by law. Moreover, third party service providers that receive personal information from a person subject to the Act are required to use the information in a manner consistent with the Act.

The Act may be enforced by the FTC and State Attorneys General. It also provides for civil penalties for violations, and expressly states that there is no private right of action. In addition, it preempts state law to the extent such laws relate to the collection, use or disclosure of information addressed by the Act. The Act also authorizes the FTC to issue rules for the establishment of safe harbor programs administered by a nongovernmental organization. Any covered entity that participates in and complies with a safe harbor program will be exempt from several substantive provisions of the Act.

A copy of the proposed legislation can be found at our website at <http://www.schwartzandballen.com/news.html>

If you have any questions, please call Gilbert Schwartz, Robert Ballen, Tom Fox, Heidi Wicker or Lauren Bianchini at (202) 776-0700.