September 13, 2004

VIA ELECTRONIC FILING
ORIGINAL VIA HAND DELIVERY

FEDERAL TRADE COMMISSION
RECEIVED DOCUMENTS
SEP 14 2004
SECRETARY

FEDERAL TRADE COMMISSION
RECEIVED

SEP 13 2004

COMMISSIONER THOMPSON

Mr. Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Re: CAN-SPAM Act Rulemaking, Project No. R411008

Dear Secretary Clark:

Adknowledge, Inc. submits these comments pursuant to the Federal Trade Commission's (the "Commission") publication of proposed regulations ("Proposed Regs") implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "Act"). 69 Fed. Reg. 50,091 (Aug. 13, 2004). Adknowledge is a privately held advertising company, founded in early 1998, based in Kansas City, Missouri. We assist advertisers in reaching their audience more effectively through the Internet with our proprietary technology.

We support the passage of CAN-SPAM as well as the Commission's efforts to properly enforce the statute. Our company and our business partners suffer from the tarnished reputation of commercial email advertising. As the Commission is aware, the experimental and developing nature of the Internet for commercial use have fed the debate over proper Internet email advertising standards. Passage of the Act and its enforcement are natural and beneficial guideposts in establishing such standards. Over the last seven years in which Adknowledge has been in business, response rates to email advertisements have plummeted by over 1,000 percent due to increased email volume and the inundation of spam on consumers. By decreasing the amount of unwanted email, consumers are more likely to be interested in advertisements from legitimate companies with which they have had prior satisfactory business relationships. We hope these comments are helpful in the Commission's efforts to define the primary purpose of commercial and "transactional or relationship" email, and in enforcing standards which foster continued growth of Internet commerce.

Over 90 percent of Internet consumers and email users are customers of Microsoft, America Online and Yahoo.[1] As the Commission is likely aware, these

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[1] See, e.g., WebSideStory, "Google, Yahoo, MSN, and AOL Account for more than 90 Percent of Search Referrals to Shopping Web Sites" (Dec. 4, 2002), available at http://www.websidestory.com/pressroom/pressreleases.html?id=175).

companies have been aggressively fighting spam over the past several months in response to their customers' feedback.[2] These companies focused their considerable experience and resources on meeting customers' demands. In short, like the Commission, they are looking for the most efficient and effective ways to foster email use, promote commerce and reduce unwanted email delivered to consumers.

For these reasons, we strongly endorse the comments already submitted to the Commission by Microsoft and Time Warner, including its America Online division, with regard to clarifications of the fifth category of "transactional or relationship messages" as well as addressing the definition of a "sender" under the Act.[3] We also endorse the comments, among others, of the NetCoalition (which includes Yahoo)[4] and the Online Publishers Association[5] on the clarification of "sender." The views expressed by these commenters have a direct bearing on the proper analysis of an email message's primary purpose and the congressional mandate to foster the development of frictionless commerce.

The first finding of Congress in the Act is that electronic mail is an "extremely important" communications vehicle, whose "low cost and global reach make it extremely convenient and efficient, and offer unique opportunities for the development and growth of frictionless commerce."[6] Industry followers assert email marketing contributed more than $2 billion dollars to the economy in 2003.[7] Observers project its contribution to rise from $8.4 billion in 2004 to $16 billion by 2009.[8] Some experts assert online sales by 2010 could reach $316 billion.[9] This growth is threatened by the Proposed Regs, which

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2 See, e.g., Mara, Janis, "Anti-Spam Alliance Makes Authentication Push," ClickZNews (June 22, 2004), available on http://www.clickz.com/news/print.php/3371921 (viewed Sept. 3, 2004); IDG News Service, "AOL, Microsoft, Yahoo push effort to fight spam," (Apr. 28, 2003) available on http://www.itworld.com/Man/2695/030428spamfight/pfindex.html (viewed Sept. 3, 2004).

3 Letter from Microsoft Corp. to Secretary Clark, Public Comment 3424 at 1, 3-5, 7-15 (Apr. 20, 2004) ("Microsoft Letter"); Comments of Time Warner Inc., Public Comment 5646 at 3-6 (Apr. 20, 2004) ("Time Warner Comments").

4 Comments of NetCoalition.com, Public Comment 3697 (Apr. 20, 2004).

5 Letter from Online Publishers Association to Secretary Clark, Public Comment 4250 at 8-10 (Apr. 20, 2004).

6 15 U.S.C. § 7701(a)(1).

7 JupiterResearch, "Online Advertising Through 2009" (July 2004).

8 Id.

9 Forrester Research, "US eCommerce Overview: 2004 to 2010" (Aug. 2004).

unintentionally undermine consumer choice, deter development of frictionless commerce, and promote more, rather than less, unwanted email and breaches of privacy.

In summary, Adknowledge urges the Commission to revise the regulations at this time to clarify that there may only be one "sender" in an email message containing multiple advertisements. If each sponsor or advertiser in such a message is treated as a "sender" of the message under the Act, unintended burdens and costs will be imposed upon the regulated community and the public. If the Commission declines to address this issue at this time, it should modify the regulations to clarify that the primary purpose of a message containing multiple advertisements sent at the request of a consumer, which meets additional indicia outlined below, be transactional or relationship under the Act.

I. ADKNOWLEDGE'S ADVERTISING TECHNOLOGY WILL REQUIRE UNDULY BURDENSOME MODIFICATION ABSENT FURTHER CLARIFICATION OF THE COMMISSION'S PROPOSED REGULATIONS

Adknowledge works with businesses that own, control or seek access to various communities of "opt-in Internet users," that is, people who knowingly and voluntarily request receipt of certain advertising to their electronic mailboxes. For example, prior to making a significant purchase, such as a car or home appliance (e.g., stove, refrigerator, washing machine, etc.), a consumer may want the convenience of receiving to their electronic mailbox promotional advertising about specific product categories, pricing and related terms. Adknowledge's CustomAd™ technology permits its partners to efficiently and cost-effectively serve advertisements well-tailored to the interests of consumers. The email advertisements are personalized through use of statistical and other analysis, such as anonymous data knowingly and voluntarily supplied by Internet users. This data is aggregated into our proprietary systems and analyzed against the available advertising inventory to determine the likelihood of a consumer response. When a match is found, multiple promotions of a similar product or service are pulled from inventory and dynamically served to the consumer in a single email message.[10]

Due to the dynamic nature in which CustomAds™ are served, the company does not know which promotion(s) will be integrated into an email in advance. A reasonable recipient wishing to terminate their advertisement subscription would place such request with the subscription provider, not the various sponsors which may appear in the email messages. If the Commission treats each sponsor within a multi-advertisement email as a "sender" under the Act, Adknowledge will need to invent new technologies and procedures to track the personalized emails, as well as permit each email recipient to unsubscribe from a particular sponsor. The time, resources and costs of such an undertaking will be significant and should be unnecessary.

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[10] Advertisements served by Adknowledge are dynamic because they are served in "real time" based on the calculations of the company's proprietary software and examination of the current advertising inventory.

Adknowledge works with over 20,000 sponsors. This magnitude alone makes tracking unsubscribe requests from a specific user back to a specific sponsor very challenging and burdensome. Even when surmounted, this challenge is overshadowed by the burdens generated from a consumer's need to transmit unsubscribe requests to thousands of individual sponsors. The chain of privacy and data security integrity becomes attenuated with each new link required in the transfer and coordination of each unsubscribe request. Therein lies additional inconvenience for the consumer, and additional responsibility on the regulated community and the Commission.[11] As detailed below, it also places standards on our industry which are fundamentally unjustified.

II. MESSAGES SENT UNDER CIRCUMSTANCES BEYOND MERE CONSENT SHOULD BE RECOGNIZED AS TRANSACTIONAL OR RELATIONSHIP EVEN WHEN THEY ARE PROMOTIONAL IN NATURE

Adknowledge is aware that the Act's definition of affirmative consent is limited to commercial email messages. We request the Commission to interpret the Act in a manner consistent with responsible behavior by both consumers and businesses. Absent an ability to clarify the definition of "sender" at this time, the Commission should select bright-line criteria which, beyond mere consent, establish solicited email subscriptions fulfilling advertising services as transactional or relationship in nature.

Email messages sent by Adknowledge partners are all or nearly all advertisements; however, they are messages consumers specifically requested. The primary purpose of such advertising emails are to fulfill consumers' expectations expressed in their original subscription requests. As Microsoft Corporation pointed out in its April 20, 2004 comments to the Commission on this subject:

> ". . . [I]f a consumer subscribes to a service and is clearly informed that as part of subscribing to that service, he or she will receive messages about special offers or promotions, then by agreeing to enter into that transaction, the recipient is not only 'entitled' to receive these types of messages, but in fact he or she expects to receive them."[12]

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[11] The Proposed Regs are a millstone which force a consumer to coordinate unsubscribe requests among an overwhelmingly large community of advertisers rather than a small community of expert advertisement delivery service providers. From the standpoint of efficiently using resources and minimizing opportunity for error and mischief, the Commission should prefer having the consumer place an unsubscribe request within the smaller community of the latter.

[12] Letter from Michael Hintze, Senior Attorney, Microsoft Corporation, to Secretary Donald S. Clark, FTC Pub. Comment 3424, at 5 (Apr. 20, 2004), available at http://www.ftc.gov/os/comments/canspam/001051.pdf.

Whether the subscription service transmits editorial opinion, purely promotional content and advertising, or other lawful content, should not be a subject of further inspection, censorship or evaluation by the Commission. The Commission should protect consumer opt-in choices through regulations which better define how solicited messages may be treated as transactional or relationship messages. There are at least five specific criteria the Commission should use: offer, acceptance, consideration, course of performance and consumer control, as elaborated in the following sections. Unlike the Proposed Regs, enforcement of the Act as suggested below better conforms to accepted and understood traditional contract analysis; companies in any line of business will adapt and be able to comply with CAN-SPAM more easily where the regulations follow a well-trodden path.

A. Indicia of offer, acceptance and consideration

The first set of criteria the Commission should require for a transactional or relationship message includes evidence of full and fair offer, acceptance and consideration. These are the basic terms of any contract, which is a fundamental indicator of a valid transaction or relationship between parties. Where sufficient evidence is presented that the offer is not fully and fairly disclosed, or the acceptance is not knowingly and voluntarily provided, the Commission may conclude that messages sent pursuant to the terms are not transactional or relationship messages under the Act. Because many spammers claim to be sending email that is "permission-based" when in reality it is not, industry groups have been established which certify legitimate, permission-based email marketing companies. For example, the Commission may coordinate with entities such as BondedSender™ and TrustE™ to help it distinguish between reputable businesses and spammers. Upon request, certified members of these organizations should be able to produce evidence of an email recipient's opt-in or subscription request.[13]

The third criterion, consideration, may be financial or non-financial in character. Congress contemplated arrangements involving non-financial consideration by differentiating between a "commercial transaction" on the one hand, see § 3(17)(A)(i), and a "transaction" on the other, see § 3(17)(A)(v), within its definition of a transactional or relationship message. Further, well-established court precedent, recently re-affirmed within the Internet context, acknowledges the enforceability of Internet-based agreements which do not involve direct financial consideration. Where a consumer takes a benefit -- whether it be advertisements, stock quotes or other requested information -- subject to known terms, such as periodic receipt of the information requested via email, a reviewing court will likely recognize a binding transaction.[14]

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13 See www.bondedsender.com and www.truste.org, respectively. Companies certified by these two groups should be able to produce records relatively quickly of the time and date of subscription for each email recipient, as well as the recipient's IP address at such time and date.

14 See Register.com v. Verio, 356 F.3d 393, 403-404 (2d Cir. 2004). The case concerns review of a temporary restraining order issued by a federal district judge against Verio. The company was harvesting WHOIS data from the Web pages of Register.com which contained the terms "By

B. Indicia concerning course of performance

A fourth criterion for the Commission to examine is course of performance. The Commission should assess whether the emails sent conformed to the terms of the agreement. If a consumer visits a travel agency's Web site and accepts an offer to sign-up for an email subscription about last-minute vacation packages, the promotional email should be limited to last-minute vacation packages. The consumer would not expect a steady diet of emails concerning debt consolidation or prescription drugs. Finally, the Commission should consider whether the regulated company conformed to any privacy policy offered and accepted as part of the terms of a contested matter. Where the course of performance does not meet the terms of offer and acceptance, the Commission may determine that contested messages which were sent were not transactional or relationship messages under the Act.

C. Indicia of customer control

The fifth criterion the Commission should consider is the level of consumer control. Evidence of consumer control may include the ability to supply, review and modify profile data (such as email address, gender, zip code, job category and other information) and preference data (such as hobbies, interests, products to be purchased, companies or stocks of interest, news category and similar information). It may also include the ability terminate the agreement. For example, a subscription may terminate when a consumer fails to re-subscribe to a time-limited subscription; or the consumer may provide notice of their intent to no longer receive a particular subscription. Other specific indicia which can affect the consumer's control over an email subscription include an unsubscribe link to the subscription provider and a hypertext link to the subscription provider's privacy policy.

III. THE COMMISSION SHOULD CLARIFY "SENDER" AND MODIFY ITS THREE-PRONG TEST, OR CREATE A FOURTH PRONG RECOGNIZING TRANSACTIONAL/RELATIONSHIP MESSAGES CAN BE COMMERCIAL

The Proposed Regs determine the primary purpose of an electronic message through a three-prong analysis.[15] Under the first prong, a message containing only

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submitting a WHOIS query, you agree that . . . under no circumstances will you use this data to . . . support the transmission of mass unsolicited . . . advertising . . . via email." Verio argued that these terms were not sufficient to constitute a contract and that even if they were, Verio never assented to the contract because it never signed a document, checked a click box (there were no such boxes or buttons provided on the Register.com Web pages) or otherwise manifested agreement to the terms. The Second Circuit found that Verio took the information for its own benefit, aware of the terms; that alone could be a sufficient manifestation of assent to establish a binding contract.

[15] 69 Fed. Reg. at 50,106 (Proposed § 316.3).

content which advertises or promotes a product is commercial and is consequently subject to § 5(a)(4) of the Act.[16] Under the second prong, a message containing some commercial content and some transactional or relationship content is deemed commercial if the second prong criteria are met.[17] Under the third prong, a message containing some commercial and some non-"transactional or relationship" content is deemed commercial if the third prong criteria are met.[18]

With this framework, an email subscription of personalized promotions may be treated as commercial email for any of the following reasons. It may be deemed commercial under the first prong because it contains only content which advertises or promotes one or more products or services. It may be deemed commercial under the second prong because a recipient interpreting its subject line could conclude the message is nothing more than an unsolicited advertisement (i.e., even if that conclusion is inaccurate), or because the transactional or relationship element does not appear at or near the beginning of the message.[19] It may be deemed commercial under the third prong because the definition of transactional or relationship message does not unambiguously define this type of subscription and, for reasons similar to a second prong analysis, a decision-maker may conclude the message is commercial.

This framework is flawed and inconsistent with congressional intent. Failure by the Commission to correct this framework to reduce the burdens on legitimate advertising will likely reduce the depth and variety of advertising-supported goods and services presently available over the Internet. For example, free electronic subscriptions of news, stock quotes, weather, classified ads or other information may be cut back or eliminated;

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16 See 15 U.S.C. at § 7704(a)(4).

17 These criteria are: "(i) A recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message advertises or promotes a product or service; or (ii) The electronic mail message's content pertaining to one of the functions listed in paragraph (b) of this section does not appear at or near the beginning of the message;" 69 Fed. Reg. at 50,106.

18 These criteria are: "(i) A recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message advertises or promotes a product or service; or (ii) A recipient reasonably interpreting the body of the message would likely conclude that the primary purpose of the message is to advertise or promote a product or service. Factors illustrative of those relevant to this interpretation include the placement of content that advertises or promotes a product or service at or near the beginning of the body of the message; the proportion of the message dedicated to such content; and how color, graphics, type size, and style are used to highlight commercial content." Id.

19 There are many valid business reasons why the transactional or relationship element may not appear at or near the beginning of a message. For example, the advertiser or sponsor may not want the advertising message diluted by branding from the advertisement delivery service provider. Further, marketing analysis demonstrates that the most effective message is one presenting the product or service immediately, rather than go into a long explanation as to why the email was transmitted; time and attention span are limited.

the Commission should not frustrate the desires of Internet users who requested subscriptions from receiving them.

A. The Proposed Regs establish an "impact" or "effects" test in violation of the plain language of the Act

The regulatory scheme set out in the Proposed Regs is at fundamental odds with the congressional mandate to establish criteria to "facilitate the determination of the primary purpose of an electronic mail message."[20] The Proposed Regs regulate a message depending upon its effect or impact on the perception of a reasonable recipient, which merely begs the question of how one defines a reasonable recipient. For example, a reasonable recipient who opted-in to an email subscription service would expect there to be an ongoing transaction or relationship with the subscription provider. Further, a reasonable recipient would not expect to be able to unsubscribe or opt-out from specific sponsors within a subscription service; they would, however, expect the subscription provider to be able to terminate their subscription upon request.

Adknowledge's proprietary technology executes about six billion calculations daily in helping its customers identify the right sponsors within an email. If surveyed about CustomAds™, some recipients would likely consider them to be purely commercial, while others would likely consider them to be relationship or transactional. The Proposed Regs are drafted in an effects-based analytical framework as applied to traditional advertising outlets for decades,[21] but cause a result which the Commission has never and would not require from any traditional media outlet. That is, the Commission would never enforce an effects-based test for newspapers requiring newspaper publishers to suppress car or insurance advertisements from a "reasonable recipient" subscribing to a particular newspaper. Absent clarification of a "sender" or a "transactional or relationship message," this is the effect of the Proposed Regs on an email-based circular or subscription containing multiple advertisements; it cannot have been the intent of Congress.

B. There are many specific ways in which the primary purpose tests in the Proposed Regs may be perfected

Adknowledge comments on two broad approaches to correct the Proposed Regs without significant alternation to the framework in which they are presented; there are doubtless other approaches which are equally acceptable. The first is to introduce a fourth prong of analysis under Proposed Regulation 316.3(a). The second is to retain a three-prong analysis but to modify the second prong at 316.3(a)(2), enlarging it to clearly treat subscriptions to advertisements as transactional or relationship messages.

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[20] 15 U.S.C. at § 7702(2)(C) (emphasis added).

[21] See, e.g., FTC Policy Statement on Deception (Oct. 14, 1983).

1. Options for introduction of a fourth prong of analysis in 316.3(a)

For example, the following language may be inserted immediately after Proposed Regulation 316.3(a)(3):

> "(4) If an electronic mail message contains only content that advertises or promotes a product or service, then the 'primary purpose' of the message shall be deemed to be commercial only if:
>
> (i) The sender is unable to produce, upon request, sufficient evidence that the message was sent to fulfill a request by the recipient; or
>
> (ii) The recipient did not have a relationship or transaction with the sender as alleged by the sender; or
>
> (iii) The service performed was outside the scope of the agreement; or
>
> (iv) The recipient revoked the permission relied upon by the sender."

Alternatively, a new fourth prong could be drafted in a manner to define when a message examined under the prong would be transactional or relationship, rather than commercial. For example:

> "(4) If an electronic mail message contains only content that advertises or promotes a product or service, then the 'primary purpose' of the message shall be deemed to be transactional or relationship only if:
>
> (i) The sender is able to timely produce, upon request, evidence that the message is sent pursuant to offer, acceptance and consideration to fulfill one of the functions listed in paragraph (b) of this section, and
>
> (ii) The message content is within the scope of the agreement; and
>
> (iii) Where the message is sent pursuant to a subscription-type service, the recipient has sufficient means to modify and terminate the subscription."

2. Options to modify the existing three-prong analysis in 316.3(a)

If the Commission prefers not to establish a fourth prong of analysis, it could supplement the test at Proposed Reg § 316.3(a)(2) with the language in double-underscore below:

(ii) "The electronic mail message's content pertaining to one of the functions listed in paragraph (b) of this section does not appear at or near the beginning of the message; or

(iii) The sender is unable to present sufficient evidence demonstrating performance within the scope of an existing transaction or relationship between itself and the recipient."

Alternatively, Proposed Reg § 316.3(a)(2) could be modified with the underscored phrase below to state:

> "If an electronic mail message contains content that advertises or promotes a product or service as well as content that pertains to one of the functions listed in paragraph (b) of this section and the message is sent without sufficient prior offer, acceptance and consideration with the recipient, then the 'primary purpose' of the message shall be deemed to be commercial if:"

This language clarifies that a sufficiently enforceable prior agreement between sender and recipient are necessary to deem the message transactional or relationship in nature; the regulations may further address course of performance and consumer control issues within this language.[22]

IV. LACK OF CLARITY OVER THE DEFINITION OF "SENDER" IMPOSES SIGNIFICANT BURDENS ON SMALL BUSINESSES AND IS LIKELY TO INCREASE UNWANTED COMMERCIAL EMAIL

The Commission invites comment on how it may minimize scope and impact of the Act while still satisfying the congressional mandate.[23] Where an email contains multiple promotions from different sponsors, the requirement to honor a recipient's unsubscribe or opt-out request should fall only on the business which obtained the email address to which the message was sent, rather than on each of the sponsors within the message. The Microsoft Letter and Time Warner Comments, among others, artfully detail the problem faced by the regulated community in identifying the "sender" under the Act. Rather than repeat the thoughtful comments made by these organizations, Adknowledge incorporates them by reference and amplifies selectively on the topics below. The definition of "sender" is related to the clarification of "primary purpose"

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22 The term "affirmative consent" is intentionally omitted, as that term is only defined by the Act "when used with respect to a commercial electronic message." 15 U.S.C. at § 7702(1).

23 69 Fed. Reg. at 50,104.

under the Act and should be addressed at this time by the Commission, rather than at some later period.[24]

As an initial matter, the Commission should recognize that there are over 150,000 advertisers on the Internet and many them participate in email marketing. In contrast, there are a few hundred companies or individuals that represent over half of all email communications. See Tab A and www.senderbase.org. From an efficiency standpoint, it would appear compelling to have a few hundred companies manage unsubscribe requests, rather than coordinate such requests among 150,000 advertisers. Further, the former have greater expertise and incentive to properly manage unsubscribe requests than the latter, who are primarily providers of goods and services in fields other than email communications.

A. Declining to clarify "sender" in the regulations under the theory that it may be clarified through enforcement action will undermine congressional intent and eviscerate consumer choice and convenience

In light of the regulatory uncertainty and lack of clarity over who constitutes a "sender" under the Act, Adknowledge partners have already cut back on projects which would enhance choice and convenience to opt-in consumers interested in specific types of promotions. For example, CustomAd™ technology permits a consumer interested in purchasing a product to make a direct purchase by selecting from multiple advertisers or sponsors within an email advertisement. However, if each sponsor were defined under the Act as a "sender" of an email advertisement transmitted with CustomAd™, small businesses in particular – an important segment of Adknowledge's customer base – would be discouraged from using CustomAd™ at all. Adknowledge's technology makes it practicable for businesses to allocate small and efficient advertising budgets, sometimes as low as $100 per month. This category of advertiser would likely be greatly diminished if not eliminated by the cost and technological hurdles imposed by a Commission determination that each sponsor of a multi-advertisement email is a "sender" of the email.

B. The current regulatory uncertainty has a disproportionately adverse impact on small businesses

If the Commission fails to clarify the definition of "sender" or if it elects to interpret the Act as establishing multiple senders in an email containing multiple advertisements, the impact is disproportionately adverse on small businesses for at least two reasons. First, technology permitting an Internet user to unsubscribe or opt-out from an individual advertisement in a multi-advertisement email does not yet exist, and the costs of developing such technology will be much more difficult to bear for a small

[24] The definition of sender should not be considered a part of discretionary rulemaking. See 69 Fed. Reg. at 50,093 ("the Commission will address issues of discretionary rulemaking upon which comment was solicited in the ANPR in a future Federal Register notice . . .").

business than a large one. Second, assuming the technology can be developed, it could result in the "pooling" together of unsubscribe or opt-out requests from all advertisers within a multi-advertisement email, to establish a unified suppression list (that is, a list of Internet users to whom the email will not be sent) for the advertising campaign. Large companies, who have greater customer interaction than smaller businesses lacking analogous reach, will likely have dramatically larger unsubscribe lists. These lists, if pooled, would impair the ability of smaller businesses from reaching new customers who may be interested in their products. Such a "crowding out" effect could deter the growth of small business as well as deter growth of Internet commerce.

C. Favoring a "multi-sender" interpretation will increase unwanted commercial email and identity theft

For the reasons described above and referenced in earlier endorsed comments, there is little incentive for sponsors to permit their advertisements to be placed in a multi-advertisement email, if the Act is interpreted to make each sponsor a "sender" of the email. Adknowledge anticipates that it will be asked to assist with fewer multi-advertisement emails and more single advertisement emails. This would likely increase, rather than decrease, the overall volume of email-based Internet advertising.

Adknowledge would also expect the number of non-expert market participants asked to manage and process unsubscribe requests to rise dramatically. On a statistical basis alone, this would likely increase the opportunity for error, mischief and fraud with regard to the personal information transferred between and among market participants. Such an outcome is fundamentally incompatible with congressional intent. According to one tracking agency, Yahoo! and Hotmail alone may handle more than 350 million emails per day.[25] If tens of thousands, or hundreds of thousands, of inexpert businesses were responsible for tracking and implementing unsubscribe requests, in an environment where technology, procedures and protocol are rapidly changing, the result would likely create a tendency for error and a degradation of privacy. Dedicated spam operations are likely far more technologically adept at circumventing security measures than the average business is at enforcing or monitoring such measures. This is in part because overcoming security measures for the former is a basic necessity to maintaining profitability, while enforcing Internet email security for the latter is not mission critical and constitutes a cost center where the incentive is to minimize expenses.[26]

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25 SenderBase reported 250.3 and 104.9 million daily emails from yahoo.com and hotmail.com, respectively, on September 13, 2004. See Tab A and http://www.senderbase.org/.

26 For example, new technology to help identify the sender of an e-mail message has in a recent survey been found to be potentially ineffective – despite its backing from Microsoft Corp. – because spammers have been faster in adapting to the technology than legitimate businesses. See, e.g., Paul Roberts, IDG News Service, "Spammers using sender authentication too, study says," NetworkWorldFusion (Aug. 31, 2004) available on www.nwfusion.com/news/2004/0831spammusing.html).

The Commission has access to resources identifying potential sources of spam without resorting to Draconian regulatory measures creating disincentives for businesses to utilize the Internet. For example, the Register of Known Spam Operations ("ROKSO") tracks organizations denied access to Internet Service Providers three or more times. This Register asserts that the spammers it tracks are responsible for about 90 percent of spam on the Internet.[27] ROKSO asserts that it collects information and evidence about spammers specifically to assist law enforcement agencies, among others. A list of the operations it tracks is published at http://www.spamhaus.org/rokso. It is not justifiable for an enforcement agency to impose unduly burdensome requirements on a regulated community where prima facie evidence identifies – sometimes by name, telephone number and postal mailing address – concrete leads on those offenders within that community that constitute 90 percent of the problem.

CONCLUSION

The Commission needs to adopt a regulatory enforcement methodology reassuring consumers that the Internet is a viable medium through which goods and services may be safely and conveniently purchased. Absent modification as advocated herein, the Proposed Regulations will foster identify theft and increase spam.

An unclear definition of "sender" in the Proposed Regs will tend to cause smaller, legitimate businesses to drop out of email advertising due to the burdensome costs to comply with unsubscribe and opt-out requests. Further, consumers will be encouraged to transfer unsubscribe requests directly to advertisers instead of email subscription providers, thereby unwittingly placing their data in the hands of a far larger group of businesses inexperienced with properly processing such requests. Finally, unwanted email may increase from the disincentive to transmit multiple advertisements within one email. Advertisers will tend to prohibit the pooling of their promotions into a single email by subscription providers, and tend to favor transmitting individual email promotions.

If the Commission declines to squarely address the definition of "sender" at this time, it should correct the Proposed Regs in the following way. Where the email is sent pursuant to a subscription meeting sufficient criteria of offer, acceptance, consideration, course of performance and consumer control, it should be a transaction or relationship message, even where its content is purely promotional. Failing to correct the Proposed Regs in this manner will disrupt existing customer relationships within our industry; an industry which is growing rapidly in the face of great challenges in other and far larger segments of our economy.

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[27] See http://www.spamhaus.org/rokso/about.html.

The Commission needs to discourage spamming without imposing unduly burdensome rules on the regulated business community. The chorus of comments from the regulated business community has been strikingly uniform on the subjects which Adknowledge has addressed in these comments. We strongly urge the Commission to pay attention to these issues now, not at some undefined future time, because it materially affects our industry today.

Sincerely,

Michael R. Geroe
General Counsel

Adknowledge, Inc.

Enclosure

TAB A

Search

Enter domain, network owner, IP address or CI

The Leading Email Reputation Service

Home Domains IP's

What is SenderBase?

SenderBase is an email reputation service designed to help email administrators research senders, identify legitimate sources of email and block spammers. You are viewing a report on the top senders of email on the Internet based on data provided from over 28,000 organizations that receive email.

More...

Related Links

IronPort - Our messaging gateway appliances
Bonded Sender - Our email certification program

TRUSTe - Web privacy seal program
Abuse.net - Info on how to report spam
Spamcop.net - Spam reporting service

Recent SenderBase News

InfoWorld 3/09/04

Press Release - IronPort previews SenderBase Client - 2/16/04

InfoWorld 6/20/03

Top Senders by Don

Daily Magn.	Monthly Magn.	Estimated Daily Volume (m)	Domain	Network Owner
8.2	8.3	250.3	yahoo.com	Yahoo! Inc.
8.0	7.8	166.0	hinet.net	CHTD, Chunghwa T
8.0	8.1	157.1	ameritech.net	Ameritech Electron
8.0	7.9	141.3	bbtec.net	SOFTBANK BB COR
8.0	7.8	138.2	ocn.ne.jp	Open Computer Ne
8.0	8.1	133.7	pacbell.net	Pac Bell Internet S
7.9	8.0	132.3	rr.com	Road Runner
7.9	8.0	128.2	shawcable.net	Shaw Communicati
7.9	7.9	122.7	charter.com	CHARTER COMMUN
7.9	8.0	116.3	comcast.net	Comcast Cable
7.8	8.0	104.9	hotmail.com	MS Hotmail
7.8	8.0	102.7	swbell.net	Southwestern Bell
7.8	8.0	101.7	verizon.net	Verizon Internet Se
7.8	8.0	98.1	dsl.verizon.net	GTE Intelligent Net
7.8	7.9	94.3	attbi.com	Comcast Cable Com
7.8	7.9	90.7	aol.com	America Online
7.7	7.8	78.0	interbusiness.it	Telecom Italia
7.7	7.8	75.5	t-dialin.net	Deutsche Telekom
7.6	7.6	66.8	proxad.net	Proxad / Free SAS
7.6	7.6	62.1	ebay.com	eBay Inc.

Top Senders by Add

IP address	Host	Daily Magn
218.51.250.242	http://www.senderbase.org/?searchBy=hostname&searchString=	6.
66.35.250.206	lists.sourceforge.net	6.6
66.63.164.86	mx1.axpit.com	6.6
205.206.231.27	outgoing.securityfocus.com	6.
24.177.130.92	c24.177.130.92.static.ncr.charter.com	6.
66.54.92.44	http://www.senderbase.org/?searchBy=hostname&searchString=	6.

InfoWorld	6/20/03
PC Magazine	5/6/03
eWeek	3/17/03

66.54.92.44	http://www.senderbase.org/?searchBy=hostname&searchString=	6.5
64.233.170.130	sproxy.google.com	6.5
206.71.52.43	bounces.coldreign07.com	6.5
64.4.240.67	smtp-outbound.nix.paypal.com	6.5
65.182.143.151	65.182.143.151 (dns err) ?	6.5
81.214.198.253	dsl81-214-50941.adsl.ttnet.net.tr	6.5
146.82.138.6	murphy.debian.org	6.5
206.71.52.16	bounces.ibumblebee7.com	6.5
207.182.146.228	mail1.montebic.com	6.5
63.209.156.65	hint-host-63-209-156-65.hintsprovider.com	6.4
64.119.196.48	64.119.196.48.rev.iwaynetworks.com (dns err) ?	6.4
213.165.64.20	pop.gmx.de	6.4
65.182.142.103	mail5.stocksntalk.com	6.4
66.109.19.228	lists.inboxvalues.com	6.4
66.63.164.85	mailer12.axpit.com (dns err) ?	6.4

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email: name (opt.): submit

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