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June 24, 2005

VIA ELECTRONIC FILING  
ORIGINAL VIA COURIER

Donald S. Clark  
Secretary  
Federal Trade Commission  
Room H-159  
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") further implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "Act"). 70 Fed. Reg. 25,426 (May 12, 2005). 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.

The Commission should clarify four areas of its Proposed Regs, listed in order of importance: additional precision with regard to the definitions of a "sender" and a "person" under the Act, creation of a safe harbor for content providers, and reasonable protection of unsubscribe pages from attacks by hackers. Further, these comments incorporate by reference Adknowledge's comments to the Commission dated September 13, 2004, during an earlier phase of the Act's rulemaking.

## I. PROPOSED DEFINITION OF SENDER SHOULD BE FURTHER MODIFIED

Further perfection of the definition of "sender" under the Act is correctly recognized by the Commission as a cornerstone to efficient oversight of the regulated community. Adknowledge commends the Commission's staff opinion letter<sup>1</sup> on this subject in providing sensible guidance about commercial email with multiple advertisers. The Proposed Regs are equally valuable for providing consistency with the Staff Letter and extending further guidance to the regulated community.

The Proposed Regs should better address a growing abusive practice many in the email advertising community assert is permitted because of an alleged loophole in the Act. Like many businesses assisting in email marketing, Adknowledge's partners –

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<sup>1</sup> Letter from Eileen Harrington, FTC to Jerry Cerasale, Direct Marketing Association (Mar. 8, 2005) ("Staff Letter").

# acknowledge

Federal Trade Commission  
CAN-SPAM Act Rulemaking  
Page 2

primarily list owners – are experiencing a rapid decrease in response rates due to an increasing volume of spam or unsolicited commercial email (“UCE”). Legitimate email is going unnoticed due to the flood of UCE consumers regularly receive in their email inboxes. Ironically, much of this UCE originates from spammers who allege they are strictly in compliance with the Act.

A. A “sender” should be broadly defined in order to include list owners

One significant factor in the persistently high levels of UCE, notwithstanding the Act’s intent, is the inadequate definition of a “sender.” Each list owner controls whether it is a “sender” of an email message, by voluntarily choosing to include or omit a promotion or advertisement of its own services, product or Web site in the email messages it transmits. Predictably, most spammers responsible for UCE do not advertise or promote themselves in the messages they transmit to avoid becoming “senders” under the Act.

A principal constraint on the Commission’s ability to effectively regulate UCE is an insufficient focus on regulating list owners. Some unscrupulous list owners tend to harvest email addresses from the Internet or use software to guess email aliases and attempt delivery, and only honor unsubscribe requests at the advertiser level. Such abusive behavior is an increasing cause of UCE; it tends to drive down the response rates to legitimate email marketing by making it more difficult for consumers to notice legitimate marketing communications.<sup>2</sup>

An unscrupulous list owner may have an enormous email address collection created through various methods over the Internet without permission of the email address owners. This list owner may subsequently rent its master list (or subsets thereof) to many different advertisers. It makes each rented list advertise or promote itself within the email messages sent to the respective list. The list owner maintains it is not a “sender” under the Act; it does not promote or advertise its “own” service, product or Web site in the messages sent.<sup>3</sup> Rather, the list owner may assert that each of its rented lists is its own business entity and is the “sender.” Thus, if the list owner works with 200 advertisers, each consumer on the list owner’s master list may have to unsubscribe 200 times to get off each rented list; if the list owner signs up more advertisers, recipients

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<sup>2</sup> See, e.g., TechWeb News, “Spam Filtering Makes Workers Miss Deadlines” (April 27, 2005), at <http://www.informationweek.com/story/showArticle.jhtml?articleID=161601194>; Pew Internet & American Life Project, Spam: How it is hurting email and degrading life on the Internet (Oct. 2003), at [http://www.pewinternet.org/pdfs/PIP\\_Spam\\_Report.pdf](http://www.pewinternet.org/pdfs/PIP_Spam_Report.pdf).

<sup>3</sup> See 15 U.S.C. § 7702(16).

# adknowledge

Federal Trade Commission  
CAN-SPAM Act Rulemaking  
Page 3

may continue to have to unsubscribe from each one. In short, the unscrupulous list owner only honors unsubscribe requests at the advertiser level, without ever removing email addresses from its own master list.

The Commission should prevent such abusive practices by making it mandatory for list owners to advertise or promote themselves in each email message they transmit (and, as discussed further in Part II below, ensuring “senders” are bona fide entities). The Proposed Regs should provide a sensible and responsible interpretation of what it means to advertise or promote one’s own product, service or Web site.

- B. The Commission should broadly interpret the scope of “advertised or promoted” in the second prong of the “sender” test

The Commission is well poised to close the alleged loophole described above. The Proposed Regs reinforce the effort in the Commission’s Staff Letter to satisfy consumer expectations, protect consumer privacy and minimize unintended and unnecessary burdens on the regulated community by clarifying when an advertiser is not the “sender” of commercial email with multiple advertisements. For example, the Staff Letter explains that

“ . . . when a recipient affirmatively consents to receive commercial email messages after having received clear and conspicuous disclosure that ensuing email messages may contain advertising from other sellers, those additional sellers should not be considered ‘senders’ for purposes of CAN-SPAM . . . .”<sup>4</sup>

The basis of the definition of sender under the Proposed Regs is the Act. The Act establishes a two-prong test in defining a sender: (1) a person who initiates a message and (2) “whose product, service, or Internet web site is advertised or promoted by the message.”<sup>5</sup> Adknowledge requests the Commission to further discuss the boundaries of what constitutes an advertisement or promotion sufficient to meet the second prong of the Act’s “sender” test, ensuring that list owners be required to become senders, while applying rules which are modest and sensible for the regulated community.

It is significant that the Act permits either “advertisement” or “promotion” of the message. Merriam-Webster OnLine defines “advertise” as “to make something known,” “to announce publicly especially by a printed notice or a broadcast” and “to call public

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<sup>4</sup> Staff Letter at 3.

<sup>5</sup> 15 U.S.C. § 7702(16) (emphasis added). See also Staff Letter at 3.

# adknowledge

Federal Trade Commission  
CAN-SPAM Act Rulemaking  
Page 4

attention to . . . so as to arouse a desire to buy or patronize.”<sup>6</sup> It defines “promote” as, inter alia, “to present (merchandise) for buyer acceptance through advertising, publicity, or discounting.”<sup>7</sup>

The Commission should expansively interpret the second prong of the Act’s “sender” test to capture list owners who may otherwise seek to avoid “sender” unsubscribe obligations. For example, publication of a list owner’s corporate name and unsubscribe link within the message should be sufficient to come within the statutory scope of a “sender” and should be mandatory for all list owners. The Proposed Regs should have a new provision stating something to the effect of:

“Any email address list owner or manager responsible in whole or substantial part for the transmission of a commercial electronic mail message shall advertise or promote its own product, service, or Internet web site in the message by including at least its corporate name and a functional unsubscribe mechanism.”

- C. Proposed Rule should clarify an advertiser does not control “the content of the message” merely because it controls its own promotional copy

The Proposed Regs try clarifying where a person may be designated the “sender” of a single email containing multiple advertisements. To qualify as a “sender,” a person must meet both the Act’s statutory test and a test proposed by the Commission, one element of which is that the person “controls the content of” the email message.<sup>8</sup>

As the Commission is likely aware, an advertiser controls the content of its particular advertisement copy.<sup>9</sup> For example, assume an email message in which manufacturers Acme Inc. and Widget Inc. each agree to pay a list owner to facilitate the creation of a single email advertisement. Acme and Widget each provide ad copy to the list owner to combine into a single piece of ad copy. Presumably it is not the Commission’s position that since Acme and Widget each assert control over their respective ad copy and they meet the Act’s statutory “sender” test, they would each be

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<sup>6</sup> See <http://www.merriamwebster.com/cgi-bin/dictionary?book=Dictionary&va=advertised>.

<sup>7</sup> See <http://www.merriamwebster.com/cgi-bin/dictionary?book=Dictionary&va=promote>.

<sup>8</sup> Proposed Rule 316.2(m)(1).

<sup>9</sup> Generally, the term copy denotes textual content, while the term creative – as in advertisement creative – implies a graphical content. Adknowledge uses the term “copy” in these comments to denote both.

# acknowledge

Federal Trade Commission  
CAN-SPAM Act Rulemaking  
Page 5

“senders” under the Proposed Regs. By such interpretation, the Commission’s proposal to address the problems identified in the Staff Letter and the Proposed Regs,<sup>10</sup> concerning single email messages with multiple advertisements, would be futile. Some commenters are concerned the Commission may take such a position. While the Commission’s record recognizes such interpretation could place undue burdens on the regulated community and “endanger the privacy of consumers’ personal information,”<sup>11</sup> the Commission should take the opportunity to clarify the language to better reflect its intent.

For example, it may clarify the proposed term “controls the content of such message” means overall control of an email message; *i.e.* notwithstanding the control that each advertiser exerts over its own copy in a multi-advertisement message. The Commission may consider modifying the provision to state something along the lines of:

“that person controls the overall content of such message;”

The list owner may, for example, control the overall content of a message by any or some combination of the following factors. It may control which multiple promotions are contained within each email message; it may have the right to reject ad copy (*i.e.* copy found objectionable for its content, perhaps for a violation of intellectual property rights); and/or it may be able to truncate and/or edit copy which is too lengthy.

## II. FURTHER DETAIL IN DEFINITION OF “PERSON” WOULD HELP DETER CIRCUMVENTION EFFORTS

The Commission’s desire to better define a “person” is a necessary component of the broader need to perfect the definition of a “sender” and also prevent circumvention of the Act. As alluded to in Part I.A. above, the Commission should limit circumvention practices through better definition of the term “business entity.” The Proposed Regs should explicitly state that a “person” may not merely be a “business entity,” but a bona fide business entity, with a unique revenue stream, a unique product or service reflecting some reasonable level of market demand, dedicated staff, overhead and on-going operations. Many spammers continually change the name of the originating entity along with header or other information, or consider a mere email address list as a “business entity.” Requiring a “business entity” to meet the qualifications suggested above would help reduce UCE by making currently abusive practices more clearly a violation of the Act and more susceptible to enforcement action.

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<sup>10</sup> Proposed Regs, 70 Fed. Reg. at 25430 (“The proposed Rule provides that . . . the sellers may structure the sending of the e-mail message so that there is but one ‘sender’ . . .”).

<sup>11</sup> See, e.g., Proposed Regs, 70 Fed. Reg. at 25430 and Staff Letter.

# adknowledge

Federal Trade Commission  
CAN-SPAM Act Rulemaking  
Page 6

Further, the Proposed Regs should state that the meaning of “entity” as used at 15 U.S.C. § 7702(16)(B) is the same as “person.” That provision of the Act, which addresses separate lines of business or divisions for purposes of defining “sender,” does not employ the term “person,” but is related to circumvention practices which would be easier to foreclose by more thorough definitions as recommended herein.

### III. A SAFE HARBOR FOR ADVERTISERS SHOULD BE CREATED

The Commission inquires whether a safe harbor provision should be added to the Proposed Regs.<sup>12</sup> The Commission should create a safe harbor provision for advertisers who rely upon list owners to send their email advertisements. This would provide necessary clarity to the regulated community with regard to the transmission of single emails containing one or more advertisements.

The right to come within the safe harbor’s scope should be extended to any advertiser when it:

1. markets only to a permission-based or “opt-in” email address list;
2. receives a warranty of compliance with the Act and its regulations from its email service provider; and
3. makes an explicit effort to not come within the scope of “sender” (e.g., by prohibiting the use of its name in the “from line;” asserting that its control of the email message shall be limited to its promotional copy material; and agreeing not to determine the email addresses to which email is sent).

Creation of a safe harbor under these conditions will encourage advertisers to make better and more responsible use of email advertising by only delivering their advertisements through permission-based marketing channels. It tends to make reliance upon unscrupulous third party spammers uneconomical because the liability outweighs the modest amounts saved. Consumers would benefit, advertisers would benefit, and the safe harbor would foster growth of email whose “low cost and global reach make it extremely convenient and efficient, and offer unique opportunities for the development and growth of frictionless commerce.”<sup>13</sup>

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<sup>12</sup> 70 Fed. Reg. at 25450.

<sup>13</sup> 15 U.S.C. § 7701(a)(1).

# acknowledge

Federal Trade Commission  
CAN-SPAM Act Rulemaking  
Page 7

## IV. THE COMMISSION SHOULD PERMIT DEFENSES AGAINST DICTIONARY STYLE ATTACKS ON UNSUBSCRIBE PAGES

Hackers or others with malicious intent are able to launch a dictionary or dictionary-style attack on unsubscribe pages in order to erode legitimate email lists and cause injury to list owners. For example, a hacker may write a script to randomly generate characters or words for \*@aol.com email addresses and be reasonably successful at unsubscribing users without their knowledge or approval. Consequently, there is a legitimate business reason to deploy a challenge/response system to defeat a robot programmed to launch such an attack. Challenge/response systems usually ask the unsubscribe requestor to enter in a randomly generated phrase which can be seen, but is created through a graphic image, rather than through text which may be read by a robot.

The Commission should clarify that deployment of such a system by a member of the regulated community would not constitute a violation of Proposed Rule 316.5. As drafted, this provision prohibits the requirement to provide “any information other than the recipient’s electronic mail address and opt-out preferences. . . .” This broad language could reasonably be interpreted to prohibit defenses against hackers, which is presumably not the intent of the Commission in drafting this provision.

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In preparing the Proposed Regs, the Commission has done an exemplary job studying a rapidly developing and changing industry and accurately pinpointing portions of the Act requiring modification. There remain a number of industry practices, however, which have not been addressed by the Proposed Regs and which constitute increasingly material sources of UCE. The Commission should close existing or perceived loopholes through this rulemaking and has the opportunity to do so through further refinements to its proposed definitions of “sender” and “person.” The Commission should also encourage permission-based marketing practices through creation of a responsible safe-harbor provision for advertisers.

Sincerely,

{ Michael R. Geroe  
General Counsel