February 17, 2011

VIA ELECTRONIC FILING

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room H-135 (Annex N)
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Re: Comments to the Preliminary Federal Trade Commission Staff Report, "Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers"

Dear Secretary Clark:

Adknowledge, Inc. is pleased to submit this letter in response to the request for comments published in the Federal Trade Commission's (the "Commission") December 2010 preliminary Staff Report entitled "Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers" (referred to hereafter as the "Staff Report"). We are a privately held, international technology company in the online advertising industry, founded in early 1998 and headquartered in Kansas City, Missouri. Adknowledge helps advertisers reach their audience more effectively through the Internet with proprietary technology, and currently operates the fourth largest Internet-based auction marketplace available to advertisers, located at www.bidsystem.com.

From its founding, Adknowledge's culture has revolved around helping publishers deliver the most relevant advertising experience possible to consumers, without tracking personally identifiable consumer information.

Notwithstanding our consequent support for Commission initiatives to enhance consumer privacy, many of the proposals suggested in the Staff Report would create a burdensome framework for ourselves and consumers, hurting commerce and frustrating the consumer experience online. Some of the Staff Report's proposals are also inconsistent with their stated goals. The Staff Report challenges the regulated community to simplify consumer choices and provide "greater transparency," but proposes a framework which in execution, will require the average consumer to spend more time wading through multiple notices from different affiliate service providers acting on behalf of first-party websites. We do not believe such a framework is necessary or workable, and therefore offer the following seven recommendations in response to specific suggestions and commentary in the Staff Report:

1. Non-PII that cannot ultimately be used to identify an individual consumer should not be regulated;

2. The concept of "commonly accepted practices" should be fleshed out or perfected;

3. Choice options should not frustrate consumer expectation and experience;

4. In some circumstances, "First Party" marketing should not be limited to a principal, but should include affiliates and agents working on behalf of the principal;

5. In the event that non-PII information is regulated, opt-out, rather than opt-in, is the appropriate standard for consent;

6. Regulation of geo-location technology needs to better understand context and define the meaning of "precise"; and

7. Industry self-regulation should be granted more time and opportunity to mature.

## I. NON-PII SHOULD REMAIN UNREGULATED

It is the Commission's role to properly balance and weigh factors such as welfare, economic impact and convenience in regulating online marketing practices. The Staff Report's analytical framework fails to strike the appropriate balance: it is overly broad, bringing within the regulated scope not only data which contains personally identifiable information ("PII") but also non-PII. Justification provided in the Staff Report for regulation of non-PII is observation that it is possible to link together various pieces of disparate non-PII and use them to identify a particular individual. Rather than offering a balanced solution narrowly tailored to minimize the undesired behavior, the proposals offered will introduce disproportionate, unnecessary burdens on consumers and the regulated community, along with economic disruption, as detailed below.[1] In helping the Commission find the appropriate balance, Aknowledge recommends:

- "PII" should be explicitly defined as (i) name, address, telephone number, email address, or social security number, and (ii) those different fragments of non-PII, which, when joined, result in a name, address, telephone number, email address, or social security number.

- Applying the various principles identified in the Staff Report, such as choice, security, access, etc. to non-PII is impractical and unduly burdensome. It is frustrating and inconvenient for the consumer who will be faced with additional requests for approval and information, and is burdensome, expensive and inefficient for the regulated community.

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[1] One narrowly tailored alternative, for example, would be to prohibit the linking together of disparate non-PII in order to identify a particular individual. Such regulation would fall far short of regulating all non-PII as if it were PII.

- Content publishers, such as websites, rely upon many affiliates to conduct business; these include analytics companies, ad networks (for monetization) and customer service providers. The average for-profit website may rely upon as many as 20 different affiliates to operate its site. The Commission should place the onus of compliance on these affiliates. It should not create a cumbersome regime requiring consumers who do not wish to have data tracked, to opt-out of such tracking from hundreds or thousands of different companies.

Adknowledge, for example, does not have a consumer-facing business. While our corporate culture does not permit the tracking of PII, our business operations have no readily available way to reach a consumer in order to ask questions and log responses from a consumer. The nature of the data we collect makes the consumer's affirmative choice self-evident. If a consumer clicks on a commercial ad stating, "Click here for information about Travel Deals to Utah," it is evident that they consent to have the information sent to them. It will likely seem redundant and be frustrating for some to be confronted with additional notices asking for the permission of several entities to record such consent. By way of example, and based on the Commission's proposals, the following different entities may all need to obtain consent from the consumer in the above example:

- Internet service provider(s),
- ad serving companies,
- the ad network serving the ad,
- analytics companies used to analyze the effectiveness of the ad,
- the advertiser itself, and
- any additional intermediaries that the advertiser uses to operate or monetize its site (such as an ad agency representing the advertiser, or other networks, analytics or other service providers).

In short, there are likely multiple independent businesses involved in the display, analysis and fulfillment of an Internet promotion on which a consumer clicks. Many or all of these businesses may track metrics for various legitimate business reasons, but few or none of those metrics could reasonably be considered PII. Requiring the consumer to grant permission to each of these entities would frustrate the consumer experience and cause material, unnecessary disruption to the efficient and relatively frictionless manner in which Internet commerce has developed. It would be arbitrary and capricious to require consumers to coordinate with each of these types of entities in order to use the Internet, and it is unnecessary for them to do so in order to protect consumers' private information.

In considering the economic impact of its proposed framework, the Commission Staff should consider more carefully germane findings by Congress and guidance from the White House. Congress has found that the low cost of electronic mail offers "unique opportunities for

the development and growth of frictionless commerce."[2] Convenience, low cost and other characteristics driving the development of commerce which Congress finds so valuable in commercial email are, broadly, also attributes of many if not most forms of online marketing, as demonstrated by its rapid growth during a period of general economic uncertainty and dislocation. Recently, the White House issued an executive order to federal agencies promoting coordination, simplification and harmonization of industry regulation.[3] Folding non-PII into a regulatory scheme historically and consistently reserved for PII is inconsistent with the letter and spirit of this Executive Order. It abdicates the Commission's obligation to exercise expert judgment and discretion in issuing regulation narrowly tailored to meet compelling interests of the government, the regulated community and the public.

## II. "COMMONLY ACCEPTED PRACTICES" SHOULD BE BASED UPON MARKETPLACE REALITY RATHER THAN ACADEMIC CONJECTURE

The Staff Report's use of the term "commonly accepted practices" is confusing because it does not recognize practices that, in fact, are used in the normal course of business. In particular, third-party marketing is a ubiquitous practice which the Staff Report inexplicably fails to acknowledge as a commonly accepted practice.

A third-party which records non-PII data, i.e., whether a consumer clicks on an Internet advertisement the third-party delivers on behalf of an advertiser, should be considered engaging in a "commonly accepted practice" as used by the Staff Report, for a variety of reasons. First, it is accurate: it is common practice for Internet-based clicks by consumers to be tracked and recorded by third parties. Second, there are no meaningful privacy implications where the identity of the consumer is not known. Third, there may be no practical way for the third-party to offer any consumer choice options, i.e., the third-party may not have the identity of the consumer and not have a technological means to query the consumer. Adknowledge, for example, helps advertisers reach consumers through a large network of publishers. Adknowledge sits in the middle of the market, between the advertiser and the consumer and the publisher. Neither the advertiser nor the publisher know in advance to which consumer a particular advertisement will be displayed. In addition, Adknowedge has no means to associate a consumer's choice-option with the consumer.

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[2] 15 U.S.C. § 7701(a)(1).

[3] See, http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order (Jan. 18, 2011).

## III. CONSUMER EXPECTATIONS SHOULD BE MET AND CHOICE OPTIONS SHOULD NOT FRUSTRATE AND IMPEDE CONSUMER EXPERIENCE

The Commission should look to consumer expectations and consumer experience in determining whether and how to regulate privacy matters in connection with online marketing. With respect to consumer expectations, precedent marking a boundary between acceptable and unacceptable practices already exists in the form of litigation and investigation of outlier, aggressive techniques, e.g., key logging, deep packet inspection and sale of data to third parties. The Commission should limit its regulations to restriction or prohibition of such outlier practices.

The Commission should not restrict behavior that is already relied upon by the online marketing industry and consumers who shop online, simply because such behavior could, if misused, disclose private information. The solution is to merely prohibit the undesired activity; that is, if anything, limit restrictions and prohibitions to the compilation of diverse non-PII data with the intent of identifying particular individuals. To the extent additional principles such as notice and choice should be applied, they should be reserved to circumstances where such heighted security for the consumer is warranted. If a business collects PII and sells it to third parties, it makes sense to ensure the consumer understands their personal information will be sold and shared with third parties; this was a fundamental basis underlying the establishment of privacy policies. However, if a business – such as Adknowledge – is collecting anonymous data when a consumer clicks on an ad served from the Adknowledge network, and is not selling such data to any third-party, it should not be placed in the same regulatory bucket with a business that is collecting and selling PII.

As previously discussed, a regulatory scheme which fails to distinguish between significant and insignificant events, e.g., a spyware application where key logging occurs versus a software program that uses a consumer's IP address to display the current weather, will numb the consumer with a barrage of requests for consent, to the point where the consumer cannot easily distinguish between where consent should be granted and where it should be withheld. The Staff Report observes that privacy policies have become less effective as they have become longer, more complicated and harder to understand. The Commission should not encourage a system in which requests for notice and consent suffer the same fate, by peppering consumers with too many questions and too many requests for consent.

## IV. FIRST PARTY MARKETING SHOULD NOT EXCLUDE THIRD-PARTY AFFILIATES AND AGENTS

There are other areas of this debate where the Commission should be guided by common sense. Where a consumer has subscribed to a service, or opted-in to receive marketing material, the consumer has already exercised his or her choice. If that subscription service is fulfilled by a network of third-party affiliates, the consumer should not be inundated with choice requests from each affiliate. Where an affiliate is providing a requested service on behalf of a principal marketer, the affiliate should be treated as the "first party" marketer since it is merely acting as an agent for its principal. Indeed, if done seamlessly, the consumer may not realize the

fulfillment of the service is coming from an agent rather than the principal. The consumer may close their account, opt-out of further marketing or cancel their subscription with the principal at the consumer's convenience. The effect of such behavior will be passed along by the principal marketer to its various affiliates in an orderly manner and in due course. If, instead, each third-party affiliate sending marketing communications to the consumer must provide choice options to that consumer, the consumer will be burdened not only with the obligation to grant choice in each instance, but also to withdraw it. Where time passes between the consumer's grant of permission and the consumer's decision to withdraw permission to track behavior, the consumer will likely find it impractical – if not practically impossible – to track down each affiliate to whom permission was earlier granted, in order to withdraw the permission. In the intervening time, moreover, the principal's network of agents may have changed, so that even if the consumer could find and notify each affiliate, the undertaking may be futile, as new affiliates join the principal's network and existing affiliates leave the network.

## V. OPT-OUT RATHER THAN OPT-IN IS THE PROPER MEANS OF OBTAINING CONSENT IN NON-SENSITIVE ADVERTISING AND MARKETING CONTEXTS

Debate over PII's role and use, and whether an opt-out or opt-in standard is more appropriate for the average, non-sensitive consumer marketing campaign, was already held during drafting and passage of the CAN-SPAM Act of 2003. The United States Internet-based marketing industry has been on an opt-out standard since that time. To adopt a different standard in the context of consumer privacy will be inconvenient, illogical and inefficient. It will lead to confusion among members of the regulated community, consumers and regulators. Where sensitive financial, health or other information is to be tracked or recorded, opt-in may be the appropriate standard.

## VI. REGULATION AROUND GEO-LOCATION REQUIRES A BETTER UNDERSTANDING OF THE CONTEXT IN WHICH IT IS USED

The Staff Report does not sufficiently describe or consider what constitutes "precise" geo-location information. A definition of "precise" should clearly tether location of a specific device to a specific individual. Adknowledge is among many companies which rely upon IP address information to estimate the general DMA or zip code of an individual device. This does not provide Adknowledge a precise location of a consumer; it generally provides city level location information or, in some instances, neighborhood level location information. Geo-location information collected or disclosed in general, aggregate or anonymous form, such as through an IP address, should not be subject to the same level of regulation as geo-location information which identifies the location of a person within 10 meters of accuracy and in real-time. Given advances in technology and rapid changes in business practices, what one considered "precise" a decade ago may be very different from what one considers "precise" today or a decade from now. If the Commission is determined to regulate in this area, its owes the regulated community more guidance than a vague reference to "precise" location.

## VII. INDUSTRY SELF-REGULATION NEEDS MORE TIME TO MATURE

Significant self-regulatory efforts are underway to protect consumer privacy as online marketing technology evolves. These undertakings need to be provided with more time to develop and become established throughout the marketplace. For example, on January 24, 2011, Google, Inc. unveiled a free downloadable application, in the form of a plug-in to its browser, Chrome, to further protect consumer privacy. According to Google, the application has been downloaded about 80,000 times and is experiencing roughly 10,000 downloads per week.[4] Other providers of Internet web browsers, including Microsoft and Mozilla, are reportedly in various stages of releasing similar applications.[5]

The Commission should not mandate any particular "do-not-track" mechanism. Given the plethora of platforms (e.g., mobile phone, tablet, computer), and the ever growing and changing number of online distribution methods (e.g., email, display, social networking, instant messaging, search) through which consumers may view advertisements, it is likely that there is no single "do-not-track" mechanism that can work. Additional discussion about industry self-regulatory efforts are detailed under separate cover by the Direct Marketing Association ("DMA"), in response to the Staff Report's request for comments. Adknowledge is a member of the DMA, endorses its comments and incorporates them herein by reference.

On behalf of Adknowledge, I thank the Commission and its staff for its interest in and guidance to our industry. I further appreciate the opportunity to present these comments to the Commission, and would be delighted to answer questions in follow-up to our comments.

Sincerely,

Michael R. Geroe,
General Counsel

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[4] See https://chrome.google.com/webstore/detail/hhnjdplhmcnkiecampfdgfjilccfpfoe (visited February 4, 2011).

[5] See, e.g., http://www.clickz.com/clickz/news/1939201/google-offers-privacy-plug-chrome?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+clickz+(ClickZ+-+News).