October 15, 2012

To the Program Committee:

**Re:** **ESPC Position Paper for W3C Workshop: Do Not Track and Beyond**

The Email Sender and Provider Coalition ("ESPC") submits this position paper in connection with the forthcoming W3C workshop entitled "Do Not Track and Beyond," which is scheduled for November 26-27, in Berkeley, California.

The ESPC is a cooperative group of industry leaders working to create solutions to the continued proliferation of spam and the emerging problem of legitimate email deliverability. ESPC's membership provides mail delivery services to over one million clients, from small businesses to large Fortune 500 enterprises. The ESPC's mission is to advocate on behalf of email senders, providers, and other digital marketers operating globally in the online, mobile and social media environments in favor of global laws and self-regulatory efforts that balance consumer protection and business innovation; to educate its membership on current and emerging business and legal developments affecting its membership; and to continue to develop and refine best practices (such as our Information Security Best Practices guidelines for email service providers ("ESPs")) that foster innovation, industry growth, and consumer trust.

The W3C's announcement of the Workshop expressly invites participants from industries that "might respond to a Do Not Track ("DNT") preference or use DNT and related technologies for user transparency and choice beyond online behavioral advertising: including, for example, email marketing, mobile application development and online social networking." As the trade association representing the ESP industry, ESPC is uniquely qualified to represent the views of the email service provider industry as a whole.

The ESPC applauds the work done by the W3C in developing, through a consensus process, standards and specifications for web technologies. Recently, the W3C's Tracking Protection Working Group ("TPWG") has taken on complex issues of public policy; in particular, web tracking. One of the key goals of that effort has been to reach, again, through a consensus process, a common meaning to be attributed to a consumer's Do Not Track request to a user agent. That has proved to be a difficult process, and, as of the date of this writing, it is not complete.

ESPC believes that, ultimately, policymakers should resolve public policy issues. We further believe that the experience of the TPWG has demonstrated the difficulty with applying the W3C's technical expertise and consensus approach to public policy issues. That said, we *do* believe that the W3C provides a unique forum to bring together industry, academics, advocates, and other stakeholders to exchange views, engage in fruitful dialog, and to learn from one another. There is no reason why its activities must be limited to technical standards. Public policy, and, in this case, the important issues surrounding consumer privacy, are good candidates

for healthy and productive dialog in a W3C setting. If the TPWG process has shown anything, it is that the online ecosystem is complex, that there is not a common set of knowledge shared among all stakeholders, that there are a variety of opinions, and that we can all learn from one another. Ultimately, good privacy is good business, and ESPC is eager to learn from other stakeholders how it can, through self-regulation, continue to improve on its' members commitment to consumer privacy. Likewise, we believe that to the extent there may be misperceptions about how our industry operates, we may be able to provide clarity and, thereby, further a productive dialog.

Substantively, the W3C has proposed the following topics for discussion at the workshop. These include:

- Directions for, and input to, the W3C Tracking Protection Working Group's ongoing work on Do Not Track.
- Preliminary implementation experience and impact evaluations of Do Not Track and related approaches.
- Candidates for future W3C standardization on tracking protection in particular, and on user privacy on the Web in general.
- Trends in online privacy issues and potential techniques to address new concerns.

ESPC is unable to comment in detail on the TPWG's DNT standard or implementation experience because it is not yet final, and, as we understand it, key issues remain to be resolved. That said, we recognize that the general framework of the developing standard addresses first parties, service providers, and third parties. In the context of email delivery, our members believe that the advertisers (our members' clients) whose products are services are featured in emails our members cause to be delivered should be considered first parties. We believe that our members should be treated as service providers under the current version of the Tracking Protection and Scope document. As of the date of these comments, there is not a consensus on the definition of "service provider," but we believe that, at its core, the elements necessary to qualify as a service provider should be that the ESP act as an agent for the advertiser, that it silo the data it collects in this capacity so that it cannot be accessed by other parties, that its use of the data it collects is limited to those uses necessary to perform the services for the advertiser, and to those that the advertiser expressly directs, and to a limited set of other uses, such as auditing, reporting, and fraud prevention, akin to the "permitted uses" being debated by the TPWG. We do not believe that any special designation, as a "service provider" or otherwise, of an ESP acting in this capacity is necessary.

On behalf of the ESPC, I thank you for this opportunity to submit this position paper.  The ESPC looks forward to participating in the Workshop.

Sincerely,

D. Reed Freeman, Jr.
Outside Counsel

cc:  ESPC Board of Directors