

## Enforceable Undertaking

This enforceable undertaking (Undertaking) is given by Upside.Digital Pty Ltd (ACN 139 669 248) to the Australian Communications and Media Authority (the ACMA) pursuant to section 38 of the *Spam Act 2003* (Cth)

### 1 Definitions and interpretation

1.1 In this Undertaking:

- a. the **ACMA** means the Australian Communication and Media Authority;
- b. **Advertisers** means any party that has an arrangement with Upside.Digital that results in Upside.Digital sending, or arranging for the sending, of CEMs;
- c. **Arrangement** means any contract, arrangement or understanding, either written or verbal;
- d. **Business Day** means a day that is not a Saturday, Sunday, public holiday or bank holiday in Melbourne or Sydney;
- e. **CEM** means 'commercial electronic message' as that phrase is defined in the Spam Act;
- f. **CEM Campaign** means a CEM with distinct content sent by email to one or more recipient/s (whether or not at the same time);
- g. **Commencement Date** has the meaning effected by clause 2;
- h. **Publishers** means entities that are permitted under an arrangement with Upside.Digital to access, and send or arrange for the sending of CEMs with advertising material sourced from the Upside.Digital network;
- i. **Spam Act** means the *Spam Act 2003* (Cth);
- j. **Undertaking** means this Enforceable Undertaking;
- k. **Upside.Digital** means Upside.Digital Pty Ltd (ACN 139 669 248) of Suite 406, 39 East Esplanade, Manly, NSW, 2095;
- l. **Upside.Digital network** means the platform that Upside.Digital uses to make content for CEM campaigns available to Publishers; and
- m. **Upside.Digital personnel** includes Upside.Digital's employees and any person contracted directly or indirectly to carry out activities for or on behalf of Upside.Digital.

1.2 Word and expressions defined in the Spam Act have the same meaning in this Undertaking, unless otherwise specified.

1.3 A reference to legislation includes any modification or re-enactment of it, and any regulations made under it.

### 2. Term of the Undertaking

2.1 This Undertaking commences when it has been executed by Upside.Digital, and so executed, it has been accepted by the ACMA and written notification of the acceptance has been given to Upside.Digital.

- 2.2 This undertaking continues for a period of 24 months from the Commencement Date or until it is withdrawn or varied by Upside.Digital, with the consent of the ACMA, pursuant to section 38 of the Spam Act, whichever is earlier.

### 3 Background

- 3.1 Upside.Digital is incorporated in New South Wales and carries on a business in Australia as a provider of digital marketing services.

#### *The ACMA's Investigation*

- 3.2 On 13 May 2016, the ACMA commenced an investigation into Upside.Digital for alleged contraventions of the Spam Act 2003 following on from complaints received in relation to one of Upside.Digital Publishers; J&M Mainwaring. The investigation was to determine:
- a) whether Upside.Digital had contravened section 16 of the Spam Act, by sending, or causing to be sent, CEMs that were unsolicited;
  - b) whether Upside.Digital had contravened section 17 of the Spam Act, by sending, or causing to be sent, CEMs that did not clearly and accurately identify the individual or organisation that authorised the sending of the message, and/or did not include accurate information about how the recipient could readily contact that individual or organisation;
  - c) whether Upside.Digital has contravened section 18 of the Spam Act, by sending, or causing to be sent, CEMs that did not include an unsubscribe message presented in a clear and conspicuous manner; and
  - d) whether Upside.Digital has contravened any other provision of the Spam Act.
- 3.3 On 1 March 2017, the ACMA presented its preliminary view. That view was as follows:
- a) CEMs **"sent" by Upside. Digital** between 15 April and 13 May 2016 (inclusive):
    - (i) CEMs may have been sent without clearly and accurately identifying the *authoriser* (as defined at section 8 of the Spam Act) of the message in contravention of subsection 17(1)(a) of the Spam Act;
    - (ii) CEMs may have been sent without including accurate information about how the recipient can readily contact the authoriser of the message in contravention of subsection 17(1)(b) of the Spam Act;
  - b) CEMs **"caused" to be sent by Upside.Digital** from their publisher J & M Mainwaring between 11 March 2015 and 20 September 2015:
    - (i) CEMs may have been sent without clearly and accurately identifying the *authoriser* (as defined at section 8 of the Spam Act) of the message in contravention of subsection 17(1)(a) of the Spam Act;
    - (ii) CEMs may have been sent without including accurate information about how the recipient can readily contact the authoriser of the message in contravention of subsection 17(1)(b) of the Spam Act;

### 4 Acknowledgement of the ACMA's concerns

- 4.1 Upside.Digital acknowledges that, on the basis of the documents and information obtained during the course of its investigation, the ACMA is of the view that Upside.Digital has contravened subsection 16(1) and paragraphs 17(1)(a) and 17(1)(b) of the Spam Act in relation to CEMs it sent, or caused to be sent.

4.2 In response to the ACMA's concerns regarding compliance with the Spam Act, Upside.Digital offers this Undertaking to the ACMA.

## 5. Undertaking

5.1 Under section 38 of the Spam Act, Upside.Digital gives the following Undertaking to ensure future compliance with the Spam Act for all CEMs that are sent or caused to be sent by Upside.Digital.

## 6. Independent Consultant

6.1 Upside.Digital undertakes to appoint an independent consultant (**Independent Consultant**) acceptable to the ACMA. The Independent Consultant will be engaged to review the current e-marketing activities (including any procedures, policies and systems relating to those activities) of Upside.Digital with regard to its compliance with the requirements of the Spam Act that:

- a) all CEMs sent, or caused to be sent, by Upside.Digital are sent with the consent of the recipient and that Upside.Digital is able to provide evidence of the consent to the ACMA if required;
- b) all CEMs sent, or caused to be sent, by Upside.Digital contain the information required by subsection 17(1)(a) of the Spam Act; and
- c) all CEMs sent, or caused to be sent, by Upside.Digital contain the information required by subsection 17(1)(b) of the Spam Act

(together, **Spam Act compliance**), and to produce a report (**Report**) identifying any deficiencies and making recommendations as to:

- d) improvements to policies and procedures to ensure Spam Act compliance, including improvements to Arrangements with Advertisers and Publishers;
- e) training for Upside.Digital personnel;
- f) ongoing monitoring of Spam Act compliance measures; and
- g) procedures for quality assurance and implementation where changes are made to CEM Campaign procedures or Spam Act compliance measures during the term of the Enforceable Undertaking,

(each, a **Recommendation**).

6.2 Upside.Digital will notify the ACMA within 30 Business Days after the Commencement Date of the proposed Independent Consultant, for the ACMA's approval. If necessary, Upside.Digital will repeat this process until it has the ACMA's approval.

6.3 Upside.Digital will appoint the Independent Consultant within 10 Business Days after the ACMA has given its approval.

6.4 The Independent Consultant will provide the final Report to Upside.Digital, and at the same time to the ACMA, within 2 months of their appointment.

6.5 Subject to the ACMA's agreement, Upside.Digital may remove the Independent Consultant at any time and replace the Independent Consultant with a new Independent Consultant approved by the ACMA.

## **7 Implementation Plan**

- 7.1 Within 1 month after receiving the Report, Upside.Digital will produce an implementation plan (**Implementation Plan**) setting out:
- a) the steps Upside.Digital has taken, or will take, to implement all Recommendations made by the Independent Consultant in the Report, including timeframes, unless the ACMA specifically agrees that any Recommendation need not be implemented; and
  - b) any other matters Upside.Digital sees fit.
- 7.2 The Implementation Plan should be:
- a) inclusive of implementation of all Recommendations, or to rectification of any deficiencies, identified in the Report;
  - b) limited to measures directly relating to compliance with the Spam Act by Upside.Digital;
  - c) practicable and reasonable having regard to the legal status and responsibilities of Upside.Digital; and
  - d) practicable and reasonable having regard to the nature and volume of CEMs handled and sent, or caused to be sent, by Upside.Digital, and the manner in which CEMs are handled by Upside.Digital's systems.
- 7.3 The Independent Consultant must review the Implementation Plan to determine whether it addresses the Recommendations in the Report (having regard to any comments made by the ACMA) and formally approve the Implementation Plan within 1 month of its development. A copy of this formal approval will be promptly provided to the ACMA by Upside.Digital.
- 7.4 Prior to the formal approval, the Independent Consultant may be requested to review, and provide interim recommendations on the Implementation Plan to Upside.Digital. Upside.Digital will seek to address these interim recommendations and update the Implementation Plan prior to the formal review and approval by the Independent Consultant.
- 7.5 Upside.Digital will comply with the Implementation Plan, in the form that has formal approval for the term of this Undertaking and carry out each of the steps to be performed by it under that Implementation Plan in accordance with the timeframes specified in the plan. Upside.Digital will report to the ACMA on Upside.Digital's implementation of the Implementation Plan on a quarterly basis, beginning three months from formal approval of the Implementation Plan.

## **8 Audit and reporting**

- 8.1 The Independent Consultant must determine an appropriate audit program (**Audit Program**) which will allow Upside.Digital to detect Spam Act compliance issues. The Audit Program (and associated reporting templates) must be provided to Upside.Digital and to the ACMA at the same time as the Report and should include the following measures:

- a) a program for Upside.Digital to conduct random audits of CEM Campaigns sent, or caused to be sent, by Upside.Digital during a 12 month period to assess compliance with sections 16 and 17 of the Spam Act;
  - b) documentation of the approach, sample size methodology, mechanisms, ownership and frequency of controls testing (which frequency may reduce if there is a consistent pattern of compliant CEM Campaigns);
  - c) a process for communicating results and escalating exceptions within Upside.Digital;
  - d) details of the frequency and mode of reporting audit results to the ACMA; and
  - e) documented templates for reporting audit results to the ACMA.
- 8.2 Audits in accordance with the Audit Program are to commence within 2 months of the Independent Consultant providing its recommendations for the Audit Program.
- 8.3 During the term of the Undertaking, Upside.Digital will carry out the Audit Program with the frequency determined under the Audit Program.

## **9 Arrangements with Advertisers**

- 9.1 Within 30 days after the commencement date, Upside.Digital will update its written arrangements with Advertisers to expressly refer to Spam Act compliance obligations, and set out that all submitted advertising material must clearly and accurately identify the organisation or person that authorised the sending of the message, and contain accurate information on how the recipient can readily contact that individual or organisation.
- 9.2 Within 60 days of the Commencement date, all new and existing Advertisers will be asked to agree to the new written arrangements that have been revised in accordance with clause 9.1.
- 9.3 Unless doing so would contravene a contractual requirement that existed before the Commencement Date, from 90 days of the Commencement Date, Upside.Digital undertakes to cease sending, or causing to be sent, any CEMs where the relevant Advertiser has not signed the new Advertiser Terms and Conditions addressing the matters referred to in clause 9.1.

## **10. Publisher Arrangements**

- 10.1 Within 30 days after the Commencement Date, Upside.Digital will update its written Arrangements with Publishers to:
- a) clearly explain the requirements of section 16 of the Spam Act and include provisions for Upside.Digital to obtain evidence of the consent relied upon by the Publisher to send CEMs to recipients prior to entering into any Arrangement with the Publisher;
  - b) clearly, and in detail, explain the requirements of subsections 17(1)(a) and 17(1)(b) of the Spam Act; and
  - c) contain terms that enable Upside.Digital to audit the CEM Campaigns that it causes its Publishers to send, in line with the Independent Consultants Report.
- 10.2 Within 60 Days of the Commencement Date, all new and existing Publishers utilising the Upside.Digital network will be asked to agree to the new written arrangements that have been revised in accordance with clause 10.1.

- 10.3 Unless doing so would contravene a contractual requirement that existed before the Commencement Date, from 90 days of the Commencement Date, Upside.Digital undertakes to revoke access to the Upside Digital network for any Publisher that has not agreed to the written Arrangements that have been revised in accordance with clause 10.1.

## **11. Training for Upside.Digital staff**

- 11.1 Within 45 days after the Independent Consultant provides its formal approval of the Implementation Plan, Upside.Digital will finalise a training program in relation to its e-marketing activities and the e-marketing activities that it causes (**Training Program**). The Training Program must be consistent with the Implementation Program.
- 11.2 The Training Program must include:
- a) an explanation of the Spam Act and the obligations under sections 16, 17 and 18 of the Spam Act;
  - b) information about how Upside.Digital complies, or propose to comply, with Spam Act obligations for the CEMs that it sends and causes to be sent;
  - c) information about the role of the ACMA and point to relevant information on the ACMA website; and
  - d) matters recommended by the Independent Consultant for inclusion in the Training Program, unless the ACMA specifically agrees that any recommendation need not be included.
- 11.3 The Independent Consultant must review the Training Program before it is established to determine whether its design and content address the requirements of the Spam Act (having regard to Recommendations in the Report and any comments made by the ACMA), and provide written advice as to whether the Training Program is appropriate. A copy of this written advice must be provided to the ACMA by Upside.Digital within 5 Business Days of receipt. Unless otherwise agreed with the ACMA, the Training Program must not be finalised until the Independent Consultant agrees it is adequate.
- 11.4 The Training Program must be provided to Upside.Digital personnel within 30 days of finalisation or of commencement as Upside.Digital personnel, whichever is the later.

## **12. General**

- 12.1 For the duration of the term of this Undertaking, Upside.Digital undertakes that as part of the approval process prior to setting a CEM Campaign live, an Upside.Digital member of staff will check to see if the CEM contains information to clearly and accurately identify the organisation that authorised the sending of the message, and how the recipient can contact that individual or organisation. Any advertising material that does not comply will be rejected to the advertiser or agency booking the campaign.
- 12.2 Within 15 days of the Commencement Date, and thereafter for the duration of Undertaking, Upside.Digital undertakes to require Publishers to agree to not change or modify the approved content of CEM campaigns, as provided to the Publisher through the Upside.Digital network, before the Publisher is provided with access to that CEM content.

## **13. Acknowledgment of Upside.Digital Pty Ltd**

- 13.1 Upside.Digital acknowledges that:


- a. the ACMA may make this Undertaking available for public inspection; and
- b. acceptance by the ACMA of this Undertaking does not derogate from any rights and remedies available to any other person arising from the conduct described in the Undertaking.

***Date given by Upside Digital Pty Limited***

Name and position of Upside Digital representative authorised to give this Undertaking

Lee Bush

Signature of Upside Digital representative authorised to give this Undertaking



Witness



***The Undertaking offered by Upside.Digital Pty Limited is accepted by the Australian Communications and Media Authority pursuant to section 38 of the Spam Act 2003 (Cth) by its delegate***

***Date Accepted by ACMA***

Name and position of ACMA delegate

Jeremy Denton - A/g Executive Manager  
3 JULY 2017

Signature of ACMA delegate



Witness



