Deborah Zuccarini
President

Experian Marketing Solutions
955 American Lane
Schaumburg, IL 60173
(224) 698-8409

September 13, 2004

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room H159
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

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

Dear Mr. Secretary:

Experian Marketing Solutions is pleased to have the opportunity to offer comments on the Commission's implementation of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("the CAN-SPAM Act") pursuant to the Commission's Notice of Proposed Rulemaking (NPR), issued on August 13, 2004. Definition, Implementation, and Reporting Requirements Under the CAN-SPAM Act, 69 Fed. Reg. at 50,991.

Experian, along with its affiliates, is a global leader in providing information services solutions to consumers and its client organizations. We have 13,000 employees worldwide who support clients in more than 60 countries. Our annual sales exceed $2.2 billion. We do business with more than 40,000 clients every day, across a range of industries as diverse as financial services, telecommunications, health care, insurance, retail and catalog, automotive, manufacturing, leisure, utilities, property, e-commerce and government. Experian helps organizations find, develop and manage profitable customer relationships by providing them with information, decision-making solutions and processing services, including e-mail deployment services. In addition to providing marketing solutions, Experian and its predecessor companies have provided credit reporting services for more than 100 years; our consumer credit reporting business, in fact, provides hundreds of millions of credit reports to lenders annually, thereby

contributing significantly to the streamlined credit system that exists in the United States today. We also work tirelessly to provide fraud and identity theft prevention services, scoring and analytic tools, and risk management consulting. We are pleased to be able to comment on this proposed rule and we are anxious to be a resource to the Commission as it continues its work on this very important matter.

I. Reasonable Sender

Section 3(2)(C) of the CAN-SPAM Act requires that the FTC issue regulations "defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message." 15 U.S.C. 7702(2)(C). Experian believes that "primary purpose" is the pivotal phrase in the Act. It is contained in the definition of "commercial electronic mail message" as well as the definition of "transactional or relationship message." 15 U.S.C. 7702(2) and 7702(17). It is, therefore, the most critical component of the Act, since the ultimate definition will dictate what email messages are and are not covered by the other provisions of the Act and, in the case of a transactional or relationship message, the scope of the exceptions to coverage.

Primary Purpose

As discussed in our comments submitted earlier on the ANPR, Experian continues to believe that it is imperative that the Commission recognize that "primary purpose" under the CAN-SPAM Act requires a fundamentally different analysis than the FTC Act Section 5(a) analysis applied in the context of advertising as proposed in the NPR. Particularly, we strongly believe that primary purpose should be evaluated based upon the perspective, or purpose, of a "reasonable sender," rather than the interpretation of the recipient. As articulated in our ANPR comments, we believe that the described "but for" test is consistent with the statute and what Congress originally intended. Unfortunately, the Commission has chosen, in this NPR, to propose a rule that rejects any definition of "primary purpose" that is based on the sender's intent, noting that the CAN-SPAM Act "refers to the primary purpose of the message, not of the sender," and then concluding that, "while one way to determine a message's purpose could be to assess the sender's intent, a more appropriate way is to look at the message from the recipient's perspective." 69 Fed. Reg. at 50,098. Respectfully, the Commission does not indicate where it finds the legal authority to choose a "more appropriate way" than that which Congress provided, and the distinction it seeks to make between the purpose of the message and the purpose of the sender is not articulated.

It is critically important that the meaning of "primary purpose" and its application to us, and to companies like ours, must be absolutely clear so that we can be confident that we are unambiguously in compliance with the law and the regulations governing our business. Experian, and others in our industry, have a tremendous stake in combating the proliferation of spam while also assuring the continued viability of an extremely valuable medium of communications to consumers and businesses alike. It is our position that the Commission should be assisting business with compliance requirements, rather than the proposed rulemaking which seemingly subjects those compliance requirements to biased email recipients.

For example, under section 7702(2)(B), the compliance obligations that attach to a commercial email message, do not cover a "transactional or relationship" message, which is defined in section 7702(17) as a message, the "primary purpose" of which is to allow companies "to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into" or to provide information related to an ongoing commercial relationship. It is essential to Experian and other companies, that the Commission's rule on primary purpose preserve the transactional or relationship exception rather than erode the impact of the exception as the proposed rule would. As the NPR itself notes, Senator Ron Wyden (D-OR) in his Senate Floor remarks stated that Congress' goal in passing the Act was "not to discourage legitimate online communications between businesses and their customers." 69 Fed. Reg. at 50,096 fn. 40.

A. The Proposed Rule is Contrary to Legislative Intent

Nowhere in the statute does the Congress even inferentially suggest that the "perspective of the recipient," or the email's "effect" on the recipient, will be the controlling factor. "[P]rimary purpose" is all that the statute requires, and the Commission should not direct our compliance requirements in an alternative fashion. Companies concerned about their potential non-compliance exposure, and the consequences of the Commission's proposed rule might, in fact, be forced to act in a way that would defeat the goal of the statute. In the face of this proposed rule, senders may well choose to send two separate emails to recipients, one exclusively commercial and the other exclusively transactional, thereby further clogging the recipient's in-box, a result Congress clearly did not intend. Or in the case of traditionally sent "dual purpose" messages, senders may reconsider including any commercial content in a transactional message, thus eliminating potential commercial success and perhaps negatively impacting the U.S. economy.

On page 50,094 of the NPR, the Commission refers to the criteria used to determine the primary purpose of an email message, "[a]ll three sets of criteria are based on a single fundamental principle: determining the "primary purpose" of an email message *must focus* on what the message's recipient would reasonably interpret the primary purpose to be" (emphasis added). Like other references in the rule to the recipient's perspective as the sole test of "primary purpose," this second statement is not accompanied by a description of legal authority for the conclusion that such a message "must focus" on the recipient's perspective. The only reference to a legal precedent for this view appears on page 50,098 in footnote 69, and attempts to justify the Commission's position on what the Commission believes is necessary to prove a violation of section 5 of the FTC Act. However, the plain language of the statute does not direct the Commission to interpret "primary purpose" in the context of what is necessary to enforce section 5 of the FTC Act. Indeed, if Congress had actually intended for the Commission, as it has in previous statutes, to interpret this critical phrase "consistent with the criteria used in enforcement of section 5," it clearly would have said so, as it did expressly with regard to deceptive subject headings. 15 U.S.C. 7704(a)(2). Yet, the Commission has chosen to make just such an interpretation.

Further along in its discussion on page 50,098 of the NPR, the Commission explains its decision to "decline[], at this time," to consider the sender's intent by referring to the analytical approach it historically takes with respect to what constitutes

"advertising," presumably using the "commercial advertisement or promotion" language in 15 U.S.C. 7702(2)(A) as an analog. Once again, though, the NPR does not detail a legal authority for this position, in either the statute or the legislative history, which would justify this approach. While we believe it is fair for the Commission to use its historic analysis of commercial advertising to determine what constitutes advertising in an email, its focus on "primary purpose" is misplaced, since, again on page 50,098, the NPR itself applies to the email "message," not to any "advertisement or promotion" it may contain.

B. The Proposed Rule is Contrary to Plain Meaning and Precedent

The American Heritage Dictionary's 4th edition primary definition of "message" is "[a] usually short communication transmitted by words, signals, or other means from one person . . . to another." The same source defines communication as "[t]he exchange of thoughts, messages, or information, as by speech, signals, writing, or behavior." It is clear from these two definitions that the "thoughts, messages, or information" being conveyed in a message are those of the sender—and not of the recipient.

This interpretation of "purpose" as the functional equivalent of "intent" is reinforced by numerous United States Supreme Court cases equating a showing of, for example, discriminatory "purpose" with a showing of discriminatory "intent" *See,* e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265 (1977). In such circumstances, the Supreme Court has consistently equated the two terms and required the examination of all relevant evidence of intent or purpose, not just the "effects," or the "impact" of the action, Id., at 266, and "impact alone is not determinative" in proving "purpose" or "intent." Id. In sum, prevailing law, which appears to have been rejected by the Commission in this proposed rule, holds that "*purpose* may often be established from the totality of the relevant facts," including the perspective of the recipient, but also including other available evidence of the sender's intent or purpose, as well. *See* Washington v. Davis, 426 U.S. 229 (1976) (emphasis added).

Interpretations of analogous statutes also appear to counsel in favor of the opposite conclusion, as we argued previously. For example, Section 5 of the Voting Rights Act requires pre-clearance of changes in voting procedures to make sure that any change "does not have the *purpose* and will not have the *effect* of denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973 (emphasis added). In that context, discriminatory "effect" is judged without regard to the intent of the jurisdiction proposing the change, but a showing of discriminatory "purpose" requires an analysis of the intent of the jurisdiction making the change. *See,* e.g., Reno v. Bossier Parish School Board, 528 U.S. 320, 328 (2000).

We contend that the term, "primary purpose," was created by the Congress to distinguish this statute from those where violations can be shown by either intent or effect. See, e.g., 7 U.S.C. 192(d) (prohibiting the sale of any article "for the *purpose* or with the *effect* of manipulating or controlling prices" in the meatpacking industry) (emphasis added); 12 U.S.C. 1467a(c)(1)(A) (barring savings and loan holding companies from engaging in any activity on behalf of a savings association subsidiary "for the *purpose* or with the *effect* of evading any law or regulation applicable to such

savings association)(emphasis added); 47 U.S.C. 541(b)(3)(B)(1994 ed., Supp. III) (prohibiting cable franchising authorities from imposing any requirement that "has . . . the *purpose* or *effect* of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof)(emphasis added).

It is our view that, since compliance with the Act lies on the shoulders of the sender, the standards applicable to the sender's "primary purpose" should, logically, also lie in the mind and motivation of a "reasonable sender" rather than the recipient. The word, "purpose," is inescapably tied to "intent," and the term is inescapably linked to the decision-making process of the sender, as opposed to that of the recipient or some other third party. To determine otherwise is seemingly counterintuitive and outside the clear interpretation of the Act. Respectfully, we do not believe the Commission has the legal authority to change a "purpose" or "intent" test enacted by the Congress into a wholly different "effects" test, simply by issuing a regulatory fiat.

Experian believes this view is supported by the weight of responsibility placed upon the sender throughout the CAN-SPAM Act, and contained in section 7704 in particular. 15 U.S.C. 7704. For example, section 7704(a)(1) subjects the sender, or any "person who initiates" a commercial email message, to liability if that person improperly "initiate[s] the transmission" of a commercial email message. Similarly, subsections 7704(a)(2), (a)(3), (a)(4)(A)(i) and (a)(5) all link the sender to liability for improperly initiating a commercial email. The same is also true of sections 7704(b)(1) and 7704(d). Similarly, the term "primary purpose" modifies "electronic mail message" in the statute, which, in turn, is under the exclusive control of the sender.

The Commission's proposed language would ignore the sender's perspective entirely, a view that, as we have stated, we believe is unsupported by both the Act itself and by current law. We therefore urge the Commission to reconsider its current analysis and revisit its conclusions with respect to this portion of its proposal, with a view to reconsidering the "but for" test outlined in our first letter and by providing, at a minimum, that the "totality of the [relevant] circumstances," rather than the interpretation of the recipient alone, should determine what is and what is not the message's "primary purpose." Under such an analysis, if, after considering the totality of the relevant circumstances, an email message would not have been sent, "but for" its secondary, commercial content (such as a trade association newsletter, bill, or reservation/purchase confirmation that carries with it commercial content), then we believe that the email should be classified as a "commercial" email under this Act. If, on the other hand, the email, such as a bill or accounting statement, would be sent notwithstanding its commercial content, then its primary purpose simply cannot be regarded as commercial. Consistent with Congressional intent, commercial advertisements or promotions that are "incidental" to the primary purpose of the email should not be allowed to transform an email message, the primary purpose of which is non-commercial, into a commercial message.

II. Assessment of the Commission's Proposed Rule

Should the Commission reject Experian's strong recommendation regarding the "reasonable sender" approach as discussed above, Experian also submits the following with respect to the Commission's proposal to divide potential commercial emails into three categories: 1) emails that contain only content that advertises or promotes a commercial product or service, as required by 15 U.S.C. 7702(2)(a); 2) so-called "dual purpose," emails that contain both commercial and either "transactional or relationship" messages, as required by 15 U.S.C. 7702(2)(b); and 3) "dual purpose" emails that contain both commercial and non-transactional or relationship content.

Experian will address the criteria for the evaluation of the second and third categories, both of which apply two distinct tests in order to decide whether an email is "commercial" and thereby subject to the obligations of the CAN-SPAM Act. Under the Commission's proposed language for the second category of emails, the message will be deemed to be commercial if either "the recipient reasonably interpreting the subject line" of the message "would likely conclude" that the message contains advertising or promotional material ("Subject Line Test"), or the message's transactional or relationship language does not appear "at or near the beginning" of the message ("Message Test"). Fed. Reg. 69 at 50,094. The third category of emails is subject to the same Subject Line Test as the second category. However, the third category adopts a broader analysis for the second test ("Message Body Test") which includes factors "derive[d] from the Commission's traditional analysis of advertising under section 5 of the FTC Act." Fed. Reg. 69 at 50,096.

A. Subject Line Test

We fully recognize and share the concerns the Commission has about deceptive subject headings, and about the strength of the materiality requirement that the statute puts in place before deception, pursuant to 15 U.S.C. 7704(a)(2), can be established. However, we do not believe that the Subject Line Test is workable, as currently constructed. There are simply too many ambiguities.

On page 50,095 the Commission assumes that, when sending what they believe to be commercial emails, "bona fide" email senders are likely to "highlight that fact" in their subject lines, and that such a "highlight" is enough to qualify the email's "primary purpose" as commercial. But what does "highlight" mean and how can a company be reliably confident, in advance, that it is complying with the law? For example, does an email message "highlight" a commercial purpose if the subject line merely mentions commercial content? It would seem so. For example, would an email be adjudged "commercial" if it notes the expiration of a warranty while also adding that an extension can be obtained if desired? Does it matter what the order of the listed subjects on the subject line is? The NPR's explanations are limited and leave significant room for error and recipient-subjective discrepancies.

On page 50,094, the explanation tracks the actual language of the proposed rule (sections 316.3(a)(2)(i) and 316.3(a)(3)(i)) when it states that an email will qualify as commercial if "a recipient reasonably interpreting the subject line of the message would likely conclude that the message advertises or promotes a product or service[.]" Coverage does not appear to hinge, as we believe it should, on whether the recipient would reasonably conclude that the "primary purpose" of the message is to advertise or promote

a product or service, but, instead, coverage under the Subject Line Test is determined by what is in effect the "primary purpose" of the subject line. In other words, the explanation of the Commission's proposed rule, as well as the actual language of the proposed rule itself, appears to broaden the "primary purpose" test articulated by Congress, so that the mere mention of a commercial purpose in the subject line may well be sufficient to obligate the inclusion of all commercial compliance requirements under 15 U.S.C. 7704(a).

As previously noted, Congress clearly anticipated that businesses would be able to include commercial material in their transactional or relationship messages without becoming subject, among other things, to a mandatory opt-out, a point the Commission concedes on page 50,096. However, it appears to us, from the Commission's own explanation of its proposed rule, that the proposed rule could also be interpreted to mean that virtually any expression of commercial purpose in the subject line can be interpreted by a reasonable recipient as the "primary purpose" of the entire email. In footnote 37, for example, the NPR states that its discussion "is not intended to require that every email message with any commercial content must use a subject line that refers to the message's commercial content," (emphasis added) but it does not give us any sense for when, if at all, the inclusion of a commercial reference in the subject line will not lead to the "likely" conclusion that the primary purpose is commercial.

Consistent with Congressional intent, the Commission should preserve the ability of companies to convey transaction-related and account-related information via dual purpose email rather than creating a mechanism by which consumers decide that transaction-related information really is promotional based merely on the subject line, irrespective of the content of the email message. We believe that it is in the best interest of the consumer for emails to be able to accurately reflect their content in the subject line, even if the commercial content is limited, without necessarily becoming subject to the obligations of the Act, as the Congress intended.

The Subject Line Test alone, as currently described in this NPR, is simply too vague to be of any reliable use. The subject line alone is not always a reliable indicator of the purpose of an email because of its limited size and vulnerability to truncation by Internet Service Providers (ISPs) or email hosts. Experian and similar companies send many transactional or relationship content messages. Under the Subject Line Test any dual purpose reflected in the subject line of such message would seem to deem the message commercial. As such, it cannot be overstated that compliance obligations must be clear and unambiguous. Companies devote enormous resources to complying with government regulations and must be able to confidently dispatch what they sincerely and reasonably believe to be dual purpose emails in which the commercial motivation is not the "primary purpose." The Commission has proposed to view "primary purpose" from the perspective of the recipient; therefore it is incumbent on the Commission to provide senders with reliable compliance guidelines by which they can avoid the risk of unintentional or accidental violation of the Act. As currently written, this proposal fails to fulfill that obligation.

Additionally, the Subject Line Test raises questions about whether the proposed rule violates the explicit limitation under 15 U.S.C. 7711(b) on the Commission's authority "to establish a requirement pursuant to 15 U.S.C. 7704(a)(5)(A) to include any

specific words, characters, marks, or labels in a commercial electronic mail message, or to include the identification required by section 7704(a)(5)(A) in any particular part of such a mail message (such as the subject line or body)." In that section 7704(a)(5)(A) is the requirement for a commercial email message to include "clear and conspicuous identification that the message is an advertisement or solicitation," we are concerned that the Subject Line Test as proposed in the NPR is precisely the mandate which Congress intended to prevent.

B. Message Test

In its analysis of proposed section 316.3(a)(2)(ii), the Commission concludes that if a recipient reasonably interpreting the subject line "would not likely conclude" that the message advertises or promotes a product or service, it then becomes necessary to use the Message Test in order to determine whether the primary purpose of the entire email is commercial. This second test involves where the commercial content is positioned in the text of the message, and if it appears "at or near" the beginning of the message, ahead of the transactional or relationship portion of the message, then it may be deemed to be commercial. 69 Fed. Reg. 50,096. We believe this aspect of the analysis of proposed section 316.3(a)(2) is potentially workable, but certainly not when used in the disjunctive with subsection (a)(2)(i).

However, it is important to note that the phrase "at or near" the beginning of the message will also require additional clarification. In many cases, sponsored email advertisements come in the "header" of the message, in order to gain the maximum exposure. These image advertisements are usually less than 70 pixels in height, or less than three lines of text. It is unclear, from the Commission's explanation, whether these sponsored advertisements would enable transactional or relationship content to fall below the advertisement, and yet, still be a transactional or relationship message. As mentioned earlier, many transactional or relationship senders are now using enhanced techniques to create incentives for recipients to open and read their messaging, and special-offer advertisements are one such way to accomplish this goal.

Alternative Proposals

We respectfully recommend that the Commission consider several alternatives to the proposed interpretation of sections 316.3(a)(2) and 316.3(a)(3).

First. The Commission might consider changing "or" at the end of sections 316.3(a)(2)(i) and 316.3(a)(3)(i) to "and," thereby lessening the uncertainty of the subject line criteria and yet allowing the consumer to receive the transactional or relationship message and then ignore any commercial content that may slightly precede or follow. This option achieves Congress's goal, which was to provide consumers with a mandatory opt-out for purely commercial emails as well as those with a primary commercial purpose, yet it also allows, again as Congress intended, for transactional or relationship messages to include commercial content without triggering the mandatory opt-out requirement. It also has the ancillary benefit of making it safe for companies to engage in "full disclosure" in the subject line of transactional or relationship emails. Although the impact of this change is less certain with respect to messages containing both commercial and non transactional relationship content, it will allow greater certainty once the

Commission clarifies the definitions of "transactional or relationship message" and "other" non transactional or relationship content.

Second. We propose a second alternative to section 316.3(a)(2) that we believe is fairest for all parties involved. It requires a shift of the presumption now contained in section 316.3(a)(2) so that a dual-purpose email will be considered to be a transactional or relationship message if, based on the subject line, 1) the recipient reasonably interpreting the subject line would likely conclude that the message relates to a transaction the recipient agreed to enter into with the sender, or a product or service the recipient purchased from the sender, or any other ongoing relationship the recipient has with the sender and 2) the transactional and relationship message appears at or near the beginning of the message. Likewise, under section 316.3(a)(3) the presumption would shift to the "other" noncommercial content. This option has the benefit of embracing the perspective of the recipient, as the Commission prefers, while also presuming that an email message does not have a primary commercial purpose if the recipient's reasonable impression is that its primary subject is a transactional or relationship purpose and the transactional or relationship content is at or near the beginning of a message. The recipient can then simply ignore or delete any commercial content that may slightly precede or follow. The underlying goal of the CAN-SPAM Act, that of protecting the unsuspecting consumer from unsolicited commercial emails, is thereby preserved.

Third. We propose a third alternative to section 316.3(a)(2), the application of the "net impression" test as presented in the Discussion of the Proposed Rule. In its treatment of section 316.3(a)(3)(ii), the Commission draws on its traditional analysis of advertising under section 5 of the FTC Act to use such factors as "the placement of content that advertises or promotes a product or service at 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" in order to evaluate the net impression of the message. The discussion explains on page 50,097 that much like the analysis applied to advertising which evaluates "the entire document," the Commission will evaluate the body of an email message "taken as a whole."

Experian finds the Commission's treatment of this third category of messages preferable to the treatment of email with commercial and transactional or relationship content because the standard is broader. However, there is no particular weight given to any of these factors so that, once again, it becomes difficult for businesses to determine, in advance, what their compliance exposure is. We suggest that the last two elements in this list of factors be revised to read as follows: "the content that advertises or promotes a product or service is at or near the beginning of the body of the message, is the majority of the content, and is highlighted in a color, graphics, type size, or style that first draws the recipient's attention."

With respect to the third category of email set forth under section 316.3(a)(3), a message that contains commercial content as well as "other content" not pertaining to transactional or relationship material, does not seem to have the same protections as messages with commercial and transactional or relationship content despite the Commission's similar treatment under the proposed rule. However, because of the uncertainty surrounding the definition of "transactional or relationship message" and the absence of any explanation of "content that is neither commercial nor transactional or

relationship," it is unclear whether emails in the third category will be provided with the same flexibility as to subject lines reflected in the legislative history as emails containing transactional or relationship content. As the NPR notes on page 50,098, unlike transactional or relationship content, Congress did not provide any special protections or treatment for messages that are not transactional or relationship. We urge the Commission to provide guidance on this point.

Additionally, Experian believes the Commission should clarify precisely what material falls under "other content." As drafted, the proposed rule fails to provide any guidance on whether, for example, newsletters, editorial, or educational materials or new product or service announcements are considered "other content" or transactional or relationship material. We urge the Commission to consider common industry practices related to editorial content, including those with sponsorships attached. Often, the subject lines of messages containing editorial content, much like subject lines for some transactional or relationship messages, include a mention of an incentive from a sponsor in an effort to entice recipients to open and read the editorial message. Experian believes the Commission should provide similar treatment for the second category of messages containing commercial and transactional or relationship content and the third category of messages containing commercial and non transactional or relationship content. Combining the two categories would ensure similar content is subject to similar treatment under the rule.

Ambiguities In Need of Clarification

We also request that the Commission clarify several ambiguities under section 316.3(a)(2).

First, with respect to subsection (a)(2)(ii), the NPR speaks of the placement of the functions listed in section 316.3(b) "at or near the beginning of the message." However, it fails to include the word "body, " as it explicitly does in the proposed rule contained in section 316.3(a)(3)(ii). By the use of the word "message," in conjunction with the references to "body" throughout the Discussion of Dual-Purpose Messages, and in particular in the heading "b. Analysis of the Body of a Dual-Purpose Message To Determine the Message's Primary Purpose" on page 50,095, we assume that the Commission's failure to include the word "body" in section 316.3(a)(2) was an oversight. If so, we believe the word "body" should be added to the language of the final rule, so that it reads "at or near the beginning of the body of the message," just as section 316.3(a)(3)(ii) does.

Second, the NPR's current categories do not appear to anticipate responses to a recipient's previous inquiry or request for information, such as a quotation on a transaction that has not yet been agreed to or entered into. We believe that the explanation of proposed section 316.3(b) relating to transactional or relationship functions of email messages needs to include emails not only to existing customers but also those that have purchased a product or newsletter, and those who have opted-in to receive emails from the sender, that respond to an inquiry or request for quotation that the recipient has previously made to the sender, or emails sent to limited numbers of people in the context of a business-to-business relationship.

Third, there are emails about which there should be no debate as to their "transactional or relationship" nature, and to which "primary commercial purpose," cannot possibly apply, even if commercial content is included along with them. Such emails include bills, privacy and compliance notifications and periodic account statements. The explanation of proposed section 316.3(b) should likewise include such a clarification.

Fourth, the Commission does not appear to recognize the existence of a fourth category of potential email, that of emails that include commercial, transactional or relationship and "other content" within a single message. The Commission should clarify how this kind of email is to be treated.

III. Other Comments

Experian recognizes that the Commission is subject to a statutory deadline with respect to regulations regarding primary purpose. Although this deadline does not apply to any discretionary rules the Commission may issue, we believe it is important to note that a number of the other issues addressed in the ANPR remain inextricably linked to primary purpose. Experian urges the Commission to move forward with these clarifications concomitantly with the primary purpose proceeding, or as soon as practicable, because the terms are inextricably linked. These issues include the definition of "transactional or relationship message," the definition of "sender," the definition of "valid physical postal address," clarification of the issues surrounding referral marketing (also known as "refer a friend") campaigns, the ten business day time period for processing opt-out requests, false or misleading transmission information in a message's "from" field, and the duration of an opt-out once exercised. We strongly encourage the Commission to refer back to our ANPR comments as each of these issues are increasingly inhibiting the growth of the email medium as compliance requirements are ambiguous, and conservative approaches to interpretations have significantly limited legitimate email acquisition campaigns such as those through referral marketing.

With respect to the definition of "transactional or relationship message," Experian believes the Commission should utilize its authority under section 7702(17)(B) to modify the definition in order to accommodate widely accepted, industry emailing practices. Common business-to-business messaging which is essential to day-to-day operations and subsequent emails related to product or service purchases should similarly fall under the definition of transactional or relationship message. Senders who initiate such business-to-business emails should not, in our view, be liable for not including an opt-out mechanism, not including identification as an advertisement or solicitation, or not utilizing a suppression list.

Additionally, as stated in our comments on the ANPR, the Commission should clarify that an email with multiple advertisers should not be treated as having multiple senders. Instead the sender should be the service that collects and maintains the email list, who often emails on behalf of multiple advertisers, and who are clearly identified by the email address from which the message is sent. Having multiple senders requires each advertiser to maintain opt-out lists, which is technically challenging and costly for most companies, and runs the risk of undermining consumer privacy. Finally, this process of "pre-emptive suppression" across permission-based email acquisition processes, such as

with refer-a-friend campaigns, is significantly impacting legitimate marketing efforts, and potentially damaging the U.S. economy.

IV. Questions

The NPR includes several questions on which it solicits comment. Some of them have already been addressed in the course of this comment letter, but we will review the balance as succinctly as possible.

1. Section 316.1- Scope

(a) We believe the scope of this section is inextricably tied to the definition of "sender." If the advertisement or promotion is tied to multiple parties, then it is still unclear as to how the compliance requirements effect each of those parties. It would be very helpful if the scope of this, as well as the other sections, encompassed a clarification of the definition of "sender."

2. Section 316.3- Primary Purpose

(a) We do not believe the Commission's standard provides sufficient guidance and we have so stated in the text of this letter. The proposal's dependence on the recipient's perspective is the core problem, because those responsible for assuring compliance cannot readily anticipate what that perspective might be. But, even given that perspective, the NPR's explanation potentially inhibits the growth of email as a successful commercial medium. By qualifying, in effect, any email as commercial if "a recipient reasonably interpreting the subject line of the message would likely conclude that the message advertises or promotes a product or service," the Commission unintentionally broadens Congress' mandate and creates a new standard, the primary purpose of the subject line. We have proposed two alternatives that we would urge the Commission to consider.

(b) We believe that the Commission's "primary purpose" standard runs the risk of including messages that we believe should not be treated as commercial. Because of the NPR's decision, in the case of a dual purpose message to effectively create two "primary purpose" tests—one that presupposes a primary commercial purpose if a recipient reasonably interpreting the subject line "would likely conclude that the message advertises or promotes a product or service" and another that finds that a message is commercial if the commercial content "appears at or near the beginning of the message"—it precludes businesses from reliably including commercial content, even if it is tied to the transactional or relationship content, for fear of being charged with a violation of the Act. We believe that this interpretation is inconsistent with the purpose and text of the statute.

Furthermore, the proposed approach uses several terms upon which the determination of an email as commercial hinges. These terms require additional clarification in order to make any determination of the commercial nature of an e-mail, irrespective of these proposed rules. For example, the CAN-SPAM Act defines a commercial e-mail message as "…any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or

service." The term "promotion" is unclear without examples to distinguish it from "advertisement." The Commission should provide examples or illustrations to clarify its meaning of "promotion."

(c) The Commission's use of three categories of email messages that include commercial content, and use of separate tests for each, is a good approach. However, in our above comments we have suggested some variations in the proposed approach including changing the two part tests applied to proposed sections 316.3(a)(2) and 316.3(a)(3) to conjunctive rather than disjunctive.

(d) While the criteria is helpful, without a more elaborate definition of "sender," it is unclear exactly how multiple advertisers and initiators will comply with this requirement.

(e) It does not, for reasons previously discussed.

(f) A better approach should be sought here, and our comments, as noted previously, offers two possible alternatives. The "net impression" test, would be a possible third consideration.

(g) As stated, we believe this category deserves further clarification. In this case, and perhaps a fourth case, this content could be intertwined with both commercial and transactional or relationship messages. It is our belief that this third category of content should be blended with the second category of content, and also include the case of all three instances together. In that sense, it would certainly be more appropriate to consider the proposed alternatives, or the "net impression" test.

(h) This question is also inextricably tied to the definition of "sender." It is our belief that email recipients typically refer to the "sender" to help determine the commercial nature of the message. While some of the categories for commercial determination as stated in the NPR are acceptable, without a clear definition of "sender" it may be difficult to reach a complete compliance requirement. When asked about the "senders intent," Experian has stated on the record above and in our ANPR response that we believe the "primary purpose" for all commercial email should be tied to "sender intent."

(i) The question speaks to the "deliberation" of a sender. Again, this issue is inextricably tied to the definition of "sender." More importantly, this question is contradictory to the Commissions position of compliance requirements based upon the interpretation of the recipient, rather than "sender intent." We believe that "sender intent" should be the primary determination for all commercial messaging, and can be reflected in the structure of given messaging.

(j) We believe the subject line should not be considered a determinative factor with commercial email.

(k) We agree.

(l) “Bona fide” marketers use the subject line for every conceivable use possible. Commercial emailers use this to signify their relationship with the recipient, transactional or relationship emailers use this to highlight an incentive to recipients, and content emailers use this to highlight a sponsor. Each of these cases signifies a point where the subject line would de-classify a normally commercial or transactional/relationship message as the opposite if the subject line were the determinative factor. Experian believes this should not be the case.

(m) Same as (l).

(n) No comment.

(o) Spammers already do not comply with the CAN-SPAM Act. Legitimate emailers do not intentionally confuse recipients, and misleading actions are already subjected to the law under numerous statutes.

(p) No comment.

(q) We believe newsletters and other electronically delivered content, especially if it flows from a transaction willingly entered into by the recipient, should receive the same treatment and fall under the same category as transactional or relationship messages. The inclusion of commercial content should not alter this analysis.

Again, Experian very much appreciates its opportunity to comment on this final proposed rule, and we urge the Commission to seriously review these provisions and carefully consider our comments before issuing a final rule. We understand the Commission’s views, but reject any suggestion that Congress intended, or even that the words suggest, the presence of an “effect” test. We very much appreciate the opportunities the Commission has provided to us, and we are anxious to be a resource to the Commission and its staff going forward.

Sincerely,

Deborah Zuccarini