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Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room 159-H
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

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

Dear Secretary Clark:

Courthouse News Service (“Courthouse News”) is pleased to submit this letter in response to the Federal Trade Commission’s request for public comments on the issues raised by proposed 16 C.F.R. § 316.3, defining the relevant criteria to facilitate the determination of the “primary purpose” of an electronic mail message. 69 Fed. Reg. 50091, August 13, 2004. In particular, Courthouse News directs its comments to proposed 16 C.F.R. § 316.3(a)(3), pertaining to messages that contain content that promotes a product or service as well as other content that is neither commercial nor transactional/relationship in nature.

As we have indicated in previous submissions to the Commission, Courthouse News is a 13-year-old legal news service that provides its subscribers with daily e-mailed reports of new court filings, from new complaints to appellate opinions. Subscribers receive prompt notice of new appellate filings, including U.S. Supreme Court opinions and all U.S. Circuit Court of Appeals rulings, with links to full text, as well as notice of new complaints. Law firm subscribers have come to view this service as a necessary and critical part of their business. Similarly, for media clients, whose resources are often stretched and which cannot regularly send reporters to courthouses in remote locations, these electronic reports tip them off to newsworthy new filings.

Paper-based newspapers and magazines often send free trial subscriptions to potential subscribers via U.S. Mail, or hand free issues out in public places such as grocery stores. Similarly, as it has done for the last several years, Courthouse News sends free sample subscriptions of its electronic reports to potential business subscribers via e-mail. These free samples are sent to small groups of recipients together with an

note that the report is a free sample and, at the end of the trial period, recipients are invited to subscribe—much like a subscription card in a magazine is an invitation to subscribe. For the purposes of proposed 16 C.F.R. § 316.3, these e-mails would likely fall under those categories of messages governed by subsection (a)(3), which applies to messages that both advertise or promote a product or service as well as other content that is neither commercial nor transactional/relationship in nature.

Courthouse News' comments fall into three categories. First, Courthouse News believes that e-mails consisting of primarily editorial content, such as bona fide newspapers, newsletters, or news wire reports, should never be considered to be commercial, and urges the Commission to adopt this position in its final rule or, at the very least, to make it clear that the application of the § 316.3(a)(3) analysis to bona fide newsletters, newspapers, and news wire reports is likely to result in a conclusion that the message does not have a primary purpose that is commercial. Second, while Courthouse News believes that the adoption of an objective standard is the correct approach to determining whether an e-mail has a primary purpose that is commercial, it is concerned that the proposed rule as currently drafted does not go far enough in ensuring that an objective standard is faithfully applied. Finally, Courthouse News also addresses below one of the specific questions posed by the Commission in its Notice of Proposed Rulemaking (“NPRM”) regarding transactional/relationship messages.

1. The Commission Should Clarify That E-mails Consisting Of Bona Fide Newsletters, Newspapers, Or News Wire Reports Do Not Have A Primary Purpose That Is Commercial

As Courthouse News indicated in its response to the Advance Notice of Proposed Rulemaking (“ANPRM”), it believes that e-mail that is predominantly editorial in nature -- such as Courthouse News' free sample reports that include a short statement on how to subscribe—should *never* be deemed to have a “primary purpose” that is commercial. Nor should the content of the subject line of such an e-mail affect this determination. The mere inclusion of advertisements and subscription information has been held to be insufficient to transform paper newspapers and magazines into commercial speech, *e.g.*, *Commodity Trend Service, Inc. v. Commodity Futures Trading Commission*, 149 F.3d 679, 685 (7th Cir. 1998); *Ad World, Inc., v. Township of Doylestown*, 672 F.2d 1136, 1139 (3d Cir. 1982), and the same should hold true for editorial content that is disseminated in electronic form—which is, after all, the mode in which Americans are increasingly receiving their news. Unless the Commission makes clear that the same rule applies to editorial content that is e-mailed, publishers of such content will be working in an environment of uncertainty, leading to a possible chilling effect on these publishers' First Amendment rights.

Courthouse News appreciates the Commission's recognition, in its NPRM, that the application of the standard in proposed § 316.3(a)(3) to a "bona fide electronic newsletter ... is likely to result in the conclusion that the message does not have a primary purpose that is commercial," NPRM at 32, and trusts that this conclusion would apply not only to electronic newsletters, but also to electronic newspapers and news wire reports such as those published by Courthouse News. In the event that the Commission decides against creating an exemption for e-mails consisting predominantly of editorial content, Courthouse News believes that, at the very least, it should affirmatively state in either its final rule or accompanying order that the application of the § 316.3(a)(3) standard to a bona fide newspaper, newsletter or news wire report is unlikely to result in a conclusion that the primary purpose of that message is the advertisement or promotion of a commercial product or service.

Courthouse News believes that clarifying this matter is particularly important for less-established publishers, particularly those who are publishing news content in electronic form only. For many of these publishers, the only way to get the word out about their publications is by offering via e-mail free samples to those who may be interested in the content, and an invitation to subscribe that may be part of these e-mails is no different from a subscription card that is included in a paper copy of a newspaper or magazine. It is precisely these less-established publishers—who would be least able to afford to defend a claim that they have violated the CAN-SPAM Act—who need some measure of certainty that their newsletters, newspapers or news wire reports are not transformed into commercial electronic mail messages for purposes of the Act by the mere inclusion of advertisements or subscription information.

2. The Commission Should Supplement Proposed § 316.3(a)(3) With Additional Guidelines To Guide The Primary Purpose Determination

Courthouse News applauds the Commission's conclusion that there should be an objective standard for determining the "primary purpose" of an e-mail message. However, it is concerned that the standards set forth in proposed § 316.3(a)(3) are still too vague to achieve that goal. Although the proposed rule as currently drafted sets forth certain factors that are relevant to the interpretation of whether "[a] recipient interpreting the body of the message would likely conclude that the primary purpose of the message is to advertise or promote a product or service," the rule still creates a great deal of uncertainty, and Courthouse News suggests that the Commission augment this rule by setting forth additional guidelines for determining the primary purpose of a message. These guidelines should include, but not necessarily be limited to:

- In determining primary purpose, the focus is on the message, and the fact that the sender is a commercial entity is not enough to warrant a conclusion that the primary purpose of the message is to advertise or promote a product or service. *See* NPRM at 28, 43.
- The inclusion of commercial content in an e-mail message is not enough, by itself, to warrant a conclusion that the primary purpose of the message is to advertise or promote a product or service. *See* NPRM at 30.
- In the case of a bona fide newspaper, newsletter, news wire report, or similar publication that is predominantly editorial in nature, the inclusion of information on how to subscribe is not enough, by itself, to warrant a conclusion that the primary purpose of the message is to advertise or promote a product or service.

Courthouse News strongly objects to including the recipient's interpretation or other subjective factors as among the criteria in § 316.3(a)(3) for determining the primary purpose of e-mail messages. Inclusion of subjective criteria as a relevant factor would create added uncertainty for senders of e-mail messages and lead to an added chilling effect on speech. In addition, including the recipient's interpretation as among the relevant criteria would tend to put the focus on the primary purpose as viewed by the recipient rather than the primary purpose of the message, in contravention of the CAN-SPAM Act, *see* NPRM at 28.

3. E-Mail Messages Sent Pursuant To A Transaction That Entitles The Recipient To Receive Electronically Delivered Content Should Be Deemed To Be Transactional/Relationship

In its NPRM, the Commission posed the following question:

Where a recipient has entered into a transaction with a sender that entitles the recipient to receive future newsletters or other electronically delivered content, should such e-mail messages be deemed to be transactional or relationship messages? Why or why not? Should the inclusion of commercial content affect this analysis? If so, how?

The CAN-SPAM Act, at 15 U.S.C. § 7702(17), provides that e-mails sent “to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender” shall be considered transactional/relationship e-mails. Accordingly, where a recipient has previously entered into a transaction with a sender that entitles the recipient to receive certain content

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delivered by e-mail (such as, in the case of Courthouse News, e-mailed reports of new court filings), those e-mails should necessarily be considered transactional/relationship. The inclusion of commercial content regarding additional products or services offered by the sender should not affect this determination. Where a preexisting relationship exists between the sender and the recipient, the recipient would likely want to hear about additional products or services they may wish to purchase. In the case of Courthouse News, for example, subscribers may wish to hear about the availability of new reports covering additional geographic jurisdictions, and incidental information about the availability of such products should not affect the transactional/relationship classification of the e-mail.

Courthouse News Service appreciates the Commission's consideration of its views as to the issues raised in the NPRM. Should there be any questions regarding these comments, do not hesitate to contact our offices.

Respectfully submitted,

Rachel E. Matteo-Boehm

cc: Bill Girdner, Editor, Courthouse News Service