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September 13, 2004

Federal Trade Commission/Office of the
Secretary
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: CAN-SPAM Act Rulemaking, Project No. R4110008

Dear Sirs and Madams:

This comment letter is submitted to the Federal Trade Commission (the “Commission”) on behalf of Wachovia Corporation and its subsidiary companies, including but not limited to Wachovia Bank, N.A., Wachovia Mortgage Corporation, Wachovia Insurance Services, Inc, Wachovia Securities, LLC, and Wachovia Education Services, Inc.(collectively referred to as “Wachovia”). Wachovia is pleased to provide comments on the proposed rulemaking under the CAN-SPAM Act (“Proposed Rule”).

There are a number of categories of messages that recipients expect to receive that should either 1) be considered to have a primary purpose that is not commercial or 2) deemed to be a transactional or relationship message as is authorized by the CAN-SPAM Act (the “Act”). These messages include 1) email messages containing billing statements, 2) email messages that primarily contain editorial content such as newsletters, 3) email messages sent in a business capacity from an individual employee at a business to another business or employee of the business, and 4) email content that has been requested or consented to by the recipient. In these cases, characterizing the email message as having a commercial primary purpose will either impose an unnecessary burden on delivery of a desired communication or cause customer confusion. Wachovia believes Congress did not intend to subject these categories of email communications to the restrictions of the Act.

Email Messages Containing Billing Statements

Email messages that contain billing statements and other similar messages that cannot be opted out of or are legally required should always be considered to have a primary purpose that is transactional. In certain cases, optional services should be proposed in connection with a billing statement or other legally required message. These services are typically related to the statement or other message, and the customer’s needs are best served by presenting the service contemporaneously with the statement or other message. These additional provisions could lead the sender, out of an abundance of caution, to

conclude that the opt out provisions of the Act have to be included in the message. Customer confusion would result from the appending opt out choices to messages that the sender is required to provide to the customer. Accordingly, email messages containing billing statements or legally required communications should always be considered transactional messages.

Email Messages that deliver newsletters and other editorial content

An important component of business-to-business communications are electronic messages that advise businesses of new developments. Businesses want to learn about developments, such as market or regulatory changes, as they occur. Email is particularly valuable to provide these communications because of the speed with which the information can be delivered. Although these newsletters build awareness of the expertise of the sender, they typically do not promote a specific product or service.

In several areas of Section C of the Analysis, the Commission notes that electronic newsletters are not likely to be considered to have as a primary purpose the promotion of a product or service. For example:

In the case of a bona fide electronic newsletter, application of this analysis is likely to result in the conclusion that the message does not have a primary purpose that is commercial.

Or:

CAN-SPAM does not set up a dichotomy between “commercial” and “nonprofit” messages. Rather, it focuses on messages whose primary purpose is to sell something, as distinguished from “transactional or relationship messages,” information and editorial messages, and (relevant to nonprofit entities) messages seeking a charitable contribution.

However, the definition of primary purpose in the Proposed Rule does not specifically address how a newsletter or other update would be categorized.

Businesses would benefit from a bright line example in the Proposed Regulation that confirmed the implication that newsletters that do not offer or solicit specific products or services are not considered to be commercial emails. Although such emails seek to build a relationship with the recipient, they do not promote a product or service. Wachovia recommends that the Proposed Rule include an example that a newsletter that does not specifically offer or promote a product or service is not considered to be a commercial email. Such a conclusion would benefit businesses as information could be promptly communicated without the delays attendant to assessing the nature of the communication and determining whether the recipient has opted out of receipt of commercial emails.

Business-to-Business communications sent by individual employees

As described above, businesses are constantly seeking information about products and services in order to gain cost and service advantages in a competitive marketplace. Knowledge of these opportunities is increasingly communicated by email in order to timely address needs. For example, individual lenders send emails with the latest interest rates to brokers and to automobile dealers. Corporate bankers will communicate financing opportunities that are driven by market conditions. These communications benefit businesses of all sizes, and these communications have not been identified as a material component of the spam problem.

Although the Commission previously rejected the proposal that the Act exempt business to business messages, Wachovia respectfully submits that Congress did not view business-to-business communications as a significant source of unwanted email messages and that it did not intend to subject business-to-business email communications to the additional requirements of containing an opt out and being scrubbed against suppression lists. Instead, Wachovia believes Congress intended to address through the Act the burden of unwanted individually oriented (i.e., consumer purpose) messages. The consumer purpose messages would not inadvertently be exempted from the requirements of the Act through a determination that business-to-business communications are transactional or relationship messages. Therefore, Wachovia requests that the Commission conclude that business-to-business communications sent within the scope of an employee's job responsibilities are considered transactional or relationship messages.

Email sent at the recipient's request

If a recipient has requested a type of email, the email should be considered a transactional or relationship email as long as the email delivered is consistent with the request and the sender honors any request to cease delivery. Since the recipient has requested the email, the sender should not have to evaluate whether the opt out mechanism and checking of suppression lists mandated by the Act would be required. Although the recipient may have opted out receiving commercial emails from the sender, the sender should be able to deliver a communication that has been requested by the recipient without addressing the other requirements of the Act. Instead, the sender should only be required to honor a request to terminate delivery of the previously requested service.

If you have any further questions or comments on this matter, please do not hesitate to contact the undersigned at 704-374-4645.

Sincerely,

Campbell Tucker