April 20, 2004

Federal Trade Commission
Washington, D.C. 205802
(Via Electronic Filing)

Re: CAN-SPAM Act Rulemaking
Project No. R411008
Comments of Wells Fargo & Company

Ladies and Gentlemen:

Wells Fargo & Company ("Wells Fargo") welcomes the opportunity to comment on the advance notice of proposed rulemaking by Federal Trade Commission (the "Commission" or "FTC") with regard to the CAN-SPAM Act (the "Act"). Wells Fargo is one of the country's largest diversified financial holding companies with subsidiaries including banks, a mortgage company, a consumer finance company, insurance brokers and agents and securities broker-dealers.

In enacting the CAN-SPAM Act, Congress recognized that e-mail has become an extremely popular and important means for Americans to communicate for both personal and commercial purposes, but that an avalanche of unwanted spam now threatens the reliability and usefulness of this astounding new channel of communications. Wells Fargo agrees.

On the commercial side, e-mail is used on a daily basis to communicate an enormous range of information. Many companies use e-mail to deliver messages of all types and to discuss business issues with fellow employees, external colleagues, business partners, customers and potential customers as well as to promote their products and services. Business men and women use e-mail in nearly every imaginable business context. Our operating subsidiaries often use e-mail to communicate with customers and potential customers and to exchange messages regarding interest rates, market research, mortgage costs and other financial information that is critical to the proper functioning of consumer and commercial financial markets.

The CAN-SPAM Act generally recognizes this broad business use of e-mail in the safe-harbor section it calls "transactional or relationship" messages. Unfortunately, the categories described in this section of the Act primarily address deals already made. Therefore, in our view, the Act could leave a wide range of e-mail messages improperly vulnerable to its requirements and prohibitions.

Fortunately, Congress has given the Commission the authority to refine its definitions. Wells Fargo believes that in the CAN-SPAM Act, Congress has placed in the hands of the Commission an effective tool to combat the onslaught of bad actors who flood everyone's mailboxes with fraudulent and deceptive spam. In this rulemaking the Commission should ensure that the Act does not result in the unintended effect of bludgeoning legitimate electronic commerce to the detriment of e-mail recipients and the national economy. We believe the keys to effective CAN-SPAM regulation are in defining "commercial electronic mail messages," "senders," and "transactional and relationship messages" so as to focus the law on bad actors without damaging the utility of e-mail for legitimate commerce of all types.

Wells Fargo would like to comment on the following issues raised in the rulemaking:

1. Primary Purpose. The Commission should provide senders of e-mail with clear standards that allow for certainty in managing their e-mail operations.

2. Sender. The Commission should clarify what entities are "senders" with respect to an e-mail message that indicates in situations where there are numerous advertisers, that each advertiser is not necessarily a "sender."

3. Transactional and Relationship Messages. The categories of "transactional and relationship" messages should be expanded to include (1) messages sent with recipient consent or at the recipient's request, (2) messages sent by sales representatives or employees in the business to business context, and (3) messages containing legally required content. Moreover, several existing categories should be modified to clarify their intent or broaden their reach to provide greater certainty and accurately reflect current business e-mail practices. These include (1) e-mail sent to a recipient concerning products or services in connection with an ongoing relationship; (2) e-mail relating to the provision of goods or services received as a result of a transaction entered into with the sender; (3) e-mail negotiating transactions; and (4) e-mail sent by a company to its employees regarding products or services available to the employees, including products or services of third parties.

4. Time for Action. The 10 day time frame to honor opt-out requests should be extended to 31 days.

5. Duration of Opt-Out. A two to three year time limit should be established for the duration that
opt-outs must be maintained and honored.

6. Other Issues. The Commission should clarify who may opt out on behalf of a business, and should recommend against "ADV" or similar labeling and against a reward system.

These items are discussed in more detail below.

I. Primary Purpose

The primary obligations of the Act apply to "commercial electronic mail" messages, defined as any e-mail message whose "primary purpose" is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose.) The Commission has suggested several alternative tests for determining primary purpose.

The statute, by stating "the primary purpose," provides that an e-mail message can only have a single primary purpose. Many messages sent by Wells Fargo have multiple purposes—regarding a transaction as well as including advertisements or promotions. As the Commission develops its standards regarding "primary purpose" it should provide clear standards that provide the certainty required by businesses to manage their e-mail operations.

There are several categories of e-mail that are not "commercial." First, e-mail messages whose primary purpose is to transmit billing or account related information that may also include advertising are not "commercial." The recipient in this situation has a relationship and can manage the e-mail received in that context.

Second, the Commission should clarify that e-mail messages that would not have been sent "but for" the non-commercial component of the message should not be deemed as "commercial" in nature.

Third, the Commission should clarify that e-mail that provides substantial editorial content, including newsletters, is not "commercial." Wells Fargo often sends its customers editorial content intended to educate them about financial issues, for example financial literacy. Such messages are not the advertisement or promotion of a particular good or service and should not be treated as commercial.

We believe that there are categories of e-mail the primary purpose of which is not commercial in addition to those enumerated. The more clarification and examples like these that the Commission can provide in its rule, the more certainty will exist for businesses that send e-mail. This will prevent unnecessary litigation and potential interpretations of the Act that could hurt legitimate commerce.

Finally, the Commission should clarify that a message does not need to fall within the category of "transactional or relationship" message in order to fall outside of the scope of "commercial" email. There is e-mail that does not have a primary purpose of advertisement or promotion of a good or service and may not fall into the categories of transactional or relationship. For example, some messages from a financial institution that relate to issues of safety and soundness may not fit squarely within the definitions of either commercial or transactional or relationship, such as (a) protecting the confidentiality or security of records, (b) protecting against actual or potential fraud, unauthorized transactions, claims or other liability, (c) risk control or resolving customer disputes, or (d) warning customers about password "phishing" that may be occurring. The Commission should clarify that such messages are not subject to the Acts requirements including opt-out and suppression for senders of commercial e-mail.

II. Who is the Sender?

A. Criteria to determine the sender

The Commission should provide criteria that will assist businesses in determining who is a "sender" under the Act. Some interpretations of the Act suggest that multiple parties that advertise in an e-mail are all senders. Such an interpretation would require multiple opt-outs, suppression against multiple lists, and inclusion of multiple physical addresses in such e-mail. For example, financial institutions sometimes send messages that include advertisements or special offers from other entities. Conversely, they are sometimes advertisers in email that contains multiple advertisers. Consumers react very favorably to these communications. Requiring suppression against multiple lists of all of the numerous advertisers in such messages is impractical and unworkable. Such a result could also undermine privacy by requiring the transfer of e-mail addresses across unrelated businesses. We do not believe that this is what the Congress intended.

Wells Fargo believes that the Commission can avoid this unintended result by setting forth criteria that would determine whether an entity is a "procurer" under the statute such that it becomes a "sender." We recommend the following criteria:

- **Who the message is from.** If it is clear the message is from a sender, even if other advertisement exists, the other advertisers would not necessarily be senders. Who a message is from can be determined by multiple factors including indication in the header of the email and prominent indication in the text.

- **Advertiser provision of recipients.** If the advertiser does not provide the sender with a list of e-mail recipients, then the advertiser should not be treated as a sender. An entity "procures" a message under the statute if it is sent on "one's behalf." The purpose of this definition is to prevent an entity that is prohibited from sending messages as a result of an opt-out from having another entity do it on their behalf. If no recipient e-mail addresses are provided to the sender, then this scenario will not occur. While we believe that whether email addresses are provided is an important factor to consider, the fact that an advertiser does transfer addresses would not necessarily make the advertiser a sender.

- **"But for" test.** If a message would have been sent regardless of a particular advertiser, then the advertiser should not be treated as a sender. Many financial institutions send particular types of e-mail on a regular basis such as special offers for participants in their rewards or points programs. These messages are sent regardless of any particular offer or advertisement. The advertisers rotate on a regular basis. In this situation, the financial institution is the sender and not the advertisers.

B. Line of Business

The Commission should clarify that a product or service that consists of different products or services marketed under a single brand can be considered a line of business. The statute indicates that "if an entity operates through separate lines of business or divisions and holds itself out to the recipient throughout the message as that particular line of business or division rather than as the entity of which such line of business or division is a part, then the line of business or the division shall be treated as the sender of such message for purposes of this Act." As long as the sender indicates throughout the message that the message is from that line of business, then other lines of business advertising their products or services should not be considered separate senders.

In addition, the mere fact that a parent company is mentioned in a line of business's e-mail should not alone eliminate the ability for an e-mail to be treated as sent by a line of business under the definition of "sender."

If one line of business sends an e-mail with an offer from an affiliate, which itself may be a line of business, only the line of business actually sending the e-mail will be considered the sender.

III. Transactional and Relationship Messages

The Act includes five categories of messages that are "transactional or relationship messages." The Act authorizes the Commission to expand or contract these categories. The Commission should expand and not contract these categories. Wells Fargo believes that several of these categories should be clarified or modified to provide clarity and certainty to businesses that certain messages are transactional or relationship messages. Moreover, the Commission should expand this list to include three additional categories: (1) e-mail messages where the recipient has requested the e-mail or consented to receive the e-mail; (2) one-to-one e-mail sent in the business capacity by individual or employees; and (3) e-mail containing legally required content.

Each of these additional categories will provide helpful guidance to Wells Fargo and other businesses regarding these types of messages, allowing business operations to continue without unnecessarily burdensome changes in the manner that we communicate using e-mail.

A. Recipient consent or at the recipient's request

The Commission should add to the list of e-mail that is "transactional or relationship" in nature messages that are sent to recipients with the recipient's consent or at the recipient's request. Under the CAN-SPAM Act, there may be situations where an individual has provided consent that does not fit within the existing types of messages considered to be "transactional or relationship" messages. For example, our mortgage company, when requested, will send a consumer who is in the process of purchasing or refinancing a house, e-mail that includes the latest interest rates.

Clearly, if an individual has requested the material, then there is a relationship that should not by limited by this Act. For example, the Commission, in its Telemarketing Sales Rule, 16 C.F.R. Part 310, allows for marketing to individuals with consent. If these types of consensual e-mail are not included in this category, it is possible that individuals could not receive e-mail that they have asked to receive. This could be the case if an individual has requested a specific message from an entity whose commercial e-mail the individual has previously opted-out of. This is not a result that either senders or recipients desire. Thus, the Commission should indicate that any time consent is obtained or information is requested by a consumer, such messages should fall within the definition of transactional or relationship.

B. E-mail sent in the business capacity by individual employees.

Like consent, a category should be added for one-to-one e-mail that is sent by employees in the business to business context. Both large and small businesses engage in corporate to corporate email exchanges that involve complex transactions with multiple e-mails flowing both ways. For example, in the real estate lending business, e-mails are sent to brokers by lenders to inform them of current mortgage rates. One interpretation of the Act could require that such e-mail contain an opt-out and be run against the businesses' suppression list prior to transmission. Wells Fargo believes such a result would be very difficult for businesses to administer and was not intended by the Congress.

Business e-mail systems are not designed to scrub each e-mail sent by an employee against the business' suppression list. Such a requirement would result in the need to redesign many businesses' e-mail systems and would be extraordinarily burdensome and expensive. In addition such a requirement would interfere with legitimate practices that are critical to business operations and email that provides information critical to developing the financial marketplace. This type of email is not problematic.

C. E-mail sent that contains legally required content.

Subpart (iii) of the first category of "transactional or relationship" messages includes messages whose primary purpose is to provide certain important information relating to accounts and other ongoing commercial relationships. For example, change in terms, change in status of the account or account statements. Financial institutions also use e-mail, which may be combined with commercial messages, to send their account holders notices and other information as required by law, including disclosures under Federal Reserve Board's Regulations E and Z and privacy notices that are required under the Gramm-Leach-Bliley Act. The Commission should take note of this practice and add it as a new category, as it is consistent with the goals of Congress in establishing the transactional and relationship message category. The Commission should also coordinate with the traditional regulators of financial institutions to ensure that any regulations issued in this area are consistent with existing financial services regulations.

D. Modification of Existing Categories

In addition to creating these new categories, the Commission should modify several of the other categories to provide clarity to businesses that certain types of messages are "transactional or relationship" messages. These modifications would include as "transactional and relationship" e-mail (1) sent to a recipient as part of an ongoing relationship that contains additional information related to products or services that the recipient has received or will receive from the sender; (2) relating to the provision of goods or services received as a result of the opening of a relationship with the sender; (3) negotiating transactions; and (4) sent by a company to its employees regarding products or services available to the employees, including products or services of third parties.

1. E-mail sent to a recipient as part of an ongoing relationship concerning products or services that the recipient has received or will receive from the sender.

The Commission should extend the existing 17(3)(iii) to include information related to products or services that a client or customer will often expect as a part of an ongoing relationship. The current category classifies as "transactional or relationship" messages that provide "(I) notification concerning a change in the terms or features of; (II) notification of a change in the recipient's standing or status with respect to; or (III) at regular periodic intervals, account balance information or other type of account statement with respect to a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender." The FTC should amend this provision by adding a new (IV) "concerning information, products, or services that the recipient has received or will receive from the sender." As part of an ongoing relationship, a customer will often expect additional information or information about related products or services. This section as currently drafted is limited to account statements or a change in terms of a customer's account. This category should be expanded to include information that a customer expects to receive such as prospectus, inventory, research, and information about seminars.

2. E-mail relating to the provision of goods or services received as a result of a transaction entered into with the sender.

The Commission should clarify or if necessary expand the scope of 17(3) so that it is clear that e-mail that is sent pursuant to account opening or other documents that establish the terms of a relationship or service are transactional or relationship messages.

3. E-mail negotiating transactions.

The use of e-mail has greatly facilitated the ease and efficiency of negotiating transactions. Section 17(A)(i) should be modified to include situations where parties are negotiating a transaction. The subparagraph should state: "to negotiate a commercial transaction or to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender."

4. E-mail sent by a company to its employees regarding products or services available to the employees, including products or services of third parties.

Section 17(A)(iv) covers messages that have a primary purpose "to provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled" The Commission should clarify the scope of that phrase to indicate that a company's' communications with employees concerning products and services available to them are "directly related to an employment relationship or related benefit plan."

IV. The Commission Should Extend the Time Frame to Honor Opt-Outs to 31 Days

If a recipient opts out of future e-mails from a sender, the Act requires the sender and others who act on behalf of the sender to cease future e-mails not later than 10 business days after receiving the recipient's message. The Commission has the authority to expand this time frame. The Commission should extend the number of days required to comply with an opt-out to 31 business days.

Ten days may be a possible time frame if the financial institution is the only sender. However, in joint marketing situations or other instances where multiple advertisers are involved in the e-mail programs that have opt-outs lists, 10 days is insufficient. It takes time for businesses to obtain an opt-out and scrub it against a list of addresses to which a commercial e-mail is going to be sent. Often a commercial e-mail campaign is in progress with the e-mail addresses selected more than 10 days prior to the sending. Compliance with a 10-day opt-out would be difficult in these situations. This is particularly true when the sender uses the services of a third party to transmit the message on its behalf. Congress recently mandated that the Commission modify its Telemarketing Sales Rule to require that do-not-call lists be updated every 31 days for phone numbers submitted to the do-not-call registry. Wells Fargo believes that a 31 day time frame is equally appropriate in this context.

V. Length of Time on Company-Specific Opt-out

The Commission has requested comment on other issues than those raised in the notice that it should address under the authority to issue rules on the Act. Wells Fargo recommends that the Commission should set a two to three year cap on the length of time to honor an opt-out. Setting such a cap will reduce the scrubbing of lists from nonfunctional e-mail addresses, will give businesses an opportunity to attempt to contact recipients with new offers, and will provide businesses with a manageable time frame to maintain such information.

Unless there is a time cap on the duration that opt-outs are preserved, these lists could continue to grow with no limit. A large percentage of e-mail addresses change annually. For this reason, many of the addresses on an opt-out list over time will not be functioning. Putting a time limit on the opt-outs would reduce the need to suppress e-mail addresses that are no longer operational.

Likewise, over time, businesses change and evolve, as do recipient preferences. Providing for a two to three year duration strikes a balance so that as businesses and consumer preferences change a business could send commercial e-mail to the recipient. Of course, at that time, the recipient would have the ability to opt-out for another two ro three year time period.

Finally, maintaining opt-out requests for even two to three years is a significant amount of time for recordkeeping. An increase in the length of the number of e-mail addresses on opt-out list results in a corresponding increase in business costs to maintain and honor such requests. Such a cap will reduce the recordkeeping and administrative costs associated with maintaining opt-out list. For these reasons Wells Fargo believes that two to three years is an appropriate time frame.

VI. The Commission should clarify that only authorized persons may opt out on behalf of business entities

It is reasonably clear in the case of indivdiuals that the "recipient" of is presumed to be the owner or an authorized user of the account to which the e-mail is directed, and thus an appropriate person to opt out of future commercial e-mail from that sender. However, in the case of e-mail accounts owned by a business, the user of a particular e-mail account may often not be an appropriate person to make an opt out decision on behalf of the business. Accordingly, we request the Commission to clarify that in a business-to-business context, the sender of e-mail is not required to accept opt-outs from employees of the receiving business who would not have authority to bind the receiving business with respect to other aspects of the business relationship.

VII. The Commission should recommend against "ADV" and other Labeling

The Commission requests comments regarding its required report to Congress on putting an "ADV" header or comparable identifier in an e-mail message. Wells Fargo opposes the use of "ADV" labeling. Such labeling is unnecessary. The Act already requires that messages include a clear and conspicuous identification that the message is an advertisement or solicitation. This is sufficient notification that a message may contain an advertisement.

Wels Fargo is particularly concerned about the inclusion of "ADV" in messages that may have multiple purposes. Recipients may disregard messages that include such a label and thereby not open an e-mail with important information.

An "ADV" label would not be observed by bad actors. Prior to the CAN-SPAM Act, many state laws required the use of "ADV" labeling. This requirement had no impact on eliminating spam. This is because spam is sent by entities that do not comply with the law. This fact is clearly indicated in the results of the FTC's survey that showed that only tiny fraction of commercial e-mail included an "ADV" label.

VIII. The Commission Should Recommend Against a Reward System

The Commission has also requested comment regarding the report it is required to submit to Congressregarding a reward system for those who supply information to the Commission about violations of the Act. Wells Fargo opposes the creation of a reward system to assist in enforcing against spam. Such a system would divert significant Commission resources needed to combat spam into determining who should receive a reward. It is our understanding that the Commission already possesses tremendous amounts of information about spam that is forwarded to it. Likewise there already are significant private sector efforts by ISPs to enforce laws against spammers.

Conclusion

Wells Fargo appreciates this opportunity to comment in this proceeding. We look forward to continuing to work with the Commission on these issues. Please feel free to contact the undersigned at (415) 396-0940 or by email at "mccorkpl@wellsfargo.com" if you have any questions regarding the foregoing comments.

Very truly yours,

Peter L. McCorkell