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Federal Trade Commission
CAN-SPAM Act
Post Office Box 1030
Merrifield, VA 22116-1030

CAN-SPAM Act Rulemaking, Project No. R411008

Ladies and Gentleman:

Bank of America Corporation, a diversified financial holding company headquartered in Charlotte, North Carolina, ("Bank of America") is pleased to have this opportunity to comment on the Notice of Proposed Rulemaking of the Federal Trade Commission ("Commission") published in the Federal Register, concerning the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act").

Bank of America is one of the world's largest financial institutions, serving individual consumers, small businesses and large corporations with a full range of banking, investing, asset management and other financial and risk-management products and services. The company provides unmatched convenience in the United States, serving 33 million consumer relationships with over 5,700 retail banking offices and 16,500 ATMs, and award-winning online banking with more than thirteen million active users. The company serves clients in 150 countries and has relationships with 96 percent of the U.S. Fortune 500 companies and 80 percent of the Global Fortune 500. Bank of America Corporation stock (ticker: BAC) is listed on the New York Stock Exchange.

I. Introduction & Summary

Congress has recognized that e-mail has become an extremely popular and important means of communication for both personal and commercial purposes. The use of e-mail communication provides benefits both to businesses and consumers. As with other commercial entities, Bank of America communicates with its customers and potential customers for a wide-range purposes, but we also have a strong interest in seeing the reduction of unwanted, intrusive and often fraudulent messages sent to users of e-mail. The CAN-SPAM Act recognizes the need to balance

the goals of providing a framework for the legitimate uses of e-mail while reducing potentially abusive or fraudulent e-mails.

In response to the request for comments, Bank of America recommends the Commission revise its proposed rule to:

- Provide clarity regarding what is meant by "control of the content" of a message for the purpose of designating a single sender in commercial e-mail with advertisements from multiple sellers;
- Maintain the time to honor opt-outs at 10 business days;
- Clarify that sellers are not "senders" in forward-to-a-friend messages where no consideration is provided;
- Set a specified duration to maintain opt-outs;
- Allow senders flexibility in the means provided to recipients to opt-out; and
- Provide further clarification regarding the types of messages treated as "transactional or relationship" messages.

II. The Commission Should Further Clarify the Means of Designating a Single Sender in Commercial E-Mail Containing Multiple Advertisements

Bank of America appreciates the Commission's efforts to set forth criteria to designate one seller as the "sender" in commercial e-mail messages with multiple sellers. The Commission proposes that in a multiple seller message, one of the sellers can be designated as the "sender" if (1) the entity controls the content of the message; (2) the entity determines the e-mail addresses to which such message is sent; or (3) the entity is identified in the "from" lines as the sender of the message. The Commission's proposal will only allow designation of a single sender if the other potential senders do not meet any of these three criteria. Although we agree that in many cases designation of a single sender will avoid confusion, the specific approach proposed by the Commission will leave ambiguity because it is not clear what the Commission considers "control" of the content of a message. For example, a seller will always have primary control over the portion of the content that describes its products or services. The Commission should clarify that for purposes of this rule, the seller with control should be the seller that has the ultimate ability to determine all of the content of the e-mail and whether and when the e-mail is transmitted. Control of the content of an e-mail should not include placement or editorial control of the text of the e-mail as it relates solely to the products or services of another seller.

Similarly, a sellers control offer the placement or text of an e-mail related solely to its products or services, without the ability to control the placement of all advertisements in an e-mail, should not be deemed control. Whatever means the Commission elects to provide clarity, the critical factor will be to allow for a simple method of designating one sender in multiple-seller e-mails.

III. The Commission Should Maintain the Time Frame to Honor Opt-Outs at 10 Business Days

Bank of America urges the Commission to reconsider its proposal to decrease the time period for a sender to effectuate an opt-out from 10 business days to three business days. In many cases, a time period of less than 10 business days will not be sufficient for senders to act on the opt-out request of a receiver.

Shorter time frames may be feasible if the financial institution has a limited number of lines of business and is the only entity involved in sending e-mail messages, but for larger institutions with multiple lines of business, the entire 10 day period is often necessary. For example, Bank of America permits customers to exercise their opt-out rights in many different ways. If the customer comes directly to our website, we update the information on a daily basis. However, customers may also make requests through our branches or a large number of bank representatives, or in some cases through third-party service providers. In these cases the information is processed less frequently through a patch process. Given the number of possible contact points, faster processing would result in significant additional costs. Further, we often work with third party processors and other parties, such as a co-brand partner, to further scrub the lists and to create more targeted offers for the benefit of consumers.

We note there is no evidence in the record that supports a need to shorten the time frame, much less evidence sufficient to justify the additional costs to sending institutions. There is no record that entities are intentionally evading the intent of the opt-out by sending large quantities of e-mails or, in fact, any e-mails between three and 10 business days after an opt-out is provided by the recipient. Further, if this later becomes a legitimate concern, the Commission could address through a more targeted rule prohibiting this specific activity instead of adding additional costs to companies using e-mail for legitimate purposes.

IV. The Commission Should Clarify that Sellers are not Senders in any Forward-to-a-Friend Messages Where No Consideration is Provided to the Recipient

We agree with the conclusion of the Commission that when a seller encourages a person to forward or use a Web-based mechanism to transmit a commercial e-mail message to another by providing some form of consideration for doing so, such as money, coupons, discounts, awards, additional entries in a sweepstakes, the seller would be a “sender” as defined in the CAN-SPAM

Act. However, we are concerned by the suggestion that the seller could still be the sender when the original recipient forwards the e-mail even if no payment or consideration is provided.

The Commission has suggested the further standard that the seller may be a "sender" if it affirmatively acts or makes an explicit statement that is "designed to urge another to forward the message." This is too vague a standard to be workable. Sellers of products or services are always hoping their customers will be pleased and recommend the product or service to friends. Word of month remains an important source of advertising. Would inclusion of a statement "tell a friend if you like our service" make the seller a sender? If yes, the seller has no way of controlling to whom the original receiver may forward the message, and so no method of making sure the original message is not altered, perhaps by deleting the opt-out information, nor that the friend has not previously opt-out out of commercial e-mails from that seller.

V. The Commission Should Set a Limited Duration For Maintaining Opt-Outs

The Commission has declined to set a time duration on sender's maintaining opt-outs and asks for further comment on this issue. Bank of America recommends that the Commission 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 of nonfunctional e-mail addresses, give businesses an opportunity to attempt to contact new recipients with offers, and 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 will continue to grow with no limit. In fact, our experience is that e-mail addresses change much more rapidly than either physical addresses or phone numbers, with as many as 30% of e-mail addresses becoming inactive within one year. Putting a reasonable time limit on the opt-outs would reduce the need to suppress e-mail addresses that are no longer operational and avoid potential confusion as old addresses are recycled to new customers who may be interested in obtaining commercial e-mails.

VI. Business Should Maintain Flexibility in the Providing a Non-Burdensome Ability for Consumers to Opt Out

Bank of America agrees that senders should be prohibited from charging a fee for the ability to opt out. We also agree with the Commission's view that the process should be simple and easy. However, the Commission's proposal would prohibit a sender from imposing any requirements other than sending a reply message or visiting a single website.

Bank of America requests that the Commission reconsider its position and provide a more general standard that ensures that recipients are afforded a simple means to opt out while

providing businesses flexibility to properly authenticate and verify an opt-out request. Such flexibility is particularly relevant in the financial services industry where e-mail messages relate to accounts with sensitive financial information. Due to the nature of the information communicated, financial institutions take additional measures to verify changes of e-mail addresses and e-mail opt-out preferences. For example, a recipient may be required to provide an account number or password that generates an e-mail to an address on file confirming the change in preferences. For this reason, Bank of America recommends that the Commission adopt a rule that requires senders to provide an opt-out procedure that is not burdensome to consumers, but that leaves the specifics on the method used to the sender.

VII. The Commission Should Expand and Further Interpret the Act's Categories of Transactional and Relationship Messages

A. The Commission Should Expand the Transactional or Relationship Category to Include Individual Business Relationship Messages

The Commission asks questions with respect to creating a category of "business relationship" messages: "those that are individualized and sent from one employee of a company to an individual recipient (or small number of recipients)." E-mail is often the preferred method for Bank of America to communicate with its businesses customers. Our customers both expect and demand the convenience and speed of electronic communications. For example, in the first mortgage business, e-mails are sent to brokers to inform them up-to-the minute information about current mortgage rates. As another example, treasury management officers are in frequent contact with financial officers of our customers explaining new products. The Commission should avoid any interpretation of the CAN-SPAM Act that could require that such e-mails contain an opt-out and be run against the opt-out list prior to transmission.

Business e-mail systems are not designed to scrub each e-mail sent by an employee against the business's suppression list. Such a requirement would result in the need to redesign numerous 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 relationships and operations and e-mail that provides information critical to developing the financial marketplace. Because such communication is based upon an existing business relationship, it is not subject to the type of abuses that gave rise to the need for the CAN-SPAM Act.

B. The Commission Should Expand the "Transactional and Relationship" Categories to Include Legally Required Messages

The Commission declined to include legally required messages under any of the "transactional and relationship" message categories. Bank of America disagrees with this position and

recommends that legally required notifications be included in section 7702(17)(A)(iii) as "transactional or relationship" messages. Financial institutions are often required to issue legal notifications and rely on e-mail to efficiently notify consumers. Business will incur unnecessary costs if such messages are treated as commercial messages, and that classification would impede financial institutions' efforts to provide required legal notices. Moreover, for legally required notices consumers have additional protection from unwanted e-mails because of the notice and consent requirements under the Electronic Signatures In Global and National Commerce Act.

In addition to messages that are legally required, Congress, the Commission, and the banking agencies often have provided exceptions for financial institutions in consumer protection laws for a broad array of reasons that relate to safety and soundness of the industry. The Commission should add the following purposes to the list of transactional and relationship purposes for sending an e-mail: "if the content is legally required or relates to a recipient's financial accounts or transactions, including, without limitation, billing (whether or not at a regular periodic interval), protecting the confidentiality or security of records, protecting against fraud, unauthorized transaction claims or other liability, risk control, or resolving recipient disputes."

C. E-Mail Sent with Permission of Employers to an Employee's Firm Owned E-Mail Account

The Commission has chosen not to interpret the phrase "employment relationship" so broadly as to allow all messages sent to an employer to an employee to qualify as a transaction or relationship message. Although Bank of America understands the hesitancy of the Commission to state such a broad rule, we recommend that the Commission reconsider its conclusion when limited to e-mail messages sent to an account provided by the employer. In this limited case, the Commission should indicate that the employee is not a "recipient" as defined under the statute or include all e-mail sent to such accounts as transactional or relationship messages. An employer should have the right to send any e-mail, irrespective of whether there are advertisements or promotions in the message, to such accounts. Further, in this situation the Commission should clarify that "employer" includes affiliated companies for purpose of determining employer owned e-mail accounts.

D. E-Mail Messages Regarding Service Updates and Upgrades Should Be Included with Product Updates and Upgrades Under "Transactional or Relationship" Messages

The Commission indicated that it is not inclined to expand Section 7702(17)(A)(v) to include "service" updates and upgrades. Bank of America requests that the Commission reconsider its position and confirm that "transactional and relationship" category includes e-mails to update or upgrade a service. Not including service updates and upgrades in this category would impose an

undue burden on the financial services industry not justified by any difference between a "product" and a "service."

E. Messages Send As Part Of A Negotiation

Bank of America agrees that e-mails sent as part of a negotiation should be treated as "transactional or relationship" messages. It is appropriate that when a recipient participates in a negotiation with a sender, subsequent e-mail communications regarding that subject matter are treated as a "transactional or relationship" message. For the Commission to categorize such e-mails as commercial would seriously limit a sender's ability to conduct business. Requiring such e-mail to comply with the Act would provide no consumer benefit, especially considering that the recipient invited such communications by entering into a negotiation with the sender.

Conclusion

Bank of America appreciates this opportunity to comment on this matter. If you have any questions concerning these comments, or if we may otherwise be of assistance, please do not hesitate to contact the undersigned.

Sincerely,

Daniel G. Weiss
Associate General Counsel

/DGW(697877)