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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 ("NPRM") 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"). Bank of America supports the goal of CAN-SPAM and appreciates the opportunity to comment on this important matter.

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 5,700 retail banking offices, nearly 16,500 ATMs and award-winning online banking with more than nine million active users. The company serves clients in 150 countries and has relationships with 96 percent of the U.S. Fortune 500 companies and 82 percent of the Global Fortune 500. Bank of America Corporation stock (ticker: BAC) is listed on the New York Stock Exchange.

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 is not only necessary but is expected by the public. 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. CAN-SPAM recognizes the need for balancing to

permit legitimate businesses to achieve the full benefits of electronic communications while reining in the continued growth of true spam. Bank of America previously submitted comments on the related Advance Notice of Proposed Rulemaking ("ANPRM")

Overview of Comments

Bank of America believes that the Commission's approach, which is based in large part on the recipient's reasonable interpretation of a message, is not consistent with the requirements adopted by Congress. CAN-SPAM sets forth a "purpose" test to determine whether a message is commercial. In contrast, rather than setting forth criteria to determine the purpose, the NPRM uses an "effects" test. The NPRM's approach leaves considerable ambiguity for businesses that send e-mail, because the reasonable recipient standard is subjective and the Commission has provided very little guidance as to how a reasonable recipient would interpret different types of e-mail messages. Bank of America continues to believe that the Commission should follow a "but for" standard as set forth in our comments to the ANPRM or look to the intent of the sender. Such an approach will be simple for legitimate entities to follow, but will provide substantial protection from true spammers who rarely if ever have any transaction or relationship with the receiver.

Even if the Commission elects to follow the approach taken in the NPRM, we believe that the final rule would be improved if the Commission takes two additional steps. First, the final rule should reflect inclusion of "primary purpose" in the statute as part of the definition of a commercial e-mail. Second, the Commission should provide more specificity to assist legitimate businesses that send e-mail. The NPRM sets forth criteria to determine the primary purpose of an e-mail once the types of purposes of a message are identified, but it provides little guidance as to what types of messages have "commercial," "transactional or relationship," or "other" content.

Bank of America offers the following suggestions on the NPRM, discussed in more detail below, which we believe will provide more certainty to businesses in determining the primary purpose of an e-mail message:

- Classification of mixed messages should be based upon "primary purpose."
- The Commission should specifically identify types of e-mail that are not "commercial."
- The Commission should modify some of the existing definitions for "transactional or relationship."
- The Commission should clarify that when e-mail contains content from multiple businesses, each business is not a "sender."

"Primary Purpose" in mixed content e-mails

One of the tests contained in the NPRM for determining whether a mixed content e-mail should be considered "commercial" is if: "A recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message advertises or promotes a product or service." This test appears to omit the statutory requirement of "primary purpose."

CAN-SPAM recognizes that many e-mail messages will have multiple purposes, but Congress specified that an e-mail is "commercial" only if its "primary purpose" is the advertisement or promotion of a commercial product or service. In a multi-purpose e-mail, a reasonable recipient may likely interpret the subject line to include an advertisement, although the reasonable recipient may not interpret this as the primary purpose. As a simple example, many consumers anticipate that a monthly statement will contain some promotional material. Hence, a reasonable consumer may interpret the subject line identifying the content as a monthly statement as also likely to include at least some commercial content. Under the test proposed by the NPRM, this means that such an e-mail could be "commercial" even though the primary purpose is clearly "transactional and relationship."

We believe the test should be revised in both mixed content scenarios to read: "A recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the primary purpose of the message is to advertise or promote a product or service."

Messages that are not "commercial"

The Commission should identify specific types of messages that have a primary purpose that is not "commercial," including any e-mails: (A) that contain a billing statement or other legally required notice; (B) sent to "deliver goods or services"; (C) sent at the recipient's request; (D) that contain primarily editorial content; and (E) sent in a business capacity by individual employees on a one-to-one basis. These messages are too critical to business communications to leave their classification as ambiguous or in a manner such that they could be classified as "commercial." Each of these additional categories will provide helpful guidance, allowing business operations to continue without unnecessarily burdensome changes in the manner in which businesses communicate using e-mail.

A. E-Mail that includes billing statements or other legally required

E-mail messages that contain billing statements and other legally required messages should always be considered to have a primary purpose that is "transactional or relationship." Under the NPRM, if either the billing statement is not at or near the beginning of the message, or the

recipient could reasonably interpret the subject line of the message to be for an advertisement or promotion, the e-mail would be "commercial." This is contrary to the intent of Congress. The alternative is for the sender to not include any promotional material in bills. This also is not the intent of Congress.

When addressing electronic delivery to consumers of legally required information, Congress has already provided adequate protections under the Electronic Signatures in Global and National Commerce Act ("E-Sign"). Under E-Sign, businesses must provide detailed disclosures and obtain affirmative consent prior to the use of e-mail or other electronic means for delivery of legally required information. Once consent is obtained, the language of E-Sign makes clear that Congress did not intend to otherwise burden electronic delivery by forbidding or restricting inclusion of promotional information together with the required information. The history of CAN-SPAM is clear that communication of legally required information is not the type of intrusive e-mails that Congress intended to control, and the Commission should not do so indirectly by creating uncertainty in the definition of "commercial."

B. E-mail sent to "deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender."

CAN-SPAM enumerates this category within the types of e-mail that has a primary purpose that is transactional or relationship. We believe where the message falls within this category and the message is sent within the scope of the existing relationship, then the message always has a primary purpose that is transactional or relationship. This is consistent with the statute and is particularly important when the content of the message, while received pursuant to and consistent with an existing relationship, viewed alone could be seen as promotional. For example, if an individual engages a financial institution to provide investment advice, the expectation of the individual is that he or she will receive investment recommendations as part of this relationship. The inclusion of such recommendations, which could also be viewed as promoting a commercial product, should not convert the e-mail to "commercial" as long as within the scope of the existing relationship. Similarly, banks frequently use real estate loan brokers to source loans. E-mail communications about changes to current loan terms is within the scope of that relationship and should never be deemed as "commercial" even though the content clearly promotes a commercial product.

C. E-mail sent at the recipient's request

The Commission should add messages that are sent to recipients at the recipient's request to the list of e-mail that is "transactional or relationship." For example, consumers in the process of purchasing or refinancing a house may request information by e-mail about current interest rates

or loan terms. Although the consumer clearly desires to receive this information, because there is no existing agreement between the parties, it is not clear that it falls within the literal language in CAN-SPAM that states a "transactional or relationship" message must "facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter…" Thus, the Commission should indicate that any e-mail requested by a consumer has a "primary purpose" that is transactional or relationship. In order to ensure that recipients maintain the ability to terminate their request, the Commission could require the following additional criteria:

- the sender may only send e-mail within the scope of the request;

- upon termination of the request, the sender will not initiate messages within the scope of the original request

D. E-mail that contains primarily editorial content

The Commission should clarify that e-mail that contains primarily editorial content is not "commercial." The primary purpose of such messages is not the commercial advertisement or promotion of a particular commercial product or service, but rather the provision of editorial content. Such communications provide recipients with important content regarding developments in the marketplace. Because the sender is a commercial entity with the ultimate goal of selling goods or services, should not result in editorial content being treated as commercial e-mail.

E. E-mail sent in a business capacity by individual employees

Like e-mail sent pursuant to the recipient's request, one-to-one e-mail that is sent by employees in the business-to-business context should not be treated as "commercial" e-mail. Both large and small businesses engage in corporate-to-corporate e-mail exchanges that involve complex transactions with a lot of e-mail flowing both ways. For example, in the area of Treasury Management, e-mails are sent to senior executives at existing clients describing new products that could assist the client. This is exactly the type of pro-active support businesses expect from their financial institution, and is not susceptible to abuse because of the nature of the relationships. One interpretation of CAN-SPAM could require that such e-mail contain an opt out and be run against the business's suppression list prior to transmission. Such a result would be very difficult to administer and was not intended by Congress.

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 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

relationships and operations and e-mail that provides information critical to developing the financial marketplace. Moreover, regulating this type of e-mail would restrict legitimate e-mail without addressing the spam problem.

Modification of Existing Categories

In addition to indicating that the above types of e-mail are not "commercial," the Commission should modify several of the other categories to provide clarity to businesses that certain types of content are "transactional or relationship" in nature. These modifications should include as "transactional or relationship" e-mail: (A) 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; (B) sent pursuant to the terms and conditions of an agreement; (C) negotiating transactions; and (D) sent by a company to its employees regarding products or services available to the employees, including products or services of third parties.

A. 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 § 3(17)(A)(iii) of the Act 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 Commission 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." 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 a prospectus, inventory, research, and information about seminars.

Additionally, the Commission should eliminate the words "at regular periodic intervals" from § 3(17)(A)(iii)(III). Often there are account statements that are sent following a transaction, rather then on a "regular" temporal schedule. Such messages are clearly transactional or relationship in nature. Thus, this section should allow for the sending of account information even if it is not "regular."

B. E-mail sent pursuant to the terms and conditions of an agreement.

The Commission should clarify or, if necessary, expand the scope of § (3)(17)(A)(v) of the Act so that it is clear that e-mail sent pursuant to consent obtained in account opening or other documents that establish the terms of an agreement, are "transactional or relationship" messages. This section currently includes e-mail that has a primary purpose "to deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender." The Commission should clarify that if an e-mail is sent pursuant to consent obtained at the establishment of the relationship, such e-mail constitutes "services" that the recipient is entitled to receive under "the terms of a transaction that the recipient has previously agreed to enter into with the sender." Alternatively, the Commission should expand the scope of § 3(17) and add a new (vi) in order to include messages sent pursuant to the terms and conditions of an agreement.

C. E-mail negotiating transactions.

The use of e-mail has greatly facilitated the ease and efficiency of negotiating transactions and should not be restricted. Section 3(17)(A)(i) of the Act 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."

D. 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 3(17)(A)(iv) of the Act 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 this provision so that a company's communications with employees concerning products and services available to them are considered to be "directly related to an employment relationship or related benefit plan."

E-Mails with content from multiple businesses

The Commission should attempt to address the issues surrounding whether there can be multiple "senders" and corresponding "opt outs." This issue is inextricably linked with the "primary purpose" of a message. Some interpretations of the Act suggest that if multiple parties provide commercial content in an e-mail, then each of the businesses is a sender. Such an interpretation requires multiple opt outs, suppression against multiple lists, and inclusion of multiple physical addresses in such e-mail. We do not believe that this is what the Congress intended, and the Commission should address this issue in this rulemaking. By clarifying that each provider of

commercial content is not a "sender," only the business that is actually sending the message will be impacted by the determination of the "primary purpose" of the message.

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)