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By Electronic Delivery

Federal Trade Commission  
CAN-SPAM Act  
Post Office Box 1030  
Merrifield, VA 22116-1030  
**Attention: CAN-SPAM Act Rulemaking, Project NO. R411008**

**Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act**

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 Advance Notice of Proposed rulemaking of the Federal Trade Commission (FTC) 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 supports the goal of the CAN-SPAM Act 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 the balancing

of the need to permit legitimate businesses to achieve the full benefits of electronic communications while reining in the continued growth of true spam. Fortunately, Congress gave the Commission the authority to further refine many of the definitions in CAN-SPAM to better meet these competing goals.

### **Overview of Comments**

The Bank of America would like to comment on the following issues raised in the rulemaking:

1. **Definition of “commercial electronic mail”** – As the key definition in CAN-SPAM, it is important that the Commission provide senders of e-mail with clear standards to permit certainty for legitimate businesses.
2. **Transactional or Relationship Messages** – The Commission should clarify that a response to an inquiry is considered a transactional message. In addition, the definition of a relationship message should be expanded to include e-mail communications that a customer would reasonably expect to receive based on his established relationship with the bank. Finally, businesses should be permitted to send any e-mail to their own employees at e-mail addresses provided by the employer for business use, even if the employer permits the employee to use the address for some personal uses.
3. **Sender** – The Commission should limit the definition of “sender” to one entity when the e-mail message contains promotional information for multiple businesses.
4. **Refer a Friend Messages** – The Commission should clarify whose address should be in the “From Line” and other Header Information.

These items are discussed in more detail below.

### **Definition of “commercial electronic mail”**

The obligations of CAN-SPAM apply primarily to “commercial electronic mail” defined as any e-mail message whose “primary purpose” is the advertisement or promotion of a commercial product or service. Because many messages sent by Bank of America have multiple purposes, for example promotional information included with an account statement, it is essential that the Commission develop clear and easy to use standards for determining the primary purpose of an e-mail message.

First, we recommend that the Commission recognize the statutory language “the primary purpose” means that an e-mail message may have only a single primary purpose. Second, we recommend a simple “but for” test that avoids the need to attempt to measure the relative weight of multiple purposes within a single e-mail. If the message would not have been sent “but for”

the “non-commercial” component of the e-mail, then the entire e-mail should be considered as “non-commercial.” We believe this is particularly important when a part of the message is transactional or relationship in nature. Such a test will be simple for legitimate entities to follow, and will provide substantial protection from true spammers who rarely if ever have any transaction or relationship with the receiver.

### **Transactional or Relationship Messages**

The current five categories of messages that are considered “transactional or relationship” messages should be modified to provide clarity to include those instances in which the recipient would reasonably expect to receive an e-mail communication based on their established relationship with an institution. The Commission should expand these categorizations to include:

- *Messages where the recipient has requested the e-mail or consented to receive the e-mail.* It is common for individuals to request e-mail notification of specific information from a bank, for example information about interest rates in connection with a potential loan or deposit. In many cases, individuals will not use language precise enough to fall within the limited definition of “affirmative consent” nor will there exist a commercial transaction “that the recipient has previously agreed to enter.” The Commission should indicate that messages sent at the consent or request of the recipient, or to fulfill a clear request of the recipient, fall within the definition of a transactional or relationship message.
- *E-mails sent by financial advisors or client managers to their clients in a business capacity.* Customers want and expect to have regular communications with their financial advisors and their client managers. At times these messages involve the introduction of products or services that would be beneficial to the customer. The Commission should clarify that E-mail messages sent in furtherance of the existing relationship and within the reasonable expectation of the recipient, should be included in the definition of a relationship message. We note that the existence of the relationship assures this type of e-mail messages will not be abused, since the relationship is too important to risk annoying the customer.
- *Business to business e-mails.* Large corporate customers and even small business customers use e-mail to assure an efficient flow of information in the marketplace. They expect to do business with financial institutions in a way that will not inhibit their ability to move quickly and decisively in the decision making process. Because e-mail systems are not designed to scrub each e-mail sent by an employee against a suppression list, such a requirement would be exceedingly burdensome and expensive to implement, while disrupting many legitimate practices. Finally, we note that emails sent between business entities with existing relationships was clearly not the impetus for CAN-SPAM, and so there would be little or no benefit from the creation of such complex systems. As with the e-mails sent by financial advisors or client managers, the fact that this is an

individualized message or will be sent to a small number of recipients, assures that it will not be subject to the abuse associated with true spam. This additional clarification would provide guidance without interfering with normal communication patterns of today's society.

- *E-mail negotiation of transactions.* The use of e-mail is frequently used to facilitate negotiation of transactions, but the current definition in 17(A)(i) requires an existing transaction. This subparagraph should be modified to 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."
- *E-mail sent by a company to its own employees.* Bank of America regularly provides some of its products and services to employees at a discounted rate. Companies should be able to send promotional information to its own employees as long as limited to e-mail addresses provided by the employer for business purposes.

### **Sender**

The Commission should provide criteria that will assist business in determining who the "sender" is under the Act. It is not uncommon for one business to send out newsletters or advertisements that include information about the products and services of several other businesses. For example, an airline may send a communication to its frequent flyer customers promoting their own products and services as well as include information regarding products or services for a number of their promotional partners such as credit cards, hotels, car rental companies, etc. Some interpretations of the Act would consider each of these businesses the "sender" of the messages thereby requiring multiple addresses and opt out mechanisms. This would be confusing to the customer. In addition, this interpretation would require each of the businesses mentioned in the communication to screen the recipient list prior to the communication being sent. This is both impractical and raises concerns over information sharing between unrelated businesses. The criteria should be that if the initiator controls the sending and would send the e-mail regardless of whether information regarding the other businesses was included in the message, then the initiator is considered the sole sender.

### **Refer a Friend E-mails**

The Commission should provide clarification regarding the name and address that should be included in the "from" line and other header information. While we agree that the business should be considered the sender under the act, the Act should permit the name and address of either the friend who initiates the e-mail or the business on whose behalf the message is being sent.

An additional comment regarding the ten-day time frame for honoring opt-out requests. If the changes recommended in this letter were instituted, the ten-day opt-out time frame would be sufficient for honoring customer preferences. If further clarification is not made regarding

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transactional and relationship messages, an extension of the ten day requirement to 31 days is recommended.

**Conclusion**

The Bank of America appreciates this opportunity to comment in this proceeding. We would be happy to discuss our views in greater detail, or to discuss any new ideas that the Commission wishes to pursue. If you have any questions concerning these comments, or if we may otherwise be of further assistance in this matter, please do not hesitate to contact the undersigned at 415 622 9688 or the address noted above.

Sincerely,

Daniel G. Weiss  
Associate General Counsel

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