

April 20, 2004

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

Ladies and Gentlemen:

BMO Financial Group appreciates the opportunity to comment to the Federal Trade Commission ("FTC") on the Advanced Notice of Proposed Rulemaking ("ANPR") covering the definitions, implementation, and reporting requirements under the CAN-SPAM Act ("the Act"), specifically referenced as the CAN-SPAM Act Rulemaking, Project No. R411008.

BMO Financial Group is a Canadian organization operating in the United States with three foreign banking offices, and under Harris Financial Corp., a financial holding company with assets of more than \$38 billion (U.S.) at year-end 2003, 29 banks including Harris Trust and Savings Bank and several non-bank entities, two of which are registered broker dealers. We offer a wide range of financial services including trust, retail and private banking, and investment services.

#### Comments to the ANPR

We appreciate the FTC soliciting comments on various topics related to the CAN-SPAM Act. We support the development of regulations that would clarify the applicability of the Act to certain electronic messages ("email"). We also support the development of regulations for those sections of the Act where the FTC has discretionary rulemaking authority. We offer the following comments.

#### Mandatory "Primary Purpose" Rulemaking (Section II)

We strongly encourage the FTC to issue clear and easy to apply rules for determining the primary purpose of an email. For transactional or relationship messages that may also advertise or promote a commercial product or service, the primary purpose of the email is relevant for the purposes of determining compliance with the Act. It is not uncommon in our business for an employee to send a customer or prospect an email message in response to a specific email inquiry. These frontline employees need clear rules that are easy to understand and apply in determining when the opt-out requirements are triggered. Without these clear guidelines, an employee may unknowingly and inadvertently violate the Act.

We would suggest that the most appropriate criteria for determining whether the primary purpose of an email is to promote a product or service is to consider whether the commercial advertisement or promotion in an email is more than incidental to the email. It is our opinion that this would be in keeping with the spirit of the Act. For example, if the email is in response to a question the recipient sent to the sender requesting information about the recipient's account with the sender and the sender replies with the information requested plus a short promotion about other services the sender offers at the end of the message, it is clear that the primary purpose of this type of email is not commercial, but transactional or relationship oriented and the commercial email disclosure requirements should not be triggered.

Recipients of emails can benefit from brief commercial messages placed in an email that is being sent to them for another purpose, much as a customer of a financial institution benefits from statement messages or marketing materials included with their statement. If the recipient of these messages doesn't care about the

advertisement portion of the correspondence, it can be ignored. In these cases, it is information in addition to what was requested or needed by the consumer.

We would ask that the FTC consider using the following specific criteria to determine whether the primary purpose of an email is to promote a product or service. A negative response to any one of the following questions would mean that the email is not for transactional or relationship purposes, but to promote a product or service

- Is the email a specific response to an email sent by the recipient requesting information about his/her account, or requesting information on the businesses products and services?
- Is the only promotional aspect of the email a link to the sender's website?
- Does the promotion of products or services appear at the end of the email, after the transactional or relationship message?
- Does the promotion of products and services consist of, for example, 5 or fewer sentences?

Using as criteria a determination as to whether the commercial advertisement or promotion "is more important than all of the emails other purposes combined" or "is more important than any other single purpose of the email" would require a sender, especially in the case of a frontline employee, to make a very subjective decision that they may not be trained to make, especially if they only send several emails to customers a year. Rules that are clear and easy to apply would go a long way to preventing violations of the Act by an employee that only occasionally sends an email to a customer.

#### Ten (10) Business Day Period for Processing Opt-Out Requests (Section III.B.)

We recommend the FTC reconsider the ten (10) business day time period for processing opt-out requests and extend that time period to twenty (20) business days. The ten (10) business day requirement would place a hardship on businesses that do not have significant Internet operations. These businesses likely are not equipped to easily capture and process out-out requests in an automated fashion. For example, a business with a large number employees in which many of those employees send periodic emails messages to a few prospects or clients will need to have manual processes in place to record and distribute any opt-outs they receive. Also, businesses that conduct most of their customer contact through face-to-face meetings or telephone should not be forced to expend significant costs to upgrade or automate processes to capture and honor opt-out requests resulting from a very small number of emails sent per year. A large business with a manual process could easily take more than ten (10) business days to have a centralized area receive the opt-out request and to enter it into a tracking system so that it would be accessible to employees sending emails.

Businesses that use email as their primary marketing channel and conduct most of their customer contacts over the Internet are more likely to have implemented automated systems to capture and honor opt-out requests. However, the rules should be the same regardless of the business size or process. A twenty (20) business day requirement would not cause undue hardship to individuals who opt-out, and would put all businesses sending commercial email messages on a level playing field.

We thank you for allowing us the opportunity to provide you with comments on the ANPR and look forward to reviewing any future proposed rules. If you have any questions concerning this comment letter, or if we may otherwise be of assistance, please do not hesitate to contact us.

Respectfully submitted,



Paul V. Reagan

Senior Vice President and U.S. General Counsel