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Federal Communications Commission
445 12th Street, SW.
Washington, DC 20554

Re: CG Docket No. 02-278
CG Docket No. 05-338

Dear Sir or Madam:

This comment letter is submitted on behalf of Bank of America Corporation in response to the notice of proposed rulemaking ("Proposed Rule") and request for public comment issued by the Federal Communications Commission, published in the Federal Register on December 19, 2005. The Proposed Rule would prescribe regulations to implement the Junk Fax Prevention Act of 2005 ("Junk Fax Act") which amends section 227 of the Communications Act of 1934. 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 38 million consumer and small business relationships with 5,800 retail banking offices, more than 16,700 ATMs and award-winning online banking with more than fourteen million active users. Bank of America appreciates the opportunity to comment on this important topic.

Bank of America supports the right of consumers not to receive unsolicited advertisements via facsimile if they do not want such offers. Bank of America has offered its consumer customers the ability to opt-out of direct marketing communications via telephone, email and mail for many years and communicates this option regularly through the bankofamerica.com website and through the Bank of America annual privacy notice.

Established Business Relationship

The Commission is requesting comment about the definition of the "established business relationship" ("EBR") exception for sending unsolicited advertisements, including establishing parameters that will define the EBR for faxes and the time limits and verification requirements.

Definition Should Recognize Business-to-Business Relationships

Bank of America recommends that the Commission adopt an EBR definition that recognizes the unique business relationship between lenders and various intermediaries, such as mortgage brokers and automobile dealers, that deliver financing to consumers. These are often long-standing contractual and other relationships. The use of fax messages to deliver rates, terms and special financing programs to intermediaries is a long standing business practice and the definition of the EBR exception should reflect these relationships. Restricting facsimile communications to such intermediaries will limit the ability of such brokers and other intermediaries to obtain time-sensitive financing options and rates that can be communicated to consumers. Thus, the Commission should expressly include this type of business relationship within any EBR definition it adopts.

Time Limits

Bank of America also recommends that the Commission not impose time limits on the EBR exception at this time. There is currently no evidence that businesses receiving faxes of marketing information from a person with whom they have done business would expect not to continue to receive such information for any specified time after their last transaction. Should a business choose not to receive fax advertisements, the business has the option of opting out of receiving advertisements at the business fax number on file.

Should the Commission decide to adopt time limits on the EBR exception, it should adopt the definition contained in the Commission's telemarketing rule adopted under the Telephone Consumer Protection Act (TCPA), including the financial contract or account clarification, for faxing to residential subscribers only. This would provide consistency of treatment for residential subscribers

between telemarketing and fax marketing. However, the EBR exception for telemarketing under the TCPA does not cover business recipients. Therefore, the Commission should recognize the different nature of those business relationships and not establish time periods for the EBR with business subscribers at this time.

Verification of Fax Numbers

Under the proposed rules, the Commission is proposing that a company that obtains a customer's fax number, verify how (and when) the fax number was received. Bank of

America believes that senders of faxes should not be required to investigate how fax numbers were obtained. Bank of America believes that if an EBR has been established, an assumption should exist that the fax numbers obtained for such customers were voluntarily provided.

Notice and Opt-Out

The Commission is requesting comment on implementing the statutory requirement that a "clear and conspicuous" opt-out notice appear "on the first page of the unsolicited advertisement."

Clear and Conspicuous

The term "clear and conspicuous" has been used in many statutes for many years without detailed statutory guidance. In light of the variety of types of advertising materials and formats that are possible, it is unlikely that any clarification of this term would adequately cover all instances. Therefore, Bank of America believes that the Commission should not provide further guidance on the meaning of this term.

Clarify Location of Opt-Out Notice

Bank of America recommends that the Commission clarify the location requirement for the opt-out notice. The Proposed Rule states that the "notice of opt-out should be on the first page of the unsolicited advertisement." There is confusion as to whether the first page of the advertisement begins on the actual advertisement or the cover page of the faxed advertisement. Bank of America urges the Commission to interpret the statutory phrase "first page of the unsolicited advertisement" as the fax cover sheet or the first page of the fax message, when a cover sheet is not used, regardless of whether the first page contains an advertisement. Bank of America believes that interpreting the phrase "first page of the unsolicited advertisement" as the

fax cover sheet will prevent confusion and will allow compliance with the opt-out notice requirements.

Shortest Reasonable Time

Bank of America supports the Commission's proposed definition of the "shortest reasonable time" in which a sender must comply with a recipient's request not to receive future faxes as 30 days. This is consistent with the TCPA's requirement to honor future telemarketing calls. Bank of America believes that any shorter period will cause confusion between the requirement period of the TCPA and the requirement period of the Junk Fax Act.

Alternative Methods to Honor Opt-Out Requests

Bank of America does not believe that senders should have to accept opt out requests through channels they have not designated to receive such requests. Currently, Bank of

America's consumers and non-consumers can express their direct marketing preferences through telephone, mail, email and bankofamerica.com. Requiring senders to monitor alternative communications for opt-out requests is not required by the statute and will needlessly increase the inability of the sender to honor the person's opt out request. Bank of America believes that market forces, not regulatory requirements, should determine any alternative methods a recipient may use to express their preferences.

Unsolicited Advertisement

The Commission is requesting comment on the definition of "unsolicited advertisement," in addition to written permission, and what other forms of permission should be allowed under Junk Fax Act rules.

Definition of Unsolicited Advertisement

Bank of America supports the Commission's proposed definition which would permit expression of the person's prior express invitation or permission to fax to be in writing or otherwise. The current requirement for written permission is unduly burdensome without sufficient benefit to consumers or businesses. Requiring written permission to fax a document that the customer has just verbally asked us to fax (such as a copy of a statement that contains marketing information) is also burdensome and frustrating to customers.

In addition, Bank of America urges that the Commission recognize that an "unsolicited advertisement" should only cover material the primary purpose of which is to advertise the commercial availability or quality of the goods or services. Many documents or materials have a non-marketing purpose but may contain incidental or ancillary marketing messages. Examples include bank account or credit card statements. These often contain an incidental marketing message, but the definition of "unsolicited advertisement" would currently cover them. This concept is present in other similar laws, including the CAN-SPAM Act. The inability to fax such statement or marking out the marketing messages on such statements creates customer confusion and frustration. Therefore, we ask the Commission to adopt the following definition for "unsolicited advertisement:"

> "any material advertising the commercial availability or quality of any property, goods, or service which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise, but shall not include material the primary purpose or content of which is not to advertise the commercial availability or quality of any property, goods or services, but which may contain incidental advertising or marketing messages."

Bank of America appreciates the opportunity to comment on the Commission's proposal. If you have any questions regarding our comments, please contact Kathryn D. Kohler, Assistant General Counsel, at (704) 386-9644.

Very truly yours,

Kathryn D. Kohler

Kathryn D. Kohler
Assistant General Counsel