IBC
International Bank
of Commerce

May 21, 2010

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

Delivery via E-mail to Cathy.Williams@fcc.gov
and submitted via FCC Website at
http://fjallfoss.fcc.gov/ecfs2/.

Re: CG Docket No. 02-278 and FCC Number 10-18
Telephone Consumer Protect – Proposed Rules

Dear Ms. Williams:

International Bank of Commerce ("IBC") is the largest Hispanic-owned bank in the continental United States. It provides mobile banking services via SMS text message to its banking customers as part of providing deposit and lending services. Its customers expect innovative delivery of products and services and appreciate the convenience and advantages that mobile banking brings to them.

The purpose of this comment letter is to address the Federal Communication Commission's (the "FCC") Proposed Rules regarding Telephone Consumer Protection Act ("TCPA"), published in the Federal Register on March 22, 2010 (Fed. Reg. Vol 75, No. 54 (Mon., March 22, 2010) p. 13471 - 13482.

I. Clarification Regarding Account Services and Debt Collection Activities

As drafted, the new proposed FCC TCPA rules appear to apply to any "prerecorded telemarketing call" to a mobile phone, and may include calls to collect a debt, notify a customer of a payment due, or request additional information to complete an application (for credit, a loan, etc.) The proposed rules, if made final, would reverse a Federal Communication Commission ("FCC") interpretation permitting calls to mobile phones where the mobile phone number is provided "to a creditor, e.g., as part of a credit application," and would expose creditors and collectors to privacy liability and statutory damages under the TCPA.

In 2003 the FCC issued an interpretation which many financial institutions, lenders, debt collectors and others believed exposed them to potential liability under the TCPA, which allows for private rights of action and provides for between $500 and $1500 in statutory damages per each violation. (47 U.S.C.A. § 227(b)(3)) Many such organizations use telephone systems to contact their customers where, if such systems are paired with certain software, the systems become capable of generating and dialing sequential numbers at random. Given the breadth of the FCC's 2003 interpretation, many believed that even a standard telephone equipped with a speed dial might possibly be considered or interpreted to be an automatic telephone dialing system ("ATDS").

The banking, credit and collections community brought the problems and issues associated with the FCC's 2003 interpretation to the FCC's attention, and in 2007, the FCC issued a declaratory ruling that a creditor had the requisite "prior express consent" to call a consumer's mobile phone using ATDS, as long as the consumer provided the creditor with the number directly, such as in connection with an application for credit, a mortgage, etc. "We conclude that the provision of a cell phone number to a creditor, *e.g.* as part of the application process, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt." (*See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International For Clarification and Declaratory Ruling,* CG Docket No. 02-278, Declaratory Ruling, p. 6, paragraph 9 (2007)). IBC requests a telephone number at which the consumer can be reached as a part of its standard application process. The 2007 FCC declaratory ruling created a rule that allowed the efficient use of automated telephone equipment to make calls in connection with the collection of delinquent accounts while deterring truly unsolicited ATDS calls to mobile phones.

The FCC March 22, 2010, proposed rules, however, would undo this efficient and productive compromise reached by the FCC's declaratory ruling in 2007. In the current proposed rule, the FCC has proposed a new definition of "prior express consent" with regard to using an ATDS to call a mobile phone.

The proposed rule, including the new definition of "prior express consent" would not only undo the careful compromise struck by the FCC's 2007 declaratory ruling, but it would read into the TCPA a requirement that the prior consent be "written." The TCPA does not specify whether the prior consent must be written or may be given verbally as well. Further, if a consumer refuses to provide such written consent, the bank would be prohibited from declining the application or conditioning the grant of credit on the ability to use an ATDS. In addition, our bank provides account alerts and activity updates using what could be construed as ATDS systems, and these account alerts and activity updates are being provided <u>at the request</u> of our customers for such services. We are concerned that the following types of account services could be adversely affected by this proposal: (a) calls to alert customers regarding billing statement errors; (b) calls for payment reminder or debt collection purposes; (c) calls relating to possible or actual data security breaches involving customers' personal information; (d) calls to alert customers about account activity or possible fraud on their account.

While the proposed rule provisions are consistent with the new Federal Trade Commission restriction on the use of prerecorded marketing calls (*See* 16 C.F.R. § 310.4(b)(1)(v)), applying such provisions to calls made by an ATDS for account service or collection calls is not appropriate and could significantly impede communications with our customers that our customers value. It does not further any public policy goals of reducing the number of unwanted/unsolicited <u>marketing</u> calls as the calls in question have to do with account services.

We would request that the FCC ensure that the careful compromise struck by the FCC's 2007 declaratory ruling be maintained, and that the FCC maintain its current definition of "prior express consent." We also request that the FCC maintain the existing business relationship exception in 47 C.F.R. Section 64.1200(a)(2)(iv). Alternatively, if the FCC determines it will adopt the current definition of "prior express consent," we request that a specific exemption be made for any and all calls using ATDS that are not necessarily "telemarketing calls" but are made for the purposes of providing account services or collecting on accounts. Requiring written consent for these types of calls is burdensome and unnecessary as consent to call the mobile number is clearly implied in the existing business relationship.

II. Clarification Regarding What Constitutes a "Prerecorded Telemarketing Call" Under the Proposed Rule: Account Alerts and Mobile Banking SMS Text Messages

Our bank is currently providing a variety of mobile banking services to customers who request such services. These services are provided through SMS text message based services instead of or in addition to a web based version of mobile banking services via a smart phone internet connection. Such mobile banking services occurring via SMS text message include, but are not limited to, account activity alert, balance transfer capabilities, bill payment services, funds transfer capabilities, etc. When a customer chooses to obtain such services, there is often a "back and forth" of SMS text messages, such as the customer initiating a bill payment (SMS text message from customer to bank), and then the bank sending a bill payment confirmation back to the customer (SMS text message from bank to customer). Other times the SMS text messages are from bank to customer only, such as account activity or balance alerts, which are automatically sent based upon parameters the customer has chosen.

Our understanding is that SMS text messages are subject to the FCC's TCPA rules. To the extent that this proposed rulemaking may apply to SMS text messages that are necessary to deliver mobile banking services, we request that a specific exemption be made for any and all such SMS text messages, regardless of the technology that is used to generate the SMS text messages and forward them to the correct mobile phone number on file for the customer. We explain to the customer that the use of SMS text messaging is necessary to obtain the mobile banking services and the customer consents to the use of and delivery of SMS text messages to their mobile phones when they sign up for mobile banking services. Therefore, we are requesting a specific exemption from the new proposed rule so that the rule does not significantly impede communications between our bank and its customers or impede the delivery of mobile banking services that the customer requests.

Thank you for this opportunity to comment.

Sincerely,

Dennis Nixon
Chairman of the Board and President