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May 21, 2010

Ms. Marlene H. Dortch  
Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

Re: CG Docket No. 02-278; FCC 10-18

Dear Ms. Dortch:

Bank of America is pleased to have the opportunity to comment on the rules and regulations proposed by the Federal Communications Commission (the "Commission") to implement the Telephone Consumer Protection Act (the "proposed rules"). We appreciate and agree with many of the Commission's goals for the proposed rules; however we are very concerned that written consent requirements for certain telephone communications with our customers will negatively affect our ability to serve our customers' needs.

For the reasons set forth below, we strongly encourage the Commission to: (1) limit the restrictions on the use of an automatic telephone dialing system ("autodialer") to the dissemination of artificial and prerecorded voice *solicitation* messages absent consumer consent; (2) eliminate the distinction between calls made to wireless or wireline devices such that additional restrictions are not placed on calls made to wireless devices; (3) decline to adopt a written consent requirement for non-solicitation calls made using an autodialer and/or that deliver artificial or prerecorded voice messages; and (4) decline to make changes to the measurement for call abandonment rate. Any finalized rule should allow for implementation periods that mirror those adopted by the Federal Trade Commission (the "FTC") in connection with its amended rule and the final rule should confirm that it is prospective in application.

Bank of America serves individual consumers, small- and middle-market businesses and large corporations with a full range of banking, investing, asset management and other financial and risk management products and services. We serve approximately 58 million consumers and small businesses with more than 5,900 retail banking offices, more than 18,000 ATMs and an award-winning online banking platform with nearly 30 million active users. Bank of America is also among the world's leading wealth management companies and is a global leader in corporate and investment banking and trading across a broad range of asset classes. Bank of America uses a variety of communications methods to alert our customers of critical issues affecting their accounts.

Bank of America supports the Commission's efforts to harmonize the existing rules implementing the Telephone Consumer Protection Act ("TCPA") with those implementing the Telephone Sales Rule ("TSR"). However, the proposed rules go significantly beyond this goal and will result in a sharp reduction in the ability of financial services companies to service accounts in a manner that our customers have come to expect and appreciate. In fact, the Commission's stated goal of harmonization would be undermined by the proposed rules' broad application to all calls regardless of call purpose and the proposed rules' continued disparate treatment of calls made to wireline and wireless devices. With respect to the Commission's request for comment, Bank of America would like to offer the following for consideration. Specifically, we believe the adoption of a broad written consent requirement raises four significant issues that warrant comment.

- The proposed rules apply indiscriminately to calls made regardless of purpose (e.g. servicing or solicitation), which will lead to unintended negative consequences for consumers.
- The proposed rules' requirement for entities to collect *additional* written consent for calls made with autodialer technology or that deliver artificial and prerecorded voice messages as well as the disparate treatment of wireline and wireless devices will invalidate existing customer consent and result in customer confusion.<sup>1</sup>
- The proposed adoption of a written consent requirement for automated service (non-solicitation) calls to wireless devices and the delivery of artificial and prerecorded voice messages to wireline devices will severely limit our ability to contact Bank of America customers for critical non-telemarketing communications such as fraud alerts, account activity notifications, collections calls and account modifications.
- Changes to the abandonment rate measurement will not promote or create consistency between the TCPA and the TSR.

### **The Proposed Rules Will Lead to Unintended Negative Consequences for the Consumer**

The Commission seeks comment on whether it should extend a written consent requirement to autodialed calls to wireless devices and artificial or prerecorded message calls to wireline devices with the elimination of an existing business relationship exception. The Commission makes no distinction between calls made for solicitation and those made for non-solicitation (service) purposes. This will be problematic because the written consent procedures outlined in the proposed rules essentially require a separate and distinct document evidencing the consumer's agreement and authorization to receive the restricted communications. If this rule were enacted as proposed, Bank of America, and hundreds of other companies in the United States that use autodialing and artificial and prerecorded voice technologies, would have to either request that our existing customers sign *and return* an additional consent agreement or would have to consider abandoning the use of autodialers— that is, almost any sophisticated dialing technology and artificial and prerecorded voice technology. This would be the case even for

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<sup>1</sup> Existing laws and guidelines specify that the receipt of a phone number on application is to be considered consent to contact a customer regarding a particular account or transaction. See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752 (1992) ("1992 TCPA Order") ¶ 31; *Rules and Regulations Implementing the Telephone Consumer Protection Act*, 23 FCC Rcd 559 (2008) ("ACA Declaratory Ruling") ¶ 1.

customers who received such communications through their wireless and wireline devices for years.

Further, consent through electronic transmissions or telephone keypads is unlikely to be less burdensome as customers will have to receive information related to the consent, interpret the consent request and communicate their decision. It will be extremely challenging and potentially cost-prohibitive to obtain and manage this new form of express consent from our existing 58 million customers and equally challenging to segregate and manage our prospective customer population. Regardless of application, some or all Bank of America customers will be negatively impacted by our inability to communicate critical messages associated with their accounts in an effective manner.

The most effective method of communicating with our large customer base is through automated calling and text messages. As more and more customers elect to use wireless devices as their sole or primary means of communications with us, our customers have grown to expect this method of servicing as a means of protecting their accounts.

Most autodialing technology can be used in a variety of ways. While many political campaigns send excessive artificial and prerecorded voice messages to consumers absent consent, Bank of America does not. Most of the autodialing technology we use has the capacity to dial consumers and connect them to live associates when a phone is answered such that the Bank is able to efficiently monitor and track the number of attempts made to communicate with consumers. Such sophisticated autodialer technology can be programmed so as to avoid excessive dialing or sending artificial or prerecorded voice solicitation messages to wireline or wireless devices. The ability to manage these communications through autodialing technology is not only less labor intensive than manually dialing customers, it also allows us to accurately monitor and account for each call made, audit associate behavior, and address consumer complaints. Further, the use of autodialed calls can help us determine what times are most convenient to reach our customers and when they are best able to discuss their accounts. In fact, the speed and efficiency of Bank of America's autodialer technology enables us to maximize customer contact with live associates.

Some examples of autodialed, prerecorded voice and text communications that we engage in with our customers include:

- Notification of out-of-pattern account activities and requests that might reflect identity theft or fraud.
- Responses to customers' service and informational requests.
- Notification of low account balances, overdrafts, over-limit transactions or other circumstances that might result in restrictions being placed on an account, fees or negative reports to the credit bureaus.

- Communications with mortgage customers at risk of foreclosure, including notice of modification options and reminders to complete and return documentation needed to complete these modifications, which are intended to keep customers in their homes.
- Communications related to community outreach events related to mortgage modification or financial education.
- Requests to supply missing information on account applications so as to better make a credit decision to make a loan or extend credit.
- Verification of insurance information that the customer is required to maintain in connection with a loan.
- Timely communications with customers following a natural disaster to relay important information relating to customer accounts or insurance claims.
- Notification that payment cards have been mailed and reminders to activate these cards.
- Invitations to discuss the status of claims or other account activity.
- Resolution of address discrepancies and identity verification required by various federal laws including the CARD Act, the Fair Credit Reporting Act and the USA PATRIOT Act.

The proposed rule would also shut down systems we have in place in the event of a catastrophe that allow us to quickly communicate with customers regarding their insurance. For example, we contact the customer when we have received a claim check, and/or are sending them back a claim check. If the autodial option is no longer available, there would be additional time and expense in communicating this important information. Further, manual dialing makes it extremely difficult to determine if the customer was contacted, whether the issue was resolved or whether another call is needed, and the resolution of the call. In the event that a large-scale disaster, such as Hurricane Katrina, disrupts wireline service, the inability to use artificial and prerecorded voice messages or autodialing technology to reach wireless devices will significantly impair our ability to communicate critical insurance and personal recovery information to consumers. Autodialers can also help ensure that calls are *not* made to certain disaster areas, if state or federal law so requires.

At Bank of America we have a 33% contact rate when using an auto-dialer compared to a 15% contact rate when analysts manually call outward. The proposed rules will institutionalize the inefficiency of manual dialing with no clear corresponding benefit. If the rules as proposed were to be implemented, we would be unable to or would incur significant additional costs and expenses to provide important services to our customers because customers would have to go back and specifically execute an authorization to be contacted through an autodialer system. With the associated delays and confusion, fewer customers will be contacted and there could be increases in fraud losses, prolonged credit approval processes and heightened customer frustration.

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### **The Proposed Rules Will Limit Our Ability to Communicate with Customers over Wireless Devices, Invalidate Existing Customer Consent and Result in Customer Confusion**

According to a recent government survey, nearly 25% of American households use only a wireless phone, and nearly 50% of those between the ages of 25 and 29 use wireless devices only.<sup>2</sup> We have all observed a significant number of these individuals communicating extensively via text messaging. Bank of America has observed that over 30% of the numbers provided in the “residential” field on certain affiliate applications and documents are numbers to wireless devices. However, under the proposed rules, the Bank would be committing a violation by calling a wireless device listed as the sole residential number.

The proposed rules create different standards for communications to wireless and wireline devices. For wireline numbers, Bank of America would be able to use autodialing technology provided no artificial or prerecorded voice messages are sent absent written consent; however, we would not be able to use autodialing technology for any message, even a live message, sent to a wireless device without written consent. The disparate treatment of wireline and wireless number does not further the Commission’s goal of protecting consumers. Instead consumers who have yet to provide this written consent may not receive important time-sensitive servicing communications. The inefficiencies of manual dial and/or direct mail coupled with privacy law restrictions could prohibit the effective communication of critical messages to our customers.

The proposed rules not only create the above-mentioned inefficiencies, but also invalidate the consent previously provided by customers to have prerecorded and artificial messages sent to their residential (“wireline”) numbers, even if such communications are servicing in nature. An additional document requesting consent will certainly result in customer confusion; many customers may question why their previous consent has been negated, what an autodialed call is, why wireline and wireless devices are serviced differently by the Bank, and why they will not be able to receive certain artificial and prerecorded servicing communications if they do not return the requested authorization document. Restrictions on the use of autodialer systems and delivery of certain critical communications by prerecorded message or artificial voice prevents a company from utilizing state-of-the-art technologies that are proven to enhance customer service.

Customers who have provided the Bank with their telephone numbers do so with the expectation that they will be contacted at that number regarding their account(s) with us, regardless of whether the number connects to a wireline or wireless device. Communications to our existing customers requesting new written consent will likely result in customer confusion. Most consumers may misconstrue the communication as requesting consent to “new” telephone solicitation messages rather than new consent to telephone notifications they already receive.

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<sup>2</sup> Blumberg SJ, Luke JV. “Wireless substitution: Early release of estimates from the National Health Interview Survey, July–December 2009.” National Center for Health Statistics. May 2010. Available from: <http://www.cdc.gov/nchs/nhis.htm>.

This written consent requirement will significantly increase costs for no clear customer benefit. Prior written consent for servicing communications as envisioned in these proposed rules would require our company to collect and retain a record of this consent. We estimate that the construction and testing of a centralized consent system would cost in excess of \$3.6 million, not including tens of millions of dollars in ongoing costs associated with managing and maintaining the system; monitoring, servicing, and tracking servicing call lists; expanding manual dialing; researching consumer and regulatory inquiries and complaints; and the costs connected with potential fraud and other losses.

For example, in the event a customer changes a phone number or switches to a wireless device, that customer would have to sign and return an additional written consent agreement. In fact, customers in this situation will have to proactively contact the Bank alerting us of the change and then await sending and processing of this *new* written consent so that they can continue to receive the servicing communications for which they have previously provided consent. The temporary discontinuation of these services will likely create confusion and a negative customer experience. In addition, Bank of America business units that do not experience inbound customer communications, such as Risk Detection, would have no opportunity to communicate by telephone with consumers at their updated phone number (or device). Instead, this potentially time-critical and highly sensitive communication would need to be sent through the email channel, if the consumer has provided an email address or more than likely, the direct postal mail channel. This is a significant step backwards in customer service and could, in the case of Risk Detection, lead to greater fraud losses by both financial institutions and their customers.

### **The Proposed Rules Will Hamper Fraud Detection Communication Efforts**

The use of autodialed, artificial and prerecorded voice calls or text messages permits Bank of America associates to contact our customers with greater efficiency to report suspicious or possibility fraudulent activity on their accounts. Bank of America places approximately 1.3 million automated calls per month regarding suspicious activity, and places an additional 400 million calls per month to confirm receipt of fraud declarations, recently mailed cards or to confirm address changes. We currently issue 60 million texts per month regarding suspicious activities at point of sale. We send 49 million alerts per month on low balance, payment alerts, and suspicious activity. Of those 49 million alerts, 7 million are specific to default security alerts, online banking password resets, check orders and other common servicing communications.

Fraud happens quickly and globally. We must be able to swiftly contact customers who might be at risk of being victimized, and this communication needs to occur shortly after the suspicious activity in question. The use of autodialed, artificial, and prerecorded voice calls and text messages is critical; the questionable activity should trigger the most efficient and effective method of communicating with our customers. Under the proposed rules, unless the elaborate written consent procedure has been followed and the required consent has been obtained, an associate would need to manually dial an affected wireless customer and in the event the customer is unavailable, the associate would need to either continue inefficiently dialing or send delayed word through postal mail. In the event of suspicious activity identified by our fraud prevention team and a resulting inability to contact our customer, we will be forced to freeze the

account in question and wait for the issue to be resolved. This result is not the ideal solution for the Bank, our customers or any retail merchants from whom our customers are purchasing. Bank of America is committed to safeguarding the financial interests of our customers; a restricted ability to do so would have negative implications for our customers and our relationship with them.

### **The Proposed Rules Inhibits Our Ability to Contact Our Customers**

Manually dialed sales and servicing calls to wireless devices by simply using phone systems that have autodialer capabilities would violate the proposed rule as it is currently drafted. This ignores the reality that most businesses are using advanced phone systems that include a variety of technological features. For instance Bank of America uses several different calling systems that have the autodialer capability, but the proposed rule would be violated even if associates manually called out on such phone systems to wireless devices. The result is millions of dollars lost that have been invested in state-of-the-art communication systems with little defined benefit to customers.

The Bank has outlined several areas where the proposed rules will significantly impact time-critical communications to our consumers; the proposed rules also negatively impact other activities and communications. At Bank of America we routinely contact customers to obtain additional information on credit requests or new applications in order to make the best lending decision and provide a good customer experience. With sophisticated autodialing technology, we have the ability to connect with more customers, have a higher rate of application completion, and provide a better loan in a timelier manner. It can be disadvantageous to individual and small business customers if we are unable to communicate with them on their wireless devices to develop information that could ultimately assist us in approving their requests for credit.

Bank of America associates also call our customers to proactively advise them of their current claim status when they are seeking an insurance claim. Specifically, we call them when a claims check is in transit. If we can no longer autodial wireless devices or disseminate artificial or prerecorded voice messages to wireline numbers, it would be significantly more challenging to communicate this important information. Further, manual dialing would make it extremely difficult to determine how many times customers were contacted and whether another call is needed to resolve a claim. Our existing technology ensures that we can quickly and effectively communicate with consumers in the event that a catastrophe/disaster has occurred.

The Bank's practice of monitoring, tracking, and appropriately specifying call times would also be negatively impacted by a blanket adoption of the proposed rules, as written. Many states have different requirements regarding call time restrictions, inconsistent definitions for what constitutes an autodialer and express consent, different restrictions on the use of artificial, prerecorded voice and text messages, and offer varying exceptions to their restrictions. Federal laws and programs such as the Home Affordable Mortgage program and the Federal Debt Collection Practices Act also provide different call time and frequency obligations on the Bank. It would be costly and difficult to accurately track and document attempted telephone communications with customers absent the use of autodialing technology. In this case the

proposed rules actually impair our ability to comply with other federal and state telemarketing compliance requirements.

Obtaining written consent to use prerecorded messages will significantly impede the ability of our business entities to contact employees with pre-recorded messages as part of required business continuity and disaster recovery programs. If written consent is not obtained such calls would need to be made by manually dialing the numbers at a great cost of time and resources. Additionally, not being able to leverage automated messaging for this purpose would negatively impact informing employees of the appropriate course of action to take.

### **The Commission Should Not Make Changes to the Measurement for Abandonment Rate**

The Commission proposes to adopt a call abandonment rate “per campaign” limitation based on the FTC’s view that this is a necessary consumer protection measure and on Congress’s directive to “maximize consistency” in the rules promulgated by each agency. Bank of America submits that this is an unnecessary change that will not achieve the desired results. We recommend that the Commission not revise the current standard.

We disagree with the FTC’s stated concern that without a “per campaign” limitation telemarketers would likely set different abandonment rate targets for campaigns directed at more and less “desirable” or “valued” individuals. The FTC speculated that there were economic incentives for business to adopt such an approach but we find otherwise. Telemarketing, while cost-effective, is not an inexpensive marketing method. All telemarketing efforts require significant investment and must produce revenue for the company. Consumers will not tolerate delays and hold time experienced when answering a call that is not connected to an associate within two seconds. Such tactics would hinder or eliminate the potential for the telemarketing effort to produce the necessary revenue for the company. There is no economic incentive to undertake telemarketing efforts that will ultimately reduce revenue. As such, there is no impetus for the rule change as it cannot protect consumers from a speculative but unrealistic risk.

The proposed rules will not create abandonment rate regulation consistency between the TCPA and the TSR. Even if the Commission decides to adopt the same “per campaign” limitation and “campaign” definition found in the TSR, there would still be a disparity in abandonment rate measurement period. The Commission measures the call abandonment rate over a 30-day period, while the FTC measures it for the duration of the campaign separately over each successive 30-day period. This “rolling” vs. “successive” measurement period variance preserves the inconsistent business operating environment and consumer experience about which the Commission has requested comments. The rule change does not foster consistency and would add an unmerited and unnecessary compliance burden.

### **The Commission Should Consider Preempting Conflicting State Laws**

Bank of America strongly encourages the Commission to exercise authority and regulatory jurisdiction over interstate telephone communications. Many states have distinct autodialer, text messaging, and other telephone communication laws. In fact, many states have differing definitions for autodialer and requirements for “express consent.” These divergent state

requirements place unfair and costly compliance burdens and risks on companies that service customers in several states. If the Commission's state goal is to increase harmony and uniformity in this space, we believe preemption of state law will resolve any conflicts and regulatory confusion regarding interstate telephone communications.

## **Conclusion**

Bank of America supports the Commission's stated goal of harmonizing the rules implementing the TCPA with the TSR and we appreciate the opportunity to convey our views on these proposed rules. However, applying restrictions to all autodialed calls to wireless devices, regardless of the nature of the call and removing the existing business relationship exception for artificial and prerecorded voice messages to wireline numbers does not meet the Commission's intended goal. The proposed rules, if adopted as written, will not benefit customers and will in fact slow or hinder our ability to disseminate important servicing communications to our customers. The Commission should not finalize the rule as proposed. Instead, in harmony with the TSR, the Commission should apply the written consent requirements only to automatic telephone dialing systems that disseminate artificial and prerecorded voice solicitation messages. Also, wireline and wireless devices should not be treated differently. However if the Commission determines to treat the two devices differently, an exception should be added for consumers who provide their wireless devices to financial services companies regarding their accounts. Such an exception is essential to ensure that the many customers who only subscribe to wireless service continue to receive critical communications. The Commission should also clarify that consent follows the consumer and/or the account for which the consent was provided and *not* the number or device type. Finally, the Commission should have and should preempt state laws that conflict with the federal laws and regulations related to these communications.

We would be happy to discuss the dialing technologies Bank of America employs to efficiently communicate with our customers and/or to discuss our views in greater detail.

Sincerely,



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