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Ms. Carole Danielson
Division of Marketing Practices
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Telemarketing Rulemaking – Comment
FTC File No. R411001

Dear Ms. Danielson:

Bank of America Corporation ("Bank of America") appreciates the opportunity to comment on the "Telemarketing Rulemaking - Comment" proposal. Bank of America is one of the world's leading financial services companies, and is the sole shareholder of Bank of America, N.A., one of the largest banks in the United States. Through the nation's largest financial services network, Bank of America provides financial products and services to 30 million households and two million businesses, as well as providing international corporate financial services for clients around the world.

The Federal Trade Commission ("FTC") has proposed to amend its Telemarketing Sales Rule ("TSR") (the "Proposal"), that was originally adopted on August 16, 1997 pursuant to the Telemarketing Consumer Fraud and Abuse Prevention Act (the "Act"). Neither the Act nor the TSR apply directly to banks or other financial institutions regulated by one of the federal financial services regulators (Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of Thrift Supervision, and Securities and Exchange Commission). However, the FTC takes the position that the TSR and the Proposal apply to telemarketing activities performed on behalf of banks by third parties and to some subsidiaries and affiliates of a bank. Thus, because of the indirect impact of the TSR to banks, Bank of America has chosen to submit comments on the Proposal to the FTC.

Bank of America endorses the idea of a national "do not call" list, provided that a prescribed regulatory list establishes a uniform national standard and provided that any such list does not impede the ability of companies to communicate with customers with whom the companies have existing, ongoing business relationships. The following detailed comments initially identify some issues presented by the Proposal that have significant impact on these and other key concerns. Following those detailed comments, are comments on some of the questions posed by the FTC in its Proposal.

National "Do Not Call" List

Bank of America supports the concept of a national "do not call" list that would allow all consumers to register their requests not to be telemarketed. We believe consumers should have convenient methods for expressing their direct marketing preferences. That is why Bank of America established its own do not call list, which has been in place for many years. Bank of America also purchases and uses the various state do not call lists, even though banks are exempt from those requirements in many states. As Bank of America Chairman Ken Lewis recently stated, "Why would we want to call people at home who are clearly hostile to the idea of being called at home?" We also respect consumers' marketing preferences by voluntarily offering customers and non-customers the option not to receive marketing information through separate direct mail or e-mail. In addition, Bank of America uses the Direct Marketing Association's direct marketing preference services to honor telemarketing, direct mail and e-mail marketing preferences of consumers who have expressed their choices on those national databases. Our Privacy Policy for Consumers, which we furnish to every consumer customer annually and upon establishment of a relationship with Bank of America as required by the Gramm-Leach-Bliley Act and which we post at our website, tells our customers how they can elect not to receive telemarketing calls from us, as well as how to contact the Direct Marketing Association to take advantage of the DMA's national direct marketing preference lists. This history demonstrates Bank of America's deep respect to consumers' wishes not to have their privacy invaded by various forms of direct marketing.

A single national do not call list would serve the purpose of providing a convenient way for consumers to elect not to receive telemarketing calls, while providing a single system and set of rules for telemarketers to use in conducting their marketing activities. It is becoming increasingly difficult to reconcile and comply with the growing number of state "do not call" laws and to navigate the myriad of state rules governing applicability, exceptions, information provided, formatting and timing. When conducting nationwide marketing activities, even the most conscientious marketer finds it difficult to ensure that telemarketing lists meet all of the various state rules and have been timely scrubbed against the most current applicable state lists. Any national do not call list must establish a nation-wide regime for this purpose and must preempt state rules that have the same intent. Simply establishing a national do not call list on top of the many state laws, will only increase the complexity of conducting legitimate marketing activities and will confuse consumers as to where they need to go to opt out.

While we support a single national standard for a do not call list, it is still possible for states, in addition to the federal government, to provide enforcement of that standard. The Proposal contains such a provision and Bank of America is not opposed to a provision permitting states' attorneys general to enforce those national rules, where appropriate.

We recognize that the FTC might not have the authority currently to establish the uniform national standards that we believe are vital to the success of a national do not call list. Even if the FTC amends the proposal to provide for preemption of similar state laws, it is commonly thought that current law does not give the FTC authority to preempt those laws as they relate to solely intrastate calls. And, as previously mentioned, the FTC does not have jurisdiction over several industries, including financial institutions, that make use of telemarketing. While Bank of America commends the FTC for attempting to provide a national source for consumers to opt out of telemarketing calls, a national do not all registry should not be implemented unless it can replace the existing state lists. We encourage the FTC to work with other federal agencies and with Congress, if necessary, to ensure that any solution implemented is truly national in scope and effect.

Existing Business Relationships

It is imperative that businesses be able to call their existing customers to discuss those ongoing relationships. This is especially true for financial services (and other service industries) because the customer relationships constitute ongoing relationships, not single, one-time sales of goods. Financial services providers often work to develop relationships with their customers that may involve many different products (such as mortgages, credit cards, deposit accounts, and investments) that may be provided by different affiliated entities. Thus, it is common to offer customers additional or different products and services to more closely serve the customer's changing financial needs. Though we recognize that some of our customers prefer not to receive telephone calls from us and we honor those preferences, we also know that many of the same consumers who do not want to get telemarketing calls from businesses with which they have no business relationship are pleased to receive a personal call from their banker or other service provider to discuss the status of their accounts or enhancements to their services that could provide greater convenience or cost savings or better serve their changing needs. For example, last summer we called customers who, because of the existing business they did with us, qualified for service agreements that included fee waivers, rate discounts or other benefits. They didn't have to buy anything or do anything. All they had to do was say "yes" — and the 2000+ customers who did say "yes" collectively saved more than half a million dollars just for taking the call.

In addition, it is not uncommon for calls that initially constitute servicing calls to a customer to result in a sale of another product or service that would better serve the customer. For example, a call regarding a returned check or insufficient funds charge to a customer's checking account may result in the sale of overdraft protection service tied to the customer's credit card or other credit or investment account so that the customer can avoid returned checks and NSF fees in the future. It is not practical for customer service agents to consult a national registry mid-call in order to determine whether to inform the customer about services that may improve the quality or reduce the cost of services the customer receives in the future. And it is not fair or beneficial to consumers if such hallmarks of good service must be curtailed because such activities may be deemed "telemarketing." Thus, the FTC should exempt calls made to the business' existing customers from the requirement to consult the national registry and not require that the customer affirmatively opt in to receive such calls.

An exception for existing customer relationships should also apply to the affiliates of the financial institution that has the customer relationship. Frequently, as mentioned above, financial institutions have multiple legal entities that provide various elements of the financial services offered by the overall company. Examples for Bank of America are credit cards and deposit accounts. These are frequently offered by different legal entities that are affiliates. In order to best serve the customer, one entity may want to offer the products and services of another affiliated entity, and may be able to offer discounts based on the customer's total relationship. Customers clearly benefit from such offers and it otherwise may be difficult for them to learn about those savings opportunities. Thus, the customer relationship should be extended to include the financial institution's affiliates as well.

We recognize that the TSR applies to many types of businesses and granting this type of exception may make more sense in one context than in another. We suggest that the existing business exception be defined to mean situations where the business has conducted transactions with the consumer or provided services to the consumer within a 12-month period. That would prevent businesses from claiming this exception where there was a one-time sale of goods more than a year prior to the call, but would include relationships where an ongoing service is provided or a series of purchases are made that are more likely to be viewed by the consumer as an existing business relationship. In addition, the exception should apply to affiliates of the entity that has the customer relationship.

Definition of Outbound Telephone Calls

Section 310.2(t) defines an outbound telephone call to include a telephone call to "induce the purchase of goods or services…when such telephone call: (1) is initiated by a telemarketer; (2) is transferred to a telemarketer other than the original telemarketer; or (3) involves a single telemarketer soliciting on behalf of more than one seller…" As drafted, this provision could include a call that is initiated by a customer that is subsequently transferred to another person to discuss a new product or service. An example would be where the customer calls the bank to order checks and is transferred to the bank's check vendor to place that order. Such an action should not constitute an "outbound telephone call" that would require the bank to consult the national registry prior to transferring the customer to place the order. However, as drafted it would appear to require such an action.

The language could also include within its sweep an inbound servicing call initiated by the customer in which products or services of another entity may be discussed. It is unclear as to whether this would include the products or services of affiliates of the original recipient of the call. As discussed above, financial services companies frequently provide various parts of an overall financial services product set through different affiliated entities. Therefore, it is extremely common for one affiliate to sell the products and services of another affiliate that complement those the customer may already have or that meet the evolving financial needs of the customer. An example may include a customer who wishes to obtain overdraft protection for a checking account maintained with one affiliate by using his or her credit card maintained with another affiliate. If the bank is required to stop mid-call and check the national registry (which may be impossible as a practical matter) before discussing the other products with the customer, it will cause delay and dissatisfaction for customers.

Bank of America believes that the proposed definition is too broad. While we can understand the concern about some types of high-pressure "up-selling," this proposal broadly sweeps in many legitimate sales and cross-sales activities that result from inbound calls from consumers. The supplemental information with the Proposal identifies the two fundamental concerns that were the basis for the Proposal: (1) invasion of consumer's privacy, and (2) billing fraud. Where a consumer has initiated the call, a third party has not invaded the consumer's privacy; the consumer chose to make the call. If the consumer does not wish to hear an additional pitch for the sale of another product or service, he or she can always terminate the call. This part of the Proposal does not deal with billing fraud issues. In addition, both of these issues are significantly reduced for financial services companies where there is an ongoing customer relationship that the financial services companies do not wish to jeopardize.

Billing Methods

Section 310.3(a)(3) contains provisions relating to billing methods for telephone sales that are problematic and appear to be based on a misunderstanding of current law. Specifically, the Proposal would prohibit a telemarketer from submitting billing information for payment without first obtaining the consumer's "express verifiable authorization" when the payment method does not impose a limit on the consumer's liability for unauthorized charges or provide for dispute resolution procedures comparable to those in the Truth in Lending Act as amended ("TILA"). The procedure for obtaining "express verifiable authorization" is very cumbersome and difficult to implement.

Bank of America's initial concern with this provision is that it appears to exclude debit cards for the category of payment methods that are acceptable under this provision. Debit cards issued by banks that provide access to a consumer's deposit account are covered by the provisions of the Electronic Funds Transfer Act ("EFTA") and Regulation E implementing that statute. Regulation E provides for limitations on liability for unauthorized transactions that are in practice substantially similar to those contained in TILA and its implementing regulation, Regulation Z. Although Regulation E may provide for slightly higher liability than Regulation Z where lost access devices are not promptly reported, this is unlikely to apply to claims for unauthorized transactions in telemarketing contexts, where the user must only have the card number and the consumer may still have the actual access device in his or her possession.

In addition, as a practical matter, many debit card transactions are processed through the two primary national payment systems, Visa and MasterCard, both of which limit customer liability by system rule. In addition, many financial institutions impose their own "zero liability" rules for unauthorized debit card transactions. Bank of America has such a rule that goes beyond transactions that are processed through the Visa system, but include unauthorized debit card transactions that may be processed through other systems.

With respect to dispute resolution procedures, any debit card transactions that are processed through Visa or MasterCard are covered by detailed dispute resolution and charge-back rules that permit the customer to dispute a transaction. Thus, since most debit card transactions are processed through one of the major payments processing systems, they should be deemed to provide sufficient protection for consumers regarding dispute resolution.

Finally, it may be extremely difficult for a merchant to distinguish between a debit card and a credit card in a telephone transaction and accord different treatment to them. Thus, the final rule should not impose the onerous burden set forth in the Proposal for obtaining "express verifiable authorization" for use of debit cards. The rule should provide that any payment method subject to either Regulation Z or Regulation E provides sufficient consumer protection against unauthorized transactions.

Good Faith Compliance Defense

Bank of America commends the FTC for including in its proposal provisions that permit a seller or telemarketer to avoid liability for calling an individual on the do not call registry where it can establish that it had implemented a compliance program to avoid calling someone who had registered on the registry and such calls were made in error. This recognizes that errors do occur in any program and that parties who have attempted to comply with the rules should not be found liable for such inadvertent errors.

Specific Questions Posed in the Proposal

B.1. Billing information. See comments above.

B.5. Express verifiable authorization. The Proposal does not provide for a method to verify authorization using a VRU. This should be considered as it may provide a fairly secure method.

B.7. Outbound telephone call. See general comment above.

C.4. Credit card loss protection plan. The Proposal indicates that the primary concern is with respect to sales of plans to protect consumers from liability for unauthorized credit card transactions, where law already provides that protection.

However, the term is not defined in the Proposal and could be interpreted to include other types of credit card protection, such as death or disability insurance plans, programs to register a consumer's cards for one-stop calling should their wallet be lost and other similar "loss protection" plans. Therefore, Bank of America suggests that the FTC clarify that the provisions imposing addition disclosure obligations relate only to those plans that purport to provide protection to a consumer for liability for unauthorized credit card transactions.

D.1 Preacquired account telemarketing.

a. This subject is already covered in the Gramm-Leach-Bliley Act ("GLBA") with respect to disclosure of transaction account numbers by financial institutions with a somewhat different result. For example, GLBA permits disclosure of encrypted account numbers and permits disclosures of account numbers to service providers of the financial institution and to affinity program partners (such as airlines in airline frequent flyer credit card programs). The FTC should make sure that the final TSR excludes coverage for the provisions already covered by GLBA.

e. Frequently when the consumer provides the billing information there are errors. When the seller or telemarketer already has the billing information, it results in greater accuracy and correct billing for products and services purchased by the consumer. If the telemarketer already has the information, the time spent on the call can be reduced and focus on the product being purchased. Finally, requiring the consumer to provide such information is inconsistent with existing general advice from various consumer protection groups and attorneys general that consumers should not provide that type of information over the telephone when they did not originate the call.

D.3. Prohibition on blocking Caller ID. Bank of America supports this provision. The FTC should make it clear, however, that it does not require a telemarketer to display the telephone number from which it is calling.

D.5. National "do not call" registry. See comments above for Bank of America's general comments on this registry.

Bank of America questions how consumers' personal information will be protected, as it would appear that the registry would have to be public. For example, consumers with unlisted telephone numbers will have them made public. While the TSR can address restrictions on use, we do not know how this would be protected under the Freedom of Information Act.

Bank of America believes that a telephone number placed on the registry should be removed automatically after a certain period of time (such as 2 years or 5 years), unless the consumer re-registers. Also, if the number has been re-assigned to another consumer, it should be deleted from the registry or it will have the effect of preventing calls to a person who has not requested not to receive calls.

Bank of America believes that the national registry should permit the telephone line subscriber to register members of the immediate household to the registry. However, third parties should not be permitted to register consumers for the registry.

Users of the registry need to be provided with sufficient time to incorporate the lists into their operations and eliminate new numbers on the list. Thirty days may not be sufficient for this purpose, as many telemarketing programs are initiated and may last for more than 30 days. We suggest that the list not be deemed effective prior to 45 days after it is released and preferably 60 days.

D.6. Interplay between state and national registries. See comments above for Bank of America's position on federal preemption. We believe that this could create significant additional burdens and possibly make it impossible for telemarketers to conduct legitimate marketing activities while still complying with the various different standards. Also, it is unclear whether an express verifiable authorization received under this rule would supercede the consumer's inclusion on a state list.

D.7. Changes in telephone numbers. Bank of America believes that while it is appropriate to include the consumer's name together with the telephone number that is registered, users of the registry should only be required to scrub their telemarketing lists against the actual numbers. Therefore, if a consumer changes his or her telephone number, calls made to the new number should be permitted, even if the consumer's name and old number still appeared on the list. Users of the list could then decide whether to continue to exclude calls to that consumer or not.

D.8. Procedures to update registry. Bank of America suggests that the FTC contract with vendors to provide for regular updates to the registry for changes in area codes to ensure that the registry maintains the correct numbers and that users are not required to translate the numbers. If users are required to do so, it will add additional time to the process and make it even more difficult to ensure compliance.

D.9. Express verifiable authorization to call.

a. While it may appear to provide a good alternative to consumers to elect to receive calls from certain sellers, that benefit is overshadowed by the record keeping and procedural burden placed on telemarketers and consumers. Consumers who prefer not to receive telemarketing calls from companies with which they have no existing relationship should not be put to the burden of having to take affirmative action in order to continue receiving personal service from companies they have chosen to do business with. Bank of America feels that a better solution is to provide for an exception to the rule for calls made to consumers with whom a telemarketer or seller has an existing business relationship.

b. It would be extremely difficult for Bank of America to implement an opt-in system to record and maintain a list of customers who have expressed their affirmative wish to receive telephone calls. Under other current laws, we have established systems to provide for an opt out for receiving marketing and for affiliate sharing under the Fair Credit Reporting Act ("FCRA"). However, we do not have an opt-in system. In addition, having to coordinate screens of a potential telemarketing list against various state lists, the national registry and then our own opt-in list, would be practically very difficult and cause difficulty ensuring that the list has the most up-to-date information.

c. Bank of America believes that this provision will not be necessary if there is an exception for telemarketing calls made to consumers with whom the caller has an existing business relationship. Most consumers who register on a national do not call registry are only likely to wish to receive calls from companies with which they regularly transact business (i.e., where they have existing business relationships).

d. Bank of America does not believe that the provision allowing calls to consumers with express verifiable authorization is adequate as it is too complex to ensure good compliance. In addition, the Proposal is unclear as to whether an "express verifiable authorization" provided to a seller's telemarketing vendor would apply to the seller, its affiliates, the telemarketer or all of them.

e. Bank of America believes that the requirement to be able to verify that a verbal authorization, when recorded, is also being made from the telephone number to which calls are authorized to be made is unnecessary and may be very inconvenient to consumers. We believe that the approach taken now by most of the states that have do not call laws is more appropriate. That approach simply permits calls, as an exception, to customers who have provided their express permission or consent. While there is some possibility for telemarketers to misuse this exception, the law would allow the FTC to bring actions against telemarketers who appear to be abusing that exception due to a pattern of complaints. This approach balances consumers' choice not to be called (by putting their numbers on the do not call list), but also to request a call or call-back, without imposing significant burdens either on the consumer (by making them place that request from their home telephone) or business.

D.11. Abandoned calls. Bank of America believes that restricting the use of predictive dialers in telemarketing will have the effect of reducing the efficiency of this type of sales activities, costing business more and ultimately costing the consumer more for products and services. We suggest that the FTC consider some type of threshold number of dropped calls that would be permitted and still be considered in compliance. In the alternative, the FTC should permit a seller or telemarketer to utilize a recording to ensure that a customer does receive some disclosures.

E.4. Business-to-business exemption. This exemption excludes applicability to sales of Internet services or web services, among other things. Bank of America does not believe that sales by financial institutions of Internet banking services should be covered by the TSR. We recommend that the FTC consider clarifying this provision to ensure that sales of web banking services to businesses are not covered.

We would be happy to discuss our views in greater detail, or to discuss any new ideas that the regulatory authorities wish to pursue. In that regard, please contact the undersigned, at (704) 386-9644.

Very truly yours,

Kathryn D. Kohler

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