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March 29, 2002

Mr. Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
Room 159
600 Pennsylvania Avenue, NW
Washington, DC 20580
tsr@ftc.gov

Re: Telemarketing Rulemaking -- Comment.
FTC File No. R411001

Dear Mr. Secretary:

Thank you very much for providing Capital One the opportunity to comment on the Notice of Proposed Rulemaking (the "Proposal") published by the Federal Trade Commission (the "FTC") to amend the FTC's Telemarketing Sales Rule (the "Rule"). Capital One Financial Corporation, Falls Church, Virginia (together, with all of its subsidiaries and affiliates, "Capital One") is a holding company whose principal subsidiaries, Capital One Bank, Glen Allen, Virginia and Capital One, F.S.B., Falls Church, Virginia, offer consumer lending and deposit products, including credit cards, installment loans, and automobile financing. Capital One also has several non-bank subsidiaries and affiliates that offer products to prospective and existing customers. Capital One had 43.8 million accounts and $45.26 billion in managed loans outstanding, as of December 31, 2001. A Fortune 500 company, Capital One is one of the largest providers of MasterCard and Visa credit cards in the world.

Capital One appreciates the thorough effort made by the FTC to compile the Proposal. The FTC's diligence is evident in the questions that the FTC has asked the public to address, and in the depth of the FTC's analysis of the various issues. We agree with the FTC that telemarketing fraud is a significant national problem. We also recognize that the FTC does not technically exercise jurisdiction over federally regulated banks and savings associations. However, the FTC has suggested that the Proposal will apply to subsidiaries and affiliates of financial institutions, and the Proposal does apply to the third parties utilized by financial institutions to conduct telemarketing activities. Because Capital One not only employs third-party vendors to handle the cross-selling of various financial and non-financial products to our customers, but also uses the telephone to conduct transactions with our customers, we are concerned about several items found in the Proposal.

We are particularly concerned about the following issues and urge the FTC to focus on them when considering our comments: (1) the national do-not-call list (the "DNC List") should preempt existing state lists; (2) the Proposal should include an exception for calls made to pre-existing customers; (3) the Proposal's definition of "outbound telephone call" should not apply to inbound calls used to cross-sell products to a company's own customers; (4) the FTC's re-interpretation of Section 310.4(d) would require a zero percent (0%) abandonment rate for predictive dialers and is incorrect; and (5) the FTC should impose some requirement, such as a nominal fee or signature requirement, that would ensure that a consumer actually intends for his or her name to be placed on the DNC List. Given these concerns, Capital One concurs with MasterCard's request that the FTC refrain from issuing final revisions to the Telemarketing Sales Rule until it has published a revised proposal for public comment. Capital One's more detailed comments on the Proposal appear below.

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A. With Modifications, The Commissioner's Proposal For A National Do-Not-Call Registry Could Be Effective.

We have the following responses to the FTC's questions about the national do-not-call registry (questions D.5 through D.8).

1. *Federal Preemption*. As the FTC suggests, the interplay between the national DNC List and centralized state "do-not-call" requirements is important to us. We support federal preemption because it is far more efficient and effective. As many companies can attest, our experience in trying to comply currently with multiple state laws, multiple state reporting schemes, and multiple fees, has been costly and inefficient. The Federal Communications Commission has publicly taken the position that the Telephone Consumer Protection Act preempts state regulation of interstate calls (March 3, 1998 letter from Geraldine A. Matise, Chief, Network Services Division to Sanford L. Schenberg). We do not believe it is legally necessary to retain state requirements in order for the Telemarketing Sale Rule to reach intrastate telemarketing (because it is done by use of the telephone, an instrumentality used in interstate commerce).

2. *Reconciling Lists*. As the FTC suggests, our telemarketing vendors (and Capital One) will incur considerable expenses every time we must reconcile our call lists with a national registry. Those expenses could be reduced if the reconciliation were required less frequently, not more frequently than monthly.

3. *Fees*. We would support fees being charged to telemarketers for access to the DNC List to "scrub" their lists. However, in order to flush out the consumer who is not serious about being place on such a list, to avoid third parties improperly acting on

behalf of consumers, and to increase the accuracy of the DNC List, we would also support the approach taken by about ten states, which charge the consumer a nominal fee ($5 or less) to be on the state's do-not-call list. We urge the FTC to adopt a similar nominal fee for consumers to add their names to this list.

4. *End Date.* There are several reasons why entries on the DNC List should expire over time, but the Telephone Consumer Protection Act's ten year standard is far too long. First, the DNC List will become inaccurate as consumers change locations and their phone numbers are redistributed. Given the mobility of consumers today, many entries on the DNC List will become stale over a fairly short time period. Second, if a consumer has a single bad experience and adds her name to the DNC List, that consumer could be deleted from all telemarketing for all time. In fact, people do buy from telemarketers, and we believe some consumers' attitudes about telemarketing can change over time. If this DNC List is considered a success after the two-year trial period called for in section 310.4(b)(3), we suggest the DNC List be continued, but consumers should be required to re-register every two years thereafter. To alleviate the concerns that consumers might inadvertently forget to re-register, perhaps the consumer should be notified when her registration had to be renewed every two years. We would support the FTC's suggestion of deleting phone numbers from the DNC List once they have been reassigned to new consumers, but we do not know whether this is feasible for the FTC to do. In any case, we agree with the FTC's suggestion on page 4520 that that there should be a "safe harbor" for telemarketers who obtain and reconcile on no less than a monthly basis the contact information of persons who have been placed on the DNC List.

5. *Permission to Register Another Line Subscriber*. We have concerns that private companies, with a profit motive or an ideological axe to grind, will attempt to "represent" consumers and insist that the consumers' names be placed on the DNS list. This will result in inaccuracies and a cottage industry that is not motivated by helping consumers. We have evidence of this phenomenon occurring with the privacy opt-out procedures under the Gramm-Leach-Bliley Act. We agree with the FTC's comment on page 4519 that enrollment on the national registry should be required to be made by the individual consumer from the consumer's home telephone. This requirement, plus a nominal fee (discussed in paragraph 6 below), may be the only practical ways to verify that the consumer intends to be on this DNC List.

6. *Verification*. A consumer should be able to call the DNC List to determine whether her name and phone number has been registered and is accurate.

7. *Selective Registration*. In his commentary (p. 4519) the FTC says, "A national registry would eliminate many of the burdens to consumers of the company-specific approach." On the contrary, we believe consumers would prefer to have the flexibility to make these decisions at the merchant level, and the flexibility to change their minds. Without knowing the costs and observing the patterns of consumers' selective registration, it is impossible to assess whether there is a positive trade-off in terms of cost to allow selective registration, such as specifying the days and times of

permissible telemarketing (or impermissible, if opt-out), or specifying the types of products that would be permissible. If flexibility is the goal, we would support building flexibility into the national DNC List procedures. Since this DNC List will be carefully examined under a two year trial period, we would support testing selective registration under the initial structure of the DNC List.

8. *Information Collected on the DNC List*. It is unclear what information will be collected on the DNC List, but in order to avoid fraud, to increase the list's accuracy, and to facilitate authentication of the consumer when she calls in for verification, renewal, or with a change of status, the list should include, at least, the consumer's name, address, and telephone number, and perhaps another piece of identifying data. The agency retaining the DNC List should have reasonable security procedures for housing the data and transmitting it to companies.

B. The Definition of "Outbound Telephone Call" Should Not Apply to Inbound Calls Nor Outbound Calls Made to Pre-Existing Customers.

9. *Expanded Definition*. We believe the Proposal's expanded definition of "outbound telephone call" in section 310.2(t) is too broad and will have consequences that may not have been intended. The FTC's comments (page 4500) indicate the reason for this amendment is that he is concerned about consumers not receiving adequate sales disclosures from telemarketers, which are required by section 310.4(d) whenever telemarketers are engaging in "internal up-selling" (when the consumer is offered a second product by the seller of the original product) and "external up-selling" (when the consumer is transferred to a second telemarketer and offered a second product) (note 45). We do not oppose the FTC's suggestion that if a single telemarketer solicits for two or more distinct sellers in a single call, the second solicitation should be considered another outbound call for purposes of the disclosures required by section 410.4(d). We also agree that if an initial inbound call is exempt from the Rule's coverage—for example, under the section 310.6(e) exemption for calls in response to general media advertising—the consumer should receive the section 310.4(d) disclosures when the consumer is transferred to another telemarketer or seller. These are separate transactions and the expanded definition would have the effect of requiring additional disclosures, under section 310.4(d), for each separate transaction.

10. *Impact of Expanded Definition*: We are concerned, however, that an expanded definition of "outbound telephone call" as set forth above would have two other impacts that would increase costs and reduce efficiency: (1) since the FTC's Do-Not-Call Registry allows selective opt-out, a telemarketer would have to make a separate suppression against the FTC's Do-Not-Call Registry for each (newly-defined) outbound telephone call (section 310.4(b)(1)(ii) and (iii)); and (2) the telemarketer could inadvertently violate section 310.4(c), which prohibits outbound telephone calls outside the time band of 8:00 a.m. to 9:00 p.m. For example, if a customer makes an inbound call for service at 7:30am, the customer service representative could not attempt to transfer the call to a telemarketer for cross-sell purposes, but at 8:00am the

same caller could be transferred. To avoid these problems, the Proposal should apply only to section 310.4(d) disclosures.

11. *Existing Customers*. Most significantly for us, the Proposal should expressly exempt telemarketing solicitations to a company's existing customers. The exemption should certainly apply to products or services offered by the company itself, its affiliates and subsidiaries. It should also apply to products and services from a third party that are offered by a company to its current customers on a cross-sell basis. There is a substantial economic benefit to companies who efficiently cross-sell products and services to its customers, and very little harm or inconvenience in such cases to the company's customers. There should be a further exemption when the company makes an outbound call to an applicant for the company's products or services, in order to get additional or accurate information, or to offer an enhancement to the product for which the consumer has applied.

12. *Inbound Calls: Customer Service Marketing*. Many companies use inbound customer service calls as an opportunity for its internal customer service representatives to cross-sell products offered by third parties under a marketing contract. This solicitation does not involve a transfer to a third party telemarketer, and we believe there is very little opportunity for abuse in these situations. Most inbound telephone calls are exempt under the Proposal: section 310.6(d) exempts inbound telephone calls that are not the result of a solicitation, and sections 310.6(e) and (f) generally exempt calls in response to a solicitation. Nevertheless, under the expanded definition of "outbound telephone call", it appears that the Proposal could apply to a company that is cross-selling to its current customers when they call in for customer service. By reading the expanded definition of outbound telephone call (an inbound call "transferred to a telemarketer other than the original telemarketer"), together with the definition of "telemarketer" (any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor—section 310.2(z)) and the definition of "telemarketing" ("a plan, program, or campaign which is conducted to induce the purchase of goods or services"—section 310.2(aa)), the section 310.6(d) exemption may be compromised. We request clarification.

13. *Affiliates & Subsidiaries; Insurance Sales*. We do not believe the Proposal should apply to telephone calls that a company transfers to an affiliate or subsidiary, where there is no increased likelihood of confusion, invasion of privacy, or billing fraud. For the same reasons, the Proposal should not apply where the product for sale is an insurance product and the telemarketer must transfer the call to a licensed insurance agent to close the sale.

14. *Reasonable Time For Complying With DNC List Updates*. Even after a company receives and loads the updated DNC List, there is still a chance that a consumer whose name is on that list could receive a telemarketing call. This is because companies do the segmentation and suppressions for their marketing campaigns several weeks prior to mailing and, potentially, before the updated DNC List is received and loaded into the company's suppression tables. Companies often finish

their own handling of a marketing solicitation and send it to telemarketing brokers or directly to vendors several days or weeks ahead of the actual call times. It would be very difficult and expensive for a company to re-access its own suppression tables on a daily basis to assure that it was up-to-date, and most companies would not permit a telemarketer to access the company's databases for that purpose. Therefore, we propose a safe harbor that would give a subscriber thirty (30) days to load and suppress additions received from the DNC List or received directly from consumers, before the company would be in violation of section 310.4(b)(1)(iii).

C. The Proposal Should Not Mandate an Unreasonably Low Abandonment Rate for Predictive Dialers.

15. *Abandonment as an Abusive Telemarketing Act*. The FTC acknowledges that predictive dialers are not a new phenomenon, having been used in the telemarketing industry for over 20 years (note 295), but their usage in recent years has been increasing. The use of predictive dialers has not been considered "abusive" at any time during the 20 year history of that device, but now, after balancing industry productivity against consumer annoyance, the FTC says (i) the use of predictive dialers "in a way that produces many abandoned calls" is a practice that is legally abusive of the consumers' expectation of privacy. The FTC reaches this conclusion by re-interpreting the Rule to say, (i) a consumer "receives" a call when she answers the phone, irrespective of whether there is a party on the other end of the line, and (ii) if the telemarketer does not pick up the call before the consumer hangs up, even within seconds of her answering the phone, then the telemarketer has violated section 310.4(d) (page 4524). The FTC's re-interpretation is legally suspect and could have a significant impact on the longstanding use of predictive dialers.

16. We do not agree with the FTC's premise that a telemarketing call placed by a "predictive dialer", in which the two parties are never on the same call together and never speak to each other, (because the consumer answers then hangs up the phone before a live employee of the telemarketer joins the call--defined by the FTC as an "abandoned call") is a violation of section 310.4(d) of the Act. That section does not address abandoned calls; 310.4(d) provides it is an abusive practice for a telemarketer "in an outbound call . . . to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, [the seller's identity, the purpose of the call to sell goods, and the nature of those goods]."

17. While everyone would probably agree that abandoned calls are annoying, the Proposal could functionally outlaw the predictive dialer. We would support the FTC's suggestion of a maximum setting for abandoned calls; however, we believe the DMA's voluntary 5% standard (cited in the FTC's commentary) is substantially too low, and it is not followed in practice. We could support the FTC's proposed limitation of the use of predictive dialers to only those telemarketers who are able to transmit a caller ID number that consumers could use to return the call. We do not support the FTC's proposal to require telemarketers to play a recorded message that reads every one of the section 310.4(d) disclosures as soon as the consumer answers

the call and there is no live agent to take the call. This would increase the operational and technological costs necessary to comply would eliminate the effective use of predictive dialers. An alternative, similar to displaying a caller ID number, is to allow predictive dialers to play a recorded message that simply identifies the caller and asks the consumer to hold for a live representative.

D. The Permissible Methods of Achieving Express Verifiable Authorization Should Be Expanded.

18. *General*. The FTC has observed in the Proposal that abuses have occurred in telemarketers' use of new billing and collection systems, such as the Internet, debit cards, electronic benefit transfer cards, and the click of a remote control device used with a television, which bills the subscriber's cable account. The FTC believes that abuses can be reduced if telemarketers are required to obtain the consumer's "express verifiable authorization" when novel payment systems are used to bill and collect for a telemarketing purchase. The requirement would apply when the payment method used does not: (1) impose a limit on the consumer's liability for unauthorized charges; nor (2) provide for dispute resolution procedures comparable to the Truth in Lending Act as amended ("TILA"). Since the procedure for obtaining express verifiable authorization could be cumbersome and costly to implement, this type of authorization should be required only for payment methods that do not have adequate safeguards built in.

19. *Exempt Payment Methods With Adequate Protection*. The billing method limitations should expressly exempt payment methods covered by Regulation Z (which implements TILA), and payment methods covered by Regulation E (which implements the Electronic Fund Transfer Act), as well as payment methods covered by the UCC. Regulation E transactions should be exempt because Regulation E provides for limitations on liability for unauthorized transactions that are, in practice, substantially similar to the limitations on liability in Regulation Z. Although Regulation E itself may provide for somewhat higher liability where lost access devices are not reported promptly, this provision is unlikely to have any application in the context of unauthorized telemarketing transactions where the individual retains control of any physical access devices and the unauthorized transaction is based on knowledge of the account number rather than possession of the access device.

20. *Additional Exemptions*. The final rule should exempt transactions using payment systems that limit customer liability by payment system rule. For example, the Visa and Mastercard rules provide more protection in practice from unauthorized transactions for customers than either Regulations Z or E, because the Visa and Mastercard rules provide for zero customer liability. The FTC should not impose artificial restrictions on the use of a payment system that provides its users with greater protection than is otherwise provided under federal law.

21. *Written Confirmation Method*. With respect to the Proposal's elimination of the written confirmation method of obtaining express verifiable authorization, in section

310.3(a)(1)(iii) of the original Rule, it will be expensive for the industry to replace this efficient solution. We believe this method should be retained with revisions that still offer the consumer adequate protection. The Proposed Rule should permit the written confirmation method of obtaining express verifiable authorization if the written confirmation is delivered 30 days prior to submission for payment, and the consumer is permitted to repudiate the sale within that time by the consumer calling a toll-free number.

22. *Proposed Changes to UCC Article 4*. It should be noted that currently proposed revisions to Article 4 of the UCC would provide for new transfer and presentment warranties that would effectively limit consumer liability on demand drafts that are created by telemarketers. Thus, demand drafts covered under the proposed revisions to Article 4 of the UCC should be exempted from the requirements of § 310.3(a)(3) of the Proposal after the UCC revisions are completed and states adopt the revisions.

E. The Proposal Should Mirror GLB's Treatment of Preacquired Account Information and Should Not Require Customers to Reveal their Account Numbers During Telemarketing Calls.

23. *Interplay With the Gramm-Leach-Bliley Act (GLBA).* Section 310.4(a)(5) of the Proposal prevents a telemarketer from receiving billing information for use in telemarketing unless such billing information is disclosed to the telemarketer by the consumer and the consumer has authorized its use in payment processing. This limitation is more restrictive than the account number disclosure limitations in section .12 of the regulations adopted to implement Title V of GLBA. The Proposal does not include GLBA's exception for private label and affinity card programs, or the exception for telemarketers that are agents of the bank and are marketing the bank's own products. The GLBA exceptions were adopted by the eight federal agencies, including the FTC, which should not now impose limitations that would effectively prohibit practices that are consistent with GLBA. The GLBA exceptions should be added to section 310.4(a)(5).

24. *Definition of "Billing Information"*. The Proposal's definition of billing information is "any data that provides access to a consumer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account or debit card." By contrast, section .12 of the GLBA regulations prohibits a financial institution from disclosing "an account number or similar form of access number or access code for a consumer's credit card account, deposit account, or transaction account". It is clear in the Proposal that "data that provides access" does not refer only to account numbers; the FTC's comments indicate he intended this term to include data such as customer's date of birth or mother's maiden name (page 4499). It could be argued that even a consumer's name and address can assist in getting access to a consumer's account, but if "billing information" were interpreted this broadly, the Proposal would make ordinary information sharing subject to express verifiable authorization—i.e., opt in. This should be clarified, and we suggest the

definition of “billing information” should be reconciled with GLBA’s definition of “account number”.

25. *Encrypted Billing Information*. The Proposal contains no express exemption for “encrypted” billing information, and we are especially concerned that disclosing encrypted billing information could be considered a violation of section 310.4(a)(5). We request an exception for encrypted billing information similar to the one in the GLBA regulations. There can be no harm to the consumer in passing encrypted data, and given the expanded definition of billing information proposed by the FTC, it would be impossible to keep accurate records of transactions made through our telemarketing vendors if those vendors were prohibited from passing data back to us in any form.

26. *Consumer Disclosing Her Own Billing Information*. The FTC worries that if “the seller avoids the necessity of persuading the consumer to demonstrate her consent by divulging her billing information, the usual sales, dynamic of offer and acceptance is inverted.” (page 4513) Reading section 310.4(a)(5) together with section 310.3(a)(3), which requires “billing information” to be recited as part of the process of obtaining a consumer’s express verifiable authorization, it appears that the Proposal would require a telemarketer to ask a consumer for her account number. We believe this requirement will have the opposite effect intended by the FTC; it will increase fraud and identity theft. In our Privacy Notice and on our Web site, Capital One expressly advises its customers never to disclose their account numbers to a telemarketer who initiates the call to the consumer. Our advice is entirely consistent with the FTC’s longstanding admonition that consumers should not divulge their account numbers to telemarketers. Again, the GLBA scheme is workable and fair, and we suggest adopting it in this Proposal.

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Thank you again for allowing us the opportunity to comment on the Proposal. We look forward to working with the FTC as further opportunities for comment and participation arise. If you have any questions about our comments on the Proposal, please do not hesitate to contact us.

Respectfully submitted,

/s/ Vance C. Gudmundsen

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