DISCOVER®

BANK

April 19, 2002

Donald S. Clark, Secretary
Room 159
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington D.C. 20580

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

Dear Mr. Clark:

Discover Bank is pleased to respond to the FTC's request for comment dated January 30, 2002 regarding proposed amendments to the Telemarketing Sales Rule. We appreciate the opportunity to comment.

Discover Bank maintains total assets in excess of $22 billion and is among the nation's largest issuers of general-purpose credit cards, as measured by number of accounts and cardmembers. Discover Bank also offers deposit account services to customers across the country, and holds over $13 billion in consumer deposits. Discover Bank, through an affiliate and through unaffiliated telemarketing firms, places telemarketing calls to its own customers, as well as to prospective customers.

While not subject to the FTC's jurisdiction, Discover Bank believes it is nonetheless appropriate for it to submit comments in the interests of the companies providing telemarketing services on its behalf who are subject to that jurisdiction. The FTC's proposal would, among other things, greatly complicate what is already a confusing patchwork of overlapping and inconsistent federal and state law, and may negatively impact those telemarketers' efforts on our behalf.

1. The Proposed National "Do-Not-Call List" Is Unnecessary and Inappropriate

Telemarketers are currently subject to two sets of federal regulations dealing with do-not-call requests: the existing Telemarketing Sales Rule and the FCC's rule implementing the Telephone Consumer Protection Act of 1991. In addition, telemarketers must comply with numerous state laws dealing with do-not-call requests, some of which establish state-enforced do-not-call lists. The proliferation of these state do-not-call lists is making compliance an increasingly complicated and costly endeavor for telemarketers.

Unless and until Congress grants the FTC or the FCC or some other federal agency *exclusive authority* to create and maintain a national do-not-call list, and preempts state laws providing for such lists, the FTC should refrain from taking any action which would further complicate an already confusing tangle of duplicative and inconsistent federal and state regulation. Because state lists will not be preempted under the FTC's proposal, those firms subject to the FTC list would still will need to use the federal *and* the state lists, as well as their own internal do-not-call lists. We believe that the telemarketing issue is particularly suitable for a uniform national standard that would preempt state laws. Since a Commission rule cannot achieve this, we believe the FTC should defer action on a regulatory approach and instead work with Congress to devise a national legislative standard with adequate preemptive language.

We also believe that the proposed national "do-not-call list" will unnecessarily complicate the process for consumers who do not wish to receive telemarketing sales calls, because consumers in many states would be required to register with both state *and* federal authorities. Because the FTC's jurisdiction does not extend to a number of important areas such as intrastate commerce, banking, and insurance, many entities would not be legally required to use the proposed national list. While many state "do-not-call" laws provide that if the FCC creates a national list, any residents of the state who register on that list will be automatically included in the state's registry, those states do not have any similar provision for an FTC-maintained list. In short, the new list would confuse and frustrate consumers trying to avoid telemarketing calls. The FTC's resources would be put to better use educating consumers about the existing methods of reducing telemarketing calls, such as the Direct Marketing Association's free Telephone Preference Service, the state-enforced do-not-call lists, and the company-specific "do-not-call" lists maintained by telemarketers and sellers as required by the FCC, the FTC and many states.

If the FTC does go forward with this proposed national list, we suggest the following changes:

a. Calls to Persons With Whom There is a Prior or Existing Business Relationship Should be Exempt

While the states have taken many different approaches in crafting "do-not-call" statutes, every one of them has exempted calls made to persons with whom the seller has an existing business relationship. Generally, this exemption extends to both existing and former customers. There is good reason for such an exemption. Consumers benefit when companies they already know and trust contact them with offers for other, better or less expensive products or services. We are not aware of problems that have arisen under existing state laws or of consumer demands that the laws be amended to delete the existing-customer exception. In our experience, Discover Cardmembers we call are generally receptive to offers for better or less expensive products or services and rarely express a desire to be excluded from future calls from our representatives. Consumers do not know in advance which of the companies they already do business with will have useful offers, so the proposal that consumers who register on the list grant express written

and oral authorization in advance for telemarketing calls from specific companies is not helpful to consumers or telemarketers.

b. Services Opting Out on Behalf of Consumers

The FTC has requested comment on whether to allow third parties to act on behalf of consumers to add the consumers to the proposed do-not-call list. Third parties should not be permitted to place individuals on the list. Allowing this type of practice would compromise the accuracy and integrity of the list, generate duplicative opt-out requests, and would expose consumers to fraudulent and abusive practices, similar to those engaged in by certain "credit repair" companies. To allow for those situations where the consumer may be legally incompetent, we suggest allowing a consumer's court-appointed legal representative to add their name to the list.

c. Consumer Identification

The FTC proposes that a consumer would be able to place his or her name "and/or" telephone number on the do-not-call list. Names alone are not sufficient to allow telemarketers to identify the persons registered and match them to a telemarketing list. We believe the list should therefore include, at a minimum, each registrant's telephone number. The registrant's name would also be useful. Because names are spelled in many different variations, however, the Rule should make clear that only calls to the registered telephone number are prohibited.

d. 30-Day Compliance Requirement

The FTC proposes that companies be given 30 days to "scrub" the names of any consumer on the do-not-call list from their calling lists. This is too short of a timeframe in light of the complex processes used to prepare telemarketing lists and run them against updated do-not-call lists. These lists are prepared with the assistance of multiple business units and vendors, and may be used by both in-house callers and outside telemarketing firms. Also, telemarketing campaigns frequently last 45-60 days, so that a "good" list could become inaccurate – and unusable – before a marketing campaign is completed if a 30 day update is mandated. We request that companies be given a period of no less than 60 days to remove names from their calling lists.

e. Proposed Language

For all of the above reasons, we suggest that if the FTC does proceed with its proposed national do-not-call list, § 310.4 be revised as follows:

(b) Pattern of calls.

(1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

* * *

(iii) Initiating any outbound telephone call to a person when that person previously has:

* * *

(B) personally, or through a court-appointed legal representative, placed his or her name and ~~/or~~ the telephone number called on a do-not-call registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls, and unless the seller or charitable organization has a prior or existing business relationship with such person or has obtained the express verifiable authorization of such person to place calls to that person. . . .

* * *

(2) A seller or telemarketer will not be liable for violating § 310.4(b)(1)(ii) and (iii) if it can demonstrate that, in the ordinary course of business:

* * *

(iii) The seller or a telemarketer or another person acting on behalf of the seller or a charitable organization uses a process to prevent telemarketing calls from being placed to any telephone number included on the Commission's do-not-call registry, employing a version of the do-not-call registry obtained from the Commission not more than ~~30~~ 60 days before the calls are made, and maintains records documenting this process; . . . .

2. Inbound Calls

The FTC proposes to define an "outbound telephone call" so as to include a call initiated by a consumer that is transferred to a telemarketer other than the original telemarketer. Such transferred calls should not be considered "outbound telephone calls," at least where the original telemarketer has an existing business relationship with the consumer. Otherwise, a company receiving a service call from one of its customers would arguably be required to check the

customer's name against the national "do-not-call" list during the original conversation, and observe myriad legal constraints (e.g., make sure local time is between 8:00 a.m. and 9:00 p.m.) that should not apply to a consumer-initiated telephone call. In any event, a restriction on transferring calls to telemarketers should exclude calls transferred with the consent of the consumer. We suggest that § 310.2(t) be revised as follows:

(t) Outbound telephone call means any telephone call to induce the purchase of goods or services or to solicit a charitable contribution, when such telephone call:

(1) is initiated by a telemarketer;

(2) is transferred to a telemarketer other than the original telemarketer <u>without the consent of the person transferred, and the original telemarketer or seller has no prior or existing business relationship with the person transferred</u>; or

(3) involves a single telemarketer soliciting on behalf of more than one seller or charitable organization.

3. Preacquired Account Information

The FTC proposes to prohibit the disclosure or receipt of consumer "billing information" for use in telemarketing, unless the information is provided by the consumer. This prohibition should not extend to entities currently subject to the Gramm-Leach-Bliley Act. GLBA provides that a financial institution may not disclose a customer's account number for use in telemarketing, or in certain other types of marketing. 15 U.S.C. § 6802(d). The GLBA restrictions, for good reason, apply only to the disclosure of billing information to *nonaffiliated* third parties. The Congress clearly intended that financial institutions should be permitted to share such information within the corporate family. The regulations promulgated under GLBA by the FTC also provide exceptions not found in the proposal, such as where a third party service provider is used to market a companies' own products and services, and where a company provides an *encrypted* account number to the third party. 16 C.F.R. § 313.12. (As a state-chartered nonmember bank, Discover Bank is governed by the FDIC's version of this regulation, found at 12 C.F.R. § 332.12.) The FTC should not subject financial institutions to inconsistent legal requirements with respect to the sharing of billing information, and should therefore revise section § 310.4(a) as follows:

(a) Abusive conduct generally. It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

* * *

(5) Receiving from any person other than the consumer or donor for use in telemarketing any consumer's or donor's billing information, or disclosing any

consumer's or donor's billing information to any person for use in telemarketing; provided, however, this paragraph does not apply to:

(i) the transfer of a consumer's or donor's billing information to process a payment for goods or services or a charitable contribution pursuant to a transaction in which the consumer or donor has disclosed his or her billing information and has authorized the use of such billing information to process such payment for goods or services or a charitable contribution; or

(ii) the transfer of a consumer's or donor's billing information by or to a "financial institution" as that term is defined in section 6809 of Title 15.

4. Predictive Dialers

The FTC has requested comment as to the proper regulation of abandoned calls from predictive dialers. As the FTC recognizes, a blanket prohibition on all abandoned calls would significantly increase the cost of telemarketing by reducing the efficiency of every telemarketer's operations. Those costs inevitably would be passed along to consumers in the form of higher prices. We believe the DMA's efforts to achieve industry self-regulation on this issue should be encouraged, and we support those efforts. If the FTC elects to adopt a rule change on this subject, the FTC should expressly permit telemarketers to abandon a reasonably small percentage of calls (such as five per cent) without being considered in violation of the Telemarketing Sales Rule.

5. Credit Card Fraud Protection Plans

The FTC's proposal would require that telemarketers offering credit card fraud protection plans disclose the limits on cardholders' liability under federal law, and would prohibit them from misrepresenting that a consumer needs such a product in order to provide the protections available under federal law. As a provider of a credit card fraud protection plans to its Cardmembers, Discover Bank supports these proposed changes. Indeed, we believe that the FTC should adopt a rule expanding these requirements to the marketing of fraud protection plans by means other than telemarketing, so as to ensure that unscrupulous firms do not evade the proposed requirements by marketing solely through channels such as direct mail or the Internet.

In summary, we believe that the proposed national do-not-call list is unnecessary and only serves to complicate an already tangled array of federal and state telemarketing regulations. Because of the FTC's limited jurisdiction, the list also fails to provide consumers with an effective means of stopping telemarketing calls. If the FTC proceeds with the proposed list, we urge it to exempt calls to former or existing customers, and make the other revisions described above. Finally, the FTC should revise its other proposed changes to the Rule so as to narrow the definition of "outbound telephone call", exempt financial institutions subject to GLBA from the

prohibitions related to sharing billing information, and should refrain from any rulemaking that would effectively prohibit the use of predictive dialers.

Again, we appreciate the opportunity to comment on these issues. We would be pleased to provide any further information you may need regarding these comments.

Respectfully submitted,
Discover Bank

K. M. Roberts
President