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Legal Department
NC1-002-29-01
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Submitted Electronically to feerule@ftc.gov

May 1, 2003

Office of the Secretary
Room 159
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

Re: Telemarketing Rulemaking – Revised Fee NPRM Comment
FTC File No. R411001

Ladies and Gentlemen:

Bank of America Corporation ("Bank of America") appreciates the opportunity to comment on the "Telemarketing Rulemaking – Revised Fee NPRM Comment" proposal (the "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. (the "Bank"), one of the largest banks in the United States.

The Federal Trade Commission ("FTC") has published the Proposal to amend the original user fee proposal providing for fees and access to the national do-not-call registry which has been adopted as part of the Telemarketing Sales Rule ("TSR"). Because the TSR may have an indirect impact to banks, Bank of America has chosen to submit comments to the Proposal.

Bank of America generally obtains and uses the many state do-not-call lists, even where state law would not require it to do so[1]. Thus, it applauds the FTC's proposal to permit entities that otherwise would not be subject to the TSR to acquire access to the registry. It has long been Bank of America's practice to honor the requests of its customers and consumers not to be called for purposes of marketing products or services.

The FTC has also proposed that all sellers for whom telemarketers make telemarketing calls should obtain access to the list and pay the annual fees, rather than the telemarketers doing so. Since it has been the practice of Bank of America to acquire the various state lists and use them internally (as well as with respect to telemarketing calls made by telemarketing vendors on its behalf), Bank of America does not object to this requirement in principle. However, many of the entities within Bank of America, including the Bank and its credit card bank, are not subject to

[1] The one exception is Alabama, which does not permit Bank of America as an exempted entity to obtain its list.

the FTC's jurisdiction. It is thus unclear to us how this rule will work in practice. Since the FTC does not have the jurisdiction to require a bank to pay for and obtain the list, and the rule does not provide for the telemarketers to obtain the list, how can the FTC ensure compliance with the rule? While the Proposal provides that telemarketers are required to ensure themselves that their sellers have obtained access to the list, such a requirement would in practice either result in bank sellers being required to obtain the list (even though the FTC does not have jurisdiction over the banks) or result in the telemarketers being out of compliance with the rule. We believe that the final rule should permit telemarketers to obtain the list as well, particularly with respect to their sellers who are not subject to the TSR.

With respect to which entities must pay for and obtain access to the registry, the Proposal provides that separate affiliates, and even separate divisions, of a seller should be required to separately purchase the registry. We appreciate the need to fund the cost to develop and maintain the registry, but do not believe that it is appropriate to force affiliated entities to separately purchase the registry (especially affiliates that are not even subject to the TSR). Companies, especially financial services companies, are organized into multiple affiliated entities for many reasons, including tax, regulatory and other historical reasons. The fact that a company chooses to do business through several different entities should not result in it having to pay multiple times for the same list. In any event, Bank of America does applaud the FTC's agreement that any affiliates that must separately purchase access to the registry need not actually download it directly, but may handle that function in a central fashion.

In addition, it is unclear how to determine when divisions of a single entity would be required to separately purchase the registry. Stating that the factors include "whether there is substantial diversity between operational structure" and "whether the goods or services sold… are substantially different" is not sufficient to give sellers who are covered by the TSR sufficient notice as to whether any particular division would be required to separately purchase access to the registry. Bank of America strongly disagrees with any requirement that separate divisions of a company be required to separately purchase access to the registry. If the FTC elects to continue that interpretation in the final rule, the rule should provide a more definitive definition of the circumstances that would subject multiple divisions to separate fees obligations. It should also provide for a good faith exemption from liability for failure to separately purchase the list.

We appreciate the opportunity to comment on the Proposal and would be happy to discuss our comments in greater detail. In that regard, please contact the undersigned at (704)386-9644.

Very truly yours,

Kathryn D. Kohler

Kathryn D. Kohler
Assistant General Counsel