Christine A. Edwards
Executive Vice President
Chief Legal Officer & Secretary

BANK ONE CORPORATION
Mail Code IL1-0276
1 Bank One Plaza
Chicago, IL 60670-0276

tel 312 732 3551
fax 312 732 7677
chris_edwards@bankone.com

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BANK ONE

Federal Trade Commission
Office of the Secretary
Room 159
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Telemarketing Rulemaking – Comment
FTC File No. R411001

Dear Ladies and Gentlemen:

Bank One Corporation is writing to comment on the proposed amendments to the Telemarketing Sales Rule (the "Proposed Rule") issued by the Federal Trade Commission (the "FTC") under the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §6101-6108 (the "Telemarketing Act"). We appreciate this opportunity to comment on the Proposed Rule.

Bank One Corporation ("Bank One") is a multi-bank holding company headquartered in Chicago, Illinois, with offices located in Arizona, Colorado, Delaware, Illinois, Indiana, Florida, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Texas, Utah, West Virginia and Wisconsin. Bank One has several subsidiaries that are national banks, including Bank One, N.A., headquartered in Chicago, Illinois, and First **USA Bank,** N.A., the largest **VISA** issuer in the United States, headquartered in Wilmington, Delaware. Bank One also operates numerous non-bank subsidiaries that engage in credit card and merchant processing, consumer finance, mortgage banking, insurance, trust and investment management, brokerage, investment and merchant banking, venture capital, equipment leasing and data processing.

Bank One, and its banking, securities and insurance subsidiaries are not subject to the Proposed Rule, because they are exempt from coverage under the FTC Act. 15 U.S.C. §45(a)(2). However, Bank One banks and other subsidiaries hire nonaffiliated companies to engage in telemarketing activities on behalf of Bank One or to answer inbound phone calls, and these companies **are** arguably subject to the Proposed Rule, even when calling on behalf of Bank One. Therefore, the Proposed Rule will have a significant indirect effect on the telemarketing practices of Bank One and its agents.

We have three major areas of concern regarding the Proposed Rule: the definition of "outbound calls," the restrictions on the receipt of billing information for use in telemarketing and the proposed FTC "Do Not Call" list. Our comments are organized by section of the Proposed Rule rather than in order of priority to **Bank** One.

Definition of "Outbound Telephone Call" (§310.2(t)).

The proposed definition of "outbound telephone call" has been broadly expanded to include inbound calls "transferred to a telemarketer other than the original telemarketer". **Bank** One believes that the provisions of 310.4(c)(iii) (the FTC "Do Not Call" list) should not apply to inbound calls. The "Do Not Call" list was designed to give consumers a tool to avoid receiving unwanted or inconvenient telemarketing calls, and should not be applied to any calls initiated by consumers.

Banks often use third party companies to operate their call centers, and these companies would be subject to the Proposed Rule, even though call centers staffed by bank employees would not be affected. It is important that banks and their agents be able to direct an inbound call appropriately within the organization and recommend products **and** services to the consumer. This activity helps banks solve customer issues to the benefit of both the consumer **and** the bank. For example, if a bank customer calls a bank call center to discuss an overdraft on his account, the call center agent may discuss with the customer several ways to avoid the problem in the future, such **as**'an overdraft line of credit. If the customer expresses an interest in an overdraft line of credit, the call center agent may ask for the customer's consent to transfer the call to a product specialist for further discussions. It would be extremely difficult for banks and their third party agents to develop a system for compliance with the requirements of the Proposed Rule for inbound calls. Banks would be required to develop a system for real time access to the FTC "Do Not Call" list so their agents would be able to determine immediately whether **an** inbound call is from a consumer who has placed his telephone number on the FTC "Do Not Call" list. **If** so, the inbound call could not be transferred unless the bank's agent complies with the oral authorization requirements of §310.4(b)(1)(iii)(B)(2) of the Proposed Rule, which requires that oral consent be obtained on **a** recorded line, the call center agent is able to verify the telephone number of the originating call, and the recording of the oral authorization is retained for a period of 24 months. These requirements are totally impractical and will effectively prohibit the transfer of inbound calls to the detriment of banks and consumers.

We recommend that inbound calls not be subject to the "Do Not Call" list requirements set forth in §310.4(b)(1)(iii) of the Proposed Rule, in order to permit banks **and** other organizations to properly service their customers' needs.

Receipt of Billing Information for use in Telemarketing (§310.4(a)(5))

A. The Proposed Rule is Inconsistent with the Privacy Regulation

The issue of releasing account information for marketing purposes has recently been addressed in the Privacy Regulations issued by the FTC and other regulatory agencies pursuant to the Gramm-Leach-Bliley Act. The FTC Privacy Regulation contains a general prohibition on disclosing account numbers for marketing purposes, with several exceptions, including an exception permitting the sharing of encrypted account numbers as long as the recipient is not given a means to decode the encrypted number and another permitting the release of account numbers to a bank's agents in order to perform marketing for the bank's own products and services **(16** C.F.R. $313.12(c)). This GLB provision was a focus of considerable attention and debate from the regulatory agencies and the affected industries during the comment period for the Privacy Regulations in the spring of 2000, and the agencies recognized the need for these exceptions when they adopted the final regulations.

We request that $310.4(a)(5) of the Proposed Rule be modified to be consistent with $313.12(c) of the FTC Privacy Regulation, by including in the Proposed Rule exceptions permitting the sharing of encrypted account numbers with telemarketers, and permitting the release of account numbers to a seller's agents in order to perform marketing for the seller's own products and services. The **two** regulatory schemes should **be** consistent, and the sharing of encrypted account numbers actually benefits consumers by helping to prevent identity theft **(as** described in Section B below). **As** the FTC stated in its comments to the Privacy Regulation:

> "The Commission believes **an** encrypted account number without the key is something different from the number itself and thus falls outside the prohibition in Section 502(d) [of the Gramm-Leach-Bliley Act]. In essence, it operates **as an** identifier attached to an account for internal tracking purposes only. The statute, by contrast, focuses on numbers that provide ***access*** to **an** account. Without the key to decrypt **an** account number, an encrypted number does not permit someone to access an account." Joint Agency Comments, 65 Fed. **Reg. 33669** (May 24,2000).

B. The Ban on Releasing Encrypted Account Numbers Increases the Risk of Identity Theft

The Proposed Rule may contribute to increased identity theft, because it will require consumers to give their live, unencrypted account numbers over the telephone on calls that the consumer did not originate. The Proposed Rule will require **a** system in which the account numbers will be accessed by and available to more telemarketing personnel in order to process the sales of goods and services over the telephone. Asking consumers to recite their account number over the telephone is an unsafe procedure that is conducive to identity theft. In fact, the FTC recommends to consumers that they not give out their account numbers in this manner in its consumer brochure about identity theft:

> "Do not give out personal infomation on the phone, through the mail or over the Internet unless you have initiated the contact or know who you're dealing with. Identity thieves may pose as representatives of banks, Internet service providers and even government agencies to get you to reveal your **SSN,** mother's maiden name, financial account numbers and other identifying information. Legitimate organizations with whom you do business have the information they need and will not ask you for it." "ID Theft: When Bad Things Happen to Your Good Name", Federal Trade Commission (February 2002).

When banks are permitted to share encrypted account numbers with telemarketers, the telemarketers and their employees do not have access to the consumers' live unencrypted account numbers, which is a much more secure arrangement for consumers. The regulatory agencies, including the FTC, addressed the issue in the Privacy Regulation by providing an exception permitting the sharing of encrypted account information. 16 C.F.R. 5313.12(c). In its comments released in connection with its Privacy Regulation, the FTC acknowledged that allowing the sharing of encrypted numbers helps to prevent identity theft:

> "Several commenters noted that encrypted account numbers and other internal identifiers of an account are frequently used to ensure that a consumer's instructions are properly executed and that the inability to continue using these internal identifiers would increase the likelihood of errors in processing a consumer's instructions. These commenters also point out that if internal identifiers may not be used, a consumer would need to provide an account number in order to ensure proper handling of a request, which would expose the consumer to a greater risk than would the use of an internal tracking system that preserves the confidentiality of a number that may be used to access the account." Joint Agency Comments, 65 Fed. Reg. 33669 (May 24,2000).

We respectfully urge the FTC to add an exception permitting the release of encrypted account numbers, in order to protect consumers and provide a consistent regulatory scheme.

FTC "Do Not Call" List (§310.4(b)(iii))

A. Include an Exception for Calls to Existing Customers

The proposed "Do Not Call" list to be maintained by the FTC should include an exception for calls made to existing customers of a seller (as defined in the Proposed Rule). The exception should also include calls made by an affiliate of the seller or made by a third party by or on behalf of the seller.

Of the 20 existing state laws that have established a state "Do Not Call" list similar to the FTC proposal, 19 of these laws include an exception permitting calls to an existing customer.[1] The states have recognized that consumers would like to continue to receive calls from the companies with which they have chosen to do business, even if they place their telephone number on a "Do Not Call" list.

Banks contact their customers by telephone in order to service their customers' needs and provide the products and services that consumers have come to expect from their banks. Banks sometimes use third party agents to contact bank customers on behalf of the bank. These agents would be subject to the Proposed Rule, even though banks are not directly regulated by the FTC.

Under the Proposed Rule, if a bank customer placed his telephone number on the FTC "Do Not Call" list, an agent for a bank could not call the customer to:

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[1] **Indiana's "Do Not Call" statute is the only exception (Ind. Code Ann. §24.4.7).**

- Suggest that it may be to the customer's benefit to refinance his mortgage
- Assist the customer in identifying an appropriate product for funds in a maturing certificate of deposit
- Suggest an overdraft line of credit for a customer who has overdrawn his checking account
- Suggest a product that the bank believes would benefit the customer

These are telephone calls that bank customers want to receive and would not consider to be intrusive, whether they are coming from bank employees or from agents calling on behalf of a bank. The Proposed Rule would unnecessarily limit the flexibility of banks to manage their businesses as they deem appropriate by discouraging the use of agents in telephone service centers and in customer contact positions. As a result, the Proposed Rule interferes with a bank's relationship with its customers, and limits the ability of a bank to provide high quality financial service to its customers.

An exception to permit calls to existing customers of a seller should extend to calls from affiliates and agents of the seller, if the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised. Financial institution holding companies often have many affiliated subsidiaries for regulatory and other reasons, but generally operate under a single brand. The affiliated companies work together to service all of the financial needs of the consumer by offering a variety of financial products and services to the consumer.

The Federal Communications Commission recognized that consumers often consider affiliated companies as the same entity in its Rule implementing the Telephone Consumer Protection Act of 1991 (47 C.F.R. §§64 and 68). The Rule requires companies to maintain a company-specific "do not call" list, and states that a consumer's "do not call" request shall apply to the particular business entity making the call (or on whose behalf the call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised. (47 C.F.R. §64.1200(e)(v)). The standard is reasonable, and should also be applied to permit companies to call existing customers of their affiliates if they are marketed as a part of the same branded relationship.

B. *The FTC "Do Not Call" List Does Not Accomplish the Stated Goal of a Single National List*

The FTC comments to the Proposed Rule indicate that "the proposed modification of the Rule's treatment of the "do-not-call" issue would enable consumers to contact one centralized registry to effectuate their desire not to receive telemarketing calls." We respectfully disagree with this conclusion. The Proposed Rule adds yet another layer to the already complex process of complying with a number of state and federal "Do No Call" lists. The Telemarketing Act (15 U.S.C. §§6101-6108) authorized the FTC to regulate interstate calls only, and the Proposed Rule would not apply to intrastate calls. The Proposed Rule will further complicate the rules applicable to telemarketing, which are already difficult for both consumers and telemarketers to understand.

Consumers who desire to reduce telemarketing calls as much as possible will have to sign up on the FTC "Do Not Call" list and any applicable state list. The FTC list and the state lists have different requirements and exceptions. Consumers will be confused about the requirements that apply and whether a particular telemarketing call is a violation of the FTC Rule or the applicable state law. For example, if an Indiana resident places his telephone number on both the Indiana and the FTC "Do Not Call" lists, and then receives a call from a real estate broker, the call would most likely violate the FTC Proposed Rule, but not the Indiana law, which has an exception for real estate brokers. However, if the call originated in Indiana, then the FTC Proposed Rule would not apply, because it only applies to interstate calls. It will be virtually impossible for consumers to keep track of their rights under this patchwork of regulation.

We strongly advocate a more appropriate regulatory scheme where federal legislation would: create a national "Do Not Call" list, pre-empt state laws and contain appropriate exceptions to allow businesses to maintain and service their existing customers. Consumers and businesses alike would benefit from a single set of rules for telemarketing. We believe that the proposed FTC "Do Not Call" list does not simplify the regulation of telemarketing, but merely creates additional confusion and expense for consumers and businesses. Therefore, we respectfully submit that the FTC not issue a final rule incorporating a "Do Not Call" list until Congress can address this issue and provide the FTC with the authority to create a true national regulatory scheme for telemarketing.

Bank One appreciates this opportunity to comment on the Proposed Rule. If you have any questions concerning these comments, please do not hesitate to contact Andrea Beggs at 312-732-5345 or Victoria Rostow at 202-833-6653.

Very truly yours,