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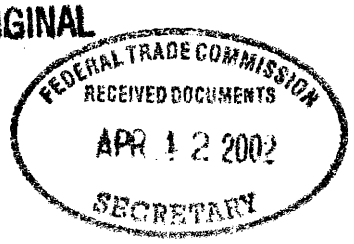


VIA UPS – OVERNIGHT DELIVERY

April 11,2002

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

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

Gentlemen:

MBNA America Bank, N.A. ("MBNA") is a national banking association specializing in the marketing of affinity credit cards. Through our agreements with more than 5,000 organizations, MBNA issues credit cards endorsed by colleges and universities, professional sports teams, cause-related organizations, professional trade associations and similar organizations. We are the world's largest independent issuer of MasterCard and Visa credit cards. MBNA's primary marketing channels include direct mail, telemarketing, direct promotions, and the Internet.

MBNA's telemarketing operations are conducted through MBNA Marketing Systems, Inc., a wholly owned subsidiary ("MSI"). MSI has offices in eleven states (California, Delaware, Florida, Georgia, Maine, Maryland, New Hampshire, New Jersey, Ohio, Pennsylvania, and Texas). Worldwide, MBNA employs 28,000 people with 7,000 of these jobs directly associated with the operations of MSI. MBNA also engages third party service providers under contract ("Service Providers") to supplement MSI's efforts.

All MBNA business units using Service Providers regularly monitor the quantity and quality of telemarketing services provided. These business units and their Service Providers communicate directly with MBNA's Central Telesales Division, which maintains a current telemarketing suppression list complying with the Telephone Consumer Protection Act ("TCPA"), all enacted and effective State "Do Not Call" ("DNC") laws, and the Direct Marketing Association's ("DMA") Telephone Preference Service ("TPS"). MBNA's Central Telesales, Law and Compliance Divisions, coordinated in part through a bank-wide Telephone Solicitation Working Group, monitor all Federal and State law, legislation and regulation concerning telemarketing and assure

MBNA's compliance. Our combined telephone suppression list contains more than 17 million residential phone numbers. We are confident that the quality of our telemarketing calls, the magnitude of our sales ratios and the success of our compliance efforts are second to none.

MBNA appreciates this opportunity to comment on the proposed Telemarketing Sales Rule (the "Proposed TSR")and commends the Federal Trade Commission ("FTC") on those proposed amendments focusing on preventing telemarketing consumer fraud and abuse. The legitimate efforts of thousands of reputable telemarketers suffer when schemes such as credit card protection programs and credit rehabilitation services are deceptively marketed through this channel. This is particularly true for credit card issuers because some consumers and consumer protection groups mistakenly associate us with such activities. However, MBNA cautions the FTC that many aspects of the Proposed TSR are written so broadly that the activities of legitimate telemarketers are unnecessarily and adversely affected, and some of the proposed remedies are so strong that they amount to an indictment of telemarketing as a channel for commerce. We believe these actions by the FTC exceed its authority and would be a disservice to both businesses and consumers.

Accordingly, this letter sets forth MBNA's comments on the Proposed TSR. Pursuant to your request, our comments are set forth in sequentially numbered paragraphs and under separate cover we request to participate in the public forum to be held on June 5, 6, and 7, 2002.

1. Proposed TSR – Scope Provision. The Telephone Consumer Fraud and Abuse Prevention Act, 15 USC §§6101- 6108 ("TCFAPA") is limited in scope and the Proposed TSR should include a provision explicitly stating that it is inapplicable to entities exempt from coverage under §5(a)(2) of the Federal Trade Commission Act, 15 USC §§41 - 58. This provision should include banks (MBNA's primary federal banking regulator is the Office of the Comptroller of the Currency ("OCC")) and state that entities acting on behalf **of** banks are not covered by the Proposed TSR because such entities are regulated by the Bank Service Company Act, 15 USC §45(a)(2), concerning services they provide for banks.

2. Proposed DNC List - Authority. The Telephone Consumer Protection Act, 47 USC §227 ***et seq.*** ("TCPA") explicitly authorizes the Federal Communications Commission ("FCC") to adopt regulations creating ***either*** a "company-by-company" ***or*** a "centralized" DNC list. Over ten years ago the FCC exercised that authority and promulgated the existing "company-by-company'' DNC list regulations under the TCPA. This uniform, easy to understand and easy to comply with rule is followed by all telemarketing companies today. MBNA understands this rule, we follow our policies and procedures to comply with it, and we have no difficulty explaining our practices to consumers. Our information systems supporting telemarketing activity are built based upon this rule.

In contrast, the TCFAPA explicitly authorizes the FTC to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices". TCFAPA contains no language whatsoever authorizing the FTC to prescribe rules creating a DNC list. The absence of such language is no accident; Congress conferred such rule-making power upon the FCC three years earlier under the TCPA. Neither the emotional appeal nor the political popularity of the privacy issue act to confer upon the FTC the power to regulate a matter already placed by Congress in the hands of another agency. While we support the FTC's efforts to eliminate fraud and abuse in telemarketing, we are deeply troubled by attempted rule-making without underlying authority, not to mention the duplicative agency functions and complex compliance efforts that would be required **of** businesses under the FTC's DNC list proposal.

The TCFAPA language cited by the FTC in support of the proposed DNC list is 15 USC §6102(a)(3)(A):

> "The Commission shall include in such rules respecting other abusive telemarketing acts or practices a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy".

Such language was the basis of the "company-by-company" DNC list requirement set forth in the existing TSR. MBNA takes no issue with that requirement because it is entirely consistent with TCPA requirements.

However, under the Proposed TSR, the FTC has apparently determined that telemarketing activity itself is "abusive" and that the TCFAPA confers upon the FTC the power to adopt a centralized DNC list to remedy this suddenly realized – and utterly unsupported by any factual record - situation. Under the FTC's reasoning, subsequent unrelated telemarketing calls from different telemarketers to a single consumer can represent a pattern. Congress made no such findings in connection with the underlying legislation. We believe it is clear that a "pattern" of calls, as used by Congress in TCFAPA, indicates intent - where one telemarketer (or a group of colluding telemarketers) - willfully call repetitively or use other coercive or abusive tactics.

3. Proposed DNC List - Proper Forum. Directly related to the issue of authority is the issue of the proper forum for resolution of a matter. Of the many troubling statements set forth in the FTC's proposed rule-making, we find the following the most disturbing:

> "One **of** the changes in the way telemarketing is conducted relates to refinements in data collection and target marketing techniques that allow sellers to pinpoint with greater precision which consumers are most likely to be potential customers. These developments offer the obvious benefit of making telemarketing more effective and efficient for sellers. However, enhanced data collection and target marketing also have led to increasing public concern about what is perceived to be increasing encroachment on consumers' privacy. These privacy concerns initially focused on the Internet. However, the privacy debate has expanded to include all forms of direct marketing. Consumers have demanded more power to determine who will have access to their time

> **and attention while they are in their homes. Indeed, a majority** of **the comments received during the Rule review focused on issues relating to consumer privacy and consumer sovereignty, rather than** fraudulent **telemarketing practices".**

As recently as last October we read that Chairman Timothy Muris of the FTC chose not to call on Congress for additional privacy legislation. The rationale now appears to be that the FTC would "legislate" through its rule-making power. As a national bank, MBNA observed the insertion of privacy into the Gramm-Leach-Bliley Act, 15 USC §6801 *et* ***seq.*** ("GLBA") and was able to participate in the balancing of interests necessary to achieve financial modernization while respecting privacy concerns. No less than twenty-four specific exceptions to the GLBA privacy regulations speak volumes about the complexity of these issues. Those exceptions exist because the financial industry was provided the time and opportunity first in Congress, and then again in the rule-making process of seven Federal agencies, to make its concerns known.

The FTC under TCFAPA is not the proper forum to resolve the privacy issues associated with telemarketing. TCFAPA authorizes the FTC to prohibit fraud and abuse in telemarketing. It is a usurpation of Congress' legislative authority for the FTC to begin regulating all forms of direct marketing - most of which have been legitimately in place for years, generating billions in sales, millions of transactions and thousands of jobs - based on concerns about consumer privacy and consumer sovereignty, whatever they may mean. Even if we accept the described basis for the FTC's proposed rule-making, the place to resolve policy issues of this sort is in Congress, not in the rule-making process of a Federal regulatory agency.

4. Proposed DNC List – Substantive Comments. If the FTC retains the DNC list within the Proposed TSR, then MBNA believes the following matters must be addressed or included:

(a) Existing Business Relationship – Most DNC regulations exclude calls made by telemarketers to consumers having an existing business relationship ("EBR') with the telemarketer or the provider of the product or service being telemarketed. This exception allows us to reach millions of customers with opportunities to acquire an additional credit card or other financial product or service, stimulate activation and use of existing loan accounts, **and** enhance retention of existing loan accounts. Consumers understand this exception and do not object to it. The alternative offered in the Proposed TSR, express verifiable authorization ("EVA") of the consumer's consent to be called by a particular telemarketer, is unrealistic and burdensome. MBNA's systems are not built to obtain, track and retain EVA as required under the Proposed TSR. System modifications and representative education will be required. Further, with the EVA requirement and without the EBR exception, the only way MBNA can even obtain consent from consumers is through inbound calls – certain to be only a tiny fraction of the populations we can reach today through the EBR.

(b) Duplicative Lists – The Proposed TSR will keep in place the existing "company-by-company'' DNC list, add the proposed "centralized" DNC list, and preempt

neither existing State DNC laws nor voluntary obligations under the DMA's TPS. Effectively, national telemarketers will be forced to comply with some 55 obligations simultaneously (50 States and DC; TCPA; TSR "company-by-company" and "centralized" DNC lists; and DMA TPS). MBNA is complying with approximately half that many now and we are confident we can comply with 55. However, we question the wisdom of this approach and the heavy involvement of government in something the commercial sector, through the efforts of the DMA, has been ready, willing and able to handle for years. The FTC should revise the Proposed TSR to simplify the DNC list concept and work with businesses to provide effective, practical solutions.

(c) Cost to be Listed and Retention Periods – The Proposed TSR fails to specify what a consumer will pay to have their phone number placed on the "centralized" DNC list and how long that listing will be effective. State DNC laws vary widely in this regard. Not unlike the payment made by consumers for unlisted telephone numbers, MBNA believes it is entirely appropriate to charge consumers for such a privilege because it alleviates the cost burden to taxpayers. Based on our survey of State DNC laws we recommend a charge of $5.00 and a retention period of two years.

(d) Cost to Obtain List and Reconciliation – The Proposed TSR fails to specify what telemarketers will pay to obtain the initial "company-by-company" DNC list and required updates. Further, the Proposed TSR's requirement for monthly reconciliation of the list is unduly burdensome. If the FTC investigates this matter, it will find that the few States that started proposing monthly updates of DNC lists quickly changed their practices to quarterly updates. This is more than sufficient to protect consumers and prevents an unnecessary burden upon telemarketers obtaining the list and upon the organization responsible for compiling, updating and distributing it. MBNA recommends that costs for telemarketers obtaining the list be based on flat fees, the totals of which should not exceed the overall cost of the program (not including any other FTC initiatives) and taking into account revenue generated from consumers.

5. Preacquired Account Telemarketing. §310.4(a)(5) of the Proposed TSR defines as an abusive telemarketing act or practice:

> "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 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.''

GLBA already contains a prohibition against sharing account numbers for purposes of direct mail marketing, telemarketing or electronic marketing to the consumer. The Proposed TSR unnecessarily addresses an issue already covered under existing law and

regulation. Even worse, it does so poorly and in a manner virtually assured to destroy existing efficiencies, and cause other unintended consequences. The FTC proposes these prohibitions without even consulting members of its staff already familiar with this complex issue and fails to cite anything other than "consumer apprehension" to justify them.

MBNA recommends deletion of this proposal in its entirety. It will require significant changes in our business practices and produce little, if any, additional consumer protection. If the FTC retains the provision, it should exclude financial and non-financial products or services marketed by or in conjunction with a financial institution as GLBA and its regulations more than adequately address any reasonable concern. At the very least, sharing such information with parties not authorized to charge the account should be permitted to avoid business costs in restructuring existing information transfers . supporting fulfillment or servicing of the product or service. Further, the terms "consumer's billing information" and "for use in telemarketing" must be carefully defined. It is common practice to pass such information - in full compliance with GLBA - through multiple parties in **a** complex telemarketing call that proceeds from marketing, through sale to processing, servicing, and fulfillment. If the FTC fails to draw a bright line, consumers may find it more costly, difficult, and time-consuming to obtain the products and services they desire. The legitimate use of account information is not, or should not be, the issue – it's the intentional misuse of preacquired account information that's abusive.

6. USA Patriot Act. MBNA commends the FTC on its proposed amendments to the TSR incorporating the provisions of the USA PATRIOT Act. We believe the proposed changes reflect Congress' intent and are limited in scope and impact while providing important consumer benefits. As a national bank not subject to the FTC's jurisdiction, we believe that charitable organizations using for-profit telemarketers for fund raising will face some consumer confusion regarding when the TSR does and does not apply. MBNA faces the same issue when using Service Providers. Our company policy is to follow all requirements of the existing TSR whether our telemarketing is being conducted by MBNA, MSI or outside organizations.

7. Definition of "Billing Information" and "Express Verifiable Authorization". The definitions of these two terms and their application to all forms of payment means that MBNA must obtain the consumer's 16-digit credit card account number to close the sale of any product or service through the telemarketing channel. This aspect of the Proposed TSR requires a complete change in long-standing business practices based only upon anecdotal evidence that consumers do not understand which account is being charged or fear for their privacy. More importantly, the proposed rule-making runs directly contrary to advice banks have given to consumers for years with the agreement of the OCC and the FTC: "Do not give your credit card account number to anyone you do not know calling you on the telephone to sell you goods or services". So just as with the increasing sophistication of telemarketing, where "privacy" enters the picture a market mechanism that's worked soundly for years and was developed to minimize the sharing of account

numbers is proposed to be discarded in favor of an outright ban. The Proposed TSR is an overreaction and fails to take into account remedial mechanisms already in place which adequately protect consumers. The proposed definitions should be applied only to those forms of payment lacking the consumer protections of credit cards (Fair Credit Billing Act), electronic funds transfers (Regulation E) and similar charge back protection or billing dispute resolution rights, and/or limited liability for unauthorized charges.

8. Definition of "Outbound Telephone Call". The definition of this term in **§3**10.2(t) of the Proposed TSR must be written with much greater precision. MBNA has invested heavily in the last few years in continuous relationship management strategies permitting us to offer a variety of products and services to consumers when we think they will be most receptive. The Proposed TSR appears to require that cross-selling in connection with inbound customer service inquiries must be treated as outbound telemarketing calls. Complying with such a provision requires call suppression connectivity that does not exist and required disclosures from representatives not educated to do so. Such a proposal is unnecessarily costly and complex; a simple and expedient solution is not only available, but is already practiced by MBNA. We always ask the caller if they are interested in hearing about the product or service marketed ***before*** the call is transferred. We do this where the call is transferred to another MBNA representative ***and*** where the call is transferred outside of MBNA, either to MSI or to **a** Service Provider. If the consumer does not consent, the call is not transferred. Our society anticipates some level of commercial contact. It is not abuse or coercion; it's protected commercial speech – and the FTC should treat it as such.

At the very least, if the FTC insists on pursuing this approach, precise definitions of "separate telemarketer" and "separate seller" must be promulgated and **a** "consent" exception incorporated. Further, we take issue with the transfer from one telemarketer to another telemarketer if the intent of the transfer is to process (or continue the processing ***of)*** a good or service already purchased by the consumer. For instance, many of the products or services MBNA telemarkets to consumers require multiple steps to authenticate the consumer and verify that the proper records or accounts are being accessed. Screening for telemarketing suppression and repeatedly requiring disclosures in such instances is counter-productive and frustrates the consumer's intent.

9. Prize Promotions. MBNA supports the FTC's proposal to add a disclosure requirement that a purchase will not improve a customer's chances of winning a prize promotion. These additions, under §310.3(a)(1) and **§3**10.4(d) of the Proposed TSR, will ensure that consumers are not deceived in prize promotions. The language is brief, directly to the point, and largely already disclosed by reputable advertisers today.

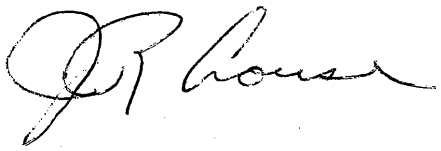
10. Credit Card Loss Protection Plans. MBNA commends the FTC for including **§3**10.3(a)(1)(iv) in the Proposed TSR, requiring telemarketers of such plans to disclose the $50 limit on a cardholder's liability for unauthorized use of a credit card under §133 of the Consumer Credit Protection Act, 15 USC § 1643. Similarly, we also fully support §310.3(a)(2)(viii) prohibiting any misrepresentation that a consumer needs offered goods

or services to have the protections offered under 15 USC § **1643.** As a credit card issuer waiving even the $50 liability still permitted under Federal law, MBNA supports these disclosures.

11. Predictive Dialers. MBNA commends the FTC for neither banning predictive dialers (which would economically cripple all telemarketing) nor arbitrarily stipulating some fixed, point-in-time, acceptable call abandonment rate. **As** part of MBNA's telemarketing quality monitoring, we are particularly sensitive to this issue and well aware that other telemarketers routinely place a call to the consumer without an ability to have a representative on **the** line in a timely manner. We understand the frustration consumers may experience as the result of such behavior and are happy to work with the FTC and the DMA to study the matter and recommend solutions. We caution the FTC that we do not foresee a "one size fits all" solution to this problem and that "average abandonment rates" over the course of several hours are the appropriate measurements to develop. Call center operations remain as much art as science and representative availability can vary widely through the course of a day based on attendance, list quality, time of day and relative experience of the representatives on duty.

MBNA appreciates the opportunity to provide these comments to the FTC on the Proposed TSR. If you have any questions or comments, please contact the undersigned at the telephone number above.

Sincerely,



c: David Maxwell
James W. Brooks, Esq.