July 9, 2002

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

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

Dear Mr. Clark:

Discover Bank is pleased to respond to the FTC's request for comment dated May 24, 2002 regarding proposed amendments to the Telemarketing Sales Rule that would create user fees for access to the proposed national do-not-call registry. 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 could be significantly impacted by the FTC's proposed user fee amendments if adopted, in the way of consumer complaints, needless expense, and undue operational burdens, as will be explained in section 3 below. Discover Bank also believes it is appropriate for it to submit comments in the interests of the companies providing telemarketing services on its behalf who are subject to the FTC's jurisdiction.

1. The FTC Has No Authority to Charge Telemarketers the Proposed User Fee.

The FTC's proposal cites as authority for the proposed user fee the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1991, 15 U.S.C. §§ 6101-6108 ("TCFAPA"). The FTC also suggests that it may charge a user fee under the Independent Offices Appropriation Act of 1952, 31 U.S.C. § 483a ("IOAA"), which under narrow circumstances permits agencies to establish fees for a "service or thing of value." The FTC has no authority to charge the proposed user fee under the TCFAPA or the IOAA, a fee that amounts to nothing less than a telemarketing tax.

The TCFAPA authorizes the FTC to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices," but does not give the FTC authority to charge regulated companies a fee for the cost of administering any rules. The FTC nonetheless argues that it may impose the fee under the IOAA, since providing the list to telemarketers is a "service or thing of value." This argument is misguided.

Under Article I, § 8 of the Constitution, only Congress has the power to "lay and collect Taxes," and Congress may not delegate to others its "essential legislative functions." *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935). It is therefore unconstitutional for an executive agency to impose a "fee" which is simply calculated to shift the cost of providing a public service to private industry. See *National Cable Television Assoc. v. United States*, 415 U.S. 336 (1974) (reversing the Court of Appeals' approval of FCC fee imposed under the IOAA on community antenna television system owners). Given these serious constitutional concerns, the IOAA must be read "narrowly." *Id.* at 342. In *National Cable*, for example, the Supreme Court held that the costs to the FCC of supervising community antenna television system owners could not simply be shifted to the owners under the IOAA to the extent that some of those costs "inured to the benefit of the public." As the Court stated:

> It is not enough to figure the total cost (direct and indirect) to the Commission for…supervision and then to contrive a formula that reimburses the Commission for that amount. Certainly some of the costs inured to the benefit of the public, unless the entire regulatory scheme is a failure, which we refuse to assume. *(Id.* at 343*)*

The case law relied upon by the FTC in its proposal relates solely to entities requiring a federal license or permit who arguably receive a "special benefit" by virtue of their federal license or permit. *See, e.g., Mississippi Power & Light Co. v. United States Nuclear Regulatory Comm'n*, 601 F.2d 223, 229 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980). Those cases are clearly inapposite here.

In 1991, the same year it enacted the TCFAPA, Congress enacted the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA") and authorized the FCC to create a national do-not-call database. Congress specifically authorized the FCC to "develop a fee schedule or price structure for recouping the cost of such database…." 47 U.S.C. § 227(c)(4)(B). Since the FCC never created a database, the constitutionality of this provision has, of course, never been tested in the courts. If the FTC's view of the IOAA were accepted, however, this provision of the TCPA is meaningless since the IOAA gives the FCC the authority to impose a database user fee. It is far more reasonable to conclude that Congress made a specific grant of authority to the FCC because it recognized that the FCC would otherwise have no such authority under the IOAA. The above-quoted language from the TCPA also illustrates that when Congress intends to permit an agency to charge telemarketers for the cost of administering telemarketing regulations, it knows how to do so, and suggests that Congress chose not to grant the FTC such authority.

The FTC's proposal is also inconsistent with federal policy on user fees, as set forth in the Office of Management and Budget ("OMB") Circular No. A-25. The Circular provides that "A user charge, as described below, will be assessed against *each identifiable recipient for special benefits* derived from Federal activities beyond those received by the general public." We respectfully suggest that it is specious to contend that the proposed list is for the "special benefit" of telemarketers. As the FTC has acknowledged, "Industry generally support[s] the Rule's current company-specific approach…." FTC Telemarketing Sales Rule, 67 Fed. Reg. 37,362 at 70 (Proposed Jan. 30, 2002). Telemarketers, through one of their national trade associations, the Direct Marketing Association, already maintain *and pay for* a national do-not-call list, in addition to the internal lists that they must maintain under the TCFAPA, the TCPA, and various state laws.

Finally, the proposed user fee is contrary to established case law holding that agency fees cannot be imposed upon one group of users who are not receiving the "primary benefit" of the regulation. *Public Service Co. v. Andrus*, 433 F. Supp. 144, 152 (D. Colo. 1977); *Sohio Transportation Co. v. United States*, 5 Cl. Ct. 620, 627-28 (1984). In short, rather than adhere to federal user fee policy and applicable case law, the FTC simply proposes to tax businesses engaged in telemarketing in order to recoup the expense of providing the do-not-call service to consumers. Such a telemarketing tax is both unauthorized and unconstitutional.

For all of the above reasons, we believe that the FTC should withdraw its proposal. If the FTC resubmits any proposal regarding a user fee, we believe the FTC must address the shortcomings discussed below with respect to the estimated cost of the national list, and limited access to the list.

2. The FTC Has Not Provided an Adequate Basis for Its Proposed Fee.

The FTC proposal estimates the cost of creating and maintaining the national list at $5 million in the first year. The FTC notes only vaguely that this estimate is based on vendor responses to a Request for Information submitted by the FTC, responses which the FTC apparently intends to keep secret on the theory that they are "confidential and proprietary business information." (67 Fed. Reg. 37, 363 note 4). By law, however, the FTC must provide more than conclusory estimates:

> The agency [proposing a user fee for a service] must provide a public explanation of the specific expenses included in the cost basis for a particular fee, and an explanation of the criteria used to include or exclude particular items….[T]he Administrative Procedure Act [also] requires the agency to make available to the public, in a form that allows meaningful comment, the data the agency used to develop the proposed rule.

Engine Manufacturers Ass'n v. EPA, 20 F.3d 1177, 1181 (D.C. Cir. 1994) (citations omitted). Thus, the FTC has not met its burden of demonstrating a reasonable basis for its estimate.

There is considerable evidence that the estimate is a significant understatement. The FTC's estimate is inconsistent with the considered judgment of the 49 state attorneys general who declared in response to the FTC's original proposal from January, "The Attorneys General are concerned that this amount [$5 million] will not be adequate to create the database, much less to cover the costs of maintenance and enforcement, even assuming significant state assistance in that endeavor." FTC File No. R411001, at 25. Indeed, when the FCC considered implementing a national do-not-call list in 1992, it was presented with estimates by industry ranging from $20 million to $80 million for implementation, in addition to an annual operational cost of around $20 million. Report and Order, Federal Communications Commission, FCC 92-443 (October 16, 1992), at 6. The FTC should address these discrepancies in any resubmitted proposal.

3. Entities Other Than "Telemarketers" Should Be Permitted to Access the Proposed List.

Under the FTC's proposal, only "telemarketers," a defined term under § 310.2(t) of the Rule, could obtain the proposed national list, and while telemarketers could access the list for multiple telemarketers or sellers (upon payment of the user fee for each), it is unclear whether they could actually provide the list to those other telemarketers or sellers. Moreover, telemarketers and sellers could use the information from the list only to comply with the Telemarketing Sales Rule. These limitations, which are partly driven by the FTC's decision to collect all of the needed revenue from telemarketers, create several unacceptable situations:

- Telemarketers and sellers such as Discover Bank who are exempt from the FTC's jurisdiction would apparently have no access to the list at all, directly or indirectly, if they wished to voluntarily suppress calls. For example, exempt entities may wish to avoid inconveniencing or provoking complaints from consumers who may be unaware of the limitations on the FTC's jurisdiction.

- Telemarketers and sellers who are within the FTC's jurisdiction would not be able to use the list to suppress calls for business purposes that are exempt. For example, companies conducting a customer survey may want to scrub against the list even though the call is not "to induce a purchase of goods or services."

- Sellers who use multiple telemarketers would effectively be required to pay multiple times for the same list without any added "special benefit."

- Sellers and telemarketers would arguably be prohibited from sharing the list with vendors for the purpose of performing list management services in support of a seller's telemarketing efforts.

- List management firms, who may be the firms best able to efficiently manage the scrub process, would be precluded from obtaining the list from the FTC.

- Arguably, telemarketers would not be permitted to provide the list to sellers, even those sellers whose identities were given to the FTC, so sellers would have no way to confirm whether their telemarketers are in compliance with the Rule.

In order to address these deficiencies, a national list should be made available to any entity, whether a seller, telemarketer or list processor, provided that the list is used solely for the purpose of preventing telephone calls to numbers on that list. Accordingly, we suggest that if the FTC does proceed with its proposed national do-not-call list and imposes a user fee, § 310.9 be amended as follows:

310.9 Fee for access to do-not-call registry.

(a) ~~Telemarketers~~ Persons who obtain access to the do-not-call registry, maintained by the Commission under [sect] 310.4(b)(1)(iii)(B), shall pay an annual fee, prior to obtaining such access, of $12.00 per area code of data they access. ~~Telemarketers~~Persons may obtain access to five or fewer area codes of data for no fee. The maximum annual fee is $3,000.00, which will provide access to 250 or more area codes of data. Any ~~telemarketer~~ person who ~~engages in telemarketing~~ obtains the registry on behalf of other sellers ~~or telemarketers~~, or who uses the information included in the registry to remove telephone numbers from the telemarketing lists of other sellers ~~or telemarketers~~, shall pay this fee for each such seller ~~or telemarketer~~.

(b) After a person ~~telemarketer~~ pays the fees set forth in paragraph (a) of this section, the person ~~telemarketer~~ may access the registry data for the selected area codes at any time for twelve months following the first day of the month in which the telemarketer paid the fee (``the annual period"). To obtain access to additional area codes of data during the first six months of the annual period, the person ~~telemarketer~~ must first pay $12 for each additional area code of data not initially selected. To obtain access to additional area codes of data during the second six months of the annual period, the person ~~telemarketer~~ must first pay $6 for each additional area code of data not initially selected. The payment of the additional fee will permit the person ~~telemarketer~~ to access the additional area codes of data for the remainder of the annual period.

(c) Access to the do-not-call registry is limited to telemarketers, sellers, others engaged in or causing others to engage in telephone calls for commercial purposes, and service providers acting on behalf of such persons.~~working on their own behalf or working on behalf of other sellers or telemarketers.~~ Prior to accessing the do-not-call registry, a person ~~telemarketer~~ must provide the identifying information required by the operator of the registry to collect the user fee, and must certify, under penalty of law, that the person ~~telemarketer~~ is accessing the registry solely to comply with the provisions of this rule or to otherwise prevent telephone calls to telephone numbers on the registry. If the person ~~telemarketer~~ is accessing the registry on behalf of other sellers ~~or telemarketers~~, that person ~~telemarketer~~ also must identify each of the other sellers ~~or telemarketers~~ on whose behalf it is accessing the registry, and it must certify, under penalty of law, that the other

sellers ~~or telemarketers~~ will be using the information gathered from the registry solely to comply with the provisions of this rule or to otherwise prevent telephone calls to telephone numbers on the registry.

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