March 29, 2002

BY HAND DELIVERY

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

Re: 16 CFR Part 310 -- Telemarketing Rule Comment

Dear Sir:

Following are the comments of the National Franchise Council ("NFC") addressing the Notice of Proposed Rulemaking ("NPR") released by the Federal Trade Commission ("FTC" or "Commission") on January 22, 2002.

As a preliminary matter, NFC appreciates the Commission's desire to modify the Telemarketing Sales Rule ("TSR" or "Rule") to prohibit deceptive telemarketing practices and protect consumers from unwanted and late-night telemarketing calls. We support the Commission's goal of establishing a central "Do Not Call" registry and enhancing the Rule's ability to enable consumers to exact greater control over when and whether to receive telemarketing calls in their homes.

We are submitting these comments because of the profound -- and possibly unintended -- impact the proposed amendments may have on franchisors' sales practices.

I. The National Franchise Council – Background

The National Franchise Council (NFC) is dedicated to fostering a legal and regulatory environment favorable to franchising's continued growth and success.

NFC membership is limited to our nation's largest and most reputable franchisors. Our members include: AFC Enterprises, Inc. (Church's Chicken, Cinnabon, Popeye's Chicken & Biscuit, Seattle Coffee Company, Torrefazione Italia); Cendant Corporation (AmeriHost Inn, Ramada, Days Inn, Super 8 Motels, Howard Johnson, Jackson Hewitt Tax Service, Travelodge, Avis, Century 21 Real Estate, Coldwell Banker Real Estate, ERA Real Estate); Choice Hotels International (Comfort Inn, Clarion Hotel, Sleep Inn, Quality Inn, Rodeway Inn, Econo Lodge, MainStay Suites); Hilton Hotels Corporation; (Hilton, Hampton Inn, Embassy Suites, Homewood Suites, Doubletree); Marriott International; Medicine Shoppe International, Inc. (Medicine Shoppe Pharmacies); Meineke Discount Muffler Shops Inc.; Midas International; Pearle Vision, Inc.; ServiceMaster Residential/Commercial Services LP (TruGreen-ChemLawn, Terminix, Merry Maids, ServiceMaster, AmeriSpec, Furniture Medic); 7-Eleven, Inc.; Six Continents Hotels (Crowne Plaza, Holiday Inn, Inter-Continental Hotels and Staybridge Suites); Starwood Hotels & Resorts Worldwide, Inc. (Sheraton, Westin, Four Points, St. Regis); Triarc Restaurant Group (Arby's, T.J. Cinnamons); and Tricon Global Restaurants, Inc. (Pizza Hut, Taco Bell, KFC).

In 1998, NFC entered into a groundbreaking public-private partnership with the Federal Trade Commission to increase compliance with federal and state franchise sales laws. Through the NFC-FTC Alternative Rule Enforcement Program, NFC seeks to enhance the effectiveness of existing franchise sales laws to protect franchisees. This pilot program was extended in 1999 to state enforcement agencies. To date, NFC has handled more than two dozen referrals.

In addition to working with federal and state officials that regulate franchising, NFC provides franchise sales law compliance training to member companies; informs members regarding pending legal, legislative and regulatory matters; and conducts programs for franchisors to discuss issues of common concern.

II. Franchisors' Sales Practices Would be Profoundly and Unjustifiably Impacted by the Proposed Exemption Provisions

The exemptions in the proposed amendments to the Telemarketing Rule threaten to have a profound -- and unwarranted -- impact on the manner in which franchisors offer franchises to prospective franchisees. As discussed below, because of ambiguity in the proposed exemption provisions, much of the impact may be unintended.

- **Section 310.6(b)**

Although the Commission retains the general exemption in Section 310.6(b) for transactions subject to the FTC Franchise Rule, the proposed amendments would narrow the effect of this exemption by requiring franchisors to comply with Section 310.4(c)(1) (prohibiting threats, intimidation or use of profane or obscene language), Section 310.4(a)(b) (blocking, circumventing, or altering the transmission of the name and/or telephone number of the calling party on Caller ID), Section 310.4(b) (prohibiting abusive pattern of calls, and requiring compliance with "Do Not Call" provisions), and Section 310.4(c) (calling time restrictions).

Unfortunately, the proposed amendments do not adequately address how these provisions would apply, especially when inbound calls are converted to outbound calls (discussed on page six of this Comment). For instance, Section 310.4(c) only allows outbound calls to consumers between 8:00 a.m. and 9:00 p.m., based on the time zone in which the consumer is located. If a consumer places an inbound call to order a product or service after 9:00 p.m., would the telemarketer violate the Rule by offering that consumer additional products or services? Uncertainty also surrounds application of the Section 310.4(b) "Do Not Call" list to such calls. If the consumer initiating the call employed a Caller ID device to block their number from being read, how would the telemarketer know that the consumer was on the "Do Not Call" list and did not wish to receive "outbound" telemarketing calls? It would be inequitable to hold a franchisor liable for violating the Rule under these circumstances.

- **Section 310.6(f)**

Although uncertainty exists regarding the effect of Section 310.6(b), its application is clear. Application of the exemption provided in Section 310.6(f), however, is unclear and troubling. This exemption for direct mail, which also includes e-mail and facsimile communications, imposes significant disclosure obligations on sellers that use these media. If applicable to franchisors, it would have a profound effect on their ability to use e-mail, facsimile and direct mail in their legitimate franchise sales efforts.

Section 310.6(f) provides an exemption from the Rule for:

> "Telephone calls initiated by a customer or donor in response to a direct mail solicitation, including solicitations via the U.S. Postal Service, facsimile transmission, electronic mail, and other similar methods of delivery in which a solicitation is directed to specific address(es) or person(s), that clearly, conspicuously, and truthfully disclose all material information listed in §310.3(a)(1) of this Rule, for any goods or services offered in the direct mail solicitation or any requested charitable contribution; **provided, however, that this exemption does not apply to calls initiated by a customer in response to a direct mail solicitation relating to prize promotions, investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule ….** [emphasis added]**"**

Application of this exemption to franchising may be inferred from the reference to "business arrangements covered by the Franchise Rule" as not being included in an exception to the exemption. Clarification is needed so franchisors understand whether the exemption applies to them.

Section 310(6)(f) provides that the exemption for calls made by a customer in response to a direct mail, e-mail or facsimile applies only if the solicitation "clearly, conspicuously, and truthfully" discloses all material information listed in Section 310.3(a)(1) of the Rule. Among other things, Section 310.3(a)(1) requires disclosure of the "total costs" to purchase, receive or use the goods or services and all "material restrictions, limitations, or conditions" relating to them.

If applicable, this requirement would require franchisors to provide, at the very least, the following disclosures from their franchise offering circulars: Item 5 (Initial Franchise Fee), Item 6 (Other Fees), Item 7 (Initial investment), Item 8 (Restrictions on Sources of Products or Services), Item 9 (Franchisee's Obligations), Item 12 (Territory), Item 13 (Trademarks), Item 14 (Patents, Copyrights and Proprietary Information), Item 15 (Obligation to Participate in the Actual Operation of the Franchise Business), Item 16 (Restrictions on What the Franchisee May Sell) and Item 17 (Renewal, Termination, Transfer and Dispute Resolution).

As a practical matter, this new requirement would obligate a franchisor to provide a copy of its franchise offering circular as part of *every* e-mail, facsimile or direct mail communications sent to a prospective franchisee. This would be extraordinarily and unjustifiably burdensome. It also is inconsistent with the clear requirements of the FTC Franchise Rule, which requires delivery of the offering circular at the earlier of the first personal meeting or ten business days before the payment of any money or execution of any agreement relating to the franchise.

The Franchise Rule contemplates that such formal disclosure activity occurs at a later point in the selling process, after the type of initial contact represented by direct mail and e-mail solicitation occurs and the recipient affirmatively replies with genuine interest. The Commission and its staff have long held the view that preliminary, unilateral marketing activities do not merit the same level of disclosure as more significant, bilateral sales exchanges. The loss of economic efficiency now embodied and well understood in the Franchise Rule would be unfortunate.

Given the absence of evidence, anecdotal or otherwise, in the record of this or the contemporaneous rulemaking on the Franchise Rule suggesting the existence of any abusive or deceptive sales practices by franchisors that would warrant these new restrictions, we respectfully suggest that these provisions require reconsideration. If the Commission intends that both of these exemptions apply to franchise sales activities, their conterminous application must be reconciled. If, however, as we strongly advise, the disclosure obligations that would be imposed under Section 310(6)(f) are inapplicable, that must be clarified.

III. Calls Initiated By Consumers Should Not Be Subject To "Outbound" Rules

The proposed amendments would dramatically expand the definition of "outbound" calls to include calls that involve "upselling" or cross marketing that occurs during a consumer-initiated "inbound" call. Specifically, Section 310.2(t) expands the existing definition of "outbound telephone call" to include "any telephone call to induce the purchase of goods or services …. when such telephone call …. (2) is transferred to a telemarketer other than the original telemarketer; or (3) involves a single telemarketer soliciting on behalf of more than on seller …"

In its Analysis of Comments and Discussion of Proposed Revisions, the Commission explains that "when calls are transferred from one seller or telemarketer to another, or when a single telemarketer solicits on behalf of two distinct sellers, it is crucial that consumers or donors clearly understand that they are dealing with separate entities …. In the case of a call transferred by one telemarketer to another to induce the purchase of goods or services, or in which a single telemarketer offers he goods or services of two separate sellers, it is equally important that the consumer know the identity of the second seller, and that the purpose of the second call is to sell goods or services."

This provision would impair the ability of many franchising companies to provide services from which consumers derive significant benefit. For example, consumers often reach hotel companies by calling a toll free number for reservations. It is quite common for the employee at the reservations center to offer the consumer related goods or services provided by an affiliated company. Although there is little evidence of abusive or deceptive practices by these companies, "upselling" activity under these circumstances -- conceivably even if the sellers were not entirely separate or distinct -- would be prohibited. As discussed above on page three of this Comment, the proposed amendments also do not address how the Rule might apply when inbound calls become outbound calls.

NFC suggests that a telemarketer ought to be able to ask the consumer who initiated the call if he or she desires to learn about other goods or services. If the consumer says "No" in response to this question, the telemarketer should end the call. If, however, the consumer says "Yes", the supplementary sales promotion -- with the required disclosures -- should be allowed to continue.

IV. Uncertainty Regarding Use of Consumer Billing Information

NFC seeks clarification that sharing a consumer's billing information with the actual contemplated provider of the service would not violate the proposed amendments. In the case of a hotel, car rental or travel reservation, for example, the reservation service center requests a consumer's billing information to hold the room or vehicle. While it is normal practice for the consumer to also provide this billing information to the hotel or car rental provider when registering as a guest or renting the car, the hotel or car rental agency may need it to be transferred from the reservations center in order to obtain any non-refundable portion of the first night's room charge or first day's rental if the guest subsequently changes his or her plans without providing the required advance notification and cancellation.

Even if the reservation was made as the result of an "outbound" telemarketing call as defined under the proposed amendments, we do not believe that the transfer of this information from the reservations center to the hotel or car rental agency should be prohibited. Under these circumstances, the transfer is not an act done "for use in telemarketing" since the telemarketing, if any, had concluded.

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We appreciate the Commission's granting NFC an opportunity to comment on the proposed revised Rule and stand ready to assist the Commission as it moves forward.

Respectfully submitted,

Neil A. Simon
President