



April 12, 2002

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

Re: Telemarketing Rulemaking – Comment  
FTC File No. R411001

Dear Mr. Clark:

These comments are submitted for the record pursuant to the Notice of Proposed Rulemaking to Amend the Telemarketing Sales Rule, 16 CFR Part 310, as published by the Commission in the Federal Register (67 FR 4492) on January 30, 2002. The International Cemetery and Funeral Association (“ICFA”) is a national trade association founded in 1887 representing approximately 6,000 members including for profit, nonprofit, religious, and municipal cemeteries, as well as funeral homes, crematories, and monument retailers.

The ICFA has supported the FTC Telemarketing Sales Rule (“TSR”) since its promulgation in 1995 as an effective regulation that protects the public from abusive and fraudulent telemarketers without imposing unreasonable burdens on legitimate businesses. We believe that the existing Rule achieves an appropriate balance between enabling consumers to avoid unwelcomed calls while safeguarding the constitutional rights of commercial free speech to businesses. However, for the reasons discussed below, the ICFA opposes enactment of the amendments proposed to the Sec. 310.6(c) exemption.

### **Background**

Our comments are specifically addressed to Sec. 310.6(c) of the Rule that exempts “Telephone calls in which the sale of goods or services is not completed and payment or authorization of payment is not required, until after a face-to-face sales presentation by the seller.” The ICFA advocated this exemption during the original 1995 rulemaking proceeding and we believe that it has worked well for the following reasons.

Typically, members of the funeral home and cemetery profession do not sell property, merchandise or services over the phone. Telephone calling is used to determine the level of interest by consumers in making prearranged funeral and burial plans, that is, whether a consumer wishes to make funeral or burial arrangements well in advance of any need. If so, then the caller merely seeks to make an appointment with a prospective customer at a mutually convenient time in order to make a face-to-face “preneed” presentation. It should also be noted that relatively few cemeteries and funeral homes in any given geographic region contact consumers by telephone, so

we believe that the incidents of such calls per household are small.

The ICFA is not aware of abuses to the Sec. 310.6(c) exemption by funeral-related sellers and the required “face-to-face” component of the exemption is a significant safeguard to prevent potential abuses. Based on the public comments submitted to the Commission during the TSR “Review” period two years ago, only one comment alleged abuses by funeral-related sellers subject to the “face-to-face” exemption. That comment was filed by the Funeral Consumers Alliance with extensive but irrelevant attachments that failed to establish any pattern of abusive, deceptive or fraudulent telephone calls by cemeteries or funeral homes.

The ICFA continues to urge the Commission to retain the Sec. 310.6(c) exemption as a common sense method of applying the TSR only to those entities that actually attempt to sell goods and services over the telephone. Application of the Rule’s requirements to business callers that solely make appointments with prospective purchasers is unreasonable and unduly burdensome, offering no additional level of consumer protection. Furthermore, consumers are protected from potential fraudulent or high-pressure sales tactics of face-to-face presentations through the FTC Three-Day Cooling Off Rule and other federal and state laws.

### **Proposed Amendments to Sec. 310.6(c)**

Based on the January 30<sup>th</sup> Notice of Proposed Rulemaking, the FTC has recommended the retention of the face-to-face exemption in its TSR. However, the Commission proposes five amendments to this exemption that can be divided into three categories:

1.) Two amendments duplicate existing requirements under another federal statute, the Telephone Consumer Protection Act of 1991 (“TCPA”), 47 U.S.C. 227 *et seq.*, that is enforced by the Federal Communications Commission. These two provisions involve maintaining a company-specific “Do Not Call” list [TSR Sec. 310.4(b)(iii)(A)], and the prohibition against calling residences between 9 PM and 8 AM [TSR Sec. 310.4(c)].

2.) Another two of the five proposed amendments require compliance with TSR provisions that prohibit the use of threats, intimidation or use of profane or obscene language [sec. 310.4(a)(1)], and prohibit the blocking or circumventing a consumer’s “caller ID” system [sec. 310(a)(6)].

3.) The fifth and most sweeping proposal in the entire Notice prohibits calls to consumers who place their residential telephone numbers on a proposed FTC national “Do Not Call” registry [sec.310.4(b)(iii) (B)].

The two proposals in the first category - a company-specific “Do Not Call” List and time calling restrictions - prompt the ICFA to question why the Commission wishes to needlessly impose existing federal law on businesses already required to comply with similar regulations under the TCPA. While the Commission seems to anticipate this concern in its Notice, the issue remains unanswered and seems to be a case of excessive and duplicative regulation. The ICFA urges the Commission to work closely with the FCC to assure full enforcement of the TCPA, and to delete these two proposed amendments, at least as applied to the Sec. 310.6(c) face-to-face exemption.

The two proposals in the second category that prohibit intimidation, obscene language, and blocking caller ID, appear reasonable on a practical level. Indeed, a caller hoping to make an appointment with a consumer at a mutually convenient time would not be motivated to use such tactics in the first place. However, the ICFA is concerned that certain terminology potentially determinative of whether a violation has occurred has not been defined in the proposed TSR. For example, the term, “Intimidation,” is not listed among the TSR’s “Definitions.” We are concerned that a consumer could potentially claim to have been “intimidated” simply because a preneed caller suggested meeting to discuss funeral arrangements. So while these amendments are not unreasonable, the ICFA is not in a position to endorse them until the Commission has clarified certain terms or at least by referencing them through existing definitions in specific statutes.

The third category of proposed amendments to the Sec. 310.6(c) exemption raises the most serious concerns by the ICFA. The proposed national “Do Not Call” registry as applied to the face-to-face exemption would, for all practical purposes, eliminate the distinction between defined “telemarketing” under the TSR, where the purpose of the call is to sell something by phone, and the face-to-face exemption, whereby nothing is sold by phone.

In addition, preneed callers must already maintain internal Do Not Call lists under the TCPA, and perhaps ultimately under the TSR as well. Since funeral homes and cemeteries function almost entirely on a local basis in their communities, a consumer potentially will be contacted only by a small number of these entities and can easily eliminate their calls by placing his or her number on the company-specific List. In another words, if consumers wish to eliminate preneed calls, resorting to a national registry will be unnecessary for them and burdensome for the businesses involved. The requirement for funeral-related businesses to also “scrub” their lists each month from a national FTC registry is unduly burdensome. We note that the Commission has stated that the cost to the public, to businesses, and to the Government, to establish and update a national Do Not Call registry is currently unknown.

### **Procedural Concerns in the Rulemaking Amendments**

In addition to the issues discussed above, the ICFA is seriously concerned with the lack of substantial evidence in the TSR rulemaking record to justify implementing the proposed amendments to Sec. 610.6(c). According to the FTC Rules of Practice, 16 CFR Part 1, §§1.14 and 1.15, the substantive amendment of a trade rule such as the TSR follows the same requirements as the issuance of such rule. Among the requirements is the publication of the Statement of Basis and Purpose to accompany the rule that contains “a statement as to the prevalence of the acts or practices treated by the rule” and “a statement as to the manner and context in which such acts or practices are unfair or deceptive.” 16 CFR Part 1, §1.14(1)(i) and (ii).

As applied to the five proposed amendments to the TSR section 610.6(c) exemption, the ICFA is compelled to draw the Commission’s attention to the absence of substantial evidence in the rulemaking record demonstrating that preneed callers are engaging in unfair or deceptive acts or practices, or that such acts or practices are prevalent. Although the Commission’s current

solicitation of public comments could theoretically produce data to substantiate these requirements, the ICFA is seriously concerned that the Commission is pursuing these proposals regardless of the lack of such evidence. As comments filed by interested parties are placed on the public record by the Commission, the ICFA will continue to analyze the record for evidence that would justify imposing any of the five proposed amendments on preneed callers representing funeral homes and cemeteries, per the Rules of Practice as referenced above.

For these reasons, the ICFA is opposed to the five amendments proposed by the Commission insofar as they affect the Sec. 610.6(c) face-to-face exemption. We appreciate this opportunity to comment on the rulemaking proceedings and we encourage the Commission staff to contact us should they have questions or require additional information.

Finally, under a separate cover, the ICFA has filed its notification of interest to participate in the TSR public forum scheduled for June 5, 6, and 7, 2002, at the FTC Building in Washington, D.C. Thank you.

Respectfully submitted,

Robert M. Fells  
General Counsel