April 15, 2002

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

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

Dear Sir or Madam,

American Express Travel Related Services Company, Inc. and American Express Financial Advisors (collectively, "American Express" and "We") appreciate the opportunity to provide comments on the FTC's Notice of Proposed Rulemaking to amend the Telemarketing Sales Rule (the "Proposed Rule").

American Express Travel Related Services Company, Inc. ("TRS") and its affiliates issue American Express ® charge cards and credit cards, serve individuals with Travelers Cheques and other stored value products, helps companies manage their travel, entertainment and purchasing expenses through its family of Corporate Card services, offer accounting and tax preparation services to small businesses, and provide travel and related consulting services to individuals and corporations. American Express Financial Advisors Inc. ("AEFA"), through its financial advisors and through direct and Internet channels, offers financial planning, investment advice and consulting services, securities, insurance and brokerage products, and other related products and services, provided or procured through affiliates and third parties.

We utilize a variety of channels to provide our customers with timely information about products and services they may find of value. Speaking directly with our customers on the telephone allows us to interact with them in "real time," respond to their questions, and recommend products that may suit their needs. We manage this process carefully to maximize our customers' satisfaction. For over twenty years, TRS has offered Cardmembers the option not to receive telemarketing calls from us.

The reevaluation of the Telemarketing Sales Rule ("TSR") is appropriate in light of changes in technology and in the marketplace. However, we are concerned that certain aspects of the Proposed Rule are unnecessarily complex or unclear and might diminish customer convenience and choice. American Express therefore offers the following comments and suggestions for the Commission's consideration.

National "Do-Not-Call" Registry.

The Proposed Rule would establish a national "do-not-call" registry, aimed at addressing "consumer frustration over unwanted telephone solicitations." (Notice of Proposed Rulemaking, p. 69). The registry would apparently operate as an addition to the options that consumers already have available in the company-specific "do not call" provisions of the current TSR, private sector efforts (such as the Direct Marketing Association's Telephone Preference Service), and state laws. American Express supports the concept of a national "do-not-call" registry only if it (i) preempts the growing patchwork of state regulations, and (ii) provides an exception to permit calls to existing customers.

Interaction with State "Do-Not-Call" Laws: The Commission seeks comment on the interaction between a federal "do-not-call" registry and state laws. Current state laws already present a patchwork of varying standards; access to "do-not-call" lists is provided on different schedules, in different formats, with varying fees, registration requirements, penalties and exemptions. In short, the interaction among the various state regulations, and between current state and federal regulations, is complex and unclear. Commenters have suggested that state laws cover intrastate calls, possibly not interstate, and conversely, that the federal rule would govern interstate calls, possibly not intrastate. Attempting to distinguish between intra- and interstate calls, and sort through who is on the state but not the federal registry, is impractical at best. Further, the distinction between intrastate and interstate activity is not helpful to consumers. The Proposed Rule leaves open the question of which calls are covered and which companies must comply. These complexities unnecessarily add to the administrative burden of compliance and are likely to leave consumers confused and frustrated at continuing to receive certain telemarketing calls.

We suggest that the national registry should provide consumers with "one stop shopping" to empower them to decide which calls they receive. In order to provide a workable framework, one "do-not-call" standard should prevail. If a national registry is put in place without fully preempting the states, consumers will not get this benefit. Moreover, businesses will be faced with a truly formidable and costly compliance burden: honoring a new and substantially different federal "do-not-call" requirement on top of the plethora of existing and emerging state laws. The burden is magnified by the new hurdles that telemarketers will face in order to take advantage of the "safe harbor" in Section 310.4(b)(2): obtaining and reconciling the national "do-not-call" registry with internal call lists no less than every 30 days; monitoring and demonstrating that the telemarketer enforces compliance with its telemarketing policies and procedures; and taking disciplinary action for non-compliance.

While we recognize the obstacles to achieving federal preemption, the Commission should reconsider the significant operational burden, economic and competitive consequences of a national "do-not-call" registry when layered on top of multiple state laws. We believe the Commission's estimate of the cost of compliance is significantly low, particularly because of the express authorization, detailed disclosure and record-

keeping requirements. There are also costs associated with lost sales and customer relationships, which could be substantial for us and all covered firms and individuals. To the extent a national registry is established, we think it is important that the relevant federal regulatory agencies coordinate to make the national register preempt various state registries.

Existing Customers: One particularly problematic aspect of the national registry is its application to calls to existing customers. The Proposed Rule prohibits companies from calling their current customers who have placed themselves on the registry.

Nineteen of the approximately twenty states with "do-not-call" laws have recognized that it is appropriate to allow companies to contact individuals who have chosen to do business with them. The Proposed Rule, by requiring that companies honor the "do-not-call" registry for calls to both customers and non-customers, inhibits consumer choice by presenting an all or nothing scenario. Many consumers wish to eliminate cold calls but still wish to learn about additional products and services from the companies with which they do business, and may not realize that in placing their number on the registry, they will stop hearing from these companies. In our experience, customers appreciate receiving information about these products and services, even if they choose not to make a purchase.

In addition, the prohibition against calling current customers could unnecessarily harm customers of businesses that have a fiduciary duty to them. For example, American Express Financial Advisors, Inc. is a registered investment advisor and its financial advisors are investment advisor representatives. Thus, American Express financial advisors have a fiduciary duty to act in the best interests of their customers. On occasion that duty requires our financial advisors to expeditiously contact their customers with time-sensitive information. If our financial advisors are required to first determine whether their customers are on a do-not-call registry and, if registered, then find alternative means of contact, for example by mail, customers may be deprived of time-sensitive information, information that could materially affect their financial situation.

A fairer balance between consumer and commercial interests is achieved by exempting calls to existing customers from the scope of the "do-not-call" registry, in line with customer expectations and the vast majority of state "do-not-call" laws.

Express Verifiable Authorization: We would urge the Commission to adopt a more flexible standard for written authorization that does not include a signature requirement. If we provide as part of a direct marketing fulfillment package a card for the consumer to complete to request a call including a signature line, the prospective customer may not always comply by providing a signature. Nonetheless, the consumer's actions in completing and sending us the card still provide sufficient evidence of the consumer's authorization or request to be called. The requirement of a signature in Section 310.4(b)(1)(iii)(B)(1) appears unnecessarily burdensome.

We would also urge the Commission to provide for an alternative method of documenting express oral authorization. Under Section 310.4(b)(1)(iii)(B)(2), oral authorization is to be recorded and effective only when the telemarketer is able to verify that the authorization is being made from the telephone number to which the consumer is authorizing access. Many smaller businesses do not have recording technology, and would find it difficult and costly to retain oral authorization in the form proposed by the Commission. We suggest as an alternative that documentation as to the date and time the consumer provided oral authorization be retained for the required period of time.

In addition, a firm should be able to utilize its account opening documents and product and service agreements to obtain its customers' authorization to call them for the purpose of providing them with service and information concerning their accounts. AEFA's business involves establishing long-term relationships through which financial advisors provide advice and service to our customers. Our customers rely on us to provide them with timely information and guidance about how to handle market volatility and other unexpected occurrences – as we learned from the aftermath of last year's events.

Implementation: It is unclear how other aspects of a national "do-not-call" registry would be implemented. There is no provision that telephone numbers on the registry "expire" after a given time. Consumers frequently move or change telephone numbers, and numbers are recycled to new subscribers after a fairly short time; how are accurate "do-not-call" preferences to be maintained under such circumstances? The data on the registry should not remain there in perpetuity; it should expire from the list after a reasonable period of time and the consumer made aware that he/she may renew his or her "do-not-call" preference.

Preacquired Account Telemarketing

Section 310.4(a)(5) of the Proposed Rule prohibits a seller or telemarketer from receiving a consumer's billing information from any third party for use in telemarketing, or from disclosing a consumer's billing information to any third party for use in telemarketing. We suggest modifying the Proposed Rule to make it consistent with the Privacy Rule promulgated by the Commission under the Gramm-Leach-Bliley Act (16 C.F.R. Part 313.12)("Privacy Rule"). The Privacy Rule and commentary noted two important exceptions to the overall prohibition against disclosure of account numbers to third parties for marketing purposes:

- Disclosure to an agent or service provider for purposes of marketing a financial institution's own products and services, as long as the agent or service provider is not authorized to initiate charges to the consumer's account.

- The use of encrypted account numbers, where the third party does not hold the decryption "key" and thus is unable to access the consumer's account.

The Proposed Rule contemplates that consumers will provide billing information to the telemarketer over the telephone in order to finalize the transaction. This approach will

actually operate to introduce account numbers into broader circulation. As customers provide account numbers, employees of telemarketers, processors and others in the distribution chain may have access to them. This practice will actually increase the chances for unauthorized use.

The Privacy Rule minimizes the potential for abuse. Sophisticated encryption processes keep account numbers out of circulation, and out of the hands of potential unauthorized users. Using encrypted numbers eliminates the need for telemarketing representatives to ask the consumer to read his/her account number, which minimizes the introduction of the number into broader circulation. The Privacy Rule also recognizes that many companies use outsourcing vendors to conduct telemarketing calls on behalf of the company, and regulates the manner in which account numbers may be provided to telemarketing vendors. This approach provides appropriate protection for consumers while also permitting efficient business operations and relationships to be maintained. Preventing businesses from utilizing these fraud prevention mechanisms will impair consumer protection. Consumer protection is increased when businesses use the methods set forth in the Privacy Rule. We encourage the Commission to explicitly incorporate these concepts into the Proposed Rule.

Many diversified companies are subject to both the Privacy Rule and the TSR, and the need for a single standard in this area is compelling. Requiring such companies to juggle inconsistent rules in this area depending on whether or not the entity providing or receiving the information is covered by the Privacy Rule, the TSR, or both, presents obvious practical issues and serves neither consumer nor business needs. The Privacy Rule reflects a reasoned approach, recognizing the legitimate use of information to provide efficient customer service while limiting the dissemination of account numbers. Adopting the same standard in the TSR addresses the need for uniformity while in no way undermining consumer protection.

Inbound Calls

Section 310.2(t) of the Proposed Rule expands the definition of "outbound telemarketing" to include inbound calls "transferred to a telemarketer other than the original telemarketer" or calls that involve "a single telemarketer soliciting on behalf of more than one seller or charitable organization" (practices referred to in the Supplementary Information as "up-selling"). Our concern with the proposal rests with the lack of clarity as to which types of calls would be deemed "up-selling", and whether the full scope of the TSR should apply if a call is transferred from one telemarketer to another.

We encourage the Commission to incorporate an exception to these requirements for products and services that are offered by the recipient company of the customer call. Customer-initiated calls often present opportunities to provide consumers with important information about products and services that may suit their needs. If the customer is interested in learning more about a product or service, the call may be transferred to the appropriate area of expertise and product fulfillment. Many businesses utilize affiliates or third parties to manage these processes.

These types of activities raise questions under the broad wording of the Proposed Rule. Would a call that is transferred from one representative to another within the same company, or to a service provider, be deemed a transfer from the "original telemarketer" to another telemarketer? "Telemarketer" is defined simply as "any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor." If the transfer converts the call to an outbound call, does that mean that it violates the TSR if it is transferred during a prohibited calling time, or that a previous "do-not-call" request must be honored? Applying such provisions to inbound calls is contrary to customer expectation and may prevent companies from informing customers about products and services that may be useful to the customer.

We agree with the Commission that the disclosure requirements of the TSR should apply whenever a new offer is made to the consumer, whether by the original telemarketer or a telemarketer to whom a call is transferred. Consumers should always be informed of material terms and conditions before they purchase a product. However, clarification is needed that an inbound call is not subject to hour of day or "do-not-call" requirements merely by virtue of its involving a call transfer or an offer of products or services offered by the company that the consumer has called. And the Proposed Rule should be modified such that companies that manage these processes efficiently by utilizing third party agents or representatives would not be subject to a different regulatory standard than those that perform the same function "in house."

Internet Services and Web Services

The Proposed Rule adds new definitions for "Internet Services" and "Web Services" (Sections 310.2(o) and (bb)) and proposes to eliminate the business-to-business exemption for the telemarketing of such services. This revision is in response to numerous reports by small businesses of telemarketing scams involving free trial offers for website hosting and design and other services related to Internet access.

The proposed definitions delineate the scope of such services to by covered by the TSR – the provision of access to the internet, and the design, building, creation, publication, maintenance, provision or hosting of a website. However, the Commission notes in the Supplementary Information its intent to construe such terms broadly – for example, that "Web services" encompasses "any and all services related to the World Wide Web" (notice, page 25). An overly broad construction of these terms will give rise to uncertainty as to whether a business-to-business call which mentions a Web-based product or service is in fact covered by the TSR. We recommend that the commentary be clarified to conform to the scope of the Proposed Rule's definitions.

Thank you for the opportunity to provide these comments. Should you have any questions, or if we can be of further assistance, please do not hesitate to call me at 516-292-2234.

Sincerely,

Christine C. Wrynn
Director
Legal Affairs