Securities Industry Association
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September 17, 2003

VIA ELECTRONIC MAIL

Mr. Jonathan G. Katz
Secretary
United States Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-0609

Re: Proposed Amendments to NASD Telemarketing Rules Relating to the National Do Not Call Registry, File No. SR-NASD-2003-131

Proposed Amendments to MSRB Telemarketing Rules Relating to the National Do Not Call Registry, File No. SR-MSRB-2003-07

Dear Mr. Katz:

The State Regulation and Legislation Committee of the Securities Industry Association[1] ("SIA") appreciates this opportunity to comment on the proposed amendments to NASD and MSRB telemarketing rules relating to the implementation of the national Do Not Call Registry set forth in SEC Release Nos. 34-48389 and 34-48390. Many of SIA's member firms rely heavily on telephone communication to provide full and effective service to existing clients. We therefore have a strong interest in helping develop reasonable telemarketing rules, while voicing concerns for rules that unduly restrict or impede legitimate business activity. SIA believes responsible telemarketing practices are in everyone's interest. Our member firms strive to develop long-term relationships with existing clients. Respectful telemarketing practices help us achieve that goal.

However, the NASD and MSRB interpretation of the amendments to the Telephone Consumer Protection Act of 1991 ("TCPA") and its application of those amendments to current NASD and MSRB telemarketing rules will unduly restrict the ability of member firms to contact their existing customers.

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[1] The Securities Industry Association, established in 1972 through the merger of the Association of Stock Exchange Firms and the Investment Banker's Association, brings together the shared interests of more than 600 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs nearly 800,000 individuals. Industry personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2002, the industry generated $222 billion in domestic revenue and $356 billion in global revenues. (More information about SIA is available on its home page: www.sia.com)

Because the proposed amendments to NASD Rule 2211 and MSRB Rule G-39 limit the definition of an "established business relationship" ("EBR") with a member firm to only those customers who have engaged in a securities transaction or a deposit of funds within eighteen months, the NASD and MSRB have unnecessarily narrowed the scope of the EBR exception set forth in the amended TCPA and the accompanying FCC Rules.[2] The NASD and MSRB interpretation would force member firms to segregate their own client database based upon an artificial and irrelevant consideration, that is, whether a financial transaction has occurred rather than whether an ongoing business relationship exists between a client and a member firm. This is not only inconsistent with the requirements for non-industry companies, but could lead to additional non-compliance risks for our member firms.

It is imperative that our members retain the ability to contact persons with whom they have prior or existing business relationships. For example, a margin call situation has developed in a client's account. At this time, the financial advisor should be able to call the client to inform him or her of the need to deposit additional cash or securities promptly to avoid selling securities to satisfy the margin call. Likewise, a financial advisor often initiates contact with clients to discuss changes in the securities market and the investment environment. Such contacts would enable clients to consider and take timely appropriate action. Additionally, firms need to contact customers to review and discuss the reinvestment alternatives when certificates of deposit or bonds reach maturity. Further, we may need to contact our clients with pertinent financial news that might impact their investments as, for example, a merger or reorganization announcement. The business relationship between client and financial advisor is organic, ongoing and often changes as the personal and financial circumstances of a client changes. Although a member firm may have an ongoing relationship with a client, including one or more accounts, custody substantial client assets, provide regular account statements and even provide investment advice and other financial services, that relationship will not qualify as an "EBR" under the NASD and MSRB interpretation of EBR unless that client has chosen to deposit funds or execute a securities transaction with the member firm in the prior 18 months. We respectably request that the proposed amendments be modified to avoid this unintended result.

SIA suggests that a more effective approach would be to make clear that, as is contemplated by the amendments to the TCPA, where a member firm has an ongoing business relationship with its clients, as evidenced by a transaction with that client that results in the provisions of goods or services, *with or without consideration*, an "established business relationship" exists between the client and that firm, i.e. "open" positions or "buy and hold" accounts such as a mutual fund. This approach is more consistent with the FCC Rules interpreting the TCPA[3] and recognizes the nature of the existing relationship between a client and a member firm.

Comment 1: Proposed NASD Rule 2211 and MSRB Rule G-39 should be consistent with EBR under TCPA and the FCC Rules.

The amendments to the TCPA include a revision to the definition of ("EBR") a longstanding exemption to many of the telemarketing rules contained therein. In recognizing the legitimate necessity of firms to communicate with its clients, the FCC adopted the FCC Rules, applying TCPA's amended definition of the established business relationship exemption to the national do not call list.

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[2] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, FCC 03-153, adopted June 26, 2003 (hereinafter "FCC Rules")

[3] Id. at §112 (FCC noted that "[ERB] focuses on the relationship between the sender of the message and the consumer, rather than on the content of the message.")

The FCC defines an EBR as follows:

> "A prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber *with or without and exchange of consideration*, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three (3) months immediately preceding the date of the call…"[4]

The FCC indicates that "eliminating EBR would possibly interfere with the suggestion that customers benefit from calls that inform them in a timely manner of new products, services and pricing plans".[5] The FCC concludes "a company's prior relationship with a consumer entitles the company to call the consumer for eighteen (18) months from the date of the last payment of financial transaction, even if the company does not currently provide service to that customer."[6] Moreover, the FCC emphasizes that to the extent customers oppose the exemption, there is a remedy available. They may ask at any time to be placed on that firm's company-specific do not call list[7]. However, NASD and MSRB have proposed amendments to its current NASD Rule 2211 and to MSRB Rule G-39, which in our views represent a significant departure from amended version of EBR under TCPA and from what NASD and MSRB currently have in place.

Comment 2: NASD and MSRB interpretation of "financial transaction" is too narrow in scope and inconsistent with the TCPA's amended definition of EBR and adopted by the FCC Rules.

The Proposed Rule 2211 and Rule G-39, which focus on participation in the national Do Not Call Registry, include a more narrow definition of "established business relationship" than we had expected and under which member firms have operated. In the case of a broker-dealer who continues to custody a client's assets, sends quarterly account statements, and regularly mails regulatory notices to that client, is just the type of relationship where a client might "expect a call" from the firm. Their ongoing relationship is contemplated and allowed by the amended TCPA.

Current NASD and MSRB regulations regarding telemarketing made an exception to most telemarketing rules for "existing customers." The current rules restrict calls by time of day requirements, and mandate that individuals making calls identify themselves and their firm, their telephone number or address, and state that the purpose of the call is to solicit the purchase of securities or related services. These rules do not restrict such calls only to existing clients or to those with whom a firm has an EBR. In fact, unsolicited outbound calls are permitted under the rules so long as the requirements set forth above are followed. However, even those requirements need not be adhered to where the recipient of the call is an "existing customer" who has effected a securities transaction, deposited funds or earned interest or dividend income within the prior 12 months.

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[4] Id. at §113; *See* 47 C.F.R §64.1200(f)(3)
[5] Id. at §112
[6] Id. at §113
[7] Id. at §43

An existing customer is defined as "a customer for whom the broker dealer, or a clearing broker on behalf of such broker dealer, carries an account." As such, SIA firms have always worked under the assumption that calls to our customers were not considered "unsolicited" phone calls subject to certain time restrictions and disclosure requirements. Although it had an opportunity to state that the 18-month EBR exception applies to an "existing customer" in the context of a securities firm, the NASD and MSRB chose not to do so. Instead, NASD and MSRB propose that an EBR for purposes of the 18-month exception is established only where the customer has "effected a securities transaction or deposited funds or securities with the member" within the prior 18 months. This is a new concept, which was not included in the FCC Rules interpreting ERB as provided by TCPA. Not only does the definition expressly exclude interest or dividend income, it also is silent on such other transactions as period account fees, or the provision of other products or services, whether or not a fee is charged for those services.

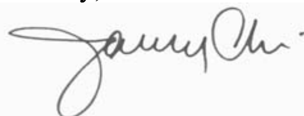
Although the NASD and MSRB correctly note that the FCC referred to a requirement that the EBR include a "purchase or transaction with the entity," there is no such requirement that such a purchase or transaction be a "financial transaction," or even that the transaction include consideration. This narrower interpretation for our industry creates difficult compliance obligations, a heightened risk of broker confusion and possibly inadvertent non-compliance. If a client has been inactive for over 18 months (even though firms have sent them quarterly statements), firms are deemed not to have an EBR with them. SIA contends that this seems counter-intuitive to the nature of client-broker relationship. Although a firm custody their assets and sends them regular statements, to say that firm could be deemed not to have an EBR is unreasonable.

Conclusion

For existing clients, telephone communications provide exposure and convenient access to a wide range of desired goods and services. For small, medium and large financial services firms, telephone communications provide opportunities to strengthen relationships with existing customers. Through this rule making process, SIA respectfully requests that before the proposed amendments to Rule 2211 and Rule G-39 are adopted, consideration should be given to the business activities of our firms, and how these activities have been developed for the benefit of clients and are part of an efficient and effective delivery of products and services by firms.

Thank you once again for this opportunity to present our views. If you or your staff has any questions, please contact me at 212-720-0617.

Sincerely,



James Y. Chin
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Subcommittee

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