

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-48390; File No. SR-NASD-2003-131)

August 21, 2003

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Proposed Amendments to NASD's Telemarketing Rules to Require Members to Participate in the National Do-Not-Call Registry

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 15, 2003, the National Association of Securities Dealers, Inc. ("NASD"), filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. SELF-REGULATORY ORGANIZATION'S STATEMENT OF THE TERMS OF SUBSTANCE OF THE PROPOSED RULE CHANGE

NASD is filing with the Commission a proposed rule change to require members to participate in the Federal Trade Commission's ("FTC") national do-not-call registry. Proposed new language is italicized; proposed deletions are in brackets.

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2200. COMMUNICATIONS WITH THE PUBLIC

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¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

2211. Telemarketing

[No member or person associated with a member shall:]

[(a) make outbound telephone calls to the residence of any person for the purpose of soliciting the purchase of securities or related services at any time other than between 8 a.m. and 9 p.m. local time at the called person's location, without the prior consent of the person; or]

[(b) make an outbound telephone call to any person for the purpose of soliciting the purchase of securities or related services without disclosing promptly and in a clear and conspicuous manner to the called person the following information:]

[(1) the identity of the caller and the member firm;]

[(2) the telephone number or address at which the caller may be contacted;
and]

[(3) that the purpose of the call is to solicit the purchase of securities or related services.]

[(c) The prohibitions of paragraphs (a) and (b) shall not apply to telephone calls by any person associated with a member, or another associated person acting at the direction of such person for the purpose of maintaining and servicing the accounts of existing customers of the member under the control of or assigned to such associated person:]

[(1) to an existing customer who, within the preceding twelve months, has effected a securities transaction in, or made a deposit of funds or securities into, an account that, at the time of the transaction or the deposit, was under the control of or assigned to, such associated person;]

[(2) to an existing customer who previously has effected a securities transaction in, or made a deposit of funds or securities into, an account that, at the time of the transaction or deposit, was under the control of or assigned to, such associated person, provided that such customer's account has earned interest or dividend income during the preceding twelve months, or]

[(3) to a broker or dealer.]

[(d) For the purposes of paragraph (c), the term "existing customer " means a customer for whom the broker or dealer, or a clearing broker or dealer on behalf of such broker or dealer, carries an account. The scope of this Rule is limited to the telemarketing calls described herein; the terms of this Rule shall not otherwise expressly or by implication impose on members any additional requirements with respect to the relationship between a member and a customer or between a person associated with a member and a customer.]

(a) General Telemarketing Requirements

No member or person associated with a member shall initiate any telephone solicitation, as defined in paragraph (g)(2) of this rule, to:

(1) Time of Day Restriction

Any residence of a person before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), unless

(A) the member has an established business relationship with the person pursuant to paragraph (g)(1)(A)(i),

(B) the member has received that person's prior express invitation or permission, or

(C) the person called is a broker or dealer;

(2) Firm-Specific Do-Not-Call List

Any person that previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the member; or

(3) National Do-Not-Call List

Any person who has registered his or her telephone number on the Federal Trade Commission's national do-not-call registry.

(b) National Do-Not-Call List Exceptions

A member making telephone solicitations will not be liable for violating paragraph (a)(3) if:

(1) Established Business Relationship Exception

The member has an established business relationship with the recipient of the call. A person's request to be placed on the firm-specific do-not-call list terminates the established business relationship exception to that national do-not-call list provision for that member even if the person continues to do business with the member;

(2) Prior Express Written Consent Exception

The member has obtained the person's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement between the person and member which states that the person agrees to be contacted by the member and includes the telephone number to which the calls may be placed; or

(3) Personal Relationship Exception

The associated person making the call has a personal relationship with the recipient of the call.

(c) Safe Harbor Provision

A member or person associated with a member making telephone solicitations will not be liable for violating paragraph (a)(3) if the member or person associated with a member demonstrates that the violation is the result of an error and that as part of the member's routine business practice, it meets the following standards:

(1) Written procedures. The member has established and implemented written procedures to comply with the national do-not-call rules;

(2) Training of personnel. The member has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;

(3) Recording. The member has maintained and recorded a list of telephone numbers that it may not contact; and

(4) Accessing the national do-not-call database. The member uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than three months prior to the date any call is made, and maintains records documenting this process.

(d) Procedures

Prior to engaging in telemarketing, a member must institute procedures to comply with paragraph (a). Such procedures must meet the following minimum standards:

(1) Written policy. Members must have a written policy for maintaining a do-not-call list.

(2) Training of personnel engaged in telemarketing. Personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the do-not-call list.

(3) Recording, disclosure of do-not-call requests. If a member receives a request from a person not to receive calls from that member, the member must record the request and place the person's name, if provided, and telephone number on the firm's do-not-call list at the time the request is made. Members must honor a person's do-not-call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date of such request. If such requests are recorded or maintained by a party other than the member on whose behalf the telemarketing call is made, the member on whose behalf the telemarketing call is made will be liable for any failures to honor the do-not-call request.

(4) Identification of sellers and telemarketers. A member or person associated with a member making a call for telemarketing purposes must provide the called party with the name of the individual caller, the name of the member, an address or telephone number at which the member may be contacted, and that the purpose of the call is to solicit the purchase of securities or related service.

The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.

(5) Affiliated persons or entities. In the absence of a specific request by the person to the contrary, a person's do-not-call request shall apply to the member making the call, and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.

(6) Maintenance of do-not-call lists. A member making calls for telemarketing purposes must maintain a record of a caller's request not to receive further telemarketing calls. A firm-specific do-not-call request must be honored for 5 years from the time the request is made.

(e) Wireless Communications

The provisions set forth in this rule are applicable to members telemarketing or making telephone solicitations calls to wireless telephone numbers.

(f) Outsourcing Telemarketing

If a member uses another entity to perform telemarketing services on its behalf, the member remains responsible for ensuring compliance with all provisions contained in this rule.

(g) Definitions

(1) Established business relationship

(A) An established business relationship exists between a member and a person if:

(i) the person has made a financial transaction with the member within the previous 18 months immediately preceding the date of the telemarketing call; or

(ii) the person has contacted the member to inquire about a product or service offered by the member within the previous three months immediately preceding the date of the telemarketing call.

(B) A person's established business relationship with a member does not extend to the member's affiliated entities unless the person would reasonably expect them to be included.

Similarly, a person's established business relationship with a member's affiliate does not extend to the member unless the person would reasonably expect the member to be included.

(2) The terms telemarketing and telephone solicitation mean the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(3) The term personal relationship means any family member, friend, or acquaintance of the telemarketer making the call.

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II. SELF-REGULATORY ORGANIZATION'S STATEMENT OF THE PURPOSE OF, AND STATUTORY BASIS FOR, THE PROPOSED RULE CHANGE

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background

Earlier this year, both the FTC and the Federal Communications Commission ("FCC") established requirements for sellers and telemarketers to participate in a national do-not-call registry. Beginning in June 2003, consumers have been able to enter their home telephone numbers into the national do-not-call registry, which is maintained by the FTC. Under rules of the FTC and FCC, sellers and telemarketers generally are prohibited from making telephone solicitations to consumers whose numbers are listed in the national do-not-call registry. The FCC's rules are directly applicable to broker/dealers.

The national do-not-call registry is not the FCC's or FTC's first foray into regulating telemarketing. In 1992 and 1995, the FCC and FTC developed requirements for firms to maintain do-not-call lists and to limit the hours of telephone solicitations.

NASD adopted substantially similar rules in 1995 and 1996.³ On July 2, 2003, the SEC requested that NASD amend its telemarketing rules to include a requirement for its members to participate in the national do-not-call registry.⁴

In this proposed rule change, NASD is amending its rules to implement the national do-not-call registry. Because broker/dealers and banks are subject to the FCC's jurisdiction, the NASD modeled its rules after the FCC, with minor modifications tailoring the rules to broker/dealers and the securities industry.⁵

General Telemarketing Requirements

Paragraph (a)(1) of the proposed rule change provides the time-of-day restrictions under which a member or person associated with a member may make outbound telephone calls to the residence of any person for the purpose of soliciting the purchase of securities or related services. Specifically, members may engage in such telephone solicitations only between the hours of 8 a.m. to 9 p.m. (local time at the called party's location) unless the member has an established business relationship with the called

³ See 60 FR 31527 (June 15, 1995) (approving NASD rule requiring members to maintain firm-specific do-not-call lists); 61 FR 65625 (Dec. 13, 1996) (approving NASD rule creating telemarketing time-of-day restrictions and disclosure provisions).

⁴ The Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 requires the SEC to promulgate telemarketing rules substantially similar to those of the FTC or direct self-regulatory organizations to do so, unless the SEC determines that such rules are not in the interest of investor protection. 47 U.S.C. 6102(d) (2003).

⁵ Substantively, the Rules of the FCC and FTC are very similar. Indeed, Congress has asked the FCC to consult with the FTC to maximize consistency between their respective do-not-call rules. See The Do-Not-Call Implementation Act, 108 P.L. 10, 117 Stat. 557 (Mar. 11, 2003).

person based upon a financial transaction with the member, the member has received express written permission from the person which allows the member to call outside the applicable time frame, or the person called is a broker or dealer. These provisions are substantively equivalent to those currently in Rule 2211, except that NASD is replacing the current existing customer exception with the established business relationship exception. This change is discussed in detail below.

Paragraph (a)(2) provides the requirement for firms to maintain a firm-specific do-not-call list.⁶ NASD originally established the requirement for firms to maintain their own do-not-call lists in 1995. The new federal legislation imposes the additional requirement for firms to consult the national do-not call registry; it does not eliminate the obligation for firms to maintain their own do-not-call lists. The provisions in paragraph (a)(2) are substantively equivalent to those in current Rule 3110(g)(1). Members should note that under proposed paragraph (d)(3), they must honor a request by a person to be placed on a firm-specific do-not-call list within thirty days, or sooner if they are able to do so.

Paragraph (a)(3) prohibits a member or person or associated with a member from making telephone solicitations to any person who registers his or her phone number on the national do-not-call registry. Members should note that such registrations are maintained in the national registry for a period of five years. A consumer may re-register

⁶ NASD Rule 3110(g)(1) currently requires firms to maintain firm-specific do-not-call lists. In an effort to consolidate and clarify NASD's telemarketing rules, NASD is proposing to combine Rule 3110(g)(1) with its main telemarketing rule, Rule 2211. The remaining sections of Rule 3110 are substantively unchanged.

his or her telephone number at any time. This re-registration re-commences the applicable five-year registration.

Exceptions

The rules of the FCC and FTC provide several exceptions under which sellers and telemarketers may make telephone solicitations to persons on the national registry.⁷

NASD has adopted these exceptions.

The first exception, contained in paragraph (b)(1), is for calls made to persons with whom the member has an “established business relationship.” An “established business relationship may be formed in two ways. First, under paragraph (g)(1)(A)(i), an established business relationship exists between a member and a person if such person has made a financial transaction with the member within the previous 18 months immediately preceding the date of the telemarketing call. Second, under paragraph (g)(1)(A)(ii), an established business relationship arises if a person has contacted the member to inquire about a product or service offered by the member within the previous three months immediately preceding the date of the telemarketing call.

The definition of established business relationship replaces the definition of “existing customer,” which was applicable solely to the time-of-day restriction and disclosure provisions in current Rule 2211. NASD believes that requiring members to follow separate definitions of existing customer and established business relationship would lead to confusion and inadvertent violations. We note that the proposed definition of “established business relationship” is generally broader than the NASD’s definition of

⁷ The FTC rule only contains two exceptions: (1) prior express written consent; and (2) an established business relationship. The FTC rule, unlike the FCC rule, does not include a personal relationship exception.

existing customer in that it looks back 18 months rather than 12 months to see if a consumer made a financial transaction. In addition, an established business relationship may be established by a person inquiring about a product or service from the member within the previous three months. NASD proposes, however, that time-of-day restrictions should not be waived solely because a person inquired about a product or service within the past three months. Thus, for purposes of the time-of-day restrictions in paragraph (a)(1), an established business relationship must exist based upon a financial transaction as specified in paragraph (g)(1)(A)(i).

In addition, for purposes of paragraph (g)(1)(A)(i), NASD proposes interpreting the term “financial transaction” to mean that a person has effected a securities transaction or deposited funds or securities with the member. NASD does not believe that under the FCC’s or FTC’s definitions of established business relationship,⁸ the receipt of interest or dividends would constitute a financial transaction. We note that this is a distinction from current Rule 2211(c)(2), under which a person could be an existing customer solely on the basis of interest or dividend income. However, because members are subject to FCC rules, we have sought to harmonize NASD standards with those of the FCC. We also believe that consumers generally would not view receiving interest or dividends as sufficient to overcome their expectation that entering their telephone number in the national do-not-call registry will curtail telephone solicitations.

⁸ The FCC’s definition of established business relationship requires a person’s “purchase or transaction with the entity.” FCC Report 03-153 (July 3, 2003). The FTC’s definition is substantially similar and states that the established business relationship may be formed by the consumer’s purchase, rental, or lease of the seller’s goods or services or a financial transaction between the consumer and seller. 68 FR 4580, 4669 (Jan. 29, 2003).

A person's request to be placed on a firm-specific do-not-call list terminates the established business relationship exception. Thus, a member or person associated with a member may not make telephone solicitations to a person with whom it has an established business relationship if such person requests to be placed on the member's do-not-call list. This is consistent with NASD's current do-not-call provisions, which do not contain any exemption for existing customers. Nothing in this section prohibits a member from contacting a customer concerning the administration of his or her account. Such calls are not telephone solicitation or telemarketing and are not precluded under existing NASD rules or the proposed rule change.

The second exception to the national do-not-call rules, contained in paragraph (b)(2), is for calls to persons from whom the member has obtained prior express invitation or permission. In accordance with the requirements of the FCC and FTC, permission must be evidenced by a signed, written agreement between the member and person that specifically states that the person agrees to be contacted by the member. The agreement also must include the telephone number to which calls may be placed.

The third exception, in paragraph (b)(3), is for calls made by an associated person who has a personal relationship with the recipient. The definition of personal relationship is in paragraph (g)(3) and means "any family member, friend, or acquaintance of the telemarketer making the call." The FCC has indicated that in determining whether a telemarketer is a friend or acquaintance of the consumer, the FCC will look at, among other things, whether a reasonable consumer would expect a call from such persons because they have a close, or, at least, a firsthand relationship. Members and persons associated with a member also should be aware that this exception applies solely to the

national do-not-call registry. Thus, if a person with whom an associated person has a personal relationship has requested to be placed on a firm's do-not-call list, the associated person may not make a telephone solicitation to such person.

Safe Harbor Provision

The FCC and FTC rules also contain a "safe harbor" under which a person will not be liable for a violation that is the result of error if the telemarketer's routine business practice meets certain specified standards. The safe harbor is established in paragraph (c) and applies only to a violation of paragraph (a)(3), the national do-not-call registry provision. To be eligible for this safe harbor, a member or person associated with a member must demonstrate that the member's routine business practice meets the following four standards. First, the member has established and implemented written procedures to comply with the national do-not-call rules. Second, the member has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules. Third, the member has maintained and recorded a list of telephone numbers that the member may not contact. Fourth, the member uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the FTC no more than three months prior to the date any call is made, and maintains records documenting this process.⁹

⁹ We note that under the rules of the FCC, the safe harbor contains an additional requirement that a seller or telemarketer use a process to ensure that it does not sell, rent, lease, purchase or use the national do-not-call database, or any part thereof, for any purpose except compliance with the FCC's national do-not-call rules and any such state or federal law to prevent telephone solicitations to telephone numbers registered on the national database. The telemarketer also

Telemarketing Procedures

Paragraph (d) tracks the requirements of the FCC rule and existing Rule 2211 in establishing procedures that member firms must institute prior to engaging in telemarketing. These procedures include requirements to: (1) have a written policy for maintaining a do-not-call list; (2) train personnel engaged in telemarketing in the existence and use of the do-not-call list; (3) record and disclose requests from a person to be added to the member's do-not-call list; and (4) have the member provide the called party with the name of the individual caller, the name of the member, a telephone number or address at which the member may be contacted, and that the purpose of the call is to solicit the purchase of securities or related services.

Paragraph (d)(5) contains the FCC's position with respect to affiliated persons or entities. In general, a person's do-not-call request applies only to the entity making the call, and does not apply to any affiliated entity unless the customer reasonably would

must purchase access to the relevant do-not-call data from the administrator of the national database and must not participate in any arrangement to share the cost of accessing the national database, including any arrangement with other entities to divide the costs to access the national database among various client sellers.

The FTC will collect fees from sellers and telemarketers to fund the ongoing expenses of the national registry. The annual cost of accessing the FTC's national registry has been set at \$25 per area code, with a maximum annual cap of \$7,375 (equivalent to 300 area codes). See 68 FR 45134, 45141 (July 31, 2003). In addition, as part of the FTC's Regulatory Flexibility analysis on the burdens to small entities, the FTC determined that it would not charge an access fee for the first five area codes.

Although NASD's proposed safe harbor does not contain provisions concerning the sale, rent, lease, purchase, use, or means of accessing the national do-not-call registry as such matters generally fall outside the purview of the investor protection concerns underlying the proposed rule change, members are subject to the FCC's national do-not-call rules and must nevertheless comply with these provisions or risk administrative action by the FCC.

expect the affiliated entity to be included given the identification of the caller and the product being advertised. Similarly, the established business relationship exception does not extend to the member's affiliated entities unless the customer reasonably would expect the member to be included.

Paragraph (d)(6) explains that members must maintain a record of a caller's request not to receive further telemarketing calls and must honor that request for a period of five years.

Miscellaneous Provisions

Paragraph (e) tracks the FCC's position with respect to the application of the proposed rule change to wireless telephone numbers. In general, the FCC has stated that wireless subscribers may participate in the national do-not-call registry. Although FCC telemarketing rules only generally apply to residential telephone subscribers, the FCC has stated that it will presume wireless subscribers who ask to be put on the national do-not-call list are residential subscribers. Such a presumption, however, may require a complaining wireless customer to provide further proof of the validity of that presumption should it need to take enforcement action. NASD agrees with this interpretation and, consistent with the FCC, will apply its telemarketing provisions to members engaging in telephone solicitations with wireless subscribers.

Paragraph (f) provides that if a member uses another entity to perform telemarketing services on its behalf, the member remains responsible for ensuring compliance with all provisions contained in this proposed rule. Members also should be mindful of the limitations on the use of unregistered persons to perform telemarketing services. In NASD Notice to Members 00-50 (Aug. 2000), NASD identified the limited

telemarketing activities that can be performed by unregistered persons. Under this Notice, unregistered persons may only contact prospective customers to: (1) extend invitations to firm-sponsored events; (2) inquire whether the customer wishes to discuss investments with a registered person; and (3) inquire whether the customer wishes to receive investment literature. Members must also be mindful of the supervision and training requirements contained in the Notice.

2. Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, which requires, among other things, that NASD's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that investors will expect that their participation in the national do-not-call registry will, subject to certain limited exceptions, preclude telephone solicitations by broker/dealers.

(B) Self-Regulatory Organization's Statement on Burden on Competition

NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Comments were neither solicited nor received.

III. DATE OF EFFECTIVENESS OF THE PROPOSED RULE CHANGE AND TIMING FOR COMMISSION ACTION

Within 35 days of the date of publication of this notice in the Federal Register or

within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. by order approve such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. SOLICITATION OF COMMENTS

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of NASD. All submissions

should refer to File No. SR-NASD-2003-131 and should be submitted by [insert date 21 days from the date of publication].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁰

Margaret H. McFarland
Deputy Secretary

¹⁰ 17 CFR 200.30-3(a)(12).