THE FINANCIAL SERVICES ROUNDTABLE

September 25, 2003

Mr. Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

Re: Proposed Amendments to the NASD's Telemarketing Rules to Require Members to Participate in the National Do-Not-Call Registry, File No. SR-NASD-2003-131

Dear Mr. Katz:

The Financial Services Roundtable ("the Roundtable") is a national association that represents 100 of the largest integrated financial services companies providing banking, insurance, investment products, and other financial services. The member companies of the Roundtable appreciate the opportunity to comment to the Securities and Exchange Commission ("SEC") on the proposed rule change by the NASD relating to amendments to NASD telemarketing rules requiring member firms to participate in the national Do-Not-Call Registry ("DNCR").

Background

In its current form, NASD Rule 2211 places various restrictions on telemarketing calls for NASD member firms. A member firm's representative may call customers only at certain times, they must identify their firm, telephone number or address, and they must state that the purpose of the call is to solicit the purchase of securities or related services. The proposed amendments to Rule 2211 focus on NASD member firms' participation in the national DNCR. The amendments seek to clarify when member firms are subject to the DNCR and must check the list prior to making a telemarketing call.

The Established Business Relationship Exception ("EBR") Should Be Reviewed

The Roundtable appreciates the efforts of the NASD to comply with the DNCR. However, the Roundtable *recommends* that the SEC review and amend the "established business relationship" ("EBR") exception in the proposed amendments (2211(b)(1)). Under the exception, member firms would not have to verify that a consumer is listed on a national or state DNCR prior to making a telemarketing call *if* an EBR exists. Also, under the proposed rule, an EBR is established when the customer has "effected a securities transaction or deposited funds or securities with the member" within the prior eighteen months or for three months following an inquiry by a consumer regarding a product or service (2211(g)(1)). The definition of securities transaction does not include the receipt of interest or dividend income.

The Roundtable member companies believe the proposed definition is too narrow and inconsistent with the way their customers' brokerage accounts are treated under the securities laws. Under these laws, member firms are required, for many purposes to treat accounts containing funds or securities as accounts of customers. In particular, member firms send these customers regular account statements, prospectuses and privacy notices. They also may monitor certain accounts where there hasn't been any activity for eighteen months and offer their customers investment advice. In other words, mere inactivity in a customer's account, for an arbitrary period of time, should not preclude a member firm from fulfilling their real and perceived responsibilities to monitor the performance of investments and provide advice on how to maximize performance, including avoiding losses. The EBR exception should not be defined in a way that impedes member firms carrying out their obligations to their customers and it should not be defined in such a way as to conflict with the policy behind other securities laws and regulations.

The Roundtable Believes the EBR Exception is Too Narrow and Not in Accordance with Similar Telemarketing Rules

The Roundtable *opposes* this narrow definition of "established business relationship". This definition contradicts prior telemarketing regulations which list broader exceptions for telemarketing rules as they apply to "existing customers". In particular, the proposed amendment to Rule 2211 is similar to the recent amendment to the Telephone Consumer Protection Act of 1991, FCC 03-153, adopted June 26, 2003 ("FCC Rules"). The FCC Rules also limit the duration of an EBR to eighteen months, but they define EBR more liberally stating, in part, that a prior or existing relationship is formed by a voluntary two-way communication between a person or entity and a residential subscriber *with or*

without an exchange of consideration. This rule clearly states that an EBR may exist without having entered into a financial transaction. Furthermore, in the accompanying regulations implementing this rule, the FCC stressed that the ability of sellers to contact their existing customers is "an important aspect of their business plan and often provides customers with valuable information" about products or services that may be available to them from the company. The FCC also states that customers who fall under the exemption may ask at any time to be placed on that seller's company-specific do not call list.

Further evidence that an EBR has been previously defined more liberally comes in the form of the FCC and FTC rules covering affiliates. Both the FCC and FTC have suggested that affiliates fall within the EBR exemption if the consumer would reasonably expect them to be included given the nature and type of goods or services offered and the identity of the affiliate.

Based on these rules and regulations, the practice in the industry has been that marketing calls to existing customers were not considered "unsolicited" phone calls subject to certain telemarketing rules, regardless of when the customer last made a transaction with the company. Given that the FTC and FCC have more expansive EBR interpretations and that these interpretations appear to better accommodate the unique broker-customer relationship, subject to SEC-NASD jurisdiction, the Roundtable respectfully *suggests* that the NASD incorporate these or other similar amendments expanding the EBR definition.

The Roundtable believes that it is vital to create fair telemarketing rules that will not unduly restrict their business activities. Roundtable member companies rely on telecommunications with their clients in order to perform their daily operations. The Roundtable believes that the proposed amendments would interfere with these communications. For example, these proposed amendments may impede a financial advisor who needs to call a customer in a margin call situation. In this situation, an investor must deposit additional funds to avoid the sale of securities to satisfy the call. Also, firms need to contact clients to review their portfolio and investment objectives because these objectives change as the client's circumstances change (*i.e.,* the need for additional income, retirement planning, college education, *etc.*). The member firm may need to contact a customer as a result of recent financial news, such as a merger or bankruptcy, which may affect the client's portfolio. And finally, what about the member firm that believes it necessary to call a customer who has a 529 college savings plan, but hasn't made a contribution? In all of these cases, timing is critical. The proposed amendments would significantly obstruct these communications by forcing member firms to (1) check their internal database to see if the customer has entered into a transaction with the member firm in the last eighteen months and (2) if not, then the member

firm must make sure that customer is not of the relevant DNCR prior to making a call.

The EBR Exception Would Be Costly for Member Firms and Would Create Internal Systems and Management Problems

The Roundtable believes that the definition of EBR under the amendments would create difficult systems obligations and heightened confusion among company representatives. The rule would force member firms to implement costly systems changes to identify those existing account holders with whom they are not deemed to have an EBR. Without implementing these systems changes, registered representatives would be required to verify each individual who is an existing client and whether or not they have engaged in a qualified "financial transaction" or the purchase or receipt of other unqualified goods or services before contacting a customer to notify them of products or services that may benefit them. If a client's account has indeed been inactive for over eighteen months, the company is not deemed to have an EBR with them. Therefore, before calling a client, companies would be required to verify that the client was not on the applicable national or state DNCR. Also, even though companies would still be allowed to make account service calls to their clients under this proposed rule, they would have to be careful about marketing any products or services during the call, even if a new product or service could benefit the client.

The Roundtable believes that the proposed EBR exception contradicts the nature of the relationship that is supposed to exist between a securities firm and a client. The eighteen month limit for an EBR may be reasonable when a consumer engages in a one time transaction of a retail product and no longer holds the asset in their account. In that case, a customer might not reasonably expect that eighteen months later they would still be considered a "customer" of that company.

The Roundtable opposes the Prior Express Written Consent Exception

The proposed amendments create an exception allowing member firms to make telephone solicitations to consumers who are listed on the national DNCR if that member has obtained a written, signed agreement from the consumer which states that the person agrees to be contacted by the member firm and includes the telephone number in which calls may be placed. (2211(b)(2)). This means that if an existing bank customer had previously signed up for a DNCR, but wanted to talk to a bank's affiliated member firm about a new account, the member firm would have to get the customer to sign a written consent before the member firm could call them. No such requirement exists under the comparable FTC or FCC

rules. Under the FTC and FCC rules, a member firm can rely on a customer's verbal invitation or consent to be called despite having signed up for the DNCR. The Roundtable *opposes* the written consent requirement. We *recommend* that the proposed rule mirror the FTC and FCC rules by allowing member firms to call customers who provide them with verbal consent to call.

Conclusion

The Roundtable strongly *recommends* expanding the definition of EBR to include all existing customers regardless of whether their account is active or inactive during a set period of time. Unlike the proposed rule which unduly restricts access to customers, an expanded definition of EBR that treats member firms' accounts with cash and securities in a similar manner as other securities rules and regulations do would go a long way to rationalizing the treatment of customer accounts in a realistic and appropriate manner. This rule would also be more in accordance with similar rules in this area, such as the recently adopted FCC rules.

If you have any further questions or comments on this matter, please do not hesitate to contact me or John Beccia at (202) 289-4322.

Sincerely,

Richard M. Whiting

Richard M. Whiting
Executive Director and General Counsel