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SUBMITTED VIA EMAIL AND OVERNIGHT MAIL

Mr. Jonathan G. Katz
Secretary
United States Securities and Exchange Commission
450 Fifth St. NW
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 Secretary Katz:

Charles Schwab & Co., Inc. ("Schwab") appreciates this opportunity to comment on the proposed amendments to NASD and MSRB telemarketing rules set forth in SEC Release Nos. 34-48389 and 34-48390 relating to the implementation of the national Do Not Call Registry. Schwab has ongoing relationships with clients who maintain over eight million accounts with Schwab and who have access to Schwab's services, including its extensive branch network, call centers and Web site. Schwab supports the National Do Not Call Registry and the right of consumers to exercise control over the kinds telemarketing calls they choose to receive at their residence.

Schwab is concerned, however, that the NASD and MSRB's interpretation of the amendments to the Telephone Consumer Protection Act of 1991 ("TCPA") and the application of those amendments to their current telemarketing rules will unduly restrict the ability of member firms to contact their existing customers. Because the proposed amendments to NASD Rule 2211 and MSRB Rule G-39 (collectively the "Rules") 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 deposited 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.[1] Although a member firm may have an ongoing relationship with a client, including

[1] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, FCC 03-153, adopted June 26, 2003.

carrying one or more accounts, custodying of substantial client assets, providing regular account statements and even providing investment advice and other services, that relationship will not qualify as an EBR unless that client has chosen to deposit funds or execute a securities transaction with the member firm in the prior 18 months.

Schwab submits that a more effective approach would be to make clear that, as is contemplated by the amendments to the TCPA and reflected in current Rules 2211 and G-39, where a client is an account holder at a member firm, there is an "established business relationship" between the client and that firm. This approach is far more consistent with the intent of the FCC Rules which provide that a transaction with a client that results in the provision of goods or services, *with or without consideration* creates an EBR between the client and the firm. *See FCC Rules at ¶ 113*.

Schwab therefore recommends that the proposed amendment to Rules 2211(g)(1)(A)(i) and G-39(g)(i)(A)(1) be revised to define an EBR between a member and a customer to include where:

> The person is one for whom the broker or dealer, or a clearing broker or dealer on behalf of such broker or dealer, carries an account or has carried an account within the eighteen months immediately preceding the date of the telemarketing call.[2]

A. Amendments to the TCPA and the accompanying FCC Rules Broadly Define A "Transaction" and Recognize the Inherent Difference Between One Time Purchases and Ongoing Relationships.

The amendments to the TCPA reaffirm the importance of the EBR exclusion, and revise the definition of EBR by narrowing the timeframe for which an EBR may exist to 18 months from the last transaction or purchase, and by limiting an EBR for inquiries and applications to only 3 months. The FCC Rules recognize that the established business relationship exemption that has long been a part of the TCPA should also be applied to the national do not call list. *FCC Rules at ¶ 42*. The FCC noted 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" regarding products or services that may be available to them from the company. *Id*. The FCC goes on to say that to the extent any customers oppose the exemption, there is a remedy available. They may ask at any time to be placed on that seller's company-specific do not call list. *Id. at ¶ 43*.

The amended TCPA defines an EBR as:

> A prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber *with or without an 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

[2] This definition mirrors the current definition of "existing customer" in NASD Rule 2211(d).

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 . . ."

47 C.F.R. § 64.1200(f)(3)(emphasis added). Although the amended rule does limit the duration of the EBR to 18 months, the limit is based upon the notion that a consumer is more likely to "expect a call from a company with which they have recently conducted business." *FCC Rules at ¶ 113*. This 18-month limit is particularly relevant where, for example, a consumer may engage in a one-time purchase of a retail product. A consumer might not reasonably expect that 18 months later they would still be considered a "customer" of that company. However, a broker-dealer who maintains an ongoing relationship with their account holders, including the custody of a client's assets, charging account service fees, sending periodic account statements and regulatory notices and providing other services to that client, is just the type of company from whom a client would "expect a call" regarding their account, as well as other products and services from that company.

The FCC Rules expressly allow a company the right to attempt to "winback" a client who has terminated service with that company for up to 18 months after the client terminates the relationship. *Id*. Under the TCPA, an EBR may be based upon transactions entered into "with or without consideration" and without narrowing the scope of what constitutes a "transaction." Despite the permissive scope of EBR provided by the FCC Rules, the NASD and MSRB have drafted proposed rule amendments (including interpretations of them) that are significantly more narrow than contemplated by the FCC Rules. The result is to place unduly burdensome restrictions on a member firm's ability to contact its own customers and to require costly systems changes in order to comply.

B. The Proposed Rules Drastically Change What It Means To Be A Customer of a Member Firm.

The current Rules 2211 and G-39 restrict outbound solicitation calls through time of day requirements, and require that individuals making outbound solicitation calls identify themselves and their firm, their telephone number or address and that the purpose of the call is to solicit the purchase of securities or related services.[3] The current time of day and disclosure restrictions of the Rule do not apply 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. An existing customer is defined very broadly as "a customer for whom the broker dealer, or a clearing broker on behalf of such broker dealer, *carries an account*." Rules 2211(d) and G-39(b) (emphasis added). Thus the purpose of the existing Rules is to exempt member firms from time of

[3] The 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 to prospects are permitted under the Rules so long as the requirements set forth above are followed. Similarly, federal do not call laws also do not prohibit such calls, but only require that the National DNC Registry be consulted before such calls are made.

day and disclosure requirements for their most active "existing customers," those who have made a "financial transaction" in the last 12 months.

The NASD and MSRB incorrectly note in their interpretations that their proposed definition of EBR is "generally broader than [their] definition of existing customer in that it looks back 18 months rather than 12 months to see if a customer made a financial transaction." However, while the time horizon was increased, the definition of "existing customer" was significantly narrowed. In fact, the concept in the proposed Rules that an existing customer would only be one whom has executed a "financial transaction" is entirely new. As noted above, the current Rules use the "financial transaction" restriction only as part of a narrow exclusion to its time of day and disclosure requirements for certain existing customers. The NASD and MSRB appear to have modeled their definition of an EBR on that narrow exclusion, but ignored their longstanding definition of "existing customer" within the very same rule. The current definition of "existing customer" is consistent with the way in which member firms view their ongoing client relationships and have accordingly built their client data systems. This is also consistent with the amended TCPA and accompanying FCC Rules that provide for not only purchases of goods and services but also other transactions "with or without consideration" to qualify as the basis for establishing and maintaining an EBR.

The scope of EBR under the proposed Rules is further narrowed by the proposed interpretation of "financial transaction" to include only a person who has "effected a securities transaction or deposited funds or securities with the member." Not only does the definition expressly exclude interest or dividend income, it also is silent on such other transactions as periodic account fees, advice consultations not resulting in a securities transaction or the provision of other products or services, whether or not a fee is charged for those services.[4]

Although it was the stated intent of the NASD and MSRB to harmonize their telemarketing standards with those of the FCC, the result would be to place more onerous restrictions on its member firms than those outlined by the FCC that govern other types of companies.[5]

[4] The new definition even creates an incentive for firms to encourage securities transactions for the sole purpose of maintaining an EBR where the best advice may often be that no action should be taken.

[5] The NASD and MSRB's reliance upon the mention in the FCC Rules that the EBR should include a "purchase or transaction with the entity," (*FCC Rules at ¶ 115*) is misplaced. As described in detail in Section A above, there is no such requirement that such a purchase or transaction be a "financial transaction", or even that the transaction include consideration.

C. The Proposed Rules Create Illogical Results and Require Member Firms To Invest Significant Resources in the Modification of Their Systems and Contact Policies for Representatives in Order To Prevent Inadvertent Non-Compliance.

The unintended consequences of the proposed Rules create illogical results and a heightened risk of confusion and potential non-compliance. Under the FCC rules, an individual could sign up with an unregistered financial web portal to receive a free investing newsletter and provide her residential phone number, creating an EBR by virtue of a voluntary two-way communication based on a "transaction" without consideration for the provision of goods and services. That EBR would subsequently be renewed on each date that the next issue of the newsletter was sent to that consumer (an additional "transaction"). Even after the consumer terminated that newsletter subscription, the sender would still have 18 months in which to communicate with that consumer in an effort to "winback" that consumer's relationship. The FCC rules would also recognize an ongoing EBR where an individual purchased a T-shirt from a retailer once every 18 months.

On the other hand, under the proposed NASD and MSRB Rules an existing account holder at a member firm with $1,000,000 in an interest-bearing cash account and $1,000,000 worth of dividend-earning stock who receives monthly account statements, quarterly check-in phone calls from his registered representative, regular email alerts regarding his investments, quarterly financial reports and regulatory notices related to his investments would not be deemed to have an EBR with that firm unless that client had executed a securities transaction, or deposited funds into their account in the prior 18 months. This result is inconsistent with the ongoing nature of a broker-client relationship, as well as the long-standing definition of "existing customer" under Rules 2211 and G-39.

In addition, defining a "financial transaction" as one involving the purchase or sale of securities or the deposit of funds but not the receipt of interest or dividend income, or the provision of other services will force member firms to implement additional costly systems changes to identify those existing account holders with whom it is not deemed to have an EBR. Without implementing costly systems changes, registered representatives will be required to perform the awkward and complicated task of verifying not just that the individual is an existing client, but also whether or not they have engaged in a qualified "financial transaction," before contacting customers to notify them of products or services that may benefit them.

The FCC's revised definition of EBR already adds a time limit to the prior definition of EBR for clients (18 months) and prospective clients (3 months). Schwab agrees that this is a reasonable distinction made in the interests of those past and prospective clients who might not expect the same level of contact as an existing account holder. Further, clients and prospective clients maintain their right to be placed on a member firm's internal DNC list at any time. However, to make an artificial distinction

between a member firm's account holders depending upon the types of transactions in which they engage is counter-intuitive, confusing and adds a high and unnecessary risk of complexity to an already complex set of marketing rules and regulations. Such an illogical result was not intended by the amended TCPA and would unduly limit the ability of member firms to market valuable services to their customers who have come to expect such calls as part of their relationship with their financial services provider.

CONCLUSION

We support the effort made by the NASD and MSRB staffs to revise their telemarketing rules to comply with changes to the TCPA and to implement the National Do Not Call Registry. We urge revision of the proposed rules and interpretations as set forth above to better reflect the business realities of its member firms and to permit those firms to service their clients in the manner they expect. Please feel free to contact me to discuss the points raised in this comment letter.

Very truly yours,

Ted F. Angus
VP and Senior Corporate Counsel for Retail Brokerage

Cc: Hon. William H. Donaldson, Chairman, SEC
Hon. Paul S. Atkins, Commissioner, SEC
Hon. Roel C. Campos, Commissioner, SEC
Hon. Cynthia A. Glassman, Commissioner, SEC
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