

(i)–(xviii) No change.

(xix) [Telemarketing Requirements] *Negotiable Instruments Drawn From a Customer's Account*

[(A) Each broker, dealer and municipal securities dealer shall make and maintain a centralized do-not-call list of persons who do not wish to receive telephone solicitations from such broker, dealer or municipal securities dealer or its associated persons.]

[(B)] No broker, dealer or municipal securities dealer or person associated with such broker, dealer or municipal securities dealer shall obtain from a customer or submit for payment a check, draft or other form of negotiable paper drawn on a customer's checking, savings, share, or similar account, without that person's express written authorization, which may include the customer's signature on the negotiable instrument.

(xx)–(xxii) No change.

(b)–(g) No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the SEC, the MSRB 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 texts of these statements may be examined at the places specified in Item IV below. The MSRB 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. The MSRB adopted substantially similar rules in 1996.³ On July 2, 2003, the SEC requested that the MSRB amend its telemarketing rules to include a requirement for dealers to participate in the national do-not-call registry.⁴

In this proposed rule change, the MSRB 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 MSRB 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)(i) of the proposed rule change provides the time-of-day restrictions under which a dealer or person associated with a dealer may make outbound telephone calls to the residence of any person for the purpose of soliciting the purchase of securities or related services. Specifically, dealers 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 dealer has an established business relationship with the called person based upon a financial transaction with the dealer, the dealer has received express written permission from the person which allows the dealer to call outside the applicable time frame, or the person called is a broker, dealer or municipal securities dealer. These provisions are substantively equivalent to those currently in Rule G–39, except that the MSRB is replacing the current existing customer exception with the established business relationship exception. This change is discussed in detail below.

³ See Release No. 34–38053 (Dec. 16, 1996), 61 FR 68078 (Dec. 26, 1996) (approving MSRB rule requiring brokers, dealers and municipal securities dealers ("dealers") to maintain firm-specific do-not-call lists and 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 Pub. L. 10, 117 Stat. 557 (Mar. 11, 2003).

Paragraph (a)(ii) provides the requirement for firms to maintain a firm-specific do-not-call list.⁶ The MSRB originally established the requirement for firms to maintain their own do-not-call lists in 1996. 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)(ii) are substantively equivalent to those in current Rule G–8(a)(xix)(A). Dealers should note that under proposed paragraph (d)(iii), 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)(iii) prohibits a dealer or person associated with a dealer from making telephone solicitations to any person who registers his or her phone number on the national do-not-call registry. Dealers should note that such registrations are maintained in the national registry for a period of five years. A consumer may re-register 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 The MSRB has adopted these exceptions.

The first exception, contained in paragraph (b)(i), is for calls made to persons with whom the dealer has an "established business relationship." An established business relationship may be formed in two ways. First, under paragraph (g)(i)(A)(1), an established business relationship exists between a dealer and a person if such person has made a financial transaction with the dealer within the previous eighteen months immediately preceding the date of the telemarketing call. Second, under paragraph (g)(i)(A)(2), an established business relationship arises if a person has contacted the dealer to inquire about a product or service offered by the

⁶ MSRB Rule G–8(a)(xix)(A) currently requires firms to maintain firm-specific do-not-call lists. In an effort to consolidate and clarify the MSRB's telemarketing rules, the MSRB is proposing to combine Rule G–8(a)(xix)(A) with its main telemarketing rule, Rule G–39. The remaining section of Rule G–8(a)(xix) is substantively unchanged.

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.