

dealer 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 G-39. The MSRB believes that requiring dealers 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 MSRB's definition of existing customer in that it looks back eighteen months rather than twelve months to see whether 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 dealer within the previous three months. The MSRB 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)(i), an established business relationship must exist based upon a financial transaction as specified in paragraph (g)(i)(A)(1).

In addition, for purposes of paragraph (g)(i)(A)(1), the MSRB proposes interpreting the term "financial transaction" to mean that a person has effected a securities transaction or deposited funds or securities with the broker, dealer or municipal securities dealer. The MSRB 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 G-39(b)(ii), under which a person could be an existing customer solely on the basis of interest or dividend income. However, because dealers are subject to FCC rules, we have sought to harmonize MSRB 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.

A person's request to be placed on a firm-specific do-not-call list terminates the established business relationship exception. Thus, a dealer or person associated with a dealer 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 dealer's do-not-call list. This is consistent with the MSRB's current do-not-call provisions, which do not contain any exemption for existing customers. Nothing in this section prohibits a dealer 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 MSRB rules or the proposed rule change.

The second exception to the national do-not-call rules, contained in paragraph (b)(ii), is for calls to persons from whom the dealer 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 dealer and person that specifically states that the person agrees to be contacted by the dealer. The agreement also must include the telephone number to which calls may be placed.

The third exception, in paragraph (b)(iii), 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)(iii) 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. Dealers and persons associated with a dealer 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)(iii), the national do-not-call registry provision. To be eligible for this safe harbor, a dealer or person associated with a dealer must demonstrate that the dealer's routine business practice meets the following four standards. First, the dealer has established and implemented written procedures to comply with the national do-not-call rules. Second, the dealer has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules. Third, the dealer has maintained and recorded a list of telephone numbers that the dealer may not contact. Fourth, the dealer 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

Telemarketing Procedures

Paragraph (d) tracks the requirements of the FCC rule and existing Rule G-39 in establishing procedures that dealer 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

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 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 the MSRB'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, dealers 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.

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).