

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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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 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

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 Pub. L. 10, 117 Stat. 557 (Mar. 11, 2003).

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,