

originally established the requirement for firms to maintain their own do-not-call lists in 1995. 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)(2) are substantively equivalent to those in current Rule 3110(g)(1). Members should note that under proposed paragraph (d)(3), 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)(3) prohibits a member or person or associated with a member from making telephone solicitations to any person who registers his or her phone number on the national do-not-call registry. Members 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 NASD has adopted these exceptions.

The first exception, contained in paragraph (b)(1), is for calls made to persons with whom the member has an "established business relationship." An "established business relationship" may be formed in two ways. First, under paragraph (g)(1)(A)(i), an established business relationship exists between a member and a person if such person has made a financial transaction with the member within the previous 18 months immediately preceding the date of the telemarketing call. Second, under paragraph (g)(1)(A)(ii), an established business relationship arises if a 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.

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 2211. NASD believes that requiring members 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 NASD's definition of existing customer in that it looks back 18 months rather than 12 months to see if 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 member within the previous three months. NASD 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)(1), an established business relationship must exist based upon a financial transaction as specified in paragraph (g)(1)(A)(i).

In addition, for purposes of paragraph (g)(1)(A)(i), NASD proposes interpreting the term "financial transaction" to mean that a person has effected a securities transaction or deposited funds or securities with the member. NASD 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 2211(c)(2), under which a person could be an existing customer solely on the basis of interest or dividend income. However, because members are subject to FCC rules, we have sought to harmonize NASD 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 member or person associated with a member 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 member's do-not-call

list. This is consistent with NASD's current do-not-call provisions, which do not contain any exemption for existing customers. Nothing in this section prohibits a member 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 NASD rules or the proposed rule change.

The second exception to the national do-not-call rules, contained in paragraph (b)(2), is for calls to persons from whom the member 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 member and person that specifically states that the person agrees to be contacted by the member. The agreement also must include the telephone number to which calls may be placed.

The third exception, in paragraph (b)(3), 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)(3) 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. Members and persons associated with a member 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)(3), the national do-not-call registry provision. To be eligible for this safe harbor, a member or person associated with a member must demonstrate that the member's routine business practice meets the following four standards. First, the member has established and implemented written procedures to comply with the national do-not-call

Rule 2211. The remaining sections of Rule 3110 are 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.

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).