

rules. Second, the member has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules. Third, the member has maintained and recorded a list of telephone numbers that the member may not contact. Fourth, the member 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.<sup>9</sup>

### Telemarketing Procedures

Paragraph (d) tracks the requirements of the FCC rule and existing Rule 2211 in establishing procedures that member 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 telemarketing in the existence and use of the do-not-call list; (3) record and disclose requests from a person to be added to the member's do-not-call list; and (4) have the member provide the called party with the name of the individual caller, the name of the member, a telephone number or address at which the member may be contacted, and that the purpose of the call is to

solicit the purchase of securities or related services.

Paragraph (d)(5) contains the FCC's position with respect to affiliated persons or entities. In general, a person's do-not-call request applies only to the entity making the call, and does not apply to any affiliated entity unless the customer reasonably would expect the affiliated entity to be included given the identification of the caller and the product being advertised. Similarly, the established business relationship exception does not extend to the member's affiliated entities unless the customer reasonably would expect the member to be included.

Paragraph (d)(6) explains that members must maintain a record of a caller's request not to receive further telemarketing calls and must honor that request for a period of five years.

### Miscellaneous Provisions

Paragraph (e) tracks the FCC's position with respect to the application of the proposed rule change to wireless telephone numbers. In general, the FCC has stated that wireless subscribers may participate in the national do-not-call registry. Although FCC telemarketing rules only generally apply to residential telephone subscribers, the FCC has stated that it will presume wireless subscribers who ask to be put on the national do-not-call list are residential subscribers. Such a presumption, however, may require a complaining wireless customer to provide further proof of the validity of that presumption should it need to take enforcement action. NASD agrees with this interpretation and, consistent with the FCC, will apply its telemarketing provisions to members engaging in telephone solicitations with wireless subscribers.

Paragraph (f) provides that 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 proposed rule. Members also should be mindful of the limitations on the use of unregistered persons to perform telemarketing services. In *NASD Notice to Members* 00-50 (Aug. 2000), NASD identified the limited telemarketing activities that can be performed by unregistered persons. Under this *Notice*, unregistered persons may only contact prospective customers to: (1) Extend invitations to firm-sponsored events; (2) inquire whether the customer wishes to discuss investments with a registered person; and (3) inquire whether the customer wishes to receive investment literature. Members must also be mindful of the

supervision and training requirements contained in the *Notice*.

### 2. Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, which requires, among other things, that NASD's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that investors will expect that their participation in the national do-not-call registry will, subject to certain limited exceptions, preclude telephone solicitations by broker/dealers.

### (B) Self-Regulatory Organization's Statement on Burden on Competition

NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

### (C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Comments were neither solicited nor received.

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the

<sup>9</sup> 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 NASD'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, members 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.