

**MEMO# 16520**

September 10, 2003

# **NASD PROPOSES RULE AMENDMENTS TO REQUIRE MEMBERS TO PARTICIPATE IN THE FTC'S NATIONAL DO-NOT-CALL REGISTRY**

[16520] September 10, 2003 TO: COMPLIANCE ADVISORY COMMITTEE No. 73-03 OPERATIONS MEMBERS No. 27-03 SEC RULES MEMBERS No. 120-03 SALES FORCE MARKETING COMMITTEE No. 15-03 SMALL FUNDS MEMBERS No. 50-03 TECHNOLOGY ADVISORY COMMITTEE No. 11-03 RE: NASD PROPOSES RULE AMENDMENTS TO REQUIRE MEMBERS TO PARTICIPATE IN THE FTC'S NATIONAL DO-NOT-CALL REGISTRY As you may recall, in June 2003, the Federal Communications Commission (FCC) adopted rules that, as of October 1, 2003, preclude telemarketers from calling a person who has registered on the national-do-not-call list maintained by the Federal Trade Commission (FTC) if the purpose of the call is to encourage the person to invest or purchase a service.<sup>1</sup> As adopted, the FCC's rules would include any solicitation calls made by or on behalf of an investment company, investment adviser, broker-dealer, or other person in the securities industry. In light of the applicability of these FCC rules to NASD members, NASD has proposed to revise its provisions relating to telemarketing to conform to the FCC's requirements.<sup>2</sup> The revisions proposed by NASD to its telemarketing rules are summarized below. The SEC is requesting comment on the NASD's proposed revisions, no later than September 17, 2003. Inasmuch as NASD's proposed revisions track the rules adopted by the FCC that are applicable to broker-dealers, the Institute does not plan to file a comment letter. 1 See Institute Memorandum to Compliance Advisory Committee No. 53-03, Operations Members No. 18-03, SEC Rules Members No. 90-03, Sales Force Marketing Committee No. 11-03, Small Funds Members No. 33-03, and Technology Advisory Committee No. 6-03 [No. 16291], dated July 11, 2003, which summarizes and provides a website link to the FCC's rules. 2 See SEC Release No. 34-48390, 68 Fed. Reg. 51613 (Aug. 27, 2003). A copy of the release is available on NASD's website at: [http://www.nasdr.com/pdf-text/rf03\\_131.pdf](http://www.nasdr.com/pdf-text/rf03_131.pdf). Unlike the FCC's rules, however, NASD does not propose to regulate the use of unsolicited fax advertisements, fax broadcasters, automated dialing equipment, or artificial or prerecorded voice messages. Despite the absence of such provisions in NASD's proposed rules, the provisions in the FCC's rules in these areas are applicable to NASD members. 2 NASD'S CURRENT TELEMARKETING PROVISIONS Currently, NASD Rules 2211 and 3110 govern telemarketing activities. Rule 2211 limits the hours within which telemarketing calls may be made, and requires the disclosure of certain identifying information in any telemarketing call. Exceptions to these provisions are provided for calls relating to the servicing of a customer's account or to existing customers. In addition, NASD Rule 3110(g)(1) currently requires each member to make and maintain a centralized do- not-call list of persons who

do not wish to receive telephone solicitations from the member or its associated persons.

**PROPOSED REVISIONS TO NASD RULE 2211** As proposed to be amended by NASD, the current provisions of Rule 2211 would be stricken in their entirety and replaced with more detailed provisions tracking those in the FCC's telemarketing rules. Also, Rule 3110(g)(1) would be stricken, inasmuch as the substance of this provision would be covered by the amendments proposed to Rule 2111. In particular, Rule 2211 would be revised to prohibit any NASD member or person associated with a member from initiating any telephone solicitation to:

- Any residence or person before 8 a.m. or after 9 p.m.<sup>4</sup> unless the member has an established business relationship with the person,<sup>5</sup> the member had received the person's prior express invitation or permission, or the person called is a broker or dealer;
- Any person that is on the member's specific do-not-call list (i.e., any person that has previously informed the member that he or she does not wish to receive an outbound call made by or on behalf of the member); or
- Any person who has registered his or her telephone number on the FTC's national do-not-call registry.

As regards this last prohibition, a member making a call to a person on the FTC's registry will not be liable for violating this prohibition if: (1) the member has an established business relationship with the recipient of the call; (2) the member has obtained the person's

<sup>3</sup> These prohibitions apply to all telephone solicitation calls, including those made to a wireless telephone number. Also, as proposed, members that use another entity to perform telemarketing services would remain responsible for ensuring compliance with all provisions contained in the rule.

<sup>4</sup> These time of day restrictions, which are included in the FCC's rules, are consistent with limitations currently in Rule 2211.

<sup>5</sup> As defined in the rule, a member would have an "established business relationship" with a person if (1) the person had made a financial transaction with the member within the previous 18 months immediately preceding the date of the call, or (2) 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. This definition is more liberal than that currently in Rule 2211, which provides a look-back period of only 12 months to see if a consumer has made a financial transaction. Notwithstanding an existing business relationship between a member and a person, however, the person's request to be placed on the member's specific do-not-call list overrides this exception even if the recipient of the call continues to do business with the member.

<sup>3</sup> prior express written invitation or permission;<sup>6</sup> (3) the associated person making the call has a personal relationship with the recipient of the call; or (4) the member meets the conditions of the rule's safe harbor provision. To qualify for the safe harbor provision, the member must demonstrate that the violative call was the result of an error and that as part of the member's routine business practice, it:

- (1) has established and implemented written procedures to comply with the national-do-not-call rules;
- (2) has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national-do-not-call rules;
- (3) maintains and records a list of telephone numbers that the member may not contact; and
- (4) uses a process to prevent telephone solicitations to persons on the national do-not-call registry.<sup>7</sup>

**PROCEDURES THAT WOULD BE REQUIRED OF NASD MEMBERS THAT TELEMARKE**

As with the rules adopted by the FCC that apply to broker-dealers, NASD's proposed revisions to Rule 2211 would require members, prior to engaging in telemarketing, to abide by certain procedures. These proposed procedures, which track those of the FCC, are as follows:

- Written Policy – members must have a written policy for maintaining a do-not-call list;
- Training of personnel engaged in telemarketing – personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the do-not-call list;
- Recording, disclosure of do-not-call requests – if a member receives a request from a person not to receive calls from that member, the member must record the request and place the person's name, if provided, and telephone number on the firm's do-not-call list at

the time the request is made. Such requests must be honored by the member within a reasonable time from receipt of the request, not to exceed thirty days; • Identification of sellers and telemarketers – a member or person associated with a member making a telemarketing call 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 services;<sup>8</sup> • 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; • Maintenance of do-not-call lists – a member making telemarketing calls 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. Tamara K. Salmon Senior Associate Counsel 6 As with the FCC’s rule, NASD’s proposed rule would require the permission to be evidenced by a signed, written agreement between the person and the member stating that the person agrees to be contacted by the member and including the telephone number to which the calls may be placed. 7 This last condition additionally requires that the member obtain a copy of the registry no more than three months prior to the date any call is made and maintain records documenting this process. 8 The telephone number may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.