

Notice to Members

JANUARY 2005

SUGGESTED ROUTING

Legal & Compliance
Operations
Registered Representatives
Senior Management
Training

KEY TOPICS

Cold Call
Do-Not-Call
Do-Not-Call Registry
Rule 2212
Telemarketing
Telephone Solicitation

GUIDANCE

Do-Not-Call Registry

SEC Approves Amendments to Rule 2212 Concerning Frequency of Updates From the National Do-Not-Call Registry; **Effective Date: March 1, 2005**

Executive Summary

On January 11, 2005, the Securities and Exchange Commission (SEC) approved amendments to NASD Rule 2212, NASD's telemarketing sales rule.¹ A member that seeks to qualify for the safe harbor set forth in Rule 2212 now will be required to, among other things, use a process to prevent telephone solicitations to any telephone number in a version of the national do-not-call registry obtained from the administrator of the registry no more than **thirty-one (31) days** prior to the date any call is made. This amendment is consistent with recent amendments to the comparable do-not-call rules of the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC).

The amendment becomes effective on **March 1, 2005**.

The rule, as amended, is set forth in Attachment A.

Questions/Further Information

Questions concerning this *Notice* may be directed to Gary L. Goldsholle, Associate Vice President and Associate General Counsel, Office of General Counsel (OGC), Regulatory Policy and Oversight (RPO), at (202) 728-8104; or James L. Eastman, Assistant General Counsel, OGC, RPO, at (202) 728-6961.

Background and Discussion

In 2003, the FTC and FCC established requirements for sellers and telemarketers to participate in a national do-not-call registry. Since 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.

In July 2003, the SEC requested that NASD amend its telemarketing rules to require NASD members to participate in the national do-not-call registry. The SEC approved NASD's amended rules in January 2004, and the rules took effect on March 31, 2004.²

Safe Harbor Provision for the National Do-Not-Call Registry Requirements

The FCC and FTC each provided persons subject to their respective do-not-call rules a "safe harbor" providing that a seller or telemarketer is not liable for a violation of the do-not-call rules that is the result of an error if the seller or telemarketer's routine business practice meets certain specified standards. NASD has provided a parallel safe harbor in paragraph (c) of Rule 2212. This safe harbor is limited to a violation of subparagraph (a)(3) of Rule 2212, which prohibits initiating any telephone solicitation to any person who has registered his or her phone number with the national do-not-call registry.

To be eligible for the safe harbor in Rule 2212, a member or person associated with a member must demonstrate that the member's routine business practice meets four standards. The first three of these four standards remain unchanged, and the fourth standard is modified as described below. First, the member must have established and implemented written procedures to comply with the national do-not-call rules. Second, the member must have trained its personnel, and any entity assisting it in its compliance, in procedures established pursuant to the national do-not-call rules. Third, the member must have maintained and recorded a list of telephone numbers that the member may not contact. Fourth, a member must use 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 must maintain records documenting this process. This fourth standard has now changed.

Shortly after NASD's rules were approved, Congress instructed the FTC to amend its telemarketing rules to require use of the national do-not-call registry no more than thirty-one (31) days old – as opposed to three months – before a telephone solicitation call is made.³ Accordingly, in March 2004, the FTC amended its Telemarketing Sales Rule to require sellers and telemarketers seeking to qualify for the FTC's do-not-call safe harbor to use a version of the national do-not-call registry obtained from the FTC no more than thirty-one (31) days prior to the date any telephone solicitation call is made. In August 2004, the FCC adopted a conforming amendment to its Miscellaneous Rules Relating to Common Carriers, requiring that persons who seek to qualify for a similar safe harbor provided in the rule use a version of the national do-not-call registry obtained from the administrator of the national do-not-call registry (*i.e.*, the FTC) no more than thirty-one (31) days prior to the date any telephone solicitation call is made.⁴ The FTC and FCC rule amendments took effect on January 1, 2005.

NASD has amended Rule 2212 to conform to the changes in the rules of the FTC and FCC. Effective March 1, 2005, under amended Rule 2212(c)(4), a member relying on Rule 2212's safe harbor provision must use 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 administrator of the registry no more than **thirty-one (31) days** prior to the date any call is made, and must maintain records documenting this process.

Endnotes

- 1 See SEC Notice and Accelerated Approval of Rule Change Relating to Frequency of Updates From the National Do-Not-Call Registry, Exchange Act Release No. 51023 (Jan. 11, 2005), 70 Fed. Reg. 3083 (Jan. 19, 2005) (File No. SR-NASD-2004-174).
- 2 SEC Notice and Accelerated Approval of Proposed Amendments to NASD's Telemarketing Rules to Require Members To Participate in the National Do-Not-Call Registry, Exchange Act Rel. No. 49055 (Jan. 12, 2004); 69 Fed. Reg. 2801 (Jan. 20, 2004) (File No. SR-NASD-2003-131). See also *NASD Notice to Members 04-15* for detailed background relating to NASD's rule amendments relating to the establishment of the national do-not-call registry.
- 3 FCC Statement of Basis and Purpose and final amended Telemarketing Sales Rule, 69 Fed. Reg. 16368 (Mar. 29, 2004). The FTC indicated that it was directed to amend its rules by Congress in the Consolidated Appropriations Act of 2004, Public Law 108-199, 188 Stat 3 (requirement in Division B, Title V).
- 4 Final FCC Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 69 Fed. Reg. 60311 (Oct. 8, 2004); CG Docket No. 02-278, FCC 04-204 (adopted Aug. 25, 2004; released Sept. 21, 2004). The FCC indicated that while Congress did not direct the FCC to amend its do-not-call rule, it determined to do so, in part, because it is required to consult and coordinate with the FTC with respect to, and maximize the consistency of, their respective do-not-call rules. 69 Fed. Reg. 60313.

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ATTACHMENT A

New language is underlined; deleted language is in brackets.

2200. COMMUNICATIONS WITH CUSTOMERS AND THE PUBLIC

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2212. Telemarketing

(a) No Change.

(b) No Change.

(c) Safe Harbor Provision

(1) - (3) No Change.

(4) Accessing the national do-not-call database. 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 administrator of the registry no more than [three months] thirty-one (31) days prior to the date any call is made, and maintains records documenting this process.

(d) - (g) No Change.