

# Notice to Members

MARCH 2004

## SUGGESTED ROUTING

Legal & Compliance  
Operations  
Registered Representatives  
Senior Management  
Training

## KEY TOPICS

Cold Call  
Do-Not-Call  
Telemarketing  
Telephone Solicitation  
Established Business Relationship

INFORMATIONAL

## Do-Not-Call Registry

SEC Approves Amendments to NASD Rules Concerning Member Participation in the National Do-Not-Call Registry; **Effective Date: March 31, 2004**

### Executive Summary

On January 12, 2004, the Securities and Exchange Commission (SEC or Commission) approved amendments to NASD Rule 2212 (Telemarketing) and Rule 3110 (Books and Records). These amendments set forth NASD's requirement that member firms participate in the Federal Trade Commission's (FTC) national do-not-call registry.<sup>1</sup> The amendments will become effective on March 31, 2004.

NASD Rule 2212, Telemarketing, and NASD Rule 3110, Books and Records, as amended, are 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, Regulatory Policy and Oversight, NASD, at (202) 728-8104.

### Background and Discussion

In 2003, the FTC and the Federal Communications Commission (FCC) established requirements for sellers and telemarketers to participate in a national do-not-call registry.<sup>2</sup> 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

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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.

In July 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.<sup>3</sup> Because broker/dealers are subject to the FCC's jurisdiction, NASD modeled its rules after those of the FCC, with minor modifications tailoring the rules to broker/dealer activities and the securities industry. Members, however, have an independent obligation to comply with both the FCC's and NASD's telemarketing rules. While this *Notice* highlights some of the textual differences between the NASD and FCC rules, NASD cannot advise its members on the manner in which the FCC intends to interpret or apply its telemarketing rules. Accordingly, compliance with NASD's telemarketing rules may not ensure compliance with the FCC's rules, and vice versa.<sup>4</sup>

## General Telemarketing Requirements

As a preliminary matter, NASD reminds members that Rule 2212 applies only to telephone solicitations. Rule 2212(g)(2) defines a telephone solicitation as "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." As a result, if a member telephones a customer solely concerning a margin call or similar administrative event, such call generally would not constitute a telephone solicitation.

Paragraph (a)(1) of Rule 2212 provides the time-of-day restrictions under which a member or person associated with a member may make a telephone call 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 (1) the member has an "established business relationship" with the called person based on the person having made a financial transaction or having a security position, a money balance, or account activity with the member or at a clearing firm that provides clearing services to such member within the previous 18 months immediately preceding the date of the telemarketing call;<sup>5</sup> (2) the member has received express written permission from the person that allows the member to call outside the applicable time frame; or (3) the person called is a broker or dealer. These provisions are substantively equivalent to those currently in place, except that NASD is replacing the current "existing customer" exception with an "established business relationship" exception. This change is discussed in detail below.

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Paragraph (a)(2) of Rule 2212 requires firms to maintain a firm-specific do-not-call list.<sup>6</sup> NASD 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. Thus, the provisions in paragraph (a)(2) of Rule 2212 are substantively equivalent to those in current Rule 3110(g)(1). Members should note that under paragraph (d)(3) of Rule 2212, they must honor a request by a person to be placed on a firm-specific do-not-call list within thirty days of such request, or sooner if they are able to do so.

Paragraph (a)(3) of Rule 2212 prohibits a member or person 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 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. Such re-registration re-commences the applicable five-year registration period.

### Exceptions from the National Registry Do-Not-Call Requirements

The rules of the FCC and FTC provide certain exceptions under which sellers and telemarketers may make telephone solicitations to persons on the national registry.<sup>7</sup> NASD has adopted these exceptions.

#### Established Business Relationship

The first exception, contained in paragraph (b)(1) of Rule 2212, is for calls made to persons with whom the member has an "established business relationship." An "established business relationship" may be formed in three 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 or has a security position, a money balance, or account activity with the member or at a clearing firm that provides clearing services to such member, within the previous 18 months immediately preceding the date of the telemarketing call. The definition of account activity is borrowed from Rule 2340, which is used to determine when a member or its clearing firm must send a customer account statement.

Second, under paragraph (g)(1)(A)(ii), an established business relationship exists when the member is the "broker/dealer of record" for the account of the person within the previous 18 months immediately preceding the date of the telemarketing call. The term "broker/dealer of record" refers to the broker/dealer identified on a customer's account application for accounts held directly at a mutual fund or variable insurance product issuer. The definition of broker/dealer of record is not contingent on the receipt of compensation.

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Third, under paragraph (g)(1)(A)(iii), an established business relationship exists 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.

As stated above, the definition of “established business relationship” replaces the definition of “existing customer,” which was applicable solely to the time-of-day restrictions and disclosure provisions in current Rule 2212. An existing customer was defined as “a customer from whom the broker or dealer, or a clearing broker or dealer on behalf of such broker or dealer, carries an account.” Moreover, the existing customer exception applied only to an existing customer who (1) within the proceeding 12 months had effected a securities transaction or made a deposit of funds or securities into an account under the control of a member’s associated person; or (2) had deposited funds or securities into an account that was under the control of a member’s associated person and his or her account earned interest or dividends within the previous 12 months. NASD believes that requiring members to follow competing definitions of “existing customer” (for the time-of-day restrictions) and “established business relationship” (for the national do-not-call registry restrictions) could cause confusion and lead to inadvertent violations.<sup>8</sup> However, as noted above, for purposes of the time-of-day restrictions, the established business relationship exception must be based on the customer having made a financial transaction or having a security position, money balance, or account activity with the firm or at a clearing firm that provided clearing services to such member within the previous 18 months. A member may not call outside the time-of-day restrictions where an established business relationship is predicated on being the broker/dealer of record for an account of the person within the previous 18 months or having contacted the member to inquire about a product or service within the previous three months.

In general, an established business relationship is formed only through the relationship between a person and a member. The rule contains a narrow exception for persons with an established business relationship with a member’s affiliate, provided that the person reasonably expects the member to be included. (See Rule 2212(g)(1)(B)). This narrow exception applies solely to affiliates; no established business relationship with a member can exist based on a person’s established business relationship with a non-affiliate of the member even if such person would reasonably expect the member to be included.

Importantly, 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 firm-specific do-not-call provision, which does not contain an exception for existing customers.

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Members should be aware that nothing in amended Rule 2212 prohibits a member from contacting a customer solely concerning the administration of his or her account. As previously stated, such calls, absent more, do not constitute telephone solicitation or telemarketing.

#### **Prior Written Consent**

The second exception, contained in paragraph (b)(2) of Rule 2212, 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.

#### **Personal Relationship**

The third exception, in paragraph (b)(3) of Rule 2212, is for calls made by an associated person who has a "personal relationship" with the recipient. The definition of personal relationship is set forth 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 person 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.

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

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) of Rule 2212 and applies only to a violation of paragraph (a)(3) of Rule 2212, 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 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) of Rule 2212 tracks the requirements of the FCC rule and existing Rule 2212 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) of Rule 2212 addresses the effect of a person’s firm-specific do-not-call request on the members’ affiliates, and mirrors the FCC’s position on this point. In general, a person’s firm-specific do-not-call request applies only to the member making the call, and does not apply to any affiliated entity unless the person reasonably would expect the affiliated entity to be included given the identification of the caller and the product being advertised.

Paragraph (d)(6) of Rule 2212 requires members to maintain a record of a caller’s request not to receive further telemarketing calls and to honor that firm-specific do-not-call request for a period of five years.

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## Miscellaneous Provisions

Paragraph (e) of Rule 2212 tracks the FCC's position with respect to the application of the rule 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 wireless customer who allegedly has been contacted in violation of the national do-not-call provisions to provide further evidence that the number is a residential number.

Paragraph (f) of Rule 2212 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 the rule. Members also should be mindful of the limitations on the use of unregistered persons to perform telemarketing services. In *Notice to Members 00-50* (Aug. 2000), NASD identified the limited telemarketing activities that can be performed by unregistered persons. As further discussed in that *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 also must be mindful of the related supervision and training requirements for such activities, as discussed in the *Notice*.

## Endnotes

- 1 See Securities Exchange Act Release No. 49055 (Jan. 12, 2004), 69 Fed. Reg. 2801 (Jan. 20, 2004) (SEC Notice of Order Approving File No. SR-NASD-2003-131).
- 2 The do-not-call rules of the FCC and FTC are very similar in terms of substance, in part because Congress 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 P.L. 10, 117 Stat. 557 (Mar. 11, 2003).
- 3 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).
- 4 For example, as further discussed herein, NASD has determined that an "established business relationship" exists for purposes of NASD's telemarketing rule when, among other things, a member is the broker/dealer of record for a customer. At this time, however, NASD staff is unaware whether the FCC will adopt the same interpretation of this and other provisions.

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- 5 As further discussed herein, one exception from the prohibition against making a telephone solicitation to persons on the national registry is based on whether the firm has an “established business relationship” with the person being called. For purposes of the prohibition against soliciting a person on the national registry, an “established business relationship” may be formed in one of three ways. For purposes of being permitted to solicit a person outside of the 8 a.m. to 9 p.m. time frame, however, only one of those three ways qualifies as a predicate on which the “established business relationship” may be based, specifically on the customer having made a financial transaction or having a security position, money balance, or account activity with the firm or at a clearing firm that provided clearing services to such member within the previous 18 months. (See Rule 2212(a)(1)(A) and Rule 2212(g)(1)(A)(i)).
- 6 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 has combined Rule 3110(g)(1) with its telemarketing rule, Rule 2212. The remaining sections of Rule 3110 are substantively unchanged.
- 7 The FTC rule contains only two exceptions: (1) an established business relationship; and (2) prior express written consent. The FTC rule, unlike the FCC rule, does not include a personal relationship exception.
- 8 NASD notes that the definition of established business relationship is generally broader than the current definition of existing customer in that it looks back 18 months rather than 12 months and encompasses more activities by the customer.
- 9 NASD notes 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 Fed. Reg. 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 the safe harbor contained in NASD’s telemarketing rule 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 NASD’s rule, NASD reminds members that they are subject to the FCC’s national do-not-call rules and must comply with these provisions.

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## ATTACHMENT A

New language is underlined; deleted language is in brackets.

### 2200. COMMUNICATIONS WITH THE PUBLIC

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#### 2212. Telemarketing

[No member or person associated with a member shall:]

(a) make outbound telephone calls to the residence of any person for the purpose of soliciting the purchase of securities or related services at any time other than between 8 a.m. and 9 p.m. local time at the called person's location, without the prior consent of the person; or]

(b) make an outbound telephone call to any person for the purpose of soliciting the purchase of securities or related services without disclosing promptly and in a clear and conspicuous manner to the called person the following information:]

[(1) the identity of the caller and the member firm;]

[(2) the telephone number or address at which the caller may be contacted; and]

[(3) that the purpose of the call is to solicit the purchase of securities or related services.]

(c) The prohibitions of paragraphs (a) and (b) shall not apply to telephone calls by any person associated with a member, or another associated person acting at the direction of such person for the purpose of maintaining and servicing the accounts of existing customers of the member under the control of or assigned to such associated person:]

[(1) to an existing customer who, within the preceding twelve months, has effected a securities transaction in, or made a deposit of funds or securities into, an account that, at the time of the transaction or the deposit, was under the control of or assigned to, such associated person;]

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[(2) to an existing customer who previously has effected a securities transaction in, or made a deposit of funds or securities into, an account that, at the time of the transaction or deposit, was under the control of or assigned to, such associated person, provided that such customer's account has earned interest or dividend income during the preceding twelve months, or]

[(3) to a broker or dealer.]

[(d) For the purposes of paragraph (c), the term "existing customer " means a customer for whom the broker or dealer, or a clearing broker or dealer on behalf of such broker or dealer, carries an account. The scope of this Rule is limited to the telemarketing calls described herein; the terms of this Rule shall not otherwise expressly or by implication impose on members any additional requirements with respect to the relationship between a member and a customer or between a person associated with a member and a customer.]

**(a) General Telemarketing Requirements**

No member or person associated with a member shall initiate any telephone solicitation, as defined in paragraph (g)(2) of this rule, to:

**(1) Time of Day Restriction**

Any residence of a person before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), unless

(A) the member has an established business relationship with the person pursuant to paragraph (g)(1)(A)(i),

(B) the member has received that person's prior express invitation or permission, or

(C) the person called is a broker or dealer;

**(2) Firm-Specific Do-Not-Call List**

Any person that previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the member; or

**(3) National Do-Not-Call List**

Any person who has registered his or her telephone number on the Federal Trade Commission's national do-not-call registry.

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**(b) National Do-Not-Call List Exceptions**

A member making telephone solicitations will not be liable for violating paragraph (a)(3) if:

**(1) Established Business Relationship Exception**

The member has an established business relationship with the recipient of the call. A person's request to be placed on the firm-specific do-not-call list terminates the established business relationship exception to that national do-not-call list provision for that member even if the person continues to do business with the member;

**(2) Prior Express Written Consent Exception**

The member has obtained the person's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement between the person and member which states that the person agrees to be contacted by the member and includes the telephone number to which the calls may be placed; or

**(3) Personal Relationship Exception**

The associated person making the call has a personal relationship with the recipient of the call.

**(c) Safe Harbor Provision**

A member or person associated with a member making telephone solicitations will not be liable for violating paragraph (a)(3) if the member or person associated with a member demonstrates that the violation is the result of an error and that as part of the member's routine business practice, it meets the following standards:

(1) Written procedures. The member has established and implemented written procedures to comply with the national do-not-call rules;

(2) Training of personnel. The member has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;

(3) Recording. The member has maintained and recorded a list of telephone numbers that it may not contact; and

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(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 prior to the date any call is made, and maintains records documenting this process.

**(d) Procedures**

Prior to engaging in telemarketing, a member must institute procedures to comply with paragraph (a). Such procedures must meet the following minimum standards:

(1) Written policy. Members must have a written policy for maintaining a do-not-call list.

(2) 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.

(3) 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. Members must honor a person's do-not-call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date of such request. If such requests are recorded or maintained by a party 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.

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(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 or has a security position, a money balance, or account activity with the member or at a clearing firm that provides clearing services to such member within the previous 18 months immediately preceding the date of the telemarketing call;

(ii) the member is the broker/dealer of record for an account of the person within the previous 18 months immediately preceding the date of the telemarketing call; or

(iii) 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.

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(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.

(4) the term "account activity" shall include, but not be limited to, purchases, sales, interest credits or debits, charges or credits, dividend payments, transfer activity, securities receipts or deliveries, and/or journal entries relating to securities or funds in the possession or control of the member.

(5) the term "broker/dealer of record" refers to the broker/dealer identified on a customer's account application for accounts held directly at a mutual fund or variable insurance product issuer.

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## RULE 3100: BOOKS AND RECORDS, AND FINANCIAL CONDITION

### Rule 3110: Books and Records

(a) – (f) No Change

(g) [Telemarketing Requirements] Negotiable Instruments Drawn From A Customer's Account

[(1) Each member shall make and maintain a centralized do-not-call list of persons who do not wish to receive telephone solicitations from such member or its associated persons.]

[(2)] No member or person associated with a member shall obtain from a customer or submit for payment a check, draft, or other form of negotiable paper drawn on a customer's checking, savings, share, or similar account, without that person's express written authorization, which may include the customer's signature on the negotiable instrument. [(3)]Each member shall maintain this[e] authorization [required by subparagraph (2) ]for a period of three years. This provision shall not, however, require maintenance of copies of negotiable instruments signed by customers.

(h) No Change