

December 17, 2003

Katherine A. England  
Assistant Director  
Division of Market Regulation  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549-1001

**Re: File No. SR-NASD-2003-131 – National Do-Not-Call Registry; Amendment No. 1 and Response to Comments**

Dear Ms. England:

NASD hereby submits Amendment No. 1 and its response to comment letters received by the Securities and Exchange Commission (“SEC” or “Commission”) after the publication of SR-NASD-2003-131 in the Federal Register on August 27, 2003.<sup>1</sup> The SEC received five comment letters.<sup>2</sup> The commenters raised concerns about the proposed definition of an established business relationship and the proposed prior express written consent exception.

## **I. The Established Business Relationship Exception**

In the original rule filing, NASD stated that an established business relationship exists between a member and a person if: (i) the person has made a financial transaction with the member within the previous 18 months immediately preceding the date of the telemarketing call; or (ii) 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. In establishing this definition, NASD was attempting to model its established business relationship exception after similar exclusions promulgated by the Federal Communication Commission (“FCC”) and Federal Trade Commission (“FTC”).

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<sup>1</sup> 68 FR 51,613 (August 27, 2003).

<sup>2</sup> See Letter from the Securities Industry Association (“SIA”) to Jonathan G. Katz, dated September 17, 2003; Letter from the American Council of Life Insurers (“ACLI”) to Jonathan G. Katz, dated September 17, 2003; Charles Schwab & Co., Inc. (“Charles Schwab”) to Jonathan G. Katz, dated September 25, 2003; Letter from CUNA Brokerage Services, Inc. (“CUNA”) to Jonathan G. Katz, dated September 23, 2003; and Letter from The Financial Services Roundtable (“FSR”) to Jonathan G. Katz, dated September 25, 2003.

All five commenters believe that the NASD's definition of an established business relationship is too narrow and omits various situations under which a broker/dealer may need to contact its customers. For example, ACLI believes that the definition of established business relationship does not properly accommodate the interests of broker/dealers distributing variable life insurance and variable annuities. ACLI states that variable life insurance and annuity contracts are long-term accumulation products necessitating long-term business relationships with customers. SIA and Charles Schwab state that the proposed definition of an established business relationship is significantly narrower than (a) the NASD's definition of existing customer, which is used for NASD's existing telemarketing rules, and (b) the FCC's and FTC's definition of established business relationship. SIA and Charles Schwab also believe that an established business relationship generally should exist when a customer is an account holder at a member firm. Charles Schwab states that the proposed rule should permit a member to win back a customer's account.<sup>3</sup>

As a preliminary matter, NASD reminds members that proposed Rule 2212 would apply only to telephone solicitations.<sup>4</sup> Proposed 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 concerning a margin call or similar administrative event, such call generally would not constitute a telephone solicitation.

NASD believes that the nature of the relationship between a firm and its customers in the securities industry is unique. In the securities industry, there is at a minimum, an agency relationship between a firm and its clients. As a result, firms may be compelled to contact a customer to satisfy attendant agency obligations. Many unforeseen factors, such as market swings, interest rate changes, new tax laws, or specific industry or company news may necessitate a broker contacting his or her customer. While NASD is sensitive to the do-not-call mandate of the FCC and FTC, we believe that certain modifications are necessary to develop a workable scheme in the securities industry. In light of these concerns and in response to commenters, NASD proposes two amendments to the definition of an established business relationship. First, NASD is amending the definition to include situations where the person has a security position, a money balance, or account activity with the member or at a clearing

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<sup>3</sup> The FCC has stated, "a consumer who once had telephone service with a particular carrier or a subscription with a particular newspaper could expect to receive a call from those entities in an effort to 'win back' or 'renew' that consumer's business within eighteen (18) months." 68 FR 44,144, 44,158 (July 25, 2003).

<sup>4</sup> On May 9, 2003, the SEC approved a proposed rule change that modernized, simplified, and clarified the rules governing member communications with the public. See Exchange Act Rel. No. 47,820 (May 9, 2003) (SR-NASD-2000-12). As part of this rule change, NASD re-numbered current Rule 2211 (Telemarketing) as Rule 2212. On November 3, 2003, this rule change became effective. NASD is amending the proposed rule change to reflect this new rule number.

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 firm or its clearing firm must send a customer account statement.

Second, in response to a comment raised by ACLI regarding the application of the established business relationship to independent broker/dealers that offer variable life insurance products, NASD believes that the definition of an established business relationship also should include situations where a member was the broker/dealer of record for an account of a 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. As such, an established business relationship will extend to the broker/dealer of record in connection with the sale of variable annuities, variable life insurance products, and mutual funds. Both definitions of established business relationship continue for 18 months after a triggering event, thus providing an opportunity for a firm to win back a customer.

NASD believes that these amendments more properly harmonize the permissible scope of an established business relationship and a customer’s reasonable expectation of receiving telemarketing calls in connection with such relationship.<sup>5</sup> A customer that receives account statements—but has not made a recent financial transaction—should still be viewed as having an established business relationship and should reasonably expect to be contacted by the firm. The expansion of the established business relationship also will protect investors by ensuring that firms are able to contact customers without fear of violating the national do-not-call registry provision under Proposed Rule 2212(a)(3). At the same time, customers are protected from receiving unwanted telephone solicitations from a member because they can request to be placed on the member’s firm-specific do-not-call list.

NASD notes that this proposed rule change is NASD’s attempt to tailor the federal do-not-call rules to broker/dealers and the securities industry. As such, NASD cannot assure members that compliance with proposed Rule 2212 ensures compliance with FCC rules because members also must comply with the telemarketing rules of the FCC and any FCC interpretations of those rules.

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<sup>5</sup> Indeed, in examining the appropriate time range for the established business relationship, the FCC concluded that its definition struck an appropriate balance between the needs of industry and the consumers’ reasonable expectations of who may call them. 68 FR 44,144, 44,158 (July 25, 2003). For purposes of inquiries under the established business relationship, the FCC also stated that the “nature of any inquiry must . . . be such to create an expectation on the part of the consumer that a particular company will call them.” *Id.*

- **Networking Agreements**

CUNA commented that the proposed definition of established business relationship does not properly provide for networking relationships between different entities. CUNA believes that if a person maintains an account at a bank, the person should be viewed as having an established business relationship with banks' networking broker/dealer. NASD staff does not agree. The FCC and FTC rules concerning "related parties" were clear in that 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, the NASD proposed rules stated that 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. We do not believe that a networking arrangement, which is formed by contract and that also may be terminated by a bank under such contract, meets the threshold intended by the FCC and FTC rules. Moreover, we do not believe that a customer of the bank that has not made a financial transaction with a broker/dealer would reasonably expect to be contacted by such broker/dealer.

## **II. The Prior Express Written Consent Exception**

Like the FCC and FTC rules, NASD's proposed rule contains an exemption from the do-not-call provisions if a consumer has provided consent to be called by the firm. FSR believes that NASD's rule is inconsistent with the FTC and FCC rules in that it requires prior "written" consent. NASD's interpretation of FCC and FTC rules is that prior written consent is necessary. The FCC rule states that a person or entity shall not be held liable for violating the national do-not-call registry provisions if "[i]t has obtained the subscriber's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed." 68 FR 44144, 44177 (July 25, 2003) (to be codified at 47 C.F.R. 64.1200(c)(2)(ii)) (emphasis added). The FTC rule also requires prior express written notice.<sup>6</sup> Moreover, NASD believes the potential for misuse of this exception is heightened if it can be based on verbal consent. Based on the foregoing, NASD declines to amend the prior consent provisions to accommodate verbal requests.

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<sup>6</sup> The FTC rule states that a seller or telemarketer may call a person on the national do-not-call registry if the seller or telemarketer "has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature of that person." 68 FR 4580, 4573 (Jan. 29, 2003) (to be codified at 16 C.F.R. 310.4(b)(iii)(B)(i)) (emphasis added).

## Text of Amendment

Below is the text of the current amendment to the proposed rule text published in the Federal Register on August 27, 2003. Proposed new language is underlined; proposed deletions are in brackets.

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## 2200. COMMUNICATIONS WITH THE PUBLIC

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### 221[1]2. Telemarketing

(a) – (f) No Change

(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; [or]

(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;

[(ii)](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.

(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) - (3) No Change

(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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If you have any questions concerning this submission, please contact Gary L. Goldsholle, Office of General Counsel, Regulatory Policy and Oversight, NASD, at (202) 728-8104; e-mail [gary.goldsholle@nasd.com](mailto:gary.goldsholle@nasd.com), or Brian J. Woldow at (202) 728-6927; e-mail [brian.woldow@nasd.com](mailto:brian.woldow@nasd.com). The fax number of the Office of General Counsel is (202) 728-8264.

Very truly yours,

Brian J. Woldow

cc: Martha Haines