

SR-CBOE-96-49 and should be submitted by August 20, 1996.

For the Commission, by the Division of Market Regulation, pursuant to the delegated authority, 17 CFR 200.30-3(a)(12).

Margaret H. McFarland,  
*Deputy Secretary.*

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[Release No. 34-37475; File No. SR-NASD-96-28]

**Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the National Association of Securities Dealers, Inc. ("NASD" or "Association") Relating to Telemarketing Rules**

July 24, 1996.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on June 28, 1996, the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. On July 18, 1996, the NASD filed Amendment No. 1 to its proposal.<sup>2</sup> On July 24, 1996, the NASD filed Amendment No. 2 to its proposal.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

Below is the text of the proposed rule change. Proposed new language is

italicized; proposed deletions are in brackets.

**Conduct Rules**

**2000. Business Conduct**

\* \* \* \* \*

**2200. Communications With Customers and the public**

**2211. 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;*

*(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 divided income during the preceding twelve months; or*

*(3) To a broker or dealer. 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.*

\* \* \* \* \*

**3000. Responsibilities Relating to Associated Persons, Employees, and Others' Employees**

\* \* \* \* \*

**3100. Book and Records, and Financial Condition**

**3110. Books and Records**

\* \* \* \* \*

**(g) [Cold Call] Telemarketing Requirements**

*(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 person.*

*(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 the authorization required by subparagraph (2) for a period of three years.*

**II. Self-Regulatory Organizations Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASD has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

**A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

**1. Purpose**

**Introduction and Background.** Pursuant to the Telephone Consumer Protection Act ("TCPA"),<sup>4</sup> the NASD adopted in June 1995, a "cold call" rule to implement certain rules of the Federal Communications Commission ("FCC Rule")<sup>5</sup> that require persons who

<sup>4</sup> 47 U.S.C. § 227.

<sup>5</sup> Pursuant to the TCPA, the FCC adopted rules in December 1992 that, among other things, (1) prohibit cold-calls to residential telephone customers before 8 a.m. or after 9 p.m. (location time at the called party's location) and (2) require

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> In Amendment No. 1, the NASD withdrew its request for approving the proposed rule change prior to the 30th day after publication in the Federal Register; added the word "do" after the word "who" in subparagraph (g)(1) to Rule 3110; and added the phrase "or person associated with a member" after the word "member" in subparagraph (g)(2) to Rule 3110. See Letter from John Ramsay, Deputy General Counsel, NASD Regulation, Inc. ("NASDR"), to Katherine A. England, Assistant Director, Division of Market Regulation, SEC, dated July 18, 1996.

<sup>3</sup> In Amendment No. 2, the NASD replaced the phrase "or a person acting at the direction of a person associated with a member," with "or another associated person acting at the direction of such person" in subparagraph (c) to Rule 2211 to clarify that the exceptions to the requirements of paragraphs (a) and (b) of Rule 2211, as proposed, apply only to a person associated with a member or another associated person acting at the direction of such associated person. See Letter from John Ramsay, Deputy General Counsel, NASDR, to Katherine A. England, Assistant Director, Division of Market Regulation, SEC, dated July 24, 1996.

engage in telephone solicitations to sell products and services ("telemarketers") to establish and maintain a list of persons who have requested that they not be contacted by the called (a "do not-call" list).<sup>6</sup> Under the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), which became law in August 1994,<sup>7</sup> the Federal Trade Commission adopted detailed regulations ("FTC Rules") to prohibit deceptive and abusive telemarketing acts and practices that became effective on December 31, 1995.<sup>8</sup> The FTC Rules, among other things, (i) require the maintenance of "do-not-call" lists and procedures, (ii) prohibit abusive, annoying, or harassing telemarketing calls, (iii) prohibit telemarketing call before 8 a.m. or after 9 p.m., (iv) require a telemarketer to identify himself, the company he works for, and the purpose of the call, and (v) require express written authorization or other verifiable authorization from the customer before use of negotiable instruments called "demand drafts."<sup>9</sup> While the FCC and FTC Rules are applicable to members that engage in telephone solicitation to market their products and services, those regulations cannot be enforced by either the Securities and Exchange Commission ("SEC") or the securities self-regulatory organizations ("SROs"). Under the Telemarketing Act, the SEC is required either to promulgate or to require the SROs to promulgate rules substantially similar to the FTC rules, unless the SEC determines either that the rules are not

necessary or appropriate for the protection of investors or the maintenance of orderly markets, or that existing federal securities laws or SEC rules already provide for such protection.<sup>10</sup> The staff of the SEC has advised that it believes that additional rulemaking is necessary to satisfy the requirements of the Telemarketing Act. The NASD believes that, because the SROs will be the primary enforcers of these rules, it may be more appropriate to require the SROs individually to adopt separate rules than for the SEC to adopt the rules for the entire industry. In addition, these rules relate to the regulation of sales practices which the NASD believes it should take the lead in promulgating and enforcing. The NASD intends to implement requirement (ii) by issuing an interpretation that such conduct is violative of existing rules and implement requirements (iii)–(v) by amending their rules.<sup>11</sup> In order to approve the proposed rule change in accordance with the Telemarketing Act, the SEC must determine that the rule, together with existing federal securities laws and regulations, provide protection substantially similar to the FTC Rules.

*Description of Proposed Amendments.* Time Limitations and Disclosure. The proposed rule change adds new Rule 2211 to Rule 2200 of the NASD's Conduct Rules to prohibit, under proposed paragraph (a) to Rule 2211, a member or person associated with a member from making outbound telephone calls to a member of the public's residence 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 and to require, under proposed paragraph (b) to

Rule 2211, such member or associated person to promptly disclose to the called person in a clear and conspicuous manner the caller's identity and firm, the telephone number or address at which the caller may be contacted, and that the purpose of the call to solicit the purchase of securities or related services.

Proposed paragraph (c) to Rule 2211 creates exemptions from the time-of-day and disclosure requirements of paragraphs (a) and (b) for telephone calls by associated persons, or other associated persons acting at the direction of such persons for purposes of maintaining and servicing existing customers assigned to or under the control of the associated persons, to certain categories of "existing customers." Paragraph (c) defines "existing customer" as a customer for whom the broker or dealer, or a clearing broker or dealer on behalf of the broker or dealer, carries an account. Proposed subparagraph (c)(1) exempts such calls 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 under the control of or assigned to such associated person at the time of the transaction or deposit. Proposed subparagraph (c)(2) exempts such calls to an existing customer who, at any time, has effected a securities transaction in, or made a deposit of funds or securities into an account under the control of or assigned to the associated person at the time of the transaction or deposit, as long as the customer's account has earned interest or dividend income during the preceding twelve months. Proposed paragraph (c)(3) exempts telephone calls to a broker or dealer.

Subparagraphs (c) (1) and (2) together exclude only some calls to existing customers from the time-of-day and disclosure requirements of the proposed rule. An associated person, or a person acting at the direction of such associated person, may contact a customer without complying with the requirements of the rule if the customer has effected a transaction or made a deposit during the past year into an account controlled by such associated person, or if the customer has effected a transaction or made a deposit at any time into an account controlled by such associated person and the customer's account has earned interest or dividend income during the past year. Thus, calls to certain older or inactive accounts that fall outside these parameters would not be covered by the exemption.

The Telemarketing Act specifically requires the SEC to establish rules or

persons or entities engaging in cold-calling to institute procedures for maintaining a "do-not-call" list that includes, at a minimum, (a) a written policy for maintaining the do-not-call list, (b) training personnel in the existence and use thereof, (c) recording a consumer's name and telephone number on the do-not-call list at the time the request not to receive calls is made, and retaining such information on the do-not-call list for a period of at least ten years, and (d) requiring telephone solicitors to provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made and a telephone number or address at which such person or entity may be contacted. 57 FR 48333 (codified at 47 C.F.R. § 64.1200). With certain limited exceptions, the FCC Rules apply to all residential telephone solicitations, including those relating to securities transactions. *Id.* The term "telephone solicitation" refers to 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, other than with the called person's express invitation or permission, or to a person with whom the caller has an established business relationship, or by tax-exempt non-profit organization. *Id.*

<sup>6</sup> Securities Exchange Act Release No. 35831 Jun. 9, 1995, 60 FR 31527 (Jun. 15, 1995) (order approving File No. SR–NASD–95–13).

<sup>7</sup> 15 U.S.C. §§ 6101–08

<sup>8</sup> §§ 310.3–4 of FTC Rules.

<sup>9</sup> *Id.*

<sup>10</sup> Specifically, Section 3(d)(1)(B) of the Telemarketing Act provides that the Commission is not required to promulgate a rule under Section 3(d)(1)(A) if it determines that (i) federal securities laws or rules adopted by the Commission thereunder provide protection from deceptive and other abusive telemarketing by persons described in Section 3(d)(2) substantially similar to that provided by rules promulgated by the Federal Trade Commission under Section 3(a) or (ii) a rule promulgated by the Commission is not necessary or appropriate in the public interest, or for the protection of investors, or would be inconsistent with the maintenance of fair and orderly markets. 15 U.S.C. § 6102(d)(1)(B).

<sup>11</sup> The SEC staff requested that the SROs implement the requirement in (ii) referenced above by issuing an interpretation that abusive telemarketing calls are inconsistent with just and equitable principles of trade. At its May 1996 meeting, the NASD Board authorized a Notice to Members ("NTM") that sets forth the interpretation that abusive communications from members or associated persons of members to customers is a violation of Rule 2110 of the NASD's Conduct Rules. The NASD published this NTM in July 1996. NTM 96–44 (July 1996).

require the self-regulatory organizations to promulgate telemarketing rules consistent with the legislation, unless the SEC determines that the federal securities laws or SEC rules provide protection from abusive telemarketing similar to the rules adopted by the FTC or that a rule by the SEC is not necessary in the public interest.<sup>12</sup> The NASD believes that it is both appropriate and necessary to create an exemption for calls to a class of customers for whom personal and timely contact with a broker is important, particularly in the emerging environment of 24-hour trading and trading in multiple time zones across the United States where prompt contact with customers to respond to market developments may be necessary. Specifically, the NASD believes that the failure to create such an exemption would be harmful for those securities customers for whom the need exists to be called in a timely manner on certain occasions, and thus inconsistent with the mandate of the Telemarketing Act. The NASD, however, also believes that an exemption for existing customers should not extend to all customers, and should not cover calls to those customers whose accounts do not meet certain minimum levels of activity.

Demand Draft Authorization and Recordkeeping. The proposed rule change amends Rule 3110 of the NASD's Conduct Rules to (i) prohibit a member or person associated with a member from obtaining from a customer or submitting for payment a check, draft, or other form of negotiable paper drawn on a customer's checking, savings, share, or similar account ("demand draft") without that person's express written authorization, which may include the customer's signature on the instrument, and (ii) to require the retention of such authorization for a period of three years. A "demand draft" is a methodology for obtaining funds from a customer's bank account without that person's signature on a negotiable instrument. The customer provide a potential payee with bank account identification information that permits the payee to create a piece of paper that will be processed like a check, including the words "signature on file" or "signature pre-approved" in the location where the customer's signature normally appears. Most potential payees obtain a written authorization for the use of such a demand draft, but the FTC found that in certain cases only oral authorization was provided by the customer. The new language in subparagraph (g)(2) of Rule 3110 is

drawn substantially from the FTC Rule, with the difference that the proposed rule change requires that the customer provide written authorization of a negotiable instrument, in comparison to the FTC Rule which would permit both written and oral authorization subject to certain conditions.<sup>13</sup> The provision in the proposed rule for demand drafts is only intended to reflect and implement the exact same requirement as set forth in the FTC Rule.

## 2. Statutory Basis

The NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b) (6) of the Act,<sup>14</sup> which require that the Association adopt and amend its rules to promote just and equitable principles of trade and generally provide for the protection of customers and the public interest, in that the proposed rule change, by imposing time restriction and disclosure requirements, with certain exceptions, on members' telemarketing calls, and by requiring verifiable authorization from a customer for demand drafts, prevents members from engaging in certain deceptive and abusive telemarketing acts and practices while allowing for legitimate telemarketing practices. The NASD also believes that the proposed rule change fulfills the mandate that SRO rules promulgated under the Telemarketing Act provide protection from deceptive and abusive telemarketing practices and are necessary and appropriate in the public interest and for the protection of investors.

### *B. Self-Regulatory Organization's Statement on Burden on Completion*

The Association does not believe that the proposed rule change will impose any inappropriate burden on competition.

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

No written comments were either solicited or received.

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

Within 35 days of the 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 organizations consents, the Commission will:

(A) By order approve the 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. Comments particularly are requested as to whether the proposed rule change satisfies the requirements of the Telemarketing Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and by any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR-NASD-96-28 and should be submitted by August 20, 1996.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,  
Deputy Secretary.

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## COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

### Adjustment of Import Limits for Certain Cotton Textile Products Produced or Manufactured in India

July 24, 1996.

**AGENCY:** Committee for the Implementation of Textile Agreements (CITA).

**ACTION:** Issuing a directive to the Commissioner of Customs adjusting limits.

**EFFECTIVE DATE:** July 24, 1996.

**FOR FURTHER INFORMATION CONTACT:** Janet Heinzen, International Trade Specialist, Office of Textiles and

<sup>12</sup> Telemarketing Act, *supra* note 10.

<sup>13</sup> § 310.3 of FTC Rules.

<sup>14</sup> § 15 U.S.C. 78o-3.