

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,
Deputy Secretary.

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[Release No. 34-37626; File No. SR-MSRB-96-06]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to Telemarketing Rules

August 30, 1996.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ notice is hereby given that on July 30, 1996, the Municipal Securities Rulemaking Board ("Board" or "MSRB") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. 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

The MSRB is filing herewith a proposed rule change relating to telemarketing rules. Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

Rule G-39, Telemarketing

No broker, dealer or municipal securities dealer or person associated with a broker, dealer or municipal securities dealer shall:

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

(i) the identity of the caller and the firm;

(ii) the telephone number or address at which the caller may be contacted; and

(iii) that the purpose of the call is to solicit the purchase of municipal securities or related services.

(c) The prohibitions of paragraphs (a) and (b) shall not apply to telephone calls by any person associated with a broker, dealer, or municipal securities dealer, 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 broker, dealer or municipal securities dealer under the control of or assigned to such associated person:

(i) 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;

(ii) 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

(iii) to a broker, dealer or municipal securities dealer.

For the purposes of paragraph (c), the term "existing customer" means a customer for who the broker, dealer or municipal securities dealer, or a clearing broker or dealer on behalf of such broker, dealer or municipal securities dealer, carries an account.

Rule G-21, Advertising

(a) Definition of "Advertisement." For purposes of this rule, the term "advertisement" means any material (other than listings of offerings) published or designed for use in the public, including electronic, media, or any promotional literature designed for dissemination to the public, including any notice, circular, report, market letter, form letter, telemarketing script or reprint or excerpt of the foregoing. The term does not apply to preliminary official statements or official statements, but does apply to abstracts or summaries of official statements, offering circulars and other such similar documents prepared by [municipal securities] brokers, dealers or municipal securities dealers.

(b)-(e) No change.

Rule G-8, Books and Records to be Made by Brokers, Dealers and Municipal Securities Dealers

(a) Description of Books and Records Required to be Made. Except as otherwise specifically indicated in this rule, every broker, dealer and municipal securities dealer shall make and keep current the following books and records, to the extent applicable to the business of such broker, dealer or municipal securities dealer:

(i)-(xviii) No change.

(xix) Telemarketing Requirements.

(A) Each broker, dealer and municipal securities dealer shall make and maintain a centralized do-not-call list of persons who do not wish to receive telephone solicitations from such broker, dealer or municipal securities dealer or its associated persons.

(B) No broker, dealer or municipal securities dealer or person associated with such broker, dealer or municipal securities dealer 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.

(b)-(e) No change.

(f) Compliance with Rule 17a-3.

Brokers, dealers and municipal securities dealers other than bank dealers which are in compliance with rule 17a-3 of the Commission will be deemed to be in compliance with the requirements of this rule, provided that the information required by subparagraph (a)(iv)(D) of this rule as it relates to uncompleted transactions involving customers; paragraph (a)(viii); paragraph (a)(xi); paragraph (a)(xii); paragraph (a)(xiii); paragraph (a)(xiv); paragraph (a)(xv); paragraph (a)(xvi); [and] paragraph (a)(xviii); and paragraph (a)(xix) shall in any event be maintained.

Rule G-9, Preservation of Records

(a) No change.

(b) Records to be Preserved for Three Years. Every [municipal securities] broker, dealer and municipal securities dealer shall preserve the following records for a period of not less than three years:

(i)-(ix) No change.

(x) all records of deliveries of rule G-32 disclosures required to be retained as described in rule G-8(a)(xiii); [and]

(xi) the records to be maintained pursuant to rule G-8(a)(xv);

(xii) the authorization required by rule G-8(a)(xix)(B); and

¹ 15 U.S.C. § 78s(b)(1).

(xiii) each advertisement from the date of each use.

(c)–(g) No change.

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

In its filing with the Commission, the self-regulatory organization 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 self-regulatory organization 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

Under the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), which became law in August 1994, 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. 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 abusive, annoying, or harassing telemarketing calls, (iii) prohibit telemarketing calls 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."²

²Pursuant to the Telephone Consumer Protection Act, the Federal Communications Commission ("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. (local time at the called party's location) and (2) require 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 the 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

While the FCC rules are applicable to brokers, dealers and municipal securities dealers that engage in telephone solicitation to market their products and services, those regulations cannot be enforced by either the SEC or the securities self-regulatory organizations ("SROs"). The FTC rules expressly do not apply to brokers, dealers, and other securities industry professionals. 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 such rules are not necessary or appropriate for the protection of investors or the maintenance of fair and orderly markets or that existing federal securities laws or SEC rules already provide for such protection.³ The staff of the SEC has advised the MSRB that it believes that additional rulemaking is necessary to satisfy the requirements of the Telemarketing Act. The Board intends to implement requirement (ii) referenced above by issuing an interpretation that such conduct is violative of existing rules and implement requirements (i) and (iii)–(v) by amending its rules.⁴

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 CFR § 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.*

³Specifically, 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).

⁴The Board intends to 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 July 1996 meeting, the Board authorized an interpretive notice of rule G–17, on fair dealing, to clarify that the use of threats, intimidation, or profane or obscene language, and calling a person repeatedly or continuously, with intent to annoy, abuse, or harass the called party, is inconsistent with just and equitable principles of trade. The Board intends to publish this notice in the near future.

Description of Proposed Amendments Do Not Call List

As noted above, the Commission is required by the Telemarketing Act to promulgate, or require the SROs to promulgate, rules substantially similar to the FTC rules, unless existing rules provide substantially similar protection in securities transactions, or such additional rules otherwise are not necessary or appropriate. Brokers, dealers and municipal securities dealers who engage in telephone solicitation to market their products and services are subject to the requirements of the rules of the FCC relating to telemarketing practices and the rights of telephone consumers and shall refer to FCC rules for specific restrictions on telephone solicitations. This includes, but is not limited to, the requirements to make and maintain a list of persons who do not want to receive telephone solicitations. The proposed rule change amends rule G–8, on books and records, so that each broker, dealer and municipal securities dealer that engages in telephone solicitation to market its products and services is required to make and maintain a centralized do-not-call list of persons who do not wish to receive telephone solicitations from a broker, dealer or municipal securities dealer or a person associated with a broker, dealer or municipal securities dealer.

Time Limitations and Disclosure

The proposed rule change adds proposed rule G–39, on telemarketing. Paragraph (a) prohibits a broker, dealer or municipal securities dealer or a person associated with a broker, dealer or municipal securities dealer from making outbound telephone calls to a member of the public's residence for the purpose of soliciting the purchase of municipal 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. Paragraph (b) requires such broker, dealer or municipal securities dealer or a person associated with a broker, dealer or municipal securities dealer 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 is to solicit the purchase of municipal securities or related services.

Paragraph (c) to proposed rule G–39 creates exemptions from the time-of-day and disclosure requirements of paragraphs (a) and (b) for telephone calls by associated persons, or another

associated person acting at the direction of such associated persons, for purposes of maintaining and servicing existing customers assigned to or under the control of such associated persons, to certain categories of "existing customers." Paragraph (c) defines "existing customer" as a customer for whom the broker, dealer or municipal securities dealer, or a clearing broker or dealer on behalf of such broker, dealer or municipal securities dealer, carries an account. Proposed subparagraph (c)(i) 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)(ii) 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 that was under the control of or assigned to such associated person at the time of the transaction or deposit, as long as such customer's account has earned interest or dividend income during the preceding twelve months. Proposed subparagraph (c)(iii) exempts telephone calls to a broker, dealer or municipal securities dealer.

Subparagraphs (c) (i) and (ii) together exclude only some calls to existing customers from the time-of-day and disclosure requirements of the proposed rule. An associated person, or another associated 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. Therefore, 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 require the SROs 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. The Board 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 dealer 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 Board 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 Board, 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 G-8, on books and records, to prohibit 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. The proposed rule change to rule G-9, on preservation of records, requires the retention of such authorization for a period of three years. A "demand draft" is a method for obtaining funds from a customer's bank account without that person's signature on a negotiable instrument. The customer provides 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 rule G-8(a)(xix) is drawn substantially from the FTC rule, with the difference that the proposed rule change required that the customer provide written authorization of a negotiable instrument, in comparison to the FTC rule which would permit both written and oral authorization.⁵ The provision in the proposed rule for demand drafts is only intended to

reflect and implement the same requirement as set forth in the FTC rule.

Telemarketing Scripts

The FTC rules contain a recordkeeping requirement that all substantially different telemarketing scripts be retained. The Board is amending its definition of "advertisement," in rule G-21, to include "telemarketing scripts" within that definition. Thus, the associated record retention requirement for advertisements contained in the proposed change to rule G-9(b)(xiii), on record retention, will require dealers to retain telemarketing scripts for three years.

The Board is also amending the definition of "advertisement" to include "electronic" messages sent via computer. The inclusion of the term "electronic" within the definition of "advertisement" is intended to apply to communication available to all network subscribers including items displayed over network bulletin boards, and it is intended to apply to messages sent directly to individuals or targeted groups.

2. Statutory Basis

The Board believes the proposed change is consistent with Section 15B(b)(2)(C) of Act,⁶ which provides that the Board's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The MSRB 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

⁵ § 310.3 of FTC Rules.

⁶ 15 U.S.C. 78o-4.

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 organization 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, N.W., Washington, D.C. 20549. Copies of the submissions, 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 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 in the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the Board's principal offices. All submissions should refer to File No. SR-MSRB-96-06 and should be submitted by September 27, 1996.

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

Margaret H. McFarland,

Deputy Secretary.

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[Release No. 34-37625; File Nos. SR-Philadep-96-14]

Self-Regulatory Organization; Philadelphia Depository Trust Company; Notice of Filing and Order Granting Accelerated Partial Permanent Approval and Accelerated Partial Temporary Approval of a Proposed Rule Change Seeking Permanent Approval of the Inter-Depository Delivery Procedures and the Participants Fund Formulas

August 30, 1996.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ notice is hereby given that on July 26, 1996, the Philadelphia Depository Trust Company ("Philadep") filed with the Securities and Exchange Commission ("Commission") the proposed rule change (File No. SR-Philadep-96-14) as described in Items I and II below, which items have been prepared primarily by Philadep. The Commission is publishing this notice and order to solicit comments from interested persons and to grant accelerated permanent approval of the portion of the proposed rule change relating to inter-depository delivery procedures and to grant accelerated temporary approval through December 31, 1996, of the portion of the proposed rule change relating to Philadep's participants fund formulas.

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

The proposed rule change seeks permanent approval of Philadep's inter-depository delivery procedures and of Philadep's participants fund formulas. The Commission previously granted partial temporary approval to a proposed rule change establishing Philadep's procedures for inter-depository deliveries and Philadep's participants fund formulas as part of the conversion of Philadep's money settlement system from a next-day funds settlement ("NDFS") to a same-day funds settlement ("SDFS") system.²

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

In its filing with the Commission, Philadep included statements concerning the purpose of and basis for the proposed rule change and discussed

any comments that it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Philadep has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.³

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

On February 22, 1996, Philadep converted its processing environment from an NDSF system to an SDFS system. In an effort to reduce risk in an SDFS settlement environment, the Stock Clearing Corporation of Philadelphia ("SCCP") and Philadep implemented a new system and new controls with enhanced processing capabilities. The Commission approved Philadep's SDFS system on a permanent basis for all aspects of the filing except the participants fund formulas and the inter-depository delivery procedures.⁴

1. Inter-Depository Delivery Procedures

When processing a participant's delivery to The Depository Trust Company ("DTC"), Philadep employs an immediate update technique whereby a delivering participant's security position, collateral, and settlement account are immediately updated if the delivering participant has sufficient securities and collateral to allow the delivery to be completed. The delivering participant's position is reduced by the quantity of securities delivered, its settlement account is credited for the settlement value of the transaction, and its collateral monitor is increased by the settlement credit received and reduced by the collateral value of the securities delivered (provided the securities being delivered are part of the participant's collateral position).

Once a delivery satisfies Philadep's risk management controls and completes at Philadep (e.g., the participant has sufficient securities to make the delivery and the participant's collateral monitor will not become negative because of the delivery), Philadep send the delivery to DTC where it is subject to DTC's internal risk management controls. In certain instances, DTC's internal risk management controls will prevent a delivery from completing (i.e., the receiving participant does not have sufficient collateral or the receipt would

¹ 15 U.S.C. 78s(b)(1) (1988).

² Securities Exchange Act Release No. 36876 (February 22, 1996), 61 FR 7841 [SR-Philadep-95-08] (order granting partial temporary approval and partial permanent approval of a proposed rule change).

³ The Commission has modified the text of the summaries submitted by Philadep.

⁴ *Supra* note 2.