

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁸ that the proposed rule change (SR-Amex-96-47) is approved on a pilot basis for a two-month period ending on February 10, 1997.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁹

Jonathan G. Katz,

Secretary.

[FR Doc. 96-31725 Filed 12-12-96; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-38009; File No. SR-NASD-96-28]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Approval to Proposed Rule Change and Notice of Filing of, and Order Granting Accelerated Approval to, Amendment No. 3 to the Proposed Rule Change Relating to NASD Telemarketing Rules

December 2, 1996.

I. Introduction

On June 28, 1996, the National Association of Securities Dealers, Inc. ("NASD" or "Association") submitted to the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend NASD telemarketing rules.³ The proposed rule change was published for comment in the Federal Register on July 30, 1996.⁴ The Commission received two comment letters regarding the proposal.⁵

II. Background

Pursuant to the Telephone Consumer Protection Act ("TCPA"),⁶ the NASD adopted in June 1995, a "cold call" rule⁷ that paralleled one of the rules of the Federal Communications Commission ("FCC Rule")⁸ and requires persons who 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 caller ("do-not-call list").⁹

Under the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), which became law in August 1994,¹⁰ the Federal Trade Commission adopted detailed regulations ("FTC Rules")¹¹ to prohibit deceptive and abusive telemarketing acts and practices that became effective on December 31, 1995.¹² The FTC Rules, among other things, (i) require the maintenance of "do-not-call" lists and procedures, (ii) prohibit certain 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 or herself, the company he or she works

for, and the purpose of the call, and (v) require express written authorization or other verifiable authorization from the customer before the firm may use negotiable instruments called "demand drafts."¹³

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. The NASD believes that, because the SROs will be the primary enforcers of these rules, it may be more appropriate for the SROs individually to adopt separate rules than for the SEC to adopt 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 believes it has implemented the prohibition against certain abusive, annoying, or harassing telemarketing calls contained in the FTC Rules by issuing an interpretation that such conduct is violative of existing rules.¹⁴ The NASD believes that the proposed rule change addresses all other relevant elements of the FTC Rules not covered by existing federal securities laws and regulations.

III. Description of the Proposals

Time Limitations and Disclosure

The proposed rule change adds Rule 2211 to 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 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

¹⁸ 15 U.S.C. § 78s(b)(2).

¹⁹ 17 C.F.R. 200.30-3(a)(12).

¹ 15 U.S.C. (§ 78s(b)(1) (1988).

² 17 CFR 240.19b-4 (1994).

³ On July 18, 1996, the NASD filed Amendment No. 1 to its proposal. 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. On July 24, 1996, the NASD filed Amendment No. 2 to its proposal. Letter from John Ramsay, Deputy General Counsel, NASDR, to Katherine A. England, Assistant Director, Division of Market Regulation, SEC, dated July 24, 1996. On October 21, 1996, the NASD filed Amendment No. 3 to its proposal. Letter from John Ramsay, Deputy General Counsel, NASDR, to Katherine A. England, Assistant Director, Division of Market Regulation, SEC, dated October 18, 1996.

⁴ See Securities Exchange Act Release No. 37475 (July 24, 1996), 61 FR 39686 (July 30, 1996) (notice of File No. SR-NASD-96-28).

⁵ See Letter from Brad N. Bernstein, Assistant Vice President & Senior Attorney, Merrill Lynch, to Jonathan G. Katz, Secretary, SEC, dated August 19, 1996 ("Merrill Lynch Letter"), and Letter from Frances M. Stadler, Associate Counsel, Investment Company Institute ("ICI"), to Jonathan G. Katz, Secretary, SEC, dated Aug. 21, 1996 ("ICI Letter").

⁶ 47 U.S.C. § 227.

⁷ Under the "cold call" rule, each NASD member who 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 such member or its associated persons. Securities Exchange Act Release No. 35831 (Jun. 9, 1995), 60 FR 31527 (Jun. 15, 1995) (order approving File No. SR-NASD-95-13).

⁸ 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. (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 included, 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 CFR 64.1200). With certain limited exceptions, the FCC Rules apply to all residential telephone solicitations, including those relating to securities transactions. *Id.* While the FCC Rules are applicable to brokers 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").

⁹ Release No. 35831, *supra* note 7.

¹⁰ 15 U.S.C. §§ 6101-08.

¹¹ 16 CFR 310.

¹² §§ 310.3-4 of FTC Rules.

¹³ *Id.* Pursuant to the Telemarketing Act, the FTC Rules do not apply to brokers, dealers, and other securities industry professionals. Section 3(d)(2)(A) of the Telemarketing Act.

A "demand draft" is used to obtain 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.

¹⁴ The NASDR issued 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 NASDR published this NTM in July 1996. NTM 96-44 (July 1996).

prior consent of the person, 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 is 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 responsible for maintaining and servicing accounts of certain "existing customers" assigned to or under the control of the associated persons. 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, by an associated person, 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 the associated person at the time of the transaction or deposit. Proposed subparagraph (c)(2) exempts such calls, by an associated person, 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. Each of these exemptions also permit calls by other associated persons acting at the direction of an associated person who is assigned to or controlling the account. Proposed paragraph (c)(3) exempts telephone calls to a broker or dealer. The proposed rule change also expressly clarifies that the scope of this rule is limited to the telemarketing calls described herein; the terms of the Rule do 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.¹⁵

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. The proposal also states that this provision shall not, however, require maintenance of copies of negotiable instruments signed by customers.¹⁶

IV. Summary of Comments

The Commission received two negative comment letters regarding the NASD's initial proposal to amend NASD telemarketing rules.¹⁷ The issues raised therein, together with responses by the NASD, including amendments to its initial proposed rule change, are discussed below.

In the Merrill Lynch Letter, Merrill Lynch objected to paragraph (c) of Rule 2211, which exempts from the time-of-day and disclosure requirements of paragraphs (a) and (b) telephone calls by associated persons 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." Merrill Lynch stated that the language of paragraph (c) implies that the relationship between the associated person controlling or assigned to the specific customer account is the defining relationship for purposes of the Rule rather than the relationship between the firm and the customer. Merrill Lynch further stated that the language appears to disregard the common practice of a firm designating an associated person in place of one earlier assigned to an account but who may no longer be assigned to it or may no longer be associated with the firm. Accordingly, Merrill Lynch suggested deletion of the phrase "under the control of or assigned to such associated person" in paragraph (c) of Rule 2211 and replacing the words "an account that, at the time of the transaction or the deposit, was under the control of or assigned to, such associated person" in subparagraphs (c) (1) and (2) of Rule 2211 with the phrase "an account maintained at the member." Merrill Lynch also objected to the definition of "existing customer" provided in subparagraph (c)(3) of Rule

2211, which defines the term as "a customer for whom the broker or dealer, or clearing broker or dealer on behalf of such broker or dealer, carries an account." Merrill Lynch stated that the language fails to recognize those customers that may use or engage services of the firm, but not maintain an account with the firm. Accordingly, Merrill Lynch suggested modifying the definition of "existing customer" to mean "a person who currently maintains an account with, has positions or assets on the books of, or who within the past twelve months has used services provided by the firm, an affiliated firm, or a clearing broker or dealer acting, on its behalf."

Merrill Lynch also objected to NASD Conduct Rule 3110, which seeks to (i) 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 or similar account without obtaining that person's express written authorization; and (ii) to require the retention of such authorization for a three year period. Merrill Lynch stated that this creates an unintended consequence with respect to original checks in that it requires the maintenance of customer checks for three years. This is because actual checks pass out of the receiving firms' possession and return ultimately to the makers' banks, and thus physically could not be retained. Accordingly, Merrill Lynch suggested adding to subparagraph (g)(3) the following language: "This provision shall not, however, require maintenance of copies of negotiable instruments signed by customers."

In response to the Merrill Lynch Letter, the NASDR amended Rule 2211 by adding the following to subparagraph (c)(3): "The scope 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." The NASDR believes that this clarifies that the proposed rule is not intended to affect the definition of "customer" or the nature of firm-customer or salesperson-customer relationships, outside the context of the rule. The NASDR also amended Rule 3110 by adding the following to subparagraph (g)(3): "This provision shall not, however, require maintenance of copies of negotiable instruments signed by customers."

In the ICI Letter, the ICI raised the concern that Rule 3110 may apply to and, therefore, prohibit certain

¹⁵ See Amendment No. 3, *supra* note 3.

¹⁶ *Id.*

¹⁷ See *supra* note 5.

telephonic or electronic mutual fund transactions initiated by existing mutual fund shareholders. For example, the ICI argued that telephone exchange transactions could be deemed to violate Rule 3110 because they entail oral instructions to redeem shares of one fund and purchase shares of another fund. Moreover, ICI argues that unless the broker-dealer's customer provided written authorization to debit the customer's bank account to his or her broker-dealer, who in turn forwarded such written authorization to the fund's distributor, the distributor could be deemed to be in violation of Rule 3110. In response to the ICI Letter, the NASDR stated that electronic or telephonic mutual fund transfers initiated by existing mutual fund shareholders do not involve telemarketing and, therefore, Rule 3110 does not apply to such transactions.

V. Discussion

After careful consideration of the comments and the NASDR's responses thereto, the Commission has determined to approve the proposed rule change. The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the Association, and, in particular, with Section 15A(b)(6) of the Act¹⁸ which requires, among other things, that the rules of the Association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.¹⁹ The proposed rule change is consistent with these objectives in that it imposes time restriction and disclosure requirements, with certain exceptions, on members' telemarketing calls, requires verifiable authorization from a customer for demand drafts, and prevents members from engaging in certain deceptive and abusive telemarketing acts and practices while allowing for legitimate telemarketing practices.

The Commission believes that the addition of Rule 2211, prohibiting a member or person associated with a member from making 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, is appropriate.

The Commission notes that, by restricting the times during which a member or person associated with a member may call a residence, the proposal furthers the interest of the public and provides for the protection of investors by preventing members and member organizations from engaging in unacceptable practices, such as persistently calling members of the public at unreasonable hours of the day and night.

The Commission also believes that the addition of Rule 2211, requiring a member or person associated with a member to promptly disclose to the called person in a clear and conspicuous manner the caller's identity and firm, telephone number or address at which the caller may be contacted, and that the purpose of the call is to solicit the purchase of securities or related services, is appropriate. By requiring the caller to identify himself or herself and the purpose of the call, the Rule assists in the prevention of fraudulent and manipulative acts and practices by providing investors with information necessary to make an informed decision when purchasing securities. Moreover, by requiring the associated person to identify the firm for which he or she works and the telephone number or address at which the caller may be contacted, the Rule encourages responsible use of the telephone to market securities.

The Commission also believes that Rule 2211, creating exemptions from the time-of-day and disclosure requirements for telephone calls by associated persons, or other associated persons acting at the direction of such persons, to certain categories of "existing customers" is appropriate. The Commission believes it is appropriate to create an exemption for calls to customers with whom there are existing relationships in order to accommodate personal and timely contact with a broker who can be presumed to know when it is convenient for a customer to respond to telephone calls. Moreover, such an exemption also may be necessary to accommodate trading with customers in multiple time zones across the United States. The Commission, however, believes that the exemption from the time-of-day and disclosure requirements should be limited to calls to persons with whom the broker has a minimally active relationship. In this regard, the Commission believes that Rule 2211 achieves an appropriate balance between providing protection for the public and the members' interest in competing for customers.

The Commission also believes that the amendment to Rule 3110, requiring that a member or person associated with a member obtain from a customer, and maintain for three years, express written authorization when submitting for payment a check, draft, or other form of negotiable paper drawn on a customer's checking, savings, share or similar account, is appropriate. The Commission notes that by requiring a member or person associated with a member to obtain express written authorization from a customer in the above-mentioned circumstances assists in the prevention of fraudulent and manipulative acts in that it reduces the opportunity for a member or person associated with a member to misappropriate customers' funds. Moreover, the Commission believes that by requiring a member or person associated with a member to retain the authorization for three years, Rule 3110 protects investors and the public interest in that it provides interested parties with the ability to acquire information necessary to ensure that valid authorization was obtained for the transfer of a customer's funds for the purchase of a security.

Finally, the Commission believes that the proposed rule achieves a reasonable balance between the Commission's interest in preventing members from engaging in deceptive and abusive telemarketing acts and the members' interest in conducting legitimate telemarketing practices.

The Commission finds good cause for approving Amendment No. 3 prior to the thirtieth day after the date of publication of notice thereof in the Federal Register. Amendment No. 3 simply clarifies portions of the proposed Rule and does not raise any significant regulatory concerns. Therefore, the Commission believes that granting accelerated approval to Amendment No. 3 is appropriate and consistent with Section 15A and Section 19(b)(2) of the Act.

Interested persons are invited to submit written date, views and arguments concerning Amendment No. 3. 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 submission, all subsequent Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 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

¹⁸ 15 U.S.C. § 780-3.

¹⁹ In approving these rules, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. 15 U.S.C. § 78c(f).

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 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 January 6, 1997.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,²⁰ that the proposed rule change (SR-NASD-96-28), as amended, as approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority:²¹

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 96-31723 Filed 12-12-96; 8:45 am]

BILLING CODE 8010-01-M

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Collection Request

The Social Security Administration publishes a list of information collection packages that will require submission to the Office of Management and Budget (OMB) for clearance in compliance with Public Law 104-13 effective October 1, 1995. The Paperwork Reduction Act of 1995. The information collection listed below requires extension of the current OMB approval:

1. Letter to Employer Requesting Wage Information—0960-0138. The information collected on form SSA-L4201 is used by the Social Security Administration to determine eligibility and proper payment for Supplemental Security Income (SSI) applicants/recipients. The respondents are employers of applicants for and recipients of SSI payments.

To receive a copy of the form(s) or clearance package(s), call the SSA Reports Clearance Officer on (410) 965-4125 or write to her at the address listed below. Written comments and recommendations regarding information collections should be sent within 60 days from the date of this publication directly to the SSA Reports Clearance Officer at the following address: Social Security Administration, DCFAM, Attn: Judith T. Hasche, 1-A-21 Operations

Building, 6401 Security Blvd.,
Baltimore, MD 21235.

In addition to your comments on the accuracy of the agency's burden estimate, we are soliciting comments on the need for the information; its practical utility; ways to enhance its quality, utility and clarity; and on ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology.

Dated: December 9, 1996.

Judith T. Hasche,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 96-31646 Filed 12-12-96; 8:45 am]

BILLING CODE 4190-29-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Air Traffic Control Tower; West Memphis, Arkansas; Notice of Decommissioning

AGENCY: Federal Aviation Administration [FAA], DOT.

SUMMARY: Notice is hereby given that on or about December 27, 1996, the Airport Traffic Control Tower at West Memphis, Arkansas will be decommissioned. This information will be reflected in the FAA Organization Statement the next time it is issued.

49 U.S.C. 1348, 1354(a); 439 U.S.C. 106(g)

Issued in Fort Worth, Texas, on December 6, 1996.

Clyde M. DeHart, Jr.,

Regional Administrator, Southwest Region.

[FR Doc. 96-31729 Filed 12-12-96; 8:45 am]

BILLING CODE 4910-13-M

Notice of Intent To Rule on Application To Impose and Use the Revenue from a Passenger Facility Charge (PFC) at Nashville International Airport, Nashville, TN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment the application to impose and use the revenue from a PFC at Nashville International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Public Law 101-508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

DATES: Comments must be received on or before January 13, 1997.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Memphis Airports District Office, 2851 Directors Cove, Suite #3, Memphis, TN 38131-0301.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to General William G. Moore, Jr., President of the Metropolitan Nashville Airport Authority at the following address: Metropolitan Nashville Airport Authority, One Terminal Drive, Suite 501, Nashville, Tennessee 37214-4114.

Air carriers and foreign air carriers may submit copies of written comments previously provided to the Metropolitan Nashville Airport Authority under section 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: Mr. Charles L. Harris, Airport Program Manager, Memphis Airports District Office, 2851 Directors Cove, Suite 3, Memphis, Tennessee 38131-0301; telephone number 901-544-3495. The application may be reviewed in person at this location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Nashville International Airport under provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Public Law 101-508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

On December 6, 1996, the FAA determined that the application to impose and use the revenue from a PFC submitted by the Metropolitan Nashville Airport Authority was substantially complete within the requirements of section 158.25 of Part 158. The FAA will approve or disapprove the application, in whole or in part, no later than March 6, 1997.

The following is a brief overview of the application.

PFC application number: 97-03-C-00-BNA.

Level of the proposed PFC: \$3.00.

Proposed charge effective date: January 1, 2002.

Proposed charge expiration date: March 15, 2002.

Total estimated PFC revenue: \$1,475,000.

Total amount of Use approval requested in this application: \$1,475,000.

Brief description of proposed project(s): Multiple User Flight Information Display System.

²⁰ 15 U.S.C. § 78s(b)(2).

²¹ 17 CFR 200.30-3(a)(12) (1994).