



This document is scheduled to be published in the Federal Register on 11/02/2011 and available online at <http://federalregister.gov/a/2011-28348>.

8011-01p
SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-65645; File No. SR-FINRA-2011-059)

October 27, 2011

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change to Adopt FINRA Rule 3230 (Telemarketing) in the FINRA Consolidated Rulebook

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 13, 2011, Financial Industry Regulatory Authority, Inc. (“FINRA”) (f/k/a National Association of Securities Dealers, Inc. (“NASD”)) 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 substantially prepared by FINRA. 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

FINRA is proposing to adopt NASD Rule 2212 (Telemarketing) as FINRA Rule 3230 (Telemarketing) in the consolidated FINRA rulebook, subject to certain amendments. The proposed rule change would delete Incorporated NYSE Rule 440A (Telephone Solicitation) and Incorporated NYSE Rule Interpretation 440A/01. Additionally, the proposed rule change would adopt provisions that are substantially similar to the telemarketing rules of the Federal Trade Commission (“FTC”).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

The text of the proposed rule change is available on FINRA's website at <http://www.finra.org>, at the principal office of FINRA and at the Commission's Public Reference Room.

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

In its filing with the Commission, FINRA 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. FINRA 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

As part of the process of developing a new consolidated rulebook ("Consolidated FINRA Rulebook"),³ FINRA is proposing to adopt NASD Rule 2212 (Telemarketing) as FINRA Rule 3230 (Telemarketing) with changes discussed below. The proposed rule change would delete Incorporated NYSE Rule 440A⁴ (Telephone Solicitation) and Incorporated NYSE Rule Interpretation 440A/01 as they are, in main part, duplicative of

³ The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE ("Incorporated NYSE Rules") (together, the NASD Rules and Incorporated NYSE Rules are referred to as the "Transitional Rulebook"). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE ("Dual Members"). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, see Information Notice, March 12, 2008 (Rulebook Consolidation Process).

⁴ For convenience, the proposed rule change refers to Incorporated NYSE Rules as NYSE Rules.

NASD Rule 2212. However, as further described below, the proposed rule change would incorporate certain provisions of NYSE Rule 440A and its Interpretation into new FINRA Rule 3230. Further, the proposed rule change adds provisions that are substantially similar to FTC rules that prohibit deceptive and other abusive telemarketing acts or practices as described below.

NASD Rule 2212 and NYSE Rule 440A are similar rules that require members to maintain do-not-call lists, limit the hours of telephone solicitations and prohibit members from using deceptive and abusive acts and practices in connection with telemarketing. The Commission directed FINRA and NYSE to enact these telemarketing rules in accordance with the Telemarketing Consumer Fraud and Abuse Prevention Act of 1994 (“Prevention Act”).⁵ The Prevention Act requires the Commission to promulgate or direct any national securities exchange or registered securities association to promulgate, rules substantially similar to the FTC rules to prohibit deceptive and other abusive telemarketing acts or practices.⁶

In 2003, the FTC and the Federal Communications Commission (“FCC”) established requirements for sellers and telemarketers to participate in the national do-not-call registry.⁷ Pursuant to the Prevention Act, the Commission requested that FINRA and NYSE amend their telemarketing rules to include a requirement that their members participate in the national do-not-call registry. In 2004, the Commission approved

⁵ 15 U.S.C. 6101-6108.

⁶ 15 U.S.C. 6102.

⁷ See 68 FR 4580 (January 29, 2003); 68 FR 44144 (July 25, 2003); CG Docket No. 02-278, FCC 03-153, (adopted June 26, 2003; released July 3, 2003).

amendments to NASD Rule 2212 requiring member firms to participate in the national do-not-call registry.⁸ The following year, the Commission approved amendments to NYSE Rule 440A, which were similar to the NASD rule amendments, but included additional provisions regarding the use of caller identification information, pre-recorded messages, telephone facsimiles and computer advertisements.⁹

As mentioned above, the Prevention Act requires the Commission to promulgate, or direct any national securities exchange or registered securities association to promulgate, rules substantially similar to the FTC rules to prohibit deceptive and other abusive telemarketing acts or practices.¹⁰ Earlier this year, Commission staff directed FINRA to conduct a review of its telemarketing rule and propose rule amendments that provide protections that are at least as strong as those provided by the FTC's telemarketing rules.¹¹ Commission staff had concerns "that the SRO [self-regulatory organization] rules overall have not kept pace with the FTC's rules, and thus may no longer meet the standards of the Prevention Act."¹²

Proposed FINRA Rule 3230

The proposed rule change would adopt NASD Rule 2212 into the Consolidated FINRA Rulebook as FINRA Rule 3230 (Telemarketing) in the consolidated FINRA

⁸ See Securities Exchange Act Release No. 49055 (January 12, 2004), 69 FR 2801 (January 20, 2004) (approval order).

⁹ See Securities Exchange Act Release No. 52579 (October 7, 2005), 70 FR 60119 (October 14, 2005) (approval order).

¹⁰ See supra note 6.

¹¹ See Letter from Robert W. Cook, Director, Division of Trading and Markets, SEC, to Richard G. Ketchum, Chairman and Chief Executive Officer, FINRA, dated May 10, 2011.

¹² Id.

rulebook, subject to certain amendments. The proposed rule change would incorporate certain unique aspects of NYSE Rule 440A and its Interpretation. Additionally, the proposed rule change would make amendments and adopt provisions that are substantially similar to rules promulgated by the FTC pursuant to the Prevention Act.

First, the proposed rule change would adopt into new FINRA Rule 3230 similar caller identification information provisions contained in NYSE Rule 440A(h). These provisions provide that members engaging in telemarketing must transmit caller identification information and are explicitly prohibited from blocking caller identification information. The telephone number provided must permit any person to make a do-not-call request during normal business hours. Inclusion of these caller identification information provisions in the proposed rule will not create any new obligations on broker-dealers as they are already subject to identical provisions under FCC regulations.¹³

The proposed rule change would not incorporate the additional provisions in NYSE Rule 440A regarding pre-recorded messages and the use of telephone facsimile or computer advertisements.¹⁴ Similar provisions were never adopted by the FTC under the Prevention Act and thus are not required to be part of SEC or SRO rules. Moreover, these provisions in the NYSE rule are duplicative of similar FCC regulations that are applicable to broker-dealers.¹⁵

Second, the proposed rule change would adopt a provision that is similar to NYSE Rule Interpretation 440A/01 as Supplementary Material. The provision reminds firms

¹³ See 47 CFR 64.1601.

¹⁴ See NYSE Rule 440A(e), (g), (j)(3), (6), (8).

¹⁵ See 47 CFR 64.1200.

that the rule does not affect the obligation of any member or person associated with a member that engages in telemarketing to comply with relevant state and federal laws and rules, including the rules of the FCC relating to telemarketing practices and the rights of telephone consumers. The proposed rule change would not incorporate the remainder of NYSE Rule Interpretation 440A/01 because the requirement for a member to make and maintain a list of persons who do not want to receive telephone solicitations is duplicative of an existing provision in the NASD rule.¹⁶

Third, the proposed rule change, as directed by the Commission staff, would make amendments and adopt provisions that are substantially similar to FTC rules that prohibit deceptive and other abusive telemarketing acts or practices as described below.

Maintenance of Do-Not-Call lists

Proposed FINRA Rule 3230(d)(6) would maintain the requirement in NASD Rule 2212(d)(6) that a member making an outbound telephone call must maintain a record of a caller's request not to receive further calls. However, the proposed rule change would delete the requirement that a member honor a firm-specific do-not-call request for five years from the time the request is made. Commission staff directed FINRA to delete this provision because the time for which the firm-specific opt-out must be honored under the FTC's Telemarketing Sales Rule¹⁷ is indefinite, rather than five years as currently provided in the rule.¹⁸

¹⁶ See NASD Rule 2212(d)(6).

¹⁷ See 16 CFR 310.

¹⁸ See supra note 11.

Wireless Communications

NASD Rule 2212(e) states that the provisions set forth in the rule are applicable to members telemarketing or making telephone solicitations calls to wireless telephone numbers. Proposed FINRA Rule 3230(e) would clarify that the application of the rule also applies to persons associated with a member making outbound telephone calls to wireless telephone numbers.

Outsourcing Telemarketing

NASD Rule 2212(f) states that if a member uses another entity to perform telemarketing services on its behalf, the member remains responsible for ensuring compliance with all provisions contained in the rule. Proposed FINRA Rule 3230(f) would clarify that members must consider whether the entity or person that a member uses for outsourcing, must be appropriately registered or licensed, where required.

Unencrypted Consumer Account Numbers

Proposed FINRA Rule 3230(h) would prohibit a member or person associated with a member from disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing. The proposed rule change is substantially similar to the FTC's provision regarding unencrypted consumer account numbers.¹⁹ The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.²⁰ Additionally, the proposed rule change would define "unencrypted" as not only complete, visible account numbers, whether provided in lists or singly, but also

¹⁹ See 16 CFR 310.4(a)(6).

²⁰ See FTC, Telemarketing Sales Rule, 68 FR 4580 (January 29, 2003) at 4615.

encrypted information with a key to its decryption. The proposed definition is substantially similar to the view taken by the FTC.²¹

Submission of Billing Information

Proposed FINRA Rule 3230(i) would require, for any telemarketing transaction, a member or person associated with a member to obtain the express informed consent of the person to be charged, and to be charged using the identified account. If the telemarketing transaction involves preacquired account information and a free-to-pay conversion feature, the member or person associated with a member would have to: (1) obtain from the customer, at a minimum, the last four digits of the account number to be charged; (2) obtain from the customer an express agreement to be charged and to be charged using the identified account number; and (3) make and maintain an audio recording of the entire telemarketing transaction. For any other telemarketing transaction involving preacquired account information, the member or person associated with a member would have to: (1) identify the account to be charged with sufficient specificity for the customer to understand what account will be charged; and (2) obtain from the customer an express agreement to be charged and to be charged using the identified account number. The proposed rule change is substantially similar to the FTC's provision regarding the submission of billing information.²² The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.²³

²¹ See id. at 4616.

²² See 16 CFR 310.4(a)(7).

²³ See FTC, supra note 20, at 4615.

Abandoned Calls

Proposed FINRA Rule 3230(j) would prohibit a member or person associated with a member from abandoning any outbound telemarketing call. The abandoned calls prohibition would be subject to a “safe harbor” under proposed subparagraph (j)(2) that requires: (1) the member or person associated with a member to employ technology that ensures abandonment of no more than three percent of all calls answered by a person, measured over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues; (2) the member or person associated with a member, for each telemarketing call placed, allows the telephone to ring for at least 15 seconds or four rings before disconnecting an unanswered call; (3) whenever a person associated with a member is not available to speak with the person answering the telemarketing call within two seconds after the person’s completed greeting, the member or person associated with a member promptly plays a recorded message stating the name and telephone number of the member or person associated with a member on whose behalf the call was placed; and (4) the member to maintain records documenting compliance with the “safe harbor.” The proposed rule change is substantially similar to the FTC’s provisions regarding abandoned calls.²⁴ The FTC provided a discussion of the provisions when they were adopted pursuant to the Prevention Act.²⁵

²⁴ See 16 CFR 310.4(b)(1)(iv); see also 16 CFR 310.4(b)(4).

²⁵ See FTC, supra note 20, at 4641.

Prerecorded Messages

Proposed FINRA Rule 3230(k) would prohibit a member or person associated with a member from initiating any outbound telemarketing call that delivers a prerecorded message without a person's express written agreement to receive such calls. The proposed rule change also would require that all prerecorded telemarketing calls provide specified opt-out mechanisms so that a person can opt out of future calls. The prohibition would not apply to a prerecorded message permitted for compliance with the "safe harbor" for abandoned calls under proposed subparagraph (j)(2). The proposed rule change is substantially similar to the FTC's provisions regarding prerecorded messages.²⁶ The FTC provided a discussion of the provisions when they were adopted pursuant to the Prevention Act.²⁷

Credit Card Laundering

Proposed FINRA Rule 3230(l) would prohibit credit card laundering, the practice of depositing into the credit card system a sales draft that is not the result of a credit card transaction between the cardholder and the member. Except as expressly permitted, the proposed rule change would prohibit a member or person associated with a member from: (1) presenting to or depositing into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the member; (2) employing, soliciting, or otherwise causing a merchant, or an employee, representative or agent of the merchant, to present to or to deposit into the credit card system for payment,

²⁶ See 16 CFR 310.4(b)(1)(v).

²⁷ See Federal Trade Commission, Telemarketing Sales Rule, 73 FR 51164 (August 29, 2008).

a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or (3) obtaining access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement or the applicable credit card system. The proposed rule change is substantially similar to the FTC’s provisions regarding credit card laundering.²⁸ The FTC provided a discussion of the provisions when they were adopted pursuant to the Prevention Act.²⁹

Definitions

Proposed FINRA Rule 3230(m) would adopt definitions that are substantially similar to the FTC’s definitions.³⁰ The proposed rule change would adopt substantially similar definitions of “acquirer,”³¹ “billing information,”³² “caller identification service,”³³ “cardholder,”³⁴ “charitable contribution,”³⁵ “credit,”³⁶ “credit card,”³⁷ “credit

²⁸ See 16 CFR 310.2.

²⁹ See Federal Trade Commission, Telemarketing Sales Rule, 60 FR 43842 (August 23, 1995) at 43852.

³⁰ See 16 CFR 310.2.

³¹ See 16 CFR 310.2(a).

³² See 16 CFR 310.2(c).

³³ See 16 CFR 310.2(d).

³⁴ See 16 CFR 310.2(e).

³⁵ See 16 CFR 310.2(f).

³⁶ See 16 CFR 310.2(h).

³⁷ See 16 CFR 310.2(i).

card sales draft,”³⁸ “credit card system,”³⁹ “customer,”⁴⁰ “donor,”⁴¹ “free-to-pay conversion,”⁴² “merchant,”⁴³ “merchant agreement,”⁴⁴ “outbound telephone call,”⁴⁵ “person”⁴⁶ and “preacquired account information.”⁴⁷ Additionally, the proposed rule change amends the definition of “telemarketing” to track the FTC definition and deletes the reference to “telephone solicitation.” The FTC provided a discussion of each definition when they were adopted pursuant to the Prevention Act.⁴⁸

Technical and Conforming Changes

The proposed rule change also would make a number of minor technical and conforming changes. First, proposed FINRA Rule 3230(m) would renumber and make minor technical changes to the terms “account activity,” “broker-dealer of record” and “established business relationship.” Second, proposed FINRA Rule 3230 would amend paragraphs (a), (b) and (c) by replacing the term “telephone solicitation” with the term “outbound telephone call.” Third, proposed FINRA Rule 3230(d) would replace the term

³⁸ See 16 CFR 310.2(j).

³⁹ See 16 CFR 310.2(k).

⁴⁰ See 16 CFR 310.2(l).

⁴¹ See 16 CFR 310.2(n).

⁴² See 16 CFR 310.2(p).

⁴³ See 16 CFR 310.2(s).

⁴⁴ See 16 CFR 310.2(t).

⁴⁵ See 16 CFR 310.2(v).

⁴⁶ See 16 CFR 310.2(w).

⁴⁷ See 16 CFR 310.2(x).

⁴⁸ See FTC, supra note 29, at 43843; see also FTC, supra note 20, at 4587.

“telemarketing call” with the term “outbound telephone call.” Fourth, the proposed rule change would update a reference to an “established business relationship” in subparagraph (a)(1)(A). Finally, the proposed rule change would amend paragraph (b) to clarify that a signed, written agreement may be obtained electronically under the E-Sign Act.

FINRA will announce the implementation date of the proposed rule change in a Regulatory Notice to be published no later than 90 days following Commission approval. The implementation date will be no later than 180 days following Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁴⁹ which requires, among other things, that FINRA rules must 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. FINRA believes that the proposed rule change will protect investors and the public interest by continuing to prohibit deceptive and other abusive telemarketing acts or practices.

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

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

⁴⁹ 15 U.S.C. 78o-3(b)(6).

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

Within 45 days of the date of 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 organization consents, the Commission will:

(A) by order approve or disapprove such 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, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-FINRA-2011-059 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2011-059. This file number should be included on the subject line if e-mail is used. To help the Commission process

and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). 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 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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-FINRA-2011-059 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁰

Kevin M. O'Neill
Deputy Secretary

[FR Doc. 2011-28348 Filed 11/01/2011 at 8:45 am; Publication Date: 11/02/2011]

⁵⁰ 17 CFR 200.30-3(a)(12).