

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 53	SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 Form 19b-4	File No.* SR - 2012 - * 04 Amendment No. (req. for Amendments *)
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Proposed Rule Change by NYSE MKT LLC.  
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input type="checkbox"/>	Section 19(b)(3)(A) * <input checked="" type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>		
Pilot <input type="checkbox"/>			Rule				
Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>	19b-4(f)(1) <input type="checkbox"/>	19b-4(f)(2) <input type="checkbox"/>	19b-4(f)(3) <input type="checkbox"/>	19b-4(f)(4) <input type="checkbox"/>	19b-4(f)(5) <input type="checkbox"/>	19b-4(f)(6) <input checked="" type="checkbox"/>

Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>
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**Description**  
Provide a brief description of the proposed rule change (limit 250 characters, required when Initial is checked \*).  
Proposal to delete NYSE MKT Rule 428a which addresses telephone solicitation and amend NYSE MKT Rule 429 which addresses telemarketing to adopt new rule text that is substantially similar to FINRA Rule 3230

**Contact Information**  
Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name \* Clare Last Name \* Saperstein  
Title \* Vice President NYSE Regulation Inc  
E-mail \* csaperstein@nyx.com  
Telephone \* (212) 656-2355 Fax (212) 656-2223

**Signature**  
Pursuant to the requirements of the Securities Exchange Act of 1934,  
  
has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized officer.

Date 06/25/2012  
By Sudhir Bhattacharyya Vice President  
(Name \*) (Title \*)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

NYX Sudhir Bhattacharyya,

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

**Form 19b-4 Information (required)**

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change (required)**

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

- (a) NYSE MKT LLC (“NYSE MKT” or the “Exchange”) proposes to delete Rule 428(a), which addresses telephone solicitation, and amend Rule 429, which addresses telemarketing, to adopt new rule text that is substantially similar to FINRA Rule 3230. A copy of this filing is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the Exchange’s principal office and at the Public Reference Room of the Securities and Exchange Commission (“Commission”).
- (b) The Exchange does not believe that the proposed rule changes will have any direct effect, or any significant indirect effect, on any other Exchange rule in effect at the time of this filing.
- (c) Not applicable.

2. Procedures of the Self-Regulatory Organization

Senior management has approved the proposed rule changes pursuant to authority delegated to it by the Board of the Exchange. No further action is required under the Exchange’s governing documents. Therefore, the Exchange’s internal procedures with respect to the proposed rule changes are complete.

The person on the Exchange staff prepared to respond to questions and comments on the proposed rule changes is:

Clare F. Saperstein  
Vice President  
NYSE Regulation Inc.  
(212) 656-2355

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

(a) Purpose

The Exchange proposes to delete Rule 428(a), which addresses telephone solicitation, and amend Rule 429, which addresses telemarketing, to adopt new rule text that is substantially similar to FINRA Rule 3230.<sup>1</sup>

Proposed Rule Change

The Exchange proposes to delete Rule 428(a), amend Rule 429, and adopt new rule text to Rule 429 to conform to the changes adopted by FINRA for

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<sup>1</sup> See Securities Exchange Act Release No. 66279 (January 30, 2012), 77 FR 5611 (February 3, 2012) (SR-FINRA-2011-059). FINRA’s rule change will become effective on June 29, 2012. See FINRA Regulatory Notice 12-17.

telemarketing. FINRA adopted NASD Rule 2212 as FINRA Rule 3230, taking into account FINRA Incorporated New York Stock Exchange LLC (“NYSE”) Rule 440A and NYSE Interpretation 440A/01. FINRA Rule 3230 adds provisions that are substantially similar to Federal Trade Commission (“FTC”) rules that prohibit deceptive and other abusive telemarketing acts or practices.

NASD Rule 2212 and Rules 428 and 429 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 the Exchange to enact these telemarketing rules in accordance with the Telemarketing Consumer Fraud and Abuse Prevention Act of 1994 (“Prevention Act”).<sup>2</sup> 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.<sup>3</sup>

In 2003, the FTC and the Federal Communications Commission established requirements for sellers and telemarketers to participate in the national do-not-call registry.<sup>4</sup> Pursuant to the Prevention Act, the Commission requested that FINRA and the Exchange amend their telemarketing rules to include a requirement that their members participate in the national do-not-call registry. In 2004, the Commission approved amendments to NASD Rule 2212 requiring member firms to participate in the national do-not-call registry.<sup>5</sup> The following year, the Commission approved amendments to Rule 429, 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.<sup>6</sup>

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.<sup>7</sup> In 2011, Commission staff directed all exchanges and FINRA to conduct a review of their telemarketing rules and propose rule amendments that provide protections that are at least as

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<sup>2</sup> 15 U.S.C. 6101-6108.

<sup>3</sup> 15 U.S.C. 6102.

<sup>4</sup> 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).

<sup>5</sup> See Securities Exchange Act Release No. 49055 (January 12, 2004), 69 FR 2801 (January 20, 2004) (Order Approving File No. SR-NASD-2003-131).

<sup>6</sup> See Securities Exchange Act Release No. 52844 (December 5, 2005), 70 FR 72477 (November 28, 2005) (Order Approving File No. SR-Amex-2005-064).

<sup>7</sup> 15 U.S.C. 6102.

strong as those provided by the FTC’s telemarketing rules. FINRA’s adoption of FINRA Rule 3230 reflects amendments to NASD Rule 2212 and FINRA Incorporated NYSE Rule 440A that update those rules to meet the standards of the Prevention Act.<sup>8</sup>

The proposed rule change, as directed by the Commission staff, adopts provisions in proposed Rule 429 that are substantially similar to the FTC’s current rules that prohibit deceptive and other abusive telemarketing acts or practices as described below.<sup>9</sup>

### Telemarketing Requirements

Proposed Rule 429(a) provides that no member organization or person associated with a member organization shall initiate any outbound telephone call<sup>10</sup> to:

- (1) any residence of a person before the hour of 8 a.m. or after 9 p.m. (local time at the called party’s location), unless the member organization has an established business relationship<sup>11</sup> with the

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<sup>8</sup> See Securities Exchange Act Release No. 65645 (October 27, 2011), 76 FR 67787 (November 2, 2011) (Order Approving File No. SR-FINRA-2011-059).

<sup>9</sup> The text of proposed Rule 429 would be the same as FINRA Rule 3230, except that the Exchange would substitute the term “member organization” for “member.”

<sup>10</sup> An “outbound telephone call” is a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution from a donor. A “customer” is any person who is or may be required to pay for goods or services through telemarketing. A “donor” means any person solicited to make a charitable contribution. A “person” is any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity. “Telemarketing” means consisting of or relating to a plan, program, or campaign involving at least one outbound telephone call, for example cold-calling. The term does not include the solicitation of sales through the mailing of written marketing materials, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the marketing materials and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term “further solicitation” does not include providing the customer with information about, or attempting to sell, anything promoted in the same marketing materials that prompted the customer’s call. See proposed Rule 429(m)(11), (14), (16), (17), and (20); see also FINRA Rule 3230(m)(11), (14), (16), (17), and (20); and 16 CFR 310.2(f), (l), (n), (v), (w), and (dd).

<sup>11</sup> An “established business relationship” is a relationship between a member organization and a person if (i) the person has made a financial transaction or has a security position, a money balance, or account activity with the member

person pursuant to paragraph, the member organization has received that person's prior express invitation or permission, or the person called is a broker or dealer;

- (2) any person that previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the member organization;<sup>12</sup> or
- (3) any person who has registered his or her telephone number on the FTC's national do-not-call registry.

The proposed rule change is substantially similar to the FTC's provisions regarding abusive telemarketing acts or practices.<sup>13</sup> The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.<sup>14</sup>

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organization or at a clearing firm that provides clearing services to the member organization within the 18 months immediately preceding the date of an outbound telephone call; (b) the member organization is the broker-dealer of record for an account of the person within the 18 months immediately preceding the date of an outbound telephone call; or (c) the person has contacted the member organization to inquire about a product or service offered by the member organization within the three months immediately preceding the date of an outbound telephone call. A person's established business relationship with a member organization does not extend to the member organization's affiliated entities unless the person would reasonably expect them to be included. Similarly, a person's established business relationship with a member organization's affiliate does not extend to the member organization unless the person would reasonably expect the member organization to be included. The term "account activity" includes, but is not limited to, purchases, sales, interest credits or debits, charges or credits, dividend payments, transfer activity, securities receipts or deliveries, and/or journal entries relating to securities or funds in the possession or control of the member organization. The term "broker-dealer of record" refers to the broker or dealer identified on a customer's account application for accounts held directly at a mutual fund or variable insurance product issuer. *See* proposed Rule 429(m)(1), (4), and (12); *see also* 16 CFR 310.2(o) and FINRA Rule 3230(m)(1), (4), and (12).

<sup>12</sup> This restriction was previously included under Rule 429(a). *See* the discussion below under Procedures.

<sup>13</sup> *See* 16 CFR 310.4(b)(1)(iii)(A) and (B) and (c); *see also* FINRA Rule 3230(a).

<sup>14</sup> *See* Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (Jan. 29, 2003) at 4628; and Federal Trade Commission, *Telemarketing Sales Rule*, 60 FR 43842 (Aug. 23, 1995) at 43855.

### National Do-Not-Call List Exceptions

Proposed Rule 429(b) provides that a member organization making outbound telephone calls will not be liable for initiating any outbound telephone call to any person who has registered his or her telephone number on the FTC's national do-not-call registry if:

- (1) the member organization has an established business relationship with the recipient of the call;<sup>15</sup>
- (2) the member organization has obtained the person's prior express invitation or permission;<sup>16</sup> or
- (3) the associated person making the call has a personal relationship<sup>17</sup> with the recipient of the call.

The proposed rule change modifies the established business relationship exception in Rule 429 and the definition for "established business relationships," which is substantially similar to the FTC's definition of that term.<sup>18</sup> In addition, the proposed rule change is substantially similar to the FTC's provision regarding an exception to the prohibition on making outbound telephone calls to persons on the FTC's do-not-call registry.<sup>19</sup> The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.<sup>20</sup>

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<sup>15</sup> A person's request to be placed on the firm-specific do-not-call list terminates the established business relationship exception to that national do-not-call list provision for that member organization even if the person continues to do business with the member organization.

<sup>16</sup> Such permission must be evidenced by a signed, written agreement (which may be obtained electronically under the E-Sign Act (*See* 15 U.S.C. 7001 et seq.) between the person and member organization which states that the person agrees to be contacted by the member organization and includes the telephone number to which the calls may be placed.

<sup>17</sup> The term "personal relationship" means any family member, friend, or acquaintance of the person making an outbound telephone call. *See* proposed Rule 429(m)(18); *see also* FINRA Rule 3230(m)(18).

<sup>18</sup> *See supra* note 11; *see also* FINRA Rule 3230(a).

<sup>19</sup> *See* 16 CFR 310.4(b)(1)(iii)(B); *see also* FINRA Rule 3230(b).

<sup>20</sup> *See* Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (Jan. 29, 2003) at 4628; and Federal Trade Commission, *Telemarketing Sales Rule*, 60 FR 43842 (Aug. 23, 1995) at 43854.

### Safe Harbor Provision

Proposed Rule 429(c) provides that a member organization or person associated with a member organization making outbound telephone calls will not be liable for initiating any outbound telephone call to any person who has registered his or her telephone number on the FTC's national do-not-call registry if the member organization or person associated with a member organization demonstrates that the violation is the result of an error and that as part of the member organization's routine business practice, it meets the following standards:

- (1) the member organization has established and implemented written procedures to comply with the national do-not-call rules;
- (2) the member organization has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;
- (3) the member organization has maintained and recorded a list of telephone numbers that it may not contact; and
- (4) the member organization uses a process to prevent outbound telephone calls to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than 31 days prior to the date any call is made, and maintains records documenting this process.

The proposed rule change is substantially similar to the FTC's safe harbor to the prohibition on making outbound telephone calls to persons on the FTC's national do-not-call registry.<sup>21</sup> The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.<sup>22</sup>

### Procedures

Proposed Rule 429(d) adopts procedures that member organizations must institute to comply with Rule 429(a) prior to engaging in telemarketing. These procedures are substantially similar to the procedural requirements under Rule 429(d); however, the proposed rule change deletes the requirement that a member organization honor a firm-specific do-not-call request for five years from the time the request is made. Additionally, the proposed rule change clarifies that the

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<sup>21</sup> See 16 CFR 310.4(b)(1)(iii)(B); *see also* FINRA Rule 3230(c).

<sup>22</sup> See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (Jan. 29, 2003) at 4628; and Federal Trade Commission, *Telemarketing Sales Rule*, 60 FR 43842 (Aug. 23, 1995) at 43855.

request not to receive further calls would come from a person. The procedures must meet the following minimum standards:

- (1) Member organizations must have a written policy for maintaining their do-not-call lists.
- (2) Personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the member organization's do-not-call list.
- (3) If a member organization receives a request from a person not to receive calls from that member organization, the member organization must record the request and place the person's name, if provided, and telephone number on its do-not-call list at the time the request is made.<sup>23</sup>
- (4) Member organizations or persons associated with a member organization making an outbound telephone call must make certain caller disclosures set forth in Rule 429(d)(4).
- (5) In the absence of a specific request by the person to the contrary, a person's do-not-call request shall apply to the member organization making the call, and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the call and the product being advertised.
- (6) A member organization making outbound telephone calls must maintain a record of a person's request not to receive further calls.

Inclusion of this requirement to adopt these procedures will not create any new obligations on member organizations, as they are already subject to identical provisions under FCC telemarketing regulations.<sup>24</sup>

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<sup>23</sup> Member organizations must honor a person's do-not-call request within a reasonable time from the date the request is made, which may not exceed 30 days from the date of the request. If these requests are recorded or maintained by a party other than the member organization on whose behalf the outbound telephone call is made, the member organization on whose behalf the outbound telephone call is made will still be liable for any failures to honor the do-not-call request.

<sup>24</sup> See 47 CFR 64.1200(d); see also FINRA Rule 3230(d).

### Wireless Communications

Proposed Rule 429(e) states that the provisions set forth in the rule are applicable to member organizations telemarketing or making telephone solicitations calls to wireless telephone numbers. In addition, proposed Rule 429(e) clarifies that the application of the rule also applies to persons associated with a member organization making outbound telephone calls to wireless telephone numbers.<sup>25</sup>

### Outsourcing Telemarketing

Rule 429(f) states that if a member organization uses another entity to perform telemarketing services on its behalf, the member organization remains responsible for ensuring compliance with all provisions contained in the rule. Proposed Rule 429(f) also clarifies that member organizations must consider whether the entity or person that a member organization uses for outsourcing, must be appropriately registered or licensed, where required.<sup>26</sup>

### Caller Identification Information

Proposed Rule 429(g) provides that any member organization that engages in telemarketing must transmit or cause to be transmitted the telephone number, and, when made available by the member organization's telephone carrier, the name of the member organization, to any caller identification service in use by a recipient of an outbound telephone call. The telephone number so provided must permit any person to make a do-not-call request during regular business hours. In addition, any member organization that engages in telemarketing is prohibited from blocking the transmission of caller identification information.<sup>27</sup>

These provisions are similar to the caller identification provision in the FTC rules.<sup>28</sup> Inclusion of these caller identification provisions in this proposed rule change will not create any new obligations on member organizations, as they are already subject to identical provisions under FCC telemarketing regulations.<sup>29</sup>

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<sup>25</sup> See also FINRA Rule 3230(e).

<sup>26</sup> See also FINRA Rule 3230(f).

<sup>27</sup> Caller identification information includes the telephone number and, when made available by the member organization's telephone carrier, the name of the member organization.

<sup>28</sup> See 16 CFR 310.4(a)(8); see also FINRA Rule 3230(g).

<sup>29</sup> See 47 CFR 64.1601(e).

### Unencrypted Consumer Account Numbers

Proposed Rule 429(h) prohibits a member organization or person associated with a member organization 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.<sup>30</sup> The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.<sup>31</sup> Additionally, the proposed rule change defines "unencrypted" as not only complete, visible account numbers, whether provided in lists or singly, but also encrypted information with a key to its decryption. The proposed definition is substantially similar to the view taken by the FTC.<sup>32</sup>

### Submission of Billing Information

The proposed rule change provides that, for any telemarketing transaction, no member organization or person associated with a member organization may submit billing information<sup>33</sup> for payment without the express informed consent of the customer. Proposed Rule 429(i) requires, for any telemarketing transaction, a member organization or person associated with a member organization 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<sup>34</sup> and a free-to-pay conversion<sup>35</sup> feature, the member organization or person associated with a member organization must:

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<sup>30</sup> See 16 CFR 310.4(a)(6); *see also* FINRA Rule 3230(h).

<sup>31</sup> See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (January 29, 2003) at 4615.

<sup>32</sup> *See id.* at 4616.

<sup>33</sup> The term "billing information" means any data that enables any person to access a customer's or donor's account, such as a credit or debit card number, a brokerage, checking, or savings account number, or a mortgage loan account number. *See* proposed Rule 429(m)(3).

<sup>34</sup> The term "preacquired account information" means any information that enables a member organization or person associated with a member organization to cause a charge to be placed against a customer's or donor's account without obtaining the account number directly from the customer or donor during the telemarketing transaction pursuant to which the account will be charged. *See* proposed Rule 429(m)(19).

<sup>35</sup> The term "free-to-pay conversion" means, in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period. *See* proposed Rule 429(m)(13).

- (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 organization or person associated with a member organization must:

- (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.<sup>36</sup> The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.<sup>37</sup>

#### Abandoned Calls

Proposed Rule 429(j) prohibits a member organization or person associated with a member organization from abandoning<sup>38</sup> any outbound telemarketing call. The abandoned calls prohibition is subject to a "safe harbor" under proposed subparagraph (j)(2) that requires:

- (1) the member organization or person associated with a member organization 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;

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<sup>36</sup> See 16 CFR 310.4(a)(7); see also FINRA Rule 3230(i).

<sup>37</sup> See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (January 29, 2003) at 4615.

<sup>38</sup> An outbound telephone call is "abandoned" if the called person answers it and the call is not connected to a member organization or person associated with a member organization within two seconds of the called person's completed greeting.

- (2) the member organization or person associated with a member organization, 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 organization is not available to speak with the person answering the telemarketing call within two seconds after the person's completed greeting, the member organization or person associated with a member organization promptly plays a recorded message stating the name and telephone number of the member organization or person associated with a member organization on whose behalf the call was placed; and
- (4) the member organization to maintain records documenting compliance with the "safe harbor."

The proposed rule change is substantially similar to the FTC's provisions regarding abandoned calls.<sup>39</sup> The FTC provided a discussion of the provisions when they were adopted pursuant to the Prevention Act.<sup>40</sup>

#### Prerecorded Messages

Proposed Rule 429(k) prohibits a member organization or person associated with a member organization from initiating any outbound telemarketing call that delivers a prerecorded message without a person's express written agreement<sup>41</sup> to receive such calls. The proposed rule change also requires that all prerecorded telemarketing calls provide specified opt-out mechanisms so that a person can opt out of future calls. The prohibition does not apply to a prerecorded message permitted for compliance with the "safe harbor" for abandoned calls under proposed subparagraph (j)(2).

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<sup>39</sup> See 16 CFR 310.4(b)(1)(iv); see also 16 CFR 310.4(b)(4).

<sup>40</sup> See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (January 29, 2003) at 4641.

<sup>41</sup> The express written agreement must: (a) have been obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the member organization to place prerecorded calls to such person; (b) have been obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service; (c) evidence the willingness of the called person to receive calls that deliver prerecorded messages by or on behalf of the member organization; and (d) include the person's telephone number and signature (which may be obtained electronically under the E-Sign Act).

The proposed rule change is substantially similar to the FTC's provisions regarding prerecorded messages.<sup>42</sup> The FTC provided a discussion of the provisions when they were adopted pursuant to the Prevention Act.<sup>43</sup>

### Credit Card Laundering

Proposed Rule 429(l) prohibits credit card laundering, the practice of depositing into the credit card system<sup>44</sup> a sales draft that is not the result of a credit card transaction between the cardholder<sup>45</sup> and the member organization. Except as expressly permitted, the proposed rule change prohibits a member organization or person associated with a member organization from:

- (1) presenting to or depositing into, the credit card system for payment, a credit card sales draft<sup>46</sup> generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the member organization;
- (2) employing, soliciting, or otherwise causing a merchant,<sup>47</sup> or an employee, representative or agent of the merchant, to present to or

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<sup>42</sup> See 16 CFR 310.4(b)(1)(v); see also FINRA Rule 3230(k).

<sup>43</sup> See Federal Trade Commission, *Telemarketing Sales Rule*, 73 FR 51164 (August 29, 2008) at 51165.

<sup>44</sup> The term "credit card system" means any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system. The term "credit card" means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit. The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment. See proposed Rule 429(m)(7), (8), and (10).

<sup>45</sup> The term "cardholder" means a person to whom a credit card is issued or who is authorized to use a credit card on behalf of or in addition to the person to whom the credit card is issued. See proposed Rule 429(m)(6).

<sup>46</sup> The term "credit card sales draft" means any record or evidence of a credit card transaction. See proposed Rule 429(m)(9).

<sup>47</sup> The term "merchant" means a person who is authorized under written contract with an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution. The term "acquirer" means a business organization, financial institution, or an agent of a business organization or financial institution that has authority from an organization that operates or licenses a credit card system to authorize merchants to accept, transmit, or process payment by credit card through the credit card system for money, goods or services, or anything else of value. A "charitable contribution" means any donation or gift of money or any

to deposit 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 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<sup>48</sup> or the applicable credit card system.

The proposed rule change is substantially similar to the FTC’s provisions regarding credit card laundering.<sup>49</sup> The FTC provided a discussion of the provisions when they were adopted pursuant to the Prevention Act.<sup>50</sup>

### Definitions

Proposed Rule 429(m) adopts the following definitions, which are substantially similar to the FTC’s definitions of these terms: “acquirer,” “billing information,” “caller identification service,” “cardholder,” “charitable contribution,” “credit,” “credit card,” “credit card sales draft,” “credit card system,” “customer,” “donor,” “established business relationship,” “free-to-pay conversion,” “merchant,” “merchant agreement,” “outbound telephone call,” “person,” “preacquired account information,” and telemarketing”.<sup>51</sup> The FTC provided a discussion of each definition when they were adopted pursuant to the Prevention Act.

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other thing of value, for example a transfer to a pooled income fund. *See* proposed Rule 429(m)(2) and (14).

<sup>48</sup> The term “merchant agreement” means a written contract between a merchant and an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or charitable contribution. *See* proposed Rule 429(m)(15).

<sup>49</sup> *See* 16 CFR 310.2; *see also* FINRA Rule 3230(1).

<sup>50</sup> *See* Federal Trade Commission, *Telemarketing Sales Rule*, 60 FR 43842 (August 23, 1995) at 43852.

<sup>51</sup> *See* proposed Rule 429(m)(2), (3), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (19), and (20); and 16 CFR 310.2(a), (c), (d), (e), (f), (h), (i), (j), (k), (l), (n), (o), (p), (s), (t), (v), (w), (x), and (dd); *see also* FINRA Rule 3230(m)(2), (3), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (19), and (20). The proposed rule change also adopts definitions of “account activity,” “broker-dealer of record,” and “personal relationship” that are substantially similar to FINRA’s definitions of these terms. *See* proposed Rule 429(m)(1), (4), and (18) and FINRA Rule 3230(m)(1), (4), and (18); *see also* 47 CFR 64.1200(t)(14) (FCC’s definition of “personal relationship”).

The Exchange proposes make the new rule text to Rule 429 effective on the same date as FINRA makes FINRA Rule 3230 effective.<sup>52</sup>

(b) Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act<sup>53</sup> in general, and furthers the objectives of Section 6(b)(5)<sup>54</sup> in particular, in that it is 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 facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. Specifically, the Exchange believes that the proposed rule change supports the objectives of the Act by providing greater harmonization between Rules and FINRA Rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance. In particular, NYSE MKT member organizations that are also FINRA members are subject to Rules 428 and 429 and FINRA Rule 3230 and harmonizing these two rules would promote just and equitable principles of trade by requiring a single standard for telemarketing. In addition, adopting new rule text to Rule 429 will assure that the Exchange's rules governing telemarketing meet the standards set forth in the Prevention Act. To the extent the Exchange has proposed changes that differ from the FINRA version of the Rules, such changes are technical in nature and do not change the substance of the proposed Rules. The Exchange also believes that the proposed rule change will update and clarify the requirements governing telemarketing, which will promote just and equitable principles of trade and help to protect investors.

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

The Exchange does not believe that the proposed rule changes will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Member Organizations, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule changes.

6. Extension of Time Period for Commission Action

Not applicable.

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<sup>52</sup> See *supra* note 1.

<sup>53</sup> 15 U.S.C. 78f(b).

<sup>54</sup> 15 U.S.C. 78f(b)(5).

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

The Exchange believes that the proposal qualifies for immediate effectiveness upon filing as a “non-controversial” rule change in accordance with Section 19(b)(3)(A) of the Act<sup>55</sup> and Rule 19b-4(f)(6) thereunder.<sup>56</sup>

The Exchange asserts that the proposed rule change (i) will not significantly affect the protection of investors or the public interest, (ii) will not impose any significant burden on competition, and (iii) by its terms, will not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest. In addition, the Exchange provided the Commission with written notice of its intent to file the proposed rule changes, along with a brief description and text of the proposed rule changes, at least five business days prior to the date of filing, or such shorter time as the Commission may designate.

The Exchange believes that this filing is non-controversial because it raises no novel issues and is consistent with FINRA rules previously approved by the Commission. In particular, the purpose of the proposed rule change is to conform the Rules to FINRA Rule 3230. Moreover, by updating and clarifying the requirements governing telemarketing, the proposed rule change would help to protect investors and would not significantly burden competition. The Exchange proposes to adopt the rule changes in substantially the form that they were approved by the Commission for FINRA.<sup>57</sup> Accordingly, the Exchange believes that these rule changes are eligible for immediately effective treatment under the Commission’s current procedures for processing rule filings.<sup>58</sup>

The Exchange respectfully requests that the Commission waive the 30-day delayed operative date so that the proposed rule change may become effective and operative upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act<sup>59</sup> and Rule 19b-4(f)(6)<sup>60</sup> thereunder. Waiving the 30-day delay would permit the Exchange to more promptly harmonize its rules with FINRA.

For the foregoing reasons, the Exchange believes that this rule filing qualifies for immediate effectiveness as a “non-controversial” rule change. At any time within

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<sup>55</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>56</sup> 17 CFR 240.19b-4(f)(6).

<sup>57</sup> *See supra* note 1.

<sup>58</sup> *See* Securities Exchange Act Release No. 58092 (July 3, 2008), 73 FR 40144 (July 11, 2008) (concerning 17 CFR 200 and 241).

<sup>59</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>60</sup> 17 CFR 240.19b-4.

60 days of the filing of the proposed rule changes, the Commission summarily may temporarily suspend such rule changes if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

The proposed rule change is based on FINRA Rule 3230.

9. Exhibits

Exhibit 1 – Form of Notice of Proposed Rule Change for Federal Register

Exhibit 5 – Text of Proposed Rule Change

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34- ; File No. SR-NYSEMKT-2012-04)

[Date]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Deleting Rule 428(a), Which Addresses Telephone Solicitation, and Amending Rule 429, Which Addresses Telemarketing, to Adopt New Rule Text That is Substantially Similar to FINRA Rule 3230

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on June 25, 2012, NYSE MKT LLC (the “Exchange” or “NYSE MKT”) filed with the Securities and Exchange Commission (the “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 Exchange proposes to delete Rule 428(a), which addresses telephone solicitation, and amend Rule 429, which addresses telemarketing, to adopt new rule text that is substantially similar to FINRA Rule 3230. The text of the proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

The Exchange proposes to delete Rule 428(a), which addresses telephone solicitation, and amend Rule 429, which addresses telemarketing, to adopt new rule text that is substantially similar to FINRA Rule 3230.<sup>4</sup>

Proposed Rule Change

The Exchange proposes to delete Rule 428(a), amend Rule 429, and adopt new rule text to Rule 429 to conform to the changes adopted by FINRA for telemarketing. FINRA adopted NASD Rule 2212 as FINRA Rule 3230, taking into account FINRA Incorporated New York Stock Exchange LLC (“NYSE”) Rule 440A and NYSE Interpretation 440A/01. FINRA Rule 3230 adds provisions that are substantially similar to Federal Trade Commission (“FTC”) rules that prohibit deceptive and other abusive telemarketing acts or practices.

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<sup>4</sup> See Securities Exchange Act Release No. 66279 (January 30, 2012), 77 FR 5611 (February 3, 2012) (SR-FINRA-2011-059). FINRA’s rule change will become effective on June 29, 2012. See FINRA Regulatory Notice 12-17.

NASD Rule 2212 and Rules 428 and 429 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 the Exchange to enact these telemarketing rules in accordance with the Telemarketing Consumer Fraud and Abuse Prevention Act of 1994 (“Prevention Act”).<sup>5</sup> 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.<sup>6</sup>

In 2003, the FTC and the Federal Communications Commission established requirements for sellers and telemarketers to participate in the national do-not-call registry.<sup>7</sup> Pursuant to the Prevention Act, the Commission requested that FINRA and the Exchange amend their telemarketing rules to include a requirement that their members participate in the national do-not-call registry. In 2004, the Commission approved amendments to NASD Rule 2212 requiring member firms to participate in the national do-not-call registry.<sup>8</sup> The following year, the Commission approved amendments to Rule 429, which were similar to the NASD rule amendments, but included additional provisions regarding the use of caller identification information, pre-recorded messages,

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<sup>5</sup> 15 U.S.C. 6101-6108.

<sup>6</sup> 15 U.S.C. 6102.

<sup>7</sup> *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).

<sup>8</sup> *See* Securities Exchange Act Release No. 49055 (January 12, 2004), 69 FR 2801 (January 20, 2004) (Order Approving File No. SR-NASD-2003-131).

telephone facsimiles and computer advertisements.<sup>9</sup>

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.<sup>10</sup> In 2011, Commission staff directed all exchanges and FINRA to conduct a review of their telemarketing rules and propose rule amendments that provide protections that are at least as strong as those provided by the FTC's telemarketing rules. FINRA's adoption of FINRA Rule 3230 reflects amendments to NASD Rule 2212 and FINRA Incorporated NYSE Rule 440A that update those rules to meet the standards of the Prevention Act.<sup>11</sup>

The proposed rule change, as directed by the Commission staff, adopts provisions in proposed Rule 429 that are substantially similar to the FTC's current rules that prohibit deceptive and other abusive telemarketing acts or practices as described below.<sup>12</sup>

#### Telemarketing Requirements

Proposed Rule 429(a) provides that no member organization or person associated with a member organization shall initiate any outbound telephone call<sup>13</sup> to:

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<sup>9</sup> See Securities Exchange Act Release No. 52844 (December 5, 2005), 70 FR 72477 (November 28, 2005) (Order Approving File No. SR-Amex-2005-064).

<sup>10</sup> 15 U.S.C. 6102.

<sup>11</sup> See Securities Exchange Act Release No. 65645 (October 27, 2011), 76 FR 67787 (November 2, 2011) (Order Approving File No. SR-FINRA-2011-059).

<sup>12</sup> The text of proposed Rule 429 would be the same as FINRA Rule 3230, except that the Exchange would substitute the term "member organization" for "member."

<sup>13</sup> An "outbound telephone call" is a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution from a donor. A "customer" is any person who is or may be required to pay for goods or services through telemarketing. A "donor" means any person solicited to

- (1) any residence of a person before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), unless the member organization has an established business relationship<sup>14</sup> with the person pursuant to paragraph, the member organization has received that person's prior express invitation or permission, or the person called is a broker or dealer;

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make a charitable contribution. A "person" is any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity. "Telemarketing" means consisting of or relating to a plan, program, or campaign involving at least one outbound telephone call, for example cold-calling. The term does not include the solicitation of sales through the mailing of written marketing materials, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the marketing materials and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term "further solicitation" does not include providing the customer with information about, or attempting to sell, anything promoted in the same marketing materials that prompted the customer's call. *See* proposed Rule 429(m)(11), (14), (16), (17), and (20); *see also* FINRA Rule 3230(m)(11), (14), (16), (17), and (20); and 16 CFR 310.2(f), (l), (n), (v), (w), and (dd).

<sup>14</sup> An "established business relationship" is a relationship between a member organization and a person if (i) the person has made a financial transaction or has a security position, a money balance, or account activity with the member organization or at a clearing firm that provides clearing services to the member organization within the 18 months immediately preceding the date of an outbound telephone call; (b) the member organization is the broker-dealer of record for an account of the person within the 18 months immediately preceding the date of an outbound telephone call; or (c) the person has contacted the member organization to inquire about a product or service offered by the member organization within the three months immediately preceding the date of an outbound telephone call. A person's established business relationship with a member organization does not extend to the member organization's affiliated entities unless the person would reasonably expect them to be included. Similarly, a person's established business relationship with a member organization's affiliate does not extend to the member organization unless the person would reasonably expect the member organization to be included. The term "account activity" includes, but is not limited to, purchases, sales, interest credits or debits, charges or credits, dividend payments, transfer activity, securities receipts or deliveries, and/or journal entries relating to securities or funds in the possession or control of the member organization. The term "broker-dealer of record" refers to the broker or dealer identified on a customer's account application for accounts held directly at a mutual fund or variable insurance product issuer. *See* proposed Rule 429(m)(1), (4), and (12); *see also* 16 CFR 310.2(o) and FINRA Rule 3230(m)(1), (4), and (12).

- (2) any person that previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the member organization;<sup>15</sup> or
- (3) any person who has registered his or her telephone number on the FTC's national do-not-call registry.

The proposed rule change is substantially similar to the FTC's provisions regarding abusive telemarketing acts or practices.<sup>16</sup> The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.<sup>17</sup>

#### National Do-Not-Call List Exceptions

Proposed Rule 429(b) provides that a member organization making outbound telephone calls will not be liable for initiating any outbound telephone call to any person who has registered his or her telephone number on the FTC's national do-not-call registry if:

- (1) the member organization has an established business relationship with the recipient of the call;<sup>18</sup>
- (2) the member organization has obtained the person's prior express invitation or permission;<sup>19</sup> or

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<sup>15</sup> This restriction was previously included under Rule 429(a). *See* the discussion below under Procedures.

<sup>16</sup> *See* 16 CFR 310.4(b)(1)(iii)(A) and (B) and (c); *see also* FINRA Rule 3230(a).

<sup>17</sup> *See* Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (Jan. 29, 2003) at 4628; and Federal Trade Commission, *Telemarketing Sales Rule*, 60 FR 43842 (Aug. 23, 1995) at 43855.

<sup>18</sup> A person's request to be placed on the firm-specific do-not-call list terminates the established business relationship exception to that national do-not-call list provision for that member organization even if the person continues to do business with the member organization.

<sup>19</sup> Such permission must be evidenced by a signed, written agreement (which may be obtained electronically under the E-Sign Act (*See* 15 U.S.C. 7001 et seq.) between the person and member organization which states that the person agrees to be contacted by the member organization and includes the telephone number to which the calls may be placed.

- (3) the associated person making the call has a personal relationship<sup>20</sup> with the recipient of the call.

The proposed rule change modifies the established business relationship exception in Rule 429 and the definition for “established business relationships,” which is substantially similar to the FTC’s definition of that term.<sup>21</sup> In addition, the proposed rule change is substantially similar to the FTC’s provision regarding an exception to the prohibition on making outbound telephone calls to persons on the FTC’s do-not-call registry.<sup>22</sup> The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.<sup>23</sup>

#### Safe Harbor Provision

Proposed Rule 429(c) provides that a member organization or person associated with a member organization making outbound telephone calls will not be liable for initiating any outbound telephone call to any person who has registered his or her telephone number on the FTC’s national do-not-call registry if the member organization or person associated with a member organization demonstrates that the violation is the result of an error and that as part of the member organization’s routine business practice, it meets the following standards:

- (1) the member organization has established and implemented written procedures to comply with the national do-not-call rules;

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<sup>20</sup> The term “personal relationship” means any family member, friend, or acquaintance of the person making an outbound telephone call. *See* proposed Rule 429(m)(18); *see also* FINRA Rule 3230(m)(18).

<sup>21</sup> *See supra* note 14; *see also* FINRA Rule 3230(a).

<sup>22</sup> *See* 16 CFR 310.4(b)(1)(iii)(B); *see also* FINRA Rule 3230(b).

<sup>23</sup> *See* Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (Jan. 29, 2003) at 4628; and Federal Trade Commission, *Telemarketing Sales Rule*, 60 FR 43842 (Aug. 23, 1995) at 43854.

- (2) the member organization has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;
- (3) the member organization has maintained and recorded a list of telephone numbers that it may not contact; and
- (4) the member organization uses a process to prevent outbound telephone calls to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than 31 days prior to the date any call is made, and maintains records documenting this process.

The proposed rule change is substantially similar to the FTC's safe harbor to the prohibition on making outbound telephone calls to persons on the FTC's national do-not-call registry.<sup>24</sup> The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.<sup>25</sup>

#### Procedures

Proposed Rule 429(d) adopts procedures that member organizations must institute to comply with Rule 429(a) prior to engaging in telemarketing. These procedures are substantially similar to the procedural requirements under Rule 429(d); however, the proposed rule change deletes the requirement that a member organization honor a firm-specific do-not-call request for five years from the time the request is made.

Additionally, the proposed rule change clarifies that the request not to receive further calls would come from a person. The procedures must meet the following minimum standards:

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<sup>24</sup> See 16 CFR 310.4(b)(1)(iii)(B); see also FINRA Rule 3230(c).

<sup>25</sup> See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (Jan. 29, 2003) at 4628; and Federal Trade Commission, *Telemarketing Sales Rule*, 60 FR 43842 (Aug. 23, 1995) at 43855.

- (1) Member organizations must have a written policy for maintaining their do-not-call lists.
- (2) Personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the member organization's do-not-call list.
- (3) If a member organization receives a request from a person not to receive calls from that member organization, the member organization must record the request and place the person's name, if provided, and telephone number on its do-not-call list at the time the request is made.<sup>26</sup>
- (4) Member organizations or persons associated with a member organization making an outbound telephone call must make certain caller disclosures set forth in Rule 429(d)(4).
- (5) In the absence of a specific request by the person to the contrary, a person's do-not-call request shall apply to the member organization making the call, and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the call and the product being advertised.
- (6) A member organization making outbound telephone calls must maintain a record of a person's request not to receive further calls.

Inclusion of this requirement to adopt these procedures will not create any new obligations on member organizations, as they are already subject to identical provisions under FCC telemarketing regulations.<sup>27</sup>

#### Wireless Communications

Proposed Rule 429(e) states that the provisions set forth in the rule are applicable

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<sup>26</sup> Member organizations must honor a person's do-not-call request within a reasonable time from the date the request is made, which may not exceed 30 days from the date of the request. If these requests are recorded or maintained by a party other than the member organization on whose behalf the outbound telephone call is made, the member organization on whose behalf the outbound telephone call is made will still be liable for any failures to honor the do-not-call request.

<sup>27</sup> See 47 CFR 64.1200(d); see also FINRA Rule 3230(d).

to member organizations telemarketing or making telephone solicitations calls to wireless telephone numbers. In addition, proposed Rule 429(e) clarifies that the application of the rule also applies to persons associated with a member organization making outbound telephone calls to wireless telephone numbers.<sup>28</sup>

#### Outsourcing Telemarketing

Rule 429(f) states that if a member organization uses another entity to perform telemarketing services on its behalf, the member organization remains responsible for ensuring compliance with all provisions contained in the rule. Proposed Rule 429(f) also clarifies that member organizations must consider whether the entity or person that a member organization uses for outsourcing, must be appropriately registered or licensed, where required.<sup>29</sup>

#### Caller Identification Information

Proposed Rule 429(g) provides that any member organization that engages in telemarketing must transmit or cause to be transmitted the telephone number, and, when made available by the member organization's telephone carrier, the name of the member organization, to any caller identification service in use by a recipient of an outbound telephone call. The telephone number so provided must permit any person to make a do-not-call request during regular business hours. In addition, any member organization that engages in telemarketing is prohibited from blocking the transmission of caller identification information.<sup>30</sup>

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<sup>28</sup> See also FINRA Rule 3230(e).

<sup>29</sup> See also FINRA Rule 3230(f).

<sup>30</sup> Caller identification information includes the telephone number and, when made available by the member organization's telephone carrier, the name of the member organization.

These provisions are similar to the caller identification provision in the FTC rules.<sup>31</sup> Inclusion of these caller identification provisions in this proposed rule change will not create any new obligations on member organizations, as they are already subject to identical provisions under FCC telemarketing regulations.<sup>32</sup>

#### Unencrypted Consumer Account Numbers

Proposed Rule 429(h) prohibits a member organization or person associated with a member organization 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.<sup>33</sup> The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.<sup>34</sup> Additionally, the proposed rule change defines "unencrypted" as not only complete, visible account numbers, whether provided in lists or singly, but also encrypted information with a key to its decryption. The proposed definition is substantially similar to the view taken by the FTC.<sup>35</sup>

#### Submission of Billing Information

The proposed rule change provides that, for any telemarketing transaction, no member organization or person associated with a member organization may submit billing information<sup>36</sup> for payment without the express informed consent of the customer.

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<sup>31</sup> See 16 CFR 310.4(a)(8); *see also* FINRA Rule 3230(g).

<sup>32</sup> See 47 CFR 64.1601(e).

<sup>33</sup> See 16 CFR 310.4(a)(6); *see also* FINRA Rule 3230(h).

<sup>34</sup> See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (January 29, 2003) at 4615.

<sup>35</sup> See *id.* at 4616.

<sup>36</sup> The term "billing information" means any data that enables any person to access a

Proposed Rule 429(i) requires, for any telemarketing transaction, a member organization or person associated with a member organization 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<sup>37</sup> and a free-to-pay conversion<sup>38</sup> feature, the member organization or person associated with a member organization must:

- (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 organization or person associated with a member organization must:

- (1) identify the account to be charged with sufficient specificity for the customer to understand what account will be charged; and

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customer's or donor's account, such as a credit or debit card number, a brokerage, checking, or savings account number, or a mortgage loan account number. *See* proposed Rule 429(m)(3).

<sup>37</sup> The term "preacquired account information" means any information that enables a member organization or person associated with a member organization to cause a charge to be placed against a customer's or donor's account without obtaining the account number directly from the customer or donor during the telemarketing transaction pursuant to which the account will be charged. *See* proposed Rule 429(m)(19).

<sup>38</sup> The term "free-to-pay conversion" means, in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period. *See* proposed Rule 429(m)(13).

- (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.<sup>39</sup> The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.<sup>40</sup>

#### Abandoned Calls

Proposed Rule 429(j) prohibits a member organization or person associated with a member organization from abandoning<sup>41</sup> any outbound telemarketing call. The abandoned calls prohibition is subject to a "safe harbor" under proposed subparagraph (j)(2) that requires:

- (1) the member organization or person associated with a member organization 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 organization or person associated with a member organization, 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 organization is not available to speak with the person answering the telemarketing call within two seconds after the person's completed greeting, the member organization or person associated with a member organization promptly plays a recorded message stating the name and telephone number of the member organization or person

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<sup>39</sup> See 16 CFR 310.4(a)(7); see also FINRA Rule 3230(i).

<sup>40</sup> See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (January 29, 2003) at 4615.

<sup>41</sup> An outbound telephone call is "abandoned" if the called person answers it and the call is not connected to a member organization or person associated with a member organization within two seconds of the called person's completed greeting.

associated with a member organization on whose behalf the call was placed; and

- (4) the member organization to maintain records documenting compliance with the “safe harbor.”

The proposed rule change is substantially similar to the FTC’s provisions regarding abandoned calls.<sup>42</sup> The FTC provided a discussion of the provisions when they were adopted pursuant to the Prevention Act.<sup>43</sup>

#### Prerecorded Messages

Proposed Rule 429(k) prohibits a member organization or person associated with a member organization from initiating any outbound telemarketing call that delivers a prerecorded message without a person’s express written agreement<sup>44</sup> to receive such calls. The proposed rule change also requires that all prerecorded telemarketing calls provide specified opt-out mechanisms so that a person can opt out of future calls. The prohibition does 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.<sup>45</sup> The FTC provided a discussion of the provisions

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<sup>42</sup> See 16 CFR 310.4(b)(1)(iv); see also 16 CFR 310.4(b)(4).

<sup>43</sup> See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (January 29, 2003) at 4641.

<sup>44</sup> The express written agreement must: (a) have been obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the member organization to place prerecorded calls to such person; (b) have been obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service; (c) evidence the willingness of the called person to receive calls that deliver prerecorded messages by or on behalf of the member organization; and (d) include the person’s telephone number and signature (which may be obtained electronically under the E-Sign Act).

<sup>45</sup> See 16 CFR 310.4(b)(1)(v); see also FINRA Rule 3230(k).

when they were adopted pursuant to the Prevention Act.<sup>46</sup>

### Credit Card Laundering

Proposed Rule 429(1) prohibits credit card laundering, the practice of depositing into the credit card system<sup>47</sup> a sales draft that is not the result of a credit card transaction between the cardholder<sup>48</sup> and the member organization. Except as expressly permitted, the proposed rule change prohibits a member organization or person associated with a member organization from:

- (1) presenting to or depositing into, the credit card system for payment, a credit card sales draft<sup>49</sup> generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the member organization;
- (2) employing, soliciting, or otherwise causing a merchant,<sup>50</sup> or an employee, representative or agent of the merchant, to present to or

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<sup>46</sup> See Federal Trade Commission, *Telemarketing Sales Rule*, 73 FR 51164 (August 29, 2008) at 51165.

<sup>47</sup> The term “credit card system” means any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system. The term “credit card” means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit. The term “credit” means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment. See proposed Rule 429(m)(7), (8), and (10).

<sup>48</sup> The term “cardholder” means a person to whom a credit card is issued or who is authorized to use a credit card on behalf of or in addition to the person to whom the credit card is issued. See proposed Rule 429(m)(6).

<sup>49</sup> The term “credit card sales draft” means any record or evidence of a credit card transaction. See proposed Rule 429(m)(9).

<sup>50</sup> The term “merchant” means a person who is authorized under written contract with an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution. The term “acquirer” means a business organization, financial institution, or an agent of a business organization or financial institution that has authority from an organization that operates or licenses a credit card system to authorize merchants to accept, transmit, or process payment by credit card through the credit card system for money, goods or services, or anything else of value. A “charitable contribution” means any donation or gift of money or any

to deposit 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 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<sup>51</sup> or the applicable credit card system.

The proposed rule change is substantially similar to the FTC's provisions regarding credit card laundering.<sup>52</sup> The FTC provided a discussion of the provisions when they were adopted pursuant to the Prevention Act.<sup>53</sup>

### Definitions

Proposed Rule 429(m) adopts the following definitions, which are substantially similar to the FTC's definitions of these terms: "acquirer," "billing information," "caller identification service," "cardholder," "charitable contribution," "credit," "credit card," "credit card sales draft," "credit card system," "customer," "donor," "established business relationship," "free-to-pay conversion," "merchant," "merchant agreement," "outbound telephone call," "person," "preacquired account information," and "telemarketing".<sup>54</sup> The FTC provided a discussion of each definition when they were adopted pursuant to the Prevention Act.

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other thing of value, for example a transfer to a pooled income fund. *See* proposed Rule 429(m)(2) and (14).

<sup>51</sup> The term "merchant agreement" means a written contract between a merchant and an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or charitable contribution. *See* proposed Rule 429(m)(15).

<sup>52</sup> *See* 16 CFR 310.2; *see also* FINRA Rule 3230(1).

<sup>53</sup> *See* Federal Trade Commission, *Telemarketing Sales Rule*, 60 FR 43842 (August 23, 1995) at 43852.

<sup>54</sup> *See* proposed Rule 429(m)(2), (3), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14),

The Exchange proposes make the new rule text to Rule 429 effective on the same date as FINRA makes FINRA Rule 3230 effective.<sup>55</sup>

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act<sup>56</sup> in general, and furthers the objectives of Section 6(b)(5)<sup>57</sup> in particular, in that it is 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 facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. Specifically, the Exchange believes that the proposed rule change supports the objectives of the Act by providing greater harmonization between Rules and FINRA Rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance. In particular, NYSE MKT member organizations that are also FINRA members are subject to Rules 428 and 429 and FINRA Rule 3230 and harmonizing these two rules would promote just and equitable principles of trade by requiring a single standard for telemarketing. In addition, adopting new rule text to Rule 429 will assure that the Exchange's rules governing telemarketing meet the standards set forth in the Prevention Act. To the extent

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(15), (16), (17), (19), and (20); and 16 CFR 310.2(a), (c), (d), (e), (f), (h), (i), (j), (k), (l), (n), (o), (p), (s), (t), (v), (w), (x), and (dd); *see also* FINRA Rule 3230(m)(2), (3), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (19), and (20). The proposed rule change also adopts definitions of “account activity,” “broker-dealer of record,” and “personal relationship” that are substantially similar to FINRA’s definitions of these terms. *See* proposed Rule 429(m)(1), (4), and (18) and FINRA Rule 3230(m)(1), (4), and (18); *see also* 47 CFR 64.1200(t)(14) (FCC’s definition of “personal relationship”).

<sup>55</sup> *See supra* note 4.

<sup>56</sup> 15 U.S.C. 78f(b).

<sup>57</sup> 15 U.S.C. 78f(b)(5).

the Exchange has proposed changes that differ from the FINRA version of the Rules, such changes are technical in nature and do not change the substance of the proposed Rules. The Exchange also believes that the proposed rule change will update and clarify the requirements governing telemarketing, which will promote just and equitable principles of trade and help to protect investors.

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

The Exchange does not believe that the proposed rule change will impose 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

No written comments were solicited or received with respect to the proposed rule change.

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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>58</sup> and Rule 19b-4(f)(6) thereunder.<sup>59</sup> Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A)

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<sup>58</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>59</sup> 17 CFR 240.19b-4(f)(6).

of the Act and Rule 19b-4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)<sup>60</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>61</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

#### 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](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEMKT-2012-04 on the subject line.

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<sup>60</sup> 17 CFR 240.19b-4(f)(6).

<sup>61</sup> 17 CFR 240.19b-4(f)(6)(iii).

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-NYSEMKT-2012-04. 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 Section, 100 F Street, NE, Washington, DC 20549-1090. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet website at [www.nyse.com](http://www.nyse.com). 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-NYSEMKT-2012-04 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.<sup>62</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>62</sup> 17 CFR 200.30-3(a)(12).

Additions underlined.  
Deletions [bracketed].

**NYSE MKT LLC Rules**

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**Rule 428. [~~Telephone Solicitation—~~]Recordkeeping**

(a) [Each member and member organization shall make and maintain a centralized list of persons who have informed the member, member organization or any employee thereof, that they do not wish to receive telephone solicitations.] Reserved.

(b) No member or member organization, or person associated with a member or member organization, 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.(c) Each member and member organization shall maintain the authorization required by subparagraph (b) for a period of three years. This provision shall not, however, require maintenance of copies of negotiable instruments signed by customers.

**Rule 429. Telemarketing**

[(a) General Telemarketing Requirements

No member, member organization or person associated with a member shall initiate any telephone solicitation, as defined in paragraph (g)(2) of this rule, to:

(1) Time of day Restriction

Any residence of a person before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), unless

(A) the member has an established business relationship with the person pursuant to paragraph (g)(1)(A),

(B) the member has received that person's prior express invitation or permission, or

(C) the person called is a broker or dealer;

(2) Firm Specific Do-Not-Call List

Any person that previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the member; or

(3) National Do-Not-Call List

Any person who has registered his or her telephone number on the Federal Trade Commission's national do-not-call registry.

(b) National Do-Not-Call List Exceptions

A member making telephone solicitations will not be liable for violating paragraph (a)(3) if:

(1) Established Business Relationship Exception

The member has an established business relationship with the recipient of the call. A person's request to be placed on the firm-specific do-not-call list terminates the established business relationship exception to that national do-not-call list provision for that member even if the person continues to do business with that member;

(2) Prior Express Written Consent Exception

The member has obtained the person's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement between the person and the member which states that the person agrees to be contacted by the member and includes the telephone number to which the calls may be placed; or

(3) Personal Relationship Exception

The associated person making the call has a personal relationship with the recipient of the call.

(c) Safe Harbor Provision

A member or person associated with a member making telephone solicitations will not be liable for violating paragraph (a)(3) if the member or person associated with the member demonstrates that the violation is the result of an error and that as part of the member's routine business practice, it meets the following standards:

(1) Written procedures. The member has established and implemented written procedures to comply with the national do-not-call rules;

(2) Training of personnel. The member has trained its personnel and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;

(3) Recording. The member has maintained and recorded a list of telephone numbers that it may not contact; and

(4) Accessing the national do-not-call database. The member uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than thirty-one (31) days prior to the date any call is made, and maintains records documenting this process.

(d) Procedures

Prior to engaging in telemarketing, a member must institute procedures to comply with paragraph (a). Such procedures must meet the following minimum standards:

(1) Written policy. Members must have a written policy for maintaining a do-not-call list.

(2) Training of personnel engaged in telemarketing. Personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the do-not-call list.

(3) Recording, honoring of do-not-call requests. If a member receives a request from a person not to receive calls from that member, the member must record the request and place the person's name if provided, and telephone number on the firm's do-not-call list at the time the request is made. Members must honor a person's do-not-call request within a reasonable time from the date such request is made.

(4) Identification of sellers and telemarketers. A member or person associated with a member making a call for telemarketing purposes must provide the called party with the name of the individual caller, the name of the member, an address or telephone number at which the member may be contacted, and that the purpose of the call is to solicit the purchase of securities or related service. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.

(5) Affiliated persons or entities. In the absence of a specific request by the person to the contrary, a person's do-not-call request shall apply to the member making the call, and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.

(6) Maintenance of do-not-call lists. A member making calls for telemarketing purposes must maintain a record of the caller's request not to receive further telemarketing calls. A firm specific do-not-call request must be honored for five (5) years from the time the request is made.

(e) Wireless Communication

The provisions set forth in this rule are applicable to members telemarketing or making telephone solicitations calls to wireless telephone numbers.

(f) Outsourcing Telemarketing

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 this rules.

(g) Definitions

(1) Established business relationship

(A) An “established business relationship” exists between a member and a person if:

(i) the person has made a financial transaction or has a security position, a money balance, or account activity with the member within the previous eighteen months immediately preceding the date of the telemarketing call;

(ii) the member is the broker/dealer of record for an account of the person within the previous 18 months immediately preceding the date of the telemarketing call; or

(iii) the person has contacted the member to inquire about a product or service offered by the member within the previous three months immediately preceding the date of the telemarketing call.

(B) A person’s established business relationship with a member does not extend to the member’s affiliated entities unless the person would reasonably expect them to be included. Similarly, a person’s established business relationship with a member’s affiliate does not extend to the member unless the person would reasonably expect the member to be included.

(2) The terms “telemarketing” and “telephone solicitation” mean 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.

(3) The term “personal relationship” means any family member, friend, or acquaintance of the telemarketer making the call.

(4) The term “account activity” shall include, but not be limited to, purchases, sales, interest credits or debits, charges or credits, dividend payments, transfer activity, securities receipts or deliveries, and/or journal entries relating to securities or funds in the possession or control of the member.

(5) The term “broker/dealer of record” refers to the broker/dealer identified on a customer’s account application for accounts held directly at a mutual fund or variable insurance product issuer.]

(a) General Telemarketing Requirements

No member organization or person associated with a member organization shall initiate any outbound telephone call to:

(1) Time of Day Restriction

Any residence of a person before the hour of 8 a.m. or after 9 p.m. (local time at the called party’s location), unless

(A) the member organization has an established business relationship with the person pursuant to paragraph (m)(12)(A),

(B) the member organization has received that person’s prior express invitation or permission, or

(C) the person called is a broker or dealer;

(2) Firm-Specific Do-Not-Call List

Any person that previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the member organization; or

(3) National Do-Not-Call List

Any person who has registered his or her telephone number on the Federal Trade Commission’s national do-not-call registry.

(b) National Do-Not-Call List Exceptions

A member organization making outbound telephone calls will not be liable for violating paragraph (a)(3) if:

(1) Established Business Relationship Exception

The member organization has an established business relationship with the recipient of the call. A person’s request to be placed on the firm-specific do-not-call list terminates the established business relationship exception to that national do-not-call list provision for that member organization even if the person continues to do business with the member organization;

(2) Prior Express Written Consent Exception

The member organization has obtained the person’s prior express invitation or permission. Such permission must be evidenced by a signed, written agreement

(which may be obtained electronically under the E-Sign Act) between the person and member organization which states that the person agrees to be contacted by the member organization and includes the telephone number to which the calls may be placed; or

(3) Personal Relationship Exception

The associated person making the call has a personal relationship with the recipient of the call.

(c) Safe Harbor Provision

A member organization or person associated with a member organization making outbound telephone calls will not be liable for violating paragraph (a)(3) if the member organization or person associated with a member organization demonstrates that the violation is the result of an error and that as part of the member organization's routine business practice, it meets the following standards:

(1) Written procedures. The member organization has established and implemented written procedures to comply with the national do-not-call rules;

(2) Training of personnel. The member organization has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;

(3) Recording. The member organization has maintained and recorded a list of telephone numbers that it may not contact; and

(4) Accessing the national do-not-call database. The member organization uses a process to prevent outbound telephone calls to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than 31 days prior to the date any call is made, and maintains records documenting this process.

(d) Procedures

Prior to engaging in telemarketing, a member organization must institute procedures to comply with paragraph (a). Such procedures must meet the following minimum standards:

(1) Written policy. Member organizations must have a written policy for maintaining a do-not-call list.

(2) Training of personnel engaged in telemarketing. Personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the do-not-call list.

(3) Recording, disclosure of do-not-call requests. If a member organization receives a request from a person not to receive calls from that member organization, the member organization must record the request and place the person's name, if provided, and telephone number on the firm's do-not-call list at the time the request is made. Member organizations must honor a person's do-not-call request within a reasonable time from the date such request is made. This period may not exceed 30 days from the date of such request. If such requests are recorded or maintained by a party other than the member organization on whose behalf the outbound telephone call is made, the member organization on whose behalf the outbound telephone call is made will be liable for any failures to honor the do-not-call request.

(4) Identification of sellers and telemarketers. A member organization or person associated with a member organization making an outbound telephone call must provide the called party with the name of the individual caller, the name of the member organization, an address or telephone number at which the member organization may be contacted, and that the purpose of the call is to solicit the purchase of securities or related service. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.

(5) Affiliated persons or entities. In the absence of a specific request by the person to the contrary, a person's do-not-call request shall apply to the member organization making the call, and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.

(6) Maintenance of do-not-call lists. A member organization making outbound telephone calls must maintain a record of a person's request not to receive further calls.

(e) Wireless Communications

The provisions set forth in this Rule are applicable to member organizations and persons associated with a member organization making outbound telephone calls to wireless telephone numbers.

(f) Outsourcing Telemarketing

If a member organization uses another appropriately registered or licensed entity or person to perform telemarketing services on its behalf, the member organization remains responsible for ensuring compliance with all provisions contained in this Rule.

(g) Caller Identification Information

(1) Any member organization that engages in telemarketing, as defined in paragraph (m)(20) of this Rule, must transmit or cause to be transmitted the telephone number, and, when made available by the member organization's

telephone carrier, the name of the member organization, to any caller identification service in use by a recipient of an outbound telephone call.

(2) The telephone number so provided must permit any person to make a do-not-call request during regular business hours.

(3) Any member organization that engages in telemarketing, as defined in paragraph (m)(20) of this Rule, is prohibited from blocking the transmission of caller identification information.

(h) Unencrypted Consumer Account Numbers

No member organization or person associated with a member organization shall disclose or receive, for consideration, unencrypted consumer account numbers for use in telemarketing. The term “unencrypted” means not only complete, visible account numbers, whether provided in lists or singly, but also encrypted information with a key to its decryption. This paragraph shall not apply to the disclosure or receipt of a customer’s billing information to process a payment pursuant to a telemarketing transaction.

(i) Submission of Billing Information

For any telemarketing transaction, a member organization or person associated with a member organization must obtain the express informed consent of the person to be charged and to be charged using the identified account.

(1) In any telemarketing transaction involving preacquired account information and a free-to-pay conversion feature, the member organization or person associated with a member organization must:

(A) obtain from the customer, at a minimum, the last four digits of the account number to be charged;

(B) obtain from the customer an express agreement to be charged and to be charged using the account number pursuant to paragraph (i)(1)(A); and

(C) make and maintain an audio recording of the entire telemarketing transaction.

(2) In any other telemarketing transaction involving preacquired account information not described in paragraph (i)(1), the member organization or person associated with a member organization must:

(A) identify the account to be charged with sufficient specificity for the customer to understand what account will be charged; and

(B) obtain from the customer an express agreement to be charged and to be charged using the account number identified pursuant to paragraph (i)(2)(A).

(j) Abandoned Calls

(1) No member organization or person associated with a member organization shall “abandon” any outbound telemarketing call. An outbound call is “abandoned” if a person answers it and the call is not connected to a person associated with a member organization within two seconds of the person’s completed greeting.

(2) A member organization or person associated with a member organization shall not be liable for violating paragraph (j)(1) if:

(A) the member organization or person associated with a member organization employs technology that ensures abandonment of no more than three percent of all telemarketing 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;

(B) the member organization or person associated with a member organization, for each telemarketing call placed, allows the telephone to ring for at least 15 seconds or four rings before disconnecting an unanswered call;

(C) whenever a person associated with a member organization is not available to speak with the person answering the telemarketing call within two seconds after the person’s completed greeting, the member organization or person associated with a member organization promptly plays a recorded message that states the name and telephone number of the member organization or person associated with the member organization on whose behalf the call was placed; and

(D) the member organization retains records establishing compliance with paragraph (j)(2).

(k) Prerecorded Messages

(1) No member organization or person associated with a member organization shall initiate any outbound telemarketing call that delivers a prerecorded message other than a prerecorded message permitted for compliance with the call abandonment safe harbor in (j)(2)(C) unless:

(A) the member organization has obtained from the recipient of the call an express agreement, in writing, that:

(i) the member organization obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the member organization to place prerecorded calls to such person;

(ii) the member organization obtained without requiring, directly or indirectly, that the agreement be executed as a condition of opening an account or purchasing any good or service;

(iii) evidences the willingness of the recipient of the call to receive calls that deliver prerecorded messages by or on behalf of a specific member organization; and

(iv) includes such person's telephone number and signature (which may be obtained electronically under the E-Sign Act);

(B) the member organization or person associated with a member organization allows the telephone to ring for at least 15 seconds or four rings before disconnecting an unanswered call; and within two seconds after the completed greeting of the person called, plays a prerecorded message that promptly provides the disclosures in paragraph (d)(4), followed immediately by a disclosure of one or both of the following:

(i) for a call that could be answered by a person, that the person called can use an automated interactive voice and/or keypress-activated opt-out mechanism to assert a firm-specific do-not-call request pursuant to the member organization's procedures instituted under paragraph (d)(3) at any time during the message. The mechanism must:

a. automatically add the number called to the member organization's firm-specific do-not-call list;

b. once invoked, immediately disconnect the call; and

c. be available for use at any time during the message;

(ii) for a call that could be answered by an answering machine or voicemail service, that the person called can use a toll-free telephone number to assert a firm-specific do-not-call request pursuant to the member organization's procedures instituted under paragraph (d)(3). The number provided must connect directly to an automated interactive voice or keypress-activated opt-out mechanism that:

a. automatically adds the number called to the member organization's firm-specific do-not-call list;

b. immediately thereafter disconnects the call; and

c. is accessible at any time throughout the duration of the telemarketing campaign; and

(C) the member organization complies with all other requirements of this Rule and other applicable federal and state laws.

(2) Any call that complies with all applicable requirements of paragraph (k) shall not be deemed to violate paragraph (j).

(l) Credit Card Laundering.

Except as expressly permitted by the applicable credit card system, no member organization or person associated with a member organization shall:

(1) present to or deposit 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 organization;

(2) employ, solicit, or otherwise cause a merchant, or an employee, representative or agent of the merchant, to present to or to deposit 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 merchant; or

(3) obtain 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.

(m) Definitions

For purposes of this Rule:

(1) The term “account activity” shall include, but not be limited to, purchases, sales, interest credits or debits, charges or credits, dividend payments, transfer activity, securities receipts or deliveries, and/or journal entries relating to securities or funds in the possession or control of the member organization.

(2) The term “acquirer” means a business organization, financial institution, or an agent of a business organization or financial institution that has authority from an organization that operates or licenses a credit card system to authorize merchants to accept, transmit, or process payment by credit card through the credit card system for money, goods or services, or anything else of value.

(3) The term “billing information” means any data that enables any person to access a customer’s or donor’s account, for example a credit or debit card number, a brokerage, checking, or savings account number, or a mortgage loan account number.

(4) The term “broker-dealer of record” refers to the broker-dealer identified on a customer’s account application for accounts held directly at a mutual fund or variable insurance product issuer.

(5) The term “caller identification service” means a service that allows a telephone subscriber to have the telephone number, and, where available, name of the calling party transmitted contemporaneously with the telephone call, and displayed on a device in or connected to the subscriber’s telephone.

(6) The term “cardholder” means a person to whom a credit card is issued or who is authorized to use a credit card on behalf of or in addition to the person to whom the credit card is issued.

(7) The term “credit” means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(8) The term “credit card” means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(9) The term “credit card sales draft” means any record or evidence of a credit card transaction.

(10) The term “credit card system” means any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system.

(11) The term “customer” means any person who is or may be required to pay for goods or services offered through telemarketing.

(12) The term “established business relationship” means a relationship between a member organization and a person if:

(A) the person has made a financial transaction or has a security position, a money balance, or account activity with the member organization or at a clearing firm that provides clearing services to such member organization within the previous 18 months immediately preceding the date of the telemarketing call;

(B) the member organization is the broker-dealer of record for an account of the person within the previous 18 months immediately preceding the date of the telemarketing call; or

(C) the person has contacted the member organization to inquire about a product or service offered by the member organization within the previous three months immediately preceding the date of the telemarketing call.

A person's established business relationship with a member organization does not extend to the member organization's affiliated entities unless the person would reasonably expect them to be included. Similarly, a person's established business relationship with a member organization's affiliate does not extend to the member organization unless the person would reasonably expect the member organization to be included.

(13) The term "free-to-pay conversion" means, in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period.

(14) The term "merchant" means a person who is authorized under a written contract with an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution. A "charitable contribution" means any donation or gift of money or any other thing of value, for example a transfer to a pooled income fund.

(15) The term "merchant agreement" means a written contract between a merchant and an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(16) The term "outbound telephone call" means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution from a donor. A "donor" means any person solicited to make a charitable contribution.

(17) The term "person" means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(18) The term "personal relationship" means any family member, friend, or acquaintance of the person associated with a member organization making an outbound telephone call.

(19) The term "preacquired account information" means any information that enables a seller or telemarketer to cause a charge to be placed against a customer's or donor's account without obtaining the account number directly from the customer or donor during the telemarketing transaction pursuant to which the account will be charged.

(20) The term "telemarketing" means consisting of or relating to a plan, program, or campaign involving at least one outbound telephone call, for example cold-calling. The term does not include the solicitation of sales through the mailing of written marketing materials, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in

response to the marketing materials and during those calls takes orders only without further solicitation. For purposes of the pervious sentence, the term “further solicitation” does not include providing the customer with information about, or attempting to sell, anything promoted in the same marketing materials that prompted the customer’s call.

**••• Commentary: -----**

**.01 Compliance with Other Requirements.**

(a) This Rule does not affect the obligation of any member organization or person associated with a member organization that engages in telemarketing to comply with relevant state and federal laws and rules, including but not limited to the Telemarketing and Consumer Fraud and Abuse Prevention Act codified at 15 U.S.C. 6101–6108, as amended, the Telephone Consumer Protection Act codified at 47 U.S.C. 227, and the rules of the Federal Communications Commission relating to telemarketing practices and the rights of telephone consumers codified at 47 CFR 64.1200.

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