

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 49	SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 Form 19b-4		File No.* SR - 2011 - * 059	Amendment No. (req. for Amendments *)
Proposed Rule Change by Financial Industry Regulatory Authority 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 checked="" type="checkbox"/>	Section 19(b)(3)(A) * <input type="checkbox"/>
			Section 19(b)(3)(B) * <input type="checkbox"/>	
			Rule	
Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>	<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)
			<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)
			<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)
Exhibit 2 Sent As Paper Document <input type="checkbox"/>		Exhibit 3 Sent As Paper Document <input type="checkbox"/>		
<b>Description</b> Provide a brief description of the proposed rule change (limit 250 characters, required when Initial is checked *).				
Proposed Rule Change to Adopt FINRA Rule 3230 (Telemarketing) in the Consolidated FINRA Rulebook				
<b>Contact Information</b> 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 *	Matthew		Last Name *	Vitek
Title *	Counsel			
E-mail *	matthew.vitek@finra.org			
Telephone *	(202) 728-8156	Fax	(202) 728-8264	
<b>Signature</b> 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	10/13/2011			
By	Gary L. Goldsholle		Vice President and Associate General Counsel	
		(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.			Gary L. Goldsholle,	

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 Proposed Rule Change**

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> Financial Industry Regulatory Authority, Inc. (“FINRA”) (f/k/a National Association of Securities Dealers, Inc. (“NASD”)) is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change to adopt NASD Rule 2212 (Telemarketing) as FINRA Rule 3230 (Telemarketing) in the consolidated FINRA rulebook, subject to certain amendments. The proposed rule change would delete Incorporated NYSE Rule 440A (Telephone Solicitation) and Incorporated NYSE Rule Interpretation 440A/01. Additionally, the proposed rule change would adopt provisions that are substantially similar to the telemarketing rules of the Federal Trade Commission (“FTC”).

The text of the proposed rule change is attached as Exhibit 5 to this rule filing.

(b) Upon Commission approval and implementation by FINRA of the proposed rule change, the corresponding NASD and Incorporated NYSE rules will be eliminated from the current FINRA rulebook.

(c) Not applicable.

**2. Procedures of the Self-Regulatory Organization**

At its meeting on July 16, 2009, the FINRA Board of Governors authorized the filing of the proposed rule change with the SEC. The proposed rule change has been approved by the General Counsel of FINRA (or his officer designee) pursuant to delegated authority. No other action by FINRA is necessary for the filing of the proposed rule change.

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

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

The implementation date will be no later than 180 days following Commission approval.

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

(a) Purpose

As part of the process of developing a new consolidated rulebook (“Consolidated FINRA Rulebook”),<sup>2</sup> FINRA is proposing to adopt NASD Rule 2212 (Telemarketing) as FINRA Rule 3230 (Telemarketing) with changes discussed below. The proposed rule change would delete Incorporated NYSE Rule 440A<sup>3</sup> (Telephone Solicitation) and Incorporated NYSE Rule Interpretation 440A/01 as they are, in main part, duplicative of NASD Rule 2212. However, as further described below, the proposed rule change would incorporate certain provisions of NYSE Rule 440A and its Interpretation into new FINRA Rule 3230. Further, the proposed rule change adds provisions that are substantially similar to FTC rules that prohibit deceptive and other abusive telemarketing acts or practices as described below.

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

<sup>3</sup> For convenience, the proposed rule change refers to Incorporated NYSE Rules as NYSE Rules.

NASD Rule 2212 and NYSE Rule 440A are similar rules that require members to maintain do-not-call lists, limit the hours of telephone solicitations and prohibit members from using deceptive and abusive acts and practices in connection with telemarketing. The Commission directed FINRA and NYSE to enact these telemarketing rules in accordance with the Telemarketing Consumer Fraud and Abuse Prevention Act of 1994 (“Prevention Act”).<sup>4</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>5</sup>

In 2003, the FTC and the Federal Communications Commission (“FCC”) established requirements for sellers and telemarketers to participate in the national do-not-call registry.<sup>6</sup> Pursuant to the Prevention Act, the Commission requested that FINRA and NYSE amend their telemarketing rules to include a requirement that their members participate in the national do-not-call registry. In 2004, the Commission approved amendments to NASD Rule 2212 requiring member firms to participate in the national do-not-call registry.<sup>7</sup> The following year, the Commission approved amendments to NYSE Rule 440A, which were similar to the NASD rule amendments, but included

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<sup>4</sup> 15 U.S.C. 6101-6108.

<sup>5</sup> 15 U.S.C. 6102.

<sup>6</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>7</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).

additional provisions regarding the use of caller identification information, pre-recorded messages, telephone facsimiles and computer advertisements.<sup>8</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>9</sup> Earlier this year, Commission staff directed FINRA to conduct a review of its telemarketing rule and propose rule amendments that provide protections that are at least as strong as those provided by the FTC's telemarketing rules.<sup>10</sup> Commission staff had concerns "that the SRO [self-regulatory organization] rules overall have not kept pace with the FTC's rules, and thus may no longer meet the standards of the Prevention Act."<sup>11</sup>

#### Proposed FINRA Rule 3230

The proposed rule change would adopt NASD Rule 2212 into the Consolidated FINRA Rulebook as FINRA Rule 3230 (Telemarketing) in the consolidated FINRA rulebook, subject to certain amendments. The proposed rule change would incorporate certain unique aspects of NYSE Rule 440A and its Interpretation. Additionally, the proposed rule change makes amendments and adopts provisions that are substantially similar to rules promulgated by the FTC pursuant to the Prevention Act.

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<sup>8</sup> See Securities Exchange Act Release No. 52579 (October 7, 2005), 70 FR 60119 (October 14, 2005) (Order Approving File No. SR-NYSE-2004-73).

<sup>9</sup> 15 U.S.C. 6102.

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

<sup>11</sup> Id.

First, the proposed rule change would adopt into new FINRA Rule 3230 similar caller identification information provisions contained in NYSE Rule 440A(h). These provisions provide that members engaging in telemarketing must transmit caller identification information and are explicitly prohibited from blocking caller identification information. The telephone number provided must permit any person to make a do-not-call request during normal business hours. Inclusion of these caller identification information provisions in the proposed rule will not create any new obligations on broker-dealers as they are already subject to identical provisions under FCC regulations.<sup>12</sup>

The proposed rule change would not incorporate the additional provisions in NYSE Rule 440A regarding pre-recorded messages and the use of telephone facsimile or computer advertisements.<sup>13</sup> Similar provisions were never adopted by the FTC under the Prevention Act and thus are not required to be part of SEC or SRO rules. Moreover, these provisions in the NYSE rule are duplicative of similar FCC regulations that are applicable to broker-dealers.<sup>14</sup>

Second, the proposed rule change would adopt a provision that is similar to NYSE Rule Interpretation 440A/01 as Supplementary Material. The provision reminds firms that the rule does not affect the obligation of any member or person associated with a member that engages in telemarketing to comply with relevant state and federal laws and rules, including the rules of the FCC relating to telemarketing practices and the rights of telephone consumers. The proposed rule change would not incorporate the remainder of

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<sup>12</sup> See 47 CFR 64.1601.

<sup>13</sup> See NYSE Rule 440A(e), (g), (j)(3), (6), (8).

<sup>14</sup> See 47 CFR 64.1200.

NYSE Rule Interpretation 440A/01 because the requirement for a member to make and maintain a list of persons who do not want to receive telephone solicitations is duplicative of an existing provision in the NASD rule.<sup>15</sup>

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

*Maintenance of Do-Not-Call lists*

Proposed FINRA Rule 3230(d)(6) maintains the requirement in NASD Rule 2212(d)(6) that a member making an outbound telephone call must maintain a record of a caller's request not to receive further calls. However, the proposed rule change deletes the requirement that a member honor a firm-specific do-not-call request for five years from the time the request is made. Commission staff directed FINRA to delete this provision because the time for which the firm-specific opt-out must be honored under the FTC's Telemarketing Sales Rule<sup>16</sup> is indefinite, rather than five years as currently provided in the rule.<sup>17</sup> Additionally, the proposed rule change clarifies that the request not to receive further calls would come from a person.

*Wireless Communications*

NASD Rule 2212(e) states that the provisions set forth in the rule are applicable to members telemarketing or making telephone solicitations calls to wireless telephone

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<sup>15</sup> See NASD Rule 2212(d)(6).

<sup>16</sup> See 16 CFR 310.

<sup>17</sup> See Letter from Robert W. Cook, Director, Division of Trading and Markets, SEC, to Richard G. Ketchum, Chairman and Chief Executive Officer, FINRA, dated May 10, 2011.



numbers. Proposed FINRA Rule 3230(e) clarifies that the application of the rule also applies to persons associated with a member making outbound telephone calls to wireless telephone numbers.

*Outsourcing Telemarketing*

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

*Unencrypted Consumer Account Numbers*

Proposed FINRA Rule 3230(h) prohibits a member or person associated with a member from disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing. The proposed rule change is substantially similar to the FTC's provision regarding unencrypted consumer account numbers.<sup>18</sup> The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.<sup>19</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>20</sup>

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<sup>18</sup> See 16 CFR 310.4(a)(6).

<sup>19</sup> See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (January 29, 2003) at 4615.

<sup>20</sup> See id. at 4616.

*Submission of Billing Information*

Proposed FINRA Rule 3230(i) requires, for any telemarketing transaction, a member or person associated with a member to obtain the express informed consent of the person to be charged and to be charged using the identified account. If the telemarketing transaction involves preacquired account information and a free-to-pay conversion feature, the member or person associated with a member 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 or person associated with a member 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>21</sup> The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.<sup>22</sup>

*Abandoned Calls*

Proposed FINRA Rule 3230(j) prohibits a member or person associated with a member from abandoning any outbound telemarketing call. The abandoned calls prohibition is subject to a "safe harbor" under proposed subparagraph (j)(2) that requires:

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<sup>21</sup> See 16 CFR 310.4(a)(7).

<sup>22</sup> See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (January 29, 2003) at 4615.

(1) the member or person associated with a member to employ technology that ensures abandonment of no more than three percent of all calls answered by a person, measured over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues; (2) the member or person associated with a member, for each telemarketing call placed, allows the telephone to ring for at least 15 seconds or four rings before disconnecting an unanswered call; (3) whenever a person associated with a member is not available to speak with the person answering the telemarketing call within two seconds after the person's completed greeting, the member or person associated with a member promptly plays a recorded message stating the name and telephone number of the member or person associated with a member on whose behalf the call was placed; and (4) the member to maintain records documenting compliance with the "safe harbor." The proposed rule change is substantially similar to the FTC's provisions regarding abandoned calls.<sup>23</sup> The FTC provided a discussion of the provisions when they were adopted pursuant to the Prevention Act.<sup>24</sup>

#### *Prerecorded Messages*

Proposed FINRA Rule 3230(k) prohibits a member or person associated with a member from initiating any outbound telemarketing call that delivers a prerecorded message without a person's express written agreement to receive such calls. The proposed rule change also requires that all prerecorded telemarketing calls provide specified opt-out mechanisms so that a person can opt out of future calls. The prohibition

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<sup>23</sup> See 16 CFR 310.4(b)(1)(iv); see also 16 CFR 310.4(b)(4).

<sup>24</sup> See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (January 29, 2003) at 4641.

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>25</sup> The FTC provided a discussion of the provisions when they were adopted pursuant to the Prevention Act.<sup>26</sup>

### *Credit Card Laundering*

Proposed FINRA Rule 3230(1) prohibits credit card laundering, the practice of depositing into the credit card system a sales draft that is not the result of a credit card transaction between the cardholder and the member. Except as expressly permitted, the proposed rule change prohibits a member or person associated with a member from: (1) presenting to or depositing into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the member; (2) employing, soliciting, or otherwise causing a merchant, or an employee, representative or agent of the merchant, to present to or to deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or (3) obtaining access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement or the applicable credit card system. The proposed rule change is substantially similar to the

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<sup>25</sup> See 16 CFR 310.4(b)(1)(v).

<sup>26</sup> See Federal Trade Commission, *Telemarketing Sales Rule*, 73 FR 51164 (August 29, 2008).

FTC's provisions regarding credit card laundering.<sup>27</sup> The FTC provided a discussion of the provisions when they were adopted pursuant to the Prevention Act.<sup>28</sup>

*Definitions*

Proposed FINRA Rule 3230(m) adopts definitions that are substantially similar to the FTC's definitions.<sup>29</sup> The proposed rule change adopts substantially similar definitions of "acquirer,"<sup>30</sup> "billing information,"<sup>31</sup> "caller identification service,"<sup>32</sup> "cardholder,"<sup>33</sup> "charitable contribution,"<sup>34</sup> "credit,"<sup>35</sup> "credit card,"<sup>36</sup> "credit card sales draft,"<sup>37</sup> "credit card system,"<sup>38</sup> "customer,"<sup>39</sup> "donor,"<sup>40</sup> "free-to-pay conversion,"<sup>41</sup>

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<sup>27</sup> See 16 CFR 310.2.

<sup>28</sup> See Federal Trade Commission, *Telemarketing Sales Rule*, 60 FR 43842 (August 23, 1995) at 43852.

<sup>29</sup> See 16 CFR 310.2.

<sup>30</sup> See 16 CFR 310.2(a).

<sup>31</sup> See 16 CFR 310.2(c).

<sup>32</sup> See 16 CFR 310.2(d).

<sup>33</sup> See 16 CFR 310.2(e).

<sup>34</sup> See 16 CFR 310.2(f).

<sup>35</sup> See 16 CFR 310.2(h).

<sup>36</sup> See 16 CFR 310.2(i).

<sup>37</sup> See 16 CFR 310.2(j).

<sup>38</sup> See 16 CFR 310.2(k).

<sup>39</sup> See 16 CFR 310.2(l).

<sup>40</sup> See 16 CFR 310.2(n).

<sup>41</sup> See 16 CFR 310.2(p).

“merchant,”<sup>42</sup> “merchant agreement,”<sup>43</sup> “outbound telephone call,”<sup>44</sup> “person”<sup>45</sup> and “preacquired account information.”<sup>46</sup> Additionally, the proposed rule change amends the definition of “telemarketing” to track the FTC definition and deletes the reference to “telephone solicitation.” The FTC provided a discussion of each definition when they were adopted pursuant to the Prevention Act.<sup>47</sup>

#### *Technical and Conforming Changes*

The proposed rule change also makes a number of minor technical and conforming changes. First, proposed FINRA Rule 3230(m) renumbers and makes minor technical changes to the terms “account activity,” “broker-dealer of record” and “established business relationship.” Second, proposed FINRA Rule 3230 amends paragraphs (a), (b) and (c) by replacing the term “telephone solicitation” with the term “outbound telephone call.” Third, proposed FINRA Rule 3230(d) replaces the term “telemarketing call” with the term “outbound telephone call.” Fourth, the proposed rule change updates a reference to an “established business relationship” in subparagraph (a)(1)(A). Finally, the proposed rule change amends paragraph (b) to clarify that a signed, written agreement may be obtained electronically under the E-Sign Act.

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<sup>42</sup> See 16 CFR 310.2(s).

<sup>43</sup> See 16 CFR 310.2(t).

<sup>44</sup> See 16 CFR 310.2(v).

<sup>45</sup> See 16 CFR 310.2(w).

<sup>46</sup> See 16 CFR 310.2(x).

<sup>47</sup> See Federal Trade Commission, *Telemarketing Sales Rule*, 60 FR 43842 (August 23, 1995) at 43843; see also Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (January 29, 2003) at 4587.

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

(b) Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>48</sup> which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change will protect investors and the public interest by continuing to prohibit deceptive and other abusive telemarketing acts or practices.

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

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

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

Written comments were neither solicited nor received.

**6. Extension of Time Period for Commission Action**

FINRA does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.<sup>49</sup>

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<sup>48</sup> 15 U.S.C. 78o-3(b)(6).

<sup>49</sup> 15 U.S.C. 78s(b)(2).

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

Not applicable.

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

Not applicable.

9. **Exhibits**

Exhibit 1. Completed notice of proposed rule change for publication in the Federal Register.

Exhibit 5. Text of the proposed rule change.



EXHIBIT 1

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

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

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on , Financial Industry Regulatory Authority, Inc. (“FINRA”) (f/k/a National Association of Securities Dealers, Inc. (“NASD”)) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

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

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

<sup>2</sup> 17 CFR 240.19b-4.

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

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

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

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

1. Purpose

As part of the process of developing a new consolidated rulebook ("Consolidated FINRA Rulebook"),<sup>3</sup> FINRA is proposing to adopt NASD Rule 2212 (Telemarketing) as FINRA Rule 3230 (Telemarketing) with changes discussed below. The proposed rule change would delete Incorporated NYSE Rule 440A<sup>4</sup> (Telephone Solicitation) and Incorporated NYSE Rule Interpretation 440A/01 as they are, in main part, duplicative of

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

<sup>4</sup> For convenience, the proposed rule change refers to Incorporated NYSE Rules as NYSE Rules.

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

NASD Rule 2212 and NYSE Rule 440A are similar rules that require members to maintain do-not-call lists, limit the hours of telephone solicitations and prohibit members from using deceptive and abusive acts and practices in connection with telemarketing. The Commission directed FINRA and NYSE to enact these telemarketing rules in accordance with the Telemarketing Consumer Fraud and Abuse Prevention Act of 1994 (“Prevention Act”).<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 (“FCC”) 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 NYSE amend their telemarketing rules to include a requirement that their members participate in the national do-not-call registry. In 2004, the Commission approved

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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).

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 NYSE Rule 440A, which were similar to the NASD rule amendments, but included additional provisions regarding the use of caller identification information, pre-recorded messages, telephone facsimiles and computer advertisements.<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> Earlier this year, Commission staff directed FINRA to conduct a review of its telemarketing rule and propose rule amendments that provide protections that are at least as strong as those provided by the FTC's telemarketing rules.<sup>11</sup> Commission staff had concerns "that the SRO [self-regulatory organization] rules overall have not kept pace with the FTC's rules, and thus may no longer meet the standards of the Prevention Act."<sup>12</sup>

#### Proposed FINRA Rule 3230

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

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<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).

<sup>9</sup> See Securities Exchange Act Release No. 52579 (October 7, 2005), 70 FR 60119 (October 14, 2005) (Order Approving File No. SR-NYSE-2004-73).

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

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

<sup>12</sup> Id.

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

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

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

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

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<sup>13</sup> See 47 CFR 64.1601.

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

<sup>15</sup> See 47 CFR 64.1200.

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

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

*Maintenance of Do-Not-Call lists*

Proposed FINRA Rule 3230(d)(6) maintains the requirement in NASD Rule 2212(d)(6) that a member making an outbound telephone call must maintain a record of a caller's request not to receive further calls. However, the proposed rule change deletes the requirement that a member honor a firm-specific do-not-call request for five years from the time the request is made. Commission staff directed FINRA to delete this provision because the time for which the firm-specific opt-out must be honored under the FTC's Telemarketing Sales Rule<sup>17</sup> is indefinite, rather than five years as currently

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<sup>16</sup> See NASD Rule 2212(d)(6).

<sup>17</sup> See 16 CFR 310.

provided in the rule.<sup>18</sup> Additionally, the proposed rule change clarifies that the request not to receive further calls would come from a person.

*Wireless Communications*

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

*Outsourcing Telemarketing*

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

*Unencrypted Consumer Account Numbers*

Proposed FINRA Rule 3230(h) prohibits a member or person associated with a member from disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing. The proposed rule change is substantially similar to the FTC's provision regarding unencrypted consumer account numbers.<sup>19</sup> The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention

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<sup>18</sup> See Letter from Robert W. Cook, Director, Division of Trading and Markets, SEC, to Richard G. Ketchum, Chairman and Chief Executive Officer, FINRA, dated May 10, 2011.

<sup>19</sup> See 16 CFR 310.4(a)(6).

Act.<sup>20</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>21</sup>

*Submission of Billing Information*

Proposed FINRA Rule 3230(i) requires, for any telemarketing transaction, a member or person associated with a member to obtain the express informed consent of the person to be charged and to be charged using the identified account. If the telemarketing transaction involves preacquired account information and a free-to-pay conversion feature, the member or person associated with a member 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 or person associated with a member 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

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<sup>20</sup> See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (January 29, 2003) at 4615.

<sup>21</sup> See id. at 4616.



regarding the submission of billing information.<sup>22</sup> The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.<sup>23</sup>

*Abandoned Calls*

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

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<sup>22</sup> See 16 CFR 310.4(a)(7).

<sup>23</sup> See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (January 29, 2003) at 4615.

abandoned calls.<sup>24</sup> The FTC provided a discussion of the provisions when they were adopted pursuant to the Prevention Act.<sup>25</sup>

#### *Prerecorded Messages*

Proposed FINRA Rule 3230(k) prohibits a member or person associated with a member from initiating any outbound telemarketing call that delivers a prerecorded message without a person's express written agreement to receive such calls. The proposed rule change also 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>26</sup> The FTC provided a discussion of the provisions when they were adopted pursuant to the Prevention Act.<sup>27</sup>

#### *Credit Card Laundering*

Proposed FINRA Rule 3230(l) prohibits credit card laundering, the practice of depositing into the credit card system a sales draft that is not the result of a credit card transaction between the cardholder and the member. Except as expressly permitted, the proposed rule change prohibits a member or person associated with a member from: (1)

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<sup>24</sup> See 16 CFR 310.4(b)(1)(iv); see also 16 CFR 310.4(b)(4).

<sup>25</sup> See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (January 29, 2003) at 4641.

<sup>26</sup> See 16 CFR 310.4(b)(1)(v).

<sup>27</sup> See Federal Trade Commission, *Telemarketing Sales Rule*, 73 FR 51164 (August 29, 2008).

presenting to or depositing into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the member; (2) employing, soliciting, or otherwise causing a merchant, or an employee, representative or agent of the merchant, to present to or to deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or (3) obtaining access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement or the applicable credit card system. The proposed rule change is substantially similar to the FTC's provisions regarding credit card laundering.<sup>28</sup> The FTC provided a discussion of the provisions when they were adopted pursuant to the Prevention Act.<sup>29</sup>

*Definitions*

Proposed FINRA Rule 3230(m) adopts definitions that are substantially similar to the FTC's definitions.<sup>30</sup> The proposed rule change adopts substantially similar definitions of "acquirer,"<sup>31</sup> "billing information,"<sup>32</sup> "caller identification service,"<sup>33</sup>

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<sup>28</sup> See 16 CFR 310.2.

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

<sup>30</sup> See 16 CFR 310.2.

<sup>31</sup> See 16 CFR 310.2(a).

<sup>32</sup> See 16 CFR 310.2(c).

<sup>33</sup> See 16 CFR 310.2(d).

“cardholder,”<sup>34</sup> “charitable contribution,”<sup>35</sup> “credit,”<sup>36</sup> “credit card,”<sup>37</sup> “credit card sales draft,”<sup>38</sup> “credit card system,”<sup>39</sup> “customer,”<sup>40</sup> “donor,”<sup>41</sup> “free-to-pay conversion,”<sup>42</sup> “merchant,”<sup>43</sup> “merchant agreement,”<sup>44</sup> “outbound telephone call,”<sup>45</sup> “person,”<sup>46</sup> and “preacquired account information.”<sup>47</sup> Additionally, the proposed rule change amends the definition of “telemarketing” to track the FTC definition and deletes the reference to “telephone solicitation.” The FTC provided a discussion of each definition when they were adopted pursuant to the Prevention Act.<sup>48</sup>

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<sup>34</sup> See 16 CFR 310.2(e).

<sup>35</sup> See 16 CFR 310.2(f).

<sup>36</sup> See 16 CFR 310.2(h).

<sup>37</sup> See 16 CFR 310.2(i).

<sup>38</sup> See 16 CFR 310.2(j).

<sup>39</sup> See 16 CFR 310.2(k).

<sup>40</sup> See 16 CFR 310.2(l).

<sup>41</sup> See 16 CFR 310.2(n).

<sup>42</sup> See 16 CFR 310.2(p).

<sup>43</sup> See 16 CFR 310.2(s).

<sup>44</sup> See 16 CFR 310.2(t).

<sup>45</sup> See 16 CFR 310.2(v).

<sup>46</sup> See 16 CFR 310.2(w).

<sup>47</sup> See 16 CFR 310.2(x).

<sup>48</sup> See Federal Trade Commission, *Telemarketing Sales Rule*, 60 FR 43842 (August 23, 1995) at 43843; see also Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (January 29, 2003) at 4587.

*Technical and Conforming Changes*

The proposed rule change also makes a number of minor technical and conforming changes. First, proposed FINRA Rule 3230(m) renumbers and makes minor technical changes to the terms “account activity,” “broker-dealer of record” and “established business relationship.” Second, proposed FINRA Rule 3230 amends paragraphs (a), (b) and (c) by replacing the term “telephone solicitation” with the term “outbound telephone call.” Third, proposed FINRA Rule 3230(d) replaces the term “telemarketing call” with the term “outbound telephone call.” Fourth, the proposed rule change updates a reference to an “established business relationship” in subparagraph (a)(1)(A). Finally, the proposed rule change amends paragraph (b) to clarify that a signed, written agreement may be obtained electronically under the E-Sign Act.

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

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>49</sup> which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change will protect investors and the public interest by continuing to prohibit deceptive and other abusive telemarketing acts or practices.

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<sup>49</sup> 15 U.S.C. 78o-3(b)(6).

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

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

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

Written comments were neither solicited nor received.

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form

(<http://www.sec.gov/rules/sro.shtml>); or

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2011-059 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-FINRA-2011-059. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2011-059 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

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

Elizabeth M. Murphy

Secretary

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<sup>50</sup> 17 CFR 200.30-3(a)(12).



**EXHIBIT 5**

Exhibit 5 shows the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

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**Text of Proposed New FINRA Rule  
(Marked to Show Changes from NASD Rule 2212; NASD Rule 2212 to be Deleted in  
its Entirety from the Transitional Rulebook)**

\* \* \* \* \*

**3000. SUPERVISION AND RESPONSIBILITIES RELATING TO ASSOCIATED  
PERSONS**

\* \* \* \* \*

**3200. RESPONSIBILITIES RELATING TO ASSOCIATED PERSONS**

\* \* \* \* \*

**[2212]3230. Telemarketing**

**(a) General Telemarketing Requirements**

No member or person associated with a member shall initiate any outbound telephone call [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)](m)(12)(A)(i),

(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 outbound telephone [solicitations] calls 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 the 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 (which may be obtained electronically under the E-Sign Act) between the person and 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 outbound telephone [solicitations] calls will not be liable for violating paragraph (a)(3) if the member or person associated with a 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 outbound telephone [solicitations] 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 [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, disclosure 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. This period may not exceed [thirty] 30 days from the date of such request. If such requests are recorded or maintained by a party other than the member on whose behalf the outbound telephone [telemarketing] call is made, the member on whose behalf the outbound telephone [telemarketing] call is made will be liable for any failures to honor the do-not-call request.

(4) Identification of sellers and telemarketers. A member or person associated with a member making an outbound telephone call [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 outbound telephone calls [for telemarketing purposes] must maintain a record of a [caller]person's request not to receive further [telemarketing] calls. [A firm-specific do-not-call request must be honored for 5 years from the time the request is made.]

**(e) Wireless Communications**

The provisions set forth in this [r]Rule are applicable to members and persons associated with a member making outbound telephone [telemarketing or making telephone solicitations] calls to wireless telephone numbers.

**(f) Outsourcing Telemarketing**

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

**(g) Caller Identification Information**

(1) Any member 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's telephone carrier, the name of the member, 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 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 or person associated with a member 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 or person associated with a member 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 or person associated with a member 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 or person associated with a member 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 or person associated with a member 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 within two seconds of the person’s completed greeting.

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

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

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

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

**(k) Prerecorded Messages**

(1) No member or person associated with a member 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 has obtained from the recipient of the call an express agreement, in writing, that:

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

(ii) the member 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; and

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

(B) the member or person associated with a member 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'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'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'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'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 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 or person associated with a member 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;

(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:

[(4)1] [t]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.

(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.

(5) [4] [t]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

[(A) An established business] relationship [exists] between a member and a person if:

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

[(ii)B) 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)C) 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.

(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.

([3]18) The term “personal relationship” means any family member, friend, or acquaintance of the person associated with a member making an outbound telephone [telemarketer making the] 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.

([2]20) The term[s] “telemarketing” means consisting of or relating to [and telephone solicitation mean] 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 [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].

**••• Supplementary Material: -----**

**.01 Compliance with Other Requirements.**

(a) This Rule does not affect the obligation of any member or person associated with a member that engages in telemarketing to comply with relevant state and federal laws and rules, including 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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**Text of Incorporated NYSE Rule and NYSE Rule Interpretation to be Deleted In Their Entirety from the Transitional Rulebook**

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**Incorporated NYSE Rule**

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**[Rule 440A. Telephone Solicitation]**

**Entire text deleted.**

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**NYSE RULE INTERPRETATION**



\* \* \* \* \*

**[Rule 440A Telephone Solicitation]**

[/01 Compliance with FCC and SEC Rules]

**Entire text deleted.**

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