# Regulatory Notice 12-17

# Telemarketing

## SEC Approves Consolidated Telemarketing Rule

**Effective Date: June 29, 2012**

## Executive Summary

The SEC approved FINRA's proposed rule change to adopt NASD Rule 2212 (Telemarketing) as FINRA Rule 3230 (Telemarketing) in the consolidated rulebook (Consolidated FINRA Rulebook), taking into account certain requirements under NYSE Rule 440A (Telephone Solicitation) and its Interpretation.[1] Further, the new rule adopts provisions that are substantially similar to Federal Trade Commission (FTC) rules that prohibit deceptive and other abusive telemarketing acts or practices. FINRA Rule 3230 becomes effective on June 29, 2012.

The text of FINRA Rule 3230 can be found at *www.finra.org/notices/12-17*.

Questions concerning this *Notice* should be directed to:


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## Background & Discussion

NASD Rule 2212 and NYSE Rule 440A are similar rules that require member firms to maintain and consult 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 SEC directed FINRA and NYSE to adopt these telemarketing rules in accordance with the Telemarketing Consumer Fraud and Abuse Prevention Act of 1994 (Prevention Act).[2] The Prevention Act requires the SEC 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.[3] In 2011, SEC staff directed FINRA to conduct a review of its telemarketing rule and propose rule amendments that provide protections that are, in the SEC's view, at least as strong as those provided by the FTC's telemarketing rules.[4]

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### Notice Type

- Consolidated Rulebook
- New Rule

### Suggested Routing

- Compliance
- Legal
- Senior Management

### Key Topics

- Cold Call
- Do-Not-Call Lists
- Established Business Relationship
- Telemarketing

### Referenced Rules & Notices

- FINRA Rule 3230
- NASD Rule 2212
- NYSE Rule 440A and its Interpretation

FINRA® Financial Industry Regulatory Authority

## FINRA Rule 3230

The SEC approved FINRA's proposed rule change to adopt NASD Rule 2212 as FINRA Rule 3230 in the Consolidated FINRA Rulebook, subject to certain amendments.[5] The approved rule change deletes NYSE Rule 440A and NYSE Rule Interpretation 440A/01. However, the new rule incorporates certain provisions of NYSE Rule 440A and its Interpretation, and contains additional provisions that are substantially similar to FTC rules that prohibit deceptive and other abusive telemarketing acts or practices as described below.

### Caller Identification Information

FINRA Rule 3230 includes caller identification information provisions similar to those contained in NYSE Rule 440A(h). These provisions provide that firms 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 new rule does not create any new obligations on broker-dealers as they are already subject to identical provisions under FCC regulations.[6]

### Maintenance of Do-Not-Call Lists

FINRA Rule 3230(d)(6) maintains the requirement in NASD Rule 2212(d)(6) that a firm making an outbound telephone call must maintain a record of a caller's request not to receive further calls. However, the new rule eliminates the five-year window under which a firm must honor a firm-specific do-not-call request. SEC staff directed FINRA to delete this provision because the firm specific opt out period is indefinite under the FTC's Telemarketing Sales Rule,[7] rather than five years as provided in NASD Rule 2212.[8]

### Wireless Communications

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

### Outsourcing Telemarketing

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

### Unencrypted Consumer Account Numbers

FINRA Rule 3230(h) prohibits a firm or its associated person from disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing. The provision is substantially similar to the FTC's provision regarding unencrypted consumer account numbers.[9] Additionally, the provision 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 definition is substantially similar to the view taken by the FTC.[10]

### Submission of Billing Information

FINRA Rule 3230(i) requires, for any telemarketing transaction, a firm or its associated person 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 pre-acquired account information and a free-to-pay conversion feature, the firm or its associated person 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 pre-acquired account information, the firm or its associated person 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 rule is substantially similar to the FTC's provision regarding the submission of billing information.[11]

### Abandoned Calls

FINRA Rule 3230(j)(1) prohibits a firm or its associated person from abandoning any outbound telemarketing call. The abandoned calls prohibition is subject to a "safe harbor" under paragraph (j)(2), which provides that a firm or its associated person will not be liable for violating FINRA Rule 3230(j)(1) if: (1) the firm or its associated person employs 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 firm or its associated person, 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 an associated person is not available to speak with the person answering the telemarketing call within two seconds after the person's completed greeting, the firm or its associated person promptly plays a recorded message stating the name and telephone number of the firm or associated person on whose behalf the call was placed; and (4) the firm retains records establishing compliance with the "safe harbor." The rule is substantially similar to the FTC's provisions regarding abandoned calls.[12]

### Prerecorded Messages

FINRA Rule 3230(k) prohibits a firm or its associated person from initiating any outbound telemarketing call that delivers a prerecorded message without a person's express written agreement to receive such calls. The rule 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 paragraph (j)(2). The rule is substantially similar to the FTC's provisions regarding prerecorded messages.[13]

### Credit Card Laundering

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 firm. Except as expressly permitted by the applicable credit card system, the rule prohibits a firm or its associated person 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 firm; (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 the access is not authorized by the merchant agreement or the applicable credit card system. The rule is substantially similar to the FTC's provisions regarding credit card laundering.[14]

### Definitions

FINRA Rule 3230(m) adopts definitions that are substantially similar to the FTC's definitions.[15] The rule adopts substantially similar definitions of "acquirer," "billing information," "caller identification service," "cardholder," "charitable contribution," "credit," "credit card," "credit card sales draft," "credit card system," "customer," "donor," "free-to-pay conversion," "merchant," "merchant agreement," "outbound telephone call," "person" and "pre-acquired account information." Additionally, the rule amends the definition of "telemarketing" to track the FTC definition and deletes the reference to "telephone solicitation."

### Supplementary Material

FINRA Rule 3230 includes as Supplementary Material a provision that is similar to NYSE Rule Interpretation 440A/01. The provision reminds firms that the rule does not affect the obligation of any firm or its associated person 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.

## Endnotes

1. *See* Securities Exchange Act Release No. 66279 (January 30, 2012), 77 FR 5611 (February 3, 2012) (Order Approving Proposed Rule Change; File No. SR-FINRA-2011-059). The current FINRA rulebook consists of: (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE (Incorporated NYSE Rules). 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 03/12/08* (Rulebook Consolidation Process). For convenience, the Incorporated NYSE Rules are referred to as the NYSE Rules.
2. 15 U.S.C. 6101-6108.
3. 15 U.S.C. 6102.
4. *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.
5. *See* Securities Exchange Act Release No. 66279 (January 30, 2012), 77 FR 5611 (February 3, 2012) (Order Approving Proposed Rule Change; File No. SR-FINRA-2011-059).
6. *See* 47 CFR 64.1601.
7. *See* 16 CFR 310.
8. *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.
9. *See* 16 CFR 310.4(a)(6); *see also* Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (January 29, 2003) at 4615.
10. *See* Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (January 29, 2003) at 4616.
11. *See* 16 CFR 310.4(a)(7); *see also* Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (January 29, 2003) at 4616.
12. *See* 16 CFR 310.4(b)(1)(iv); *see also* 16 CFR 310.4(b)(4); *see also* Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (January 29, 2003) at 4641.
13. *See* 16 CFR 310.4(b)(1)(v); *see also* Federal Trade Commission, *Telemarketing Sales Rule*, 73 FR 51164 (August 29, 2008).
14. *See* 16 CFR 310.3(c); *see also* Federal Trade Commission, *Telemarketing Sales Rule*, 60 FR 43842 (August 23, 1995) at 43852.
15. *See* 16 CFR 310.2; *see also* 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.