

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-66279; File No. SR-FINRA-2011-059)

January 30, 2012

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

I. Introduction

On October 13, 2011, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act” or “Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to adopt FINRA Rule 3230 (Telemarketing) in the FINRA Consolidated Rulebook. The proposed rule change was published for comment in the Federal Register on November 2, 2011.<sup>3</sup> The Commission received one comment letter, from the Cornell Securities Law Clinic (the “Clinic”), in response to the proposal,<sup>4</sup> and a response from FINRA to the Clinic’s comments.<sup>5</sup> The text of the proposed rule change and FINRA’s Response Letter are available on FINRA’s website at <http://www.finra.org>, at the principal office of FINRA,

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

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

<sup>3</sup> See Exchange Act Release No. 65645 (November 2, 2011), 76 FR 67787 (November 4, 2011) (“Notice”).

<sup>4</sup> See comment letter submitted by William A. Jacobson, Associate Clinical Professor and Director, Cornell Securities Law Clinic, and Tamara Gavrilova, Cornell Law School, Class of 2013, to Elizabeth M. Murphy, Secretary, SEC, dated November 21, 2011 (“Cornell Letter”).

<sup>5</sup> See letter from Matthew E. Vitek, Counsel, FINRA, to Elizabeth Murphy, Secretary, SEC, dated December 15, 2011 (“Response Letter”).

on the Commission's website at <http://www.sec.gov>, and at the Commission's Public Reference Room.

This order approves the proposed rule change.

## II. Description of the Proposal

As described in more detail in the Notice,<sup>6</sup> FINRA proposed to adopt FINRA Rule 3230 (Telemarketing) based largely on NASD Rule 2212. FINRA also proposed to delete NYSE Rule 440A and its Interpretation,<sup>7</sup> but to include certain of their provisions in Rule 3230. These include caller identification rules based on Rule 440A(h) requiring members engaging in telemarketing to transmit caller identification information to persons they call and not to block the transmission of such information. In addition, FINRA proposed to include provisions substantially similar to those contained in rules of the Federal Trade Commission ("FTC") that prohibit deceptive and other abusive telemarketing acts or practices. These include a provision requiring members making outbound telephone calls to maintain a record of a person's request not to receive such calls indefinitely rather than for only five years.

FINRA explained that 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

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<sup>6</sup> See Notice, supra note 3.

<sup>7</sup> For convenience, the Notice referred to Incorporated NYSE Rules as NYSE Rules, and this order follows that convention.

these telemarketing rules in accordance with the Telemarketing Consumer Fraud and Abuse Prevention Act of 1994 (“Prevention Act”).<sup>8</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>9</sup>

In 2003, the FTC and the Federal Communications Commission (“FCC”) established a national do-not-call registry, and, pursuant to the Prevention Act, the Commission requested that FINRA and NYSE amend their telemarketing rules to require that their members participate. In 2004, the Commission approved amendments to NASD Rule 2212 requiring member firms to participate in the national do-not-call registry.<sup>10</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>11</sup>

Earlier this year, Commission staff directed FINRA to conduct a review of its telemarketing rule and propose rule amendments that provide protections at least as

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<sup>8</sup> 15 U.S.C. 6101-6108.

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

<sup>10</sup> See Exchange Act Release No. 49055 (January 12, 2004), 69 FR 2801 (January 20, 2004).

<sup>11</sup> See Exchange Act Release No. 52579 (October 7, 2005), 70 FR 60119 (October 14, 2005).

strong as those provided by the FTC’s telemarketing rules.<sup>12</sup> Commission staff had expressed concerns to FINRA and the other SROs that, overall, their telemarketing rules may not have kept pace with the FTC’s rules, for example by not requiring a firm-specific opt out to be honored indefinitely as under the FTC’s rules, and thus may no longer meet the standards of the Prevention Act.<sup>13</sup> FINRA filed the proposed rule change in response to these concerns.<sup>14</sup>

FINRA advised that it would announce the implementation date of the proposed rule change in a Regulatory Notice to be published no later than 90 days following Commission approval, and that the implementation date would be no later than 180 days following Commission approval.<sup>15</sup>

### III. Summary of Comments

In its comment letter,<sup>16</sup> the Clinic generally supported the proposed rule on the basis that it would comply with the Prevention Act and expressed the belief that it would be “an important step in preventing members from using deceptive and abusive practices when telemarketing.” The Clinic did, however, make some proposed recommendations.

The Clinic recommended that the proposed rule should incorporate additional provisions in NYSE Rule 440A regarding prerecorded messages and the use of telephone

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<sup>12</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>13</sup> Id.

<sup>14</sup> See Notice, supra note 3.

<sup>15</sup> Id.

<sup>16</sup> See Cornell Letter, supra note 4.

facsimile or computer advertisements. The Clinic also recommended that FINRA revise its proposal to eliminate the exception from proposed Rule 3230(k), which would permit prerecorded messages that meet the conditions of the proposed “safe harbor” for abandoned calls under proposed subparagraph (j)(2). In addition, the Clinic opined that its proposed amendments to the proposed rule would provide customers with additional protection against invasive and abusive telemarketing techniques.

In its Response Letter,<sup>17</sup> FINRA stated that it did not believe it should amend the proposed rule change to adopt the Clinic’s proposed amendments. FINRA stated that at the time the NYSE adopted Rule 440A’s provisions regarding prerecorded messages and the use of telephone facsimile or computer advertisements, the NYSE stated that broker-dealers were subject to the FCC’s telemarketing rules, and, accordingly, the NYSE modeled NYSE Rule 440A based on applicable FCC telemarketing rules.<sup>18</sup> Because broker-dealers remain subject to substantially similar FCC provisions regarding prerecorded messages and the use of telephone facsimile or computer advertisements, FINRA believes that adding the additional provisions of Rule 440A to the proposed rule is unnecessary.<sup>19</sup> Moreover, the proposed rule, at Supplementary Material .01, includes a reminder to member firms regarding their obligation to comply with relevant federal and state laws and rules, including FCC rules.

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<sup>17</sup> See Response Letter, supra note 5.

<sup>18</sup> Id. (citing Exchange Act Release No. 52308 (August 19, 2005), 70 FR 49961, 49964 (August 25, 2005)).

<sup>19</sup> Id. (citing 47 CFR 64.1200 and 47 CFR 68.318).

FINRA also stated that it did not believe it should eliminate the exception from proposed Rule 3230(k), which would permit prerecorded messages that meet the conditions of the proposed “safe harbor” for abandoned calls under proposed subparagraph (j)(2). FINRA stated that this exception would be substantially similar to FCC and FTC exemptions for prerecorded messages complying with a “safe harbor” for abandoned calls.<sup>20</sup> In addition, FINRA’s Response Letter cited to the FTC’s rationale that “a total ban on abandoned calls would amount to a ban on predictive dialers, and would not strike the proper balance between addressing an abusive practice and allowing for a technology that reduces costs for telemarketers.”<sup>21</sup> Further, FINRA restated the FTC’s and FCC’s recognition that “a prerecorded message that provides identification information not only mitigates consumers’ fears, but also makes it easier for consumers to make a do-not-call request of a company by calling the number provided in the message.”<sup>22</sup>

#### IV. Discussion and Commission’s Findings

After careful review of the proposed rule change, the Cornell Letter, and FINRA’s Response Letter, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable

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<sup>20</sup> Id. (citing 16 CFR 310.4(b)(1)(v)).

<sup>21</sup> Id. (citing FTC, Telemarketing Sales Rule, 68 FR 4580, 4642 (January 29, 2003)).

<sup>22</sup> Id. (citing 68 FR 4580, supra note 23, at 4644, and FCC, Rules and Regulations Implementing the Telephone Consumer Protection Act, 68 FR 44144, 44164 (July 25, 2003)).

to a national securities association.<sup>23</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act and the rules and regulations thereunder.<sup>24</sup> Section 15A(b)(6) of the Act requires, among other things, that FINRA rules 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. The proposed rule change is designed to prevent fraudulent and manipulative acts and practices, protect investors and the public interest, and promote just and equitable principles of trade by strengthening protections against deceptive and other abusive telemarketing acts or practices in the securities industry. Accordingly, the Commission finds that good cause exists to approve the proposed rule change.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>25</sup> that

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<sup>23</sup> In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f). Commenters did not raise concerns about the proposed rule's impact on efficiency, competition and capital formation.

<sup>24</sup> 15 U.S.C. 78o-3(b)(6).

<sup>25</sup> 15 U.S.C. 78s(b)(2).

the proposed rule change (SR-FINRA-2011-059) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>26</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>26</sup> 17 CFR 200.30-3(a)(12).