

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52844; File No. SR-Amex-2005-064)

November 28, 2005

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Relating to Telemarketing

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934,¹ (“Exchange Act”) and Rule 19b-4 thereunder,² notice is hereby given that on June 14, 2005, the American Stock Exchange LLC (“Amex” or “Exchange”) filed with the Securities and Exchange Commission (“Commission” or “SEC”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On September 23, 2005, the Amex filed Amendment No. 1 to the proposed rule change.³ On November 15, 2005, the Amex filed Amendment No. 2 to the proposed rule change.⁴ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The Exchange is proposing to amend Amex Rule 429 (“Telemarketing”) to require Amex members and member organizations to participate in the National Do-Not-Call Registry maintained by the Federal Trade Commission (“FTC”) and to follow applicable regulations of the Federal Communications Commission (“FCC”).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ In Amendment No. 1, the Amex partially amended the text of proposed amended Amex Rule 429 and made conforming and technical changes to the original filing.

⁴ In Amendment No. 2, the Amex made additional changes to the text of proposed amended Amex Rule 429 and to the original filing.

The current text of Amex Rule 429 would be deleted. The text of the proposed rule change is set forth below. Underlining indicates new text.

Telemarketing

Rule 429.

(a) General Telemarketing Requirements

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

(1) Time of Day Restriction

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

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

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

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

(2) Firm Specific Do-Not-Call List

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

(3) National Do-Not-Call List

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

(b) National Do-Not-Call List Exceptions

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

(1) Established Business Relationship Exception

The member has an established business relationship with the recipient of the call.

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

(2) Prior Express Written Consent Exception

The member has obtained the person's prior express invitation or permission.

Such permission must be evidenced by a signed, written agreement between the person and the member which states that the person agrees to be contacted by the member and includes the telephone number to which the calls may be placed; or

(3) Personal Relationship Exception

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

(c) Safe Harbor Provision

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

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

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

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

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

(d) Procedures

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

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

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

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

person's do-not-call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date of such request. If such requests are being recorded or maintained by a party other than the member on whose behalf the telemarketing call is made, the member on whose behalf the telemarketing call is made will be liable for any failure to honor the do not call request.

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

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

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

(e) Wireless Communications

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

(f) Outsourcing Telemarketing

If a member uses another entity to perform telemarketing services on its behalf, the member remains responsible for ensuring compliance with all provisions contained in this rule.

(g) Definitions

(1) Established business relationship

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

- (i) the person has made a financial transaction or has a security position, a money balance, or account activity with the member within the previous eighteen months immediately preceding the date of the telemarketing call;
- (ii) the member is the broker/dealer of record for an account of the person within the previous 18 months immediately preceding the date of the telemarketing call; or
- (iii) the person has contacted the member to inquire about a product or service offered by the member within the previous three months immediately preceding the date of the telemarketing call.

(B) A person’s established business relationship with a member does not extend to the member’s affiliated entities unless the person would

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

(2) The terms "telemarketing" and "telephone solicitation" mean the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

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

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

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

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

In its filing with the Commission, the Amex 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. The Exchange 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

Amex Rule 429 currently limits members, member organizations, and associated persons from making outbound calls to the residence of any person for the purposes of soliciting the purchase of securities or related services between the hours of 8 a.m. and 9 p.m. It also requires disclosure to the called person of the caller’s identity, firm telephone number and address, and the purpose of the call. Rule 429 currently creates exceptions from its time of day and disclosure requirements for telephone calls to certain categories of “existing customers.”

The Exchange is proposing to amend Amex Rule 429 to incorporate applicable telemarketing regulations issued by the FCC and to require members and member organizations to participate in the national do-not-call registry maintained by the FTC.

Background

In 1992 and 1995, the FCC and the FTC established regulations requiring firms to maintain do-not-call lists and to limit the hours of telephone solicitations. The Telemarketing and Consumer Fraud Abuse Prevention Act of 1994 (the “Telemarketing Act”) amended the Telephone Consumer Protection Act of 1991 (“TCPA”) and required the SEC to promulgate telemarketing rules substantially similar to those of the FTC, or direct self-regulatory organizations to do so, unless the SEC determined that such rules were not in the interest of investor protection.⁵

In 1996 and 1997 the Amex adopted Rule 428(a) and Rule 429 to require members and member organizations to maintain a centralized do-not-call list of persons

⁵ See 15 U.S.C. 6102(d)(1).

who do not wish to receive telephone solicitations from members or their associated persons, and to follow time-of-day restrictions on telemarketing.⁶

In 2003, the FCC and the FTC established rules requiring sellers and telemarketers to participate in a national do-not-call registry. These rules include a “safe harbor” for telemarketers that have made a good faith effort to comply with the national do-not-call rules. In March 2004, the FTC and FCC further amended their telemarketing rules to require the use of a national do-not-call registry that is no more than thirty-one (31) days old.

In correspondence dated February 3, 2005, Commission staff recommended that the Amex amend its telemarketing rules to require its members and member organizations to participate in the national do-not-call registry.⁷ Commission staff noted that NASD also had recently filed an amendment to their rules regarding the frequency of updates from the national do-not-call registry.⁸ In this regard, proposed Rule 429 is substantially similar to the NASD rule that was approved by the Commission in January 2004 and amended in January 2005.⁹

Proposed Amex Rule 429

Paragraph (a)(1) of proposed Amex Rule 429 provides that members, member organizations, or persons associated with a member or member organization may

⁶ See Securities Exchange Act Release No. 36748 (January 19, 1996), 61 FR 2556 (January 26, 1996); Securities Exchange Act Release No. 38724 (June 6, 1997) 62 FR 32390 (June 13, 1997).

⁷ See Correspondence dated February 3, 2005 from Martha Mahan Haines, Assistant Director, Division of Market Regulation, SEC.

⁸ See Securities Exchange Act Release No. 34-49055 (January 12, 2004); 69 FR 2801 (January 20, 2004). See also Securities Exchange Act Release No. 34-51023 (January 11, 2005); 70 FR 2083 (January 19, 2005).

⁹ Id.

engage in telephone solicitations only between the hours of 8 a.m. and 9 p.m. unless (1) they have an established business relationship with the called person; (2) the member has received that person's prior express invitation or permission; or (3) the person called is a broker-dealer. These provisions are essentially identical to those already in place, except the "existing customer" exception is being replaced with an "established business relationship" exception, mirroring the FCC's Rules. As defined in paragraph (g)(1)(A), an established business relationship exists if the person called has made a financial transaction, or has a security position, a money balance, or account activity with the member within the previous eighteen (18) months immediately preceding the date of the telemarketing call, if 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 when the person has contacted the member to inquire about a product or service offered by the member within the previous three (3) months immediately preceding the date of the telemarketing call.

Paragraph (a)(2) of proposed Amex Rule 429 prohibits members and member organizations, and persons associated with a member or member organization from initiating a telephone solicitation to any person listed on a firm specific do-not-call list. The firm specific do-not-call list is maintained pursuant to existing Amex Rule 428.

Paragraph (a)(3) of proposed Amex Rule 429 requires firms to participate in a national do-not-call list. Paragraph (b) of proposed Amex Rule 429 lists several exceptions to the national do-not-call list compliance requirement, where a member making telephone solicitations will not be liable for violating paragraph (a)(3). First, a member will not be found liable if they are able to demonstrate that there is 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 set forth in proposed Amex Rule 429(b), even if the person continues to do business with that member. The second exception applies if the member has obtained the person's prior express invitation or permission. Such permission must be confirmed by a signed written agreement between the person and the member, which states that the person agrees to be contacted by the member and includes the telephone number to which the calls may be placed. Finally, the member or associated person making the call will not be found liable if the associated person making the call has a personal relationship with the recipient of the call.

Paragraph 429(c) creates a safe harbor from the national do-not-call list requirements of paragraph (a)(3). To be eligible for this safe harbor, a member or person associated with a member making telephone solicitations must demonstrate that the member's routine business practice meets the following standards:

- The member must demonstrate that it has established and implemented written procedures to comply with the national do-not-call rules;
- The member must demonstrate that it has trained its personnel and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;
- The member must demonstrate that it has maintained and recorded a list of telephone numbers that it may not contact; and
- The member must demonstrate that it uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, and is 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.¹⁰

¹⁰ As noted above, the thirty-one (31) day requirement is consistent with recent amendments to the FCC and FTC rules that became effective January 1, 2005.

Paragraph 429(d) sets forth the procedures necessary for members to comply with Proposed Amex Rule 429(a). Under paragraphs 429(d)(1)-(d)(4), a firm's procedures must meet the following minimum standards:

- The member must have a written policy for maintaining a do-not-call list;
- The member must demonstrate that its personnel engaged in telemarketing are informed and trained in the existence and use of the do-not-call list;
- The member must record do-not-call requests when they are made and honor them within a reasonable time not to exceed 31 days;
- Members 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 a related service. Such telephone number may not be a 900 number or any other number for which charges exceed local or long-distance transmission charges.

Paragraph 429(d)(3) provides that a member will be liable for any failure to honor a do-not-call request by an entity recording or maintaining such requests on its behalf.

Paragraph 429(d)(5) provides that a person's do-not-call request applies to the member making the call, and not to affiliated entities, unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised, or unless the consumer specifically requests that it apply to affiliated entities. Finally, paragraph (d)(6) of proposed amended Amex Rule 429 requires that a member maintain a record of the caller's request not to receive further telemarketing calls. A firm specific do-not-call request must be honored for five (5) years from the time the request is made.

Paragraph 429(e) provides that the provisions of the proposed rule also apply to members telemarketing or making telephone solicitation calls to wireless telephone

numbers. Paragraph 429(f) states that a member is responsible for complying with the foregoing provisions even if it uses another entity to perform telemarketing services on its behalf.

Paragraph 429(g) defines terms used in proposed amended Rule 429. As noted above, paragraph 429(g)(1)(A) codifies the definition of an established business relationship. Paragraph 429(g)(1)(B) further states that 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, an established business relationship with an affiliate does not extend to the member unless the person would reasonably expect the member to be included.

Paragraph 429(g)(2) defines the terms "telemarketing" and "telephone solicitation" to mean the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

The term "personal relationship" is defined in paragraph 429(g)(3) as any family member, friend, or acquaintance of the telemarketer making the call. The term "account activity" as defined in paragraph 429(g)(4) 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. Finally, the term "broker/dealer of record" as defined in paragraph 429(g)(5) 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.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Exchange Act¹¹ in general and furthers the objectives of Section 6(b)(5)¹² in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange believes the proposed rule change will enhance investor protection by enabling persons who do not want to receive telephone solicitations from members or member organizations to receive the protections of the national do-not-call registry.

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

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

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

No written comments were solicited or received by the Exchange on this proposal.

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

Within 35 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

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(5).

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 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, as amended, is consistent with the Exchange 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 rulecomments@sec.gov. Please include File Number SR-Amex-2005-064 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number SR-Amex-2005-064. 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 Web site (<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 inspection and copying in the Commission's Public Reference Section, 100 F Street, NE, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Amex. 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-Amex-2005-064 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹³

Jonathan G. Katz
Secretary

¹³ 17 CFR 200.30-3(a)(12).