

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-55735; File No. SR-NYSE-2007-06)

May 10, 2007

Self-Regulatory Organizations; New York Stock Exchange LLC.; Order Approving Proposed Rule Change to Amend NYSE Rule 440A (“Telephone Solicitations”)

I. Introduction

On January 25, 2007, the New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”), 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> a proposed rule change to amend Rule 440A, addressing member organizations’ telephone solicitations of customers. The proposed rule change was published for comment in the Federal Register on March 29, 2007.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

NYSE Rule 440A generally addresses member organizations’ telephone solicitations of customers. Rule 440A(g) provides “No member or member organization may use a telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine, computer or other device.” Subsection 440A(g)(1) further provides that a facsimile advertisement is not “unsolicited” where the recipient has granted the member organization prior express invitation or permission to deliver the advertisement, as further defined in the

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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. 55517 (Mar. 23, 2007), 72 FR 14842 (Mar. 29, 2007).

Rule. This proposed rule change provided that such an advertisement also will not be considered “unsolicited” where there is an “established business relationship” as defined in the present Rule 440A(j). In addition, the Exchange proposed to delete the term “member” as used in the Rule to reflect the recent reorganization of the Exchange,<sup>4</sup> and the term “allied member” as redundant within the context of the present regulation.

The amendments to Rule 440A(g) were adopted by the Exchange on December 2, 2004<sup>5</sup> to incorporate regulations issued by the Federal Communications Commission (“FCC”) and the Federal Trade Commission (“FTC”) relating to the implementation of the National Do Not Call registry and the amendments to the Telephone Consumer Protection Act of 1991.<sup>6</sup> The FCC and FTC regulations contained no exception for facsimiles sent to customers with which a broker-dealer had an “established business relationship” as such term was defined. Subsequently, Congress passed legislation<sup>7</sup> which restored an exemption for unsolicited faxes sent to a recipient with whom the sender had an established business relationship. Accordingly, the proposed amendments to NYSE Rule 440A(g)(1) added an exception for established business relationships to the definition of “unsolicited” and set forth the measures necessary for a customer to opt out of the receipt of further communications. These standards, which are taken from applicable FCC regulations,<sup>8</sup>

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<sup>4</sup> See Exchange Act Release No. 53382 (Feb. 27, 2006), 71 FR 11251 (Mar. 6, 2006) (SR-NYSE-2005-77).

<sup>5</sup> See Exchange Act Release No. 34-52579 (Oct. 7, 2005), 70 FR 60119 (Oct. 14, 2005) (SR-NYSE-2004-73).

<sup>6</sup> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, FCC 03-153 (Jun. 26, 2003), 68 FR 44144 (Jul. 25, 2003).

<sup>7</sup> Junk Fax Prevention Act of 2005, Pub. L. 109-21, 119 Stat. 359 (2005).

<sup>8</sup> FCC 06-42 (Apr. 5, 2006), 71 FR 56893 (Sept. 28, 2006).

generally require that the member organization and the person not only have an established business relationship,<sup>9</sup> but also that the member organization obtain the fax number from the recipient (or the recipient's web site, directory, or advertisement). Further, the recipient must not have stated on those materials that they do not accept unsolicited advertisements at the listed number. Under the proposed rule change, the member organization must also take reasonable steps to verify that the recipient consented to have the number listed.

### III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the Act and, in particular, with Section 6(b)(5) of the Act, which requires, among other things, that the NYSE's rules be designed to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.<sup>10</sup> The Commission believes that in bringing the NYSE's Rule setting forth the definition and treatment of unsolicited telemarketing communications into concurrence with FCC regulations, the proposed rule change will harmonize currently disparate regulations and

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<sup>9</sup> An established business relationship is defined as a prior existing relationship formed by voluntary two-way communication between a member organization and a person where the person has, generally speaking, done business with the member organization within the 18 months preceding the telephone call, the member organization is the broker-dealer of record for the person's account within those 18 months, or the person has contacted the member organization to inquire about a product or service within the three months preceding the telephone call.

<sup>10</sup> 15 U.S.C. 78f(b)(5).

therefore provide greater clarity, both to members and customers, as to which communications between members and customers qualify as “unsolicited.”<sup>11</sup>

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<sup>11</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

**IV. Conclusion**

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act<sup>12</sup> that the proposed rule change (SR-NYSE-2007-06), be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>12</sup> 15 U.S.C. 78s(b)(2).

<sup>13</sup> 17 CFR 200.30-3(a)(12).