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Required fields are shown with yellow backgrounds and asterisks.

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SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No.* SR - 2012 - * 014
Amendment No. (req. for Amendments *)

Proposed Rule Change by BATS Y-Exchange, Inc.

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial *	Amendment *	Withdrawal	Section 19(b)(2) *	Section 19(b)(3)(A) *	Section 19(b)(3)(B) *
☑	☐	☐	☐	☑	☐

Pilot ☐ | Extension of Time Period for Commission Action * | Date Expires *

Rule

19b-4(f)(1)	19b-4(f)(2)	19b-4(f)(3)	19b-4(f)(4)	19b-4(f)(5)	19b-4(f)(6)
☐	☐	☐	☐	☐	☑

Exhibit 2 Sent As Paper Document

Exhibit 3 Sent As Paper Document

Description

Provide a brief description of the proposed rule change (limit 250 characters, required when Initial is checked *).

Proposed rule change to adopt BYX Rule 3.23 “Telemarketing”, to codify provisions that are substantially similar to FTC rules that prohibit deceptive and other abusive telemarketing acts or practices.

Contact Information

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 * Anders   Last Name * Franzon

Title * VP, Associate General Counsel

E-mail * afranzon@batstrading.com

Telephone * (913) 815-7154   Fax (913) 815-7119

Signature

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 07/06/2012

By Anders Franzon   VP, 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.

Anders Franzon,

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) Add Remove View	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) Add Remove View	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 Add Remove View 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 Add Remove View 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 Add Remove View	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 Add Remove View	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 Add Remove View	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 the Proposed Rule Change

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b-4 thereunder,[2] BATS Y-Exchange, Inc. (the "Exchange" or "BYX") is filing with the Securities and Exchange Commission ("Commission") a proposed rule change to adopt BYX Rule 3.23 "Telemarketing", to its rulebook to codify provisions that are substantially similar to FTC rules that prohibit deceptive and other abusive telemarketing acts or practices.[3] The Exchange has designated this proposal as non-controversial and provided the Commission with the notice required by Rule 19b-4(f)(6)(iii) under the Act.[4]

(a) The text of the proposed rule change is attached as Exhibit 5. Material proposed to be added is underlined. Material proposed to be deleted is enclosed in brackets.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by senior management of the Exchange pursuant to authority delegated by the Board of Directors of the Exchange on September

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 The proposed rule change is substantially similar in all material respects to Financial Industry Regulatory Authority, Inc. ("FINRA") Rule 3230 (Telemarketing), which the Commission recently approved. See Securities Exchange Act Release No. 34-66279 (January 30, 2012), 77 FR 5611 (February 3, 2012) (SR-FINRA-2011-059) (approval order of proposed rule change to adopt telemarketing rule).

4 17 CFR 240.19b-4(f)(6)(iii).

27, 2010. Exchange staff will advise the Board of Directors of the Exchange of any action taken pursuant to delegated authority. No other action is necessary for the filing of the rule change.

Questions regarding this rule filing may be directed to Eric Swanson, Senior Vice President and General Counsel of the Exchange at (913) 815-7000.

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

(a) Purpose

The Exchange proposes to add Rule 3.23, "Telemarketing", to its rulebook to codify provisions that are substantially similar to FTC rules that prohibit deceptive and other abusive telemarketing acts or practices. Rule 3.23 will require Members to, among other things, maintain do-not-call lists, limit the hours of telephone solicitations, and not use deceptive and abusive acts and practices in connection with telemarketing. The Commission directed BYX to enact these telemarketing rules in accordance with the Telemarketing Consumer Fraud and Abuse Prevention Act of 1994 ("Prevention Act").[5] 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[6] to prohibit deceptive and other abusive telemarketing acts or practices, unless the Commission determines either that the rules are not necessary or appropriate for the protection of investors or the maintenance of orderly markets, or that

5 15 U.S.C. 6101 – 6108.

6 16 CFR 310.1 – .9. The FTC adopted these rules under the Prevention Act in 1995. See Federal Trade Commission, *Telemarketing Sales Rule*, 60 FR 43842 (Aug. 23, 1995).

existing federal securities laws or Commission rules already provide for such protection.[7]

In 1997, the Commission determined that telemarketing rules promulgated and expected to be promulgated by self-regulatory organizations, together with the other rules of the self- regulatory organizations, the federal securities laws and the Commission's rules thereunder, satisfied the requirements of the Prevention Act because, at the time, the applicable provisions of those laws and rules were substantially similar to the FTC's telemarketing rules.[8] Since 1997, the FTC has amended its telemarketing rules in light of changing telemarketing practices and technology.[9]

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.[10] In May 2011, Commission staff directed BYX to conduct a review of its telemarketing rule and propose rule amendments that provide protections that are at least as strong as those

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7 15 U.S.C. 6102.

8 See *Telemarketing and Consumer Fraud and Abuse Prevention Act; Determination that No Additional Rulemaking Required*, Securities Exchange Act Release No. 38480 (Apr.7, 1997), 62 FR 18666 (Apr. 16, 1996). The Commission also determined that some provisions of the FTC's telemarketing rules related to areas already extensively regulated by existing securities laws or activities not applicable to securities transactions See id.

9 See, e.g., Federal Trade Commission, *Telemarketing Sales Rule*, 73 FR 51164 (Aug. 29,2008) (amendments to the *Telemarketing Sales Rule* relating to prerecorded messages and call abandonments); and Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (Jan. 29, 2003) (amendments to the *Telemarketing Sales Rule* establishing requirements for sellers and telemarketers to participate in the national do-not-call registry).

10 See supra note 7.

provided by the FTC's telemarketing rules.[11] Commission staff had concerns "that the [Exchange] rules overall have not kept pace with the FTC's rules, and thus may no longer meet the standards of the [Prevention] Act."[12]

The proposed rule change, as directed by the Commission staff, adopts provisions in Rule 3.23 that are substantially similar to the FTC's current rules that prohibit deceptive and other abusive telemarketing acts or practices as described below.[13]

Telemarketing Restrictions

The proposed rule change codifies the telemarketing restrictions in Rule 3.23(a) to provide that no Member or associated person of a Member[14] may make an outbound telephone call[15] to:

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11 See Letter from Robert W. Cook, Director, Division of Trading and Markets, Securities and Exchange Commission, to Joe Ratterman, President and Chief Executive Officer, BATS Global Markets, Inc., dated May 12, 2011.

12 Id.

13 The proposed rule change is also substantially similar to FINRA Rule 3230. See supra note 3.

14 An "associated person of a Member" is any partner, officer, director, or branch manager of a Member (or person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such Member, or any employee of such Member, except that any person associated with a Member whose functions are solely clerical or ministerial shall not be included in the meaning of such term. See Rule 1.5(q).

15 An "outbound telephone call" is 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 "telemarketer" is any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor. A "customer" is any person who is or may be required to pay for goods or services through telemarketing. A "donor" means any person solicited to make a charitable contribution. A "person" is any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity. "Telemarketing" means consisting of or relating to 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

(1) any person's residence at any time other than between 8 a.m. and 9 p.m. local time at the called person's locations;

(2) any person that previously has stated that he or she does not wish to receive any outbound telephone calls made by or on behalf of the Member; or

(3) any person who has registered his or her telephone number on the FTC's national do-not-call registry.

The proposed rule change is substantially similar to the FTC's provisions regarding abusive telemarketing acts or practices.[16] The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.[17]

Caller Disclosures

The proposed rule change codifies in Rule 3.23(b) that no Member or associated person of a Member shall make an outbound telephone call to any person without disclosing truthfully, promptly and in a clear and conspicuous manner to the called person the following information: (i) the identity of the caller and the Member; (ii) the

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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 previous 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. 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. See proposed Rule 3.23(n)(3), (11), (16), (17), (20), and (21); see also FINRA Rule 3230(m)(11), (14), (16), (17), and (20); and 16 CFR 310.2(f), (l), (n), (v), (w), (cc), and (dd).

16 See 16 CFR 310.4(b)(1)(iii)(A) and (B) and (c); see also FINRA Rule 3230(a). See proposed Rule 3.23(n)(16) and (21) and supra note 15.

17 See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (Jan. 29, 2003) at 4628; and Federal Trade Commission, *Telemarketing Sales Rule*, 60 FR 43842 (Aug. 23, 1995) at 43855.

telephone number or address at which the caller may be contacted; and (iii) that the purpose of the call is to solicit the purchase of securities or related services. The proposed rule change also provides that the telephone number that a caller provides to a person as the number at which the caller may be contacted may not be a 900 number or any other number for which charges exceed local or long-distance transmission charges.[18]

Exceptions

The proposed rule change adds Rule 3.23(c) to provide that the prohibition in paragraph (a)(1)[19] does not apply to outbound telephone calls by a Member or an associated person of a Member if:

(1) the Member has received that person's express prior written consent;

(2) the Member has an established business relationship[20] with the person; or

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18 See proposed Rule 3.23(b); see also FINRA Rule 3230(d)(4). The proposed rule change is substantially similar to the Federal Communications Commission's regulations regarding call disclosures. See 47 CFR 64.1200(d)(4).

19 The Exchange believes that even if a Member satisfies the exception in paragraph (c), the Member should still make the caller disclosures required by paragraph (b) to the called person to ensure that the called person receives sufficient information regarding the purpose of the call.

20 An "established business relationship" is a relationship between a Member and a person if (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 the Member within the 18 months immediately preceding the date of an outbound telephone call; (b) the Member is the broker-dealer of record for an account of the person within the 18 months immediately preceding the date of an outbound telephone call; or (c) the person has contacted the Member to inquire about a product or service offered by the Member within the three months immediately preceding the date of an outbound telephone call. 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

(3) the person is a broker or dealer.

Member's Firm-Specific Do-Not-Call List

The proposed rule change adds Rule 3.23(d) to provide that each Member must make and maintain a centralized list of persons who have informed the Member or any of its associated persons that they do not wish to receive outbound telephone calls. The proposed term "outbound telephone call" is defined substantially similar to the FTC's definition of that term.[21]

Proposed Rule 3.23(d)(2) adopts procedures that Members must institute to comply with Rule 3.23(a) and (b) prior to engaging in telemarketing. These procedures must meet the following minimum standards:

(1) Member must have a written policy for maintaining their firm-specific do-not-call lists.

(2) Personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the Member's firm-specific do-not-call list.

(3) 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

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unless the person would reasonably expect the Member to be included. The term "account activity" includes, but is not 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. The term "broker- dealer of record" refers to the broker or dealer identified on a customer's account application for accounts held directly at a mutual fund or variable insurance product issuer. See proposed Rule 3.23(n)(1), (4), and (12); see also 16 CFR 310.2(o) and FINRA Rule 3230(m)(1), (4), and (12).

[21] See 16 CFR 310.4(b)(1)(iii)(A) and supra note 15; see also FINRA Rule 3230(a)(2).

provided, and telephone number on its firm-specific do-not-call list at the time the request is made.[22]

(4) Members or associated persons of Members making an outbound telephone call must make the caller disclosures set forth in Rule 3.23(b).

(5) In the absence of a specific request by the person to the contrary, a person's do- not-call request will 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 call and the product being advertised.

(6) A Member making outbound telephone calls must maintain a record of a person's request not to receive further calls.

Inclusion of this requirement to adopt these procedures will not create any new obligations on Members, as they are already subject to identical provisions under Federal Communications Commission ("FCC") telemarketing regulations.[23]

Do-Not-Call Safe Harbors

Proposed Rule 3.23(e) provides for certain exceptions to the telemarketing restriction set forth in proposed Rule 3.23(a)(3), which prohibits outbound telephone calls to persons on the FTC's national do-not-call registry. First, proposed Rule

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22 Members must honor a person's do-not-call request within a reasonable time from the date the request is made, which may not exceed 30 days from the date of the request. If these requests are recorded or maintained by a party other than the Member on whose behalf the outbound telephone call is made, the Member on whose behalf the outbound telephone call is made will still be liable for any failures to honor the do-not-call request.

23 See 47 CFR 64.1200(d); see also FINRA Rule 3230(d).

3.23(e)(1) provides that a Member or associated person of a Member making outbound telephone calls will not be liable for violating proposed Rule 3.23(a)(3) if:

(1) the Member has an established business relationship with the called person; however, a person's request to be placed on the Member's firm-specific do-not-call list terminates the established business relationship exception to the national do-not-call registry provision for that Member even if the person continues to do business with the Member;

(2) the Member has obtained the person's prior express written consent, which must be clearly evidenced by a signed, written agreement (which may be obtained electronically under the E-Sign Act[24]) between the person and the Member that 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) the Member or associated person of a Member making the call has a personal relationship[25] with the called person.

The proposed rule change is substantially similar to the FTC's provision regarding an exception to the prohibition on making outbound telephone calls to persons

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[24] 15 U.S.C. 7001 et seq.

[25] The term "personal relationship" means any family member, friend, or acquaintance of the person making an outbound telephone call. See proposed Rule 3.23(n)(18); see also FINRA Rule 3230(m)(18).

on the FTC's do-not- call registry.[26] The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.[27]

Second, proposed Rule 3.23(e)(2) provides that a Member or associated person of a Member making outbound telephone calls will not be liable for violating proposed Rule 3.23(a)(3) if the Member or associated person of a Member demonstrates that the violation is the result of an error and that as part of the Member's routine business practice:

(1) the Member has established and implemented written procedures to comply with Rule 3.23(a) and (b);

(2) the Member has trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to the preceding clause;

(3) the Member has maintained and recorded a list of telephone numbers that it may not contact in compliance with Rule 3.23(d); and

(4) the Member uses a process to prevent outbound telephone calls to any telephone number on the Member's firm-specific do-not-call list or the national do-not-call registry, employing a version of the national do-not-call registry obtained from the FTC no more than 31 days prior to the date any call is made, and maintains records documenting this process.

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[26] See 16 CFR 310.4(b)(1)(iii)(B); see also FINRA Rule 3230(b).

[27] See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (Jan. 29, 2003) at 4628; Federal Trade Commission, *Telemarketing Sales Rule*, 60 FR 43842 (Aug. 23, 1995) at 43854.

The proposed rule change is substantially similar to the FTC's safe harbor to the prohibition on making outbound telephone calls to persons on a firm-specific do-not-call list or on the FTC's national do-not-call registry.[28] The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.[29]

Wireless Communications

Proposed Rule 3.23(f) clarifies that the provisions set forth in Rule 3.23 are applicable to Members and associated persons of Members making outbound telephone calls to wireless telephone numbers.[30]

Outsourcing Telemarketing

Proposed Rule 3.23(g) states that if a Member uses another entity to perform telemarketing services on its behalf, the Member remains responsible for ensuring compliance with Rule 3.23. The proposed rule change also provides that an entity or person to which a Member outsources its telemarketing services must be appropriately registered or licensed, where required.[31]

Billing Information

Proposed Rule 3.23(h) provides that, for any telemarketing transaction, no Member or associated person of a Member may submit billing information[32] for

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[28] See 16 CFR 310.4(b)(3); see also FINRA Rule 3230(c).

[29] See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (Jan. 29, 2003) at 4628; and Federal Trade Commission, *Telemarketing Sales Rule*, 60 FR 43842 (Aug. 23, 1995) at 43855.

[30] See also FINRA Rule 3230(e).

[31] See also FINRA Rule 3230(f).

[32] The term "billing information" means any data that enables any person to access a customer's or donor's account, such as a credit or debit card number, a brokerage, checking, or savings account number, or a mortgage loan account number. See proposed Rule 3.23(n)(3).

payment without the express informed consent of the customer. Proposed Rule 3.23(h) requires that each Member or associated person of a Member must 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[33] and a free-to-pay conversion[34] feature, the Member or associated person of 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 associated person of a Member must:

(1) identify the account to be charged with sufficient specificity for the customer to understand what account will be charged; and

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33 The term "preacquired account information" means any information that enables a Member or associated person of a Member 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. See proposed Rule 3.23(n)(19).

34 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. See proposed Rule 3.23(n)(13).

(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.[35] The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.[36]

Caller Identification Information

Proposed Rule 3.23(i) provides that Members that engage in telemarketing must transmit caller identification information[37] 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. These provisions are similar to the caller identification provision in the FTC rules.[38] Inclusion of these caller identification provisions in this proposed rule change will not create any new obligations on Members, as they are already subject to identical provisions under FCC telemarketing regulations.[39]

Unencrypted Consumer Account Numbers

Proposed Rule 3.23(j) prohibits a Member or associated person of a Member from disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing. The proposed rule change is substantially similar

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35 See 16 CFR 310.4(a)(7); see also FINRA Rule 3230(i).

36 See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (Jan. 29, 2003) at 4616.

37 Caller identification information includes the telephone number and, when made available by the Member's telephone carrier, the name of the Member.

38 See 16 CFR 310.4(a)(8); see also FINRA Rule 3230(g).

39 See 47 CFR 64.1601(e).

to the FTC's provision regarding unencrypted consumer account numbers.[40] The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.[41] 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.[42]

Abandoned Calls

Proposed Rule 3.23(k) prohibits a Member or associated person of a Member from abandoning[43] any outbound telephone call. The abandoned calls prohibition is subject to a "safe harbor" under proposed Rule 3.23(k)(2) that requires a Member or associated person of a Member:

(1) 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) for each outbound telephone call placed, to allow the telephone to ring for at least 15 seconds or four rings before disconnecting an unanswered call;

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40 See 16 CFR 310.4(a)(6); see also FINRA Rule 3230(h).

41 See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (Jan. 29, 2003) at 4615.

42 See id. at 4616.

43 An outbound telephone call is "abandoned" if the called person answers it and the call is not connected to a Member or associated person of a Member within two seconds of the called person's completed greeting.

(3) whenever a Member or associated person of a Member is not available to speak with the person answering the outbound telephone call within two seconds after the person's completed greeting, promptly to play a prerecorded message stating the name and telephone number of the Member or associated person of a Member on whose behalf the call was placed; and

(4) to maintain records documenting compliance with the "safe harbor."

The proposed rule change is substantially similar to the FTC's provisions regarding abandoned calls.[44] The FTC provided a discussion of the provisions when they are adopted pursuant to the Prevention Act.[45]

Prerecorded Messages

Proposed Rule 3.23(l) prohibits a Member or associated person of a Member from initiating any outbound telephone call that delivers a prerecorded message without a person's express written agreement[46] to receive such calls. The proposed rule change also requires that all prerecorded outbound telephone 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 Rule 3.23(k)(2). The proposed rule change is

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[44] See 16 CFR 310.4(b)(1)(iv) and (b)(4); see also FINRA Rule 3230(j).

[45] See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (Jan. 29, 2003) at 4641.

[46] The express written agreement must: (a) have been 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; (b) have been obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service; (c) evidence the willingness of the called person to receive calls that deliver prerecorded messages by or on behalf of the Member; and (d) include the person's telephone number and signature (which may be obtained electronically under the E-Sign Act).

substantially similar to the FTC's provisions regarding prerecorded messages.[47] The FTC provided a discussion of the provisions when they were adopted pursuant to the Prevention Act.[48]

Credit Card Laundering

Proposed Rule 3.23(m) prohibits credit card laundering, the practice of depositing into the credit card system[49] a sales draft that is not the result of a credit card transaction between the cardholder[50] and the Member. Except as expressly permitted, the proposed rule change prohibits a Member or associated person of a Member from:

(1) presenting to or depositing into the credit card system for payment, a credit card sales draft[51] 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,[52] or an employee,

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47 See 16 CFR 310.4(b)(1)(v); see also FINRA Rule 3230(k).

48 See Federal Trade Commission, *Telemarketing Sales Rule*, 73 FR 51164 (Aug. 29, 2008) at 51165.

49 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. 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. 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. See proposed Rule 3.23(n)(7), (8), and (10).

50 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. See proposed Rule 3.23(n)(6).

51 The term "credit card sales draft" means any record or evidence of a credit card transaction. See proposed Rule 3.23(n)(9).

52 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. 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

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 Member; 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[53] or the applicable credit card system.

The proposed rule change is substantially similar to the FTC's provision regarding credit card laundering.[54] The FTC provided a discussion of the provisions when they were adopted pursuant to the Prevention Act.[55]

Definitions

Proposed Rule 3.23(n) adopts the following definitions, which are substantially similar to the FTC's definitions of these terms: "acquirer," "billing information," "caller identification service," "cardholder," "charitable contribution," "credit," "credit card," "credit card sales draft," "credit card system," "customer," "donor," "established business relationship," "free-to-pay conversion," "merchant," "merchant agreement," "outbound telephone call," "person," "pre-acquired account information,"

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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. See proposed Rule 3.23(n)(2) and (14).

53 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. See proposed Rule 3.23(n)(15).

54 See 16 CFR 310.3(c); see also FINRA Rule 3230(l).

55 See Federal Trade Commission, *Telemarketing Sales Rule*, 60 FR 43842 (Aug. 23, 1995) at 43852.

"telemarketer," and "telemarketing."[56] The FTC provided a discussion of each definition when they were adopted pursuant to the Prevention Act.[57]

State and Federal Laws

Proposed Rule 3.23, Interpretation and Policy .01[58] reminds Members and associated persons of Members that engage in telemarketing that they also are subject to the requirements of relevant state and federal laws and rules, including the Prevention Act, the Telephone Consumer Protection Act of 1991,[59] and the rules of the FCC relating to telemarketing practices and the rights of telephone consumers.[60]

Announcement in Regulatory Circular

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

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56 See proposed Rule 3.23(n)(2), (3), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (19), (20), and (21); and 16 CFR 310.2(a), (c), (d), (e), (f), (h), (i), (j), (k), (l), (n), (o), (p), (s), (t), (v), (w), (x), (cc), and (dd); see also FINRA Rule 3230(m)(2), (3), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (19), and (20). The proposed rule change also adopts definitions of "account activity," "broker-dealer of record," and "personal relationship" that are substantially similar FINRA's definitions of these terms. See proposed Rule 3.23(n)(1), (4), and (18) and FINRA Rule 3230(m)(1), (4), and (18); see also 47 CFR 64.1200(f)(14) (FCC's definition of "personal relationship").

57 See Federal Trade Commission, *Telemarketing Sales Rule*, 60 FR 43842 (Aug. 23, 1995) at 43843; and Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (Jan. 29, 2003) at 4587.

58 See also FINRA Rule 3230, Supplementary Material .01, *Compliance with Other Requirements*.

59 See 47 U.S.C. 227.

60 See 47 CFR 64.1200.

(b) Statutory Basis

The Exchange believes that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[61] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[62] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, the proposed rule change will prevent fraudulent and manipulative acts and protect investors and the public interest by continuing to prohibit Members from engaging in deceptive and other abusive telemarketing acts or practices. Additionally, the proposed rule change removes impediments to and perfects the mechanism for a free and open market and a national market system, because it provides consistency among telemarketing rules of national securities exchanges and FINRA, therefore making it easier for investors to comply with these rules.

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

The proposed rule change does not impose any burden on competition.

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.

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61 15 U.S.C. 78f(b).

62 15 U.S.C. 78f(b)(5).

6. Extension of Time Period for Commission Action

Not applicable.

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

The Exchange has designated this rule filing as non-controversial under Section 19(b)(3)(A) of the Act[63] and paragraph (f)(6) of Rule 19b-4 thereunder.[64] The Exchange asserts that the proposed rule change: (1) will not significantly affect the protection of investors or the public interest, (2) will not impose any significant burden on competition, and (3) and will not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate. In addition, the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing, or such shorter time as designated by the Commission.[65] The proposed rule change is substantially similar in all material respects to FTC rules and FINRA Rule 3230, which the Commission recently approved.[66] For the foregoing reasons, this rule filing qualifies for immediate effectiveness as a "non-controversial" rule change under paragraph (f)(6) of Rule 19b-4.

The Exchange respectfully requests that the Commission waive the 30-day operative delay so that the proposed rule change may become effective and operative

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63 15 U.S.C. 78s(b)(3)(A).

64 17 CFR 240.19b-4.

65 17 CFR 240.19b-4(f)(6)(iii).

66 See supra note 3.

upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act[67] and paragraph (f)(6) of Rule 19b-4 thereunder.[68] Waiver of this requirement, specified in Rule 19b-4(f)(6),[69] is consistent with the protection of investors and the public interest because it will prohibit deceptive and other abusive telemarketing acts or practices, as well as allow the Exchange to comply with the Commission's directive and implement uniform telemarketing rules across self-regulatory organizations, creating consistency among these rules for investors, as soon as possible. Based on the foregoing, the Exchange believes that its proposal should become immediately effective and requests that the Commission waive the 30-day operative waiting period contained in Rule 19b-4(f)(6)(iii) under the Act.[70]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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

As discussed above, the proposed rule change is substantially similar to FINRA Rule 3230, and this rule filing is substantially similar to FINRA's rule filing proposing to adopt that rule, which the Commission recently approved.[71] Therefore, the conduct

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67 15 U.S.C. 78s(b)(3)(A).

68 17 CFR 240.19b-4(f)(6).

69 Id.

70 17 CFR 240.19b-4(f)(6)(iii).

71 See supra note 3.

required of Members to comply with Rule 3.23 is the same as the conduct required of FINRA members to comply with FINRA Rule 3230.

9. Exhibits

Exhibit 1: Completed Notice of the Proposed Rule Change for publication in the Federal Register.

Exhibits 2 – 4: Not applicable.

Exhibit 5: Text of Proposed Rule Change.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-_____________; File No. SR-BYX-2012-014)

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by BATS Y-Exchange, Inc. to Amend BYX Rules Related to Telemarketing.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on July 6, 2012, BATS Y-Exchange, Inc. (the "Exchange" or "BYX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b-4(f)(6)(iii) thereunder,[4] which renders it effective upon filing with the Commission. 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

The Exchange proposes to adopt BYX Rule 3.23 "Telemarketing", to its rulebook to codify provisions that are substantially similar to FTC rules that prohibit deceptive and other abusive telemarketing acts or practices.[5]

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 15 U.S.C. 78s(b)(3)(A).

4 17 CFR 240.19b-4(f)(6)(iii).

5 The proposed rule change is substantially similar in all material respects to Financial Industry Regulatory Authority, Inc. ("FINRA") Rule 3230 (Telemarketing), which the Commission recently approved. See Securities

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 Exchange 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 parts of such statements.

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

1. Purpose

The Exchange proposes to add Rule 3.23, "Telemarketing", to its rulebook to codify provisions that are substantially similar to FTC rules that prohibit deceptive and other abusive telemarketing acts or practices. Rule 3.23 will require Members to, among other things, maintain do-not-call lists, limit the hours of telephone solicitations, and not use deceptive and abusive acts and practices in connection with telemarketing. The Commission directed BYX to enact these telemarketing rules in accordance with the Telemarketing Consumer Fraud and Abuse Prevention Act of 1994 ("Prevention Act").[6] 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[7] to prohibit deceptive and other abusive telemarketing acts or

Exchange Act Release No. 34-66279 (January 30, 2012), 77 FR 5611 (February 3, 2012) (SR-FINRA-2011-059) (approval order of proposed rule change to adopt telemarketing rule).

6 15 U.S.C. 6101 – 6108.

7 16 CFR 310.1 – .9. The FTC adopted these rules under the Prevention Act in 1995. See Federal Trade Commission, *Telemarketing Sales Rule*, 60 FR 43842 (Aug. 23, 1995).

practices, unless the Commission determines either that the rules are not necessary or appropriate for the protection of investors or the maintenance of orderly markets, or that existing federal securities laws or Commission rules already provide for such protection.[8]

In 1997, the Commission determined that telemarketing rules promulgated and expected to be promulgated by self-regulatory organizations, together with the other rules of the self- regulatory organizations, the federal securities laws and the Commission's rules thereunder, satisfied the requirements of the Prevention Act because, at the time, the applicable provisions of those laws and rules were substantially similar to the FTC's telemarketing rules.[9] Since 1997, the FTC has amended its telemarketing rules in light of changing telemarketing practices and technology.[10]

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.[11] In May 2011,

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8 15 U.S.C. 6102.

9 See *Telemarketing and Consumer Fraud and Abuse Prevention Act; Determination that No Additional Rulemaking Required*, Securities Exchange Act Release No. 38480 (Apr.7, 1997), 62 FR 18666 (Apr. 16, 1996). The Commission also determined that some provisions of the FTC's telemarketing rules related to areas already extensively regulated by existing securities laws or activities not applicable to securities transactions See id.

10 See, e.g., Federal Trade Commission, *Telemarketing Sales Rule*, 73 FR 51164 (Aug. 29,2008) (amendments to the *Telemarketing Sales Rule* relating to prerecorded messages and call abandonments); and Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (Jan. 29, 2003) (amendments to the *Telemarketing Sales Rule* establishing requirements for sellers and telemarketers to participate in the national do-not-call registry).

11 See supra note 7.

Commission staff directed BYX 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.[12] Commission staff had concerns "that the [Exchange] rules overall have not kept pace with the FTC's rules, and thus may no longer meet the standards of the [Prevention] Act."[13]

The proposed rule change, as directed by the Commission staff, adopts provisions in Rule 3.23 that are substantially similar to the FTC's current rules that prohibit deceptive and other abusive telemarketing acts or practices as described below.[14]

Telemarketing Restrictions

The proposed rule change codifies the telemarketing restrictions in Rule 3.23(a) to provide that no Member or associated person of a Member[15] may make an outbound telephone call[16] to:

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12 See Letter from Robert W. Cook, Director, Division of Trading and Markets, Securities and Exchange Commission, to Joe Ratterman, President and Chief Executive Officer, BATS Global Markets, Inc., dated May 12, 2011.

13 Id.

14 The proposed rule change is also substantially similar to FINRA Rule 3230. See supra note 3.

15 An "associated person of a Member" is any partner, officer, director, or branch manager of a Member (or person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such Member, or any employee of such Member, except that any person associated with a Member whose functions are solely clerical or ministerial shall not be included in the meaning of such term. See Rule 1.5(q).

16 An "outbound telephone call" is 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 "telemarketer" is any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor. A "customer" is any person who is or may be required to pay for goods or services through telemarketing. A "donor" means any person solicited to make a charitable contribution. A "person" is any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(1) any person's residence at any time other than between 8 a.m. and 9 p.m. local time at the called person's locations;

(2) any person that previously has stated that he or she does not wish to receive any outbound telephone calls made by or on behalf of the Member; or

(3) any person who has registered his or her telephone number on the FTC's national do-not-call registry.

The proposed rule change is substantially similar to the FTC's provisions regarding abusive telemarketing acts or practices.[17] The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.[18]

Caller Disclosures

The proposed rule change codifies in Rule 3.23(b) that no Member or associated person of a Member shall make an outbound telephone call to any person without

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"Telemarketing" means consisting of or relating to 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 previous 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. 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. See proposed Rule 3.23(n)(3), (11), (16), (17), (20), and (21); see also FINRA Rule 3230(m)(11), (14), (16), (17), and (20); and 16 CFR 310.2(f), (l), (n), (v), (w), (cc), and (dd).

17 See 16 CFR 310.4(b)(1)(iii)(A) and (B) and (c); see also FINRA Rule 3230(a). See proposed Rule 3.23(n)(16) and (21) and supra note 15.

18 See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (Jan. 29, 2003) at 4628; and Federal Trade Commission, *Telemarketing Sales Rule*, 60 FR 43842 (Aug. 23, 1995) at 43855.

disclosing truthfully, promptly and in a clear and conspicuous manner to the called person the following information: (i) the identity of the caller and the Member; (ii) the telephone number or address at which the caller may be contacted; and (iii) that the purpose of the call is to solicit the purchase of securities or related services. The proposed rule change also provides that the telephone number that a caller provides to a person as the number at which the caller may be contacted may not be a 900 number or any other number for which charges exceed local or long-distance transmission charges.[19]

Exceptions

The proposed rule change adds Rule 3.23(c) to provide that the prohibition in paragraph (a)(1)[20] does not apply to outbound telephone calls by a Member or an associated person of a Member if:

(1) the Member has received that person's express prior written consent;

(2) the Member has an established business relationship[21] with the person; or

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19 See proposed Rule 3.23(b); see also FINRA Rule 3230(d)(4). The proposed rule change is substantially similar to the Federal Communications Commission's regulations regarding call disclosures. See 47 CFR 64.1200(d)(4).

20 The Exchange believes that even if a Member satisfies the exception in paragraph (c), the Member should still make the caller disclosures required by paragraph (b) to the called person to ensure that the called person receives sufficient information regarding the purpose of the call.

21 An "established business relationship" is a relationship between a Member and a person if (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 the Member within the 18 months immediately preceding the date of an outbound telephone call; (b) the Member is the broker-dealer of record for an account of the person within the 18 months immediately preceding the date of an outbound telephone call; or (c) the person has contacted the Member to inquire about a product or service offered by the Member within the three months immediately preceding the date of an outbound

(3) the person is a broker or dealer.

Member's Firm-Specific Do-Not-Call List

The proposed rule change adds Rule 3.23(d) to provide that each Member must make and maintain a centralized list of persons who have informed the Member or any of its associated persons that they do not wish to receive outbound telephone calls. The proposed term "outbound telephone call" is defined substantially similar to the FTC's definition of that term.[22]

Proposed Rule 3.23(d)(2) adopts procedures that Members must institute to comply with Rule 3.23(a) and (b) prior to engaging in telemarketing. These procedures must meet the following minimum standards:

(1) Member must have a written policy for maintaining their firm-specific do-not-call lists.

(2) Personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the Member's firm-specific do-not-call list.

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telephone call. 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. The term "account activity" includes, but is not 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. The term "broker- dealer of record" refers to the broker or dealer identified on a customer's account application for accounts held directly at a mutual fund or variable insurance product issuer. See proposed Rule 3.23(n)(1), (4), and (12); see also 16 CFR 310.2(o) and FINRA Rule 3230(m)(1), (4), and (12).

[22] See 16 CFR 310.4(b)(1)(iii)(A) and supra note 15; see also FINRA Rule 3230(a)(2).

(3) 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 its firm-specific do-not-call list at the time the request is made.[23]

(4) Members or associated persons of Members making an outbound telephone call must make the caller disclosures set forth in Rule 3.23(b).

(5) In the absence of a specific request by the person to the contrary, a person's do- not-call request will 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 call and the product being advertised.

(6) A Member making outbound telephone calls must maintain a record of a person's request not to receive further calls.

Inclusion of this requirement to adopt these procedures will not create any new obligations on Members, as they are already subject to identical provisions under Federal Communications Commission ("FCC") telemarketing regulations.[24]

Do-Not-Call Safe Harbors

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23 Members must honor a person's do-not-call request within a reasonable time from the date the request is made, which may not exceed 30 days from the date of the request. If these requests are recorded or maintained by a party other than the Member on whose behalf the outbound telephone call is made, the Member on whose behalf the outbound telephone call is made will still be liable for any failures to honor the do-not-call request.

24 See 47 CFR 64.1200(d); see also FINRA Rule 3230(d).

Proposed Rule 3.23(e) provides for certain exceptions to the telemarketing restriction set forth in proposed Rule 3.23(a)(3), which prohibits outbound telephone calls to persons on the FTC's national do-not-call registry. First, proposed Rule 3.23(e)(1) provides that a Member or associated person of a Member making outbound telephone calls will not be liable for violating proposed Rule 3.23(a)(3) if:

(1) the Member has an established business relationship with the called person; however, a person's request to be placed on the Member's firm-specific do-not-call list terminates the established business relationship exception to the national do-not-call registry provision for that Member even if the person continues to do business with the Member;

(2) the Member has obtained the person's prior express written consent, which must be clearly evidenced by a signed, written agreement (which may be obtained electronically under the E-Sign Act[25]) between the person and the Member that 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) the Member or associated person of a Member making the call has a personal relationship[26] with the called person.

The proposed rule change is substantially similar to the FTC's provision regarding an exception to the prohibition on making outbound telephone calls to persons

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[25] 15 U.S.C. 7001 et seq.

[26] The term "personal relationship" means any family member, friend, or acquaintance of the person making an outbound telephone call. See proposed Rule 3.23(n)(18); see also FINRA Rule 3230(m)(18).

on the FTC's do-not- call registry.[27] The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.[28]

Second, proposed Rule 3.23(e)(2) provides that a Member or associated person of a Member making outbound telephone calls will not be liable for violating proposed Rule 3.23(a)(3) if the Member or associated person of a Member demonstrates that the violation is the result of an error and that as part of the Member's routine business practice:

(1) the Member has established and implemented written procedures to comply with Rule 3.23(a) and (b);

(2) the Member has trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to the preceding clause;

(3) the Member has maintained and recorded a list of telephone numbers that it may not contact in compliance with Rule 3.23(d); and

(4) the Member uses a process to prevent outbound telephone calls to any telephone number on the Member's firm-specific do-not-call list or the national do-not-call registry, employing a version of the national do-not-call registry obtained from the FTC no more than 31 days prior to the date any call is made, and maintains records documenting this process.

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27 See 16 CFR 310.4(b)(1)(iii)(B); see also FINRA Rule 3230(b).

28 See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (Jan. 29, 2003) at 4628; Federal Trade Commission, *Telemarketing Sales Rule*, 60 FR 43842 (Aug. 23, 1995) at 43854.

The proposed rule change is substantially similar to the FTC's safe harbor to the prohibition on making outbound telephone calls to persons on a firm-specific do-not-call list or on the FTC's national do-not-call registry.[29] The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.[30]

Wireless Communications

Proposed Rule 3.23(f) clarifies that the provisions set forth in Rule 3.23 are applicable to Members and associated persons of Members making outbound telephone calls to wireless telephone numbers.[31]

Outsourcing Telemarketing

Proposed Rule 3.23(g) states that if a Member uses another entity to perform telemarketing services on its behalf, the Member remains responsible for ensuring compliance with Rule 3.23. The proposed rule change also provides that an entity or person to which a Member outsources its telemarketing services must be appropriately registered or licensed, where required.[32]

Billing Information

Proposed Rule 3.23(h) provides that, for any telemarketing transaction, no Member or associated person of a Member may submit billing information[33] for

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[29] See 16 CFR 310.4(b)(3); see also FINRA Rule 3230(c).

[30] See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (Jan. 29, 2003) at 4628; and Federal Trade Commission, *Telemarketing Sales Rule*, 60 FR 43842 (Aug. 23, 1995) at 43855.

[31] See also FINRA Rule 3230(e).

[32] See also FINRA Rule 3230(f).

[33] The term "billing information" means any data that enables any person to access a customer's or donor's account, such as a credit or debit card number, a brokerage, checking, or savings account number, or a mortgage loan account number. See proposed Rule 3.23(n)(3).

payment without the express informed consent of the customer. Proposed Rule 3.23(h) requires that each Member or associated person of a Member must 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[34] and a free-to-pay conversion[35] feature, the Member or associated person of 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 associated person of a Member must:

(1) identify the account to be charged with sufficient specificity for the customer to understand what account will be charged; and

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[34] The term "preacquired account information" means any information that enables a Member or associated person of a Member 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. See proposed Rule 3.23(n)(19).

[35] 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. See proposed Rule 3.23(n)(13).

(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.[36] The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.[37]

Caller Identification Information

Proposed Rule 3.23(i) provides that Members that engage in telemarketing must transmit caller identification information[38] 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. These provisions are similar to the caller identification provision in the FTC rules.[39] Inclusion of these caller identification provisions in this proposed rule change will not create any new obligations on Members, as they are already subject to identical provisions under FCC telemarketing regulations.[40]

Unencrypted Consumer Account Numbers

Proposed Rule 3.23(j) prohibits a Member or associated person of a Member from disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing. The proposed rule change is substantially similar

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[36] See 16 CFR 310.4(a)(7); see also FINRA Rule 3230(i).

[37] See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (Jan. 29, 2003) at 4616.

[38] Caller identification information includes the telephone number and, when made available by the Member's telephone carrier, the name of the Member.

[39] See 16 CFR 310.4(a)(8); see also FINRA Rule 3230(g).

[40] See 47 CFR 64.1601(e).

to the FTC's provision regarding unencrypted consumer account numbers.[41] The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.[42] 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.[43]

Abandoned Calls

Proposed Rule 3.23(k) prohibits a Member or associated person of a Member from abandoning[44] any outbound telephone call. The abandoned calls prohibition is subject to a "safe harbor" under proposed Rule 3.23(k)(2) that requires a Member or associated person of a Member:

(1) 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) for each outbound telephone call placed, to allow the telephone to ring for at least 15 seconds or four rings before disconnecting an unanswered call;

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41 See 16 CFR 310.4(a)(6); see also FINRA Rule 3230(h).

42 See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (Jan. 29, 2003) at 4615.

43 See id. at 4616.

44 An outbound telephone call is "abandoned" if the called person answers it and the call is not connected to a Member or associated person of a Member within two seconds of the called person's completed greeting.

(3) whenever a Member or associated person of a Member is not available to speak with the person answering the outbound telephone call within two seconds after the person's completed greeting, promptly to play a prerecorded message stating the name and telephone number of the Member or associated person of a Member on whose behalf the call was placed; and

(4) to maintain records documenting compliance with the "safe harbor."

The proposed rule change is substantially similar to the FTC's provisions regarding abandoned calls.[45] The FTC provided a discussion of the provisions when they are adopted pursuant to the Prevention Act.[46]

Prerecorded Messages

Proposed Rule 3.23(l) prohibits a Member or associated person of a Member from initiating any outbound telephone call that delivers a prerecorded message without a person's express written agreement[47] to receive such calls. The proposed rule change also requires that all prerecorded outbound telephone 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 Rule 3.23(k)(2). The proposed rule change is

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45 See 16 CFR 310.4(b)(1)(iv) and (b)(4); see also FINRA Rule 3230(j).

46 See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (Jan. 29, 2003) at 4641.

47 The express written agreement must: (a) have been 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; (b) have been obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service; (c) evidence the willingness of the called person to receive calls that deliver prerecorded messages by or on behalf of the Member; and (d) include the person's telephone number and signature (which may be obtained electronically under the E-Sign Act).

substantially similar to the FTC's provisions regarding prerecorded messages.[48] The FTC provided a discussion of the provisions when they were adopted pursuant to the Prevention Act.[49]

Credit Card Laundering

Proposed Rule 3.23(m) prohibits credit card laundering, the practice of depositing into the credit card system[50] a sales draft that is not the result of a credit card transaction between the cardholder[51] and the Member. Except as expressly permitted, the proposed rule change prohibits a Member or associated person of a Member from:

(1) presenting to or depositing into the credit card system for payment, a credit card sales draft[52] 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,[53] or an employee,

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48 See 16 CFR 310.4(b)(1)(v); see also FINRA Rule 3230(k).

49 See Federal Trade Commission, *Telemarketing Sales Rule*, 73 FR 51164 (Aug. 29, 2008) at 51165.

50 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. 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. 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. See proposed Rule 3.23(n)(7), (8), and (10).

51 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. See proposed Rule 3.23(n)(6).

52 The term "credit card sales draft" means any record or evidence of a credit card transaction. See proposed Rule 3.23(n)(9).

53 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. 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

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 Member; 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[54] or the applicable credit card system.

The proposed rule change is substantially similar to the FTC's provision regarding credit card laundering.[55] The FTC provided a discussion of the provisions when they were adopted pursuant to the Prevention Act.[56]

Definitions

Proposed Rule 3.23(n) adopts the following definitions, which are substantially similar to the FTC's definitions of these terms: "acquirer," "billing information," "caller identification service," "cardholder," "charitable contribution," "credit," "credit card," "credit card sales draft," "credit card system," "customer," "donor," "established business relationship," "free-to-pay conversion," "merchant," "merchant agreement," "outbound telephone call," "person," "pre-acquired account information,"

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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. See proposed Rule 3.23(n)(2) and (14).

[54] 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. See proposed Rule 3.23(n)(15).

[55] See 16 CFR 310.3(c); see also FINRA Rule 3230(l).

[56] See Federal Trade Commission, *Telemarketing Sales Rule*, 60 FR 43842 (Aug. 23, 1995) at 43852.

"telemarketer," and "telemarketing."[57] The FTC provided a discussion of each definition when they were adopted pursuant to the Prevention Act.[58]

State and Federal Laws

Proposed Rule 3.23, Interpretation and Policy .01[59] reminds Members and associated persons of Members that engage in telemarketing that they also are subject to the requirements of relevant state and federal laws and rules, including the Prevention Act, the Telephone Consumer Protection Act of 1991,[60] and the rules of the FCC relating to telemarketing practices and the rights of telephone consumers.[61]

Announcement in Regulatory Circular

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

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57 See proposed Rule 3.23(n)(2), (3), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (19), (20), and (21); and 16 CFR 310.2(a), (c), (d), (e), (f), (h), (i), (j), (k), (l), (n), (o), (p), (s), (t), (v), (w), (x), (cc), and (dd); see also FINRA Rule 3230(m)(2), (3), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (19), and (20). The proposed rule change also adopts definitions of "account activity," "broker-dealer of record," and "personal relationship" that are substantially similar FINRA's definitions of these terms. See proposed Rule 3.23(n)(1), (4), and (18) and FINRA Rule 3230(m)(1), (4), and (18); see also 47 CFR 64.1200(f)(14) (FCC's definition of "personal relationship").

58 See Federal Trade Commission, *Telemarketing Sales Rule*, 60 FR 43842 (Aug. 23, 1995) at 43843; and Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580 (Jan. 29, 2003) at 4587.

59 See also FINRA Rule 3230, Supplementary Material .01, *Compliance with Other Requirements*.

60 See 47 U.S.C. 227.

61 See 47 CFR 64.1200.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[62] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[63] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, the proposed rule change will prevent fraudulent and manipulative acts and protect investors and the public interest by continuing to prohibit Members from engaging in deceptive and other abusive telemarketing acts or practices. Additionally, the proposed rule change removes impediments to and perfects the mechanism for a free and open market and a national market system, because it provides consistency among telemarketing rules of national securities exchanges and FINRA, therefore making it easier for investors to comply with these rules.

(B) <u>Self-Regulatory Organization's Statement on Burden on Competition</u>

The Exchange does not believe that the proposed rule change imposes any burden on competition.

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[62] 15 U.S.C. 78f(b).

[63] 15 U.S.C. 78f(b)(5).

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

The Exchange has neither solicited nor received written comments on the proposed rule change.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[64] and Rule 19b-4(f)(6)(iii) thereunder.[65]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal 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

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64 15 U.S.C. 78s(b)(3)(A).

65 17 CFR 240.19b-4(f)(6).

- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-BYX-2012-014 on the subject line.

<u>Paper Comments</u>:

- 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 No. SR-BYX-2012-014. 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 changes 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 Web site 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 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. 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 No. SR-BYX-2012-014 and should be submitted on or before [_______21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[66]

Kevin M. O'Neill
Deputy Secretary

66 17 CFR 200.30-3(a)(12).

Note: Proposed new language is underlined. Proposed deletions are enclosed in [brackets].

Rules of BATS Y-Exchange, Inc.

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CHAPTER III. RULES OF FAIR PRACTICE

Rules 3.1.-3.22. (No change.)

<u>Rule 3.23. Telemarketing</u>

<u>(a) Telemarketing Restrictions</u>

<u>No Member or associated person of a Member shall make an outbound telephone call to:</u>

<u>(1) any person's residence at any time other than between 8 a.m. and 9 p.m. local time at the called person's location;</u>

<u>(2) any person that previously has stated that he or she does not wish to receive any outbound telephone calls made by or on behalf of the Member; or</u>

<u>(3) any person who has registered his or her telephone number on the Federal Trade Commission's national do-not-call registry.</u>

<u>(b) Caller Disclosures</u>

<u>No Member or associated person of a Member shall make an outbound telephone call to any person without disclosing truthfully, promptly and in a clear and conspicuous manner to the called person the following information:</u>

<u>(1) the identity of the caller and the Member;</u>

<u>(2) the telephone number or address at which the caller may be contacted; and</u>

<u>(3) that the purpose of the call is to solicit the purchase of securities or related services.</u>

<u>The telephone number provided may not be a 900 number or any other number for which charges exceed local or long-distance transmission charges.</u>

<u>(c) Exceptions</u>

<u>The prohibition of paragraph[s] (a)(1) does not apply to outbound telephone calls by a Member or an associated person of a Member if:</u>

<u>(1) the Member has received that person's express prior consent;</u>

(2) the Member has an established business relationship with the person; or

(3) the person called is a broker or dealer.

(d) Member's Firm-Specific Do-Not-Call List

(1) Each Member shall make and maintain a centralized list of persons who have informed the Member or an associated person of a Member that they do not wish to receive outbound telephone calls.

(2) Prior to engaging in telemarketing, a Member must institute procedures to comply with paragraphs (a) and (b). Such procedures must meet the following minimum standards:

(A) Written policy. Members must have a written policy for maintaining the do-not-call list described under paragraph (d)(1).

(B) 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.

(C) 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 Member's firm-specific 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 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 call is made, the Member on whose behalf the outbound telephone call is made will be liable for any failures to honor the do-not-call request.

(D) Identification of telemarketers. A Member or associated person of a Member making an outbound telephone call must make the caller disclosures set forth in paragraph (b).

(E) 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 shall 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.

(F) Maintenance of do-not-call lists. A Member making outbound telephone calls must maintain a record of a person's request not to receive further calls.

(e) Do-Not-Call Safe Harbors

(1) A Member or associated person of a Member making outbound telephone calls will not be liable for violating paragraph (a)(3) if:

(A) the Member has an established business relationship with the called person. A person's request to be placed on the Member's firm-specific do-not-call list terminates the established business relationship exception to the national do- not-call registry provision for that Member even if the person continues to do business with the Member;

(B) the Member has obtained the person's prior express written consent. Such consent must be clearly evidenced by a signed, written agreement (which may be obtained electronically under the E-Sign Act) 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

(C) the Member or associated person of a Member making the call has a personal relationship with the called person.

(2) A Member or associated person of a Member making outbound telephone calls will not be liable for violating paragraph (a)(3) if the Member or associated person of a Member demonstrates that the violation is the result of an error and that as part of the Member's routine business practice:

(A) the Member has established and implemented written procedures to comply with paragraphs (a) and (b);

(B) the Member has trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to paragraph (e)(2)(A);

(C) the Member has maintained and recorded a list of telephone numbers that it may not contact in compliance with paragraph (d); and

(D) the Member uses a process to prevent outbound telephone calls to any telephone number on the Member's firm-specific do-not-call list or the national do-not-call registry, employing a version of the national do-not-call registry obtained from the Federal Trade Commission no more than 31 days prior to the date any call is made, and maintains records documenting this process.

(f) Wireless Communications

The provisions set forth in this Rule are applicable to Members and associated persons of Members making outbound telephone calls to wireless telephone numbers.

(g) 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 Rule.

(h) Billing Information

For any telemarketing transaction, no Member or associated person of a Member shall cause billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer. Each Member or associated person of a Member must obtain the express informed consent of the person to be charged and to be charged using the identified account.

In any telemarketing transaction involving pre-acquired account information, the following requirements must be met to evidence express informed consent:

(1) In any telemarketing transaction involving pre-acquired account information and a free-to-pay conversion feature, the Member or associated person of 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 (h)(1)(A); and

(C) make and maintain an audio recording of the entire telemarketing transaction.

(2) In any other telemarketing transaction involving pre-acquired account information not described in paragraph (h)(1), the Member or associated person of 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 (h)(2)(A).

(i) Caller Identification Information

(1) Any Member that engages in telemarketing 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 is prohibited from blocking the transmission of caller identification information.

(j) Unencrypted Consumer Account Numbers

No Member or associated person of 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 will not apply to the disclosure or receipt of a customer's billing information to process pursuant to a telemarketing transaction.

(k) Abandoned Calls

(1) No Member or associated person of a Member shall "abandon" any outbound telephone call. An outbound telephone call is "abandoned" if a called person answers it and the call is not connected to a Member or associated person of a Member within two seconds of the called person's completed greeting.

(2) A Member or associated person of a Member shall not be liable for violating paragraph (k)(1) if:

(A) the Member or associated person of a Member employs technology that ensures abandonment of no more than three percent of all outbound telephone 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 associated person of a Member, for each outbound telephone call placed, allows the telephone to ring for at least 15 seconds or 4 rings before disconnecting an unanswered call;

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

(D) the Member or associated person of a Member retains records establishing compliance with paragraph (k)(2).

(l) Prerecorded Messages

(1) No Member or associated person of a Member shall initiate any outbound telephone call that delivers a prerecorded message, other than a prerecorded message permitted for compliance with the call abandonment safe harbor in paragraph (k)(2)(C), unless:

(A) the Member has obtained from the called person 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 purchasing any good or service;

(iii) evidences the willingness of the called person to receive calls that deliver prerecorded messages by or on behalf of the Member; and

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

(B) the Member allows the telephone to ring for a least 15 seconds or four rings before disconnecting an unanswered call and, within two seconds after the completed greeting of the called person, plays a prerecorded message that promptly provides the disclosures in paragraph (b), followed immediately by a disclosure of one or both of the following:

(i) in the case of a call that could be answered in person, that the called person 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)(2)(C) at any time during the message. The mechanism must automatically add the number called to the Member's firm-specific do-not-call list; once invoked, immediately disconnect the call; and be available for use at any time during the message; and

(ii) in the case of a call that could be answered by an answering machine or voicemail service, that the call recipient 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)(2)(C). The number provided must connect directly to an automated interactive voice or keypress-activated opt-out mechanism that automatically adds the number called to the Member's firm-specific do-not-call list; immediately thereafter disconnects the call; and 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 (l) shall not be deemed to violate paragraph (k).

(m) Credit Card Laundering

Except as expressly permitted by the applicable credit card system, no Member or associated person of 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.

(n) Definitions

For purposes of this Rule:

(1) The term “account activity” includes, but is not 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, such as a credit or debit card number, a brokerage, checking, or savings account number, or a mortgage loan account number. A “donor” means any person solicited to make 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.

(4) The term “broker-dealer of record” refers to the broker or 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 through telemarketing.

(12) The term “established business relationship” means a relationship between a Member and a person if:

(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 18 months immediately preceding the date of an outbound telephone call;

(B) the Member is the broker-dealer of record for an account of the person within the 18 months immediately preceding the date of an outbound telephone call; or

(C) the person has contacted the Member to inquire about a product or service offered by the Member within the three months immediately preceding the date of an outbound telephone call.

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.

(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.

(17) The term “person” means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(18) The term “personal relationship” means any family member, friend, or acquaintance of the person making an outbound telephone call.

(19) The term “pre-acquired account information” means any information that enables a Member or associated person of a Member 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.

(20) The term “telemarketer” means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.

(21) The term “telemarketing” means consisting of or relating to 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 previous 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.

Interpretations and Policies

.01 Members and associated persons of Members that engage in telemarketing also are subject to the requirements of relevant state and federal laws and rules, including but not limited to the Telemarketing and Consumer Fraud and Abuse Prevention Act, the Telephone Consumer Protection Act, and the rules of the Federal Communications Commission ("FCC") relating to telemarketing practices and the rights of telephone consumers.

.02 It is considered conduct inconsistent with just and equitable principles of trade and a violation of Exchange Rule 3.1 for any Member or associated person of a Member to: (1) call a person repeatedly or continuously in a manner likely to annoy or be offensive; or (2) use threats, intimidation, or profane or obscene language in calling any person.