

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * <input type="text" value="40"/>	SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 Form 19b-4	File No.* SR - <input type="text" value="2012"/> - * <input type="text" value="11"/>	Amendment No. (req. for Amendments *) <input type="text"/>
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Proposed Rule Change by EDGX Exchange, Inc.
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input type="checkbox"/>	Section 19(b)(3)(A) * <input checked="" type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
Pilot <input type="checkbox"/> Extension of Time Period for Commission Action * <input type="checkbox"/> Date Expires * <input type="text"/>			Rule		
			<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	
			<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input checked="" type="checkbox"/> 19b-4(f)(6)	

Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>
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Description
Provide a brief description of the proposed rule change (limit 250 characters, required when Initial is checked *).

EDGX Exchange, Inc. proposes to amend Chapter V of the EDGX rulebook to adopt the National Association of Securities Dealers, Inc. Rule 2212 (Telemarketing), subject to certain amendments, as EDGX Rule 3.26.

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 * <input type="text" value="Thomas"/>	Last Name * <input type="text" value="McManus"/>
Title * <input type="text" value="Chief Regulatory Officer"/>	
E-mail * <input type="text" value="tmcmanus@directedge.com"/>	
Telephone * <input type="text" value="(201) 418-3471"/>	Fax <input type="text"/>

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 <input type="text" value="03/21/2012"/>	
By <input type="text" value="Thomas N. McManus"/> (Name *)	<input type="text" value="Chief Regulatory Officer"/> (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.

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)

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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)

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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

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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

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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

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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

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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

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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

- (a) EDGX Exchange, Inc. (“EDGX” or the “Exchange”), proposes to amend Chapter V of the EDGX rulebook to adopt the National Association of Securities Dealers, Inc. (“NASD”) Rule 2212 (Telemarketing), subject to certain amendments, as EDGX Rule 3.26. Additionally, the proposed rule change would adopt provisions that are substantially similar to the telemarketing rules of the Federal Trade Commission (“FTC”). The text of the proposed rule change is attached as Exhibit 5 and is available on the Exchange’s website at www.directedge.com, at the Exchange’s principal office, and at the Public Reference Room of the Commission.
- (b) The Exchange does not believe that the proposed rule change will have any direct effect, or any significant indirect effect, on any other Exchange rule in effect at the time of this filing.
- (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 April 27, 2010. Exchange staff will advise the EDGX Exchange Board of Directors of any action taken pursuant to delegated authority. No other action is necessary for the filing of the rule change. Therefore, the Exchange's internal procedures with respect to the proposed change are complete.

The persons on the Exchange staff prepared to respond to questions and comments on the proposed rule change are:

Thomas N. McManus
Chief Regulatory Officer
EDGX Exchange, Inc.
201-418-3471

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

(a) Purpose

EDGX is proposing new Rule 3.26 (Telemarketing), which is based on NASD Rule 2212 (Telemarketing) with certain changes discussed below. In addition, the proposed rule would incorporate certain provisions of New York Stock Exchange (“NYSE”) Rule 440A and its Interpretation into new EDGX Rule 3.26. Further,

the proposed rule adds provisions that are substantially similar to FTC rules that prohibit deceptive and other abusive telemarketing acts or practices as described below.

Background

NASD Rule 2212 and NYSE Rule 440A are similar rules that require members to maintain do-not-call lists, limit the hours of telephone solicitations and prohibit members from using deceptive and abusive acts and practices in connection with telemarketing. The Commission directed the Financial Industry Regulatory Authority, Inc. (“FINRA”) and NYSE to enact these telemarketing rules in accordance with the Telemarketing Consumer Fraud and Abuse Prevention Act of 1994 (“Prevention Act”).¹ 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.²

In 2003, the FTC and the Federal Communications Commission (“FCC”) established requirements for sellers and telemarketers to participate in the national do-not-call registry.³ Pursuant to the Prevention Act, the Commission requested that FINRA and NYSE amend their telemarketing rules to include a requirement that their members participate in the national do-not-call registry. In 2004, the Commission approved amendments to NASD Rule 2212 requiring member firms to participate in the national do-not-call registry.⁴ The following year, the Commission approved amendments to NYSE Rule 440A, which were similar to the NASD rule amendments, but included additional provisions regarding the use of caller identification information, pre-recorded messages, telephone facsimiles and computer advertisements.⁵

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

¹ 15 U.S.C. 6101-6108.

² 15 U.S.C. 6102.

³ See 68 FR 4580 (January 29, 2003); 68 FR 44144 (July 25, 2003); CG Docket No. 02-278, FCC 03-153, (adopted June 26, 2003; released July 3, 2003).

⁴ See Securities Exchange Act Release No. 49055 (January 12, 2004), 69 FR 2801 (January 20, 2004) (SR-NASD-2003-131).

⁵ See Securities Exchange Act Release No. 52579 (October 7, 2005), 70 FR 60119 (October 14, 2005) (SR-NYSE-2004-73).

other abusive telemarketing acts or practices.⁶ Earlier this year, Commission staff directed EDGX and other self-regulatory organizations (“SROs”) to conduct a review of their telemarketing rules, if any, and propose rule amendments that provide protections that are “substantially similar” as those provided by the FTC’s telemarketing rules.⁷ Commission staff had concerns “that the SRO [self-regulatory organization] rules overall have not kept pace with the FTC’s rules, and thus may no longer meet the standards of the Prevention Act.”⁸

EDGX Rule 3.26

The proposed rule would adopt NASD Rule 2212 into the EDGX rulebook as EDGX Rule 3.26 (Telemarketing), subject to certain amendments. The proposed rule would also incorporate certain unique aspects of NYSE Rule 440A and its Interpretation. Additionally, the proposed rule makes amendments and adopts provisions that are substantially similar to rules promulgated by the FTC pursuant to the Prevention Act.

General Telemarketing Requirements

Proposed EDGX Rules 3.26(a), (b) and (c) are similar to NASD Rules 2212(a), (b), and (c), subject to certain amendments. Proposed Rule 3.26(a)(1) provides the time-of-day restrictions under which a Member or person associated with a Member may make outbound telephone calls to the residence of any person for the purpose of soliciting the purchase of securities or related services. Specifically, Members may engage in such telephone solicitations only between the hours of 8 a.m. to 9 p.m. (local time at the called party’s location) unless the Member has an established business relationship with the called person based upon a financial transaction with the Member, the Member has received express written permission from the person which allows the Member to call outside the applicable time frame, or the person called is a broker or dealer. Proposed Rules 3.26(a)(2) and 3.26(a)(3) provide that no Member or person associated with a Member shall initiate any outbound telephone call to: 1) any person that previously has stated that they do not wish to receive such call made by or on behalf of the Member, or 2) any person who has registered their telephone number on the FTC’s national do-not-call registry.

National Do-Not-Call List Exceptions

⁶ 15 U.S.C. 6102.

⁷ See Letter from Robert W. Cook, Director, Division of Trading and Markets, SEC, to William O’Brien, Chief Executive Officer, Direct Edge Holdings LLC, dated May 12, 2011.

⁸ Id.

Proposed EDGX Rule 3.26(b) adopts exceptions, similar to NASD Rule 2212(b), under which sellers and telemarketers may make telephone solicitations to persons on the national registry.

The first exception, contained in paragraph (b)(1), is for calls made to persons with whom the Member has an “established business relationship.” A person’s request to be placed on a firm-specific do-not-call list terminates the established business relationship exception. Thus, a Member or person associated with a Member may not make outbound telephone calls to a person with whom it has an established business relationship if such person requests to be placed on the Member’s do-not-call list.

The second exception to the national do-not-call rules, contained in paragraph (b)(2), is for calls to persons from whom the Member has obtained prior express invitation or permission. Permission must be evidenced by a signed, written agreement (which may include an electronic signature under the E-Sign Act) between the Member and person that specifically states that the person agrees to be contacted by the Member. The agreement also must include the telephone number to which calls may be placed.

The third exception, in paragraph (b)(3), is for calls made by an associated person who has a personal relationship with the recipient.

Safe Harbor Provision

Proposed EDGX Rule 3.26(c) establishes a “safe harbor” under which Members would not be held liable for a violation that is the result of error if the telemarketer’s routine business practice meets certain specified standards. The “safe harbor” applies only to a violation of proposed Rule 3.26(a)(3), the national do-not-call registry provision. To be eligible for this safe harbor, a Member or person associated with a Member must demonstrate that the Member’s routine business practice meets the following four standards. First, the Member has established and implemented written procedures to comply with the national do-not-call rules. Second, the Member has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules. Third, the Member has maintained and recorded a list of telephone numbers that the Member may not contact. Fourth, the Member uses a process to prevent outbound telephone calls to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the FTC no more than 31 days prior to the date any call is made, and maintains records documenting this process.

Telemarketing Procedures

Proposed EDGX Rule 3.26(d) establishes procedures that Members must institute prior to engaging in telemarketing. These procedures include requirements to:

(1) have a written policy for maintaining a do-not-call list; (2) train personnel engaged in telemarketing in the existence and use of the do-not-call list; (3) record and disclose requests from a person to be added to the Member's do-not-call list; and (4) have the Member provide the called party with the name of the individual caller, the name of the Member, a telephone number or address at which the Member may be contacted, and that the purpose of the call is to solicit the purchase of securities or related services.

Affiliated Persons or Entities

Proposed EDGX Rule 3.26(d)(5) provides that, in general, a person's do-not-call request applies only to the entity making the call, and does not apply to any affiliated entity unless the customer reasonably would expect the affiliated entity to be included given the identification of the caller and the product being advertised.

Caller Identification Information

The proposed rule would give new EDGX Rule 3.26(g) similar caller identification information provisions as those contained in NYSE Rule 440A(h). These provisions provide that Members engaging in telemarketing must transmit caller identification information and are explicitly prohibited from blocking caller identification information. The telephone number provided must permit any person to make a do-not-call request during normal business hours. Inclusion of these caller identification information provisions in the proposed rule will not create any new obligations on broker-dealers as they are already subject to identical provisions under FCC regulations.⁹

The proposed rule would not incorporate the additional provisions in NYSE Rule 440A regarding pre-recorded messages and the use of telephone facsimile or computer advertisements.¹⁰ Similar provisions were never adopted by the FTC under the Prevention Act and thus are not required to be part of SEC or SRO rules. Moreover, these provisions in the NYSE rule are duplicative of similar FCC regulations that are applicable to broker-dealers.¹¹

The proposed rule would adopt a provision that is similar to NYSE Rule Interpretation 440A/01 as Interpretation and Policy .01 to Rule 3.26. The provision reminds firms that the rule does not affect the obligation of any Member, or person associated with a Member, that engages in telemarketing, to

⁹ See 47 CFR 64.1601.

¹⁰ See NYSE Rule 440A(e), (g), (j)(3), (6), (8).

¹¹ See 47 CFR 64.1200.

comply with relevant state and federal laws and rules, including the rules of the FCC relating to telemarketing practices and the rights of telephone consumers. The proposed rule would not incorporate the remainder of NYSE Rule Interpretation 440A/01 because the requirement for a Member to make and maintain a list of persons who do not want to receive telephone solicitations is duplicative of an existing provision in the NASD rule, which EDGX is adopting as Rule 3.26(d)(6).¹²

Third, the proposed rule, as directed by the Commission staff, makes amendments and adopts provisions that are substantially similar to FTC rules that prohibit deceptive and other abusive telemarketing acts or practices as described below.

Maintenance of Do-Not-Call Lists

Proposed EDGX Rule 3.26(d)(6) parallels the requirement in NASD Rule 2212(d)(6) that a Member making an outbound telephone call must maintain a record of a caller's request not to receive further calls. Additionally, the proposed rule provides that the request not to receive further calls would come from a person.

Wireless Communications

Proposed EDGX Rule 3.26(e) provides that the provisions set forth in the rule are applicable to Members and persons associated with a Member making outbound telephone calls to wireless telephone numbers.

Outsourcing Telemarketing

Proposed EDGX Rule 3.26(f) provides that if a Member uses another entity to perform telemarketing services on its behalf, the Member remains responsible for ensuring compliance with all provisions contained in the rule. Proposed EDGX Rule 3.26(f) also clarifies that entities or persons used to perform telemarketing services on the Member's behalf must be appropriately registered or licensed, where required, and the Member remains responsible for ensuring compliance with all provisions in Rule 3.26.

Unencrypted Consumer Account Numbers

Proposed EDGX Rule 3.26(h) prohibits a Member or person associated with a Member from disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing. The proposed rule change is substantially similar to the FTC's provision regarding unencrypted consumer

¹² See NASD Rule 2212(d)(6).

account numbers.¹³ The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.¹⁴ Additionally, the proposed rule 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.¹⁵

Submission of Billing Information

Proposed EDGX Rule 3.26(i) requires, for any telemarketing transaction, a Member or person associated with a Member, to obtain the express informed consent of the person to be charged and to be charged using the identified account. If the telemarketing transaction involves preacquired account information and a free-to-pay conversion feature, the Member or person associated with 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 pre-acquired account information, the Member or person associated with a Member must: (1) identify the account to be charged with sufficient specificity for the customer to understand what account will be charged; and (2) obtain from the customer an express agreement to be charged and to be charged using the identified account number. The proposed rule is substantially similar to the FTC’s provision regarding the submission of billing information.¹⁶ The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.¹⁷

Abandoned Calls

Proposed EDGX Rule 3.26(j) prohibits a Member or person associated with a Member from abandoning any outbound telemarketing call. The abandoned calls prohibition is subject to a “safe harbor” under proposed subparagraph (j)(2) that requires: (1) the Member or person associated with a Member 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

¹³ See 16 CFR 310.4(a)(6).

¹⁴ See Federal Trade Commission, Telemarketing Sales Rule, 68 FR 4580 (January 29, 2003) at 4615.

¹⁵ See Id. at 4616.

¹⁶ See 16 CFR 310.4(a)(7).

¹⁷ See Federal Trade Commission, Telemarketing Sales Rule, 68 FR 4580 (January 29, 2003) at 4615.

less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues; (2) the Member or person associated with a Member, for each telemarketing call placed, allows the telephone to ring for at least 15 seconds or four rings before disconnecting an unanswered call; (3) whenever a person associated with a Member is not available to speak with the person answering the telemarketing call within two seconds after the person's completed greeting, the Member or person associated with a Member promptly plays a recorded message stating the name and telephone number of the Member or person associated with a Member on whose behalf the call was placed; and (4) the Member to maintain records documenting compliance with the "safe harbor." The proposed rule is substantially similar to the FTC's provisions regarding abandoned calls.¹⁸ The FTC provided a discussion of the provisions when they were adopted pursuant to the Prevention Act.¹⁹

Prerecorded Messages

Proposed EDGX Rule 3.26(k) prohibits a Member or person associated with a Member from initiating any outbound telemarketing call that delivers a prerecorded message without a person's express written agreement to receive such calls. The proposed rule also requires that all prerecorded telemarketing calls provide specified opt-out mechanisms so that a person can opt out of future calls. The prohibition does not apply to a prerecorded message permitted for compliance with the "safe harbor" for abandoned calls under proposed subparagraph (j)(2). The proposed rule is substantially similar to the FTC's provisions regarding prerecorded messages.²⁰ The FTC provided a discussion of the provisions when they were adopted pursuant to the Prevention Act.²¹

Credit Card Laundering

Proposed EDGX Rule 3.26(l) prohibits credit card laundering, the practice of depositing into the credit card system a sales draft that is not the result of a credit card transaction between the cardholder and the Member. Except as expressly permitted, the proposed rule change prohibits a Member or person associated with a Member from: (1) presenting to or depositing into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder

¹⁸ See 16 CFR 310.4(b)(1)(iv); see also 16 CFR 310.4(b)(4).

¹⁹ See Federal Trade Commission, Telemarketing Sales Rule, 68 FR 4580 (January 29, 2003) at 4641.

²⁰ See 16 CFR 310.4(b)(1)(v).

²¹ See Federal Trade Commission, Telemarketing Sales Rule, 73 FR 51164 (August 29, 2008).

and the Member; (2) employing, soliciting, or otherwise causing a merchant, or an employee, representative or agent of the merchant, to present to or to deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or (3) obtaining access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement or the applicable credit card system. The proposed rule is substantially similar to the FTC's provisions regarding credit card laundering.²² The FTC provided a discussion of the provisions when they were adopted pursuant to the Prevention Act.²³

Definitions

Proposed EDGX Rule 3.26(m) adopts definitions that are substantially similar to the FTC's definitions.²⁴ The proposed rule adopts substantially similar definitions of "acquirer,"²⁵ "billing information,"²⁶ "caller identification service,"²⁷ "cardholder,"²⁸ "charitable contribution,"²⁹ "credit,"³⁰ "credit card,"³¹ "credit card sales draft,"³² "credit card system,"³³ "customer,"³⁴ "established business relationship,"³⁵ "free-to-pay conversion,"³⁶ "merchant,"³⁷ "merchant

²² See 16 CFR 310.2.

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

²⁴ See 16 CFR 310.2.

²⁵ See 16 CFR 310.2(a).

²⁶ See 16 CFR 310.2(c).

²⁷ See 16 CFR 310.2(d).

²⁸ See 16 CFR 310.2(e).

²⁹ See 16 CFR 310.2(f).

³⁰ See 16 CFR 310.2(h).

³¹ See 16 CFR 310.2(i).

³² See 16 CFR 310.2(j).

³³ See 16 CFR 310.2(k).

³⁴ See 16 CFR 310.2(l).

agreement,”³⁸ “outbound telephone call,”³⁹ “person”⁴⁰ “preacquired account information”⁴¹ and “telemarketing”.⁴² The FTC provided a discussion of each definition when they were adopted pursuant to the Prevention Act.⁴³

Proposed EDGX Rule 3.26(m) proposes to define the terms “account activity,”⁴⁴ “broker-dealer of record”⁴⁵ and “personal relationship”⁴⁶ identically to the existing definitions in NASD Rule 2212.

As noted above, EDGX will announce the implementation date of the proposed rule change in an Information Circular to be published no later than 90 days following Commission approval. The implementation date will be no later than 180 days following Commission approval.

(b) Statutory Basis

EDGX believes that the proposed rule change is consistent with the provisions of Section 6(b)(5) of the Act,⁴⁷ which requires, among other things, that EDGX rules must be designed to prevent fraudulent and manipulative acts and practices, to

35 See 16 CFR 310.2 (o).

36 See 16 CFR 310.2(p).

37 See 16 CFR 310.2(s).

38 See 16 CFR 310.2(t).

39 See 16 CFR 310.2(v).

40 See 16 CFR 310.2(w).

41 See 16 CFR 310.2(x).

42 See 16 CFR 310.2(dd)

43 See Federal Trade Commission, Telemarketing Sales Rule, 60 FR 43842 (August 23, 1995) at 43843; see also Federal Trade Commission, Telemarketing Sales Rule, 68 FR 4580 (January 29, 2003) at 4587.

44 See NASD Rule 2212(g)(4).

45 See NASD Rule 2212(g)(5).

46 See NASD Rule 2212(g)(3).

47 15 U.S.C. 78f(b)(5).

promote just and equitable principles of trade, and, in general, to protect investors and the public interest. EDGX believes that the proposed rule change will protect investors and the public interest by continuing to prohibit deceptive and other abusive telemarketing acts or practices.

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

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

5. 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.

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 proposed rules are based on the approved rules of other self-regulatory organizations.⁴⁸ In addition, the proposed rules will benefit all Exchange participants, because telemarketing will assist in the maintenance of fair and orderly markets, provide additional liquidity to the Exchange, and assist in preventing excess volatility. Accordingly, the Exchange has designated this rule filing as non-controversial under Section 19(b)(3)(A) of the Act⁴⁹ and paragraph (f)(6) of Rule 19b-4 thereunder.⁵⁰ The Exchange believes that the proposed rule change should take effect immediately upon filing because it will effect a change that (1) does not significantly affect the protection of investors or the public interest, (2) does not impose any significant burden on

⁴⁸ See NYSE Rule 440A; NYSE Arca Rule 9.20(b); NASDAQ Rule 2212. See Securities Exchange Act Release No. 55735 (May 10, 2007), 72 FR 27610 (May 16, 2007) (SR-NYSE-2007-06). Other SROs also have similar requirements for telemarketing. See Securities Exchange Act Release No. 54283 (August 8, 2006), 71 FR 46534 (August 14, 2006) (SR-PCX-2005-97); Securities Exchange Act Release No. 66279 (January 30, 2012), 77 FR 5611 (February 3, 2012) (SR-FINRA-2011-059).

⁴⁹ 15 U.S.C. 78s(b)(3)(A).

⁵⁰ 17 C.F.R. 240.19b-4.

competition and, (3) does not become operative for 30 days after the date of this filing. In accordance with Rule 19b-4(f)(6)(iii),⁵¹ the Exchange submitted 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.

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

The proposed rule change is based on and substantially similar to NASD Rule 2212 and NYSE Rule 440A and its Interpretations, as amended in SR-FINRA-2011-059.

9. Exhibits

Exhibit 1 – Form of Notice of Proposed Rule Change for Federal Register.

Exhibit 5 – Text of Proposed Rule Change.

⁵¹ 17 C.F.R. 240.19b-4(f)(6)(iii).

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- ; File No. SR-EDGX-2012-11)

[Date]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing of Proposed Rule Change Relating to New EDGX Rule Regarding 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 March 21, 2012, EDGX Exchange, Inc. (the "Exchange" or "EDGX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which items have been prepared by the Exchange. 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 amend Chapter V of the EDGX rulebook to adopt the National Association of Securities Dealers, Inc. ("NASD") Rule 2212 (Telemarketing), subject to certain amendments, as EDGX Rule 3.26. Additionally, the proposed rule change would adopt provisions that are substantially similar to the telemarketing rules of the Federal Trade Commission ("FTC"). The text of the proposed rule change is attached as Exhibit 5 and is available on the Exchange's website at www.directedge.com, at the Exchange's principal office, and at the Public Reference Room of the Commission.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 self-regulatory organization has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

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

1. Purpose

EDGX is proposing new Rule 3.26 (Telemarketing), which is based on NASD Rule 2212 (Telemarketing) with certain changes discussed below. In addition, the proposed rule would incorporate certain provisions of New York Stock Exchange (“NYSE”) Rule 440A and its Interpretation into new EDGX Rule 3.26. Further, the proposed rule adds provisions that are substantially similar to FTC rules that prohibit deceptive and other abusive telemarketing acts or practices as described below.

Background

NASD Rule 2212 and NYSE Rule 440A are similar rules that require members to maintain do-not-call lists, limit the hours of telephone solicitations and prohibit members from using deceptive and abusive acts and practices in connection with telemarketing. The Commission directed the Financial Industry Regulatory Authority, Inc. (“FINRA”) and NYSE to enact these telemarketing rules in accordance with the Telemarketing Consumer Fraud and Abuse Prevention Act of 1994 (“Prevention Act”).³ The Prevention Act requires the Commission to promulgate, or direct any national securities exchange or

³ 15 U.S.C. 6101-6108.

registered securities association to promulgate, rules substantially similar to the FTC rules to prohibit deceptive and other abusive telemarketing acts or practices.⁴

In 2003, the FTC and the Federal Communications Commission (“FCC”) established requirements for sellers and telemarketers to participate in the national do-not-call registry.⁵ Pursuant to the Prevention Act, the Commission requested that FINRA and NYSE amend their telemarketing rules to include a requirement that their members participate in the national do-not-call registry. In 2004, the Commission approved amendments to NASD Rule 2212 requiring member firms to participate in the national do-not-call registry.⁶ The following year, the Commission approved amendments to NYSE Rule 440A, which were similar to the NASD rule amendments, but included additional provisions regarding the use of caller identification information, pre-recorded messages, telephone facsimiles and computer advertisements.⁷

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.⁸ Earlier this year, Commission staff directed EDGX and other self-regulatory organizations (“SROs”) to conduct a review of their

⁴ 15 U.S.C. 6102.

⁵ See 68 FR 4580 (January 29, 2003); 68 FR 44144 (July 25, 2003); CG Docket No. 02-278, FCC 03-153, (adopted June 26, 2003; released July 3, 2003).

⁶ See Securities Exchange Act Release No. 49055 (January 12, 2004), 69 FR 2801 (January 20, 2004) (SR-NASD-2003-131).

⁷ See Securities Exchange Act Release No. 52579 (October 7, 2005), 70 FR 60119 (October 14, 2005) (SR-NYSE-2004-73).

⁸ 15 U.S.C. 6102.

telemarketing rules, if any, and propose rule amendments that provide protections that are “substantially similar” as those provided by the FTC’s telemarketing rules.⁹ Commission staff had concerns “that the SRO [self-regulatory organization] rules overall have not kept pace with the FTC’s rules, and thus may no longer meet the standards of the Prevention Act.”¹⁰

EDGX Rule 3.26

The proposed rule would adopt NASD Rule 2212 into the EDGX rulebook as EDGX Rule 3.26 (Telemarketing), subject to certain amendments. The proposed rule would also incorporate certain unique aspects of NYSE Rule 440A and its Interpretation. Additionally, the proposed rule makes amendments and adopts provisions that are substantially similar to rules promulgated by the FTC pursuant to the Prevention Act.

General Telemarketing Requirements

Proposed EDGX Rules 3.26(a), (b) and (c) are similar to NASD Rules 2212(a), (b), and (c), subject to certain amendments. Proposed Rule 3.26(a)(1) provides the time-of-day restrictions under which a Member or person associated with a Member may make outbound telephone calls to the residence of any person for the purpose of soliciting the purchase of securities or related services. Specifically, Members may engage in such telephone solicitations only between the hours of 8 a.m. to 9 p.m. (local time at the called party’s location) unless the Member has an established business relationship with the called person based upon a financial transaction with the Member, the Member has received express written permission from the person which allows the Member to call

⁹ See Letter from Robert W. Cook, Director, Division of Trading and Markets, SEC, to William O’Brien, Chief Executive Officer, Direct Edge Holdings LLC, dated May 12, 2011.

¹⁰ Id.

outside the applicable time frame, or the person called is a broker or dealer. Proposed Rules 3.26(a)(2) and 3.26(a)(3) provide that no Member or person associated with a Member shall initiate any outbound telephone call to: 1) any person that previously has stated that they do not wish to receive such call made by or on behalf of the Member, or 2) any person who has registered their telephone number on the FTC's national do-not-call registry.

National Do-Not-Call List Exceptions

Proposed EDGX Rule 3.26(b) adopts exceptions, similar to NASD Rule 2212(b), under which sellers and telemarketers may make telephone solicitations to persons on the national registry.

The first exception, contained in paragraph (b)(1), is for calls made to persons with whom the Member has an "established business relationship." A person's request to be placed on a firm-specific do-not-call list terminates the established business relationship exception. Thus, a Member or person associated with a Member may not make outbound telephone calls to a person with whom it has an established business relationship if such person requests to be placed on the Member's do-not-call list.

The second exception to the national do-not-call rules, contained in paragraph (b)(2), is for calls to persons from whom the Member has obtained prior express invitation or permission. Permission must be evidenced by a signed, written agreement (which may include an electronic signature under the E-Sign Act) between the Member and person that specifically states that the person agrees to be contacted by the Member. The agreement also must include the telephone number to which calls may be placed.

The third exception, in paragraph (b)(3), is for calls made by an associated person who has a personal relationship with the recipient.

Safe Harbor Provision

Proposed EDGX Rule 3.26(c) establishes a “safe harbor” under which Members would not be held liable for a violation that is the result of error if the telemarketer’s routine business practice meets certain specified standards. The “safe harbor” applies only to a violation of proposed Rule 3.26(a)(3), the national do-not-call registry provision. To be eligible for this safe harbor, a Member or person associated with a Member must demonstrate that the Member’s routine business practice meets the following four standards. First, the Member has established and implemented written procedures to comply with the national do-not-call rules. Second, the Member has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules. Third, the Member has maintained and recorded a list of telephone numbers that the Member may not contact. Fourth, the Member uses a process to prevent outbound telephone calls to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the FTC no more than 31 days prior to the date any call is made, and maintains records documenting this process.

Telemarketing Procedures

Proposed EDGX Rule 3.26(d) establishes procedures that Members must institute prior to engaging in telemarketing. These procedures include requirements to: (1) have a written policy for maintaining a do-not-call list; (2) train personnel engaged in telemarketing in the existence and use of the do-not-call list; (3) record and disclose requests from a person to be added to the Member’s do-not-call list; and (4) have the

Member provide the called party with the name of the individual caller, the name of the Member, a telephone number or address at which the Member may be contacted, and that the purpose of the call is to solicit the purchase of securities or related services.

Affiliated Persons or Entities

Proposed EDGX Rule 3.26(d)(5) provides that, in general, a person's do-not-call request applies only to the entity making the call, and does not apply to any affiliated entity unless the customer reasonably would expect the affiliated entity to be included given the identification of the caller and the product being advertised.

Caller Identification Information

The proposed rule would give new EDGX Rule 3.26(g) similar caller identification information provisions as those contained in NYSE Rule 440A(h). These provisions provide that Members engaging in telemarketing must transmit caller identification information and are explicitly prohibited from blocking caller identification information. The telephone number provided must permit any person to make a do-not-call request during normal business hours. Inclusion of these caller identification information provisions in the proposed rule will not create any new obligations on broker-dealers as they are already subject to identical provisions under FCC regulations.¹¹

The proposed rule would not incorporate the additional provisions in NYSE Rule 440A regarding pre-recorded messages and the use of telephone facsimile or computer advertisements.¹² Similar provisions were never adopted by the FTC under the Prevention Act and thus are not required to be part of SEC or SRO rules. Moreover,

¹¹ See 47 CFR 64.1601.

¹² See NYSE Rule 440A(e), (g), (j)(3), (6), (8).

these provisions in the NYSE rule are duplicative of similar FCC regulations that are applicable to broker-dealers.¹³

The proposed rule would adopt a provision that is similar to NYSE Rule Interpretation 440A/01 as Interpretation and Policy .01 to Rule 3.26. The provision reminds firms that the rule does not affect the obligation of any Member, or person associated with a Member, that engages in telemarketing, to comply with relevant state and federal laws and rules, including the rules of the FCC relating to telemarketing practices and the rights of telephone consumers. The proposed rule would not incorporate the remainder of NYSE Rule Interpretation 440A/01 because the requirement for a Member to make and maintain a list of persons who do not want to receive telephone solicitations is duplicative of an existing provision in the NASD rule, which EDGX is adopting as Rule 3.26(d)(6).¹⁴

Third, the proposed rule, as directed by the Commission staff, makes amendments and adopts provisions that are substantially similar to FTC rules that prohibit deceptive and other abusive telemarketing acts or practices as described below.

Maintenance of Do-Not-Call Lists

Proposed EDGX Rule 3.26(d)(6) parallels the requirement in NASD Rule 2212(d)(6) that a Member making an outbound telephone call must maintain a record of a caller's request not to receive further calls. Additionally, the proposed rule provides that the request not to receive further calls would come from a person.

Wireless Communications

¹³ See 47 CFR 64.1200.

¹⁴ See NASD Rule 2212(d)(6).

Proposed EDGX Rule 3.26(e) provides that the provisions set forth in the rule are applicable to Members and persons associated with a Member making outbound telephone calls to wireless telephone numbers.

Outsourcing Telemarketing

Proposed EDGX Rule 3.26(f) provides that if a Member uses another entity to perform telemarketing services on its behalf, the Member remains responsible for ensuring compliance with all provisions contained in the rule. Proposed EDGX Rule 3.26(f) also clarifies that entities or persons used to perform telemarketing services on the Member's behalf must be appropriately registered or licensed, where required, and the Member remains responsible for ensuring compliance with all provisions in Rule 3.26.

Unencrypted Consumer Account Numbers

Proposed EDGX Rule 3.26(h) prohibits a Member or person associated with a Member from disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing. The proposed rule change is substantially similar to the FTC's provision regarding unencrypted consumer account numbers.¹⁵ The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.¹⁶ Additionally, the proposed rule 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.¹⁷

¹⁵ See 16 CFR 310.4(a)(6).

¹⁶ See Federal Trade Commission, Telemarketing Sales Rule, 68 FR 4580 (January 29, 2003) at 4615.

¹⁷ See Id. at 4616.

Submission of Billing Information

Proposed EDGX Rule 3.26(i) requires, for any telemarketing transaction, a Member or person associated with a Member, to obtain the express informed consent of the person to be charged and to be charged using the identified account. If the telemarketing transaction involves preacquired account information and a free-to-pay conversion feature, the Member or person associated with 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 pre-acquired account information, the Member or person associated with a Member must: (1) identify the account to be charged with sufficient specificity for the customer to understand what account will be charged; and (2) obtain from the customer an express agreement to be charged and to be charged using the identified account number. The proposed rule is substantially similar to the FTC's provision regarding the submission of billing information.¹⁸ The FTC provided a discussion of the provision when it was adopted pursuant to the Prevention Act.¹⁹

Abandoned Calls

Proposed EDGX Rule 3.26(j) prohibits a Member or person associated with a Member from abandoning any outbound telemarketing call. The abandoned calls

¹⁸ See 16 CFR 310.4(a)(7).

¹⁹ See Federal Trade Commission, Telemarketing Sales Rule, 68 FR 4580 (January 29, 2003) at 4615.

prohibition is subject to a “safe harbor” under proposed subparagraph (j)(2) that requires: (1) the Member or person associated with a Member 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) the Member or person associated with a Member, for each telemarketing call placed, allows the telephone to ring for at least 15 seconds or four rings before disconnecting an unanswered call; (3) whenever a person associated with a Member is not available to speak with the person answering the telemarketing call within two seconds after the person’s completed greeting, the Member or person associated with a Member promptly plays a recorded message stating the name and telephone number of the Member or person associated with a Member on whose behalf the call was placed; and (4) the Member to maintain records documenting compliance with the “safe harbor.” The proposed rule is substantially similar to the FTC’s provisions regarding abandoned calls.²⁰ The FTC provided a discussion of the provisions when they were adopted pursuant to the Prevention Act.²¹

Prerecorded Messages

Proposed EDGX Rule 3.26(k) prohibits a Member or person associated with a Member from initiating any outbound telemarketing call that delivers a prerecorded message without a person’s express written agreement to receive such calls. The proposed rule also requires that all prerecorded telemarketing calls provide specified opt-

²⁰ See 16 CFR 310.4(b)(1)(iv); see also 16 CFR 310.4(b)(4).

²¹ See Federal Trade Commission, Telemarketing Sales Rule, 68 FR 4580 (January 29, 2003) at 4641.

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 subparagraph (j)(2). The proposed rule is substantially similar to the FTC’s provisions regarding prerecorded messages.²² The FTC provided a discussion of the provisions when they were adopted pursuant to the Prevention Act.²³

Credit Card Laundering

Proposed EDGX Rule 3.26(1) prohibits credit card laundering, the practice of depositing into the credit card system a sales draft that is not the result of a credit card transaction between the cardholder and the Member. Except as expressly permitted, the proposed rule change prohibits a Member or person associated with a Member from: (1) presenting to or depositing into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the Member; (2) employing, soliciting, or otherwise causing a merchant, or an employee, representative or agent of the merchant, to present to or to deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or (3) obtaining access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement or the applicable credit card system. The proposed rule is substantially similar to the FTC’s

²² See 16 CFR 310.4(b)(1)(v).

²³ See Federal Trade Commission, Telemarketing Sales Rule, 73 FR 51164 (August 29, 2008).

provisions regarding credit card laundering.²⁴ The FTC provided a discussion of the provisions when they were adopted pursuant to the Prevention Act.²⁵

Definitions

Proposed EDGX Rule 3.26(m) adopts definitions that are substantially similar to the FTC's definitions.²⁶ The proposed rule adopts substantially similar definitions of "acquirer,"²⁷ "billing information,"²⁸ "caller identification service,"²⁹ "cardholder,"³⁰ "charitable contribution,"³¹ "credit,"³² "credit card,"³³ "credit card sales draft,"³⁴ "credit card system,"³⁵ "customer,"³⁶ "established business relationship,"³⁷ "free-to-pay conversion,"³⁸ "merchant,"³⁹ "merchant agreement,"⁴⁰ "outbound telephone call,"⁴¹

²⁴ See 16 CFR 310.2.

²⁵ See Federal Trade Commission, Telemarketing Sales Rule, 60 FR 43842 (August 23, 1995) at 43852.

²⁶ See 16 CFR 310.2.

²⁷ See 16 CFR 310.2(a).

²⁸ See 16 CFR 310.2(c).

²⁹ See 16 CFR 310.2(d).

³⁰ See 16 CFR 310.2(e).

³¹ See 16 CFR 310.2(f).

³² See 16 CFR 310.2(h).

³³ See 16 CFR 310.2(i).

³⁴ See 16 CFR 310.2(j).

³⁵ See 16 CFR 310.2(k).

³⁶ See 16 CFR 310.2(l).

³⁷ See 16 CFR 310.2 (o).

³⁸ See 16 CFR 310.2(p).

“person”⁴² “preacquired account information”⁴³ and “telemarketing”.⁴⁴ The FTC provided a discussion of each definition when they were adopted pursuant to the Prevention Act.⁴⁵

Proposed EDGX Rule 3.26(m) proposes to define the terms “account activity,”⁴⁶ “broker-dealer of record”⁴⁷ and “personal relationship”⁴⁸ identically to the existing definitions in NASD Rule 2212.

As noted above, EDGX will announce the implementation date of the proposed rule change in an Information Circular to be published no later than 90 days following Commission approval. The implementation date will be no later than 180 days following Commission approval.

2. Basis

EDGX believes that the proposed rule change is consistent with the provisions of Section 6(b)(5) of the Act,⁴⁹ which requires, among other things, that EDGX rules must be

³⁹ See 16 CFR 310.2(s).

⁴⁰ See 16 CFR 310.2(t).

⁴¹ See 16 CFR 310.2(v).

⁴² See 16 CFR 310.2(w).

⁴³ See 16 CFR 310.2(x).

⁴⁴ See 16 CFR 310.2(dd)

⁴⁵ See Federal Trade Commission, Telemarketing Sales Rule, 60 FR 43842 (August 23, 1995) at 43843; see also Federal Trade Commission, Telemarketing Sales Rule, 68 FR 4580 (January 29, 2003) at 4587.

⁴⁶ See NASD Rule 2212(g)(4).

⁴⁷ See NASD Rule 2212(g)(5).

⁴⁸ See NASD Rule 2212(g)(3).

⁴⁹ 15 U.S.C.78f(b)(5).

designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. EDGX believes that the proposed rule change will protect investors and the public interest by continuing to prohibit deceptive and other abusive telemarketing acts or practices.

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

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

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 Change and Timing for Commission Action

The proposed rules are based on the approved rules of other self-regulatory organizations.⁵⁰ In addition, the proposed rules will benefit all Exchange participants, because telemarketing will assist in the maintenance of fair and orderly markets, provide additional liquidity to the Exchange, and assist in preventing excess volatility.

Accordingly, the Exchange has designated this rule filing as non-controversial under

⁵⁰ See NYSE Rule 440A; NYSE Arca Rule 9.20(b); NASDAQ Rule 2212. See Securities Exchange Act Release No. 55735 (May 10, 2007), 72 FR 27610 (May 16, 2007) (SR-NYSE-2007-06). Other SROs also have similar requirements for telemarketing. See Securities Exchange Act Release No. 54283 (August 8, 2006), 71 FR 46534 (August 14, 2006) (SR-PCX-2005-97); Securities Exchange Act Release No. 66279 (January 30, 2012), 77 FR 5611 (February 3, 2012) (SR-FINRA-2011-059).

Section 19(b)(3)(A) of the Act⁵¹ and paragraph (f)(6) of Rule 19b-4 thereunder.⁵² The Exchange believes that the proposed rule change should take effect immediately upon filing because it will effect a change that (1) does not significantly affect the protection of investors or the public interest, (2) does not impose any significant burden on competition and, (3) does not become operative for 30 days after the date of this filing. In accordance with Rule 19b-4(f)(6)(iii),⁵³ the Exchange submitted 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.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change 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
- Send an E-mail to rule-comments@sec.gov. Please include File No. SR-EDGX-2012-11 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

⁵¹ 15 U.S.C. 78s(b)(3)(A).

⁵² 17 C.F.R. 240.19b-4.

⁵³ 17 C.F.R. 240.19b-4(f)(6)(iii).

All submissions should refer to File Number SR-EDGX-2012-11. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will 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 Number SR-EDGX-2012-11 and should be submitted by [insert date 21 days from the date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁴

Secretary

⁵⁴ 17 CFR 200.30-3(a)(12).

EXHIBIT 5

Additions: Underlined

Deletions: [Bracketed]

Chapter III. RULES OF FAIR PRACTICE

Rules 3.1.-3.22. (No change.)

Rule 3.23 – 3.25 (Reserved.)

Rule 3.26. Telemarketing

(a) General Telemarketing Requirements

No Member or person associated with a Member shall initiate any outbound telephone call to:

(1) Time of Day Restriction

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

(A) the Member has an established business relationship with the person pursuant to paragraph (m)(12)(A),

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

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

(2) Firm-Specific Do-Not-Call List

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

(3) National Do-Not-Call List

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

(b) National Do-Not-Call List Exceptions

A Member making outbound telephone calls will not be liable for violating paragraph (a)(3) if:

(1) Established Business Relationship Exception

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

(2) Prior Express Written Consent Exception

The Member has obtained the person's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement (which may be obtained electronically under the E-Sign Act) between the person and Member which states that the person agrees to be contacted by the Member and includes the telephone number to which the calls may be placed; or

(3) Personal Relationship Exception

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

(c) Safe Harbor Provision

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

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

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

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

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

(d) Procedures

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

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

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

(3) Recording, 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 firm's do-not-call list at the time the request is made. Members must honor a person's do-not-call request within a reasonable time from the date such request is made. This period may not exceed 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.

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

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

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

(e) Wireless Communications

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

(f) 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.

(g) Caller Identification Information

(1) Any Member that engages in telemarketing, as defined in paragraph (m)(20) of this Rule, 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, as defined in paragraph (m)(20) of this Rule, is prohibited from blocking the transmission of caller identification information.

(h) Unencrypted Consumer Account Numbers

No Member or person associated with 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 shall not apply to the disclosure or receipt of a customer’s billing information to process a payment pursuant to a telemarketing transaction.

(i) Submission of Billing Information

For any telemarketing transaction, a Member or person associated with a Member must obtain the express informed consent of the person to be charged and to be charged using the identified account.

(1) In any telemarketing transaction involving preacquired account information and a free-to-pay conversion feature, the Member or person associated with 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 (i)(1)(A); and

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

(2) In any other telemarketing transaction involving preacquired account information not described in paragraph (i)(1), the Member or person associated with 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 (i)(2)(A).

(j) Abandoned Calls

(1) No Member or person associated with a Member shall “abandon” any outbound telemarketing call. An outbound call is “abandoned” if a person answers it and the call is not

connected to a person associated with a Member within two seconds of the person's completed greeting.

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

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

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

(D) the Member retains records establishing compliance with paragraph (j)(2).

(k) Prerecorded Messages

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

(A) the Member obtained from the recipient of the call an express agreement, in writing, that:

(i) the Member has 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 opening an account or purchasing any good or service;

(iii) evidences the willingness of the recipient of the call to receive calls that deliver prerecorded messages by or on behalf of a specific Member; and

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

(B) the Member or person associated with a Member allows the telephone to ring for at least 15 seconds or four rings before disconnecting an unanswered call; and

within two seconds after the completed greeting of the person called, plays a prerecorded message that promptly provides the disclosures in paragraph (d)(4), followed immediately by a disclosure of one or both of the following:

(i) for a call that could be answered by a person, that the person called 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)(3) at any time during the message. The mechanism must:

a. automatically add the number called to the Member's firm-specific do-not-call list;

b. once invoked, immediately disconnect the call; and

c. be available for use at any time during the message;

(ii) for a call that could be answered by an answering machine or voicemail service, that the person called 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)(3). The number provided must connect directly to an automated interactive voice or keypress-activated opt-out mechanism that:

a. automatically adds the number called to the Member's firm-specific do-not-call list;

b. immediately thereafter disconnects the call; and

c. 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 (k) shall not be deemed to violate paragraph (j).

(1) Credit Card Laundering

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

(m) Definitions

For purposes of this Rule:

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

(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, for example a credit or debit card number, a brokerage, checking, or savings account number, or a mortgage loan account number.

(4) The term “broker-dealer of record” refers to the broker-dealer identified on a customer’s account application for accounts held directly at a mutual fund or variable insurance product issuer.

(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 offered 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 previous 18 months immediately preceding the date of the telemarketing call;

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

(C) the person has contacted the Member to inquire about a product or service offered by the Member within the previous three months immediately preceding the date of the telemarketing call. 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 and services or 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.

(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. A “donor” means any person solicited to make a charitable contribution.

(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 associated with a Member making an outbound telephone call.

(19) The term “preacquired account information” means any information that enables a seller or telemarketer 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 “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 Compliance with Other Requirements.

(a) This Rule does not affect the obligation of any Member or person associated with a Member that engages in telemarketing to comply with relevant state and federal laws and rules, including but not limited to the Telemarketing and Consumer Fraud and Abuse Prevention Act codified at 15 U.S.C. 6101–6108, as amended, the Telephone Consumer Protection Act codified at 47 U.S.C. 227, and the rules of the Federal Communications Commission relating to telemarketing practices and the rights of telephone consumers codified at 47 CFR 64.1200.