



Financial Industry Regulatory Authority

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Elizabeth M. Murphy  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

**Re: File No. SR-FINRA-2011-059 – Response to Comments**

Dear Ms. Murphy:

This letter responds to the comment letter submitted to the Securities and Exchange Commission (“SEC”) regarding SR-FINRA-2011-059, a proposed rule change to adopt NASD Rule 2212 (Telemarketing) as FINRA Rule 3230 (Telemarketing) in the consolidated FINRA rulebook, subject to certain amendments. The proposed rule change would delete Incorporated NYSE Rule 440A (Telephone Solicitation) and Incorporated NYSE Rule Interpretation 440A/01. Further, the proposed rule change adds provisions that are substantially similar to Federal Trade Commission (“FTC”) rules that prohibit deceptive and other abusive telemarketing acts or practices. The proposed rule change was published in the *Federal Register* on November 2, 2011, and comments were due by November 23, 2011.<sup>1</sup>

The proposed rule change adopts new FINRA Rule 3230, which is based largely on NASD Rule 2212 but includes several changes and additions. First, the proposed rule change would adopt into new FINRA Rule 3230 similar caller identification information provisions contained in Incorporated NYSE Rule 440A(h). Second, the proposed rule change would adopt a provision that is similar to Incorporated NYSE Rule Interpretation 440A/01 as Supplementary Material. 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 Federal Communications Commission (“FCC”) relating to telemarketing practices and the rights of telephone consumers. Third, the proposed rule change, as directed by the SEC staff, makes amendments and adopts provisions that are substantially similar to FTC rules that prohibit deceptive and other

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<sup>1</sup> Securities Exchange Act Release No. 65645 (October 27, 2011), 76 FR 67787 (November 2, 2011) (Notice of Filing of File No. SR-FINRA-2011-059).

abusive telemarketing acts or practices.<sup>2</sup> The Commission received one comment letter, from the Cornell Securities Law Clinic (“Cornell”), in response to the proposed rule change.<sup>3</sup> Cornell suggests “that the Proposed Rule [s]hould incorporate the additional provisions in NYSE Rule 440A regarding prerecorded messages and the use of telephone facsimile or computer advertisements.” Additionally, Cornell points out that the prohibition against prerecorded messages in proposed FINRA Rule 3230(k) “would not apply to prerecorded messages permitted for compliance with the ‘safe harbor’ for abandoned calls under proposed subparagraph (j)(2)” and recommends that FINRA eliminate the prerecorded messages exception. Cornell believes that these suggested amendments will provide customers with additional protection against invasive and abusive telemarketing techniques.

For the reasons set forth below, FINRA does not believe that the proposed rule change should be amended. FINRA believes that the first item Cornell suggests adding, that the provisions under Incorporated NYSE Rule 440A regarding prerecorded messages and the use of telephone facsimile or computer advertisements should be included, is unnecessary. When the NYSE adopted these provisions, it stated that the language was adopted from the requirements of FCC regulation and because broker-dealers are subject to the FCC’s telemarketing rules, the NYSE modeled its rule after the FCC’s rules.<sup>4</sup> FINRA members are already subject to substantially similar FCC provisions regarding prerecorded messages and the use of telephone facsimile or computer advertisements.<sup>5</sup> Consequently, FINRA does not believe it is necessary to explicitly repeat these obligations within proposed FINRA Rule 3230; however, FINRA reminds members of their obligations with relevant state and federal laws and rules in proposed Supplementary Material .01.

Cornell also suggests that under proposed FINRA Rule 3230(k), FINRA should eliminate the exception for prerecorded messages permitted for compliance with the “safe harbor” for abandoned calls under subparagraph (j)(2). FINRA does not believe that the “safe harbor” exception in proposed FINRA Rule 3230(k) should be eliminated. The provision in FINRA Rule 3230(k) is substantially similar to the

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<sup>2</sup> See letter from Robert W. Cook, Director, Division of Trading and Markets, SEC, to Richard G. Ketchum, Chairman and Chief Executive Officer, FINRA, dated May 10, 2011.

<sup>3</sup> Letter from William A. Jacobson, Associate Clinical Professor and Director, Cornell Securities Law Clinic and Tamara Gavrilova, Cornell Law School, to Elizabeth M. Murphy, Secretary, SEC (November 21, 2011).

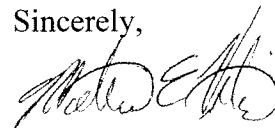
<sup>4</sup> See Securities Exchange Act Release No. 52308 (August 19, 2005), 70 FR 49961, 49964 (August 25, 2005) (Notice of Filing of File No. SR-NYSE-2004-73).

<sup>5</sup> See 47 CFR 64.1200; see also 47 CFR 68.318.

provision in the FTC's Telemarketing Sales Rule that exempts from the prerecorded message prohibition a prerecorded message that is made in compliance with a "safe harbor" for abandoned calls.<sup>6</sup> The abandoned call "safe harbor," among other things, requires telemarketers to play a recorded message that states the name and telephone number of the seller on whose behalf the call was placed whenever a sales representative is not available to speak with a consumer within two seconds of the consumer's completed greeting.<sup>7</sup> The abandoned call "safe harbor" was adopted because the FTC determined that a total ban on abandoned calls would amount to a ban on predictive dialers, and would not strike the proper balance between addressing an abusive practice and allowing for a technology that reduces costs for telemarketers.<sup>8</sup> Additionally, the FCC adopted a similar "safe harbor" for abandoned calls.<sup>9</sup> When adopting the prerecorded message provisions for the abandoned call "safe harbor," the FTC and FCC recognized that consumers are frightened and angered by "dead air" calls and repeated hang-ups; however, the FTC and FCC also recognized that a prerecorded message that provides identification information not only mitigates consumers' fears, but also makes it easier for consumers to make a do-not-call request of a company by calling the number provided in the message.<sup>10</sup> Because of the foregoing, FINRA believes that it would be improper to eliminate the "safe harbor" exception for prerecorded messages under proposed FINRA Rule 3230(k).

For the reasons set forth above, FINRA is not proposing amendments to proposed FINRA Rule 3230 based on Cornell's comment letter. FINRA believes that the foregoing responds to the material issues raised by Cornell. If you have any questions, please feel free to contact me at (202) 728-8156.

Sincerely,



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<sup>6</sup> See 16 CFR 310.4(b)(1)(v).

<sup>7</sup> See 16 CFR 310.4(b)(4)(iii).

<sup>8</sup> See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580, 4642 (January 29, 2003).

<sup>9</sup> See 47 CFR 64.1200(a)(6).

<sup>10</sup> See Federal Trade Commission, *Telemarketing Sales Rule*, 68 FR 4580, 4644 (January 29, 2003); see also Federal Communications Commission, *Rules and Regulations Implementing the Telephone Consumer Protection Act*, 68 FR 44144, 44164 (July 25, 2003).