

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52579; File No. SR-NYSE-2004-73)

October 7, 2005

Self-Regulatory Organizations; New York Stock Exchange, Inc., Order Approving Proposed Rule Change and Amendment Nos. 1 and 2 Thereto to Amend NYSE Rule 440A Relating to Telephone Solicitation

On December 30, 2004, the New York Stock Exchange, Inc. (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Exchange Act”),² and Rule 19b-4 thereunder,³ a proposed amendment to NYSE Rule 440A relating to telephone solicitation. On July 1, 2005, the NYSE filed Amendment No. 1 to the proposed rule change.⁴ On August 11, 2005, the NYSE filed Amendment No. 2 to the proposed rule change.⁵ The proposed rule change, as amended, was published for comment in the Federal Register on August 25, 2005.⁶ The Commission received no comments on the proposal. This order approves the proposed rule change, as amended.

NYSE Rule 440A currently provides that no member, allied member or employee of a member or member organization shall make an outbound telephone call to the residence of any person for the purpose of soliciting the purchase of securities or related services at any time other than between 8 a.m. and 9 p.m. local time at the called person’s location without the prior

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a et seq.

³ 17 CFR 240.19b-4.

⁴ In Amendment No. 1, the NYSE proposed to partially amend the text of proposed amended Rule 440A and made conforming and technical changes to the original filing.

⁵ In Amendment No. 2, the NYSE proposed additional changes to the text of proposed amended Rule 440A and made additional changes to the original filing.

⁶ See Securities Exchange Act Release No. 52308 (August 19, 2005), 70 FR 49961 (August 25, 2005).

consent of the person; or make an outbound telephone call to any person for the purpose of soliciting the purchase of securities or related services without disclosing promptly and in a clear and conspicuous manner to the called person the following information: (1) the identity of the caller and the member or member organization; (2) the telephone number or address at which the caller may be contacted; and (3) that the purpose of the call is to solicit the purchase of securities or related services.

The proposed amendment to NYSE Rule 440A would incorporate regulations issued by the Federal Communications Commission (“FCC”) and the Federal Trade Commission relating to the implementation of the national do-not-call registry and the amendments to the Telephone Consumer Protection Act of 1991 (“TCPA”).⁷ The amendment would delete current Rule 440A and replace it with new language that incorporates the requirements of the FCC regulation, which is applicable to broker-dealers, but retain those sections of current Rule 440A that remain relevant. The proposed amended rule would generally prohibit NYSE members, allied members, and employees of members and member organizations from making telemarketing calls to people who have registered on the national do-not-call registry, while retaining time-of-day and firm-specific do-not-call restrictions similar to those contained in the current rule.

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a

⁷ Rules and Regulations Implementing the TCPA, FCC 03-153, adopted June 26, 2003, 68 FR 44144 (July 25, 2003). The FCC rules address such diverse topics as abandoned calls and calls made on behalf of tax exempt non-profit organizations. The NYSE’s proposed amendment does not contain these provisions as such matters generally fall outside the purview of the investor protection concerns underlying the proposed rule change. Nevertheless, members and member organizations are subject to the FCC national do-not-call rules and must therefore, comply with those provisions or risk action by the FCC.

national securities exchange.⁸ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,⁹ of the Exchange Act. Section 6(b)(5) requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and national market system, and in general, to protect investors and the public interest. The Commission believes that the proposed rule change, as amended, is designed to accomplish these ends by requiring NYSE members, allied members, and employees of members and member organizations to observe time-of-day restrictions on telephone solicitations, maintain firm-specific do-not-call lists, and refrain from initiating telephone solicitations to investors and other members of the public who have registered their telephone numbers on the national do-not-call registry. The Commission also believes that the proposed rule change, as amended, establishes adequate procedures to prevent NYSE members, allied members, and employees of members and member organizations from making telephone solicitations to do-not-call registrants, which should have the effect of protecting investors by enabling persons who do not want to receive telephone solicitations from members or member organizations to receive the protections of the national do-not-call registry, while providing appropriate exceptions to the rule's restrictions, which should promote just and equitable principles of trade.

⁸ In approving this proposed rule change, the Commission has considered whether the proposed rule change will promote efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁹ 15 U.S.C. 78f(b)(5).

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁰ that the proposed rule change (SR-NYSE-2004-73), as amended, be and is hereby approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Jonathan G. Katz
Secretary

¹⁰ 15 U.S.C. 78s(b)(2).

¹¹ 17 CFR 200.30-3(a)(12).