



**CBOE Regulatory Circular RG12-064
C2 Regulatory Circular C2 RG12-024**

Date: May 11, 2012
To: CBOE, C2 and CBSX Trading Permit Holders
From: Legal and Regulatory Services Division
Re: Amendments to Rule 9.24 – Telephone Solicitation

Executive Summary

The Exchange proposed changes to CBOE Rule 9.24 (Telephone Solicitation), which changes became effective upon filing with the Securities and Exchange Commission (SEC).¹ Chapter 9 of the C2 Rules incorporates by reference Chapter IX of the CBOE Rules, so this rule also applies to C2 Trading Permit Holders. The changes adopt provisions that are substantially similar to Federal Trade Commission (FTC) rules that prohibit deceptive and other abusive telemarketing acts or practices. These changes to CBOE Rule 9.24 will become operative on June 29, 2012.

The text of Rule 9.24, as amended, can be found at <http://www.cboe.com/publish/RuleFilingsSEC/SR-CBOE-2012-024.pdf> and http://www.c2exchange.com/publish/Rulefilings_C2/SR-CBOE-2012-024.pdf.

Questions regarding Rule 9.24 may be directed to the Regulatory Service Division’s Regulatory Interpretations and Guidance team either by telephone at (312) 786-8141 or by email at RegInterps@cboe.com, or to Andy Spiwak at 312-786-7483 or spiwak@cboe.com.

Background and Discussion

Rule 9.24 requires Trading Permit Holders to maintain and consult do-not-call lists, limit the hours of telephone solicitations and prohibit Trading Permit Holders from using deceptive and abusive acts and practices in connection with telemarketing. The SEC directed CBOE to adopt these telemarketing rules in accordance with the Telemarketing Consumer Fraud and Abuse Prevention Act of 1994 (Prevention Act).² The Prevention Act requires the SEC 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.³ In 2011, SEC staff directed CBOE to

¹ See Securities Exchange Act Release No. 34-66609 (March 15, 2012), 77 FR 16574 (March 21, 2012) (SR-CBOE-2012-024) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Telemarketing Rules). The rule filing also changes the name of Rule 9.24 to “Telemarketing.”

² 15 U.S.C. 6101 – 6108.

³ 15 U.S.C. 6102.

conduct a review of its telemarketing rule and propose rule amendments that provide protections that are, in the SEC's view, at least as strong as those provided by the FTC's telemarketing rules.⁴

Rule 9.24 – Telemarketing

The amendments to Rule 9.24 adopt provisions that are substantially similar to the FTC rules that prohibit deceptive and other abusive telemarketing acts or practices as described below.

Telemarketing Restrictions

Amended Rule 9.24(a) provides that no Trading Permit Holder or associated person may make an outbound telephone call to: (1) any person's residence at any time other than between 8 a.m. and 9 p.m. local time at the called person's locations; (2) any person that previously has stated that he or she does not wish to receive any outbound telephone calls made by or on behalf of the Trading Permit Holder; or (3) any person who has registered his or her telephone number on the FTC's national do-not-call registry. The proposed rule change is substantially similar to the FTC's provisions regarding abusive telemarketing acts or practices.⁵

Amended Rule 9.24 (c) provides that these telemarketing restrictions do not apply to outbound telephone calls by a Trading Permit Holder or an associated person if: (1) the Trading Permit Holder has received that person's express prior written consent; (2) the Trading Permit Holder has an established business relationship with the person; or (3) the person is a broker or dealer.

New Rule 9.24(n)(1) defines "established business relationship" as a relationship between a Trading Permit Holder and a person if (1) the person has made a financial transaction or has a security position, a money balance, or account activity with the Trading Permit Holder or at a clearing firm that provides clearing services to the Trading Permit Holder within the 18 months immediately preceding the date of an outbound telephone call; (2) the Trading Permit Holder is the broker-dealer of record for an account of the person within the 18 months immediately preceding the date of an outbound telephone call; or (3) the person has contacted the Trading Permit Holder to inquire about a product or service offered by the Trading Permit Holder within the three months immediately preceding the date of an outbound telephone call. A person's established business relationship with a Trading Permit Holder does not extend to the Trading Permit Holder's affiliated entities unless the person would reasonably expect them to be included. Similarly, a person's established business relationship with a Trading Permit Holder's affiliate does not extend to the Trading Permit Holder unless the person would reasonably expect the Trading Permit Holder to be included.

Caller Disclosures

Rule 9.24(b) provides that no Trading Permit Holder or associated person make an outbound telephone call without disclosing truthfully, promptly and in a clear and conspicuous manner to the called person (1) the identify of the caller and the TPH 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 amended rule also provides that the telephone number provided may not be a 900 number or any other number for which charges exceed local or long-distance transmission charges.

⁴ See Letter from Robert W. Cook, Director, Division of Trading and Markets, Securities and Exchange Commission, to William J. Brodsky, Chairman and Chief Executive Officer of CBOE Holdings, Inc. (May 12, 2011).

⁵ See 16 CFR 310.4(b)(1)(iii)(A) and (B) and (c).

Firm-Specific Do-Not-Call Lists

Amended Rule 9.24(d) provides that each Trading Permit Holder making an outbound telephone call must make and maintain a list of persons who request not to receive further calls. Rule 9.24(d)(2) adopts procedures that Trading Permit Holders must institute to comply with the telemarketing restrictions and caller disclosure requirements described above prior to engaging in telemarketing. These procedures must meet the following minimum standards: (1) Trading Permit Holders must have a written policy for maintaining their firm-specific do-not-call lists; (2) personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the Trading Permit Holder's firm-specific do-not-call list; (3) if a Trading Permit Holder receives a request from a person not to receive calls from that Trading Permit Holder, the Trading Permit Holder must record the request and place the person's name, if provided, and telephone number on its firm-specific do-not-call list at the time the request is made;⁶ (4) Trading Permit Holders or associated persons making an outbound telephone call must make the caller disclosures described above; (5) in the absence of a specific request by the person to the contrary, a person's do-not-call request will apply to the Trading Permit Holder making the call, and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the call and the product being advertised; and (6) a Trading Permit Holder making outbound telephone calls must maintain a record of a person's request not to receive further calls. Inclusion of the requirement to adopt these procedures will not create any new obligations on Trading Permit Holders, as they are already subject to identical provisions under Federal Communication Commission (FCC) telemarketing regulations.⁷

Do-Not-Call Safe Harbors

New Rule 9.24(e) adopts two exceptions to the telemarketing restriction that prohibits outbound telephone calls to persons on the FTC's national do-not-call registry. First, a Trading Permit Holder or associated person making outbound telephone calls will not be liable for violating that restriction if: (1) the Trading Permit Holder has an established business relationship with the called person; however, a person's request to be placed on the Trading Permit Holder's firm-specific do-not-call list terminates this established business relationship exception; (2) the Trading Permit Holder has obtained the person's prior express written consent; or (3) the Trading Permit Holder or associated person making the call has a personal relationship with the called person.

Second, a Trading Permit Holder or associated person making outbound telephone calls will not be liable for violating the national do-not-call registry restriction if the Trading Permit Holder or associated person demonstrates that the violation is the result of an error and that as part of the Trading Permit Holder's routine business practice: (1) the Trading Permit Holder has established and implemented written procedures to comply with the telemarketing restrictions and caller disclosure requirements described above; (2) the Trading Permit Holder has trained its personnel, and any entity assisting in its compliance, in these procedures; (3) the Trading Permit Holder has maintained and recorded a firm-specific do-not-call list; and (4) the Trading Permit Holder uses a process to prevent outbound telephone calls to any telephone number on the Trading Permit Holder's firm-specific do-not-call list or the national do-not-call registry, employing a version of the national do-not-call registry obtained from the FTC no more than 31 days prior to the date any call is made, and maintains records documenting this process.

⁶ Trading Permit Holders must honor a person's do-not-call request within a reasonable time from the date the request is made, which may not exceed 30 days from the date of the request. If these requests are recorded or maintained by a party other than the Trading Permit Holder on whose behalf the outbound telephone call is made, the Trading Permit Holder on whose behalf the outbound telephone call is made will still be liable for any failures to honor the do-not-call request.

⁷ See 47 CFR 64.1200(d).

These safe harbors are substantially similar to the FTC's exceptions to the prohibition on making outbound telephone calls to persons on the FTC's national do-not-call registry.⁸

Wireless Communications

New Rule 9.24(f) clarifies that the application of the telemarketing rule also applies to Trading Permit Holders and associated persons making outbound telephone calls to wireless telephone numbers.

Outsourcing Telemarketing

New Rule 9.24(g) states that if a Trading Permit Holder uses another entity to perform telemarketing services on its behalf, the firm remains responsible for ensuring compliance with all provisions contained in the rule. Rule 9.24(f) clarifies that the entity or person that performs telemarketing services on the Trading Permit Holder's behalf must be appropriately registered or licensed, where required.

Billing Information

Amended Rule 9.24(h) requires, for any telemarketing transaction, a Trading Permit Holder or associated person 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 pre-acquired account information and a free-to-pay conversion feature, a Trading Permit Holder or associated person 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, a Trading Permit Holder or associated person 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 rule is substantially similar to the FTC's provision regarding the submission of billing information.⁹

Caller Identification Information

New Rule 9.24(i) includes caller identification information provisions that provide that Trading Permit Holders 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 new rule does not create any new obligations on Trading Permit Holders as they are already subject to identical provisions under FCC regulations.¹⁰

Unencrypted Consumer Account Numbers

New Rule 9.24(j) prohibits a Trading Permit Holder or associated person from disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing. The provision is substantially similar to the FTC's provision regarding unencrypted consumer account numbers.¹¹

⁸ See 16 CFR 310.4(b)(1)(iii)(B) and 16 CFR 310.4(b)(3).

⁹ See 16 CFR 310.4(a)(7); see also Federal Trade Commission, Telemarketing Sales Rule, 68 FR 4580 (January 29, 2003) at 4616.

¹⁰ See 47 CFR 64.1601.

¹¹ See 16 CFR 310.4(a)(6); see also Federal Trade Commission, Telemarketing Sales Rule, 68 FR 4580 (January 29, 2003) at 4615.

Additionally, the provision 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 definition is substantially similar to the view taken by the FTC.¹²

Abandoned Calls

New Rule 9.24(k) prohibits a Trading Permit Holder or associated person from abandoning any outbound telemarketing call. The abandoned calls prohibition is subject to a “safe harbor” under paragraph (k)(2), which provides that a Trading Permit Holder or associated person will not be liable for violating the prohibition on abandoning outbound telephone calls if: (1) the Trading Permit Holder or associated person employs 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 Trading Permit Holder or associated person, 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 Trading Permit Holder or associated person is not available to speak with the person answering the telemarketing call within two seconds after the person’s completed greeting, the Trading Permit Holder or associated person promptly plays a recorded message stating the name and telephone number of the Trading Permit Holder or associated person on whose behalf the call was placed; and (4) the Trading Permit Holder retains records establishing compliance with the “safe harbor.” The rule is substantially similar to the FTC’s provisions regarding abandoned calls.¹³

Prerecorded Messages

New Rule 9.24(l) prohibits a Trading Permit Holder or associated person from initiating any outbound telemarketing call that delivers a prerecorded message without a person’s express written agreement to receive such calls. The 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 described above. The rule is substantially similar to the FTC’s provisions regarding prerecorded messages.¹⁴

Credit Card Laundering

New Rule 9.24(m) 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 Trading Permit Holder. Except as expressly permitted by the applicable credit card system, the rule prohibits a Trading Permit Holder or associated person 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 Trading Permit Holder; (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 the access is not authorized by the

¹² See Federal Trade Commission, Telemarketing Sales Rule, 68 FR 4580 (January 29, 2003) at 4616.

¹³ See 16 CFR 310.4(b)(1)(iv); see also 16 CFR 310.4(b)(4); and Federal Trade Commission, Telemarketing Sales Rule, 68 FR 4580 (January 29, 2003) at 4641.

¹⁴ See 16 CFR 310.4(b)(1)(v); see also Federal Trade Commission, Telemarketing Sales Rule, 73 FR 51164 (August 29, 2008).

merchant agreement or the applicable credit card system. The rule is substantially similar to the FTC's provisions regarding credit card laundering.¹⁵

Definitions

New Rule 9.24(n) adopts definitions that are substantially similar to the FTC's definitions.¹⁶ The rule adopts substantially similar definitions of "acquirer," "billing information," "caller identification service," "cardholder," "charitable contribution," "credit," "credit card," "credit card sales draft," "credit card system," "customer," "donor," "established business relationship," "free-to-pay conversion," "merchant," "merchant agreement," "outbound telephone call," "person," "pre-acquired account information," "telemarketer," and "telemarketing."

State and Federal Laws

Amended Rule 9.24, Interpretation and Policy .01 reminds Trading Permit Holders and associated persons that engage in telemarketing that they also are subject to the requirements of relevant state and federal laws and rules, including the Prevention Act, the Telephone Consumer Protection Act of 1991,¹⁷ and the rules of the FCC relating to telemarketing practices and the rights of telephone consumers.¹⁸

¹⁵ See 16 CFR 310.3(c); see also Federal Trade Commission, Telemarketing Sales Rule, 60 FR 43842 (August 23, 1995) at 43852.

¹⁶ See 16 CFR 310.2; see also Federal Trade Commission, Telemarketing Sales Rule, 60 FR 43842 (August 23, 1995) at 43843; and Federal Trade Commission, Telemarketing Sales Rule, 68 FR 4580 (January 29, 2003) at 4587.

¹⁷ See 47 U.S.C. 227.

¹⁸ See 47 CFR 64.1200.