



August 17, 2007

Ms. Nancy M. Morris  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-2001

Subject: Securities Act Release No. 8812  
File No. S7-10-07

Dear Ms. Morris:

Pink Sheets LLC (“Pink Sheets”) respectfully submits the following comments on the amendments proposed by the Securities and Exchange Commission (“the SEC or the Commission”) to the eligibility requirements of Forms S-3 and F-3.<sup>1</sup> In Release 33-8812, the Commission proposes to allow a larger universe of issuers to benefit from the greater flexibility and efficiency in public offerings afforded by Forms S-3 and F-3. Under the amendments as currently proposed, many public companies quoted on the Pink Sheets would be included in the universe of companies that would benefit from the Commission’s proposals.

We strongly support the Commission’s proposal to expand the availability of Forms S-3 and F-3 because we believe that the proposal as adopted will reduce the cost of raising capital without any meaningful reduction in the disclosure that is readily available to public investors or their protection under federal securities laws.

We write here in response to the Commission’s question on page 11 of the Release: “Should all companies with a public trading market, including companies traded on the Pink Sheets, be allowed to use the amended form as proposed or should we limit it to just inter-dealer quotations systems with some level of oversight and operated by a self-regulatory organization?” At this time, the OTC Bulletin Board (OTCBB<sup>®</sup>), which is operated by the Financial Industry Regulatory Authority, Inc. (“FINRA”), is the only inter-dealer quotation system for OTC Equity Securities that is operated by a self-regulatory organization. In light of this fact, this question

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<sup>1</sup> Pink Sheets is the leading provider of pricing and financial information for the over-the-counter (“OTC”) securities markets and, among other things, operates an Internet-based, electronic quotation and trade negotiation service for OTC equities and bonds used by over 200 market makers and other broker-dealers registered under the Securities Exchange Act of 1934 (the “Exchange Act”).



essentially asks whether the expanded availability of Forms S-3 and F-3 should benefit issuers with equity securities quoted either on the OTCBB<sup>®</sup> or Pink Sheets, or restricted to the OTCBB<sup>®</sup>?

We urge the Commission to expand the availability of Forms S-3 and F-3 to issuers with securities quoted on either the OTCBB<sup>®</sup> or Pink Sheets. As will be discussed in more detail below, there is no substantial difference in the way both venues are regulated. In its operations, Pink Sheets provides superior facilities for regulatory compliance by broker-dealers.

We also wish to take this opportunity to comment on a related issue. Pink Sheets has recently become aware that the staff of the Division of Corporation Finance (the "Division") has taken the position that quotation and trading on the Pink Sheets is not an "established public market" in its review of certain registration statements filed under Section 5 of the Securities Act of 1933 (the "Securities Act"). In contrast, it is our understanding that the Division believes that quotations on the OTC Bulletin Board do represent an "established public market."<sup>2</sup>

For example, in its comments dated August 4, 2005, to the Form SB-2 Registration Statement of Great American Family Parks, Inc. (File No. 333-127199), the Division stated in paragraph 3 that "there is no established public market for your common stock." The comment advised the issuer to review Item 16 of Schedule A to the Securities Act. When the issuer responded that its stock was "listed" on the Pink Sheets, the Staff stated in a subsequent comment letter dated November 16, 2005: "We do not consider listing on the Pink Sheets to be listing on an established public market."

Item 16 of Schedule A does not make any reference to the term "established public market." Instead, Schedule A requires the issuer to disclose the method by which the price of an offering may be computed. The Division's comments effectively required the issuer to set a fixed price at which the securities would be offered because quotations in the Pink Sheets were not regarded as providing an adequate method to compute the price at which selling shareholders would sell registered securities "at the market."

The Division made similar comments, dated August 15, 2005, to the Form S-1 Registration Statement of American Commercial Lines, Inc. (File No. 333-1266696). Paragraph 17 of the

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<sup>2</sup> For example, in its comments dated February 17, 2005, to the Form SB-2 Registration Statement of Netfone, Inc. (File No. 333-120895), the Division made the following comment in paragraph 6 on the issuer's MD&A disclosure:

Since it does not appear that the company has any plans to list its securities on a national securities exchange or Nasdaq or enlist market makers to apply for quotation of the company's securities on the OTC Bulletin Board, explain the basis for the possibility that a public market may develop for the company's securities. If the reference is intended to refer to the Pink Sheets, please clarify and make clear that the Pink Sheets is not a liquid market.



Division's letter to this issuer pointed out that "Item 201(a)(1)(i) of Regulation S-K states that '[t]he existence of limited or sporadic quotations should not of itself be deemed to constitute an 'established public trading market.''" The Division then asked this issuer to explain the reason it was citing quotations in the Pink Sheets. It is our understanding that the Division does not take this view when quotations originate in the OTC Bulletin Board.

Pink Sheets believes that the Division's preference for quotes on the OTC Bulletin Board as compared to quotes on the Pink Sheets reflects a mistaken view about the operation and regulation of these two markets.

### **Similarities in the Operations of Pink Sheets and OTCBB<sup>®</sup>**

The Pink Sheets and the OTC Bulletin Board are "quote-driven," as compared to "listed" markets. Trading occurs in each of these markets when a broker-dealer posts a quote that can be observed by other broker-dealers. An issuer is not required to complete any application to list on the OTCBB<sup>®</sup> or the Pink Sheets. Nor is an issuer required to "enlist" broker-dealers to quote in either market. Issuers are not permitted to pay broker-dealers to post quotes in either market. An issuer's consent is not required to trade its securities on either the Pink Sheets or the OTC Bulletin Board, and in many cases, issuers may not be aware that their securities are trading in either venue. Instead, quotes in the Pink Sheets and the OTCBB<sup>®</sup> reflect a broker-dealer's belief regarding its interests or the interests of its customers in certain securities or are effectively advertisements intended to attract new orders to the broker-dealer's facilities.

Neither the Pink Sheets nor the OTC Bulletin Board requires any minimum number of broker-dealers to quote any particular security. One broker-dealer can enter a quote alone. There is no maximum number of quoting broker-dealers for any security. Moreover, a broker-dealer that has entered quotes is not required to continue entering quotes for any particular period of time, but can withdraw published quotes for any security at any time. Having withdrawn, a broker-dealer can re-enter quotes in any security at any time.

The Pink Sheets and the OTC Bulletin Board are electronic markets. In each case, quotes are published in an electronic forum that can be observed by broker-dealers and interested members of the public. These quotes identify the price and size of trading interest and the identity of quoting broker-dealers. For that reason, the OTCBB<sup>®</sup> and Pink Sheets are each considered a "quotation medium" as that term is defined Rule 15c2-11(e)(1) of the Exchange Act and an "inter-dealer quotations system" under Exchange Act Rule 15c2-11(e)(2). On the other hand, the Commission has stated that "[n]either the OTC Bulletin Board operated by [FINRA] nor the market operated by the Pink Sheets LLC are deemed to be automated inter-dealer quotation systems"<sup>3</sup> within the meaning of Exchange Act Rule 12g3-2(b) (emphasis added).

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<sup>3</sup> Securities Exchange Act Release No. 55540 (Mar. 27 2007), n.27 (adopting amendments to the rules governing the termination of registrations by foreign issuers), citing as authority Securities Act Release No. 6862 (Apr. 23, 1999), n.22.



The Pink Sheets electronic system provides a more sophisticated trading platform than the OTC Bulletin Board. Broker-dealers using the OTC Bulletin Board's system must communicate their trading interest by telephone. While broker-dealers using the Pink Sheets may also communicate by telephone, Pink Link<sup>®</sup>, the Pink Sheets electronic order and trade messaging service, enables a broker-dealer to communicate trading interest in Pink Sheets quotations electronically, facilitating a much more efficient use of broker-dealer resources and better executions for clients.

Because of the automation and trading efficiency offered by Pink Link, almost all OTC Equity Securities that are quoted in the OTCBB<sup>®</sup> are also quoted in the Pink Sheets.<sup>4</sup> The leading quoting broker-dealers are the same for each market, whether determined by reference to quotation media, in volume of shares traded, number of markets made, number of trades executed, or dollar volume.<sup>5</sup> These leading broker-dealers include Knight Equity Markets, L.P., UBS Securities, LLC, Citigroup Global Markets Inc., E-Trade Capital Markets, LLC, Hudson Securities, Hill Thompson Magid & Co., Automated Trading Desk, Domestic Securities, and E-Trade Capital Markets.

### **Similarities in the Regulations Governing Pink Sheets and OTCBB<sup>®</sup>**

Neither Pink Sheets nor the OTCBB<sup>®</sup> are required to register as a national securities exchange. Neither platform "[u]ses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of the trade," within the meaning of Exchange Act Rule 3b-16(a)(2). Instead, Pink Sheets and the OTCBB<sup>®</sup> will only accept quotations from registered broker-dealers that are FINRA members. Each platform then relies on FINRA Rules governing the conduct of broker-dealers initiating trades in the OTC markets generally to determine the terms of trades resulting from quotations published in their facilities.

FINRA Conduct Rule 3320, called "Offers at Stated Prices" or the "Firm Quote Rule" is the primary rule governing the terms of trades conducted on the Pink Sheets and the OTCBB<sup>®</sup>. The Firm Quote Rule states that "no member shall make an offer to buy from or sell to any person any security at a stated price unless such member is prepared to purchase or sell, as the case may be, at such price and under such conditions as are stated at the time of such offer to buy or sell." Quotes published in either the Pink Sheets or the OTCBB<sup>®</sup> are subject to FINRA Conduct Rule 3320. However, firms posting quotes in the OTCBB<sup>®</sup> may find it difficult to

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<sup>4</sup> During the first quarter of 2007, the number of dually quoted securities averaged 3,221 while those exclusively quoted on the two media averaged 4,866 (Pink Sheets) and 226 (OTCBB). As of the date of this letter, only 127 securities were exclusively quoted in the OTC Bulletin Board.

<sup>5</sup> Through the first quarter of this year, Pink Sheets averaged daily a total of 185 different market makers, seven market makers per stock, and 206,084 quote updates.



comply with this Rule because they may not be adequately staffed to answer telephones during peak periods. The use of Pink Sheets facilitates compliance with this Rule because its Pink Link system, while not providing automated executions against firms' quoted prices, does allow for automated, electronic responses to order messages. The average response time for Pink Link messages is under 13 seconds and the fill rate on orders is over 88%.

FINRA's Three Quote Rule, Rule 2320(g), which is intended to ensure that the customers of broker-dealers receive best execution, requires member firms to contact at least three dealers and obtain quotations if fewer than two quotations are displayed on an inter-dealer quotation system that permits quotation updates on a real-time basis. Under the Three Quote Rule, both the OTCBB and the Pink Sheets qualify as inter-dealer quotation systems that permit quotation updates on a real-time basis and publish quotations that can be relied upon for best execution. FINRA's rules therefore recognize that quotes published in the OTCBB and Pink Sheets are equivalent for purposes of determining best execution by its member firms.

FINRA Rule 6650 regulates the minimum quotation size for OTC Equity Securities. Broker-dealers must post quotations, whether in Pink Sheets or the OTCBB<sup>®</sup>, that meet firmness and minimum size requirements. Sizes range from one share to 5,000 shares depending on price. The mandatory sizes run inversely to price; as the price of the quote increases the size associated with that price decreases.

Trade reporting for securities quoted on Pink Sheets and the OTCBB<sup>®</sup> is governed by the same FINRA Rule 6620. All OTC Equity trades, whether traded on Pink Sheets or the OTCBB<sup>®</sup>, must be reported within 90 seconds to FINRA's OTC Reporting Facility, the FINRA system that handles reporting and dissemination of last sale reports in all OTC Equity Securities. The rule creates a uniform method of reporting obligations on member firms, including among other things who must report, when those reports are due, what must be reported, and how to cancel trades already reported. Rule 6620 does not draw any distinction based on quotation medium.

### **Differences between Pink Sheets and the OTCBB<sup>®</sup>**

The primary difference between Pink Sheets and the OTCBB<sup>®</sup> is that Pink Sheets is owned by Pink Sheets LLC, a private company, and OTCBB<sup>®</sup> is owned by FINRA, a self-regulatory organization. It must be stressed that the differences in ownership do not reflect any difference in regulation or operation. In each case, regulation of the two markets is accomplished by FINRA's regulation of the conduct of broker-dealers that submit quotes in each facility. As noted above, the Pink Sheets system, and particularly its Pink Link<sup>®</sup> service, provides participating broker-dealers with a superior method to achieve compliance with their best execution obligations, as compared to the OTCBB<sup>®</sup> system.

Because the OTCBB<sup>®</sup> is owned by FINRA, the Commission determined in 1999 that it was inappropriate for the OTCBB<sup>®</sup> to accept quotes in securities that are not part of a class of securities registered under Section 12(g) of the Exchange Act. As a result, Pink Sheets accepts



quotes in securities that are part of a class of registered securities, as well as in securities that are not registered, while the OTCBB<sup>®</sup> will only accept quotes in securities that are part of a class of registered securities. It should be noted that before 1999, both venues traded the same securities on an equal footing.

Moreover, Pink Sheets, as a matter of policy, fully cooperates with Commission requests for information and does not require the Commission to exercise its subpoena power to obtain access to its books and records. Pink Sheets is willing to formalize this policy to provide assurance to the Commission that it will have the same access to its records that the Commission currently enjoys with respect to books and records maintained by the OTCBB<sup>®</sup>.

### **Whether the Differences Should Make a Difference**

As discussed above, the differences between the OTCBB<sup>®</sup> and Pink Sheets amount to a simple matter of ownership. OTCBB<sup>®</sup> is owned by a self-regulatory organization, while Pink Sheets is owned by a private company. The form of regulation is identical and operationally, the use of the Pink Sheets system may better facilitate compliance with current FINRA rules. We therefore strongly believe that the availability of Forms S-3 and F-3 should not turn on whether an issuer's securities are quoted in the OTCBB<sup>®</sup> or the Pink Sheets, or as is more likely to be the case, in both venues.

We also believe the Staff's apparent position that quotations on the OTCBB<sup>®</sup>, but not the Pink Sheets, can serve as evidence of a "established public trading market" is mistaken and serves no valid regulatory objective. The history of the phrase "established public trading market" demonstrates that this term was never intended to exclude quotations on the Pink Sheets.

The term "established public trading market" used by the Division in its comment letters to Securities Act registration statements appears to be a reference to Item 201 of Regulation S-K. Item 201 is intended to require disclosure regarding the current trading environment for the issuer's equity securities. Accordingly, the issuer is required to identify the primary trading market for its securities, and if there is no "established public trading market" for a class of common equity, furnish a statement to that effect. Regulation S-K does not provide a definition of the phrase "established public trading market." Instead, it rather cryptically states that the existence of "limited or sporadic quotations" does not constitute an "established public trading market."

The term "established trading market" was first associated with Regulation S-K in SEC Release No. 6276 on December 23, 1980. In Release No. 6276, the SEC proposed incorporating into Regulation S-K several "Guides for Preparation and Filing of Registration Statements" (the "Guides") that had been issued by the SEC several years earlier. Under this proposal, Guide 13, titled "Market Quotations - Absence of Established Market," would be incorporated into proposed Item 45 of Regulation S-K. Later, in Release No. 6332 issued on August 6, 1981, Regulation S-K was further reorganized to include the information in Guide 13 in Item 201 of



Regulation S-K, with the term "Market Quotations - Absence of Established Market" revised to "established public trading market."

Guide 13 was originally published by the SEC on February 14, 1964 in Release No. 33-4666 as Guide 4 and was intended, along with other Guides published at that time, to provide persons involved in the preparation of registration statements with an understanding of the policies followed by the SEC's Division of Corporation Finance in administering the Securities Act. Guide 4 stated: "If there is no established trading market for the securities to be offered pursuant to the registration statement, the prospectus should so state in a prominent place, unless it is evident that no such market exists." The term "established trading market" was not defined or discussed any further in Guide 4.

On December 20, 1967 the SEC issued Release No. 33-4890, which included additional proposed Guides and revisions to the existing Guides. In this Release, the SEC redesignated Guide 4 as Guide 13, which then read as follows:

"If there is an established trading market for the securities to be registered, it would normally be appropriate to set forth in the prospectus the high and low sale prices of such securities (or in the absence of trading during a particular period, the high and low bid prices) for each quarterly period within the past two years and the nature of the market and source of the quotations. If the securities are traded on an exchange, the name of the exchange should also be given.

If there is no established trading market for the securities to be offered pursuant to the registration statement, the prospectus should so state in a prominent place, unless it is evident that no such market exists.

The existence of limited or sporadic quotations should not of itself be deemed to constitute an established trading market. If any known facts indicate the absence of an established trading market, reference to quotations in the prospectus should be qualified by appropriate explanation. See [Guide] #53.

Guide 53 was titled "Information as to Over-the-Counter Market for Securities to be Registered." Guide 53 stated that if there is an over-the-counter market for outstanding securities of the same class as the securities being registered, then the issuer should include with the registration statement the following supplemental information:

1) the number of holders of record of securities of the same class as those being registered, excluding directors, officers, and persons known by the issuer to own more than 10% of the outstanding securities of such class;



- 2) the total number of shares of such class held of record, excluding directors, officers, and persons known by the issuer to own more than 10% of the outstanding securities of such class;
- 3) the volume of trading of such shares over the past six months; and
- 4) the names of the most active market makers for the class of securities over the past six months.

It should be noted that Guide 13 and Guide 53 were each published in 1967. Neither NASDAQ nor the OTCBB<sup>®</sup> existed in 1967, and securities listed on an exchange were not permitted to be traded over-the-counter under then-existing exchange rules. In any event, the references to established trading markets in these rules could not apply to exchange-traded listed securities because these securities are assigned to specialists with an obligation to maintain a continuous market in such securities at all times. In 1967, Pink Sheets was the only source for OTC quotes, and those quotes were not electronic, but were published in paper and circulated among broker-dealers and the financial press. It follows that Guide 13's statement that "[t]he existence of limited or sporadic quotations should not of itself be deemed to constitute an established trading market" would appear to refer only to securities quoted in the Pink Sheets.

Since Guide 13 only referred to quotes published in the paper Pink Sheets, it cannot be the case that quotes in the Pink Sheets would not be sufficient to establish a trading market for purposes of Securities Act disclosure. Instead, Guide 13, taken together with Guide 53, as well as Item 201 of Regulation S-K, are properly read as a statement that "limited or sporadic quotations" in either the Pink Sheets or the OTCBB<sup>®</sup>, do not constitute an established trading market. In contrast, the existence of more than limited or sporadic quotations can provide evidence that an established public market exists for the quoted security. This interpretation forms the basis for a sound disclosure policy. In any quote driven market, such as the Pink Sheets or the OTCBB<sup>®</sup>, the proper test for determining whether an established public market exists for any particular security is whether there are sufficient quotations and trading interest to provide evidence of a public trading market.

The Division's current efforts to distinguish securities quoted in the OTCBB<sup>®</sup> from those quoted in Pink Sheets for determining the existence of an established public trading market is therefore without foundation. Both platforms offer a medium for public dissemination of trading interest. The proper distinction is between those securities that are quoted frequently by several broker-dealers, in contrast to those that are quoted "sporadically," independent of trading venue.

### **Conclusion**

A comparison of the trading markets represented by the OTCBB<sup>®</sup> and the Pink Sheets, their regulation and operations demonstrate that there is no principled reason to distinguish them for purposes of determining the availability of Forms S-3 or F-3 for the offerings of issuers quoted



on either venue. Similarly, trading interest and quotations in either venue can demonstrate the existence of an “established public trading market” for purposes of Securities Act or Exchange Act disclosure. The two venues are remarkably similar in operation and are functionally identical in market regulation. If anything, the Pink Link system operated by Pink Sheets provides a more robust trading platform that better facilitates compliance with FINRA’s firm quote rule and results in better executions for the clients of broker-dealers.

We urge the Commission to treat Pink Sheets and the OTCBB<sup>®</sup> as identical for determining whether any particular issuer may use Forms S-3 and F-3 to conduct a public offering. In addition, either venue should satisfy the standards for an “established public trading market” under Regulation S-K, provided that there are sufficient quotations for an issuer’s equity securities in those venues.

Thank you very much for providing Pink Sheets with the opportunity to comment on this important issue. Please call if you have any questions.

Very truly yours,

/s/ R. CROMWELL COULSON

R. Cromwell Coulson  
Chief Executive Officer

cc: Chairman Christopher Cox  
Commissioner Paul S. Atkins  
Commissioner Annette L. Nazareth  
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