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December 6, 2010

VIA ELECTRONIC SUBMISSION

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

Re: File No. S7-24-89; Release No. 34-62021

Dear Secretary Murphy:

We are writing on behalf of our client, Pink OTC Markets Inc. ("Pink OTC"), in further response to the filing of Amendment No. 21 to the "Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for NASDAQ-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis"¹ (hereinafter, such plan shall be referred to as the "NASDAQ UTP Plan" or the "Plan" and the proposed amendment shall be referred to as "Amendment No. 21"). Among other things, Amendment No. 21 seeks to amend the Plan to formally recognize the longstanding practices of (i) compensating the Financial Industry Regulatory Authority, Inc. ("FINRA") for its contribution of over-the-counter ("OTC") equity security transaction reports ("OTC Transaction Reports") and quotations ("FINRA BB Quotations") from FINRA's Over the Counter Bulletin Board (the "FINRA BB") to the Plan and (ii) the Plan's distribution of such data (collectively, OTC Transaction Reports and FINRA BB Quotations are referred to herein as "OTC Data").²

We originally commented on Amendment No. 21 in a letter dated June 3, 2010, and we are commenting again in light of the comment letter submitted by FINRA dated October 18, 2010 (the "FINRA Letter").³ As with our prior comment letter, we are limiting our comments to that aspect of Amendment No. 21 relating to recognizing FINRA's receipt

¹ See Securities Exchange Act Release No. 62021 (Apr. 30, 2010), 75 FR 27010 (May 13, 2010) (the "Proposing Release").

² As noted in our prior comment letter, currently the Plan processor (NASDAQ) offers a single market data product consisting of: 1) transaction reports for NASDAQ securities, 2) transaction reports for OTC equity securities, 3) Level 1 quotations for NASDAQ securities, and 4) Level 1 FINRA BB quotations. This single market data product, including both NASDAQ data and the OTC Data, can only be purchased for a single price. It is not possible to purchase the NASDAQ data or the OTC Data separately from the Plan processor.

³ Letter from Stephanie M. Dumont, FINRA, to Elizabeth M. Murphy, Secretary, SEC, dated October 18, 2010.

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of compensation in exchange for its contribution of OTC Data to the Plan (hereinafter, the "Proposed OTC Data Amendment") and related issues. We are not repeating each of the arguments we previously made against the Proposed OTC Data Amendment; however, we do feel it is necessary to address certain statements in the FINRA Letter as well as emphasize key aspects of our prior letter.

I. The Proposed OTC Data Amendment Contradicts the Express Provisions of the Plan

As we stated in our original comment letter, the Proposed OTC Data Amendment does not propose any new practices with respect to the collection and dissemination of the OTC Data; however, as explained more fully in our prior letter, the current practice of disseminating OTC Data under the Plan violates the express provisions of the Plan that limit its scope to data regarding NASDAQ securities. Further, if the Commission approves the Proposed OTC Data Amendment, the terms of the Plan would be self-contradictory (*i.e.*, the Plan and its processor would be limited to NASDAQ securities, yet the Plan would expressly recognize compensating FINRA for contributing the non-NASDAQ data that the Plan distributes). Nothing in the FINRA Letter rebuts our assertion that this current practice, regardless of whether it was previously approved by the Commission, violates the terms of the Plan that were also approved by the Commission.

We do not dispute that the Commission has previously approved the commingling of NASDAQ market data and non-NASDAQ OTC Data distributed by NASDAQ. It is also true, however, that the Commission approved the terms of the Plan that prohibit the Plan's processor from collecting and disseminating non-NASDAQ market data. We continue to believe that it is not appropriate for the Commission simply to ignore the regulatory inconsistency it has created between the terms of the Plan and the manner in which the OTC Data is disseminated by the Plan's processor. If the Commission were to approve the Proposed OTC Data Amendment, that would not only ignore the current regulatory contradiction, but would actually add another layer of inconsistency by making the terms of the Plan self-contradictory. For these reasons, we continue to believe that mere approval of the Proposed OTC Data Amendment is not a viable option available to the Commission. Instead, the Commission must either cause the terms of the Plan to be amended to include non-NASDAQ securities⁴ or cause the Plan processor to halt commingling the OTC Data with NASDAQ data and selling it to FINRA member firms and market data vendors, who are required to buy the NASDAQ data to meet the vendor display rule of Regulation NMS, as a single market data product for a single price.

⁴ As noted in our prior letter, amending the plan to expressly permit the collection, consolidation, and dissemination of market data for certain OTC securities would cause those OTC securities to be classified as "NMS securities" for purposes of Regulation NMS.

II. Response to Certain Other Comments in the FINRA Letter

A. The Proposed OTC Data Amendment is Inconsistent with Section 11A

We continue to believe that the Proposed OTC Data Amendment is inconsistent with Section 11A of the Exchange Act, in particular that aspect of Section 11A that limits national market system ("NMS") plans to NMS securities, as more fully discussed in our prior letter. In the FINRA Letter, FINRA disagrees with our position because the original commingling and dissemination of the OTC Data with the NASDAQ data was approved by the Commission and found to be consistent with other aspects of Section 11A. Although this assertion is correct, the Commission did not consider whether (i) the dissemination of the OTC Data by the Plan is permissible under the terms of the NASDAQ UTP Plan or (ii) Section 11A permits an NMS plan to disseminate market data for non-NMS securities. The Commission's prior approval orders regarding the commingling of OTC Data with NASDAQ market data did not relate to the dissemination of market data under an NMS plan, nor did they discuss at all whether it is permissible to include non-NMS Security data in the data distributed under an NMS plan, and no commenters appear to have raised the issues.⁵ In fact, these original approvals pre-dated the current version of the Plan, which expressly limits Plan processor's activities to NASDAQ securities.

The Commission first approved the bundling of FINRA BB Quotations along with NASDAQ Level I quotation data in 1991, almost two years before the NASDAQ UTP Plan's effective date,⁶ at a time when the NASD owned and operated both NASDAQ and the FINRA BB and no national securities exchanges traded these securities. At that time, NASDAQ was still an automated interdealer quotation system, not a national stock exchange, and securities in its Small Cap market tier were not considered National Market System Securities. Furthermore, this 1991 approval did not relate to the dissemination of market data under an NMS plan - it merely related to the manner in which NASD would make NASDAQ and other OTC security quotations available. The propriety of disseminating FINRA BB Quotations under the NASDAQ UTP Plan, or whether market data for non-NMS securities could be disseminated under an NMS plan, could not have been raised by commenters or considered by the Commission because the NASDAQ UTP Plan did not exist in 1991.

⁵ See Securities Exchange Act Release No. 29616 (Aug. 27, 1991), 56 FR 43826 (Sept. 4, 1991) (approving the bundling of the FINRA BB's best bid and ask quotations with the NASDAQ Level I quotations); Securities Exchange Act Release No. 32647 (July 16, 1993), 58 FR 39262 (July 22, 1993) (approving the NASD rule requiring NASD members to report transactions in OTC equity securities to NASD on a 'real-time' basis) (the "OTC Equity Transaction Reporting Rule Adopting Release").

⁶ According to the NASDAQ UTP Plan, its effective date was July 12, 1993.

Similarly, the Commission published for comment the NASD's proposal to collect and disseminate OTC Transaction Reports, and required all comments to be submitted, six months before the effective date of the NASDAQ UTP Plan.⁷ Again, no one could have addressed whether the proposal was consistent with the terms of the NASDAQ UTP Plan, or whether market data for non-NMS securities could be disseminated under an NMS plan, because the NASDAQ UTP Plan was not yet in effect. Moreover, the OTC Equity Transaction Reporting Rule Proposing Release did not specify that the transaction reports collected by NASD under the proposed rule would be disseminated as part of the NASDAQ market data stream or under an NMS plan.⁸ The Commission approved the NASD's rules requiring members to report OTC Transaction Reports to NASD just four days after the effective date of the NASDAQ UTP Plan, leaving commenters no meaningful opportunity to comment on the propriety of disseminating OTC equity transaction reports under the NASDAQ UTP Plan. The Commission did not address the issue at all in its approval order.⁹ The rule filing and approval order made no mention of the data being provided under an NMS plan.

These prior approvals: 1) pre-dated the NASDAQ UTP Plan, 2) did not reference the dissemination of non-NMS data under an NMS Plan, 3) prompted no comments on these issues and 4) contained no Commission discussion of these issues, meaning that the orders do not constitute a precedent for Commission approval of the Proposed OTC Data Amendment in contravention of the terms of the NASDAQ UTP Plan and Section 11A's effective limitation of NMS plans to NMS securities. Finally, regardless of whether the current distribution of the OTC Data under the NASDAQ UTP Plan is appropriate or consistent with Section 11A, the wording of the NASDAQ UTP Plan does not permit plan participants to submit non-NASDAQ market data to the processor, nor does the Plan permit the processor to disseminate non-NASDAQ data and compensate FINRA with 6.25% of the Plan's revenue for such data.

The FINRA Letter commends the "UTP Plan Operating Committee for unanimously voting in favor of this amendment," implying that plan participants' approval for publishing the amendment indicates the participants' widespread support of the amendment. That implication is misleading, as under the Plan rules an amendment to the NASDAQ plan may not be forwarded to the SEC without unanimous vote. The result is that a member of the NASDAQ plan must approve a proposal before having any

⁷ Securities Exchange Act Release No. 31695 (Jan. 6, 1993), 58 FR 4189 (Jan. 13, 1993) (publishing for comment the NASD's proposed rule requiring NASD members to report transactions in OTC equity securities to NASD on a 'real-time' basis) (the "OTC Equity Transaction Reporting Rule Proposing Release").

⁸ *See id.*

⁹ *See* OTC Equity Transaction Reporting Rule Adopting Release, *supra* note 5.

opportunity to comment in opposition, as the New York Stock Exchange (“NYSE”) has done in its comment letter dated June 4, 2010 (the “NYSE Comment Letter”).¹⁰

B. Commingling the OTC Data with NASDAQ Data is Not the Most Cost Effective

Despite FINRA’s statements to the contrary, we continue to maintain that the current commingling of NASDAQ market data and OTC Data forces consumers to purchase a product they may not want in order to support the additional costs associated with compensating FINRA with 6.25% of the Plan’s gross revenue. In arguing against the separate dissemination of NASDAQ data and OTC Data, the FINRA Letter supposes that there will be “an increase in monetary and other burdens” because, for example, separately offering the OTC Data “would require a separate administrator, separate contracts, and separate entitlements” and that “[m]oreover, it would require investors and market participants to devote additional resources to retrieving data from different logic sources and consolidate different data feeds...”¹¹ We do not believe these supposed problems would arise.

First, there is absolutely no need for a separate administrator. If FINRA were required to sell its OTC Data apart from the NASDAQ data, FINRA would be free to continue to use NASDAQ (the processor for the Plan) to do so, eliminating any need to retrieve data from different sources or consolidate different data feeds. Second, as to the supposed burden of separate contracts and separate entitlements, it is difficult to imagine that NASDAQ would need to do anything more than revise its agreements to have a “check the box” option to receive FINRA’s OTC Data for a separate fee beyond the NASDAQ market data fee. Even if administrative problems did arise to a limited extent, they could be easily overcome particularly if it is necessary to do so to comply with the express terms of the Plan and avoid the other legal issues we raised in our prior comment letter. Moreover, even though licensing of the NASDAQ data and the OTC Data is comingled, the OTC Data is currently distributed by the Plan processor on separate multicast feed channels that already require different physical entitlements.

We also find questionable FINRA’s disagreement with NYSE Euronext’s assertion that commingling the OTC Data with NASDAQ data causes confusion for market data consumers. In a recent comment letter on another FINRA rule filing relating to the dissemination of other OTC data with the NASDAQ market data, NASAA expressed the view that such commingling of non-NASDAQ market data with NASDAQ market data

¹⁰ Letter from Janet M. Kissane, NYSE, to Elizabeth M. Murphy, Secretary, SEC, dated June 4, 2010

¹¹ FINRA Letter, at page 6.

would be likely to give a false impression to public investors and other market participants.¹²

The FINRA Letter also claims that FINRA has spoken to large market data vendors and firms (unnamed by FINRA and who have not commented on Amendment No. 21), who have expressed that they are not interested in separate entitlements and feeds sold by different administrators. We question FINRA's assertion that the potential administrative burden is a widespread industry concern. A primary value-added service of market data vendors is the consolidation and normalization of market data from many sources. In addition, most market data vendors already deal with the same issues in regard to the Tape A, Tape B and Tape C plans. As noted above, there is no need for a separate administrator, as FINRA would be free to continue to use NASDAQ or switch to SIAC,¹³ the consolidator of the Tape A and B plans. There would likely be little burden in obtaining one additional entitlement and paying one additional fee for the miniscule percentage of NASDAQ UTP plan users that would need to purchase the OTC Data if offered separately (which would only be necessary in the event that NASDAQ somehow could not send a single bill for separate NASDAQ data and OTC Data). In any event, these minor, unlikely inconveniences are no reason to permit the impermissible bundling of the OTC Data with the NASDAQ data.

We also disagree with FINRA's view that end users, especially retail investors, bear none of the cost of commingling OTC Data with the NASDAQ market data. The FINRA Letter states that "most end users of Level 1 data - particularly retail investors - pay no direct cost for access"¹⁴ to the OTC Data. However, even though end users do not *directly* pay FINRA for the data, the end users ultimately, indirectly bear the costs that their providers, such as broker-dealers and mutual funds, are forced to pay to offset the millions of dollars the Plan pays to FINRA for the OTC Data. To pretend that end users are unaffected by the cost of the OTC Data is an exercise in willful ignorance. As a result of the costs ultimately borne by end users, we continue to believe that the current commingling of NASDAQ market data and OTC Data is not cost effective because it forces consumers to purchase a product they may not want and bear the additional costs associated with compensating FINRA with 6.25% of the Plan's gross revenue.

C. The Revenue Arrangement

Although we did not raise the issue in our original letter, we agree with the view expressed by NYSE Euronext that the 6.25% of gross Plan revenue that FINRA receives

¹² See Letter from Jack Herstein, Chairperson NASAA Corporation Finance Section Committee, to Elizabeth M. Murphy, Secretary, SEC, dated March 4, 2010, commenting on Exchange Act Release No. 60999, File No. SR-FINRA-2009-077, available at <http://www.sec.gov/comments/sr-finra-2009-077/finra2009077-14.pdf>

¹³ The Securities Industry Automation Corporation, a wholly-owned subsidiary of NYSE.

¹⁴ FINRA Letter, at page 7.

is an arbitrary amount, despite statements in the FINRA Letter to the contrary. There appears to be no rational basis for awarding FINRA 6.25% of the NASDAQ UTP Plan's revenue when, by virtue of the bundled, single price for NASDAQ and OTC Data, there is no way to discern the true value of the OTC Data. Considering that the overwhelming majority of securities professionals and U.S. investors do not transact in non-NMS securities, it is unreasonable that the OTC Data contributed by FINRA to the Plan merits FINRA's receipt of 6.25% of the Plan's gross revenue. FINRA's current 6.25% revenue share, which the amendment "merely seeks to document," according to the FINRA Letter, was decided by FINRA's predecessor, NASD. This percentage was arbitrarily set at a time when NASD controlled and received all of the revenue from both the NASDAQ data and the OTC Data. NASDAQ and FINRA subsequently memorialized FINRA's arbitrary 6.25% revenue share when FINRA replaced NASDAQ as the operator of the FINRA BB,¹⁵ a complicated transaction involving FINRA paying millions of dollars to NASDAQ for certain asset transfers and services¹⁶ and receiving millions of dollars back from NASDAQ for regulatory services.¹⁷ As a result of the extensive payments between FINRA and NASDAQ at that time, the granting of a 6.25% Plan revenue share to FINRA cannot be considered a competitively negotiated, arms-length transaction. The Commission should examine FINRA's 6.25% revenue share on its own merit before approving it again in reliance on a flawed prior arrangement. As part of its analysis, the Commission should review what revenues FINRA might expect to earn from the data if it were not distributed as part of the Plan.¹⁸

¹⁵ On September 2, 2005, NASD executed the [FINRA] BB and OTC Equities Revocation of Delegation and Asset Transfer and Services Agreement with NASDAQ related to the OTC Equities. Under the agreement, effective October 1, 2005, NASD assumed responsibility for the FINRA BB and OTC Equities businesses from NASDAQ. Beginning on October 1, 2005, NASD's reported transparency services fees have included revenues generated from the FINRA BB and OTC Equities businesses. See NASD 2006 Year in Review and Annual Financial Report at page 13, available at <http://www.finra.org/AboutFINRA/AnnualReports/>

¹⁶ Intercompany charges from NASDAQ to NASD for FINRA BB and OTC Equities businesses were \$14.6 million and \$3.8 million for the years ended December 31, 2006 and 2005, respectively. *Id* at page 49.

¹⁷ As of December 31, 2006 NASD provided regulatory services including surveillance, examination, investigation, and enforcement for NASDAQ. NASD charged the costs for these services to NASDAQ either through directly attributable NASDAQ effort or through an allocation of volume. Regulatory charges from NASD to NASDAQ were \$30.2 million and \$40.9 million for the years ended December 31, 2006 and 2005, respectively. *Id* at page 49.

¹⁸ In communication with representatives of Pink OTC Markets in late 2007 and early 2008, management of FINRA's Transparency Services Department expressed their belief that if the OTC Data was separated from the NASDAQ UTP and distributed on its own,

The most logical and efficient way to determine the value of the OTC Data would be to have the Tape A and Tape B Plans competitively bid to include the OTC Data in their plans. Such a bid would indicate what dollar amounts or revenue percentages, if any, these other NMS plans would be willing to pay for the rights to the OTC Data. We believe such a competitive bid would reveal the extremely minimal value the OTC Data actually brings to an NMS plan.

As the August 2010 decision of the District of Columbia Circuit Court of Appeals in *NetCoalition v. SEC* made clear, when determining the value of market data included in an NMS plan, the Commission must consider whether competitive forces increase the data's value, as well as how much the data costs to produce. The SEC considered neither of these factors when approving the agreement providing FINRA with 6.25% of the Plan's gross revenue. Neither Amendment 21 nor the FINRA Letter has provided any information describing how the current fees and allocations are determined by competitive forces, or any information regarding the cost of producing such data.¹⁹ Without such information, we do not believe the Commission can make a value determination in keeping with its statutory responsibility under Section 11A of the Exchange Act. Furthermore, in light of the *NetCoalition* case, the Commission's approval of the Proposed OTC Data Amendment without considering competition and cost may not withstand a legal challenge.

Despite the assertion in the FINRA Letter that "cost-efficient OTC data is made available to investors and the marketplace through a Commission and SRO-overseen process" the current system of distributing the OTC Data is an anti-competitive result, due to the lack of (i) competitive bids, (ii) reasonable cost valuation or (iii) an independent, arm's length transaction at the time FINRA was awarded its unreasonable 6.25% revenue payment. Such anti-competitive decision-making is exactly the type of behavior Congress sought to eliminate when it established the NMS in 1975.²⁰ Permitting FINRA or any other self-

FINRA would receive substantially less revenue than it currently receives from its 6.25% share of the Plan.

¹⁹ Any such cost would necessarily exclude regulatory costs, as the NYSE Letter notes that such amounts are offset by the Trading Activity Fee FINRA receives for regulating OTC transactions, as well as fees paid by FINRA members for reporting such trades. Moreover, in 2007, at the request of several FINRA member firms, Pink OTC offered to operate the FINRA BB at a significantly lower price than FINRA's Transparency Services management was paying NASDAQ at the time. FINRA, apparently uninterested in mitigating the costs that it ultimately passed on to its members, did not respond to Pink OTC's offer.

²⁰ See 15 U.S.C. § 78k-1(a)(1)(C)(ii).

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regulatory organization to use its regulatory power to create a competitive advantage is antithetical to the spirit and language in which Congress created the NMS.²¹

III. Conclusion

We cannot explain how it is that the Commission has allowed the operation of the Plan to progress to the point where the Plan's terms expressly limit its scope to market data relating to NASDAQ securities, yet the processor for the Plan (NASDAQ) offers a single product that includes NASDAQ data and OTC Data for a single price and remits a portion of the Plan's gross revenue to FINRA for its contribution of the non-NASDAQ OTC Data. The OTC Data adds minimal, if any, value to the NASDAQ UTP Plan, yet FINRA arbitrarily receives 6.25% of the Plan's gross revenue for providing it. FINRA's 6.25% payment is also unrelated to its costs in regulating the OTC market, as those costs are already offset by the Trading Activity Fee charged to OTC market participants. The payment to FINRA has no basis in the competitive marketplace nor is it a function of cost, and as such it clearly violates the intent of Congress in enacting Section 11A of the Exchange Act and the D.C. Circuit Court's recent *NetCoalition* decision. Regardless of how these circumstances have arisen, they should not be allowed to persist. For the reasons described herein, the Commission should not approve the Proposed OTC Data Amendment. Instead, the Commission must either amend the Plan's terms to cover the collection and dissemination of non-NASDAQ data or cause the Plan processor to halt commingling the OTC Data with NASDAQ data and selling it as a single market data product for a single price.

We would be happy to discuss these issues further with the Commission and its staff.

Sincerely yours,



Michael R. Trocchio

cc: Hon. Mary Schapiro, Chairman
Hon. Luis Aguilar, Commissioner
Hon. Kathleen Casey, Commissioner
Hon. Troy Paredes, Commissioner
Hon. Elisse Walter, Commissioner

²¹ We believe that FINRA is an extremely effective regulator, with a competent, dedicated staff, serving a valuable purpose for the broker-dealer community and the investing public. We only take issue with the management of FINRA's Transparency Services Department and its attempt to misuse FINRA's regulatory authority and its status as an SRO to gain an unfair advantage in what would otherwise be a fair, competitive marketplace.