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Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Joint Industry Plan; Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data (Release No. 34-90096; File No. 4-757)

Dear Ms. Countryman:

The Financial Industry Regulatory Authority, Inc. (“FINRA”) welcomes the opportunity to further comment on the Securities and Exchange Commission’s (“SEC’s” or “Commission’s”) notice soliciting comments on the proposed new single national market system (“NMS”) plan governing the public dissemination of real-time, consolidated equity market data for NMS stocks (the “CT Plan”),¹ which was filed by the national securities exchanges and FINRA (collectively, the “SROs”) on August 11, 2020 pursuant to the SEC’s May 6, 2020 order (the “Order”).² If approved, the CT Plan would replace the three current NMS plans (the “Current Plans”) that currently govern the public dissemination of real-time, consolidated equity market data through the securities information processors (“SIPs”).³ By letter dated November 12, 2020, FINRA commented on certain issues raised in the Commission’s request for comment.⁴ FINRA is submitting this additional letter to specifically respond to a suggestion relating to over-the-

¹ See Securities Exchange Act Release No. 90096 (October 6, 2020), 85 FR 64565 (October 13, 2020) (Joint Industry Plan; Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data).

² See Securities Exchange Act Release No. 88827 (May 6, 2020) 85 FR 28702 (May 13, 2020) (Order Directing the Exchanges and the Financial Industry Regulatory Authority To Submit a New National Market System Plan Regarding Consolidated Equity Market Data).

³ The three Current Plans are the Consolidated Tape Association Plan, the Consolidated Quotation Plan and 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 (the Unlisted Trading Privileges or “UTP” Plan).

⁴ See Letter from Marcia E. Asquith, Executive Vice President, Board and External Relations, FINRA, to Vanessa Countryman, Secretary, SEC, dated November 12, 2020.

counter (“OTC”) data made by The Nasdaq Stock Market LLC (“Nasdaq”) in its comment letter on the proposed CT Plan (the “Nasdaq Letter”).⁵

I. Background

FINRA is the only national securities association registered with the Commission under Section 15A of the Securities Exchange Act of 1934 (the “Exchange Act”)⁶ and is organized as a not-for-profit corporation. FINRA has statutory responsibility for the regulation and supervision of member broker-dealers, including broker-dealers’ off-exchange activities; in general, broker-dealers doing business with the public are required to become members of FINRA.⁷

FINRA is the sole SRO responsible for the regulation and oversight of the market for OTC equity securities (“OTC Equities”).⁸ Among FINRA’s responsibilities with respect to the market for OTC Equities is to provide FINRA members with a mechanism for reporting OTC Equity transactions, which is effected through the FINRA OTC Reporting Facility (“ORF”). FINRA also currently operates an interdealer quotation system for OTC Equities, the OTC Bulletin Board (“OTCBB”).⁹ FINRA makes publicly available ORF transaction data and OTCBB quotation data for OTC Equities (collectively, “OTCE Data”).

Currently, FINRA provides two market data feeds for OTCE Data: the Bulletin Board Dissemination Service (“BBDS”) for quotations posted on the OTCBB and the Trade Data

⁵ See Letter from Joan C. Conley, Senior Vice President and Corporate Secretary, Nasdaq, to Vanessa Countryman, Secretary, SEC, dated November 12, 2020.

⁶ See 15 U.S.C. 78o-3.

⁷ In general, broker-dealers are required by the Exchange Act to become members of a national securities association (of which currently the only one is FINRA). There are two cases where broker-dealers may be exchange-only SRO members. First, there is a statutory exception for a broker-dealer that transacts business solely on an exchange of which it is a member. See 15 U.S.C. 78o(b). Second, there is a rule-based exemption for firms that carry no customer accounts and conduct limited off-exchange business, which has become used primarily by proprietary trading firms. See 17 C.F.R. 240.15b9-1.

⁸ “OTC Equity Security” is defined in FINRA Rule 6420(f) to mean “any equity security that is not an ‘NMS stock’ as that term is defined in Rule 600(b)(47) of SEC Regulation NMS; provided, however, that the term ‘OTC Equity Security’ shall not include any Restricted Equity Security.” “Restricted Equity Security” is defined in FINRA Rule 6420(k) to mean “any equity security that meets the definition of ‘restricted security’ as contained in Securities Act Rule 144(a)(3).”

⁹ FINRA recently filed a proposed rule change to adopt new requirements for member inter-dealer quotation systems and retire the OTCBB. See Securities Exchange Act Release No. 90067 (October 1, 2020), 85 FR 63314 (October 7, 2020) (Notice of Filing of a Proposed Rule Change To Adopt FINRA Rule 6439 (Requirements for Member Inter-Dealer Quotation Systems) and Delete the Rules Related to the OTC Bulletin Board Service). While FINRA therefore expects the OTCBB to be retired in the near future, it remains operational until the SEC approves the proposed rule change and FINRA announces an effective date for when the OTCBB will cease operations. The ORF remains fully operational.

Dissemination Service (“TDDS”) for transactions reported to the ORF.¹⁰ Nasdaq, as the UTP Administrator under the UTP Plan, manages the administration of the BBDS and TDDS data feeds. Both data feeds are part of the Level 1 service of the UTP SIP that provides subscribers with market data for Nasdaq-listed securities. Therefore, all Level 1 entitled subscribers are able to receive OTCE Data via BBDS and TDDS along with Nasdaq-listed market data pursuant to arrangements under the UTP Plan.

II. Inclusion of OTCE Data in the CT Plan

In its letter, Nasdaq suggests changes to the revenue allocation formula contained in Exhibit D to the CT Plan, including “removing Over-the-Counter Bulletin Board (“OTCBB”) data from the Nasdaq SIP to lower costs.” Nasdaq states further:

OTCBB data was included in the Nasdaq SIP at its inception in 1990, when FINRA operated the SIP and Nasdaq as a single, integrated system. Although the SIP was separated from Nasdaq systems in 2002, and Nasdaq registered as an independent exchange in 2006, the allocation formula set forth in Exhibit D still provides that “6.25% of the revenue received by the Company during such calendar year attributable to the segment of the Data Feeds reflecting the dissemination of information with Network C Securities and FINRA OTC Data . . . shall be paid to FINRA as compensation for the FINRA OTC Data” In 2008, the Operating Committee submitted Amendment 21 to remove OTCBB data, but it was not acted upon. The revenue allocated to FINRA for OTCBB data should be reallocated to investors.¹¹

¹⁰ The SEC has stated that provision of these data feeds is consistent with Section 17B of the Exchange Act. See *infra* note 14. Paragraph (b) of Section 17B provides for the facilitation of the widespread dissemination of reliable and accurate last sale and quotation information with respect to OTC Equities in accordance with the findings set forth in subsection (a). Among other things, as set forth in paragraph (a), Congress found that “it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to improve significantly the information available to brokers, dealers, investors, and regulators with respect to quotations for and transactions in penny stocks.” See 15 U.S.C. 78q-2. The SEC has also stated that these arrangements are consistent with FINRA’s obligations under Section 15A of the Exchange Act. See *infra* note 14. Specifically, paragraph (b)(5) of Section 15A requires that FINRA’s rules provide for the “equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which” FINRA operates or controls. Paragraph (b)(6) of Section 15A requires that FINRA’s rules be “designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest....” See 15 U.S.C. 78o-3.

¹¹ See Nasdaq Letter at 30 (citations omitted); see also *id.* at 31 (“As noted in response to Question 47 above, Paragraph (j) provides that “6.25% of the revenue received by the Company during such calendar year attributable to the segment of the Data Feeds reflecting the dissemination of information with Network C Securities and FINRA OTC Data . . . shall be paid to FINRA as

FINRA objects to Nasdaq's suggestion in this context to remove OTCE Data from the CT Plan, as such a suggestion is outside the scope of this proposal and related directive. The proposed CT Plan was filed by the SROs with the intention of fulfilling the Commission's directive in the Order to consolidate the Current Plans and, in doing so, to incorporate certain specified changes to the governance structure of the Current Plans.¹² Consistent with that directive, the SROs did not propose to alter in any way the scope of data provided under the Current Plans or the means through which that data is disseminated. FINRA therefore believes it would be inappropriate to modify the proposed CT Plan to restructure the data covered by the Plan or the revenue allocation provisions in response to Nasdaq's suggestion.

Notwithstanding that Nasdaq's suggestion is outside the scope of this proposal, FINRA is taking this opportunity to emphasize the important benefits of having OTCE Data currently included in the data feeds provided under the UTP Plan (and, if approved, the CT Plan), as well as the potential costs and impacts that would accompany Nasdaq's suggestion to remove such data.¹³ The inclusion of OTCE Data in consolidated market data under the UTP Plan was originally adopted as the most cost-effective solution to provide transparency and continuity for investors and market participants. Investors, market participants and regulated entities continue to benefit significantly from the widespread distribution and enhanced transparency provided by dissemination of OTCE Data under the Level 1 entitlement pursuant to the UTP Plan. Given that OTC Equities may transition to NMS stocks or vice versa (NMS stocks can be delisted and become OTC Equities), dissemination of OTCE Data in the same distribution channels as market data for listed equity securities facilitates more orderly markets and transparency continuity in relation to transitioning issuers. Including OTCE Data together with listed NMS stock data allows investors and market participants to receive seamless pricing information for delisted securities in a single service; by contrast, providing data for delisted issuers through different services, sold by separate entities, could result in a disruption of market data when

compensation for the FINRA OTC Data" For the reasons set forth in response to Question 47, this antiquated revenue allocation provision serves no ongoing purpose, and should be removed from Exhibit D." (citations omitted)).

¹² See, e.g., Order at 28710.

¹³ FINRA notes that the Commission has separately proposed in the context of its Market Data Infrastructure proposal that OTCE Data be excluded from consolidated market to be provided under the Current Plans (or the CT Plan, if approved). See Securities Exchange Act Release No. 88216 (February 14, 2020), 85 FR 16726 (March 24, 2020) (Notice of Proposed Rule). FINRA submitted a comment letter on the Market Data Infrastructure proposal noting, among other things, its concerns regarding the proposed exclusion of OTCE Data. See Letter from Marcia E. Asquith, Executive Vice President, Board and External Relations, FINRA, to Vanessa Countryman, Secretary, SEC, dated May 26, 2020. Given their importance, FINRA is reiterating those concerns in response to Nasdaq's suggestion in relation to the proposed CT Plan. In any case, however, a change to the content of market data provided under the Current Plans or the CT Plan should be considered only in the context of full notice-and-comment rulemaking by the Commission.

investors or market participants are not subscribed to both services. These same considerations will continue to apply under the proposed CT Plan.

Similarly, if OTCE Data is excluded from provision under the CT Plan, FINRA will need to establish a separate framework and process to provide OTCE Data to investors and market participants, including all of the related administrative elements to facilitate dissemination such as policies and procedures, vendor and subscriber contracts, fee schedules, entitlements and audit processes. The development and maintenance of such a separate framework for dissemination would likely result in increased costs due to the loss of the economies of scale from providing OTCE Data over the Level 1 service, and would likely result in higher fees charged to vendors and subscribers. Vendors and market participants would also need to devote additional resources to retrieving data from different sources and consolidating different data feeds, which would increase the costs of separately disseminating OTCE Data that would be borne by investors and market participants. Because of the changes involved in obtaining OTCE Data, and the separate fee that would be charged for OTCE Data, it is likely that some firms might forgo obtaining this data, thus depriving their customers of current information about OTC Equities.

FINRA believes that the benefits of preserving the existing approach to ensuring that investors have access to critical information on OTC Equities through established dissemination channels at a reasonable cost is in the best interest of investors and the marketplace overall. FINRA therefore believes that the Commission should not consider Nasdaq's suggestion to exclude OTCE Data from the proposed CT Plan.

Additionally, FINRA wishes to correct two misstatements in the Nasdaq Letter with respect to both the scope of OTCE Data provided pursuant to the UTP Plan and the intent of Amendment 21 to the UTP Plan. First, the Nasdaq Letter incorrectly refers to the inclusion of "OTCBB data" in the revenue allocation formula in Exhibit D to the proposed CT Plan. As noted above, the BDDS and TDDS data feeds are both currently provided as part of the Level 1 entitlement of the UTP SIP under the auspices of the UTP Plan, and would be similarly provided under the proposed CT Plan. These data feeds include both OTCBB quotation data and ORF transaction data for OTC Equities, not just OTCBB data. The Commission has approved this arrangement, along with the associated revenue allocation, in the context of multiple rulemakings by the NASD, dating back to the 1990s.¹⁴

Second, Nasdaq incorrectly states that "[i]n 2008, the Operating Committee [of the UTP Plan] submitted Amendment 21 to remove OTCBB data, but it was not acted upon." In fact,

¹⁴ In 1991, FINRA's predecessor, the National Association of Securities Dealers, Inc. ("NASD"), filed a proposed rule change, which was effective upon filing, to, among other things, establish a "bundled information feed and subscriber charge for receipt of both Nasdaq Level 1 and [OTCBB] quotation information." The rule filing noted: "the distribution of OTCBB quotation data via the Level 1 vendor feeds will effectuate the broadest possible dissemination of quotation information on OTCBB securities. This result is fully consistent with Section 17B of the [Exchange Act] which mandates establishment of an automated quotation system for penny stocks. Subsection (b) thereunder contemplates the widespread dissemination of reliable and accurate quotation information on stocks traded through such a system. Vendor dissemination of OTCBB quotation

Amendment 21 to the UTP Plan was approved unanimously by the Operating Committee of the UTP Plan and submitted to the SEC in 2010 to accomplish precisely the opposite—it was filed with the express intent of formally memorializing into the language of the UTP Plan the pre-existing arrangements to include (not remove) OTCE Data.¹⁵ While the Commission has not yet formally approved, or disapproved, Amendment 21, the proposed amendments were intended to provide further transparency with respect to pre-existing and continuing arrangements for the provision of, and compensation for, OTCE Data. FINRA notes that the amendments are reflected in the current plan as posted on the UTP website.

information constitutes a further enhancement of the OTCBB service to meet the requirements of Section 17B.” See Securities Exchange Act Release No. 29616 (August 27, 1991), 56 FR 43826 (September 4, 1991) (Notice of Filing and Immediate Effectiveness of SR-NASD-91-38).

In 1993, NASD filed a proposed rule change to establish requirements for real-time trade reporting and dissemination for OTC Equities. See Securities Exchange Act Release No. 31695 (January 6, 1993), 58 FR 4189 (January 13, 1993) (Notice of Filing of SR-NASD-92-48). In its order approving the proposed rule change, the SEC noted that the proposed rule change was consistent with Sections 11A(a)(1), 15A(b)(6) and 17B of the Exchange Act, stating specifically its belief that “by providing greater transparency, the proposed rule change will bring to the market for [OTC Equities] a number of the benefits envisaged by Congress. Experience with the introduction of real-time trade reporting for Nasdaq/National Market System Securities and Nasdaq securities supports this belief.” See Securities Exchange Act Release No. 32647 (July 16, 1993), 58 FR 38262 (July 22, 1993) (Order Approving SR-NASD-92-48).

In 1994, NASD filed a proposed rule change to combine its Level 1 quotation data service and its last sale information service into a single, consolidated Level 1 data service. See Securities Exchange Act Release No. 35054 (December 6, 1994), 59 FR 64225 (December 13, 1994) (Notice of Filing of SR-NASD-94-70). In its order approving the proposed rule change, the SEC stated that it “finds that the rule change is consistent with the requirements of the [Exchange Act] and the rules and regulations thereunder applicable to the NASD, including the requirements of Section 15A(b)(5) of the [Exchange Act]. Section 15A(b)(5) requires, in part, that the rules of a national securities association provide for the equitable allocation of reasonable dues, fees and other charges among members, issuers and other persons using any facility or system that the Association operates or controls. While the consolidation will result in a fee increase for a small portion of subscribers, the additional cost will be partially offset by administrative savings for large subscribers and vendors. Moreover, the rule will effect a simplification in the fee structure applicable to receipt of two major data services.” See Securities Exchange Act Release No. 35217 (January 11, 1995), 60 FR 3890 (January 19, 1995) (Order Approving SR-NASD-94-70).

¹⁵ See Securities Exchange Act Release No. 62012 (April 30, 2010), 75 FR 27010, 27012 (May 13, 2010) (Notice of Filing of Amendment No. 21 to the Plan) (“For some time, the fees that the Participants charge for the receipt and use of quotation and transaction information for Nasdaq-listed securities under the Nasdaq/UTP Plan have also entitled data recipients to receive and use quotation and last sale information relating to over-the-counter securities. Historically, the Nasdaq/UTP Participants have compensated FINRA for the value represented by its quotation and last sale information relating to over-the-counter securities by allocating to FINRA 6.25 percent of gross revenues collected under the Nasdaq/UTP Plan for any particular calendar year. (The allocation is made prior to subtracting the Processor’s costs and the Administrator’s costs from gross revenue.) In the interests of transparency, the Participants propose to add to Exhibit 1 to the Nasdaq/UTP Plan a specific reference to this FINRA allocation for the receipt and use of quotation and last sale information relating to over-the-counter securities.”).

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III. Conclusion

FINRA thanks the Commission for its attention to these matters. Should you have any questions or wish to further discuss FINRA's views, please contact Stephanie Dumont, Senior Vice President and Director of Capital Markets Policy, FINRA, at [REDACTED].

Very truly yours,



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