OTC Markets

November 25, 2019

Via Electronic Submission

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
rule-comments@sec.gov

Re: Preliminary Comments to the Publication or Submission of Quotations Without Specified Information (File Number S7-14-19)

OTC Markets Group[1] is pleased to submit this preliminary comment letter in response to the Securities and Exchange Commission's ("SEC" or the "Commission") Proposed Rule and Concept Release on the Publication or Submission of Quotations Without Specified Information (the "Proposal"). We support the Proposal's goal of incentivizing companies to publish current, public disclosure and believe that, if implemented thoughtfully, the Proposal can increase market efficiency, provide greater transparency, enhance investor protection and reduce certain regulatory burdens on broker-dealers.

We are also committed to working with the Commission to improve upon areas of the Proposal that may otherwise unintentionally inhibit market efficiency, conflict with broker-dealer best execution obligations, and impair the property rights of unaffiliated investors. This letter outlines our high-level thoughts in an effort to facilitate an industry-wide discussion that will result in a successful final rule. We intend to submit a more comprehensive response in advance of the December 30th deadline.

I. Permitting broker-dealers to rely on the determinations of a regulated market operator will greatly enhance marketplace efficiency.

Over the years, we have developed a disclosure framework that provides a wide range of public companies with a cost-effective way to make information publicly available to investors. Our issuer compliance team oversees company disclosure across our OTCQX, OTCQB and Pink markets, and maintains procedures that allow us to clearly identify companies that meet their current public disclosure obligations as well as those that fail to meet applicable disclosure standards. Companies on our OTCQX and OTCQB markets must maintain up-to-date disclosure, while companies on the Pink market are designated as "Current Information," "Limited Information" and "No Information" in accordance with the sufficiency and timeliness of their disclosure.

[1] OTC Markets Group Inc. operates the OTCQX® Best Market, the OTCQB® Venture Market and the Pink® Open Market for 10,000 U.S. and global securities. Through OTC Link® ATS and OTC Link ECN, we connect a diverse network of broker-dealers that provide liquidity and execution services. We enable investors to easily trade through the broker of their choice and empower companies to improve the quality of information available for investors. OTC Link ATS and OTC Link ECN are SEC regulated ATSs, operated by OTC Link LLC, member FINRA/SIPC.

The Proposal recognizes our well-established disclosure standards, marketplace designations and compliance monitoring processes, and would allow broker-dealers to rely on our determinations with respect to current information when bringing companies to the public markets. We welcome the opportunity for our OTC Link ATS to serve as a qualified interdealer quotation system ("IDQS") and "information repository" facilitating current company information and providing compliance determinations pursuant to Exchange Act Rule 15c2-11 (the "Rule").

II. The Rule's information review standard and administration should be modernized to streamline the roles and responsibilities of each market participant.

While we support extending the ability to perform the initial information review to qualified IDQSs, as proposed, the Rule's review standard – that the reviewer have a reasonable basis under the circumstances for believing that company information is "accurate in all material respects" and from a reliable source – must be modernized in consideration of the significant changes in the regulatory landscape since the Rule's initial adoption in 1971. To promote market efficiency, the review standard must reflect the distinct roles played by issuers, broker-dealers, IDQSs and regulators:

- **The issuer:** and its management should be solely responsible for the accuracy of their disclosures. As stated by the Commission as far back as 2002, "[e]xisting antifraud law, as well as the disclosure rules governing documents filed with or submitted to the Commission, already place responsibility for the accuracy and completeness of disclosure, and liability for failure to satisfy disclosure requirements, on corporate management and directors."[2]
- **The qualified IDQS:** as an "information repository", should be responsible for:
  - Collecting and reviewing company information to determine that it is complete and from a reliable source prior to initiation of a quote,
  - Monitoring ongoing periodic company disclosure, and
  - Maintaining such information in a centralized location for the benefit of broker-dealers and the greater investing public.
- **Broker-dealers:** should be responsible for submitting transparent public quotations and pricing information, achieving best execution for customers and complying with FINRA customer, market maker and trading rules, as applicable.
- **FINRA:** as an industry regulator, should be responsible for reviewing IDQS and broker-dealer compliance with the information review and recordkeeping provisions of the Rule.

Accordingly, the standard of review for the initial publication or submission of quotations pursuant to paragraph (a) of the Rule should be a reasonable belief that the required paragraph (b) information is "***complete*** in all material respects" and from a reliable source. An initial review for completeness and reliability is in line with our current disclosure review procedures and in fact exceeds the Commission's own review standard.[3] Combined with the additional obligation

---

[2] *See* SEC Proposed Rule: Certification of Disclosure in Companies' Quarterly and Annual Reports, Release No. 34-46079 (June 17, 2002), available at: https://www.sec.gov/rules/proposed/34-46079.htm.

[3] *See* SEC Filing Review Process (Sept. 27, 2019), available at: https://www.sec.gov/divisions/corpfin/cffilingreview.htm ("The Division's review process is not a guarantee

to review "supplemental information" in paragraph (c), this standard will strike a balance between providing investors with current information, while not imposing undue burdens on the reviewing qualified IDQS or broker-dealer.

In addition to modernizing the standard of review as described above, the Commission must also consider FINRA's involvement in the administration of the Rule. In practice, the SEC's Rule 15c2-11 works in coordination with FINRA Rule 6432, which requires broker-dealers to file a Form 211 with FINRA to demonstrate compliance with Rule 15c2-11. Under the current Rule structure, broker-dealers cannot commence quoting until FINRA reviews and approves the applicable Form 211. If the SEC's Proposal is to have the desired impact, it is imperative that FINRA review and update Rule 6432 accordingly. Broker-dealers should be permitted to rely on the determination of a qualified IDQS to initiate quotes in these securities without filing a separate Form 211 with FINRA,[4] and should be permitted to join a quoted market without a 30-day "piggyback eligibility" period following the initial quotation. The qualified IDQS could then make ongoing determinations as to the eligibility of the security to be quoted under the Rule. FINRA would continue to participate in the administration of the Rule through its role as the primary regulator of the qualified IDQS and quoting broker-dealers.

III. Securities of companies that do not provide current information should be permitted to be quoted on an "Expert" market for professional investors.

The Proposal would effectively eliminate market maker quoting for securities of companies that do not provide current public information and of companies with assets primarily consisting of cash and securities. The vast majority of comments submitted in response to the Proposal to date are written by "Graham & Dodd school" professional value investors.[5] As taught in Benjamin Graham's book, "The Intelligent Investor," bankruptcies, financial restructurings, dark companies, cash shells and liquidations can all offer compelling investment opportunities for savvy fundamental investors. Without an alternate solution, investors in these securities would be relegated to the "Grey Market" – an opaque, disconnected market with sparse pricing information and no electronic mechanism to facilitate best execution.

Rather than forcing these transactions to the Grey Market, the Commission should address the trading of dark or distressed companies in a way that balances (i) protecting main street

---

that the disclosure is complete and accurate — responsibility for complete and accurate disclosure lies with the company and others involved in the preparation of a company's filings.").

[4] For issuers that make current information publicly available by other means (e.g. on the issuer's own website), a broker-dealer should still be permitted to file a Form 211 with FINRA to initiate quotations in the security.

[5] The more than 85 comments submitted in response to the Proposal to date overwhelmingly express concern that the Proposal will destroy shareholder value. *See e.g.* R. Lefton, Comment to File No. S7-14-19 (Nov. 11, 2019), available at: https://www.sec.gov/comments/s7-14-19/s71419-6408203-198451.htm ("There are many thinly traded, OTC stocks of legitimate, profitable companies. These shares have grown in value over time and continue to be profitable for those who do their research and seek out value."); *see also* Hester M. Peirce, Commissioner, "Broken Windows: Remarks before the 51st Annual Institute on Securities Regulation" (Nov. 4, 2019), available at: https://www.sec.gov/news/speech/peirce-broken-windows-51st-annual-institute-securities-regulation ("Initial commentary in response to our [Rule 15c2-11] proposal is admittedly not very supportive […] Admittedly, getting the balance right is difficult. As we finalize the rule, we need to make sure that it hinders fraudsters without killing the market for micro-cap stocks.").

investors from inadvertently buying securities of issuers that do not make current information available, which can be accomplished by using appropriate risk warnings or "gates", (ii) the availability of an efficient, regulated trading venue for professional investors, and (iii) the property rights of minority investors.

As an operator of regulated markets, our goal is to provide market makers with an open platform where they can find price transparency, achieve best execution and meet their regulatory obligations. The Proposal is premised in large part on the idea that market maker quoting in "No Information" securities can create the appearance demand for the stock and thus make retail investors more susceptible to fraud. We firmly believe in the value of proprietary quotes from competing independent market makers. We are concerned that without access to a regulated electronic platform, it will be easier for public prices to be controlled by a single broker affiliated with the issuer, or manipulated by limit orders from unregulated entities.

Securities in companies that do not provide current information under the Rule, or otherwise fail to meet an exception, should be eligible for quoting on an "Expert Market", where quote distribution is limited to professional investors. By using commonly understood market data licenses intended only for professional investors, retail investors would not have access to quote information in these securities, giving effect to the Proposal's call for increased retail investor protection while not disadvantaging the more experienced, sophisticated investors that make up the bulk of the Proposal's comment file to date. Many broker-dealer compliance teams already use our "No Information" designation and other data-driven methods to make suitability decisions. This results in broker-dealers putting up "gates" that restrict retail investors' access to "No Information" and other high-risk securities. The Commission can build on these industry best practices to modernize the Rule and provide for an "Expert" market where brokers to execute orders for financially sophisticated and risk tolerant investors.

IV. Additional regulatory guidance is necessary to give effect to the Proposed Rule.

We intend to comment on a number of other aspects of the Proposal, with the goal of improving the utility and adoption of the Rule. For example, the Proposal would prohibit market makers from displaying unsolicited quotes representing company insiders, unless current information is publicly available. This obligation to identify insider transactions would place an undue regulatory burden on market makers that provide much needed liquidity in smaller company stocks. For several reasons, the market makers' position would be untenable:

- In a dark company it is hard to ascertain the identify of insiders,
- The insider is not the "customer" of the market maker, and
- Insiders are already clearly subject to Exchange Act Section 10(b) and other existing antifraud provisions.[6]

[6] On www.otcmarkets.com, we provide the following warning for "No Information" companies: "Warning! This company may not be making material information publicly available. Buying or selling this security on the basis of material nonpublic material information is prohibited under Section 10(b) of the Securities Exchange Act of 1934 and Rules 10b-5 and 10b5-1 thereunder. Violators may be subject to civil and criminal penalties."

We thoroughly support restricting insiders, affiliates and control persons from purchasing or selling in the public markets unless adequate current information is publicly available. However, we believe the problem can be more directly addressed outside the scope of the Rule through reform in other areas of securities law, including requiring insiders, affiliates and control persons to provide increased initial and transaction-based disclosure.

The Proposal should also be amended to correct the assertion that company insiders in no-information securities would be permitted to trade.[7] The Commission staff should quickly reinforce that allowing insiders to trade in dark companies should be illegal.

The Proposal's recommended "Shell Company" definition should also be further refined so that it does not prohibit quoting in startups and other limited-operation companies that help spur capital formation. It is extremely difficult to draw bright lines that distinguish between, shell companies, startups and other development stage companies, particularly with respect to companies that do not provide current financial information. Rather than attempting to use the Rule to place all trading in shell companies into a single bucket, the Commission's goal of deterring manipulative practices would be better served by focusing on whether, and under what circumstances, shell company insiders and affiliates should be permitted to sell shares into the market.

The Commission and commenters should consider more technical aspects of Proposal, including the value of permitting piggyback eligibility for securities with a one-sided priced bid quotation. The SEC's Regulation SHO makes it difficult, often prohibitive, for market makers to publish a priced offer in securities with limited liquidity. A priced bid indicates a firm desire to buy the security, which on its own acts as a valid price discovery mechanism.

Other areas of focus include, but are not limited to, (i) more easily determined alternatives to the proposed "unaffiliated shareholders equity" test for the proposed new, large company exception, and (ii) suggestions for improving the ability of broker-dealers to identify insider and affiliate transactions.

Rule 15c2-11 regulates the publication of quotations by broker-dealers. As such, the Rule on its own cannot address every investor protection or capital formation issue. However, if combined with related regulatory changes, including many of the changes we proposed in our comments to the Commission's recent Concept Release on Harmonization of Securities Offering Exemptions,[8] the Rule can be a vital component in a functioning capital formation ecosystem.

OTC Markets Group is committed to working with all industry stakeholders, and we welcome feedback on this letter in advance of filing our more comprehensive response to the Proposal. The Commission's Proposal contains many valuable elements, and by engaging industry

---

[7] *See* Proposed Rule and Concept Release: Publication or Submission of Quotations without Specified Information, Release No. 34-87115, at pg. 77 (Sept. 25, 2019), available at: https://www.sec.gov/rules/proposed/2019/34-87115.pdf ("the proposed amendments to the Rule would not preclude a company insider from engaging in trading activity; Rule 15c2-11 applies only to the publication and submission of quotations in a quotation medium. Thus, the Rule, as proposed, would not prevent a company insider's purchases or sales in response to quotations.").

[8] *See* OTC Markets Group Inc., Comment to File No. S7-08-19 (Sept. 24, 2019), available at: https://www.sec.gov/comments/s7-08-19/s70819-6193364-192517.pdf.

stakeholders to focus on where to place the gates in our markets and how to identify the responsible gatekeepers, an amended Rule 15c2-11 can be appropriately tailored to help to improve the transparency and efficiency of the OTC marketplace.

Please contact Dan Zinn, General Counsel (dan@otcmarkets.com), or Cass Sanford, Associate General Counsel (cass@otcmarkets.com), with any questions or to request additional information.

Very truly yours,

Daniel Zinn
General Counsel

Cass Sanford
Associate General Counsel