LEONARD W. BURNINGHAM
LAWYER
2150 SOUTH 1300 EAST • SUITE 500
SALT LAKE CITY, UTAH 84106

OF COUNSEL
BRANDEN T. BURNINGHAM, ESQ.
BRADLEY C. BURNINGHAM, ESQ.

TELEPHONE (801) 363-7411
FAX (801) 990-4235
[redacted]
WWW.BURNINGHAMLAWGROUP.COM

December 30, 2019

Via Electronic Submission

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

Re: Comments to the Securities and Exchange Commission's (the "SEC") "Publication or Submission of Quotations Without Specified Information" (File No.: S7-14-19) Release (the "Release")

Ladies and Gentlemen:

I have the following comments with respect to the Release, and I appreciate the opportunity to provide them, along with the SEC's recognition of the availability of "current" publicly available information about publicly-traded companies and its value to the public markets as provided by an IDQS like OTC Markets Group, Inc. (the "OTC Markets").

Introduction

In considering and preparing my comments on the Release, I have read the 300 plus pages of the referenced Release, and I have had the opportunity to review the "Preliminary Comments" of the OTC Markets dated November 25, 2019, respecting the Release; the OTC Markets "Comments" on the "Concept Release on Harmonization of Securities Offering Exemptions" (File No.: S7-08-19) dated September 24, 2019; and I have viewed the OTC Markets webinar on the Release. I have also briefly considered the history of the SEC's rules and regulations regarding the resale of "restricted securities" and other securities prior to the adoption of Rule 144 and Rule 144 as amended to date, along with the resale exemption contained in Section 4(a)(1) of the Securities Act of 1933, as amended (the "Securities Act"), which, until the enactment of the Jobs Act in 2012, was historically known as "Section 4(1)," an exemption for "routine trading transactions" that is now embodied in the "safe harbor" of Rule 144. A short description of the history of these regulations and this exemption is included herein for perspective on some of my comments.

All references to "page" numbers herein refer to the page number of the Release where applicable.

These comments are made from the view of a private practioner who has primarily represented publicly-held companies and shareholders of these and other publicly-held companies, in connection with the offer, sale and resale of securities made in private placements, transactions through broker-dealers, securites issued in connection with mergers or acquisitions or otherwise in private and public markets, along with related legal services, rather than having represented broker-dealers or other securities industry professionals in these kinds of transactions.

My comments fully support the premise of the OTC Markets stated in its Preliminary Comments regarding "the web of regulation designed to protect investors and promote orderly markets," that "well-meaning regulation comes with a significant burden that has reduced the use of registered securities offerings, raised the cost of being SEC reporting, and lowered the number of companies that choose to be public."

It is clear from my legal practice that this "well-meaning" regulation has also substantially raised the time, cost and expense for investors to deposit and sell securities of smaller priced issuers, whether purchased in private placements or SEC registered offerings; and at the same time, has disproportionately increased the risks associated with these types of transactions for issuers, transfer agents, broker-dealers and their clearing houses, along with associated costs to mitigate these risks. As briefly outlined herein, the end result of this web of regulation has been the deterioration of a fair and open trading market for smaller priced securities in which issuers and investor can participate, regardless of whether there is "current" publicly available information about these issuers.

Except for qualifying comments below, I believe the OTC Markets Preliminary Comments on the Release that were dated November 25, 2019, if adopted, will greatly improve the trading markets for securities in general and certainly those of smaller companies, where the marketabilty for these securities has suffered greatly, despite the availability of adequate "current" public information about them and the uncertain definition of a "shell company" in Rule 12b-2 of the Exchange Act and subparagraph (i) of SEC Rule 144.

Cursory History of the Resale of Restricted Securities.

Prior to the SEC's adoption of Rule 144 in 1972, there was no real established holding period for "unregistered securities" or recognized SEC policy as to when an investor's "investment intent" had been satisfied or when such securities had come to rest. Though the SEC had a "change of circumstances" policy, the only way to take advantage of that policy was through a "no action" request or through a court action where an "Order to Show Cause" why then Section 4(1) was not available for the resale of the subject securities.

With the adoption of Rule 144, there was a three (3) year safe harbor holding period, depending upon publicly available information about the particular issuer. That was easily satisfied with respect to "reporting issuers" under the Securities Exchange Act of 1934, as amended (the "Exchange Act"); however, subparagraph (c)(2) of the Rule relied upon the information outlined in Rule 15c2-11(a)(5) and whether it was in fact "current" and "publicly available." The SEC considered the information "reasonably current" if it complied with the Rule; however, whether it was "publicly available was often a question of fact. An issuer did not meet the conditions of (c)(2) of the Rule unless the information concerning itself, as specified in Rule 15c2-11(a)(5), was "publicly available." According to the Staff of the SEC, this meant such information should be made available on an ongoing and continuous basis through the issuance of periodic reports to security holders, market makers, brokers, financial statistical services and any other interested parties. Financial statistical services included Moody's and Standard & Poor's, neither of which are customarily currently used by most smaller reporting companies. "Determining what is 'adequate' publication of specified information under Rule 144(c)(2) will depend upon the nature of the issuer and the nature of the actual and potential market for its securities. It appears, however, that information that is made available to stockholders, market-makers, brokers and any person who requests it is likely to be considered to be publicly available." Hicks, *Resales of Restricted Securities*, Sections 4.94-4.99, 2015 Ed., page 243 (also see generally, pages 244-248, of Section 4.98).

The Staff of the SEC subsequently heralded the the use of the Internet in providing public access to material information regarding issuers. "The Internet has already changed the face of brokerage and investment management through online trading and other innovations. It may also redefine disclosure and what constitutes an exchange before we're through." (Remarks of Chairman Arthur Levitt, Securities Industry Association, Boca Raton, Florida (November 7, 1996). "We are in the midst of a technological revolution. One day, paper delivery may well become the investor communication vehicle of last resort--as opposed to first resort...[E}lectronic delivery of information is not just an alternative medium for communicating, it allows for a different way of communicating. With electronic delivery, it is far easier to engage in high level analytic, real time comparisons, full text searches, industry reviews, trend spotting, etcetera. It also will provide the visually-impaired access to fundamental investor information mandated by the government. Simply put, electronic delivery is better than paper. And it is something we should be encouraging, not discouraging." (Remarks of Commissioner Steven M. H. Wallman, before the Investment Company Institute's 1995 Investment Company Directors Conference & New Directors Workshop, Stouffer Renaissance Mayflower Hotel, Washington, D.C. [September 22, 1995]).

The foregoing has come to fruition with the information provided by the Edgar Archives and the OTC Markets, which is a qualified Interdealer Quotation System ("IDQS"), an information repository facilitating current company information and is, to my understanding, a broker registered with the SEC.

On "holding periods," an investor was not even allowed to "tack" the holding period of a non-affiliate predecessor until the 1990 amendments to the Rule! And the 2008 amendments, though reducing the holding periods for "restricted securities," added the "shell company" exceptions from the safe harbor and set the regulations for resale back to the pre-Rule 144 days, and had and continue to have substantial adverse effects on the public markets of many smaller companies, which are discussed below. I believe the "Form 10 Information" requirements were a good addition to the Rule; however, the broad definition of a "shell company" has limited the ability to trade many securities and has substantially increased the cost of sale of many securities even if they were acquired under a registration statement.

The Release stated that a broker could determine if an issuer was a "shell company" in less than one minute (the last sentence at the bottom of page 156 of the Release). Funny, or at least it is a joke. The lack of a checked "Yes" on the "shell company" box on the cover page of a report filed by an issuer with the SEC is far from determinative of whether a company is a "shell company." Whether an issuer is a "shell company" is a question of fact, that often takes considerable effort to determine, and especially as the definition does not apply to "start-up" companies (SEC footnote 172 in its adopting release of Rule 144 amendments effective in the spring of 2008), and how long can an issuer rely on the "start-up" determination, a month, six months, a year, more? The SEC should consider Rule 144(c)(2) information that is "current" to be satisfactory for issuers and shareholders to rely on Rule 144 for the resale of shares of a former "shell company," even if there was some kind of a required time period for having continuously filed "current" information with OTC Markets or another IDQS, much like the "Form 10 Information" requirement of subparagraph (i) of Rule 144 for "reporting issuers." I have a client that was a "blank check company" over 20+ years ago, and is still subject to the "shell company" disqualifications of Rule 144 resale availability, despite the law that then allowed these types of companies to lawfully offer and sell securities. Today, brokers require legal opinions of shareholders who own registered, restricted or free trading shares of issuers traded in the over-the-counter market, and often require another legal opinion of their own legal counsel. A shareholder who bought 2,000 shares for $1 would need to have the share price more than double to even come close to breaking even on these costs, let alone make a profit. The OTC Markets September 24, 2019, comments on the "Concept Release on Harmonization of Securities Offering Exemptions" were very timely in today's markets! There needs to be some kind of a "safe harbor."

IDQS Determination and FINRA.

The SEC's recognition of the information that is available on publicly-held companies today, including those that are not "reporting issuers" under the the Exchange Act, is an important factor in the determinations made by the SEC in the Release, especially for "catch-all issuers," which are issuers that have "no reporting for disclosure obligation" (page 25). There were 3,211 issuers in 2018 that did not have "current" financial information available about them, 1,954 of these being catch-all issuers (pages

147 and 173, respectively); and the securities of 2,011 catch-all issuers would not be subject to quotation via a "piggyback exception" (page 189), as a result thereof if the recommendations in the Release are adopted as proposed. Note also that there were only 56 211's filed for catch-all issuers in 2018 (page 143). Allowing an IDQS like the OTC Markets to satisfy the informational requirements of Rule 15c2-11 is a primary factor that mitigates these numbers only if FINRA reviews and updates its Rule 6432 accordingly so broker-dealers "are allowed to rely on the determination of a qualified IDQS, to initiate quotations without the filing of a separate Form 211 with FINRA and should be permitted to join a quoted market without the 30-day 'piggyback eligibility' period following the initial quotation." (page 3, OTC Markets Preliminary Comments). I concur that this is one of the most important factors in considering the effects of the proposed changes to Rule 15c2-11. Allowing brokers to charge a reasonable fee for filing 211's also seems very reasonable, and would increase this practice, especially for catch-all issuers. Fees are currently charged by brokers and transfer agents for DTC eligibility service, so this concept is not new, and these prices are competitive.

Bringing information current and then having to go through the present FINRA 211 process does not provide the necessary benefit or incentive for issuers to promptly provide current and publicly available information as required by Rule 15c2-11, as I have experienced this process over the years, regardless of the proposed changes to Rule 15c2-11. The FINRA process can be long and arduous, with no timeline, and often with six (6) to nine (9) months or more lapsing between FINRA comments, many of which are mundane, and responses between brokers and FINRA, regardless of whether the issuer is a "reporting issuer" under the Exchange Act or whether the issuer has just filed a recently effective S-1 Registration Statement. If FINRA does not revisit Rule 6432 and update it as suggested, the proposed regulations embodied in the Release will do little to enhance the ability of issuers to have their shares publicly traded, and will deny shareholders a method of buying or disposing of shares they have purchased or desire to purchase. Taking away the piggyback exception for brokers without creating a reasonable method to re-institute quotations when "current" information is or has becomes available, will not improve the trading markets or provide the incentive for all issuers to provide adequate and current publicly-available information.

Also, a great deal of the SEC's discussion in the Release is about the piggyback exception and "unsolicited" bids and offers related to insiders selling or buying shares. Today, brokers require legal opinions of shareholders who own registered, restricted or free trading shares of issuers traded in the over-the-counter market, and often require another legal opinion of their own legal counsel. As indicated above regarding the cost and expense to an investor of reselling securities, restricted or otherwise, is very high, owing to regulations designed to curb one type of behavior, the trading in shell companies, without taking into consideration the obligations of the gatekeepers, which is discussed below, and the enforcement of these obligations on the gatekeepers. The OTC Markets September 24, 2019, comments on the "Concept Release on Harmonization of Securities Offering Exemptions" were very timely in today's markets! There needs to be some kind of a "safe harbor."

It also seems that the SEC, by what it is proposing on the piggyback exception for quotations by brokers, is attempting to limit the ability of investors to sell shares in companies that are not "current," which is discussed in many of the comments I reviewed online about the Release, and that alone seems to me to be an attempt to do away with the statutory exemption from registration provided in Section 4(a)(1) of the Securities Act. As far as the concerns expressed about insiders, and based upon what broker-dealers presently require to sell any securities that are not listed on a recognized national exchange, the gatekeepers, who are lawyers, brokers, their clearing houses and transfer agents, along with the issuers, should be able to determine when the transactions are those of insiders or "affiliates" and take adequate measures, especially in light of the risks of non-compliance, without over regulation that will have additional adverse affects on the market in many small companies' securities. Further, it has been the position of the SEC that the Section 4(a)(1) exemption is not available for the resale of any securities of an issuer that is or was a "shell company," by directors, executive officers, promoters or founders or their transferees. See NASD Regulation, Inc., CCH Federal Securities Law Reporter, 1990-2000 Decisions, Paragraph No. 77,681, the so-called "Worm-Wulff Letter." This position is contained in Securities Act Release No. 33-8899, effective February 15, 2008, which codified the position of the SEC set forth in the Worm-Wulff Letter and the revised Rule 144 as outlined above. I disagree with this position as Section 4(a)(1) is a statutory exemption contained in the Securities Act and is not subject to the limitations of the SEC, though their interpretive advice should be considered.

Another issue I have found is that many brokers quote securities of small priced companies and will not accept deposits from customers. In one instance, I contacted all six (6) market makers on a particular small priced issuer, and was advised by each broker that none was accepting deposits of securities of customers. What are they, "bookies" just looking for profit on the spread?

Expert Market.

I believe an "Expert" market as proposed by OTC Markets is one viable option for securities for which there is no current public information available; however, you cannot put a life size cut out of a stock certificate on the curb, with a "Clean One Owner" sign on it like cars are often sold. All kinds of people invest in securities of issuers that do not provide current publicly available information. Many of the SEC's concerns expressed in its Release are clearly covered by OTC Markets policies, including warnings about the lack of current information, caveat emptor designations, shell risk designations, stock promotions and many more. Small priced stocks and the ability to purchase and sell them effectively and with only reasonable regulation is an important foundation of our country, which was clearly the reason for Congress adopting crowd funding and related regulations. If you can buy them and not sell them, how is that reasonable? The preamble of the Securities Act should be considered in adopting these proposals: "To provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through mails, and to prevent frauds in the sale thereof, and for other purposes."

Shell Companies.

Shell companies are a valuable tool for private companies to go public, and if they provide "current" publicly available information, they should not be singled out. This is America. "SPACs" are fine, only because they require a shareholder vote and a right of rescission, though all are essentially Board approved transactions for which few stockholders ever exercise rescission rights, despite the disclosure, which is often long and very complicated. The SEC's purpose as stated above should be satisfied by "current" disclosure. The OTC Markets provides, in addition to information, risks and caveats and other very important information that any investor can access, easily, also as outlined above though more explicitly in its very inclusive website. Increase this type of disclosure if you like; however, leave the decision to invest to those who desire to invest! There are "penny stock" statements that need to be signed or provided by investors to brokers, and if you need more, craft and require them. Blanket prohibitions take out a lot more than specific ones. I understand the SEC's reticence to set specific guidelines, as too often these guidelines are utilized to "walk the line" and give a blue print for safety to those who would violate the law; however, you found no issue with that in your definition of a "shell company," and if vague is what is required to avoid "never," then let's have vague.

Toxic Notes

Though not a part of your Release, I believe a comment on promissory notes that have a substantial discount to market on exercise should be made. The SEC uses percentage fees in any ruling of whether a "finder" or an introducing party to an investment is a broker, so why is one allowed to have an 80% discount to market not an "underwriter"? If that is not taking with a view of "distribution," I don't know what is. When these discounts are negotiated in advance, they turn these promissory notes into "riskless" investments and make the purchaser an "underwriter." No one questions that an issuer can reduce the price of conversion of a convertible securities, based upon reasonable factors, including the then current market price, among others; however, that is not what is happening in the case of these "Toxic Notes." And what about the number of times that the shares that could be issued if purchased would substantially exceed the authorized shares of an issuer that is party to these arrangements? In conducting "due diligence," I have seen many issuers who engage in transactions with these types of notes sell them like "produce" in a grocery store, merely to pay their own salaries when there is no real business even being conducted. Do you believe these are done without promotion of some kind and then short selling before the conversion? Why else would there be provisions for $1,000 daily penalties for each day beyond two (2) days that the certificate

for the converted shares is not delivered? To quote a deceased and beloved American hero, "Not hardly Pilgrim."

Respectfully submitted,

Leonard W. Burningham