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February 7, 2020

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

Re: Release No. 34-87115; File No. S7-08-19

Dear Ms. Countryman:

Virtu Financial, Inc. ("Virtu") appreciates the opportunity to provide comments on the proposal (the "Proposal") by the Securities and Exchange Commission ("the Commission") to amend Rule 15c2-11 (the "Rule") under the Securities Exchange Act of 1934 ("Exchange Act").

About Virtu

Virtu is a public company and leading financial firm that leverages cutting edge technology to deliver liquidity to the global markets in approximately 25,000 financial instruments, at 235 venues, in 36 countries worldwide. Virtu's broker-dealer subsidiary Virtu Americas LLC is one of the largest market-makers in over-the-counter ("OTC") securities, making markets in several thousand of them.

Virtu provides execution services to more than 700 institutional investors and broker dealers. Virtu does not recommend investments to our clients or solicit them to make investments in OTC securities. Virtu's business is to facilitate price discovery and aid in risk transfer through the publication of competing quotations and provision of liquidity.

Introduction

Virtu supports the Commission's laudable goals of providing greater transparency to investors in OTC securities, providing greater protections to retail investors, and reducing regulatory burdens on broker-dealers in connection with the publication of quotations of certain OTC securities. However, we respectfully submit that, in certain respects, the Proposal is too blunt an instrument to achieve the Commission's objectives of protecting retail investors and would in fact harm, rather than protect, both retail investors and institutional investors.

Here's why. Functionally, the Proposal would eliminate market maker quoting not just for those penny stocks and shell companies that are the source of the fraudulent activity the Commission is seeking to root out, but also for many legitimate companies that have operated profitably for decades but for a variety of non-fraudulent reasons choose not to publish current

information. Many of these issuers are family-owned businesses, community banks, or real estate ventures that have significant tangible assets, robust operations, no long-term debt, and low price to earnings ratios. Many of these companies, which have no legal obligation to provide current information, choose not to do so. Some would prefer not to pay the fees to OTC Markets to publish the information. Others prefer to only make information available to their shareholders, and yet others prefer not to publish current information because they no longer want to be traded publicly.

The Proposal would have the perverse effect of eliminating liquidity in these legitimate companies by forcing them to the grey market and would mark a return to an earlier era where all transactions in the grey market are handled by telephone or other highly manual and inefficient processes. In this scenario, it would be virtually impossible for an investor in a legitimate company to obtain reliable price discovery. And, as reflected in dozens of letters in the comment file, investors holding such securities would be materially harmed because grey market stocks would trade at heavily discounted prices due to lack of transparency and lack of a liquid marketplace.

Furthermore, we are concerned that, despite the well-intentioned objectives underlying the Proposal, it will not actually be successful in rooting out the fraudulent activity that is being targeted. We believe that not only is fraudulent behavior is occurring in penny stock and shell companies that are not reporting information, but in fact, it is also occurring in companies that are reporting information. Individuals controlling these companies have an incentive to comply with their reporting obligations so that they can prey on retail investors through "pump and dump" schemes and other misconduct. By the time they stop reporting and their securities become ineligible for quoting the damage has been done.

Accordingly, these issuers will continue to qualify for quoting while they engage in fraudulent activity, while legitimate companies that choose not to report will be relegated to the grey markets. This will be the case even for issuers like community banks, which have an obligation to report information to regulatory authorities. Or for companies in bankruptcy, which have an obligation to report information to a court. We respectfully submit that the Proposal is not sufficiently nuanced to differentiate these legitimate companies from the penny stock and shell companies the Commission is trying to target.

Rather than relying solely on the blunt criterion of reporting status, the Commission instead should consider using other objective criteria that are indicative of fraudulent activity. As described in more detail below, OTC Markets already has in place a comprehensive system for alerting investors to potentially fraudulent activity. For example, investors can see if an issuer is currently involved in a promotional campaign, displays characteristics common to shell companies, or for which current contact information for the company is not verifiable.[1] These are the types of red flags the Proposal should be targeting, rather than the overly-broad measure of current reporting that risks throwing the baby out with the bathwater.

We believe that any final rule must seek to promote transparent markets that allow for investors to find price discovery and transfer risk in an efficient manner while also helping to protect the

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[1] *See* OTC Markets "Compliance Flags" (a suite of marketplace "designations" and informational "flags" to help identify opportunity and quantify risk), *available at* https://www.otcmarkets.com/files/OTCM%20Compliance%20Flags.pdf

most vulnerable investors from becoming the victims of fraud. Virtu is generally supportive of those aspects of the Proposal that would help to achieve this delicate balance, including those that would:

- Add an exception to allow broker-dealers to publish quotations of securities for certain issuers with significant assets and trading volume without being required to conduct the information review required by the existing Rule;
- Allow a regulated interdealer quotation system (IDQS) to conduct the information review that is currently only permitted to be conducted by broker-dealers that publish or submit quotations;
- Allow a qualified IDQS or a national securities association to be able to determine whether certain exceptions for broker-dealers are available; and
- Streamline the existing Rule to remove obsolete provisions and make technical non-substantive changes.

Evolution of the OTC Marketplace

As the proposal recognizes, much has changed since the Commission last amended Rule 15c2-11 in 1991. Among the most significant developments has been the growth of the internet, which has greatly increased investors' access to issuer information. Additionally, as noted above, OTC Markets has introduced a number of important tools that assist retail investors in assessing the risk of OTC securities, including those with "limited" or "no information", such as:

- OTC Markets "Tier System" providing quick identification of the information a company provides
- OTC Markets analytics tools that assist broker-dealers in measuring a variety of risk factors
- OTC Markets identifier for shell risk
- OTC Markets identifier of current promotional campaigns
- OTC Markets Transfer Agent Verification
- OTC Markets labeling stocks as Caveat Emptor[2]

This information is easily accessible for all investors to read. Further, OTC collects and distributes metrics to the trading community in order to asses any potential manipulative or fraudulent activity in these names. These improvements have largely addressed the Commission's stated objectives in a methodical and practical way. These changes afford all investors a broad depth of information about the OTC companies in which they are looking to invest. Virtu believes that it is in the best interest of the OTC marketplace to continue to improve investor safeguards without harming beneficial aspects of the market. Virtu also believes in the importance of balancing investor protection with the need for liquid, transparent, electronic markets to allow for fluid risk transfer across the OTC landscape.

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[2] *Id.*

Virtu has significant concerns about the number of securities – 3, 211 – the Commission estimates would lose the piggyback exception and be dropped from quotation to solve a problem that is already being addressed by the marketplace, where a subset of the investing public is actively trading while fully aware of the risks involved.

It is with this in mind that we have limited our comments to the parts of the proposal that we believe warrant more analysis and that would have the most adverse consequences for investors and the OTC marketplace, as well as the proposed changes that we think would best serve the retail investor and OTC marketplace alike.

Comment 1: Virtu Supports an Exemption for Certain Issuers with Substantial Assets and Trading Activity but Suggests Alternative Tests to Expand the Number of Securities Eligible for Quotation without a Requirement for Market Makers to Conduct an Expansive Information Review

Virtu supports the idea of an exemption for market makers to quote issuers with substantial assets and trading volume without being required to conduct the information review. However, we are concerned that the Proposed Rule will not reach enough securities and specifically the securities of issuers that have not been associated with market manipulation and fraud.

First, we believe that using the existing definition of a "penny stock"[3] (i.e., stocks trading under $5 a share and otherwise not qualifying for other exemptions) is a straight-forward and easily implementable test for determining whether a security should be subject to the Rule. In this scenario, stocks meeting the definition of a penny stock that are not reporting current information generally would not be eligible for quotation under the Rule. While this test might leave some a handful of issuers for which there are concerns it capture the greatest number of issuers that are not of concern.

Second, we believe that some kind of trading volume, or trading activity, test could be a viable solution. Many of the legitimate companies that are not subject to fraud trade very infrequently, whereas stocks that are subject to "pump and dumps" and other fraudulent activity experience wild swings in trading volume and numbers of transactions.

Finally, we believe the Commission should also consider other tests that would expand the categories of issuers that qualify for this exception. For example, banks and insurance companies that provide information to their regulators could be included. Issuers that are going through bankruptcy and providing information to a bankruptcy court could be included. And stocks that have a verifiable operating history, revenues, and that pay dividends might be included.

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[3] 17 CFR § 240.3a51-1 - Definition of "penny stock".

Comment 2: Virtu Believes that "No Information/Limited Information" Symbols Should Not Be Relegated to the Grey Market and Supports the Development of an "Expert Market"

In the Proposal, the Commission contends that market participants can take advantage of the piggyback exception to the detriment of retail investors, asserting that "an active trading market, built upon broker-dealers' quotations, can give the market for the securities an appearance of credibility. Such a situation can facilitate the purchase or sale of securities even when there is no or limited current issuer information publicly available to investors. Without current public information about an issuer, it is difficult for an investor or other market participant to evaluate the issuer and the risks involved in purchasing or selling its securities."[4] Thus, the Commission proposes to condition the availability of the piggyback exception on certain issuer information being current and publicly available.

Virtu recognizes that the Commission has valid concerns with regard to the potential for market abuse in less transparent markets and we recognize the value of having information about an issuer's securities available to investors. However, as discussed above, Virtu is concerned that the proposed changes to the piggyback exception requiring current information to be available for reliance on the exception will have unintended consequences for many of OTC securities that have not necessarily been the type of securities that have been associated with abuses. It has been our experience as a top market maker in OTC securities that pump and dump schemes and potentially manipulative behavior are not concentrated solely in "No Information/Limited Information" securities. They are present across all OTC tiers as well as for Small Cap securities listed on the Nasdaq Capital market and the NYSE American Small Cap market.

The proposed rule change, in an effort to protect the retail investor, would effectively eliminate stocks currently in the OTC Markets "No Information/Limited Information" tiers. If this occurs, current shareholders of "No Information/Limited Information" names would be irreparably harmed, as such stocks would immediately be dropped from electronic quoting and trade in the grey market. The practical effect of such a move would, for all intents and purposes, make the shares worthless. Additionally, our experience has been that grey market stocks have slower execution speeds, are more cumbersome to demonstrate best execution, are less liquid, have wider spreads, and are more prone to pricing abnormalities.[5] Furthermore, markets are harder to manipulate when competitive market makers not affiliated with the issuer are allowed to participate in the marketplace.

Virtu firmly believes that further analysis needs to be completed to assess the financial impact to current shareholders of these stocks including the number of shareholders that will be affected

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[4] As noted above, however, even for stocks that are not publishing current information, OTC Markets publishes "Compliance Flags", a suite of marketplace "designations" and informational "flags" to help identify opportunity and quantify risk. *See supra* n. 1.

[5] *See* Proposal at p. 181 (acknowledging that "retail investors could benefit from more efficient prices that are less susceptible to manipulation as a result of the trading activity of better-informed investors who acquire this information.").

and the potential loss in value of the securities that could be impaired. For reference, during a single day in the month of January 2020, Virtu held in aggregate for "No Information/Limited Information" securities: over 17,000 limit orders totaling more than $23 million in notional value. Because Virtu does not hold the accounts of the investors placing these orders but rather serves as an intermediary we do not have insight into the actual amounts of these securities held by investors. However, based upon the number of orders on our order books we can surmise that there may be significant amount of these securities whose value may be impaired.

The unintended consequences of turning these names entirely "dark" – for example, less pricing transparency, wider spreads, and longer time of execution – far outweigh any benefits. Moreover, given that transparency is a stated goal of the Commission in issuing this proposal,[6] making a stock go entirely "dark" does not seem like an appropriate outcome.

Virtu believes that securities that no longer qualify for quoting under the Proposal should be eligible for quotation in an "Expert Market" similar to the framework proposed by OTC Markets in its comment letter.[7] Although the exact parameters of how such an Expert Market would operate remain to be fleshed out, we believe that such a solution is a viable alternative that would protect investors in legitimate issuers and preserve shareholder value.

Here's how it would work. In an Expert Market, while trade data would be publicly disseminated, market/quote data would only available to market makers and to certain categories of sophisticated investors, such as accredited investors, registered investment advisors, or persons with similar credentials. Indeed, the Commission's recent proposed amendments to the accredited investor definition could be a useful proxy in defining eligibility for the Expert Market.

This limited electronic market would provide for better transparency and liquidity by allowing market makers to see inside and depth of market. Market makers could append the electronic quotes to trades to provide evidence of best execution. The Expert Market also would alleviate the burdensome manual execution that currently accompanies trading in the grey market. Investors, however, would need to request a quote from their broker-dealer. For all intents and purposes, for the individual investor, the Expert Market would operate the same way as the grey market, but without sacrificing price discovery, transparency, or liquidity for securities of legitimate issuers, and without harming the investors who hold them.

While Virtu is generally supportive of the Expert Market model proposed by OTC Markets, provided below certain modifications or clarifications that we would suggest to enhance investor protection and promote the efficiency of its operation:

- Allow market makers to quote proprietarily and use the market maker exception to short stocks. This would allow for a smoother transition for the 3,000+ names that would potentially lose the piggyback exception. Proprietary markets would allow for greater liquidity, tighter spreads, and better facilitation of risk transfer for shareholders. Without

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[6] *See* Proposal at. p. 1 ("The Commission is proposing to provide greater transparency to investors and other market participants by requiring that information about the issuer and the security be current and publicly available…").

[7] OTC Markets Comment Letter (Dec. 30, 2019), available at https://www.sec.gov/comments/s7-14-19/s71419-6590623-202249.pdf.

this change, there would be significant losses and price dislocation in these stocks as they move to the Expert Market.

- Require investors to "opt-in" to see Expert Market data. Retail accounts should default to not being able to see market data on these names. This would prevent an investor from being enticed to buy, or accidentally buying, a stock that exceeds their risk tolerance. However, the Commission should allow for deep value or active traders to "opt-in" to see the market data on these names. This could be done at the broker-dealer level by having the customer sign an attestation that they understand what the Expert Market is and the risks involved. It is in this way the individual investor will benefit from an added layer of protection while existing shareholders would have the protection of a liquid market. Additionally, the issuers will have a liquid market where their shares can trade, thereby avoiding potential litigation as referenced in some of the comment letters.

- Prohibit insiders and affiliates from submitting orders in stocks in the Expert Market. As the Commission suggested in regard to unsolicited orders – insiders and affiliates should not be able to trade in names where current and public information is not available.

- Prohibit any solicited orders in the Expert Market. This would eliminate any cold calls or questionable practices where uninformed investors could be subject to a "pump and dump" scheme or other manipulative activity.

Together, these changes would provide for the reduction of risk to the unsophisticated investor while preserving shareholder value, liquidity, and the ability for risk transfer. These steps would further the Commission's goal of increased investor protection, but without eliminating the significant benefits the OTC marketplace offers to investors.

Comment 3: Virtu Believes More Analysis of the Burden of Implementation and Potential Impact on Competition is Needed

Virtu also believes that additional analysis is needed concerning the implementation, financial impact, and potential anti-competitive aspects of the Proposal. The Commission clearly acknowledges that there are potential financial burdens associated with the proposed amendments to the Rule.[8] For example, as a cost mitigant to the broker-dealer community, the Commission proposes to allow an IDQS to file Forms 211 with FINRA , and to allow market makers to rely on the IDQS exception to publish a quote. It is unclear, however, what financial costs the market making community will incur for the services provided by Qualified IDQS (OTC Markets). Specifically, clarification is needed as to financial costs that may be potentially passed on to issuers, broker-dealers and investors for such services (collecting, reviewing and maintaining records).

Implementation cost was one of the reasons past efforts to amend 15c2-11 did not succeed. While the IDQS exception would solve this problem in theory, there are few details on the potential costs that would enable us to understand if it would work in practice. Without any

[8] *See* Proposal at p. 152, "Table 1 – Summary of Estimated Burdens associated with Initial Publication"; and at p. 162, "Table 2 – Summary of Estimated Other Burdens".

analysis fee caps or proposed fee schedules, there is no way for the Commission or the market making community to anticipate the potential financial burden the Proposal will impose. The Proposal fails to fully explore the significant compliance burdens that would be borne by the market makers, such as identifying affiliates under KYCC rules or identifying possible shell companies.

Additionally, we respectfully submit that the Commission should undertake further analysis as to how allowing OTC Markets, which operates its own ECN, to charge other market participants a fee will impact the marketplace. Potential impacts to consider include:

- The number of market makers per stock could decrease;
- The OTC Markets fee structure could be used to incentivize market makers to send orders to the OTC Markets ECN;
- There could be an impact on other ECNs in the space (e.g., ARCA, DBOX).

Further, it is unclear as to whether any costs will be passed to issuers. The Regulatory Flexibility Act[9] requires federal agencies, in promulgation of rules, to consider the impact of those rules on small businesses. We respectfully submit that the Commission has not fully considered the potential effects of the Proposal on all market participants,[10] and in particular believe that further analysis needs to be completed to determine the impact on the issuer community. For example:

- Do IDQSs plan to charge issuers a fee to the issuers for this service?
- Will the Commission impose a cap of the fees that a third party can charge?
- Did the Commission determine the finical burden on companies affected?
- Have companies been notified of proposed rule change? What concerns have they raised?
- What analysis has the Commission undertaken to anticipate how the proposed rule change will affect hiring, staffing, compensation, and capital formation?

Comment 4: Virtu Supports and Exemption Allowing Broker-Dealers to Rely on Qualified IDQSs or a Registered National Securities Association Determinations that Exceptions are Available

Virtu also supports the Commission's proposed exemption that would allow broker-dealers to rely on determinations made by a Qualified IDQS or National Securities Association. We believe this exemption potentially strikes an appropriate balance by helping to alleviate the burden on

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[9] 5 U.S.C. 601 et seq.

[10] Indeed, a number of questions included in the Proposal demonstrate that the Commission has not performed a comprehensive analysis. *See, e.g.*, Proposal at pp. 41-42: "What are the potential costs to issuers, particularly small businesses, of requiring that information, including proposed paragraph (b)(5) information that is current, be made publicly available in a way that would be easily accessible to investors, particularly retail investors?"; Proposal at. p. 58: "Would the six month time frame place an undue burden on small issuers? Would the six month time frame discourage small issuers from raising capital in the public markets? What are the potential costs and benefits to small issuers of this six month time frame?"

broker-dealers involved in compliance with Rule 15c2-11, while preserving the Commission's objective to assure that information is available to investors. However, without the benefit of information about the fees that would be charged by an IDQS, we cannot reasonably estimate the financial burden. It is very possible that some market makers would leave the marketplace because of the additional cost. It is our belief that fewer market makers would result in a less efficient, less robust marketplace.

Comment 6: Virtu Supports an Exemption for Certain Foreign Securities

Finally, Virtu supports an exemption that would allow broker-dealers to publish quotations in securities of a foreign private issuer that: (i) satisfies the ADTV test in proposed Rule 15c2-11(f)(5); (ii) is currently traded on a "designated offshore securities market" designated as such by the Commission as satisfying the criteria in Securities Act Rule 902(b)(2); and (iii) trading in the security is not suspended by a foreign financial regulatory authority.

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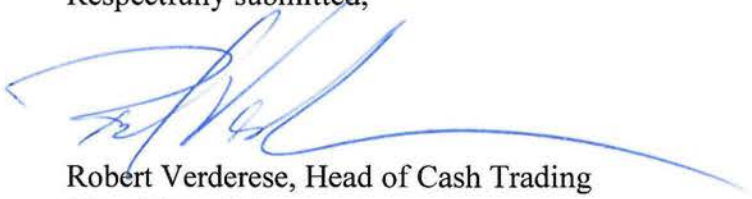
Virtu appreciates the opportunity to provide comments on the Proposal. For far too long, retail investors in the OTC marketplace have been irreparably harmed by fraudulent market manipulation, and Virtu applauds the Commission's efforts to protect investors in this space. We believe that modest tailoring of the Proposal along the lines described above will result in a final rule that achieves the SEC's objectives without harming the thousands of investors who hold securities in legitimate companies that are not vulnerable to the abuses the SEC is aiming to root out.

Respectfully submitted,



Robert Verderese, Head of Cash Trading
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