



HUNTER TAUBMAN FISCHER & LI LLC

NEW YORK WASHINGTON, D.C. MIAMI

May 28, 2020

Securities and Exchange Commission
100 F St. NW
Washington, DC 20549-9303

Rule-comments@sec.gov

Re: Publication or Submission of Quotations Without Specified Information a/k/a OTC Disclosure
File S7-14-19

Ladies and Gentlemen:

We at Hunter Taubman Fischer & Li LLC (“HTFL”) sincerely appreciate the opportunity to comment on certain amendments proposed by the Securities and Exchange Commission (the “Commission”) to Rule 15c2-11 (the “Rule”) pursuant to the above referenced rule making proposal (the “Proposal”). We support the Commission’s goal of modernizing Rule 15c2-11 in order to create greater transparency in the market for over-the-counter (“OTC”) securities, protect investors from fraud, and improve efficiency in the market for OTC securities.

We agree with certain proposed changes to the Rule, as set forth in the Proposal, in particular allowing broker-dealers to rely on the determination of a qualified inter-dealer quotation system (“IDQS”) with regard to the adequacy of the information provided in Form 211. We also support the creation of an “expert market” for certain securities with limited public disclosure or that may be characterized as shell companies. We do not, however, believe that certain other aspects of the Proposal will, on balance, improve efficiency in the market for OTC securities. For example, we do not support the continued requirement in paragraph (a)(1)(iii) of the Rule that the “broker-dealer, based upon a review of certain required information, together with any other required documents and any supplemental information, have a reasonable basis under the circumstances for believing that the information required to be reviewed is accurate in all material respects and from a reliable source.”¹ Finally, we concur with the view of OTC Markets Group in their letter dated November 25, 2019, that the Proposal should address the differing roles in which market participants can and should interact in the OTC ecosystem.²

¹ Proposed Rule at Page 27.

² 5 Letter from Daniel Zinn, General Counsel, OTC Markets Group Inc., et al., to the Commission (Nov. 25, 2019), <https://www.sec.gov/comments/s7-14-19/s71419-6471877-199389.pdf>.



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Background Considerations

In the past several years, we have seen liquidity in the OTC market diminish. We believe that this is the result of a number of factors, including the fact that fewer and fewer broker-dealers are willing to file a Form 211, as required by Rule 15c2-11, on behalf of issuers, thereby severely limiting entry into these markets. This is in part because broker-dealers are prohibited from receiving consideration from an issuer for filing a Form 211, and in part because of the increased scrutiny of broker-dealers with regard to the quotation of low-priced securities following the issuance of Regulatory Notice 09-05, titled “Unregistered Resales of Restricted Securities,”³ which placed a disproportionate amount of responsibility and potential liability on broker-dealers and clearing firms for their customers’ trading in low-priced securities. At present, we are only aware of one broker-dealer that regularly files Form 211s on behalf of issuers, which creates a bottleneck situation for issuers that wish to file Form 211s.

This problem of a bottleneck in the “211 process” is further exacerbated by the fact that the Financial Industry Regulatory Authority (“FINRA”) has over the years expanded its role from oversight of the broker-dealers who comprise its member firms to oversight of issuers as a result of Rule 6432, which requires that broker-dealers demonstrate compliance with Rule 15c2-11 before initiating a quotation in an issuer’s securities.⁴ The text of Rule 6432 simply states that the information required by the Rule must be submitted to FINRA at least three business days in advance of a broker-dealer initiating a quotation in the security. Unfortunately, this three business days period can, and regularly does, extend for weeks and often months. In theory, FINRA is simply reviewing the Form 211 to see whether the broker-dealer has met its obligation to ensure that the information provided in the Form 211 is “accurate in all material respects.” In practice, FINRA is conducting a merit-based review of the information provided by the issuer to the broker-dealer filing the Form 211 on its behalf.

Merit-based reviews of issuer disclosure is not something that FINRA, as the self-regulatory organization (“SRO”) primarily charged with overseeing broker-dealers, was ever set up to handle. Further, as the system currently operates, a broker-dealer merely acts as a conduit for an issuer who is the true respondent to the comments issued by FINRA to such broker-dealer in connection with a Form 211 filing. We believe that this has not only further exacerbated the bottleneck discussed earlier but has actually led to an increase in behavior that the Commission has actively sought to discourage in the past, for example, operating companies seeking a reverse merger with a publicly traded shell company. Because the 211 process has become so lengthy and uncertain, reverse mergers with already trading shell companies have become more attractive and convenient to issuers as they seek to avoid the 211 process, even though such a transaction may carry more risk and be more detrimental to an issuer and its shareholders in the long run.

³ <https://www.finra.org/rules-guidance/notices/09-05>.

⁴ <https://www.finra.org/rules-guidance/rulebooks/finra-rules/6432>



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It is clear that the present system is in urgent need of modernization and, as a result, we welcome the Commission's efforts in this regard.

We Support Reliance on Qualified IDQS Determinations

We believe that allowing broker-dealers to rely on the determination made by a qualified IDQS, such as OTC Markets Group, will be a large step toward eliminating delays and uncertainties in the 211 process. As discussed above, presently, issuers seeking a quotation on the OTC Markets have few choices with regard to a broker-dealer willing to file a Form 211 on their behalf and once filed, face a merit-based review process that is inefficient and not in alignment with the original intent of the applicable rules. By allowing a qualified IDQS to review and file a Form 211 on the issuer's behalf, this will not only streamline the listing process but also harmonize it with the process that an issuer would expect was it seeking a listing on a national securities exchange wherein the exchange itself reviews the application on its merits.

We further believe that a qualified IDQS is better suited than either a broker-dealer or FINRA for ensuring continued compliance with the information requirements of the Rule. Such belief is supported by the excellent work that OTC Markets Group has done over the years to provide clear and concise guidance to investors as to the availability of public disclosure by issuers whose securities are quoted on its various market tiers. An IDQS, which has systems in place to post guidance regarding availability of disclosure and warnings to market participants when that disclosure is insufficient, is in a much better position than any individual broker-dealer to monitor and inform the investing public when there is a potential issue with regard to such disclosure. A broker-dealer, although it may have filed the initial Form 211 or is maintaining a quotation in the security, has little incentive to monitor an issuer's continued compliance with the information requirements under the Rule. In fact, we submit that, if broker-dealers are required to oversee such continued compliance, they will simply continue to withdraw as participants from the OTC market, in particular with regard to smaller issuers for whom liquidity is always a concern.

We Do Not Support the Continued Obligations on Broker-dealers in Paragraph (a)(1)(iii) of the Rule

The continued requirement in the Proposal that broker-dealers, "based upon a review of certain required information, together with any other required documents and any supplemental information, have a reasonable basis under the circumstances for believing that the information required to be reviewed is accurate in all material respects and from a reliable source,"⁵ places a disproportionate burden on broker-dealers. We firmly believe that the responsibility for providing fair and accurate disclosure to the public is rightly placed on issuers, their executive officers and directors. This is not to say that a broker-dealer that

⁵ Proposal at page 27.



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becomes aware of a potential red flag with regard to an issuer should ignore that red flag. Broker-dealers, however, are not in the best position to review issuers' information for accuracy and reliability. Most broker-dealers have little or no interaction with the management of issuers for whom they may be posting quotations. Placing the burden to ensure continued compliance with the information requirements of the Rule on broker-dealers is not efficient, and will likely lead to further withdrawal by such broker-dealers from the small and microcap markets. Over the past several years, numerous broker-dealers have ceased trading in low-priced securities on behalf of their customers because the risks of potential regulatory action outweigh increasingly small returns for maintaining trading in small and microcap securities. As discussed below, broker-dealers have an important role in the market but should not be responsible for insuring the accuracy and completeness of issuer disclosure.

The Proposal Should Clarify the Roles of Market Participants

We believe that over time the system for initiating quotations in OTC securities has become inefficient and no longer works to the best interests of either issuers or their investors. In large part, this seems to be the result of shifting responsibilities and related liabilities for oversight of trading activities to broker-dealers to a greater and greater extent. In an effort to combat microcap fraud, FINRA has placed greater and greater burdens on broker-dealers to identify and prevent such fraud in their customers' trading activities. As discussed above, in 2009 FINRA released Regulatory Notice 09-05. This notice titled "Unregistered Resales of Restricted Securities – FINRA Reminds Firms of Their Obligations to Determine Whether Securities are Eligible for Public Sale" started a precipitous decline in the number of broker-dealers who are willing to bear the risk of trading on behalf of their customers in small and microcap securities. Since broker-dealers are prohibited from charging fees for filing of a Form 211, the only remaining incentive for filing such Form on an issuer's behalf is the desire to garner trading business from such issuer's shareholders. Since 2009, maintaining trading in small and microcap securities has become more and more fraught, and most broker-dealers now see little or no reason to either support a Form 211 filing or maintain a quotation for such securities. We respectfully submit that now is the time for the Commission to clarify and realign the roles of the various market participants in order to promote a liquid and efficient trading market in OTC securities.

Primary responsibility for the accuracy and completeness of disclosure should be placed on issuers and their management. Our existing system of securities laws already provides sufficient enforcement power for the Commission in order to prevent fraud in the form of the anti-fraud provisions of both the Securities Exchange Act of 1934, as amended, and the Securities Act of 1933, as amended. Shifting responsibility for such disclosure to broker-dealers to a disproportionate degree has severely impeded liquidity in the OTC securities markets as broker-dealers make the rationale business decision to withdraw from such markets as the costs outweigh the benefits of continued participation.

www.htflawyers.com | info@htflawyers.com

1450 Broadway, 26th Floor - New York, NY 10018 | Office: (212) 530-2210 | Fax: (212) 202-6380



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As discussed above, a qualified IDQS is in a better position for collecting, processing, review and dissemination of alerts to the public regarding issuers' disclosure. As a centralized repository, it is much more efficient and effective for a qualified IDQS to develop both the protocol and systems necessary to determine whether an issuer's disclosure is complete, accurate and from a reliable source prior to initiation of a quote in such issuer's securities, and to monitor ongoing periodic company disclosure. A qualified IDQS is also better situated to maintain such information in a centralized location for the benefit of broker-dealers and the investing public.

Broker-dealers, who are better placed to interact with individual customers rather than issuers, should be responsible for submitting transparent public quotations and pricing information, achieving best execution for their customers and complying with applicable FINRA and Commission rules. As discussed above, the current system which places the burden for insuring the accuracy and completeness of issuers' information on broker-dealers is not only inefficient but has had the collateral effect of causing broker-dealers to withdraw from the market for OTC traded securities.

FINRA as the primary SRO for broker-dealers should be responsible for oversight of qualified IDQS and broker-dealers' compliance with the information review and recordkeeping provisions of the Rule. FINRA was never intended to oversee issuer disclosure and by placing itself in the position of primary gate keeper for Form 211 review, it has helped to further erode the ability of small and microcap issuers to create and maintain liquid trading markets in their securities for the benefit of their shareholders.

We Support the Creation of an "Expert Marketplace"

We agree that the market for shell companies has been rife with fraud over the years and support the idea that trading in the securities of such shell companies should be limited. We acknowledge the existence of so-called "shell factories," but also know that in many cases legitimate companies that were never intended to be shells, may through no ill intent become companies with nominal or no operations, thus falling within the definition of a shell company as that term is currently interpreted⁶. We, therefore, support the Commission's idea to create a so-called "expert marketplace" where trading in otherwise high-risk securities is permitted for participants that meet certain qualifications as experts with the level of sophistication necessary to evaluate the risks of trading in such securities. We believe that this would provide an effective compromise between protection of unsophisticated investors and the continued liquidity needs of honest shareholders in such companies.

We firmly support the Commission's efforts to modernize the Rule and its implementation in the market. We believe that this is an opportunity to correct the current course of trading in OTC securities, which in

⁶ Rule 144(i) <https://www.law.cornell.edu/cfr/text/17/230.144>.



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recent years has deteriorated to the detriment of small and microcap issuers, as well as the investors who support them, while at the same time providing greater transparency and fraud protection to such investors.

Very truly yours,

HUNTER TAUBMAN FISCHER & LI LLC

Louis Taubman

Louis Taubman,
Partner