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## VIA ELECTRONIC SUBMISSION

Ms. Elizabeth M. Murphy, Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

**Re: File No. S7-24-89; Release No. 34-62021**

Dear Secretary Murphy:

We are writing on behalf of our client, Pink OTC Markets Inc. ("Pink OTC"), in response to the filing of Amendment No. 21 to 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"<sup>1</sup> (hereinafter, such plan shall be referred to as the "NASDAQ UTP Plan" or the "Plan" and the proposed amendment shall be referred to as "Amendment No. 21").

Among other things, Amendment No. 21 seeks to amend the Plan to formally recognize the longstanding practice of compensating the Financial Industry Regulatory Authority, Inc. ("FINRA") for its contribution of over-the-counter ("OTC") equity security transaction reports ("OTC Transaction Reports") and quotations ("OTCBB Quotations") from FINRA's Over the Counter Bulletin Board (the "OTCBB") to the Plan and the Plan's distribution of such data (collectively, OTC Transaction Reports and OTCBB Quotations are referred to herein as "OTC Data"). We are commenting on that aspect of Amendment No. 21 relating to recognizing FINRA's receipt of compensation in exchange for its contribution of OTC Data to the Plan (hereinafter, the "Proposed OTC Data Amendment") and related issues.

### I. Summary of Comments

Amendment 21 does not propose any new practices with respect to the collection and dissemination of the OTC Data; however, by expressly recognizing the dissemination of OTC Data in the words of the Plan itself, Amendment 21 seeks to legitimize what is an impermissible activity. The current practice of disseminating OTC Data under the Plan violates the express provisions of the current Plan that limit the Plan to NASDAQ securities. If the Commission approves the Proposed OTC Data Amendment, the terms of the Plan would be self-contradictory (*i.e.*, the Plan would be limited to NASDAQ

<sup>1</sup> See Securities Exchange Act Release No. 62021 (Apr. 30, 2010), 75 FR 27010 (May 13, 2010) (the "Proposing Release").

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securities yet would compensate FINRA for contributing the non-NASDAQ data that the Plan distributes). Furthermore, if the Commission approves the Proposed OTC Data Amendment, it may result in OTC equity securities being designated as national market system (“NMS”) securities subject to all the associated regulatory implications.<sup>2</sup> If OTC equity securities are not designated as NMS securities, then Section 11A of the Securities Exchange Act of 1934 (the Exchange Act”) does not permit the Plan to collect and distribute the OTC Data. Finally, the current anti-competitive practice of bundling NASDAQ data and OTC Data for a single price is unfair to consumers who wish to purchase only one of the two types of data.

For these reasons, we urge the Commission not to approve the Proposed OTC Data Amendment. Instead, the Commission should halt the impermissible dissemination of OTC Data by the Plan.

## II. Current Practice - Distribution of OTC Data by the NASDAQ UTP Plan

Although the express terms of the Plan limit its collection and distribution of market data to data relating to NASDAQ securities, OTC Data also is currently made available “under the Plan” as stated by the Commission in the Proposing Release.<sup>3</sup> The manner in which the OTC Data is distributed and the manner in which FINRA is compensated for its contribution of the OTC Data to the Plan strongly support the notion that the OTC Data is made available under the Plan. Consequently, when evaluating the Proposed OTC Data Amendment, the Commission must recognize that the Plan does collect and distribute the OTC Data even though there may be some who believe the distribution of the OTC Data is accomplished separate and apart from the operation of the Plan.

Today, the Plan offers a single market data product consisting of: 1) transaction reports for NASDAQ securities, 2) transaction reports for OTC equity securities, 3) Level 1 quotations for NASDAQ securities, and 4) Level 1 OTCBB quotations. This single market data product, including both NASDAQ data and the OTC Data, can only be purchased for a single price. It is not possible to buy only the NASDAQ data or only the OTC Data from the Plan processor, and purchasers must pay a single price for both types of data even if they want only one or the other. Further, the Plan distributes 6.25% of the gross Plan revenue to FINRA to compensate FINRA for its contribution of the OTC Data.<sup>4</sup> FINRA’s current compensation is not, and could not be, based on the value of the OTC Data it contributes because the OTC Data has no separate value due to the bundled

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<sup>2</sup> For example, NMS securities are subject to Regulation NMS and the short sale price test of Regulation SHO.

<sup>3</sup> Proposing Release, 75 FR at 27011.

<sup>4</sup> See Proposing Release, 75 FR at 27012.

pricing. Consequently, we believe it is without dispute that the OTC Data currently is made available by and under the NASDAQ UTP Plan.

### III. The NASDAQ UTP Plan Prohibits the Dissemination of Market Data for Non-NASDAQ Securities

The current practice of disseminating OTC Data under the Plan violates the express provisions of the Plan. The NASDAQ UTP Plan is clearly limited to distributing transaction reports and quotations of “eligible securities,” defined in the Plan as NASDAQ securities. Therefore, because OTC equity securities are not NASDAQ securities, OTC equity securities are not “eligible securities” and market data with respect to such securities may not be distributed under the Plan. Among the provisions of the NASDAQ UTP Plan that clearly show the Plan is exclusively limited to NASDAQ securities are the following (section and page references below relate to the current Plan):

- “The purpose of this Plan is to provide for the collection, consolidation and dissemination of Quotation Information and Transaction Reports in Eligible Securities from the Participants ...” (Section II, page 2);
- ““Eligible Security” means any Nasdaq Global Market or Nasdaq Capital Market security, as defined in NASDAQ Rule 4200” (Section III.B., page 2);
- “The Processor shall collect from the Participants, and consolidate and disseminate to Vendors, Subscribers and News Services, Quotation Information and Transaction Reports in Eligible Securities ...” (Section VI.A., page 10);
- “The Processor shall disseminate consolidated Quotation Information and Transaction Reports in Eligible Securities ...” (Section VI.C., page 10);
- “The Processor shall disseminate on the UTP Quote Data Feed a data stream of all Quotation Information regarding Eligible Securities received from Participants... [and] shall separately distribute on the OTC Montage Data Feed the Quotation Information regarding Eligible Securities ...” (Section VI.C.2., pages 11 - 12);
- “Each Participant shall, during the time it is open for trading be responsible promptly to collect and transmit to the Processor accurate Quotation Information in Eligible Securities ...” (Section VIII.A, page 12);
- “The Processor shall accept from Exchange Participants input for only those issues that are deemed Eligible Securities.” (Section XVIII.B., page 21); and
- “The Processor shall perform gross validation processing for quotes ... [and] Input [sent to the Processor] must be for an Eligible Security ... [and] The Processor shall return all Participant input messages that do not pass the validation checks ...” (Section XVIII.D., page 21).

These provisions make clear that, not only are OTC equity securities not “eligible securities” for purposes of the Plan, but also that the Plan processor must reject any market data that a Plan participant submits for any non-NASDAQ securities, including the OTC Data. As a result, the current practice of disseminating OTC Data by the Plan violates the provisions of the Plan. We believe the Commission should not allow this practice of violating the express terms of the Plan to continue and the Commission certainly should not legitimize this practice by approving the Proposed OTC Data Amendment.

#### IV. NMS Issues

Commission approval of the Proposed OTC Data Amendment will result in either of two undesirable outcomes - either OTC equity securities will be designated as NMS securities or the Commission will be sanctioning a violation of Section 11A of the Exchange Act. As discussed below, it is questionable whether the current distribution of OTC equity security transaction reports by and under the Plan means that OTC equity securities have unintentionally been designated as NMS securities. To the extent OTC equity securities do not already meet the definition of “NMS security,” amending the Plan to expressly recognize that the Plan compensates FINRA for the OTC equity transaction reports disseminated by the Plan makes it more likely that OTC equity securities will meet the definition of “NMS security.” Also as discussed below, to the extent OTC equity securities are not NMS securities, Section 11A of the Exchange Act does not permit the NASDAQ UTP Plan to disseminate market data relative to such securities.

##### A. Designation of NMS Securities

If the Commission approves the Proposed OTC Data Amendment (*i.e.*, amending the Plan to recognize FINRA’s receipt of compensation in exchange for its contribution of OTC Data that is distributed by the Plan), this may have the effect of designating every OTC equity security as an “NMS security” as defined in Rule 600 of Regulation NMS. If OTC equity securities are NMS securities, then OTC equity securities are subject to all the associated regulatory implications, including, for example, subjecting OTC equity securities to Regulation NMS and the short sale price test of Regulation SHO, and excluding such securities from the vast majority of state regulations by virtue of the National Securities Markets Improvement Act of 1996.

Section 11A(a)(2) of the Exchange Act requires the Commission to designate those securities eligible for trading in the national market system. Currently, the Commission designates NMS securities through its definition of “NMS security” in Rule 600(b)(46) of Regulation NMS. Specifically, Rule 600(b)(46) defines an “NMS security” as “any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.” The NASDAQ UTP Plan is both an “effective national market system plan” and an “effective transaction reporting plan,” both as defined in Rule 600(b) of Regulation NMS.

If the current distribution of OTC equity transaction reports by the NASDAQ UTP Plan is being accomplished “pursuant” to that Plan, then all OTC equity securities are, by definition, NMS securities. A strong argument can be made that OTC equity transaction reports are currently collected, processed, and made available “pursuant” to the NASDAQ UTP Plan. It is clear that the NASDAQ data is made available pursuant to the Plan, and as discussed above, the NASDAQ data and OTC Data (including OTC equity transaction reports) are only available as part of the Plan’s single product offering. Therefore, one could strongly argue, the OTC Data is being made available “pursuant” to the Plan to the same extent that the NASDAQ data is. Further, the Commission itself acknowledges in the Proposing Release that the OTC Data is currently made available “under the Plan.”

On the other hand, the NASDAQ UTP Plan currently, by its terms, prohibits the collection and dissemination of market data other than with respect to NASDAQ securities. Therefore, one could argue that OTC equity transaction reports are not being collected, processed, and made available “pursuant” to the NASDAQ UTP Plan, but rather that such steps are being taken despite the express provisions of the Plan. Such an interpretation amounts to the position that, although OTC equity transaction reports are collected and disseminated by the Plan and **under** the Plan, this is not being done **pursuant** to the Plan - an odd interpretation to say the least. We cannot predict how a court would resolve this interpretive issue; however, we are comfortable stating that either interpretation is a possibility.

Clearly, the Commission has not intended to designate all OTC equity securities as NMS securities, but it appears that permitting the Plan to distribute OTC Data despite the express words of the Plan has led to unintended complications. Either OTC equity securities are NMS securities or the OTC Data is being distributed by and under, but not pursuant to, the Plan. In either case, mere Commission approval of the Proposed OTC Data Amendment does not appear to be a viable option.

If the Commission simply approves the Proposed OTC Data Amendment, expressly acknowledging in the Plan that FINRA is entitled to a share of Plan revenue for the OTC Data distributed by the Plan, this would strengthen the argument that OTC equity security transaction reports are disseminated pursuant to the Plan. Therefore, we urge the Commission not to approve the Proposed OTC Data Amendment. Instead, we urge the Commission to either enforce the express provisions of the Plan prohibiting the collection and dissemination of non-NASDAQ market data by the Plan or amend the Plan to permit the current practice of disseminating OTC Data despite the associated consequence (*i.e.*, OTC equity securities being designated as NMS securities). The fact that the Commission has allowed the operation of the Plan to evolve to the point where it violates its own terms is not a reason to continue this unlawful practice.

B. The NASDAQ UTP Plan is Not Authorized by the Exchange Act to Disseminate Market Data for Non-NMS Securities

If OTC equity securities are not NMS securities, the NASDAQ UTP Plan may not distribute market data with respect to OTC equity securities. Not only do the express terms of the NASDAQ UTP Plan prohibit the collection and distribution of market data for non-NASDAQ securities, the Exchange Act also does not permit the distribution of market data with respect to securities that are not NMS securities through an NMS plan. As an NMS plan, the NASDAQ UTP Plan is not authorized by the Exchange Act to disseminate quotations in non-NMS securities. NMS plans are authorized by Section 11A of the Exchange Act, and Section 11A is clear that the authority granted to the Commission under Section 11A with respect to the collection and dissemination of market data is limited to “qualified securities” which are NMS securities. If the Commission takes the view that OTC equity securities are not currently designated as NMS securities, the NASDAQ UTP Plan cannot permit for the distribution of quotations for OTC equity securities under the Plan.

One of the findings by Congress included in Section 11A is that the “linking of all markets for qualified securities through communication and data processing facilities will foster efficiency, enhance competition, increase the information available to brokers, dealers, and investors, facilitate the offsetting of investors’ orders, and contribute to best execution of such orders.”<sup>5</sup> In light of this finding, Section 11A(a)(3)(B) gives the Commission the authority to require or permit self-regulatory organizations to act jointly (for example, through an NMS plan) in certain circumstances, stating:

“(a)(3) The Commission is authorized in furtherance of the directive in [Section 11A(a)(2)] ...

B. by rule or order, to authorize or require self-regulatory organizations to act jointly with respect to matters as to which they share authority under this title in planning, developing, operating, or regulating a national market system (or a subsystem thereof) or one or more facilities thereof; ...”

The Commission’s authority in Section 11A(a)(3)(B) is expressly limited to the directive in Section 11A(a)(2) which itself is limited to “qualified securities” (*i.e.*, NMS securities).<sup>6</sup> Therefore, if OTC equity securities are not NMS securities, the NASDAQ

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<sup>5</sup> See Section 11A(a)(1)(D) of the Exchange Act.

<sup>6</sup> Section 11A(a)(2) states: “The Commission is directed ... to use its authority under this title to facilitate the establishment of a national market system for securities (which may include subsystems for particular types of securities with unique trading characteristics) in accordance with the findings and to carry out the objectives set forth in paragraph (1) of this subsection. **The Commission, by rule, shall designate the securities or classes of securities qualified for trading in the national market system from among**

UTP Plan, as an NMS plan, is not permitted under Section 11A of the Exchange Act to collect and distribute data relative to OTC equity securities including the OTC Data. For this reason alone, if the Commission's view is that OTC equity securities are not NMS securities, the Commission must not permit the Plan to continue to distribute the OTC Data and must not approve the Proposed OTC Data Amendment.

#### V. Current Operation of the Plan Harms Purchasers of the Market Data

The current practice of bundling NASDAQ data and OTC Data as a single product for a single price is unfair to those who want to purchase one type of data but not the other. Although some purchasers of the Plan's data undoubtedly want both NASDAQ data and OTC Data, this cannot be true with respect to all such purchasers.<sup>7</sup> By virtue of the requirements of Regulation NMS, practically every broker-dealer that effects transactions in NMS securities for customers or its own account must purchase consolidated market data with respect to NASDAQ securities,<sup>8</sup> but this is not true with respect to OTC equity securities. Consequently, we believe that in all likelihood, the vast majority of those purchasing market data sourced from the Plan never trade or view prices regarding OTC equity securities. Those persons who want only NASDAQ data must nevertheless pay more for the data they want because millions of dollars each year must be paid to FINRA for its contribution of the OTC Data distributed by the Plan.<sup>9</sup> Similarly, there are purchasers of the Plan's data who are only interested in the OTC Data, yet they must pay significantly more than what a free market would demand because they also must pay for the receipt of NASDAQ data. Pink OTC, for example, currently must purchase the NASDAQ data even though Pink OTC is only interested in the OTC Data.<sup>10</sup> Therefore,

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**securities other than exempted securities. (Securities or classes of securities so designated [are] hereinafter in this section referred to as "qualified securities".)**" [emphasis added].

<sup>7</sup> Pink OTC estimates that less than 10% of NASDAQ data buyers would need or purchase OTC Data if it were offered as a separate product.

<sup>8</sup> For example, Rule 603(c)(1) of Regulation NMS requires every broker-dealer to purchase the consolidated NASDAQ data from the Plan and display such information to investors whenever the broker-dealer displays any information with respect to quotations for or transactions in an NMS stock to investors in connection with a trading or order-routing decision.

<sup>9</sup> Rather than compensate FINRA for OTC Data that purchasers of the Plan data likely do not want, the Plan could instead reduce the fees paid by consumers or use such revenue to improve the NASDAQ market data offering.

<sup>10</sup> Pink OTC has approached FINRA about purchasing just the OTC Data, but FINRA rejected these efforts. As a result, Pink OTC and its customers are forced to pay hundreds of thousands of dollars in license fees for NASDAQ data they do not use.

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Pink OTC believes the Commission should require the Plan to stop collecting and disseminating OTC Data (as is required by the terms of the Plan and the requirements of Section 11A) and require that the OTC Data be collected and distributed separately so that purchasers have the choice to buy one or the other or both as they see fit.

#### VI. Conclusion

For the reasons stated above, we believe the Commission cannot approve the Proposed OTC Data Amendment. Instead, the Commission needs to address the current problems caused by the Plan's current practice of collecting and distributing OTC Data, including:

- the express provisions of the NASDAQ UTP Plan do not permit the Plan to collect and disseminate non-NASDAQ market data;
- permitting the Plan to distribute OTC equity transaction reports raises the issue of whether OTC equity securities meet the definition of "NMS security";
- as an NMS plan, the NASDAQ UTP Plan is not allowed to collect and disseminate data for non-NMS securities; and
- the bundling of NASDAQ data and OTC Data as a single product forces some consumers of such data to pay for data they do not want.

We would be happy to discuss these issues further with the Commission and its staff.

Sincerely yours,



Michael R. Trocchio

cc: Hon. Mary Schapiro, Chairman  
Hon. Luis Aguilar, Commissioner  
Hon. Kathleen Casey, Commissioner  
Hon. Troy Paredes, Commissioner  
Hon. Elisse Walter, Commissioner  
Robert Cook, Director, Division of Trading and Markets  
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