NYSE Euronext

Janet M. Kissane
Senior Vice President – Legal & Corporate Secretary
Office of the General Counsel

20 Broad Street
New York, New York 10005
t 212.656.2039 | f 212.656.8101
jkissane@nyx.com

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VIA EMAIL and
BY OVERNIGHT MAIL

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

Re: **File No. S7-24-89; Release No. 34-62021**
Notice of 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 Trading on Exchanges on an Unlisted Trading Privileges Basis

Dear Ms. Murphy:

NYSE Euronext, on behalf of the New York Stock Exchange LLC ("NYSE"), NYSE Amex LLC, and NYSE Arca Inc., appreciates the opportunity to comment on the above-referenced filing relating to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Trading on Exchanges on an Unlisted Trading Privileges Basis ("UTP Plan"), as amended by Amendment No. 21 thereto. The Amendment's addition to Exhibit 1 of the UTP Plan of a specific reference to the allocation to the Financial Industry Regulatory Authority ("FINRA") of 6.25% of gross revenues collected for any particular calendar year as compensation for FINRA's provision of its quotation and last sale information relating to over-the-counter securities has finally made transparent this historical practice that we believe is objectionable for a number of reasons.

At the most fundamental level, unlisted securities should not be part of a National Market System ("NMS") plan that governs listed securities. By definition, the purpose of the UTP Plan is "to provide for the collection, consolidation and dissemination of Quotation Information and Transaction Reports in Eligible Securities from the Participants" (see Section II of the UTP Plan), where Eligible Securities are defined as "any Nasdaq Global Market or Nasdaq Capital Market security" (see Section III.B of the UTP Plan). These Nasdaq categories do not incorporate the unlisted Over-the-Counter Bulletin Board ("OTCBB") and

Pink Sheet securities whose quotation and trade information are provided by FINRA in exchange for the aforementioned compensation.

In addition, the current model that commingles listed and unlisted data in the UTP Plan causes confusion for market data customers, inhibits choice, and results in opaque and inequitable financial arrangements for both UTP Plan participants and contributors to the unlisted market.

We believe that the framework established by the existing NMS plans, although not perfect, has withstood the test of time and contains critical components that should be utilized in a **separate plan for unlisted securities**. Those components would include the following as applied to the marketplace for unlisted securities:

- **Establishment of a distinct data feed and separate fee for unlisted securities outside the UTP Plan to provide data customers with choice**

Offering a separate unlisted data feed will allow market data consumers to choose which data products they wish to purchase, in contrast to the current arrangement under which they are forced to also buy unlisted data. The fact that such unlisted data is commingled with Level 1 data is a vestige of the era in which FINRA and the predecessor to The Nasdaq Stock Market LLC ("Nasdaq") were part of a single entity.

- **Creation of transparency for SIP/Administration services and associated revenue sharing arrangements for parties contributing unlisted market data**

In connection with this proposed separate data feed for unlisted securities, FINRA should contract with a SIP/Administrator and pay any associated costs and/or fees directly to such SIP/Administrator. This arms-length arrangement must be as transparent as the current SIP/Administrator relationship that exists in other NMS plans. As with other NMS plans, any market data revenues garnered by FINRA for selling unlisted data from this separate feed should be allocated to the market participants who submit quote and trade data to the unlisted consolidator.

- **Elimination of the existing 6.25% (in excess of $8,000,000 per year) allocation from UTP Level 1 revenues to FINRA, as it is arbitrary and overstates the value of unlisted data**

Sufficient analysis must be conducted to determine the appropriate costs associated with providing this data and the appropriate pricing of the data to customers.[1]

- **Management by the participants that contribute the unlisted data of the governance and pricing of that data**

- **Utilization of the existing SIP technology infrastructure to disseminate unlisted data (i.e., CTA concurrent use model) under the proposed separate arrangement**

For the avoidance of doubt, these unlisted securities should not be revenue eligible pursuant to the UTP Plan.

We also wish to take this opportunity to comment on the following additional inequities that exist in the OTCBB and Pink Sheet markets that must be addressed:

In covering its regulatory costs, FINRA appears to be "double dipping."

FINRA has asserted that the 6.25% revenue allocation from the UTP Plan is used to cover costs of regulating the unlisted market (which claim is impossible to verify because of the lack of transparency regarding those costs as well as the disposition of this allocation). In fact, unlisted market participants already pay a high regulatory fee in the form of the Trading Activity Fee, and the combination of this fee and the 6.25% revenue allocation seems excessive relative to any reasonable estimate of regulatory costs associated with the unlisted marketplace.

The requirement that unlisted market participants use Nasdaq's ACT technology platform for trade reporting is very costly and inefficient.

Nasdaq profits from its monopolistic pricing of ACT, which is further supported by FINRA-established regulatory mandates requiring the use of ACT.[2] For example, FINRA has a regulatory mandate requiring the acceptance or rejection of ACT entries within 20 minutes of

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1 There are a number of potential pricing options available. For example, to maintain the current economics, UTP listed securities could be priced at the current $20 Level 1 fee <u>less</u> the price established for unlisted securities, or incremental pricing could be established for unlisted securities while the existing $20 Level 1 fee could be maintained solely for UTP listed securities. We take no position on the best pricing alternative.

2 All trades in OTCBB and Pink Sheet securities must be submitted for comparison via ACT, with a $0.029 fee, per side, per trade.

counterparty submission. The only way to find errant trade reports is to scan ACT, which costs $0.50 per scan via the NASDAQ Workstation. Consequently, unlisted market participants spend thousands of dollars each month just scanning ACT looking for errant counterparty submissions.

Many of the concerns discussed above with respect to the unlisted marketplace trace back to the historic close relationship between FINRA and Nasdaq due to their being part of the same entity.[3] We believe that FINRA and Nasdaq must continue to move in the direction of a truly arms-length relationship if the existing market inequities discussed in this comment letter are to be eliminated. Adoption of our recommendations herein with respect to the unlisted marketplace would represent a significant step in that direction. It would result in fair and transparent market data administration, including elimination of the inequitable 6.25% allocation of the UTP Plan revenues to FINRA, and would ensure that UTP Plan participants are no longer subsidizing the costs of data on unlisted securities.

We appreciate the opportunity to comment on this important topic, and we would be happy to discuss the matter further with the Commission and the staff.

Very truly yours,

Janet McKissane

cc: The Hon. Mary Schapiro, Chairman
The Hon. Luis Aguilar, Commissioner
The Hon. Kathleen Casey, Commissioner
The Hon. Troy Paredes, Commissioner
The Hon. Elisse Walter, Commissioner
Mr. Robert W. Cook, Director, Division of Trading and Markets
Mr. James Brigagliano, Deputy Director, Division of Trading and Markets
Mr. David S. Shillman, Associate Director, Division of Trading and Markets
Mr. John C. Roeser, Assistant Director, Division of Trading and Markets

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[3] This relationship also creates issues of inequity in the marketplace for exchange-listed securities as well. For example, pursuant to a commercial agreement between FINRA and Nasdaq, FINRA provides Nasdaq with its data from the FINRA/Nasdaq Trade Reporting Facility (“TRF”) free of charge for Nasdaq to use in its proprietary products, yet the same economic arrangement is not extended by FINRA to the NYSE in connection with FINRA’s trade data from the FINRA/NYSE TRF.