



Stephanie M. Dumont
Senior Vice President and
Director of Capital Markets Policy

Direct: (202) 728-8176
Fax: (202) 728-8264

October 18, 2010

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:

The Financial Industry Regulatory Authority, Inc. (“FINRA”) appreciates the opportunity to comment on the above-referenced filing relating to proposed Amendment No. 21 of 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” or “Plan”) which, among other things, seeks to incorporate into the UTP Plan the existing practice of compensating FINRA for the FINRA data included in the information made available under the UTP Plan.¹

FINRA is the sole self-regulatory organization (“SRO”) responsible for the regulation and oversight of the over-the-counter (“OTC”) securities market and, as such, FINRA is keenly focused on the vital role that transparency plays in driving price discovery, ensuring the efficient operation of OTC markets overall, fostering beneficial competition in the marketplace and facilitating broker-dealer compliance with both federal securities laws and FINRA rules. In furtherance of these goals, FINRA supports the approval of Amendment No. 21 and the continued broad dissemination to the investing public and market participants of core market data for OTC Equity Securities² (“OTC Data”) as part of the UTP Plan data (“Level 1”). FINRA commends the UTP Plan SRO Operating Committee for unanimously voting in favor of this amendment.

¹ See Securities Exchange Act Release No. 62021 (April 30, 2010), 75 FR 27010 (May 13, 2010) (“Amendment No. 21”).

² “OTC Equity Security” means any equity security that is not an “NMS stock” as that term is defined in Rule 600(b)(47) of SEC Regulation NMS; provided, however, that the term “OTC Equity Security” shall not include any Restricted Equity Security. See FINRA Rule 6420(c).

To date, the Securities and Exchange Commission (“SEC” or “Commission”) has received two comment letters in response to its notice of filing of Amendment No. 21, and both letters oppose SEC approval.³ Generally, the commenters argue that approval of Amendment No. 21 is inconsistent with federal securities laws, including Section 11A of the Securities Exchange Act of 1934 (“Exchange Act”). Commenters also disfavor approval due to certain financial and market structure views.

FINRA disagrees with the arguments offered by commenters, and does not believe that their comment letters fairly or adequately identify the issues of relevance to an analysis of whether Amendment No. 21 should be approved. Therefore, FINRA seeks to clarify what it believes to be the relevant analysis and statutory review standards that should be applied to the proposal and believes, based on those standards, that the SEC should approve the proposed amendment.

I. Dissemination of OTC Data through Level 1 is Consistent with the Exchange Act

Section 11A of the Exchange Act

Pink argues that the Commission is not authorized to approve Amendment No. 21 because the Commission’s authority with respect to the UTP Plan is limited to “NMS securities.”⁴ Specifically, Pink states that “. . . 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.”⁵ However, contrary to this argument, a review of nearly two decades of Commission action regarding the inclusion of OTC Data in Level 1 makes clear that the Commission has fully considered the appropriateness of the dissemination of OTC Data through Level 1, and has determined that such is consistent with the Exchange Act, including Section 11A,⁶ and in the interest of investors.

In fact, in 1993 when the SEC approved FINRA’s (then NASD’s) proposal to commence real-time trade reporting of OTC Data and to disseminate such information through Level 1,⁷ the Commission stated that:

³ See Letters from Michael R. Trocchio, Bingham McCutchen LLP on behalf of Pink OTC Markets Inc., to Elizabeth M. Murphy, Secretary, SEC, dated June 3, 2010 (“Pink”) and from Janet M. Kissane, Senior Vice President, NYSE Euronext, to Elizabeth M. Murphy, Secretary, SEC, dated June 4, 2010 (“NYSE Euronext”).

⁴ Rule 600(b)(46) of Regulation NMS provides that “NMS security means 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.”

⁵ See Pink.

⁶ See 15 U.S.C. 78k-1 (“Section 11A”).

⁷ See Securities Exchange Act Release No. 32647 (July 16, 1993), 58 FR 39262 (July 22, 1993) (“OTC Data Dissemination Approval Order”). The SEC specifically noted that “[FINRA] plans to begin disseminating last-sale trade information for transactions in OTC Equity Securities in August of 1993 . . . [and this] last-sale information will be made available through customary vendor channels as well as the NASD’s communications network [i.e., Level 1].”

The Commission believes that approval of this proposed rule change is consistent with the provisions of the Act and the rules and regulations thereunder, and, in particular, with the requirements of *Sections 11A(a)(1), 15A(b)(6) and 17B of the Act*. Recognizing the benefits of transparent markets, Congress found, in Section 11A(a)(1) of the Act that "it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure . . . the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities."

The Commission believes that by providing greater transparency, the proposed rule change will *bring to the market for securities that are neither listed on a national securities exchange nor quoted on an automated inter-dealer quotation system a number of the benefits envisaged by Congress*. Experience with the introduction of real-time trade reporting for Nasdaq/National Market System Securities and Nasdaq securities supports this belief.⁸

The above SEC findings alone, made in connection with the same activity that commenters now oppose, make plain that the dissemination of a broader range of data than solely on NMS securities through Level 1 (which by 1993 was the core data feed of the UTP Plan) was deemed by the SEC to be consistent with Section 11A, and FINRA agrees with both the Commission's reasoning and its conclusion.⁹

Pink nonetheless argues that the Commission is not authorized to approve Amendment No. 21 specifically because the UTP 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."¹⁰ NYSE Euronext argues that unlisted securities should not be part of an NMS plan that governs listed securities.¹¹ These commenters' conclusions lack a legal basis. Rule 608 of SEC Regulation NMS ("Rule 608")¹² clearly sets forth the standards that govern Commission approval of

⁸ See OTC Data Dissemination Approval Order (emphasis added). Section 11A(a)(1) sets forth Congress' findings with respect to the importance of the nation's securities markets, and identifies measures that must be undertaken in order to preserve and strengthen the markets.

⁹ Over the past two decades, numerous additional SEC filings favorably address the dissemination of OTC Data through Level 1. See e.g., Securities Exchange Act Release No. 29616 (August 27, 1991), 56 FR 43826 (September 4, 1991) (Notice of Filing and Immediate Effectiveness of File No. SR-NASD-91-38) ("OTCBB Fee Filing") (implementing a modest increase in the Level 1 monthly fee following inclusion of OTC quotation data in Level 1) and Securities Exchange Act Release No. 35217 (January 11, 1995), 60 FR 3890 (January 19, 1995) (Order Approving File No. SR-NASD-94-70) ("Quotation and Last Sale Consolidation Filing") (effectuating a consolidation of quotation and last sale data for Level 1 and of the corresponding subscriber charges).

¹⁰ See Pink.

¹¹ See NYSE Euronext.

¹² See Rule 608 of SEC Regulation NMS.

amendments to the UTP Plan, and a reading of Rule 608 evidences that the Commission possesses the authority to approve Amendment No. 21. In pertinent part, Rule 608 states that:

[T]he Commission shall approve such plan or amendment . . . *if it finds that such plan or amendment is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.*¹³

Amendment No. 21 seeks to formalize the existing revenue arrangement between FINRA and the Plan participants in furtherance of the benefits to investors and market participants that were, as discussed previously, envisioned by Congress and supported by the Exchange Act. Thus, FINRA believes that Amendment No. 21 is squarely “in furtherance of the purposes of the Act” and should be approved by the Commission. We note that Amendment No. 21 does not seek approval of the revenue arrangement or any aspect of the OTC Data dissemination arrangement – both of these have long become effective pursuant to other SEC filings.¹⁴ Amendment No. 21 merely seeks to document the existing arrangement in the text of the UTP Plan itself.¹⁵

Definition of “NMS Securities”

Pink also suggests that certain OTC Equity Securities may transform into “NMS securities” if trade data for that security is disseminated through Level 1. Pink then extends this conjecture to conclude that, “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.”¹⁶ FINRA believes this suggested analysis is incorrect and does not represent a reasonable reading of the Exchange Act.

In 2005, the SEC adopted Regulation NMS and identified the securities that are designated as part of the national market system as “NMS securities.”¹⁷ As stated previously, Regulation NMS provides, in relevant part, that an “NMS security” is any security or class of securities for which transaction reports are *collected, processed, and made available pursuant to an effective transaction reporting plan.*

¹³ See Rule 608(b)(2) of SEC Regulation NMS (emphasis added).

¹⁴ See e.g., OTCBB Fee Filing; OTC Data Dissemination Approval Order and Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (“Regulation NMS Adopting Release”).

¹⁵ Pink also argues that the terms of the UTP Plan do not explicitly permit the dissemination of OTC Data through Level 1 and that such dissemination, therefore, should be viewed as impermissible solely on this basis. See Pink. We find Pink’s argument to be both circular and misplaced given that the UTP Plan’s proposed amendment seeks to do just that – to include in the Plan itself references both to the revenue arrangement with FINRA as well as to the fact that OTC Data is disseminated through Level 1.

¹⁶ See Pink.

¹⁷ See Regulation NMS Adopting Release.

It appears Pink has concluded that, by virtue of the dissemination of data on OTC Equity Securities through the Level 1 feed, those securities may be deemed *securities for which transaction reports are collected, processed and made available pursuant to an NMS Plan*, thereby causing OTC Equity Securities to meet the definition of “NMS securities.”¹⁸ FINRA, however, notes the important distinction between the mere dissemination of data through Level 1 and the collection, processing and availability of data *pursuant to* the UTP Plan. Importantly, the UTP Plan neither *requires* nor *governs* the collection, processing and availability of OTC Data; thus, it cannot be said that such data is disseminated *pursuant to* the UTP Plan.

In fact, the UTP Plan clearly states that it only provides for the collection, consolidation and dissemination of quotation information and transaction reports in NASDAQ Global Market and NASDAQ Capital Market securities, a fact acknowledged by Pink.¹⁹ It would be fallacious to conclude that OTC Data is disseminated *pursuant to* a plan that in no way calls for its collection, consolidation and availability. Thus, as is widely understood, the OTC Equity Securities with respect to which data is disseminated through Level 1 do not meet the definition of “NMS security.”²⁰ Nothing in Amendment No. 21 would alter this analysis or result in a different conclusion, as the proposed amendment would not alter the purpose of the Plan.

Furthermore, it is already well settled that the use of the facilities of an effective transaction reporting plan to disseminate information on non-NMS, non-eligible securities is permissible under the Exchange Act and does not “transform” such securities into “NMS securities.” For example, the Consolidated Tape Association’s plan (“CTA Plan”), like the UTP Plan, is a national market system plan under Section 11A. The CTA Plan permits concurrent use of its facilities for the dissemination of data on non-NMS, non-eligible securities and such arrangements have been approved by the Commission as consistent with the Exchange Act.²¹ Similarly, this dissemination of data on non-NMS, non-eligible securities has not resulted in the transformation of those securities into NMS securities.²²

FINRA believes it is clear that the Commission has fully considered and approved the precise means of facilitating transparency that commenters attempt to raise and oppose in the context of this filing. We do not believe commenters have raised any issues that warrant cessation of the effective and cost-efficient manner in which OTC Data is made widely available to investors and the marketplace through a Commission and SRO-overseen process. The formalization of the

¹⁸ See Pink.

¹⁹ Pink states that “the NASDAQ UTP Plan is clearly limited to distributing transaction reports and quotations of ‘eligible securities,’ defined in the Plan as NASDAQ securities.” See Pink; see also UTP Plan.

²⁰ We note that Pink states in its letter that “clearly the Commission has not intended to designate all OTC equity securities as NMS securities” We agree that this is abundantly clear.

²¹ Securities Exchange Act Release No. 37191 (May 9, 1996), 61 FR 24842 (May 16, 1996) (Order Approving Restatement and Amendments to the Restated Consolidated Tape Association Plan and the Consolidated Quotation Plan).

²² *Id.*

revenue arrangement, as proposed in Amendment No. 21, does not present any new issues, continues to be in the best interest of investors and should be approved.

II. Disseminating OTC Data through Level 1 is the Most Cost-Effective Solution for Providing Transparency and Continuity for Investors and Market Participants

Both Pink and NYSE Euronext argue that data consumers are being harmed because they are required to purchase data that they do not want.²³ Specifically, because Level 1 includes data on both NASDAQ-listed securities and OTC Equity Securities, commenters complain that purchasers of Level 1 data must pay for both, even if their interest is only in one, and suggest that separate data feeds would correct this issue.

FINRA disagrees with this recommendation for several reasons. First, FINRA strongly believes that investors, market participants and regulated entities benefit significantly from the dissemination of OTC Data over the Level 1 feed. This information, among other things, furthers informed investment decision-making and enables compliance with securities laws.²⁴

Second, FINRA believes that if, as suggested by commenters, FINRA pursued the alternative of developing a separate system for disseminating OTC Data, an increase in monetary and other burdens to investors and market participants could not be avoided only to, at best, provide the same quality of data currently provided via Level 1. For example, such an approach would require a separate administrator, separate contracts and separate entitlements. Moreover, it would require investors and market participants to devote additional resources to retrieving data from different logic sources and consolidate different data feeds, either in-house or by retaining a vendor aggregation service.²⁵

Third, we note that dissemination of OTC Data through Level 1 is particularly beneficial to the market as it facilitates more orderly markets and transparency continuity in relation to delisted issuers. In those cases, due to the inclusion of OTC Data in Level 1, investors and market participants are able to continue to see seamless pricing information on a security, whereas different feeds sold by separate administrators could result in a disruption of market data, if, for example, market participants and investors were not subscribed to both services.

Finally, based on FINRA's discussions with large market data vendors and firms, there is no interest on the part of vendors to have separate entitlements and feeds sold by different

²³ See NYSE Euronext and Pink.

²⁴ NYSE Euronext also asserts that the inclusion of OTC Data through Level 1 causes confusion for market data consumers. We disagree and believe time has proven this is not the case. OTC Data has been distributed through Level 1 for nearly two decades and we are not aware of any complaints or even inquiries from investors or data purchasers expressing confusion about the dissemination of OTC Data through Level 1.

²⁵ While detailed professional and non-professional subscriber base information is non-public, FINRA can represent that the UTP Plan Level 1 data distribution is one of the largest in the U.S. equity securities market data business. We believe that this widespread dissemination of core market data made available to investors and market participants at a reasonable cost is highly beneficial for the marketplace overall.

administrators. The relatively *de minimis* cost of including OTC Data through Level 1 is far outweighed by the burden of the technical and administrative work that would be required to receive the data and redistribute it from different administrators. In addition, FINRA's understanding is that most end users of Level 1 data – particularly retail investors – pay *no direct cost* for access to this core data on which they base their investment decisions because the redistribution fee owed by a redistributor (*e.g.*, a market data vendor, retail brokerage firm or mutual fund) for providing the data to customers through their websites or otherwise, is either capped or *de minimis* (or covered by the firm on behalf of the retail investor).

III. The Plan's Revenue Arrangement with FINRA is Appropriate

NYSE Euronext argues that the revenue FINRA receives for OTC Data is arbitrary and should be revisited. The revenue arrangement that currently is in place was published by the Commission for notice and comment and, subsequently, approved by the Commission.²⁶ If NYSE Euronext wishes to debate that formula, this filing is not the proper forum to do so.

NYSE Euronext also argues that FINRA should establish a separate data feed for disseminating OTC Data and allocate the revenue received by FINRA for disseminating OTC Data among the market participants that generated the underlying data, analogizing OTC Data dissemination to the NMS data plan context. However, this analogy does not follow in the OTC Data context because, under the NMS Plan, plan participants are SROs with federally mandated responsibilities, including regulatory functions that ensure the reliability and, therefore, the value of the data itself (*i.e.*, the value of this market data in large part derives from the regulatory contributions of SROs that ensure that data is reported accurately and promptly and that related trading activity is thoroughly regulated). This concept, *i.e.*, central SRO data dissemination, has been repeatedly discussed, supported and upheld by the Commission.²⁷

NYSE Euronext also makes a variety of pricing arguments, for example that FINRA is “double dipping” because it charges a Trading Activity Fee and receives revenue associated with the dissemination of OTC Data and that FINRA supports monopolistic pricing of OTC Reporting Facility (*f/k/a* “ACT”) by NASDAQ. Again, these fees are not the subject of this rule filing and, therefore, are not germane to a consideration of the merits of the UTP Plan's amendment.

Finally, NYSE Euronext asserts that FINRA is using UTP Plan technology for its own advantage, without properly disclosing the costs of using such technology.²⁸ This is not the case. FINRA has engaged NASDAQ as its technology vendor for certain technology, including collecting OTC quote and trade data and including that data in Level 1. NASDAQ separately allocates the costs associated with disseminating OTC Data from the costs associated with NMS data. Thus, all costs related to OTC Data appearing in Level 1 are FINRA's and will be borne by FINRA (and not the UTP Plan Committee members generally). The agreement covering this

²⁶ See OTCBB Fee Filing and Quotation and Last Sale Consolidation Filing.

²⁷ See *e.g.*, Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594 (January 21, 2010) (Concept Release on Equity Market Structure).

²⁸ See NYSE Euronext.

relationship was approved by the Commission and information related to this relationship is published in FINRA's annual report.²⁹

IV. Conclusion

FINRA believes that the benefits of preserving the existing SRO approach to ensuring that investors have access to critical information on OTC Equity Securities through established dissemination channels at a reasonable cost is clearly in the best interest of investors and the marketplace overall. Thus, we fully support the UTP Plan's Amendment No. 21, we again commend the UTP Plan SRO Operating Committee for unanimously voting in favor of this amendment and we support the Commission's approval of Amendment No. 21.

FINRA appreciates the opportunity to comment on the UTP Plan's proposal of Amendment No. 21. If you have any questions, or if we can provide any additional information, please do not hesitate to contact me at (202) 728-8176 or Racquel L. Russell at (202) 728-8363.

Sincerely,

Handwritten signature of Stephanie M. Dumont in cursive script, with initials 'SK' written above the name.

Stephanie M. Dumont
Senior Vice President and
Director of Capital Markets Policy

²⁹ As documented in the report, "NASDAQ OMX and FINRA have a contractual agreement for NASDAQ OMX to provide support services for the OTCBB and OTC Equities businesses. OTCBB and OTC Equities charges from NASDAQ OMX to us were \$13.1 million, \$14.3 million and \$14.6 million for the years ended December 31, 2008, 2007 and 2006, respectively." See FINRA 2008 Year in Review and Annual Financial Report at 53, available at <http://www.finra.org/web/groups/corporate/@corp/@about/@ar/documents/corporate/p119061.pdf>. It should be noted that NASDAQ is not only FINRA's technology vendor, but also acts as the SIP Administrator for the UTP Plan.