FINRA

Financial Industry Regulatory Authority

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March 18, 2010

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

Re: File No. SR-FINRA-2009-077 — Response to Comments

Dear Ms. Murphy:

This letter responds to comments submitted to the Securities and Exchange Commission ("SEC" or "Commission") regarding the above-referenced rule filing, a proposed rule change to (1) create a Quotation Consolidation Facility ("QCF") for OTC Equity Securities for regulatory and transparency purposes that would serve as a data consolidator for all quote data in the over-the-counter ("OTC") equity market; (2) delete the FINRA Rule 6500 Series, which governs the operation of the OTC Bulletin Board Service ("OTCBB"); and (3) modify the position charge from \$6.00/security/month to \$4.00/security/month.[1] The SEC noticed the proposed rule change on November 13, 2009 and received 13 comment letters.[2] FINRA responds to the comments below.

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1 See Securities Exchange Act Release No. 60999 (November 13, 2009), 74 FR 61183 (November 23, 2009); (Notice of Filing of File No. SR-FINRA-2009-077) ("QCF Proposing Release").

2 See Letter from R. Cromwell Coulson, President and Chief Executive Officer, Pink OTC Markets Inc., to Elizabeth M. Murphy, Secretary, SEC, dated December 14, 2009 ("Pink OTC"); Letter from Jess Haberman, to Elizabeth M. Murphy, Secretary, SEC, dated December 14, 2009 ("Haberman"); Letter from Glenn Chaleff, The Vertical Trading Group, to Elizabeth M. Murphy, Secretary, SEC, dated December 15, 2009 ("Vertical"); Letter from Walter P. Carucci, President, Carr Securities Corporation, to Elizabeth M. Murphy, Secretary, SEC, dated December 17, 2009 ("Carr Securities"); Letter from James J. Angel, Ph.D., CFA, Associate Professor of Finance, Georgetown University, McDonough School of Business, to SEC, dated December 18, 2009 ("Angel"); Letter from Kimberly Unger, Executive Director, The Security Traders Association of New York, Inc., to Elizabeth M. Murphy, Secretary, SEC, dated January 13, 2010 ("STANY"); Letter from Eugene P. Torpey, Director of Compliance et

I. Legality of the Proposed Rule Change

A. Consistency with Section 15A

Some commenters raise concerns regarding the legality of the proposed rule change.[3] For example, Pink OTC states that the QCF proposal is inconsistent with the Exchange Act. Pink OTC further argues that Section 15A of the Exchange Act does not contemplate that FINRA, a national securities association, would compete in the dissemination of quotation information and that the role of disseminating a consolidated NBBO for OTC Equity Securities should first be met by the private sector whenever possible.

FINRA, as a non-profit registered securities association, is charged under Section 15A of the Exchange Act with a number of responsibilities including, among others, developing rules that address the form and content of quotations.[4] In light of this mandate, the collection, distribution and dissemination of quotation information is not a novel role for a registered securities association, and FINRA routinely provides

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al., Vandham Securities Corp., to Elizabeth M. Murphy, Secretary, SEC, dated January 14, 2010 ("Vandham"); Letter from Leonard J. Amoruso, General Counsel, Knight Capital Group, Inc. and Michael T. Corrao, Chief Compliance Officer, Knight Equity Markets, L.P., to Elizabeth M. Murphy, Secretary, SEC, dated January 26, 2010 ("Knight"); Letter from Christopher Meyer, Chief Compliance Officer, E*TRADE Capital Markets, LLC, to Elizabeth M. Murphy, Secretary, SEC, dated January 26, 2010 ("E*TRADE"); Letter from Brett F. Mock, Chairman and John C. Giesea, President and CEO, Security Traders Association, to Elizabeth M. Murphy, Secretary, SEC, dated February 4, 2010 ("STA"); Letter from David T. Hirschmann, President and Chief Executive Officer, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce, to Elizabeth M. Murphy, Secretary, SEC, dated February 4, 2010 ("Chamber"); Letter from Melissa MacGregor, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Elizabeth M. Murphy, Secretary, SEC, dated February 25, 2010 ("SIFMA"); and Letter from Jack Herstein, Chairperson, North American Securities Administrators Association, Inc., to Elizabeth M. Murphy, Secretary, SEC, dated March 4, 2010 ("NASAA").

3 See Carr Securities, NASAA, Pink OTC, SIFMA, STANY and Vandham.

4 Section 15A(b)(11) provides that:

> The rules of the association [must] include provisions governing the form and content of quotations relating to securities sold otherwise than on a national securities exchange which may be distributed or published by any member or person associated with a member, and the persons to whom such quotations may be supplied. Such rules relating to quotations shall be designed to produce fair and informative quotations, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting, distributing, and publishing quotations.

See 15 U.S.C. 78o-3(b)(11).

quotation information to the marketplace to, among other things, improve transparency – an outcome that inures to the benefit of investors and contributes to the strength and quality of the securities markets. For example, in furtherance of our statutory obligations, FINRA currently collects quotation information for OTC Equity Securities quoted on the OTCBB and disseminates such information through the Nasdaq Level 1 data feed,[5] and we consider the data dissemination aspect of our role to be essential in meeting our statutory mandate under Section 15A(b)(11) of the Exchange Act with respect to OTC Equity Securities.[6]

Thus, we believe that, not only is the proposed establishment of the FINRA QCF not "inconsistent" with the Exchange Act, it fits squarely within the scope of FINRA's affirmative regulatory authority. As the sole OTC broker-dealer regulator, FINRA is uniquely positioned to ensure on a going-forward basis that all quotes in OTC Equity Securities are reflected in a consolidated National Best Bid and Offer ("NBBO") through the QCF. While private entities may voluntarily perform similar services, without regulatory authority over the quoting participants, they lack the ability to compel quotation data reporting, as would be required by the QCF proposal.

Moreover, the proposal will improve upon the quotation information currently disseminated to the public via the Nasdaq Level 1 data feed in two important ways. First, it will provide an NBBO that captures all OTC quotation activity in a particular security, not just those quotes displayed on the OTCBB. Second, it expands the universe of securities that are disseminated via the Nasdaq Level 1 data feed to include an NBBO for all OTC Equity Securities, not just those displayed on the OTCBB.

B. Consistency with Section 3(f)

SIFMA argues that the QCF proposal is inconsistent with Section 3(f) of the Exchange Act which, among other things, requires the Commission to consider whether an SRO rule proposal will promote efficiency, competition and capital formation.[7] SIFMA

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5 See QCF Proposing Release. FINRA also operates the Alternative Display Facility, which facilitates the display of quotations and the comparison and reporting of trades in National Market System ("NMS") stocks.

6 See Securities Exchange Act Release No. 27975-A (May 30, 1990), 55 FR 23161 (June 6, 1990) (Corrected Order Approving File No. SR-NASD-88-19) ("OTCBB Pilot Approval Order") (Finding that the implementation and operation of the OTCBB is consistent with Sections 15A(b)(6) and (11) of the Exchange Act as well as Section 11A(a)(1) (which sets forth the Exchange Act's general policy goals for the securities markets) and further discussing that Congress found that new data processing and communication techniques should be applied to improve the efficiency of market operations, broaden the distribution of market information, enhance opportunities to achieve best execution and promote competition among market participants).

7 15 U.S.C. 78c(f).

asserts that the proposed QCF will hinder efficiency, competition and capital formation because it eliminates a significant source of revenue for inter-dealer quotation systems and market data vendors, and may preclude competitors from entering the interdealer quotation system business for OTC Equity Securities.[8] Similarly, Pink OTC argues that the QCF will prevent Pink OTC from deriving revenue from the dissemination of a consolidated quotation, and that this shift may result in increased costs to broker-dealers and, ultimately, to investors.

FINRA does not agree that the proposal is inconsistent with Section 3(f). As an initial matter, we note that SRO rule filings do not require a finding that the proposed rule promotes efficiency, competition and capital formation. In fact, to the contrary, it is understood that SRO rule filings may, at times, impose a burden on competition to the extent necessary to further the purposes of the Exchange Act and to execute the SRO's duties.[9] Nonetheless, while FINRA need not make a Section 3(f) finding, FINRA firmly believes that the proposed rule change will promote efficiency, competition and capital formation.[10]

FINRA's view is that the QCF will promote efficiency by, among other things, improving the ability of members and the investing public to quickly ascertain the best price available for an OTC Equity Security through a reliable, centralized source. We further believe that, rather than hindering competition, the QCF will spark competition by enabling new market entrants to compete directly (and immediately) with existing trading systems and inter-dealer quotation systems ("IDQSs") by having their quotes included in an established and widely distributed NBBO. The importance of fostering competition and the benefits that inure from competition are well established under the Exchange Act and the QCF will serve a key role in furtherance of competition. As noted above, because FINRA is the sole OTC regulator, it has the unique ability to ensure that all OTC quotes are incorporated into the QCF NBBO. By providing a neutral, SRO-sponsored NBBO, the QCF would set the stage for beneficial inter-market competition to take root in the OTC equity space. True competition in the OTC equity space may be hampered if new entrants must rely on their competitors for wide dissemination of their quotations.

FINRA also believes the QCF will facilitate capital formation by consolidating and widely distributing the best quotations displayed in the securities of all OTC issuers, not just issuers quoted on the OTCBB, providing investors and market participants with best price information on these issuers. Thus, we believe that the QCF will serve

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8 See SIFMA; see also Pink OTC and STANY.

9 See 15 U.S.C. 78o–3(b)(9).

10 As stated in the QCF Proposing Release, FINRA does not believe that the proposal will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

to enhance the capital raising abilities of OTC Equity Security issues – not dampen them.

C. Consistency with Section 17B

Pink OTC argues that FINRA may not legally operate the QCF without a congressional directive specifically instructing FINRA to do so. As an example of a situation where Congress specifically mandated that there be a system related to OTC quotations, Pink OTC notes the directive found in Section 17B.[11] Pink OTC believes that, where Congress has determined it is necessary and desirable for FINRA to fill a role that would otherwise be accomplished by the private sector, the Exchange Act is quite explicit in defining the objective. Pink OTC also states that FINRA is unable to claim that the QCF qualifies as meeting the existing Section 17B directive, because it does not accomplish that statute's legislative goals.

While it is not necessary for the Commission to determine that the proposed QCF is a Section 17B qualifying system for approval of the QCF proposal, FINRA believes that the QCF, together with the OTC Reporting Facility ("ORF"),[12] meet the characteristics set forth in Section 17B of the Act. FINRA believes that the proposed restructuring of the OTC market through the addition of the FINRA QCF will facilitate the widespread dissemination of reliable and accurate information with respect to both last sale data and quotation information for over-the-counter quotations and transactions in OTC Equity Securities more comprehensively than exists today, and therefore is consistent with the goals of Section 17B.[13]

Similarly, we do not agree that a specific congressional mandate is required for the approval of the QCF. The standard of review for approval of FINRA's rules is set forth in the Exchange Act, and such standards provide a level of flexibility to empower the Commission and SROs to respond to the changing needs of investors and the evolution of the markets. As a result, the vast majority of FINRA's rules are not the result of a specifically expressed requirement in the Exchange Act, but rather

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11 Section 17B of the Exchange Act, among other things, mandates the Commission to facilitate the widespread dissemination of reliable and accurate quotation and transaction information with respect to penny stocks. However, there is no requirement that the QCF be designated as such.

12 FINRA members generally are required to report over-the-counter trades in OTC Equity Securities to the ORF within 90 seconds of execution and FINRA disseminates this transaction information in real-time.

13 Although not necessary or relevant to the Commission's determination of whether to approve the QCF proposal, FINRA also notes that it may separately seek Section 17B designation for the QCF and ORF systems.

in furtherance of the broad framework of SRO functions that Congress intended as set forth under Section 15A.[14]

D. Anticompetitive Concerns

Certain commenters assert that the proposed rule change is generally anti-competitive or may result in a FINRA data monopoly.[15] Commenters also suggest that there is no need for an SRO to disseminate an NBBO in OTC Equity Securities because such information already is made available through private entities.[16] SIFMA further argues that the Commission should limit all SROs' control over market data whenever possible and that "for profit" SROs particularly should be disfavored. SIFMA believes that the role of ensuring the wide availability of data should be left to the free market and the quality-control pressures of competition.[17]

Under the proposed framework, FINRA will collect, calculate and disseminate only the NBBO for OTC Equity Securities, while each IDQS and ATS will retain the ability to independently distribute its depth-of-book. This framework is analogous to the data distribution construct established for NMS stocks, which distinguishes between "core" and "non-core" data. Specifically, with respect to NMS stocks, "core" data, which is the best-priced quotations and last sale information of all markets in U.S.-listed equities, is consolidated and distributed to the public by a single central processor (and administered for the sole benefit of the SRO participants of the central processor committee). In contrast, "non-core" data can be independently distributed by individual exchanges and other market participants. In making this distinction, the

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14 For example, in the Regulation NMS Adopting Release, the Commission acknowledges flexibility permitted with respect to FINRA (then NASD) rules under Section 15A. Specifically, the Commission states:

> Section 15A(b)(11) of the Exchange Act requires an association to have rules governing the form and content of quotations relating to securities sold otherwise than on a national securities exchange that are published by a member of the association. Such rules must be designed to produce fair and informative quotations and to promote orderly procedures for collecting, distributing, and publishing quotations. *The Exchange Act does not expressly require [NASD] to establish a facility for executing orders against the quotations of its members, although it could choose to do so.* (emphasis added).

See, e.g., Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) ("Regulation NMS Adopting Release").

15 See, e.g., Pink OTC, SIFMA, STANY and Vertical.

16 See Angel, Carr Securities, Chamber, E*TRADE, Knight, NASAA, Pink OTC, SIFMA, STANY, Vandham and Vertical.

17 See SIFMA.

SEC recognized the critical benefit of core data to investors, namely, "helping them to assess quoted prices at the time they place an order and to evaluate the best execution of their orders against such prices by obtaining data from a single source that is highly reliable and comprehensive."[18] To that point, one commenter stated that the creation of an NBBO would benefit market integrity and foster investor protection.[19] We agree.[20] The Commission has long determined that the central availability of quotation information is a cornerstone of a national market system, and such information has routinely been disseminated reliably by independent SROs.[21]

Thus, the central distribution of core NBBO data is an essential function that does not interfere with the ability of an IDQS or ATS independently to distribute non-core data (such as depth-of-book information). Indeed, as evidenced by the success of proprietary data products sold by the NMS exchanges (separate and apart from the consolidated SIP NBBO data products), there is a vibrant and profitable market for the sale of innovative and competitive trading center data products. Such products are indicative of the beneficial innovation that can result from inter-market competition. Therefore, while it is appropriate that depth-of-book information may be distributed at the discretion of private entities, FINRA believes it is critical that all market participants and investors are able to obtain, at a reasonable cost, reliable information on the best prices available for quoted securities, and do not believe that an SRO performing this function is anticompetitive.

Further, as noted above, unlike a private entity, FINRA has the authority to require that all quotes displayed by its members in the OTC market be incorporated into the consolidated NBBO and therefore, can best ensure the accuracy, completeness and accessibility of an NBBO for OTC Equity Securities. Moreover, we believe that having an SRO function as the central disseminator of such data is a critical safeguard

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18 See Regulation NMS Adopting Release; and Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (Order Relating to NYSE Arca Data).

19 See Haberman. This commenter believes that only quotes for at least the minimum size required for quotations displayed in an IDQS should be incorporated in the QCF NBBO. We confirm that the reporting obligation under the proposed QCF would be consistent with the minimum quotation sizes set forth in Rule 6450.

20 Notably, SIFMA concedes that a consolidated NBBO for OTC Equity Securities would improve transparency in furtherance of the goals of Section 11A of the Exchange Act, but argues that such service should be overseen by the SEC through its authority to regulate securities information processors.

21 In discussing the need for improved dissemination of quotation information, the Commission described the availability of comprehensive quotation information as a fundamental building block of the national market system and stated its belief that such information will improve both brokers' and public investors' knowledge of current prices at which reported securities can be bought or sold throughout the country. Securities Exchange Act Release No. 15009 (July 28, 1978), 43 FR 34851 (August 7, 1978). See also Regulation NMS Adopting Release.

to ensure that such data is made available on a fair and reasonable basis to investors, market participants, and data vendors.

FINRA's administration of the NBBO for OTC Equity Securities through the QCF also will ensure ongoing Commission oversight of the pricing of the data product because any pricing changes will be subject to filing with the Commission. By comparison, the Commission has little effective control over the pricing of data sold by non-SROs, and such pricing is not subject to any public process. As was concluded for NMS stocks, the distribution of core NBBO information is too critical to be left to private forces.

E. Other Issues

We believe the other objections raised by the commenters related to the legality of the proposal also are without merit and are immaterial to a proper consideration of the rule. For example, Pink OTC asserts that the dissemination of an NBBO by an SRO derived from quotations submitted by such SRO's membership may constitute, among other things, the seizure of private property in violation of the Constitution.[22] Without addressing the question of the application of the Constitution to SRO rules generally, it is clear that, among other things, the adoption of Section 11A expressly indicates the intent of Congress to create a national market system that includes widely available best-price quotation information.[23] To our knowledge, the intent of Congress that the SEC itself undertake rulemaking regarding the collection and distribution of quotation information has never been questioned; thus we believe it also is clear that SROs, including FINRA, may continue to do so.

Pink OTC also asserts that FINRA now is, contrary to a previous representation, seeking to use members' quotation information for "commercial" purposes. While we disagree with this commenter's assertion (as FINRA does not consider the QCF to be a "commercial" venture), this comment also is not germane to a review of this filing.[24] This representation was made in connection with a separate filing that is irrelevant to a consideration of the instant proposed rule change.[25] The standard that ultimately must

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22 See Pink OTC; see also Carr Securities.

23 Although Section 11A is not directly applicable to OTC Equity Securities, it provides insight into the Exchange Act's general policy goals for the securities markets. See infra note 6.

24 In the filing referenced by the commenter, FINRA (then NASD) also stated that NASD is not limited or restricted from otherwise calculating its own inside quote from quotation information received pursuant to the proposed rule change or otherwise and using such inside quote for purposes that it deems appropriate, consistent with NASD rules and the federal securities laws. See letter from Stephanie M. Dumont, Associate General Counsel, NASD, to Katherine A. England, Assistant Director, Division, Commission, dated February 26, 2003.

25 The rule change referenced by the commenter, unlike the current proposal, is a quotation recording and reporting rule adopted for FINRA internal regulatory purposes and did not

be met for the approval of the proposal is set forth in the Exchange Act and, as noted in the QCF Proposing Release and above, FINRA believes such standards have abundantly been met.

II. Utility and Impact of the Proposed Rule Change

A. The FINRA NBBO would be Delayed

Some commenters argue that the proposed rule change would result in the distribution of a delayed NBBO.[26] The proposal requires member firms to contemporaneously report to the FINRA QCF any quotation displayed by that member in an IDQS or the top-of-book of a member that is an ATS. Commenters note that the resultant QCF NBBO may vary at times from the BBO disseminated by each IDQS and ATS because of potential dissemination delays in processing the QCF NBBO.

This potential for latency between the QCF NBBO and the individual trading center data feed is not a new or unique phenomenon. For example, there also may be a time delay associated with collecting, processing and distributing the NBBO for NMS stocks by the NMS plan processors. FINRA does not believe this potential latency is a valid basis upon which to deny making important and critical information widely available to the investing public. We also note that the Commission is studying these precise types of issues in the context of NMS stocks, and the outcome of its review would inform whether future rulemaking efforts in this area are necessary.[27] However, we do not believe that the possibility for future developments warrants halting rulemaking for enhanced transparency at the present time.

B. QCF Impact on Issuers

Certain commenters believe that the proposed rule change may negatively impact issuers.[28] For example, Pink OTC notes that the proposed QCF would classify issuers as either being current in their filings, late, or non-reporting. Then, applying its own subjective standards to FINRA's proposed disclosures, Pink OTC concludes that a "non-reporting" disclosure should be considered the "lowest FINRA QCF category." Pink OTC then argues that many legitimate companies, though unregistered, have met

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propose or contemplate wide dissemination of the data. In contrast, the current QCF proposal would require the real-time submission of quotation information for inclusion in an NBBO for both regulatory and dissemination purposes, among others.

26 See Carr Securities, Pink OTC, STANY and Vandham.

27 See Securities Exchange Act Release No. 61358 (January 14, 2010) (Concept Release on Equity Market Structure).

28 See e.g., Chamber, NASAA and Pink OTC.

the requirements of OTCQX (Pink OTC's highest tier), but yet will be placed in the QCF's "lowest category."

Pink OTC's premise and conclusion are both incorrect. The proposed rule change does not propose to rank issuers or place them in tiered categories. Rather, FINRA proposes to append, using objective criteria, an identifier disclosing the reporting status of the issuer based on information obtained directly from the SEC or from another appropriate regulatory body.[29] If an issuer's securities are not registered, they will be identified as such. The fact of whether or not a company is current, delinquent or unregistered speaks to, among other things, the availability of current information for that issuer that has been filed with a regulator consistent with the registration requirements of such governmental entity. FINRA does not believe that including this information can be the cause of a negative impact on issuers – FINRA believes that, because these disclosures simply relay publicly available information, the impact on issuers is neutral (and positive on investors as it provides factual information in an easily accessible and readily available manner).

C. QCF Impact on Investors

Notably, one of the commenters who argues that legitimate, though unregistered, issuers may be unfairly harmed when identified as such in the QCF, simultaneously argues that disseminating the best quotes for securities of unregistered issuers may mislead investors that these securities are as reliable as the registered securities historically disseminated through the Nasdaq Level 1 feed.[30]

FINRA disagrees with both of these irreconcilable arguments. As noted by Pink OTC, FINRA (then NASD) amended the OTCBB eligibility rules to only permit market

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29 One commenter believes that the QCF Proposing Release states that the registration and reporting status of issuers will be differentiated with suffixes applied to the symbols and argues that the symbology used should be consistent with exchange-listed symbology. See Angel. FINRA does not propose to modify symbols on the QCF. Rather a separate identifier field will be used to indicate the filing status of the quoted securities. This commenter also expresses a view regarding the existence of separate tapes for exchange-listed securities. The issue of combining the consolidated tapes is not germane to this proposed rule change and, therefore, is not addressed in this response to comments.

30 See Pink OTC. We also do not believe that the dissemination of quotation data for unregistered securities through the Nasdaq Level 1 feed alongside Nasdaq securities will be a source of confusion for investors, as alleged by some commenters, and note that trade information in OTC Equity Securities (of unregistered issuers) has been distributed through the Nasdaq Level 1 data feed for years. See also NASAA, Pink OTC and STANY. As currently being designed, the QCF NBBO data disseminated via the Nasdaq Level 1 data feed will include the following primary data message elements: quoted price, quoted size, time of quote, issuer symbol, and broker-dealer MPID that posted the quote on an IDQS. In addition, as discussed further in the QCF Proposing Release, QCF data also will provide information concerning the issuer's financial reporting status.

makers to post quotations on the OTCBB in SEC-registered securities to promote more consistency with the full disclosure goals of the federal securities laws and help protect investors from fraud.[31] In furtherance of these objectives, rather than omitting quotations in unregistered securities altogether, FINRA believes investors are best served by disseminating an NBBO for any OTC Equity Security that is actively quoted, together with implementing a framework where investors are made aware of the issuer's registration and reporting status. Disclosure and transparency are essential to enable investors to make informed decisions and to then engage in transactions in securities in fair and open markets.[32]

Certain commenters also assert that the information sought to be provided by the QCF is inferior to that offered by private entities.[33] For example, one commenter argues that, while quotes in the QCF will carry an identifier that distinguishes between current reporting issuers, late reporting issuers and non-reporting issuers, significantly more information already is being provided by Pink OTC which categorizes OTC Equity Securities by the quantity and quality of disclosure and provides additional information to aid investors in making informed investment decisions. FINRA notes that the QCF would not preclude or otherwise impact any private, proprietary classification or disclosure schemes that currently exist or may be developed for OTC Equity Securities. Further, the proposed rule change is not intended to serve as a one-stop source for all points of information that an investor should consider prior to making an investment decision. The QCF is intended to improve price transparency by providing best price information to investors and to further indicate the filing status of the issuer, which is consistent with the disclosure regime on the OTCBB.

III. Potential Burdens and Fees

A. Administrative Burdens

Commenters raise the issue of increased administrative burdens as a result of the QCF. For example, SIFMA states that all of the SEC-sanctioned market data plans (e.g., the CQ Plan and the NASDAQ UTP Plan) have resulted in excessive administrative burdens for users due to heavily papered relationships, such as vendor agreements, subscriber agreements, customer agreements and data use policies.[34]

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31 See Pink OTC; see also Securities Exchange Act Release No. 40878 (January 4, 1999), 64 FR 1255 (January 8, 1999) (Order Approving File No. SR-NASD-98-51).

32 See Regulation NMS Adopting Release and OTCBB Pilot Approval Order.

33 See e.g., Pink OTC.

34 See SIFMA.

However, FINRA does not believe that there will be any significant administrative burdens for members as a result of the QCF. The QCF NBBO will be disseminated to subscribers through the existing Nasdaq Level 1 data feed, and it is unclear why a distribution through established subscriber relationships would result in any substantial changes. Thus, we do not agree that the proposal will result in significant administrative burdens for members.

B. Proposed Position Fee and Nasdaq Level 1 Subscription Fee

A number of commenters raise concerns regarding the potential impact of the proposed $4.00/security/month QCF position fee that would replace the existing $6.00/security/month OTCBB position fee. Generally, these commenters argue that the proposed fee is not warranted because it does not result from a value-added service offering by FINRA (e.g., because market makers cannot execute against quotes in the QCF and because NBBO information is already made available through private sources). These commenters generally also believe that the position fee will increase the cost of quoting OTC Equity Securities and potentially result in reduced liquidity, reduced ability of small issuers to raise capital and increased costs for investors.[35] Commenters also assert that the QCF proposal does not provide estimates of the cost and revenue for FINRA and the Nasdaq UTP Plan that would result; therefore the impact on investors, exchanges and other data providers cannot be fully considered.[36]

Section 15A(b)(5) of the Exchange Act requires, among other things, that FINRA rules provide for the equitable allocation of fees and other charges among members. The position fee, as proposed, is intended to reasonably reflect FINRA's costs in connection with establishing and operating the proposed QCF, the utility of which has already been discussed above. While FINRA does not necessarily concur that a position fee will result in reduced liquidity, in response to commenters' concerns, FINRA is eliminating the proposed QCF position fee at this time.

FINRA intends to revisit its fee structure after it has gained more experience with the operation of the QCF. Any future fees will be the subject of a separate rule filing with the Commission. Similarly, with respect to Nasdaq Level 1 data fees, FINRA currently does not intend to recommend to the Nasdaq UTP Plan that such fees be increased as a result of the additional QCF data; however, if such fees were to be increased at a later time, that determination would be subject to a vote at the UTP Plan Policy Committee level and then would be required to be filed with the Commission and subject to the notice and comment process. A key benefit of FINRA administering the core NBBO for the OTC equity market is that the Commission has direct oversight of pricing and the public will have the opportunity to comment if the

35 See e.g., Pink OTC and SIFMA.

36 See SIFMA; see also Angel.

UTP Plan Policy Committee ever seeks to increase the pricing of the Nasdaq Level 1 feed.

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FINRA believes that the foregoing responds to the material issues raised in the comment letters to this rule filing. If you have any questions, please contact me at (202) 728-8176 or Racquel L. Russell at (202) 728-8363.

Sincerely,

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