Michael R. Trocchio
Direct Phone: 202.373.6167
Direct Fax: 202.373.6467
michael.trocchio@bingham.com

March 19, 2010

VIA ELECTRONIC SUBMISSION

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

Re: File No. SR-FINRA-2009-077; Release No. 34-60999

Dear Secretary Murphy:

We are writing on behalf of our client, Pink OTC Markets Inc. ("Pink OTC"), to supplement Pink OTC's comment letter dated December 14, 2009 ("Original Comment Letter") in response to the above-referenced rule filing by the Financial Industry Regulatory Authority, Inc. ("FINRA"). Among other reasons, the Original Comment Letter showed that FINRA's proposed creation of a Quotation Consolidation Facility ("QCF") that would serve as a commercial data consolidator and disseminator for quote data in the over the-counter ("OTC") equity market (the "QCF Proposal") is unnecessary because Pink OTC already consolidates and provides the information at issue to the market on fair, reasonable, and nondiscriminatory terms.

In addition to those reasons, we would like to add the following, as more fully discussed below: 1) the Nasdaq UTP Plan expressly prohibits the distribution of quotations for OTC equity securities through NASDAQ Level One, as contemplated by the QCF Proposal, 2) as a national market system ("NMS") plan, the Nasdaq UTP Plan is not authorized by the Securities Exchange Act of 1934 (the "Exchange Act") to disseminate quotations in non-NMS securities, and 3) the QCF Proposal is inconsistent with Section 3(f) of the Exchange Act.

I. The Nasdaq UTP Plan Prohibits the Dissemination of Quotations for Non-Nasdaq Securities

Under the QCF Proposal, FINRA proposes to distribute quotations for OTC equity securities[1] through the Nasdaq Level 1 data feed. The Nasdaq Level 1 data feed is distributed under the Nasdaq UTP Plan.[2] However, the Nasdaq UTP Plan is clearly

[1] As used in the QCF Proposal, the term "OTC equity security" means any non-exchange-listed security and certain exchange-listed securities that do not otherwise qualify for real-time trade reporting.

[2] The current Nasdaq UTP Plan is available at: http://www.utpdata.com

Boston
Hartford
Hong Kong
London
Los Angeles
New York
Orange County
San Francisco
Santa Monica
Silicon Valley
Tokyo
Walnut Creek
Washington

Bingham McCutchen LLP
2020 K Street NW
Washington, DC
20006-1806

T 202.373.6000
F 202.373.6001
bingham.com

limited to distributing execution 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 may not be distributed under the plan through the Nasdaq Level 1 data feed. Among the provisions of the Nasdaq UTP Plan that clearly show the plan may not disseminate quotes for non-Nasdaq securities are the following:

- "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 quotations that a plan participant submits for any non-Nasdaq securities such as OTC equity securities. As a result, we believe the Commission simply cannot approve the QCF Proposal if the quotations for OTC equity securities that the QCF would collect would be disseminated through the Nasdaq Level 1 data feed.

II. The Nasdaq UTP Plan is not Authorized by the Exchange Act to Disseminate Quotations for Non-NMS Securities

Not only do the express terms of the Nasdaq UTP Plan prohibit distribution of quotations 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 such as the Nasdaq UTP Plan. NMS plans are permitted 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. OTC equity securities are not currently designated as NMS securities, therefore, unless the Commission designates them as such, 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."[3] [emphasis added]

In light of this finding, Section 11A(a)(3)(B) gives the Commission the authority to require self-regulatory organizations to act jointly (for example, through an NMS plan), 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; …"

This 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).[4] Therefore, even if the Nasdaq UTP Plan did not already by its express terms

---

[3] *See*, Section 11A(a)(1)(D) of the Exchange Act.

[4] 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 securities other than exempted securities. (Securities or classes of securities so**

exclude non-NMS securities, the QCF Proposal's planned distribution of quotations for OTC equity securities through a national market system plan would not be permitted under Section 11A of the Exchange Act because such securities are not NMS securities.

III. The QCF Proposal is Inconsistent with Section 3(f) of the Exchange Act

In accordance with the requirements of Section 19(b)(2)(B) of the Exchange Act,[5] the Commission should disapprove of the QCF Proposal because it is inconsistent with the "efficiency, competition, and capital formation" objectives of Section 3(f) of the Exchange Act. Section 3(f) of the Exchange Act provides that "whenever pursuant to this title the Commission is engaged in ... the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." We believe the QCF Proposal will harm efficiency, competition, and capital formation as well as investors for the following reasons:

- FINRA's QCF Proposal will hinder pricing efficiency and capital formation by discouraging quoting by broker-dealers by measurably increasing the costs of quoting OTC equity securities. We believe that the QCF Proposal will significantly increase the cost of quoting OTC equities, both through FINRA's proposed "per quote" charge and an expected increase in fees charged by any interdealer quotation system to offset the loss of the revenue it could have earned from the sale of its quotation data. The increase in costs can reasonably be predicted to cause broker-dealers to quote fewer issues (*i.e.*, broker-dealers will stop quoting the least active issues as the costs to quote are outweighed by revenue from transactions), and those issues that are no longer quoted will have much less price transparency, pricing efficiency, and liquidity. This decrease in transparency, efficiency, and liquidity will unequivocally make it more difficult for the affected issuers to raise capital, and harm investors who have or would seek to invest in such companies.

---

designated [are] hereinafter in this section referred to as "qualified securities".)" [emphasis added].

[5] Section 19(b)(2)(B) of the Exchange Act provides that "[t]he Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this title and the rules and regulations thereunder applicable to such organization. The Commission shall disapprove a proposed rule change of a self-regulatory organization if it does not make such finding."

- The QCF Proposal, if approved, would discourage competition among interdealer quotation systems by discouraging entry into the market for operating an interdealer quotation system because one of the primary revenue streams of such a system (sale of quotation data) would be usurped by FINRA.

- The QCF Proposal will discourage competition among market data vendors because it will grant a monopoly to FINRA with respect to commercially valuable market data (*i.e.*, quotations for OTC equity securities) and discourage, and perhaps completely prevent, other market data vendors from entering the market to provide a consolidated NBBO in OTC equity securities. If the Commission wishes to enhance distribution of OTC equity quotation information, the Commission should takes steps to encourage competition among market data vendors and not eliminate competition by granting FINRA a monopoly.

IV. Conclusion

For the reasons stated above as well as in the Original Comment Letter, Pink OTC believes the Commission should not approve the QCF Proposal. We would be happy to discuss these issues further with the Commission and its staff.

Sincerely yours,

Michael R. Trocchio

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
James Brigagliano, Deputy Director, Division of Trading and Markets
David Shillman, Associate Director, Division of Trading and Markets
Nancy Sanow, Assistant Director, Division of Trading and Markets