



November 20, 2020

Ms. Vanessa Countryman  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-0609

**Via Electronic Mail ([rule-comments@sec.gov](mailto:rule-comments@sec.gov))**

**Re: File No. SR-FINRA-2020-031** (Proposed Rule Change to Adopt FINRA Rule 6439 (Requirements for Member Inter-Dealer Quotation Systems) and Delete the Rules Related to the OTC Bulletin Board Service) – Response to Comments

Dear Ms. Countryman:

This letter is being submitted by the Financial Industry Regulatory Authority, Inc. (“FINRA”) in response to comments submitted to the U.S. Securities and Exchange Commission (“SEC”) regarding the above-referenced rule filing. The SEC published the proposed rule change for public comment in the Federal Register on October 7, 2020,<sup>1</sup> and received three comment letters in response to the rule filing.<sup>2</sup> Commenters generally support the proposed approach, though OTC Link and STANY request guidance or amendments to the Proposal, as discussed below.

*A. Proposed Deletion of OTCBB-related Rules*

FINRA proposed to cease operation of the OTC Bulletin Board Service (OTCBB) and to delete the rules that govern its operation. OTC Link and STANY both strongly supported this aspect of the proposal. OTC Link stated that “[g]iven the lack of quotation activity on OTCBB, and the prevalence of commercial IDQS operators

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<sup>1</sup> See Securities Exchange Act Release No. 90067 (October 1, 2020), 85 FR 63314 (October 7, 2020) (Notice of Filing of File No. SR-FINRA-2020-031) (“Proposal”).

<sup>2</sup> See Letter from Christopher Bok, Chief Compliance Officer, OTC Link, LLC, to Jill M. Peterson, Assistant Secretary, SEC, dated October 28, 2020 (“OTC Link”); Letter from Kimberly Unger, CEO & Executive Director, The Security Traders Association of New York, Inc., to Jill M. Peterson, Assistant Secretary, SEC, dated October 28, 2020 (“STANY”); Letter from Sherry J. Sandler, Global OTC, to Jill M. Peterson, Assistant Secretary, SEC, dated November 9, 2020 (“Global OTC”).

regulated by FINRA and by the SEC as Alternative Trading Systems, OTC Link agrees with FINRA's assertion that "[S]RO resources allocated to maintaining OTCBB operations would be better directed elsewhere."<sup>3</sup> In addition, STANY stated that "[c]easing operation of the moribund OTCBB would free resources, which FINRA currently expends on maintaining the system, to be used elsewhere where the resources can provide greater good to the marketplace."<sup>4</sup>

*B. Enhanced Firm Quote Compliance and Reporting*

Paragraphs (c) and (d) of proposed Rule 6439 seek to enhance the regulatory regime around member compliance with the firm quote obligation of Rule 5220 (Offers at Stated Prices). Proposed paragraph (c) would require a member IDQS to establish, maintain and enforce written policies and procedures that are reasonably designed to address instances of unresponsiveness when orders are presented to trade with firm quotations in OTC Equity Securities displayed on its system. The Proposal provides that, at a minimum, these policies and procedures must specify an efficient process for (1) monitoring subscriber unresponsiveness; (2) subscribers to submit complaints to the member IDQS regarding potential instances of unresponsiveness to an order; (3) documenting the subscriber's rationale for unresponsiveness; and (4) determining specified steps when an instance of or repeated order unresponsiveness may have occurred.

OTC Link and STANY request that FINRA provide additional guidance in connection with proposed paragraph (c). OTC Link specifically requested that FINRA issue guidance confirming that OTC Link's "saturation" feature (along with providing data regarding subscriber unresponsiveness) would meet the standards set forth in paragraphs (c)(3) and (c)(4) of proposed Rule 6439.<sup>5</sup> OTC Link stated that, while it recognizes the importance of an IDQS's function of monitoring subscriber responsiveness in support of compliance with Rule 5220 firm quote obligations, it also must balance that function against fair access requirements and must be mindful of its

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<sup>3</sup> See OTC Link, at 1.

<sup>4</sup> See STANY, at 1.

<sup>5</sup> In its letter, OTC Link describes its system's "saturation" feature pursuant to which it removes a subscriber's quote from OTC Link's best bid or offer calculation when the subscriber is unresponsive per the parameters that OTC Link has defined. OTC Link states that, among other things, this feature is designed to "deter unresponsiveness and facilitate our subscribers' compliance with Rule 5220's firm quote provisions." See OTC Link, at 3.

role as a private actor rather than a self-regulatory organization (SRO).<sup>6</sup> STANY agreed that unresponsiveness can be an issue, but stated that “IDQSs are unlikely to have access to subscriber’s rationale or other reasons for unresponsiveness” and requested that FINRA provide guidance on how to comply with the proposed paragraph (c)(3) requirement.<sup>7</sup>

FINRA agrees that the current “saturation” feature, as FINRA understands it, is consistent with the objectives of some of the proposed requirements in paragraph (c). FINRA understands that OTC Link currently “monitors for subscriber unresponsiveness” through the saturation feature, as would be required by proposed paragraph (c)(1). In addition, FINRA understands that OTC Link currently, through the saturation feature, has “determin[ed] specified steps when an instance or repeated order unresponsiveness may have occurred,” as would be required by proposed paragraph (c)(4), and would remove the subscriber’s quote from the best bid or offer calculation when the subscriber has not been responsive, per the terms of the saturation feature.

FINRA does not, however, believe that the current saturation feature would meet the objectives of proposed paragraphs (c)(2) or (3), which, when combined, would require that the member IDQS provide a mechanism or process where one subscriber may submit or report to the member IDQS a potential instance of order unresponsiveness by another subscriber and document the subscriber’s rationale in response to that event. This is separate and distinct from the monitoring requirement in proposed paragraph (c)(1). FINRA appreciates that a member IDQS does not have all of the information necessary to confirm whether any rationale provided by a subscriber is accurate, and FINRA confirms that it does not expect the member IDQS to, for example, investigate or confirm a subscriber’s rationale for the unresponsiveness. Instead, FINRA expects that the member IDQS provide a mechanism or process that would permit a subscriber to submit or report a potential instance of order unresponsiveness and the member IDQS would be required to request that the other subscriber provide its rationale in connection with the instance.<sup>8</sup> FINRA believes that the member IDQS is in the best position to obtain this information from the subscriber at the time of, or close in time to, the event, and to document this information and make it available to FINRA upon request. FINRA therefore believes that this aspect of the

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<sup>6</sup> See OTC Link, at 2.

<sup>7</sup> See STANY, at 3.

<sup>8</sup> For example, the member IDQS could provide a messaging protocol or other mechanism that would permit a subscriber to submit or report to the member IDQS a potential instance of order unresponsiveness and that also would contact the other party to obtain their rationale.

proposal continues to be appropriate and within the scope of a member IDQS's function of monitoring subscriber responsiveness in support of compliance with the firm quote obligations of Rule 5220.

OTC Link and STANY also discuss proposed paragraph (d), pursuant to which FINRA would collect monthly aggregate and order-level information. Both commenters note that proposed paragraph (d)(2) contains language to prevent duplicative reporting obligations should proposed paragraph (d) information become reportable pursuant to the Consolidated Audit Trail (CAT).<sup>9</sup> However, OTC Link states that it should be exempt from CAT reporting and report its order-level information pursuant to Rule 6439 only.<sup>10</sup> Likewise, STANY requests that the proposed paragraph (d) information be reported under Rule 6439 only.<sup>11</sup> FINRA notes that the instant proposal was never intended to impact the outcome of whether OTC Link's order-level information should become CAT reportable.<sup>12</sup> Therefore, the issue of whether the proposed order-level information is reportable to CAT is outside of the scope of the Proposal. FINRA continues to believe it is appropriate that this Proposal ensure that, should OTC Link's order-level information be CAT reportable, the member would not be subject to duplicative regulatory reporting under proposed Rule 6439(d)(1)(B).<sup>13</sup>

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<sup>9</sup> Proposed paragraph (d)(2) provides that a member inter-dealer quotation system would not be required to report to FINRA pursuant to Rule 6439 any of the items of information specified in paragraph (d)(1)(B) if, at a minimum, the items specified in paragraph (d)(1)(B)(i) through (xi) are subject to CAT reporting. We note that the aggregate information proposed to be received pursuant to paragraph (d)(1)(A) would be required to be reported pursuant to Rule 6439 regardless of an IDQS's reporting obligations pursuant to CAT (because, unlike paragraph (d)(1)(B) information, paragraph (d)(1)(A) is not order-level information and would not be reported to CAT).

<sup>10</sup> See OTC Link, at 4.

<sup>11</sup> See STANY, at 2.

<sup>12</sup> OTC Link stated that it views the messages in its system as "negotiations" and not "orders" for the purposes of Rule 6439 or CAT. As FINRA stated in the Proposal, these negotiation activities are indeed "orders" for purposes of firm quote rule obligations and proposed Rule 6439.

<sup>13</sup> The CAT NMS Plan participants have determined that messages sent through OTC Link constitute orders to the extent that such messages represent a "firm indication of a willingness to buy or sell such a security." See CAT NMS Plan FAQ J2 (as updated on 11/03/2020); see also 17 CFR 242.300(e).

*C. Fair Access*

The Proposal's "fair access" provision contained in paragraph (b) would require member IDQSs to establish non-discriminatory written standards for granting access to quoting and trading in OTC Equity Securities on its system that do not unreasonably prohibit or limit any person in respect to access to services offered by such member IDQS. As noted in the Proposal, this provision is consistent with SEC Regulation ATS's "fair access" requirements contained in SEC Rule 301(b)(5).<sup>14</sup> However, unlike SEC Regulation ATS, proposed Rule 6439(b) would apply irrespective of the member IDQS's percentage of average daily trading volume in a security and, therefore, the Proposal's fair access requirements would apply across a member IDQS's system for all OTC Equity Securities traded on its system.<sup>15</sup>

In its letter, OTC Link states that the Proposal contains duplicative requirements for an IDQS that already is subject to the fair access requirements of SEC Regulation ATS, and that the Proposal should exempt an IDQS from the proposed paragraph (b) requirement if it already is subject to SEC Regulation ATS.<sup>16</sup> As FINRA stated in the Proposal, proposed paragraph (b) would apply to a member IDQS's quoting and trading in all OTC Equity Securities, regardless of the percentage of average daily trading volume that such member IDQS had in the security.<sup>17</sup> Therefore, to the extent a member IDQS already is subject to SEC Regulation ATS's fair access standards with respect to all securities traded on its platform, then the Proposal would only additionally require that the required fair access policies and procedures be prominently disclosed to subscribers in accordance with the Proposal. However, to the extent a member IDQS is not already subject to SEC Regulation ATS's fair access standards for all OTC Equity Securities traded on its platform, then the proposal would fill that gap by requiring the firm to expand the fair access standards to its activity in all OTC

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<sup>14</sup> See Proposal, supra n.1.

<sup>15</sup> The SEC Regulation ATS fair access requirements apply where an alternative trading system reports 5% or more of the average daily trading volume in an OTC Equity Security over a prescribed period. See 17 CFR 242.301(b)(5).

<sup>16</sup> See OTC Link. FINRA notes that there was an error reflected in the Proposal's discussion related to the number of trades attributed to OTC Link in August 2020. FINRA erroneously stated that the quotations posted on OTC Link during August 2020 led to an average of 9,567 trades per day on OTC Link. In fact, for the 5 weeks beginning on August 3, 2020 and ending on September 4, 2020, OTC Link's average trades per day was 351,180.

<sup>17</sup> See Proposal, supra n.1.

Equity Securities and to prominently disclose the required fair access policies and procedures to subscribers in accordance with the Proposal.

*D. FINRA Rule 6437*

OTC Link and STANY both recommend that FINRA consider amendments to Rule 6437 (Prohibition from Locking or Crossing Quotations in OTC Equity Securities) in connection with the Proposal. Rule 6437 requires members to implement policies and procedures to avoid displaying, or engaging in a pattern or practice of displaying, locking or crossing quotations in any OTC Equity Security in the same IDQS. OTC Link requests that FINRA expand Rule 6437's locking and crossing restrictions to displayed quotes on interconnected IDQSs, and STANY requests that FINRA explicitly prohibit locking and crossing quotations from occurring between one or more IDQSs.<sup>18</sup> Global OTC noted that the Proposal does not contemplate changes to Rule 6437 and that any such change must be filed to provide the public with an opportunity to comment.<sup>19</sup> FINRA actively has been considering whether any changes to the scope of Rule 6437 are appropriate. FINRA currently is not proposing any changes to Rule 6437 and will continue to separately assess this issue outside of the context of the instant Proposal.

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FINRA believes that the foregoing responds to the material issues raised by the commenters regarding the Proposal. If you have any questions, please contact the undersigned at [REDACTED].

Very truly yours,

/s/ Racquel L. Russell

Racquel L. Russell  
Associate General Counsel

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<sup>18</sup> See OTC Link, at 4-5; STANY, at 3.

<sup>19</sup> See Global OTC.