BEFORE THE SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.

IN THE MATTER OF THE APPLICATION OF
FALCON TECHNOLOGIES, INC.
FOR REVIEW OF ACTION TAKEN BY FINRA

Administrative Proceeding No. 3-19575

FALCON TECHNOLOGIES, INC.'S REPLY TO FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

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SUMMARY OF REPLY

FINRA's denial of Falcon Technologies Inc.'s ("Falcon") request for a change of name and symbol is based on grounds that do not exist in fact, and the denial is not in accordance with FINRA's own rules. The Commission should grant Falcon's application for review.

STANDARD OF REVIEW

Pursuant to the Securities Exchange Act of 1934, § 19(f), the Commission must dismiss an appeal of FINRA's denial of a request for a company-related action where, among other things, the grounds on which FINRA based the denial exist in fact, and the denial is in accordance with FINRA's own rules. *See In the Matter of the Application of mPhase Technologies, Inc.*, 2015 S.E.C. Lexis 398 (2015), at *16 ("Under Section 19(f), we must dismiss mPhase's appeal of this denial if we find that (i) the specific grounds on which FINRA based its denial exist in fact, (ii) the denial was in accordance with FINRA rules, and (iii) those rules are, and were applied in a manner consistent with the purposes of the Exchange Act.") (footnote omitted).

REPLY

THE GROUNDS FOR FINRA'S DENIAL DO NOT EXIST IN FACT.

In opposing Falcon's application for review, FINRA states as follows:

> Falcon Technologies's request was deficient under FINRA Rule 6490(d)(3)(2), which provides that FINRA may deny an issuer's request if the issuer is "not current in its reporting requirements, if applicable, to [the Commission] or other regulatory authority." *See* FINRA's Brief in Opposition to the Application for Review ("Opposition"), at *13 (brackets in the original).

FINRA then states as follows:

> Falcon Technologies failed to file 20 required periodic reports with the

> Commission - 14 quarterly reports for the periods between September 2002 and December 2006, and six annual reports for the periods between June 2001 and June 2006. The grounds for FINRA's denial therefore exist in fact. *See* Opposition, at *13 (footnote omitted).

FINRA further states that, "An issuer is 'current in its reporting' when it is fully compliant in its reporting." *See* Opposition, at *15. FINRA cites no authority that establishes "fully compliant in its reporting" as the standard for "current in its reporting" under Rule 6490. Instead, FINRA cites *In the Matter of Citizens Capital Corp.*, 2012 S.E.C. Lexis 2024 (2012), where the appeal is "from an administrative law judge's decision finding that the Company violated Section 13(a) of the Securities Exchange Act of 1934 and Exchange Act Rules 13a-1 and 13a-13 by failing to file required annual and quarterly reports and, on that basis, revoking the registration of the Company's securities." *Id.*, at *2. There, the issuer had a current obligation to report, and had not filed the required reports for the ten years immediately prior to the revocation of the registration of its securities. FINRA also cites *In the Matter of Impax Laboratories, Inc.*, 2008 S.E.C. Lexis 1197 (2008), where the appeal is "from an administrative law judge's decision finding that the Company had violated Section 13(a) of the Securities Exchange Act of 1934 and Exchange Act Rules 13a-1 and 13a-13 thereunder by failing to file its required quarterly and annual reports for any period after September 30, 2004 and, on that basis, revoking the registration of the Company's common stock." *Id.*, at *1 (footnotes omitted). There, the issuer had a current obligation to report, and had not filed the required reports for the four years immediately prior to the revocation of the registration of its securities. Neither *Citizens Capital* nor *Impax Laboratories* informs the issue here, which is the applicability of Rule 6490(d)(3)(2) where Falcon has no current obligation to report, and the most recent delinquent filing was due more than 13 years prior to Falcon's request for a company-related action.

FINRA still further states as follows:

> [T]he Commission's Division of Corporation Finance has expressly stated that an issuer is not "current in its reporting" unless it has filed all required periodic reports. In its Compliance and Disclosure Interpretations of the Exchange Act's registration and reporting provisions, the Division of Corporation Finance directly addresses this question:
>
>> Question: When a registrant becomes delinquent in its reporting obligations under Section 13(a) or 15(d), what must it do to become current?
>>
>> Answer: *A delinquent filer must file all delinquent reports in order to become current in its Exchange Act reporting.* While filing required documents late will not "cure" Section 13(a) or 15(d) violations, and will not make the registrant timely for purposes of eligibility to use certain Securities Act forms, it will permit the registrant to become current in its Exchange Act reporting. *See* Opposition, at *16 (citing SEC Division of Corporation Finance, Compliance and Disclosure Interpretations-Question 130.02 (Dec. 4, 2012) (emphasis in the original).

FINRA's reliance on this interpretation is to no avail, as §§ 13(a) and 15(d) apply only to issuers of registered securities. *See United States SEC v. E-Smart Tech.*, 31 F.Supp.3d 69, 87 (D.D.C. 2014) ("Section 13(a) deals primarily with reporting. It requires every 'issuer' of registered securities to file with the SEC any annual reports, quarterly reports, or information and documents that the SEC requires.") (citing 15 U.S.C. § 78m(a)); *Hudes v. Aetna Life Ins. Co.*, 806 F.Supp.2d 180, 190 (D.D.C. 2011) ("Similarly, § 15(d) of the Exchange Act requires issuers to file reports only with respect to registered securities.") (citing 15 U.S.C.S. § 78o(d)(1))). Falcon is not an issuer of registered securities, and has not been since 2007.

Regarding the specific grounds for the denial of Falcon's request, FINRA states as follows:

> [I]n response to a comment concerning how FINRA would process an issuer's request for company-related actions when the issuer is not current in its reporting requirements, the [Rule 6490] Approval Order states:
>
> > [W]hen the Department [of Operations] reasonably believes that an issuer...has triggered one of the explicitly enumerated factors, the Department [of Operations] would generally conduct an in-depth review.... FINRA...would have the discretion not to process any such actions that are incomplete or when it determines that not processing such an action is necessary for the protection of investors and the public interest and to maintain fair and orderly markets.... [T]he failure of an issuer to remain current in its reporting obligations is one of five factors that FINRA "may" consider in making a deficiency determination. *See* Opposition, at *10 (brackets, ellipses, and quotation marks in the original).

FINRA mischaracterizes the aforementioned comment as one "concerning how FINRA would process an issuer's request for company-related actions when the issuer is not current in its reporting requirements." The Approval Order itself characterizes the comment much differently:

> Specifically, this commenter inquired whether delinquent issuers would automatically have their requests to process a Company-Related Action

determined to be deficient.... *See* Approval Order, 2010 S.E.C. Lexis 2186, at *12.

In addition, FINRA fails to state that, in the passage it quotes from the Approval Order, footnotes 18, 19, and 20 cite to "Letter from Kosha K. Dalal, Associate Vice President and Associate General Counsel, FINRA, to Elizabeth M. Murphy, Secretary, Commission, dated April 30, 2010," which is FINRA's official response to the comment to which FINRA refers in the Opposition. FINRA's letter ("Response Letter") is available on the Commission's website at https://www.sec.gov/comments/sr-finra-2009-089/finra2009089-3.pdf, and a copy is annexed hereto as Exhibit A. In the Response Letter, FINRA, through its associate vice president and associate general counsel, states as follows:

> [T]he commenter asks whether a request to process a Company-Related Action by an issuer that has a current obligation to report under the Exchange Act, but is delinquent in such obligation, would be automatic grounds for a deficiency determination by FINRA. FINRA notes that the failure of an issuer to be current in its reporting obligations, if applicable, to the SEC or other regulatory authority, is one of five explicitly enumerated factors that *may* be considered by FINRA in making a determination. *See* Exhibit A, at *4 (italics in the original).

The Response Letter refers only to the delinquent filings of "an issuer that has a current obligation to report." Here, Falcon has no current obligation to report, and has not had an obligation since 2007. The Response Letter explains that FINRA, in making a determination as to a request for a company-related action, may consider the five factors enumerated in Rule 6490, one of which is "the failure of an issuer to be current in its reporting obligations, if [those obligations are] applicable." Here, the obligation to report is not applicable to Falcon, and has not been applicable since 2007. No factor enumerated in Rule 6490 is implicated here, and so there is nothing for FINRA to consider.

While FINRA's explanation in the Response Letter is inconsistent with its determination here, it is consistent with the determinations that were made in *Citizens Capital* and *Impax Laboratories*, where the issuers had current obligations to report and had not filed the required reports for the several years immediately prior to the revocation of the registration of the securities.

The grounds for FINRA's denial do not exist in fact, and Falcon's application should be granted.

FINRA'S DENIAL IS NOT IN ACCORDANCE WITH ITS OWN RULES.

FINRA states that, in January 2019, Falcon requested a name and symbol change, and that, in support of its request, Falcon submitted various corporate documents. FINRA states that it then asked Falcon "to provide additional information and to respond to several clarifying questions regarding the company-related actions," which Falcon did. FINRA states that, "[a]fter reviewing all the information," it determined that Falcon's request was deficient, and denied it. FINRA states that it explained, in writing, that Falcon "was not current in its reporting requirements to the Commission." *See* Opposition, at *7.

According to FINRA's statement of procedural history, FINRA asked for additional information on receipt of Falcon's request, but not after determining that one of Rule 6490's five enumerating factors had been triggered. Neither does the procedural history state that, after determining that one of Rule 6490's five enumerating factors had been triggered, FINRA conducted the in-depth review to which it had committed, and which is memorialized in the Approval Order as follows:

> [W]hen the Department [of Operations] reasonably believes that an issuer

> submitting a request to process documentation related to a Company-Related Action has triggered one of the explicitly enumerated factors, the Department [of Operations] would generally conduct an in-depth review of the Company-Related Action and seek additional information or documentation from the issuer. *See* Approval Order, at *19 (citing Response Letter, at *3-4)).

FINRA's denial is not in accordance with its rules, and Falcon's application should be granted.

CONCLUSION

FINRA's denial of Falcon's request for a change of name and symbol is based on grounds that do not exist in fact, and the denial is not in accordance with FINRA's own rules. The Commission should grant Falcon's application for review.

Dated: New York, New York
January 13, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2020, I caused one facsimile original and one non-facsimile original of the foregoing Reply to FINRA's Brief in Opposition Application of Falcon Technologies, Inc, for Review of Action Taken by FINRA, Case No. CAS-65999-D4D0V6, to be served on each of the parties listed below by FedEx overnight service for delivery to:

Brent J. Fields
Office of the Secretary
Securities and Exchange Commission
I 00 F Street, NE
Washington, DC 20549-1090

Via Priority Mail
Via Facsimile: (202) 772-9324

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FINRA - Office of General Counsel
1735 K Street, NW
Washington, DC 20006

Via Priority Mail
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Dated: New York, New York
January 13, 2020

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EXHIBIT A

FINRA
Financial Industry Regulatory Authority

Kosha K. Dalal
Associate Vice President and
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April 30, 2010
Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File No. SR-FINRA-2009-089 – Response to Comments

Dear Ms. Murphy:

This letter responds to comments received by the Securities and Exchange Commission ("SEC" or "Commission") regarding the above-referenced rule filing, a proposal to adopt FINRA Rule 6490 (Processing of Company-Related Actions), to clarify the scope of FINRA's authority when processing documents related to announcements for Company-Related Actions for non-exchange listed securities and to implement fees for such services. The proposed rule change was published for comment in the Federal Register on December 28, 2009.[1] The Commission received two comment letters in response to the proposed rule change.[2]

One commenter expresses general support for FINRA's efforts to clarify the scope of its regulatory authority and discretionary power when processing documents related to SEA Rule 10b-17 announcements and other Company-Related Actions, including name changes, mergers and bankruptcy, and to establish fees for such services.[3] The other commenter also expresses general support for FINRA's efforts to prevent fraudulent activities in the over-the-counter ("OTC") market.[4] However, the commenters raise concerns regarding the scope of the proposed authority, specific factors to be considered

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1 See Securities Exchange Act ("SEA") Release No. 61189 (December 17, 2009), 74 FR 68648 (December 28, 2009) ("FINRA Rule 6490 Proposing Release"). The comment period closed on January 19, 2010. See also the FINRA Rule 6490 Proposing Release for a definition of the term "Company-Related Action."

2 See Letter from Liz Heese, Managing Director, Issuer Services, Pink OTC Markets Inc., to Elizabeth M. Murphy, Secretary, SEC, dated January 20, 2010 ("Pink OTC") and Letter from Stephen J. Nelson, The Nelson Law Firm, LLC, to Elizabeth M. Murphy, Secretary, SEC, dated February 18, 2010 ("Nelson Law Firm").

3 See Pink OTC.

4 See Nelson Law Firm.

concerns regarding the scope of the proposed authority, specific factors to be considered by FINRA in finding a request to process documentation deficient, the impact of certain proposed fees on FINRA's statutory obligations and OTC issuer behavior especially in the context of "Liquidating OTC Securities," and operational issues.[5]

Scope of Proposed Authority

One commenter asserts that "[p]roposed Rule 6490 should be amended to provide that FINRA will continue to set ex-dividend dates where appropriate for the protection of investors and the public interest, whether or not it receives timely 10b-17 Notices or payments for processing corporate actions."[6] The commenter further raises concerns with regard to the impact the proposal will have on the market for Liquidating OTC Securities, specifically that "issuers of Liquidating OTC Securities often neglect to deliver [Rule 10b-17] notice to FINRA," or that trustees representing the issuer may be advised to not pay fees to FINRA as this may diminish the value of the estate.[7] The commenter argues that the proposed rule will allow FINRA not to set an ex-dividend date for a Liquidating OTC Security because notice and/or fees have not been given to FINRA and this could "burden transactions in Liquidating OTC Securities with wholly unnecessary risks and transaction costs." The commenter suggests that proposed FINRA Rule 6490 is inconsistent with FINRA's obligations under Section 15A of the Exchange Act.

FINRA believes these concerns are not valid. First, an issuer that files for bankruptcy, or a trustee acting on its behalf, faces numerous fees and charges in an effort to discharge the issuer's obligations and FINRA sees no reason that its proposed fees should not also apply to such issuers – particularly because FINRA's proposed Rule 10b-17 corporate action processing (and associated fee) will play a key role in furthering investor protection and market integrity in the market for non-exchange listed securities. Second and more importantly, the proposal includes Supplementary Material .01 (SEA Rule 10b-17 Fee Accumulations) and .02 (Requests by Third-Parties), both of which expressly address the commenter's concerns.

Specifically, FINRA recognizes that determining ex-dates for securities is a critical function that protects and promotes market integrity. For this very reason, FINRA has expressly stated in the rule text of proposed Supplementary Material .01 (SEA Rule 10b-17 Fee Accumulations), that "*notwithstanding the timeliness of SEA Rule 10b-17 Action submission or the failure to pay applicable fees*, FINRA will make its best efforts to process documentation related to SEA Rule 10b-17 Actions (which may include

5 See Nelson Law Firm, which uses the term "Liquidating OTC Securities" to mean non-exchange listed securities of issuers that are bankrupt, in liquidation or involved in various forms of reorganization.

6 See Nelson Law Firm.

7 See Nelson Law Firm.

establishing an ex-date) that are not otherwise deemed incomplete or otherwise deficient by FINRA because of the critical nature of this information to the marketplace."

Moreover, FINRA recognizes that non-compliance with SEA Rule 10b-17 can have a negative impact on the marketplace. Again, for this very reason, FINRA has expressly stated in the rule text of proposed Supplementary Material .02 (Requests by Third-Parties), that when FINRA is unable to obtain notification from an issuer, FINRA may in its discretion review and process an SEA Rule 10b-17 Action or Other Company-Related Action based on information from a third-party, such as DTCC, foreign exchanges or regulators, members or associated persons, when it believes such action is necessary for the protection of the market and investors. FINRA strongly believes the proposed provisions strike the correct balance. However, FINRA notes that in all cases, it must have actual substantiated knowledge of a Company-Related Action from a credible source before it can consider announcing an action.

Finally, Section 15A of the Exchange Act, among other things, provides that a registered securities association such as FINRA, adopt rules that are "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest."[8] FINRA believes that the proposed rule reflects FINRA's commitment to this statutory requirement. By adopting formal procedures to collect and review documents related to the processing of Company-Related Actions, FINRA expects to improve compliance with SEA Rule 10b-17, which will enable FINRA to announce information more timely to the marketplace – a benefit to both investors and the securities markets.

Clarification of Certain Explicit Factors

Proposed FINRA Rule 6490 provides that where a Company-Related Action is deemed deficient, the Department of Operations may determine that it is necessary for the protection of investors, the public interest and to maintain fair and orderly markets, that documentation related to a Company-Related Action will not be processed. The Department may consider the five explicit factors set forth in the proposal in making such a determination. One commenter raises concern about the application of two such factors, specifically: (1) the issuer is not current in its reporting obligations, if applicable, to the SEC or other regulatory authority, and (2) there is significant uncertainty in the settlement and clearance process for the security.[9]

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8 See 15 U.S.C. 78o-3(b)(6).

9 See Pink OTC.

With respect to the first factor noted above, the commenter asks whether a request to process a Company-Related Action by an issuer that has a current obligation to report under the Exchange Act, but is delinquent in such obligation, would be automatic grounds for a deficiency determination by FINRA. FINRA notes that the failure of an issuer to be current in its reporting obligations, if applicable, to the SEC or other regulatory authority, is one of five explicitly enumerated factors that *may* be considered by FINRA in making a determination. Where FINRA reasonably believes that an issuer submitting a request to process documentation related to a Company-Related Action has triggered one of the explicitly enumerated factors, the Department would generally conduct an in-depth review of the Company-Related Action and seek additional information or documentation from the issuer. The Department would have the discretion not to process any such actions that are incomplete or when the Department determines that is necessary for the protection of investors, the public interest and to maintain fair and orderly markets.

With respect to the second factor discussed above, the same commenter states its view that "[t]here is significant divide today in the OTC marketplace regarding the Depositary Trust Corporation's (DTC's) proposed rules for eligibility of transfer agents and issuers into DTC's FAST system."[10] The commenter asks whether a request to process documentation for a Company-Related Action by an issuer that is not designated by DTC as FAST eligible would be automatic grounds for a deficiency determination by FINRA. FINRA notes that the proposal does not mandate any particular mechanism of clearance and settlement for an issuer's securities, including FAST designation by DTC. Where FINRA reasonably believes that processing documentation related to a Company-Related Action will lead to confusion or inability to settle and clear trades in that security, the Department will consider that factor in making its determination. For example, where there is uncertainty regarding the total outstanding shares of the issuer either before and after a proposed stock split, concerns regarding the validity of outstanding shares, or other similar situations, the Department would, as noted above, generally conduct an in-depth review of the Company-Related Action and seek additional information or documentation from the issuer. The Department would have the discretion not to process any such actions that are incomplete or when the Department determines that is necessary for the protection of investors, the public interest and to maintain fair and orderly markets.

Fees

One commenter generally supports the establishment of fees by FINRA relating to the processing of documentation for Company-Related Actions.[11] However, the commenter raises concerns about the impact such fees may have on the behavior of OTC issuers in terms of their obligations to timely report. The commenter suggests that a $200 fee for a timely submitted request to process documentation related to a Company-Related Action will cause more issuers to be non-compliant with their reporting

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10 Id.

11 Id.

requirements. The commenter suggests, for example, that more issuers may effect a corporate action through their transfer agent and DTC without ever notifying FINRA to avoid payment of the proposed fees.

An issuer that fails to notify FINRA of a proposed corporate action, as required by SEA Rule 10b-17, is potentially violating an anti-fraud rule of the federal securities laws. The possible sanctions for violating federal securities laws are significant. In addition, transfer agents that knowingly aid and abet such violations may also be subject to possible sanctions. Non-compliance with SEA Rule 10b-17 has been an on-going concern, and FINRA expects that the adoption of this proposed rule change will reduce such non-compliance. In addition, where FINRA staff has actual knowledge, it will use its best efforts to provide a list of non-complying issuers to the SEC staff.

Both commenters seek clarification on how FINRA will process Company-Related Actions in instances where such fees are not paid.[12] As described in the proposal, FINRA is proposing to adopt Supplementary Material .01 (SEA Rule 10b-17 Fee Accumulations) which would permit FINRA to process documentation for an SEA Rule 10b-17 Action even if the fee is not paid in a timely fashion. In such cases, FINRA would continue to process documentation related to a Company-Related Action (that is not otherwise deemed deficient) because of the critical nature of SEA Rule 10b-17 information to the marketplace. However, as described in the proposal, all unpaid SEA Rule 10b-17 Action fees associated with a specific OTC issuer would be accumulated and FINRA would not process Voluntary Symbol Request Changes until all unpaid accumulated fees are paid.

One commenter also raises concerns regarding the proposed $5,000 fee for late notifications of Company-Related Actions.[13] The commenter notes that the late fee is intended to act as a deterrent to late notifications, but is concerned that the "$5,000 is a significant financial burden to many OTC issuers, many of which are small businesses run by officers who are focusing on their own business needs and may not be knowledgeable about Rule 10b-17 timely notification requirements."[14] Ignorance of the law should not be a valid excuse to violate rules that are intended to protect investors and provide important information to the marketplace. FINRA notes that the proposed late fees are staggered. An issuer that provides notice late, but at least five days prior to the Company-Related Action Date will be charged $1,000, at least one day prior to the Company-Related Action Date will be charged $2,000, and issuers that provide notice generally on or after the Company-Related Action Date will be charged $5,000. FINRA believes the late fees will create incentives to report timely and must be significant enough to discourage issuers from repeated untimely reporting.

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12 See Pink OTC and Nelson Law Firm.

13 See Pink OTC.

14 Id.

As the proposed fees are new, FINRA cannot state with accuracy what percentage of issuers would be subject to the late fees. FINRA plans to notify issuers of the proposed rule and fees (if approved) by issuing a Regulatory Notice, sending out alerts through electronic platforms used by market participants, and posting this information on its dedicated web page for OTC Actions. FINRA is also actively reaching out to industry groups that are involved in issuer corporate actions to engage in outreach to the relevant parties that will be impacted by the proposed new rule. FINRA expects that the percentage of late notifications will decline over time.

Operational Issues

One commenter offers several suggestions for improving the current processing and dissemination of Company-Related Actions.[15] First, the commenter recommends that FINRA limit intra-day processing of Company-Related Actions to emergency situations such as security revocations, and quotations and trading halts. As a regulator, FINRA generally believes that, where appropriate and feasible, corporate action information should be disseminated real-time to the marketplace. However, FINRA notes that its current policy generally is to process only the following Company-Related Actions intra-day: SEC security revocations, quotation and trading halts, and cancellation of securities pursuant to an effective bankruptcy court order. For routine Company-Related Actions, such as name and symbol changes, FINRA's general policy is to announce actions on the Daily List published on OTCBB.com with a future effective date. In some cases, often because of failure to receive timely notification, setting a future effective date is not possible.

Second, the commenter recommends that FINRA coordinate processing Company-Related Actions across all departments within FINRA. FINRA notes that relevant departments do work closely in this regard. However, not all systems and platforms used by market participants to access such data are controlled by FINRA, and there can be a lag in the dissemination of certain information. FINRA continues to work diligently with third-party vendors to minimize inconsistencies and/or delays.

Third, the commenter recommends that FINRA ensure information regarding Company-Related Actions is disseminated accurately and consistently on Daily Lists found on both the OTCBB.com and NasdaqTrader websites. Following a determination to process documentation related to a Company-Related Action, FINRA posts relevant information regarding such Company-Related Action on the OTCBB.com website. The NasdaqTrader website simply provides a hyperlink to the OTCBB.com Daily List and is not independently generated. As a result, FINRA believes there should be no reason for inconsistencies on the two websites regarding the Daily List for Company-Related Actions.

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15 See Pink OTC.

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FINRA believes that the foregoing responds to the material issues raised by the comment letters to this rule filing. If you have any questions, please contact Stephanie Dumont, Senior Vice President and Director of Capital Markets Policy, at 202-728-8176; or me at (202) 728-6903.

Sincerely,

Kosha Dalal

Kosha K. Dalal
Associate Vice President and
Associate General Counsel