

**December 15, 2009**

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

Re: **Comments to Securities Exchange Act Release No. 60999  
File No. SR-FINRA-2009-077**

Dear Ms. Murphy,

Pink OTC Markets Inc.<sup>1</sup> ("Pink OTC") respectfully submits the following comments on the proposal by the Financial Industry Regulatory Authority, Inc. ("FINRA") to create a Quotation Consolidation Facility ("QCF") that would serve as a commercial data consolidator and disseminator for quote data in the over-the-counter equity market (the "QCF Proposal").

Pink OTC strongly opposes the QCF Proposal for the following reasons:

- The QCF Proposal is an abuse of FINRA's regulatory power.
- The QCF Proposal injures investors and harms legitimate small businesses.
- The QCF Proposal violates the letter and spirit of the Securities Exchange Act of 1934 (the "Exchange Act").
- The QCF Proposal is anti-competitive.
- The QCF Proposal is a regulatory taking without providing just compensation.

### **Summary of Objections**

The QCF Proposal represents the latest in a series of attempts, first in 1992 and again in 2000, by the commercial division of FINRA and its predecessors to achieve by unlawful regulation what it was unable to accomplish through competition in the marketplace. We urge the Securities and Exchange Commission (the "Commission") to reject the unlawful QCF Proposal, in the

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<sup>1</sup> Pink OTC is the leading provider of financial information and technology services for the OTC equity securities markets. Among other things, Pink OTC operates Pink Quote™, a real-time inter-dealer quotation system for OTC equity securities for market makers and other broker-dealers registered with FINRA. More information can be found at [www.pinkotc.com](http://www.pinkotc.com)

same way that the Commission has seen through and blocked past efforts by FINRA to obtain a competitive advantage through abuse of its regulatory power.

Pink OTC respectfully urges the Commission to reject the unlawful QCF Proposal in order to protect the investing public and small businesses. If adopted in its current form, the QCF Proposal will encourage fraudulent practices in the market for OTC equity securities by fostering the misconception by market participants that FINRA operates a QCF marketplace and regulates the issuers of securities with quotations disseminated through the NASDAQ Level One feed. The QCF's proposed classification scheme will distinguish only between current reporting issuers and non-reporting issuers, thereby frustrating innovations by the private sector to distinguish legitimate issuers from fraudulent shells. This overly broad classification scheme is a step backwards from Pink OTC's current segmentation and categorization of OTC equity securities, which is based on the quality and quantity of disclosure that will make it more difficult for legitimate small issuers to raise capital and result in less useful information available to investors.

The dissemination of a national best bid or offer ("NBBO") in OTC equity securities is currently being effectively accomplished by Pink OTC, a private firm. The QCF Proposal would, therefore, replace by regulation the beneficial services currently provided competitively by Pink OTC with the commercial services of FINRA, a quasi-governmental regulator, which, in effect, would result in the nationalizing of the intellectual property produced by Pink OTC. The Exchange Act does not require, and in fact discourages, securities regulators from assuming functions provided by the private sector.

Moreover, there is no good reason to replace the market data dissemination services currently provided by Pink OTC with those of the commercial division of a quasi-governmental regulator.<sup>2</sup> The QCF Proposal is not intended to provide market data to FINRA for regulatory and surveillance purposes. Instead, its sole purpose is to enable the commercial division of FINRA to generate revenues from the profitable dissemination of market data.

Accordingly, if the QCF Proposal is adopted as proposed, FINRA will have no competitive or other pressure to improve its market data dissemination technology or make it more useful to investors. The QCF Proposal therefore is anti-competitive, will raise costs to OTC market participants with no corresponding benefit, and will inhibit private sector initiatives to improve the usefulness and efficiency of market data dissemination for investors.

Pink OTC has private property rights in the Level One market data generated through its inter-dealer quotation system, and those rights are protected by copyright and other intellectual property laws. Pink OTC licenses the use of this data through agreements lawfully entered into with market data vendors, broker-dealers, and other subscribers which would be repudiated under the QCF Proposal. Pink OTC would, therefore, be deprived of the right to realize the full value of its property. It follows that the QCF Proposal would amount to a "taking"

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<sup>2</sup> The OTC Bulletin Board is currently managed by FINRA through its Transparency Services Division, a commercial division lacking any regulatory function.

of Pink OTC's lawful property rights without compensation, which is in violation of the U.S. Constitution.

## Background

Privately operated inter-dealer quotation systems have a long history of distributing quotations in the OTC market. Commission and FINRA rule making have recognized the valuable service provided by these private entities and have fostered their development by regulating the conduct of broker-dealers publishing quotations in inter-dealer quotation systems and the use of those quotations in documenting best execution of customer orders.

Pink OTC purchased the business of the National Quotation Bureau in 1997 with the express intent of using technology to improve the quality, quantity, and timeliness of information regarding OTC markets. After substantial investment in technology and infrastructure, the Electronic Quotation Service (EQS), the predecessor to Pink Quote, was launched in September 1999. At that time, the OTC Bulletin Board, then owned and operated by the National Association of Securities Dealers (the "NASD"), was the only other inter-dealer quotation system offering a real-time quotation service in OTC equity securities.

Since introducing its electronic inter-dealer quotation system, Pink OTC has continued to develop and enhance the services offered in order to improve functionality and usefulness for broker-dealers, regulators, and investors. There have been numerous major upgrades to the Pink Quote inter-dealer quotation system since its inception, as well as many minor enhancements. Pink OTC's investments in system enhancements have resulted in substantial improvements in the speed, accuracy, and functionality of the Pink Quote inter-dealer quotation system resulting in better executions for investors.

In 2003, Pink OTC introduced Pink Link<sup>®</sup>, an electronic trade negotiation system used by broker-dealers to improve the efficiency and accuracy of their executions. Because of Pink Link's success in improving the efficiency of trading, it was quickly expanded at the request of Pink OTC's broker-dealer customers, to include securities quoted on the OTC Bulletin Board. This higher level of functionality has incentivized broker-dealers to dually-quote 98% of OTC Bulletin Board securities on Pink Quote. Pink OTC believes that at the present time most trade negotiations between market makers in OTC equity securities are accomplished through its Pink Link system.

In contrast, the NASD and the latest owner of the OTC Bulletin Board, FINRA, have made almost no efforts to improve the functionality and usefulness of the inter-dealer quotation system entrusted to their care. The OTC Bulletin Board is essentially the same system that Pink OTC began competing with in 1999, despite repeated calls from the broker-dealer, issuer, and investor communities urging the NASD and, most recently, FINRA to improve its OTC Bulletin Board services.

Pink OTC has competed successfully against the OTC Bulletin Board by investing capital to offer superior services at competitive prices. As a result,

broker-dealers have shifted an increasing share of their quotation business in OTC equity securities from the OTC Bulletin Board<sup>3</sup> to Pink Quote.<sup>4</sup> This competitive success has been achieved despite the vastly superior resources available to the commercial division of FINRA. As the number of market maker quotes on the OTC Bulletin Board has declined, we would assume that customers of the NASDAQ Level One feed have complained to FINRA about the declining quality of the data they provide. Sadly, rather than competing on the basis of product, service or price, FINRA now seeks through its QCF Proposal to overturn the market's judgment by seizing market data for commercial use from a private competitor.

## **The QCF Proposal is an Abuse of FINRA's Regulatory Power**

### *Pink OTC has Succeeded by Offering a Superior Platform*

Real-time inter-dealer quotation systems, like exchanges, collect market data, which is valuable intellectual property and used to support their operations. In turn, market data vendors purchase licenses from the operators of inter-dealer quotation systems granting the vendors the right to display market data to their respective subscribers. Broker-dealers purchase licenses to display market data to their customers and improve the usefulness of their trading applications. Subscribers using the services provided by market data vendors, the customers of broker-dealers, and other investors use market data to make investment decisions. Recently, there has been a trend towards making trading decisions through automated systems using complicated algorithms. These systems depend on accurate, timely market data.

Pink OTC has successfully sought to improve the quality and usefulness of the market data it generates since it first established its inter-dealer quotation system in 1999. To accomplish these objectives, Pink OTC has made substantial investments to enhance its systems in order to encourage broker-dealers to use its systems more frequently and to submit quotations that are more valuable to the investment community, as well as to better integrate its market data feeds with the systems operated by market data vendors. These investments have enhanced the value of Pink OTC's intellectual property and increased the demand for its use.

Any system's market data is more valuable<sup>5</sup> if its quotations represent a larger proportion of the total market for a group of securities. Pink OTC has therefore made substantial investments in its quotation facilities to encourage all types of

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<sup>3</sup> Since December 2007, the number of quote positions on the OTC Bulletin Board has declined by 50%, from 47,185 to 23,543. During the same time period, quote positions in OTC equity securities on Pink Quote declined by 11%, from 92,905 to 82,770.

<sup>4</sup> Pink Quote has an average of 10 market maker quotes in securities dually-quoted on Pink Quote and the OTC Bulletin Board, while the OTC Bulletin Board has less than 7.

<sup>5</sup> It is important to note that unlike an exchange that receives per execution or share based compensation; the Pink Quote inter-dealer quotation system generates revenues solely from collecting and distributing information.

broker-dealers<sup>6</sup> to use its inter-dealer quotation system. Priced quotes are more valuable than un-priced quotes, and Pink OTC has instituted pricing incentives to encourage broker-dealers to submit priced quotations into its system.<sup>7</sup> Pink OTC also created the first enterprise license for broker-dealers, which facilitates the efficient dissemination of Level One inside quote data, including the NBBO, to investors at significantly reduced prices and with lower administrative burdens.<sup>8</sup> All major U.S. online broker-dealers<sup>9</sup> have obtained broker-dealer enterprise licenses to use internally and to display to their millions of brokerage clients real-time Pink OTC market data.

In 2004, Pink OTC responded to requests from its customers to provide an NBBO in OTC equity securities on its systems and began purchasing FINRA market data for display in its OTC Dealer<sup>TM</sup>, OTCQuote.com<sup>TM</sup>, and OTCIQ.com<sup>TM</sup> products. As a result, Pink OTC currently publishes a consolidated NBBO in securities that are dually-quoted in the OTC Bulletin Board and Pink Quote. Market data vendors that purchase market data from Pink OTC are contractually required to consolidate quotations from Pink Quote with quotations published on the OTC Bulletin Board.<sup>10</sup>

It should be noted that FINRA had the same opportunity to produce a consolidated NBBO by purchasing market data from Pink OTC, but failed to take this initiative. This competitive reality demonstrates that FINRA's QCF Proposal is not motivated by a desire to improve the market for OTC equity securities, but rather to seize the intellectual property successfully developed by a private sector competitor through regulatory action.

Finally, Pink OTC has worked diligently to keep its costs low, which enables it to provide financial information and technology services to the broker-dealer community at highly competitive prices. We clearly recognize that if we do not offer competitive value to our customers they can replace our services.

#### *Prior Attempts by FINRA to Seize Pink OTC's Market Data*

FINRA has responded to this competitive pressure through the use of its regulatory power, rather than making the investments necessary to improve its

<sup>6</sup> At the present time, broker-dealers operating as market makers, agency brokers and Electronic Communications Networks ("ECNs") provide quotations into Pink Quote and consume Pink OTC's market data.

<sup>7</sup> Since acquiring NQB in 1997, Pink OTC's average monthly quote position fee charged broker dealers has declined by more than 50% and is currently 38% less than the amount FINRA charges for quotation positions on the OTC Bulletin Board.

<sup>8</sup> Pink OTC Market Data License Appendix B – Fees showing the many cost efficient ways in which Pink OTC market data can be licensed is attached as Exhibit B.

<sup>9</sup> E\*Trade, TD Ameritrade, Scottrade, Fidelity, Charles Schwab and others all have enterprise licenses to display real-time Pink OTC market data to their brokerage clients.

<sup>10</sup> Pink OTC Display Requirements and Guidelines state as follows: "Broker-dealers are required by FINRA to consider the priced quotes in both the OTCBB and the Pink Sheets marketplace for Best Execution purposes. Vendors must consolidate the inside quote for securities that dually quoted on the Pink Sheets and the OTCBB. The consolidated quote should be the best quote across Pink Sheets (including OTCQX) and OTCBB. The inside should clearly identify the source of the quote, i.e., Pink Sheets marketplace or OTCBB."

<http://www.pinksheets.com/content/doc/ps/quotedisplay.pdf>



system. In June 2000, about nine months after Pink OTC launched its fledgling inter-dealer quotation system, the NASD proposed a new Rule 6330 requiring any broker-dealer submitting quotations into an inter-dealer quotation system for OTC equity securities to report these quotations to FINRA.<sup>11</sup> Quotations submitted into the OTC Bulletin Board were, of course, exempted from this proposal. Since Pink OTC operated the only other inter-dealer quotation system for OTC equity securities, only quotations submitted into Pink OTC's system would have been affected by this proposal.

While generally supporting regulatory access to its market data, Pink OTC strongly objected to this proposal for several specific reasons. Pink OTC was especially concerned that market data provided to the NASD would be used for commercial dissemination to market data vendors, which would deprive Pink OTC of this important source of market data revenue. Pink OTC requested assurances that its market data would not be distributed in competition with Pink OTC or for any other commercial purpose.

The NASD defended its proposal on the grounds that it would not be obtaining the information directly from Pink OTC, but from broker-dealers that were the source of the quotations. It therefore denied that Pink OTC had any intellectual property rights in its market data.

The Commission rejected this specious argument, recognizing that the regulation's effect would be to deprive Pink OTC of the commercial returns on its investment. Instead, the Commission wisely refused to approve the NASD's proposal until, three amendments later, the NASD finally represented that the market data it obtained through the rule would not be used for commercial purposes.<sup>12</sup>

### *The QCF Proposal Has No Regulatory Purpose*

Since 2003, Pink OTC has made all of the market data generated by its inter-dealer quotation system available to FINRA as the Reporting Agent for all its broker-dealer customers pursuant to Rule 6330. At the present time, this market data is being provided free of charge by Pink OTC to FINRA, for regulatory

<sup>11</sup> See "Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Proposed Recording and Recordkeeping Requirements of Certain Quotation Data," File SR-NASD-0042; Exchange Act Release 34-43367 (September 27, 2000).

<sup>12</sup> See "Order Approving Proposed Rule Change Relating to Requirements for Recording and Reporting of Certain Quotation Data; Notice of Filing and Order Granting Accelerated Approval of Amendment Nos. 1, 2, and 3 to the Proposed Rule Change," File SR-NASD-2000-42; Exchange Act Release 34-47587 (March 27, 2003).

This was not the first time that FINRA (or its predecessor, the NASD) has attempted to obtain market power through regulation, rather than by providing a useful, competitive product. In 1992, Richard Ketchum, then the Executive Vice President of the NASD and now the Chief Executive Officer of FINRA, urged the Commission to require all broker-dealers to submit all of their quotations in penny stocks to the OTCBB. See Letter from Richard Ketchum, Executive Vice President, NASD, to William H. Heyman, Director, Division of Market Regulation, Securities and Exchange Commission, dated November 24, 1992, SEC No-Act (December 30, 1992). The Commission has repeatedly refused to mandate broker-dealer use of FINRA's commercial products.

purposes, through a real-time market data feed, including 146 FINRA user logins to OTCQuote.com and a weekly FTP file of all quote activity. Not one of the broker-dealers that use Pink Quote provides this information to FINRA independently, nor to our knowledge are there any broker-dealers that report quotations published elsewhere to FINRA.

It is abundantly clear that FINRA does not consider the QCF necessary for regulatory purposes. FINRA is already receiving Pink OTC's market data free of charge through a real-time market data feed. The only purpose of the QCF is to provide the commercial division of FINRA with a source of revenue from the commercial dissemination of Pink OTC's market data.

At the present time, FINRA's commercial division receives nearly all of its OTC equity security market data revenue from quotation information derived from the OTC Bulletin Board, which is then disseminated through the NASDAQ Level One feed.<sup>13</sup> Under the OTC/UTP Plan, FINRA receives a share of the revenues from the NASDAQ Level One feed. The parties to the OTC/UTP Plan are FINRA and the registered stock exchanges that trade NASDAQ listed securities. Unlike the other OTC/UTP Plan participants, whose revenue share is based on the quality and the quantity of inside quote and trade data submitted for NASDAQ listed securities, FINRA receives a flat 6.25% percent of the total revenue from the NASDAQ Level One feed.

In general, the market data disseminated through the NASDAQ Level One feed can also be obtained through many other sources. For example, NASDAQ makes its market data available to broker-dealers through various products, including NASDAQ Basic and NASDAQ Delayed. Broker-dealers that wish to obtain access to NASDAQ's market data can purchase a NASDAQ Workstation where the NASDAQ Level One feed is displayed, or can choose to obtain a license from NASDAQ to purchase NASDAQ Basic or some other form of license that provides a market data feed most suitable to their operations and the needs of their clients.

Similar market choices are available to broker-dealers that wish to view market data for OTC equity securities. Broker-dealers can obtain a license at competitive prices from Pink OTC to view a consolidated NBBO in our OTC

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<sup>13</sup> The following excerpt is taken from FINRA's 2008 annual report:

"OTCBB is a regulated quotation service in which fees are charged for a variety of services related to the display of real-time quotes in OTC Equity securities that are eligible for quotation on the OTCBB. In addition, fees are earned for the sale of market data from the OTCBB and the ORF. We recognize transparency services fees as the transactions occur and when the market data is sold."

"Transparency services fees were \$44.7 million in 2008 compared with \$55.8 million in 2007— a decrease of \$11.1 million, or 19.9 percent, primarily due to decreased OTC and ADF volumes driving a decrease in trade reporting fees and market data revenues."

<http://www.finra.org/web/groups/corporate/@corp/@about/@ar/documents/corporate/p119061.pdf>

Dealer<sup>14</sup> or OTCQuote.com<sup>15</sup> products which reflects securities dually-quoted in Pink Quote and the OTC Bulletin Board, or can use a more costly NASDAQ Workstation that only displays quotations for OTC Bulletin Board securities. Alternatively, broker-dealers can obtain this market data through the thirty plus market data vendors that offer their customers the ability to consolidate Pink OTC, NASDAQ Level One quotations, and other pricing sources<sup>16</sup>, such as Bloomberg or Thomson Reuters, or from their Order Management System providers, such as SunGard or Fidessa. It is not necessary, desirable or even convenient for the NASDAQ Level One feed to contain the NBBO for OTC equity securities.

Each trading day, FINRA currently provides on average approximately 100,000 quotes and 100,000 trade reports to the NASDAQ Level One Feed. It is our understanding that the stock exchanges participating in the OTC/UTP Plan have been hostile to FINRA's participation because its revenue share is not based on the same quality and quantity criteria used to determine the revenue share of other members. Moreover, the inclusion of OTC equity securities in the NASDAQ Level One feed dilutes the value of exchange listings. As more and more broker-dealers have elected to move their quotations in OTC equity securities to Pink Quote, the commercial value of FINRA's market data in the NASDAQ Level One feed has declined. If FINRA exited the inter-dealer quotation system business entirely, the quality and quantity of market data provided by FINRA under the OTC/UTP Plan would further decrease by 50%, which would be expected to lead to further calls by other participants in the Plan to reduce or eliminate FINRA's share of plan revenues.

The Pink Quote inter-dealer quotation system creates on average 800,000 inside quote prices during the trading day. FINRA's seizure of this market data for commercial dissemination would substantially enhance its position in the OTC/UTP Plan. The QCF Proposal is a flagrant abuse of FINRA's regulatory power and is designed to protect its commercial division's revenue share in the OTC/UTP Plan by seizing Pink OTC's intellectual property for commercial dissemination through the NASDAQ Level One feed.

Pink OTC respectfully submits that the QCF Proposal is just the latest attempt by FINRA to abuse its regulatory power to deprive Pink OTC of an important source of revenue that it has developed through prudent investment in a difficult competitive environment. FINRA and its predecessors have repeatedly demonstrated little, if any, interest in making the necessary investments to operate and maintain a competitive inter-dealer quotation system or to produce a consolidated NBBO with Pink Quote. As a result, Pink OTC has effectively competed by improving Pink Quote services to make them more useful to its customers, including the publication of an NBBO in dually-quoted OTC equity securities on its technology platform, rendering the OTC Bulletin Board obsolete.

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<sup>14</sup> The OTC Dealer with integrated NASDAQ Level One is 38% to 57% lower cost per user than the NASDAQ Workstation depending on how many users a firm has.

<sup>15</sup> Our OTCQuote.com product is also available to any investor or other interested person.

<sup>16</sup> There are other sources to be considered when staffing a trading desk such as foreign exchanges, currency prices and individual broker pricing.



### *The Commission Should Reject FINRA's Intellectual Property Seizure*

Now that the OTC Bulletin Board has been rendered obsolete by market forces, the commercial division of FINRA will no longer enjoy a revenue stream from the market data the OTC Bulletin Board once produced. The commercial division of FINRA therefore seeks to “skim the cream” by seizing an important source of revenue from Pink OTC to replace revenue lost to competitive market forces without providing any compensation to Pink OTC for its confiscated intellectual property.

As in its prior proposals, FINRA will no doubt argue that broker-dealers supplying quotes will be the targets of their rule-making, rather than Pink OTC. But, this fallacious argument ignores reality. The real-time quotation information is only available because of the extensive infrastructure created by Pink OTC's investment in its electronic inter-dealer quotation system. Pink OTC is the source of the data that is currently provided to FINRA under Rule 6330, and FINRA anticipates that Pink OTC's customers will insist that Pink OTC provide FINRA with the market data it now wishes to expropriate. FINRA already obtains this market data through a real-time feed from Pink OTC free of charge for regulatory purposes under existing Rule 6330. Under the new Rule 6330, the commercial division of FINRA would distribute Pink OTC's market for commercial purposes, denying Pink OTC the fruits of its labor and its shareholders the right to profit from their investment.

We respectfully urge the Commission to reject FINRA's proposed regulatory seizure of Pink OTC's private property.

### **The QCF Proposal Hurts Market Efficiency, Injures Investors, and Harms Legitimate Small Business**

#### *The QCF Will Reduce Market Efficiency and Execution Quality*

The QCF Proposal argues that its members' best execution obligations and the potential for future market fragmentation justify the institution of the FINRA QCF. These arguments are without merit.

Pink OTC already acts as a market consolidator for quotations in OTC equity securities. Pink OTC currently purchases market data from FINRA for quotations in the OTC Bulletin Board to establish a consolidated NBBO. With the demise of the OTC Bulletin Board, there will only be one inter-dealer quotation system in the market for OTC equity securities. So, there is no present need to institute another consolidated NBBO.

A consolidated quotation is likely to be misleading. The laws of physics require that the NBBO established in Pink Quote will necessarily occur prior to the transmittal of quotations to the proposed FINRA QCF and its publication in that system through the NASDAQ Level One feed. This physical fact of life already causes best execution issues in the consolidated quotation stream for NMS securities. High-frequency traders have obtained obtain direct exchange feeds, which provides them access to quotation data before the Consolidated Tape

Association can obtain the same information and publish it. This reality of modern trading renders consolidated quotations stale before market vendors even receive the data.

Accordingly, broker-dealers will be required to consider for best execution whether or not to rely on an NBBO published by the FINRA QCF to the extent that it varies from the prices available directly through Pink Quote. This duality of quotation information also will confuse investors who view data from two different sources produced at different times that represents identical quotation information.

The potential for “future market fragmentation” also does not justify creating current market confusion by establishing a FINRA QCF today. Markets are and have been in a state of flux as new technologies become available. It is impossible to predict the nature of technology that will exist several years into the future or the type of inter-dealer quotation system that will be useful to market participants in future periods. The nature of market regulation that will exist in future periods cannot be accurately predicted. There is no good reason to disrupt current markets to establish the FINRA QCF to anticipate future needs.

### *The QCF Proposal Will Injure Investors by Encouraging Fraud*

Since the inception of the OTC Bulletin Board in 1990, the Commission has considered whether it was appropriate for securities that are not registered pursuant to Section 12 of the Exchange Act to be traded on a visible U.S. market operated by a self-regulatory organization. After years of debate on the issue, the Commission determined in 1999 that FINRA’s operation of a regulated public marketplace for unregistered securities was inconsistent with the full disclosure goals of the federal securities laws.<sup>17</sup> FINRA was therefore ordered to remove unregistered securities from the OTC Bulletin Board.

FINRA acknowledged that the display of quotations in an inter-dealer quotation system operated by a self-regulatory organization created an unjustified perception of reliability.<sup>18</sup> The Commission agreed, stating that the removal of unregistered securities from the OTC Bulletin Board would serve to protect the investing public from fraud. Unregistered securities have not been distributed through the NASDAQ Level One feed since 2000, when the Commission’s order to have them removed from the OTC Bulletin Board became effective.

We submit that the dissemination of quotations for unregistered securities in the NASDAQ Level One feed raises the same issues that troubled the Commission in 1999. This dissemination practice implies to investors and other market participants that a self-regulatory organization is regulating the issuers of

<sup>17</sup> See “Order Granting Approval of Proposed Rule Change and Amendment No. 1 to the Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Microcap Initiatives-Amendments to NASD Rules 6530 and 6540,” File SR-NASD-98-51; Exchange Act Release 34-40878 (January 4, 1999).

<sup>18</sup> See also, “Order Approving and Notice of Filing and Order Granting Accelerated Approval of Amendment Nos. 3 and 4 to Proposed Rule Change Relating to the OTC Bulletin Board Service,” File SR-NASD-92-7; Exchange Act Release 34-38456 (March 31, 1997).

unregistered securities, when, in fact, this is not the case. Moreover, dissemination of quotations for unregistered securities in the NASDAQ Level One feed lulls investors into a false sense of security that OTC equity securities have the same risk characteristics as NASDAQ listed securities. It is therefore misleading to investors to disseminate the quotations of OTC equity securities, and particularly unregistered securities, alongside the securities of issuers that have met the high listing standards of the NASDAQ Stock Market.

The investing public, and some members of the Commission's staff, have been confused about the nature of the OTC Bulletin Board's regulation. The fact is that the OTC Bulletin Board has never been a regulated marketplace, despite its nominal ownership by FINRA. The regulation of the OTC Bulletin Board is and has been the same as the regulation of Pink Quote. FINRA regulates the broker-dealers that provide quotes into each system. FINRA has no jurisdictional authority to regulate the issuers of the securities that are quoted in any OTC inter-dealer quotation system and makes no attempt to regulate them.

Many investors, even relatively sophisticated investors, are not fully cognizant of the distinction between a national securities exchange, which has listing standards that effectively regulate the conduct of an issuer, and the OTC Bulletin Board, which has no listing standards, even though it is operated by a national securities association. Fraudsters routinely exploit this confusion by causing worthless securities to be quoted on the OTC Bulletin Board. They then claim that FINRA's operation of the OTC Bulletin Board ensures the legitimacy of the securities quoted there. This claim is patently false, but nonetheless continues to serve as a trap for investors because of the confusion that exists about FINRA's operation of the OTC Bulletin Board.

Prior to the most recent amendments to Form 8-K and Rule 144, various artifices were used to obtain Exchange Act registration in order to establish an OTC Bulletin Board quotation without making adequate disclosures to the investing public. With these loopholes closed, fraudsters risk imprisonment for filing fraudulent registration statements, yet the practice continues. It is our understanding that putting these fraudsters out of business has become an enforcement priority for the Commission.

The FINRA QCF will convey a false sense of legitimacy. While the OTC Bulletin Board's termination will eliminate a favorite fraudulent device, the QCF Proposal will provide another artifice for the fraudster's toolbox. Should the QCF Proposal be adopted in its present form, the fraudsters will claim that because the quotes are disseminated through the FINRA QCF and the NASDAQ Level One feed, the marketplace that originates the quotes is regulated by FINRA.

FINRA should not be in the business of quotation distribution. FINRA's role should be limited to the regulation of its member broker-dealers, thereby eliminating the persisting falsehood that FINRA is operating a regulated marketplace. The Commission should reject the unlawful QCF Proposal to protect investors from a persistent fraudulent practice.

### *FINRA's Categorization Scheme Will Continue to Allow Scammers to Flourish*

Throughout its history, FINRA has done nothing to change its operation of the OTC Bulletin Board to discourage the false claims of fraudsters that FINRA's management ensures the legitimacy of securities quoted there. It is highly unlikely that FINRA will do anything more than collect revenue from the dissemination of market data through the QCF, still leaving the marketplace wide open for fraud.

Fraud in the market for micro-cap securities is a constant problem in the management of an OTC inter-dealer quotation system. But, that doesn't mean there is nothing that can be done about it. Pink OTC is not an SRO and lacks any regulatory authority over issuers, but nonetheless has taken active and positive steps, with demonstrated positive results, to frustrate fraudulent use of its system.

Beginning in 2007, Pink OTC began classifying issuers with securities quoted on Pink Quote into marketplace segments and categories based on the quality and timeliness of issuer disclosure.<sup>19</sup> In March of 2007, Pink OTC created the OTCQX<sup>®</sup> marketplace<sup>20</sup> in conjunction with the issuer advisory community for companies with audited financial information that can meet qualitative and quantitative standards, as well as demonstrate their compliance with U.S. securities laws. Issuers in the Pink Sheets speculative trading marketplace are segmented by the level of disclosure provided. These categories are published in our inside quote data feed and on Internet sites maintained by Pink OTC.

Pink OTC has made substantial investments to categorize issuers based on the quality and timeliness of issuer disclosure. The Pink Sheets categories<sup>21</sup> in our inside quote feed are used by compliance departments within the broker-dealer community to determine whether orders for certain securities should be accepted by their registered employees. Securities that are the subject of suspicious promotional campaigns, including securities registered under the Exchange Act, are flagged as "Caveat Emptor" to warn investors about the enhanced potential for fraud. We believe our Caveat Emptor program, coupled with the Commission's strong enforcement activities in the area, has led to the reduction in criminal activities using SPAM.<sup>22</sup> Pink OTC's efforts to warn the investing public about possibly fraudulent activities carries some risk. Pink OTC frequently receives threats of litigation from issuers and promoters complaining about their classification.

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<sup>19</sup> The November OTC Market dollar volume breakdown by segment and category is attached as Exhibit B. 92% of dollar volume in OTC quoted securities takes place in companies with Current Information available to investors. Less than 6% of dollar volume takes place in securities with Limited Information and less than 2% of dollar volume in the No Information category.

<sup>20</sup> For more information, see [www.otcqx.com](http://www.otcqx.com)

<sup>21</sup> The categorization scheme is further described in Exhibit C.

<sup>22</sup> Dollar volume of Caveat Emptor flagged securities was 0.38% of Total Quoted OTC Market volume in November 2009.

Pink OTC is especially concerned about fraudulent activities in the market for registered securities. At the present time, issuers of registered securities that are not current in their reporting requirements are classified in Pink Sheets as providing “limited information” or “no information.” Issuers that are current in their reporting requirements are classified as “SEC reporting.” Pink OTC believes the termination of the OTC Bulletin Board will permit Pink OTC to undertake further initiatives to improve the compliance by issuers of registered securities with the disclosure requirements of federal securities laws. Accordingly, Pink OTC plans to create a new, enhanced marketplace category, between the OTCQX and Pink Sheets tiers, for SEC reporting issuers that are compliant in their reporting obligations and that will make use of the issuer advisory community organized by Pink OTC.

Pink OTC is working with its market data vendors to make the changes necessary to publish its issuer classifications along with the inside quotation information for each security quoted in Pink Quote. This is intended to aid investors by providing information regarding Pink OTC’s securities classification in the places most commonly used to make investment decisions. Pink OTC believes that many investors do not take the time to carefully review disclosure statements. A brief, visual warning placed alongside the information most commonly viewed by investors should encourage the exercise of caution in making investment decisions.

Pink OTC’s actions to improve the usefulness of information displayed to investors have required a substantial investment in resources. Pink OTC has engaged in extensive discussions with market data vendors and has expended significant technology resources to develop and deliver information regarding its categories in the most efficient manner for display within market data vendor systems.

By contrast, FINRA’s QCF Proposal would take the easy way out. Issuers would only be classified as “current SEC reporters,” “late SEC reporters,” and “non-SEC reporters.” These classifications are a step backwards in providing useful information to investors and will make it easy for the bad practices that take place on the OTC Bulletin Board to continue on the FINRA QCF.

For example, an issuer of registered securities that is a shell company controlled by known criminals, that has been suspended by Canadian regulators, and that is conducting a SPAM promotional campaign, will achieve the highest FINRA QCF category. The same securities would be categorized as “Caveat Emptor” by Pink OTC for either the SPAM or the Canadian regulatory suspension. Market data vendors receiving a Level One feed from Pink OTC would be required to identify the security as “Caveat Emptor.” Market data vendors receiving market data under the QCF Proposal through the NASDAQ Level One feed would identify the security as issued by a “current SEC reporting” issuer. It is obvious that investors would benefit from the Commission’s rejection of the QCF Proposal and FINRA’s withdrawal from the business of quotation publication and dissemination.



## The QCF Proposal Will Harm the Capital Formation Process for Small Issuers

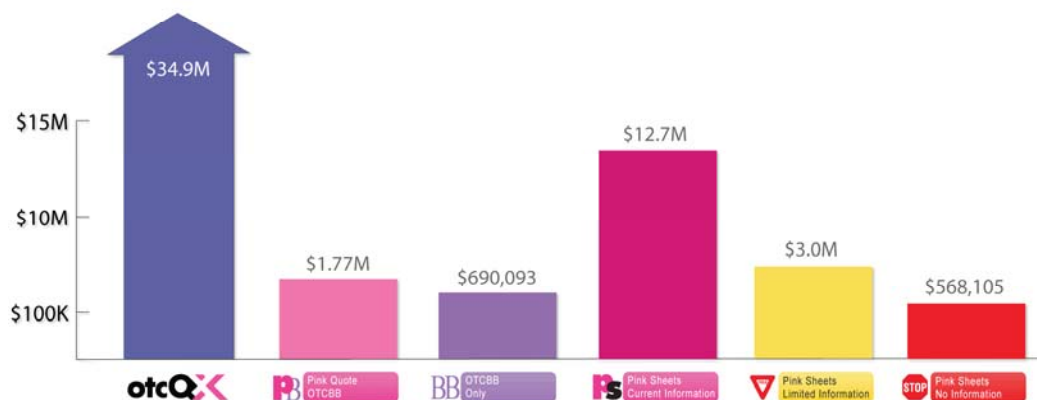
### *Legitimate Companies will be Harmed*

While the QCF Proposal will be business as usual for the bad operators, the QCF proposal will harm legitimate companies. Companies that have fewer than 500 holders of record and are not required to register any class of their securities with the Commission, but have met the requirements of OTCQX, provide U.S. GAAP audited financials to investors, and whose disclosure has been reviewed for accuracy and completeness by a regulated investment bank or the issuer's disclosure counsel, will be placed in the lowest FINRA QCF category. This classification will also apply to the ADRs and foreign ordinary shares of some of the world's leading companies.

The public markets for smaller companies in the U.S. have been a failure compared to the vibrant junior markets in Australia, Brazil, Canada, the United Kingdom, and other international markets. FINRA's unwillingness to make the required investment to attract high quality companies or improve the usefulness of the OTC Bulletin Board for legitimate small companies has been a large factor in this failure. Today, the many reputable small companies on the OTC Bulletin Board are overshadowed by a minority of lawbreakers. Rather than learning from this failure, the FINRA QCF seeks to continue this sorry record by putting a damper on the innovative market structure and segmentation by dynamic private market competitors.

Pink OTC has built an extensive infrastructure of people and technology<sup>23</sup> to allow issuers to provide information to investors and demonstrate their compliance with securities laws. This investment in products and services, coupled with extensive issuer outreach and education has improved the OTC markets. More importantly, it has driven liquidity to the securities of issuers that provide the highest quality information and away from those that do not.

### Transparency Drives Liquidity



Average Dollar Volume Per Security - 3rd Quarter, 2009

<sup>23</sup> Approximately 44% of Pink OTC headcount is related solely to issuer information collection, support or sales focused roles, and does not include the substantial amount of technology development and operations personnel that support issuer services.

The QCF Proposal reflects FINRA's unwillingness to expend the resources necessary to make market data useful to the investing public or create a market structure that improves issuer compliance. FINRA is unlikely to make the investments in process, people, and technology necessary to improve the QCF in the future. This realistic appraisal of FINRA's past behavior as a provider of marketplace services forcefully demonstrates why FINRA should focus on its statutory mission of regulating broker-dealers. Marketplace operation and the provision of products and services to market participants is a task best performed by the private sector.

### **FINRA's QCF Proposal Violates the Letter and Spirit of the Exchange Act**

FINRA cites Exchange Act Section 15A(b)(6) and (11) as justification for the authority to create the FINRA QCF. Section 15A is the statutory provision that institutes a "national securities association" and requires membership in such an association for all brokers and dealers effecting transactions in the OTC markets. FINRA is the national securities association established under Section 15A.

As FINRA notes in its proposal, Section 15A(b)(6) requires FINRA to adopt rules designed, among other things, to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade. In addition, Section 15A(b)(6) states that these rules should be designed "to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities . . ." An inter-dealer quotation system, such as Pink Quote, is fundamentally engaged in the business of "processing information with respect to . . . transactions in securities."

Nothing in Section 15A(b)(6) implies that FINRA should be engaged in the exclusive business of "processing information with respect to securities transactions." Instead, Section 15A(b)(6) commands FINRA to adopt rules intended to foster cooperation and coordination with persons in the private sector that are engaged in these activities. The commercial division of FINRA's effort to disseminate quotation information published in Pink Quote for its own commercial purposes is an intrusion into the private sector that is well outside its statutory mandate.

FINRA's claim that its proposed QCF is necessary to achieve the consolidation of quotation information for OTC equity securities is entirely disingenuous.<sup>24</sup> With the cessation of the operation of the OTC Bulletin Board, Pink Quote will be the

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<sup>24</sup> Late in the third quarter of 2009, representatives of the Commission's Division of Trading and Markets expressed the view that Pink Quote should be registered as an Alternative Trading System ("ATS"). Pink OTC is currently working with the Commission's staff to develop a registered inter-dealer quotation system ATS. Pink OTC has also engaged in preliminary discussions with FINRA regarding membership as an inter-dealer quotation system ATS, which would give FINRA access to all books and records of the Pink Quote ATS for regulatory purposes. Moreover, the Commission has the authority to cause non-exclusive Securities Information Processors such as Pink Quote to register with the Commission by rule or order if it is in the public interest or for the protection of investors.

only inter-dealer quotation system in operation. It also should be noted, in stark contrast to the one-sided QCF Proposal, exchanges are paid their share of the revenues from the dissemination of consolidated market data.

In any event, FINRA has shown no interest in consolidating quotation information derived from the OTC Bulletin Board, its inter-dealer quotation system, with quotation information from Pink Quote. As a result, it has been necessary for Pink OTC to purchase OTC Bulletin Board market data to create a consolidated quotation in dually-quoted securities. With FINRA ceasing operation of the OTC Bulletin Board, there is no other inter-dealer quotation system for OTC equity securities. It is therefore unnecessary for FINRA to establish the QCF to achieve the goal of consolidated quotations.

Section 15A(b)(6) does not provide any statutory authority for the QCF Proposal. Instead, the QCF Proposal is a thinly veiled attempt by the commercial division of FINRA to extract revenues attributable to the commercial dissemination of market data that rightfully belong to Pink OTC and its shareholders without having to incur any of the expenses,<sup>25</sup> make the necessary investments or perform any of the hard work involved in operating and maintaining an inter-dealer quotation system that will successfully compete in the marketplace.

Similarly, Exchange Act Section 15A(b)(11) requires FINRA to promulgate rules “governing the form and content of quotations” relating to OTC equity securities. These rules are to be designed to “produce fair and informative quotations, to prevent fictitious and misleading quotations, and to promote orderly procedures for collecting, distributing and publishing quotations.” FINRA has therefore promulgated rules such as the “firm quote rule” contained in NASD IM-3320, which has been carried over into the recently approved FINRA Rule 5220.

On the other hand, Exchange Act Section 15A(b)(11) cannot fairly be read to imply that the commercial division of FINRA should itself collect, distribute, and publish quotations commercially in competition with the private sector. Instead, FINRA’s role as a regulator is to design rules that will “promote orderly procedures” that will be used by its members and other entities in the private sector to collect, distribute, and publish quotations.

It is important to note that unlike trade reports that are distributed anonymously and, as such, must be constantly monitored by regulators, quote prices in inter-dealer quotation systems are available to all interested persons. As a result, the quality of each broker-dealer quote can be tested by other market participants.

The QCF Proposal would allow the commercial division of FINRA to reap where it did not sow by commercializing the distribution of quotations generated through

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<sup>25</sup> According to FINRA’s Annual Report, in 2007 FINRA paid NASDAQ \$16.9 million for operation of the OTC Equities and Trace Businesses on FINRA’s behalf. While not broken out in their financial reports, it is our understanding that FINRA has paid NASDAQ as much as \$12 million per year to operate the OTC Bulletin Board inter-dealer quotation system and quote collection facilities.

Pink OTC's inter-dealer quotation system. This is unfair and a violation of FINRA's statutory mandate.

Where Congress has determined that 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 this objective. Accordingly, in Exchange Act Section 17B, Congress instructed the Commission to facilitate the formation of an "automated quotation system" operated by a registered national securities association or exchange to facilitate the "widespread dissemination of reliable and accurate last sale and quotation information with respect to penny stocks." It was this statutory command, adopted by Congress in 1990, that resulted in the formation of the OTC Bulletin Board.<sup>26</sup>

The statutory institution of the OTC Bulletin Board by Congress was based on a finding that the private sector had failed to fill this role, so that "the market for penny stocks suffers from a lack of reliable and accurate quotation and last sale information available to investors and regulators." In 1990, the private sector had not produced an inter-dealer quotation system providing real-time quotation information for OTC equity securities. The purpose of Section 17B was to fill this void and "meet the information needs of investors and market participants."

The majority of quotation updates and dollar volume in Pink Quote securities takes place in ADR, foreign ordinary shares, or preferred securities.<sup>27</sup> In its QCF Proposal, FINRA acknowledges that a primary reason for the QCF is that "certain classes of securities that are not currently eligible by rule for quotation on the OTCBB have experienced significant growth in the recent past (e.g., unsponsored American Depositary Receipts)." None of these classes of OTC equity securities are "penny stocks." FINRA's commercial division therefore has no authority to compete with the private sector to engage in the commercial dissemination of quotations in these securities under Section 17B or any other Exchange Act provision.<sup>28</sup>

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<sup>26</sup> See "Order Approving Proposed Rule Change and Order Granting Accelerated Approval of Amendment to Proposed Rule Change of the National Association of Securities Dealers, Inc. Relating to the OTC Bulletin Board Display Service," File SR-NASD-88-19; Exchange Act Release 34-27975 (May 8, 1990). In 1999, the Commission approved the removal from the OTC Bulletin Board of all unregistered securities. The Commission thereby employed its exemptive authority under Section 17B to exempt unregistered penny stocks from the prescribed inter-dealer quotation system operated by FINRA.

<sup>27</sup> It should be noted that over 80% of the 800,000 inside quote prices generated by Pink Quote during the trading day are for securities with a price of greater than \$5.00 and thus not penny stocks. This is in stark contrast the OTC Bulletin Board in which less than 15% of the inside quote prices generated are for securities with a price greater than \$5.00.

<sup>28</sup> It is difficult to understand how a consolidated quotation for ADRs of the type proposed by FINRA would be in the public interest. Best execution of ADRs in most cases requires an executing broker-dealer to consider the pricing of the foreign securities underlying ADRs and the extent to which those prices are reasonably available. Most exchange-traded ADRs are traded at much higher volumes than ADRs that are OTC equity securities, so that these pricing differences may be minimal. This is not the case with all ADRs traded in the OTC markets. Accordingly, it would not be appropriate for a broker-dealer to rely entirely on OTC pricing of ADRs for best execution purposes. It would also be misleading to the public to claim that a quotation is consolidated in these securities without also including foreign prices, as well as

More broadly, Congress did not authorize the institution of the QCF proposed by FINRA. The proposed QCF is not an “automated quotation system,” that “provides bid and ask quotations of participating brokers and dealers.” The system instituted in response to Section 17B was the OTC Bulletin Board, which FINRA now seeks to abandon because of its inability to compete effectively with a private sector alternative.

FINRA, in fact, does not make the claim that the QCF is intended to satisfy the statutory mandate of Section 17B, nor could it make that claim. For the five years following the adoption of Section 17B, the Commission faithfully reported to Congress the institution and development of the OTC Bulletin Board. Congress apparently was satisfied that the OTC Bulletin Board accomplished its legislative purpose. FINRA cannot now claim that the QCF is intended to accomplish the legislative directive of Section 17B.

Accordingly, FINRA’s argument that quotation data from the OTC Bulletin Board has historically been consolidated through FINRA into the NASDAQ Level One data feed does nothing to justify the QCF Proposal. The OTC Bulletin Board market data historically consolidated into the NASDAQ Level One feed was generated in conjunction with the Congressional mandate in Section 17B to create an inter-dealer quotation system for penny stocks. No Congressional mandate exists to consolidate market data for OTC equity securities<sup>29</sup> in the NASDAQ Level One feed that is not derived from quotations on the OTC Bulletin Board.

Congress has not authorized FINRA to create a quotation consolidation facility, or for that matter, an inter-dealer quotation system, for unsponsored ADRs, other OTC Equity Securities that are not penny stocks or any penny stocks the Commission has specifically exempted, such as those of unregistered issuers. Nothing in Sections 15A or 17B of the Exchange Act authorizes FINRA to compete against the private sector in providing inter-dealer quotation services or other quotation facilities for the market for ADRs.<sup>30</sup> FINRA’s Congressionally-mandated regulatory goals do not include the collection or commercial distribution of market data derived from the vast majority of OTC Equity Securities that would comprise the business of the proposed QCF.

In the institution of FINRA, Congress did not intend to create a quasi-governmental regulator that would compete with the private sector. Instead, FINRA’s statutory role is limited to the “promotion” of orderly procedures to “collect, distribute and publish quotations.” The actual collection, distribution, and publication of quotations are the responsibility of the private sector. The statutory design only permits FINRA to fill a private sector role in limited circumstances,

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currencies, commissions, conversion and settlement costs. The same is true for foreign ordinary shares.

<sup>29</sup> OTC equity securities are not qualified securities under the national market system.

<sup>30</sup> As a result of the significant investment in building the quotation and trading of ADRs, there are an average of almost 15 market maker quotes in ADRs on Pink Quote. This compares to only 5 market makers on average when such ADRs were quoted on the OTC Bulletin Board in March of 1998.



specifically defined by Congress, where the needs of investors and the marketplace are not being filled by industry participants.

The fact that there is a vigorous private sector alternative to the OTC Bulletin Board in the one class of OTC equity securities still under the Section 17B mandate, penny stocks of SEC registered issuers, shows that the market no longer suffers from a lack of quotation transparency. In light of these changed circumstances, FINRA can best satisfy the Congressional intent expressed in Exchange Act Section 17B by closing down its unsuccessful inter-dealer quotation system and allowing the private sector to do its job.

## **The QCF Proposal is Anti-Competitive**

### *The QCF Proposal Creates a FINRA Market Data Monopoly*

It is difficult to establish a successful inter-dealer quotation system that publishes real-time quotation information in the market for OTC equity securities. Substantial investments in technology are required to operate and maintain a reliable, secure, and efficient quotation system. Market data provides an important source of revenue to support the products, service, and pricing needed to be successful in offering a high quality quotation, trading, and information platform for OTC equity securities.

The QCF Proposal, if adopted in its current form, would deprive Pink OTC of an important revenue source from the publication of an NBBO. But, the QCF Proposal would also send a message to any firm that wished to provide a competitive alternative to Pink Quote. The opportunity to develop this source of revenue, which might make the difference between commercial viability or failure, would not be available to potential competitors.

Pink OTC's market maker, ECN, and agency broker clients can choose whether and where to publish quotations in OTC equity securities. No regulatory mandate requires them to publish quotations on Pink Quote. Instead, Pink OTC must earn the business of its broker-dealer clients every day with innovative products, superior service, and value-driven pricing. FINRA would prefer to avoid this competitive pressure and instead make its member firms captive data providers with a proposal that increases the quotation position fees paid to FINRA by more than 145% while reducing to zero the service provided by no longer distributing individual market maker quotes.<sup>31</sup>

The anti-competitive nature of the QCF Proposal is also demonstrated by the requirement that broker-dealers withdraw their quotations from an inter-dealer quotation system that fails to comply with the reporting requirements of the rule. The withdrawal requirement could occur if an inter-dealer quotation system experienced any systems issues that caused a reporting delay. But, the effect of

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<sup>31</sup> While the position fee for quotations has been reduced from six dollars to four, this charge is assessed for producing any priced quotation in an interdealer quotation system, without also providing a system to allow other broker-dealers to interact with that quotation. The position fee is essentially changing from a fee for service to a tax on the industry for displayed liquidity that is unrelated to any service offering.

withdrawal would be catastrophic for the interdealer quotation system, as it would inevitably lead to a shut down. We can think of no good reason for this requirement other than to punish Pink OTC, and any other of FINRA's potential competitors.

The QCF Proposal is anti-competitive and therefore denies FINRA members the benefits of a competitive environment for inter-dealer quotation services in the market for OTC equity securities. The increase of FINRA fees will drive broker-dealers to reduce the number of securities they quote, thus harming investors with increased quote spreads and reduced competition in the trading of OTC securities.<sup>32</sup>

### *Protection of Pink OTC's Intellectual Property is Pro-competitive*

The protection of private property is fundamental to our system of laws and regulation and the foundation of a market-based economy. This respect for private property rights is based on the recognition that the owner of private property has a personal incentive to develop the property in ways that will increase the profits that can be realized from its use. As a result, the usefulness and value of property increases throughout society. Congress and the courts have long recognized that intellectual property is a form of property; it follows that the development and use of intellectual property is consistent with the social goal of enhancing consumer welfare.

Pink OTC has invested significant resources in the development and marketing of market data products, including a Level One feed in OTC equity securities that publishes an NBBO. These investments have resulted in the creation of a valuable market data product that is widely used by market data vendors, broker-dealers, regulators, and investors. Pink OTC has made these investments with the understanding that it would be entitled to enjoy profits from licensing its valuable intellectual property to others. The active development and promotion of market data products by Pink OTC and others has enhanced competition and given investors the benefit of market data products that are more functional, as well as new and useful market data products. As a result, 36% of the revenues garnered by Pink OTC in the first nine months of 2009 were derived from its market data products, a substantial portion of which is attributable to its publication of an NBBO in quoted OTC equity securities. Pink OTC's development and promotion has given its market data products the value that FINRA now seeks to expropriate through its QCF Proposal.

In support of its proposal, FINRA argues that it is only seeking to expropriate a small portion of Pink OTC's intellectual property, the NBBO in OTC equity securities published in Pink Quote. However, the NBBO is the most important component of market data for the investing public. The customers for other market data are limited primarily to industry participants. The regulatory seizure

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<sup>32</sup> The QCF position fee only applies for published quotations. Industry participants can avoid the fee by not publishing quotations. The QCF Proposal therefore encourages dark liquidity, which will result in inferior executions, and is unfair to the broker-dealers that do publish quotations.

of the NBBO will severely limit Pink OTC's ability to develop useful market data products for a broader audience.

Moreover, if FINRA succeeds in its regulatory seizure of Pink OTC's intellectual property rights to commercialize an NBBO in OTC equity securities, this would have a chilling effect on Pink OTC's incentives to produce other useful market data products. After all, if the need to consolidate market data to produce an NBBO is so important that it trumps the private property rights of Pink OTC, what assurance can be given that future market developments will not be used as a pretext to seize other market data products? Will FINRA have the exclusive right to seize and distribute all market data in any non-NMS security such as high-yield, corporate, municipal, and treasury securities? These are all OTC markets in which private market innovators are investing substantial capital to increase pre-trade quotation transparency for the investors that trade these securities.

There is no logical way to contain FINRA's avaricious behavior. Securities analysis is important to investors; the Commission has recognized that consolidated securities analysis is extremely useful and has taken steps to encourage its development. Firms such as Thomson Reuters and Bloomberg collect and consolidate analyst opinions from FINRA members. If the QCF Proposal succeeds, FINRA might next be expected to seize these and other analytical products for commercial development of a consolidated source of such information. Indeed, the more useful that a market data product becomes as a result of Pink OTC's development and promotional efforts, the more likely that this enhanced usefulness will support arguments for its seizure so the commercial division of FINRA can distribute the information.

The chilling effect of the QCF Proposal will not be limited to Pink OTC. Potential competitors of Pink OTC must consider the extent to which their own development of superior market data products will make them more likely to be expropriated by FINRA. The result will be that Pink OTC and others will reduce their investment in market data products. Investors will end up with less useful market data products, to their detriment. In fact, the QCF Proposal is a thinly-veiled attempt by FINRA to free ride on the increased value of the market data products developed by Pink OTC, and thereby neutralize its commercial competitor. All potential competitors will be forced to reckon with FINRA's regulatory power to seize the value of their investments if the QCF Proposal succeeds.

### *The SEC Lacks Authority to Approve the QCF Proposal*

Pink OTC believes that approval of the QCF Proposal is not within the Commission's regulatory authority and would amount to a regulatory "taking" by the Commission of Pink OTC's intellectual property in violation of the Due Process clause of the Fifth Amendment of the U.S. Constitution. The United States Supreme Court has held that the collection of quotations is intellectual property entitled to protection under the law. In *Board of Trade v. Christie Grain*

& *Stock Co.*, the Court observed that “[t]he fact that others might do similar work, if they might, does not authorize them to steal the plaintiff’s [quotations].”<sup>33</sup>

While the QCF Proposal is, on its face, directed to broker-dealers that submit quotations into Pink Quote, its impact would fall directly on Pink OTC. Pink OTC has private property rights in its market data, and those rights are protected by this country’s intellectual property laws. Those laws recognize that owners of intellectual property have invested enormous resources to develop their intellectual property, and have the right to protect their investments. The intellectual property laws provide these rights because of Congress’ recognition that allowing the owners of intellectual property to maximize the value of that property encourages investment in new innovative products, to the benefit of consumers.

The QCF Proposal would abrogate Pink OTC’s existing lawful license agreements and would deprive Pink OTC of the right to realize the full value of their property. Such an abrogation would amount to a “taking” of Pink OTC’s lawful property rights without compensation.

Moreover, the QCF Proposal is terribly unfair. Pink OTC has spent millions of dollars developing the market for its market data products. Pink OTC made this substantial investment with the reasonable expectation that it would have the exclusive right to reap the benefits of its investment. The expropriation of the NBBO portion of Pink OTC’s intellectual property by FINRA would allow it to profit from Pink OTC’s competitive efforts.

## **Conclusion**

The QCF Proposal is an unlawful attempt by a marketplace regulator to seize Pink OTC’s valuable intellectual property and realize profits from its sale.

FINRA has failed to compete successfully in the business of providing an inter-dealer quotation system for OTC equity securities. The QCF Proposal is a bald faced attempt to replace the market data revenues formerly received from the OTC Bulletin Board by seizing market data from Pink Quote. This amounts to an unjust taking by a governmental entity without compensation that unfairly deprives Pink OTC’s investors and employees of the rewards of their capital investment and hard work.

The QCF Proposal is inconsistent with the Exchange Act. Section 15A of the Exchange Act does not contemplate that FINRA, a national securities association, will compete in the commercial dissemination of quotation information. FINRA lacks the statutory authority to seize Pink OTC’s property to engage in this business.

Worse yet, the QCF Proposal denies investors the benefits of improving technology in the dissemination of market data. FINRA has no incentive to make market data more useful to investors. Pink OTC must provide a competitive

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<sup>33</sup> 198 U.S. 236 (1905). See also, *Hunt v. New York Cotton Exchange*, 205 U.S. 322 (1907).

service to survive in the marketplace and therefore must constantly improve its market data services to the benefit of the investing public. The QCF Proposal already represents a step backwards from current technology because it would not properly classify the securities of OTC issuers in a manner most helpful to investors.

Finally, the QCF Proposal is anti-competitive. It deprives Pink OTC of the returns on its substantial investment in its intellectual property. Potential competitors will have to reckon with FINRA's regulatory power to seize the fruits of their competitive efforts. The result will be to discourage innovation in the development of market data products. Investors will ultimately be deprived of the benefit of more useful market data products.

We respectfully urge the Commission to reject the unlawful QCF Proposal.

Thank you very much, and please contact me should you have any questions.

Very truly yours,



R. Cromwell Coulson  
President and Chief Executive Officer

cc: Hon. Mary Schapiro, Chairman  
Hon. Luis A. Aguilar, Commissioner  
Hon. Kathleen L. Casey, Commissioner  
Hon. Troy A. Paredes, Commissioner  
Hon. Elisse B. Walter, Commissioner  
Robert W. Cook, Director of Trading and Markets  
James Brigagliano, Deputy Director of Trading and Markets



**MARKET DATA DISTRIBUTION AGREEMENT  
APPENDIX B**

**FEES  
(Effective January 1, 2009)**

**PORT CHARGES**

**Port Charge per Port Pair (for receipt of redundant Pink Feed)**

**\$600.00 per month.** (Note: Distributor is responsible for any network connectivity charges.)

**FEES PER SUBSCRIBER**

**For each Professional Subscriber Account:**

Pink OTC Markets Level 1 Quotations: **\$24.00 per month**

Pink OTC Markets Level 2 Quotations: **\$60.00 per month**

**For Each Non-Professional Subscriber Account:**

Pink OTC Markets Level 1 Quotations: **\$3.00 per month**

Pink OTC Markets Level 2 Quotations: **\$12.00 per month**

**BROKER-DEALER ENTERPRISE LICENSES**

**Broker-Dealer Enterprise License – Pink OTC Markets Level 1 Quotations**

Display Usage, Non-Display Usage and Derived Data Usage of Pink OTC Markets Level 1 Quotations received from Pink OTC Markets and not more than one data vendor for distribution to all (i) employees of Distributor and (ii) customers of Distributor that are Subscribers; *provided* that none of such Subscribers may view such Information except as an integral part of the password protected display devices, password protected trading applications or password protected Internet sites of the Distributor.

**\$9,000.00 per month.**

**Broker-Dealer Enterprise License – Pink OTC Markets Level 1 Quotations plus Depth of Book**

Display Usage, Non-Display Usage and Derived Data Usage of Pink OTC Markets Level 1 Quotations plus Depth of Book display (Pink OTC Markets Level 2 Quotations, excluding Market Maker identifiers and contact information) received from Pink OTC Markets and not more than one data vendor for distribution to all (i) employees of Distributor and (ii) customers of Distributor that are Subscribers; *provided* that none of such Subscribers may view such Information except as an integral part of the password protected display devices, password protected trading applications or password protected Internet sites of the Distributor.

**\$18,000.00 per month.**

**NON-DISPLAY LICENSES**

**Internal Systems/Applications Enterprise License – Pink OTC Markets Level 1 Quotations**

Non-Display Usage of Pink OTC Markets Level 1 Quotations received from Pink OTC Markets or not more than one data vendor; *provided* that the applications and services that use the Information are not available to any person that is not a User.

**\$700.00 per month.**

#### **Internal Systems/Applications Enterprise License – Pink OTC Markets Level 2 Quotations**

Non-Display Usage of Pink OTC Markets Level 2 Quotations received from Pink OTC Markets or not more than one data vendor; *provided* that the applications and services that use the Information are not available to any person that is not a User.

**\$1,500.00 per month.**

### **DERIVED DATA LICENSES**

#### **Internal Derived Data License – Pink OTC Markets Level 2 Quotations**

Derived Data Usage of Pink OTC Markets Level 2 Quotations received from Pink OTC Markets or not more than one data vendor by the Distributor; *provided* that the data derived from the Information may not be distributed to any person that is not a User.

**\$500.00 per month.**

#### **External Derived Data License – Pink OTC Markets Level 2 Quotations**

Derived Data Usage of Pink OTC Markets Level 2 Quotations received from Pink OTC Markets or not more than one data vendor by the Distributor and the data derived from the Information may be distributed to any person.

**\$1,000.00 per month.**

### **INVESTOR INFORMATION WEBSITE LICENSES**

#### **Delayed Pink OTC Markets Level 1 Quotations for Website License**

Pink OTC Markets Level 1 Quotations, on a 15 minute delayed basis, continuously updated from 8:00 AM to 5:00 PM Eastern Standard Time on Distributor's Internet Properties; *provided* that such Information shall not include the identity of the executing broker-dealer.

**\$350.00 per month.**

#### **Real-Time Pink OTC Markets Last Trade Prices for Website License**

Real-time price and sale information for transactions in OTC Equity Securities (within the meaning of Rule 6610 of the Financial Industry Regulatory Authority, Inc. ("FINRA")) communicated to Pink OTC Markets on Pink Link or advertised through facilities operated by Pink OTC Markets, for display on Distributor's own website. OTC Equity Securities include OTCQX, Pink Sheets and OTCBB<sup>®</sup> securities.

Tiered pricing per month:

Tier 1: **\$2,400.00 per month** (1,000,000 or more Unique Website Visitors)  
Tier 2: **\$1,600.00 per month** (100,001 to 999,999 Unique Website Visitors)  
Tier 3: **\$800.00 per month** (1 to 100,000 Unique Website Visitors)

#### **Real-Time Pink OTC Markets Level 2 Quotations for Issuer's Investor Relations Website License**

License to receive and publish Information consisting of Pink OTC Markets Level 2 Quotations relating to over-the-counter securities of a particular Issuer that are quoted on Pink Quote on a website owned by such Issuer and operated by such Issuer or the Distributor, and to provide such Information to such Issuer

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Information consisting of a snapshot of the Inside Market Quote taken at 4:00 PM Eastern Standard Time or at such other time agreed upon by both parties in writing received from Pink OTC Markets or not more than one data vendor to be used for (i) Investment Accounting, (ii) valuation, (iii) settlement, clearing and custody, and (iv) information, research or analysis. Available only to broker-dealers, investment advisors, institutional money managers, banks, investment companies, custodian banks, clearing firms, prime brokers and service bureaus.

Requires separate Addendum and Pricing Schedule.

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Requires separate Addendum and Pricing Schedule.

## Exhibit B

As of Nov 30, 2009 Category Breakdown  
(based on actual daily volume accumulation)

	# Securities	Monthly \$ Volume	% of Total \$ Volume
<b>OTCQX Quality Controlled Marketplace</b>			
<b>OTCQX Total:</b>	<b>76</b>	<b>1,044,456,117</b>	<b>9.75%</b>
SEC Reporting Standard	7	964,749	0.01%
Alternative Reporting Standard	19	15,651,480	0.15%
ADR or F Share 12g3-2(b) International Information Standard	50	1,027,839,888	9.60%
<b>OTCBB Registered Company Marketplace</b>			
<b>Pink Quote/OTCBB Dually Quoted Total:</b>	<b>3,330</b>	<b>1,581,390,956</b>	<b>14.77%</b>
SEC Reporting	2,767	1,581,390,956	14.77%
Non-SEC Bank/Thrift or Non-Bank Regulated	371	25,558,123	0.24%
ADR	4	5,466,438	0.05%
Foreign Ordinary (F share)	188	164,765,192	1.54%
Total Pink/OTCBB(Dually)-(from volume_analysis):		1,581,390,956	
<b>OTCBB Only Total:</b>	<b>67</b>	<b>34,655,907</b>	<b>0.32%</b>
SEC Reporting	65	34,655,907	0.32%
Bank/Thrift U.S. Regulated	2	0	0.00%
ADR	0	0	0.00%
<b>Pink Sheets Speculative Trading Marketplace</b>			
<b>Current Information Total:</b>	<b>1,642</b>	<b>7,285,521,855</b>	<b>68.03%</b>
SEC Reporting	365	1,067,862,391	9.97%
Alternative Reporting Standard	107	103,081,452	0.96%
Bank/Thrift U.S. Regulated	223	14,332,660	0.13%
ADR 12g3-2(b) International Information Standard	614	5,220,166,918	48.74%
Foreign Ordinary 12g3-2(b) International Information Standard	333	880,078,433	8.22%
<b>Limited Information</b>	<b>753</b>	<b>609,745,903</b>	<b>5.69%</b>
SEC Reporting	353	456,108,771	4.26%
Non-SEC Reporting	384	146,091,633	1.36%
ADR	1	67,377	0.00%
Foreign Ordinary (F share)	15	7,478,122	0.07%
<b>No Information</b>	<b>3,465</b>	<b>153,489,993</b>	<b>1.43%</b>
SEC Reporting (exclude ADR*)	1,236	42,304,689	0.40%
Non-SEC Reporting (exclude ADR*)	2,093	99,759,013	0.93%
ADR	16	6,469,240	0.06%
Foreign Ordinary (F share)	120	4,957,051	0.05%
Without category/tier	0	232,116	0.00%
<b>Total Quoted OTC Market:</b>		<b>10,709,492,848</b>	<b>100.00%</b>
<b>Percent With Current Information Available</b>		<b>9,946,024,835</b>	<b>92.87%</b>
<b>Caveat Emptor/Buyer Beware Flag</b>			
OTCBB	5	7,362,683	0.07%
Pink Sheets	224	32,981,972	0.31%
<b>Total:</b>	<b>229</b>	<b>40,344,656</b>	<b>0.38%</b>

# OTC Market Tiers

## ISSUER LISTED - Companies apply to list and undergo a screening process



The highest tier for non-U.S. exchange listed companies that want an efficient cross-listing on a credible market tier, and the highest primary market tier for U.S. companies that trade over-the-counter

TRUSTED

## BROKER QUOTED - Market maker(s) publish quotes based on trading interest or customer demand



Pink Quote  
OTCBB

Identifies securities that are quoted on both Pink Quote and OTCBB



BB  
OTCBB  
Only

Securities quoted solely on FINRA's OTCBB



Pink Sheets  
Current Information

Pink Sheets securities that provide adequate current information in accordance with Pink OTC Markets' Guidelines or that are current in their required reports to a regulator such as the SEC, FDIC, or a qualified exchange



Pink Sheets  
Limited Information

Companies with financial reporting problems or in economic distress that cannot or choose not to provide current and adequate disclosure



Pink Sheets  
No Information

Dark and defunct companies that do not provide disclosure to the public markets - either to a regulator, an exchange or Pink OTC Markets

TRANSPARENT

DISTRESSED

## NOT QUOTED - No Broker-Dealer is willing or able to publish quotes for these securities



Grey Market

There are no market makers in this security. It is not listed, traded or quoted on any U.S. stock exchange, the OTCBB or Pink Quote

DARK / DEFUNCT

## WARNING FLAG - Buyers beware of companies in this category



Caveat Emptor

Buyer Beware. There is a public interest concern associated with the company, which may include a spam campaign, questionable stock promotion, known investigation of fraudulent activity, regulatory suspensions, or disruptive corporate actions

TOXIC