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May 5, 2010

## VIA ELECTRONIC SUBMISSION

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

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

Dear Secretary Murphy:

We are writing on behalf of our client, Pink OTC Markets Inc. ("Pink OTC"), to supplement Pink OTC's comment letter dated December 14, 2009 and our letter dated March 19, 2010 in connection with the above-referenced rule filing<sup>1</sup> by the Financial Industry Regulatory Authority, Inc. ("FINRA"). We believe that a response to FINRA's letter dated March 18, 2010 (the "FINRA Response Letter" or "Response Letter") challenging the legal arguments presented by Pink OTC and other commenters against approval of the Quotation Consolidation Facility ("QCF") by the Securities and Exchange Commission (the "Commission") will assist the Commission in its review of this proposal.

### I. INTRODUCTION -- SUMMARY OF MAIN ARGUMENTS

#### A. The QCF Proposal is Not Authorized Under Applicable Securities Law

We believe that the Commission and FINRA lack the legal authority to adopt the QCF as proposed in the QCF Proposing Release (the "QCF Proposal"). As described in greater detail later in this comment letter, we believe that the QCF Proposal: (1) is not required or authorized by the Securities Exchange Act of 1934 and is contrary to Congressional intent; (2) is contrary to the express provisions of the national market system plan ("NMS Plan") for NASDAQ securities (the "NASDAQ UTP Plan") approved by the Commission under Rule 608(b) of the Commission's Regulation NMS and would cause FINRA to violate Rule 608(c) of Regulation NMS; and 3) would violate Pink OTC's property and constitutional rights.

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<sup>1</sup> Securities Exchange Act Release No. 60999 (Nov. 20, 2009), 74 FR 61183 (Nov. 23, 2009) (the "QCF Proposing Release").

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B. There is No Broader Market Structure or Investor Protection Need for the QCF Proposal

As part of the QCF Proposal, FINRA seeks approval to cease operating the OTCBB. If the Commission approves the QCF Proposal and the OTCBB ceases operation, Pink OTC's "Pink Quote" will be the sole interdealer quotation system ("IQS")<sup>2</sup> in the over-the-counter ("OTC") market. If Pink Quote is the sole IQS in the OTC market, there will be no need for the QCF. One could reasonably argue that in such a situation, one of the purposes of the QCF Proposal would be to permit FINRA to appropriate for its private use the OTC quotation data collected by Pink OTC.

To the extent FINRA continues to operate the OTCBB, the QCF is still unnecessary. The Commission does not need to approve the QCF Proposal in order to address a broader market failure regarding OTC quotation data. Currently, OTC equity quotation data originates in two IQSs - Pink Quote and FINRA's OTCBB.<sup>3</sup> This data is already being consolidated and distributed widely to the market on fair, reasonable, and non-discriminatory terms by many market participants, including Pink OTC, broker-dealers, market data vendors, and order management system providers.<sup>4</sup>

C. Alternatives Are Available

We believe that regardless of whether the market is already performing the functions envisioned by the QCF Proposal, whether there will be a future need for quotation consolidation, or whether the QCF Proposal is required or authorized under applicable securities law, if the Commission believes there is a greater market structure need for

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<sup>2</sup> Rule 15c2-7(c)(1) under the Exchange Act defines "inter-dealer-quotation-system" as "any system of general circulation to brokers and dealers which regularly disseminates quotations of identified brokers or dealers ...." Rule 15c2-11(e)(2) under the Exchange Act defines "inter-dealer quotation system" as "any system of general circulation to brokers or dealers which regularly disseminates quotations of identified brokers or dealers."

<sup>3</sup> As of the date of this comment letter, one alternative trading system ("ATS") trades OTC equities, ArcaEdge, and it displays its quotes/orders on Pink Quote and the OTCBB.

<sup>4</sup> The need for OTC equity quotation consolidation is a recent development that the private market is addressing. Prior to 2008, the vast majority of market makers that quoted OTCBB-eligible securities quoted them on the OTCBB. Thus, even if these market makers also quoted in Pink Quote, the OTCBB still had the best available quotes. In 2008, however, a major market maker started quoting OTCBB-eligible securities solely on Pink Quote. In response to this development, Pink OTC updated its quotation display guidelines to require market data vendors to consolidate quotation data from Pink OTC and the OTCBB. As vendors made the changes, more and more broker-dealers chose to quote exclusively on Pink Quote based on the quality of the system and better pricing when compared to the OTCBB.

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regulatory control of OTC equity quotations, there are currently available alternative regulatory structures to the QCF. For example, we believe that requiring Pink OTC to register as a securities information processor is a currently available and legal means to impose Commission supervision over OTC equity quotations.

#### D. The QCF Proposal Violates the Property Rights and U.S. Constitutional Rights of Pink OTC

As further described in this comment letter, FINRA has been collecting OTC quotations through the OTCBB in competition with Pink OTC for years. The intended termination of the OTCBB by FINRA indicates that Pink OTC has provided the market with a better and more competitive product. Pink OTC has invested substantial resources to develop a market-preferred IQS for OTC equities, and the quotation data that Pink Quote generates has substantial value to Pink OTC. If the Commission approves the QCF Proposal permitting FINRA to appropriate Pink OTC's quotation data for dissemination by the NASDAQ UTP Plan, we believe this action would violate the property rights of Pink OTC and will also constitute a violation of the Takings Clause and Due Process Clauses of the United States Constitution.

In this comment letter, we further elaborate on the positions articulated above and provide a discussion of certain incorrect assertions made by FINRA in the Response Letter.

## II. BACKGROUND

### A. Pink Quote and the OTCBB -- Origins

FINRA and Pink OTC operate the only two electronic IQSs for OTC equity securities in the U.S. (*i.e.*, the OTCBB and Pink Quote). Pink OTC began operating Pink Quote as an electronic IQS in 1999. Prior to that time, Pink OTC disseminated quotations for OTC equities in paper form. The OTCBB began operation in 1990 in connection with the mandate in The Penny Stock Reform Act of 1990 that the Commission establish an automated quotation system meeting the requirements of Section 17B of the Exchange Act (*i.e.*, that the Commission establish, through the self-regulatory organizations, one or more automated quotation systems to facilitate the widespread dissemination of last sale and quotation information with respect to penny stocks).<sup>5</sup> The OTCBB was originally operated by the National Association of Securities Dealers, Inc. ("NASD"), FINRA's predecessor, then by the NASDAQ Stock Market, Inc. ("NASDAQ"), the NASD's

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<sup>5</sup> Congress mandated in Section 17B of the Exchange Act that the Commission establish one or more automated quotation systems operated by a self-regulatory organization to facilitate the widespread dissemination of last sale and quotation information with respect to *penny stocks*. "Penny stocks," as defined in the Exchange Act and Commission rules thereunder, constitute only a subset of all OTC equity securities. See Section 3(a)(51) of the Exchange Act and Rule 3a51-1, thereunder.

subsidiary, until 2005, when NASDAQ transferred ownership, management, and regulation of the OTCBB back to the NASD. Since 2005, NASDAQ has continued to provide the technology and connectivity used to carry out the day-to-day functions of the OTCBB for which FINRA pays NASDAQ millions of dollars each year.<sup>6</sup>

#### B. Operation of Pink Quote and the OTCBB

Both the OTCBB and Pink Quote permit broker-dealers to submit and update, on a real-time basis, quotations for OTC equity securities that the IQSs then display and commercially disseminate to other broker-dealers, market data vendors, and investors. Broker-dealers who see such quotations may telephone the broker-dealer responsible for a quotation to accept the quotation's bid or offer or further negotiate a possible transaction.<sup>7</sup>

#### C. Market Data Collected through Pink Quote and the OTCBB

Broker-dealers who choose to submit quotations to Pink Quote enter into written agreements with Pink OTC whereby those broker-dealers acknowledge that Pink OTC owns the quotations posted on Pink Quote. Pink OTC sells a licensed market data feed ("Pink Feed") containing the quotations received through Pink Quote to direct subscribers and to market data redistributors. These redistributors include broker-dealers who provide the data to their customers, market data vendors, such as Bloomberg and Thomson Reuters, and order management system providers, such as SunGard and Fidessa.<sup>8</sup> The Pink Feed service delivers either the entire Pink Quote quotation montage or the best bid and ask quotations on Pink Quote ("Pink NBBO") on a real-time or delayed basis. The commercial division of FINRA sells the OTCBB's quotations through the NASDAQ Level 1 data feed, for which FINRA receives a revenue share from the NASDAQ UTP Plan.

Both FINRA and Pink OTC charge broker-dealers monthly, per security fees for the securities such broker-dealers choose to quote on the respective IQSs. Broker-dealers are not required to display quotations for OTC equity securities in an IQS, and there is no requirement that a broker-dealer who publishes quotations in one IQS do so in the other

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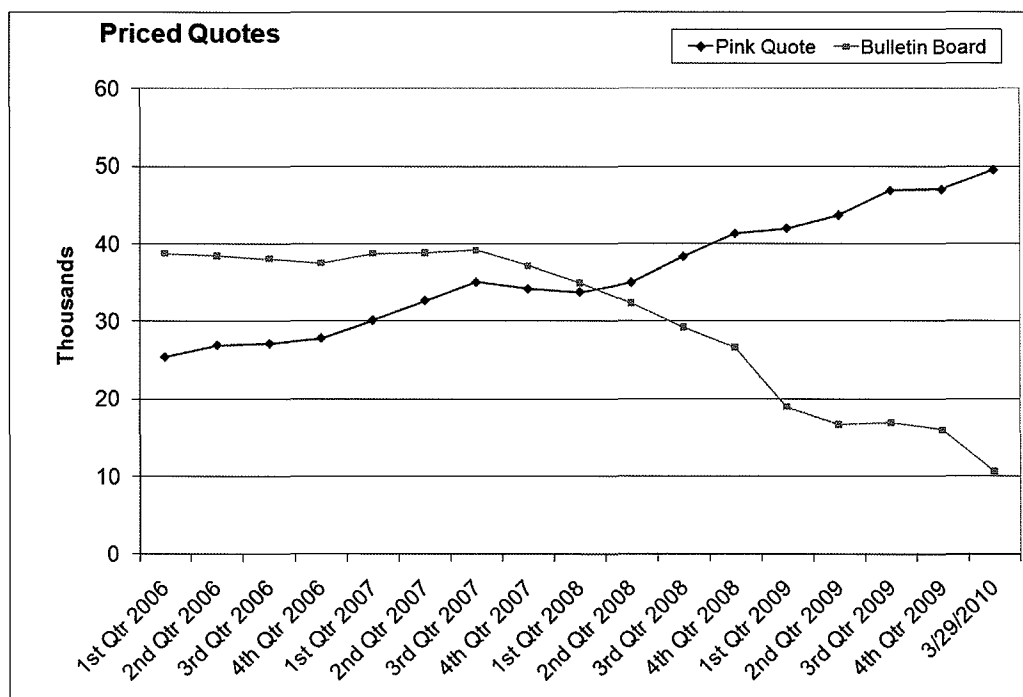
<sup>6</sup> For example, under the "OTCBB and OTC Equities Revocation of Delegation and Asset Transfer and Services Agreement" between NASD and NASDAQ, dated October 1, 2005, during the first two years of NASD's/FINRA's ownership of the OTCBB, NASD/FINRA paid NASDAQ at least \$11,500,000 and \$12,000,000, respectively, to operate the OTCBB.

<sup>7</sup> Pink OTC also offers additional functionalities currently not offered by the OTCBB, including an electronic messaging system ("Pink Link") that broker-dealers can use rather than using the telephone.

<sup>8</sup> Screen shots of consolidated data on various market data providers' screens are provided as Appendix A.

(although broker-dealers that publish priced quotations in two IQSs must show the same price in both systems). Broker-dealers generally only publish quotations for an OTC equity security in either or both the OTCBB and Pink Quote to the extent they believe the cost of quoting will be less than the revenue to be made as a result of such quoting activity.<sup>9</sup> As a result, the OTCBB and Pink Quote compete for quotations from broker-dealers.

As can be seen in the chart below, Pink OTC has been much more successful than FINRA in collecting quotations from broker-dealers for display through their respective IQSs. The OTCBB now is collecting approximately only 25% of the quotations that it collected in 2005 when FINRA inherited the OTCBB from NASDAQ. Because Pink OTC has dedicated significant resources to improving its systems, its quotations have essentially doubled, and it now receives approximately five times as many priced quotations as the OTCBB.



<sup>9</sup> It should be noted that many broker-dealers are extremely cost sensitive and decrease or cease their quotation activity when the costs increase. Through Pink Quote and Pink Link, Pink OTC offers broker-dealers an independent, electronic platform to display their real-time, firm “bid” and “ask” quotes and communicate OTC trade information with each other. These systems generate a substantial amount of OTC market data, which Pink OTC licenses to OTC market participants. By licensing OTC market data, Pink OTC is able to offer quotation and trade messaging services to broker-dealers at a reduced cost.

Due at least in part to its declining market share, FINRA now seeks to close the OTCBB. Interestingly, at the same time that FINRA is terminating the OTCBB and thereby eliminating the millions of dollars in costs associated with running it, FINRA also proposes through the QCF Proposal to require broker-dealers who publish quotations on the Pink Quote platform to provide their quotations to FINRA so that the commercial division of FINRA can distribute that data through the NASDAQ Level 1 data feed under the NASDAQ UTP Plan. Pink OTC has exclusive ownership of the quotations displayed on Pink Quote, just like stock exchanges own their quotations in exchange-listed securities. While the stock exchanges receive revenue for the quotations they collect and distribute, FINRA's QCF proposal would take Pink OTC's property without compensating Pink OTC, even though FINRA takes 6.25% of the total revenue earned under the NASDAQ UTP Plan.

### III. THE QCF PROPOSAL IS NOT PERMITTED BY THE EXCHANGE ACT

FINRA asserts in its QCF rule filing and its Response Letter that the Exchange Act authorizes the Commission to approve the QCF Proposal. We disagree with this assertion based on the reasons set forth below as well as in our prior comment letters.<sup>10</sup>

#### A. Exchange Act Standards for Commission Approval of SRO Rules

We believe three provisions of the Exchange Act are most relevant when the Commission is considering whether to approve an SRO rule such as the QCF Proposal:

- Section 19(b)(2)(B) of the Exchange Act provides that “[t]he Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of [the Exchange Act] and the rules and regulations thereunder applicable to such organization. The Commission shall disapprove a proposed rule change of a self-regulatory organization if it does not make such finding.”
- Section 3(f) of the Exchange Act provides that “whenever pursuant to this title the Commission is engaged in ... the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.”

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<sup>10</sup> See Letter from R. Cromwell Coulson, President & CEO, Pink OTC Markets Inc., Dec. 14, 2009, available at <http://www.sec.gov/comments/sr-finra-2009-077/finra2009077-1.pdf>; see also Letter from Michael Trocchio, Bingham McCutchen LLP, March 19, 2010, available at <http://www.sec.gov/comments/sr-finra-2009-077/finra2009077-17.pdf> (providing additional detail and arguments regarding the legality of the QCF Proposal).

- Section 15A(b)(9) of the Exchange Act provides that an SRO's rules may "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act]."

We believe that in light of the standards set forth in Sections 3(f), 15A(b)(9), and 19(b)(2)(B) of the Exchange Act, the Commission cannot approve the QCF Proposal because, among other things, it is anti-competitive, unnecessary, and would harm capital formation. Furthermore, even if the Commission disagrees with our analysis regarding Sections 3(f), 15A(b)(9), and 19(b)(2)(B), the Commission still cannot approve the QCF Proposal because, among other things, the QCF Proposal: lacks statutory authority under the Exchange Act; would violate Section 11A; would violate the provisions of the NASDAQ UTP Plan; would cause FINRA to violate Rule 608(c) of Regulation NMS; and would result in an illegal and unconstitutional appropriation of Pink OTC's property rights in the quotation information collected by Pink Quote.

B. The QCF Proposal Fails to Meet the Exchange Act Standard for Approval of an SRO Rule Filing

The QCF Proposal is inconsistent with the requirements of the Exchange Act provisions and rules thereunder applicable to FINRA for the reasons set forth below; therefore, the QCF Proposal does not meet the standard for Commission approval set forth in Section 19(b)(2)(B). Consequently, we believe the Commission should not approve the QCF Proposal.

1. The Exchange Act Provisions Cited by FINRA in its Rule Filing and the Response Letter Do Not Provide Adequate Statutory Basis for Commission Approval of the QCF Proposal

Section 19(b)(2)(B) of the Exchange Act permits the Commission to approve the QCF Proposal only if the Commission finds the proposal is consistent with the provisions of the Exchange Act and rules thereunder that are applicable to FINRA. When evaluating whether a proposed FINRA rule is consistent with the Exchange Act, the Commission primarily looks to Section 15A(b) of the Exchange Act.<sup>11</sup> In its QCF rule filing, and the FINRA Response Letter, FINRA cites only Sections 15A(b)(6) and 15A(b)(11) of the Exchange Act as providing the statutory basis for the QCF Proposal. We believe that, for the reasons set forth below, neither provision can reasonably be interpreted by the Commission to require or permit FINRA to take and disseminate quotations displayed by FINRA members through venues such as Pink OTC, especially without compensation. The Commission, therefore, cannot find that the QCF Proposal is consistent with the requirements of the Exchange Act on the basis of Sections 15A(b)(6) and 15A(b)(11).

<sup>11</sup> Securities Exchange Act Release No. 17371 (Dec. 12, 1980), 45 FR 83707, 83715 (Dec. 19, 1980) (stating that Section 15A(b) of the Act delineates statutory requirements relevant to the Commission's determination of whether to approve a proposed rule of a national securities association under Section 19(b)(2) of the Act.).

a. Section 15A(b)(11) Does Not Permit FINRA Itself to Engage in the Distribution and Publication of Quotations

FINRA erroneously asserts that Section 15A(b)(11) of the Exchange Act should be read to permit FINRA itself to engage in the distribution and publication of quotations. FINRA states in its Response Letter that “[i]n light of [the mandate in Section 15A(b)(11)], the collection, distribution and dissemination of quotation information is not a novel role for a registered securities association . . .” FINRA points to its operation of the OTCBB and its dissemination of OTCBB quotations through the NASDAQ Level 1 data feed as an example of its role in collecting and disseminating quotations permitted by Section 15A(b)(11). We strongly disagree with FINRA’s assertions. In fact, not only would FINRA’s proposed taking and distribution of quotations collected by another IQS be a novelty, it would clearly exceed the clear and unambiguous words of Section 15A(b)(11).

The fact that FINRA has historically collected and disseminated quotations through the OTCBB is irrelevant to evaluating the legality of the QCF Proposal. FINRA’s operation of the OTCBB is fully authorized by Section 17B of the Exchange Act whereas the QCF has no statutory basis. Just as importantly, FINRA’s historical role in disseminating quotations has been limited to quotations that FINRA (or its predecessor, NASD) collected through the operation of an IQS.<sup>12</sup> The QCF would, for the first time, involve the distribution by FINRA of quotations collected by an IQS operated by an unaffiliated third party. Similarly, the fact that FINRA already distributes OTCBB quotations through the NASDAQ Level 1 data feed cannot overcome the reality, as discussed in detail below, that the NASDAQ UTP Plan does not (and legally cannot) permit the distribution of quotations for securities that are not designated as national market system securities (“NMS Securities”) by the Commission.

Section 15A(b)(11) simply states that a national securities association such as FINRA should adopt rules “governing the form and content of quotations relating to securities sold otherwise than on a national securities exchange which may be distributed or published by any member or person associated with a member, and the persons to whom such quotations may be supplied.” Section 15A(b)(11), therefore, simply permits FINRA to have rules: 1) governing the form and content of quotations that are distributed or published by FINRA members, and 2) governing the persons to whom such FINRA members may supply quotations. Section 15A(b)(11) does not authorize FINRA itself to distribute or publish quotations for OTC equity securities collected by a competing IQS, but this is exactly what the QCF would permit FINRA to do.

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<sup>12</sup> Historically, all of NASD’s/FINRA’s collection of quotations has been through the operation of an IQS, not taking quotations from other IQSs. NASD started operating NASDAQ to provide its members with an electronic alternative for displaying quotes in active OTC equities, and the OTCBB did the same for penny stocks. Similarly, FINRA’s “alternative display facility” provides FINRA members with an alternative to displaying quotations on NASDAQ.



Section 15A(b)(11) merely permits FINRA to impose standards on its members that are in the business of distributing or publishing quotations. As stated above, this section permits FINRA to issue rules that govern the form and content of member firm quotations and the persons to whom FINRA members may supply quotations. The QCF Proposal, however, would not govern either of these activities. Rather, the proposal would permit FINRA to take, consolidate and distribute OTC quotations collected by others. This activity is not authorized by Section 15A(b)(11) of the Exchange Act.<sup>13</sup> Section 15A(b)(11) cannot, therefore, provide the Commission with a basis to approve the QCF Proposal under Section 19(b)(2)(B).

b. Section 15A(b)(6) Cannot Reasonably be Interpreted to Permit FINRA to Take and Distribute the OTC Equity Quotations of Others; Analysis of Sections 11A and 17B of the Exchange Act

Sections 19(b)(2)(B) and 15A(b)(6) of the Exchange Act, when read in the context of the Exchange Act as a whole, cannot reasonably be interpreted to conclude that Congress intended to permit FINRA to take and distribute quotations for OTC equity securities that are the property of unaffiliated third parties, especially without compensation to the property owners. Section 15A(b)(6) can potentially provide the Commission with a basis to approve a FINRA rule under Section 19(b)(2)(B) provided such FINRA rule, among other things, is 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 ... and ... to protect investors and the public interest....”

Although Section 15A(b)(6) may be viewed as granting somewhat broad rulemaking authority to FINRA, FINRA’s authority under this provision is certainly not limitless. The Commission cannot look at Section 15A(b)(6) in a vacuum to determine whether Congress intended to enable the Commission to permit FINRA to confiscate and disseminate quotations for OTC equity securities collected and disseminated by private businesses; rather, the Commission must read that section in the context of the entire Exchange Act.<sup>14</sup> In particular, we believe the ability of the Commission to approve a

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<sup>13</sup> We note that FINRA already has rules governing member firms’ quoting activities with respect to OTC equity securities. *See, e.g.*, FINRA Rule 6450 (governing quotation size); FINRA Rules 6460 and 6470 (governing cessation of quoting); and FINRA Rule 6480 (governing the use of multiple firm identifiers when quoting).

<sup>14</sup> *See* *Indiv. Reference Servs. Group, Inc. v. FTC*, 145 F. Supp. 2d 6 (D.D.C., 2001) (stating that, for the purposes of applying the standard set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, a statutory provision must not be read in isolation, but rather it must be placed “in context, interpreting the statute to create a symmetrical and coherent regulatory scheme.”).

FINRA rule in reliance on Section 15A(b)(6) must be constrained by the specific limitations Congress placed on the Commission's rulemaking authority relative to the collection and dissemination of quotations in Sections 11A and 17B of the Exchange Act.<sup>15</sup>

Sections 11A and 17B of the Exchange Act were adopted by Congress decades after the adoption of Section 15A(b)(6). Both Sections 11A and 17B explicitly address the manner in which quotations should be made available. Neither section, however, permits the Commission or FINRA to confiscate and disseminate, without compensation, quotations for OTC equity securities from privately operated IQSs. Congress understood the importance of quotation information when it adopted Sections 11A and 17B of the Exchange Act, and Congress gave the Commission specific authority relative to quotations for securities through these sections. Congress, however, limited these sections to quotations in NMS Securities and penny stocks, respectively, and limited the actions the Commission could take with respect to quotations in those securities. It is, therefore, unreasonable to read Section 15A(b)(6) in a manner that would permit the Commission much broader authority with respect to OTC equity quotations than Congress permitted under Sections 11A and 17B.

#### *Section 11A*

Section 11A was added to the Exchange Act through enactment of the Securities Acts Amendments of 1975 (the "1975 Amendments").<sup>16</sup> Prior to the 1975 Amendments, the Commission's authority with respect to regulating the distribution of quotations was questionable, especially in light of a series of Supreme Court cases that recognized the property rights of persons who collect quotations for securities.<sup>17</sup> In passing the 1975 Amendments, Congress recognized both the importance of the availability of quotation information to the U.S. markets and investors as well as the apparent limitations on the Commission's authority.<sup>18</sup>

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<sup>15</sup> See *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932) (stating that the "[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment.... Specific terms prevail over the general in the same or another statute which otherwise might be controlling.").

<sup>16</sup> Pub. L. No. 94-29, 89 Stat. 97 (1975).

<sup>17</sup> See, *Bd. of Trade v. Christie Grain & Stock Co.*, 198 U.S. 236 (1905); *Hunt v. New York Cotton Exch.*, 205 U.S. 322 (1907); and *Moore v. New York Cotton Exch.*, 270 U.S. 593 (1926) (collectively, hereinafter, the "Ticker Cases").

<sup>18</sup> See S. Rep. No. 94-75 at 9 (1975) (hereinafter, the "Senate Report") (noting that "there are significant questions as to the SEC's authority to regulate persons operating and administering" communications systems that disseminate last sale and quotation information).

We do not believe the 1975 Amendments overturned the Supreme Court decisions that quotations are the property of those who collect such quotations. Although the 1975 Amendments provided the Commission with the necessary authority to make rules requiring the consolidation and public dissemination of market data when the private sector failed to achieve an appropriate solution, it did not allow the Commission to confiscate market data without compensation to the exchanges that collected it. Instead, Congress enabled the Commission to require or permit the exchanges to act jointly with respect to the dissemination of quotations. In response to this grant of authority, the Commission adopted rules enabling the exchanges to submit market data sufficient to create a consolidated quote stream to a jointly-owned consolidator that would publish the quotations, but this regulatory regime provides for the compensation of exchanges for their market data through revenue sharing arrangements.

The 1975 Amendments did not direct the Commission itself to create (as opposed to foster) a national market system. Rather, Congress intended that “the national market system evolve through the interplay of competitive forces.”<sup>19</sup> Congress expected the Commission to intervene only in “those situations where competition may not be sufficient, such as the creation of a composite quotation system ...”<sup>20</sup> Under Section 11A, Congress did not intend the Commission to “have either the responsibility or the power to operate as an ‘economic czar’ for the development of a national market system,” but rather, Congress intended the “vigor of competition” to create the national market system with the Commission intervening only when “competitive forces cannot ... be relied upon.”<sup>21</sup>

The legislative history of the 1975 Amendments shows that Congress, through Section 11A of the Exchange Act, intended to vest in the Commission the authority to foster the availability of consolidated quotation information as part of the national market system only with respect to NMS Securities<sup>22</sup> and where competition failed to do so. Congress’

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<sup>19</sup> H.R. Rep. No. 94-229 at 92 (1975) (hereinafter, the “Conference Report”).

<sup>20</sup> *See id.*

<sup>21</sup> *See* Senate Report, *supra* note 18, at 12.

<sup>22</sup> The Commission’s authority to foster the national market system, which would include the creation of a consolidated quotation system, is limited to “qualified securities” (*i.e.*, NMS Securities) by Section 11A(a)(2) of the Exchange Act. Under the authority granted to the Commission by the 1975 Amendments, specifically Section 11A(a)(3) of the Exchange Act, among other things, the Commission promulgated what is now Rule 603(b) of the Commission’s Regulation NMS. Rule 603(b) requires all national securities exchanges that trade NMS Securities and all national securities associations to act jointly through NMS Plans to disseminate consolidated quotations for NMS Securities. Rule 603(b) also requires that any such NMS Plan disseminate quotations for NMS Securities through a single plan processor. As required by the limitations of Section 11A(a)(2), these measures were limited to NMS Securities.

preference for competition in this area, coupled with limiting the Commission's power to securities the Commission designates as NMS Securities, does not permit for a broad reading of Section 15A(b)(6) that would permit the Commission to interfere with the competitive forces in the OTC equity securities marketplace by mandating that all OTC equity quotations be given to FINRA so that FINRA may consolidate them for distribution under an NMS Plan. Such a reading of Section 15A(b)(6) of the Exchange Act would render meaningless Congress' more limited and focused mandate in Section 11A of the Exchange Act.

### *Section 17B*

In 1990, fifteen years after the 1975 Amendments, Congress enacted The Penny Stock Reform Act of 1990 (the "Penny Stock Reform Act") which, in part, added Section 17B to the Exchange Act. In so doing, Congress found that, among other things, "the penny stock market still lacks an adequate and sufficient regulatory structure, particularly in comparison to the structure for overseeing trading in National Market System securities."<sup>23</sup> Congress also found that "the penny stock market suffers from a lack of reliable and accurate quotation ... information available to investors and regulators."<sup>24</sup> Congress recognized that the market for penny stocks did not reap the benefits of the national market system for NMS Securities that Congress sought through adoption of Section 11A.<sup>25</sup> The Penny Stock Reform Act added Section 17B to the Exchange Act to address these findings. By doing so, Congress directed the Commission "to facilitate the widespread dissemination of reliable and accurate last sale and quotation information regarding all *penny stocks* through the establishment of one or more automated quotation

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<sup>23</sup> Section 502(5) of the Penny Stock Reform Act, Public Law 101-429 (Oct. 15, 1990).

<sup>24</sup> Section 17B(a)(1) of the Exchange Act.

<sup>25</sup> See H.R. Rep. No. 101-617, at 31(1990) ( hereinafter, the "House Report for the Penny Stock Reform Act") (stating "[t]he Committee notes that through the adoption of Section 11A of the Exchange Act in 1975, Congress sought an electronic national market system for equity securities qualified for trading in that market. Penny stocks have not been included in this evolving national market system."). The legislative history of the Penny Stock Reform Act makes clear that Congress understood that in 1990 the Pink Sheets, published by National Quotation Bureau (Pink OTC's predecessor), did not offer an adequate means of publishing quotations for penny stocks because, among other things: it was published daily on paper even though the markets had moved to electronic trading systems and computerized quotation services; indications of interest may not even have had prices; Pink Sheets was available only to broker-dealer subscribers; broker-dealers widely ignored the minimum information requirements required prior to quoting in Pink Sheets; Pink Sheet quotations were not firm and may not have been honored; and most Pink Sheet stocks traded without effective electronic supervision. See *id.* at 8.

systems”<sup>26</sup> that collect and distribute quotations and are operated by a registered securities association or a national securities exchange. (Emphasis added.)

When enacting the Penny Stock Reform Act, Congress understood the limitations of Section 11A of the Exchange Act and, in light of these limitations, directed the Commission through Section 17B to take very specific action (*i.e.*, establish one or more automated quotation systems) with respect to a very specific subset of securities (*i.e.*, penny stocks). Congress did not direct the Commission to take any additional steps beyond this very limited mandate. Congress did not direct or authorize the Commission to consolidate quotations for non-NMS Securities irrespective of whether more than one automated quotation system for penny stocks arose. Similarly, Congress did not direct or authorize the Commission to take steps with respect to any other non-NMS Securities besides penny stocks even though it clearly understood that there were securities that were neither penny stocks nor NMS Securities.<sup>27</sup> Nor did Congress mandate that broker-dealers furnish to any automated quotation systems created under Section 17B the quotations they display elsewhere.

When seeking to address the lack of adequate quotation information for penny stocks, Congress did not authorize the Commission to require, directly or indirectly, the consolidation of quotations for all OTC equity securities. This result, however, is precisely what the QCF would do. The clear limitations that Congress placed on the Commission’s authority with respect to quotations regarding a subset of OTC equity securities (*i.e.*, penny stocks) does not permit for a broad reading of Section 15A(b)(6) of the Exchange Act to permit the Commission to approve the QCF Proposal. Such a broad reading of a general statutory provision would violate the more limited mandate that Congress laid out for the Commission in Sections 11A and 17B with respect to OTC equity quotations.

*Sections 11A and 17B Supersede Section 15A(b)(6)*

Although Section 15A(b)(6) may be viewed as permitting somewhat broad rulemaking authority to FINRA, when this provision is interpreted in the context of the Exchange Act as a whole, and especially the more limited and focused Congressional mandates found in Sections 11A and 17B, Section 15A(b)(6) cannot reasonably be read to permit the Commission to require each IQS to provide all OTC equity quotations to an SRO for consolidation and dissemination under an NMS Plan. Such a measure is not permitted by the two provisions of the Exchange Act that specifically address the Commission’s authority regarding the dissemination of quotation information. Moreover, if FINRA ceases operation of the OTCBB, Section 15A(b)(6) cannot reasonably be read to permit

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<sup>26</sup> *Id.* at 31.

<sup>27</sup> *See id.* at 32 (expressing concern regarding NASD permitting the OTCBB to display quotations for “non-penny stock, unregistered foreign securities”).

or require FINRA to take and disseminate solely the quotations collected and disseminated by Pink OTC.

The QCF Proposal contemplates that the OTCBB, the only other IQS operating in the market for OTC equity securities other than Pink Quote, will be terminated. It is particularly inappropriate to mandate consolidation of market data when it is contemplated that there will be only one IQS. The QCF must therefore be understood, not as a consolidator of market data, but as a disseminator of market data already displayed on the Pink Quote IQS. Since it is through the dissemination of market data that revenues are derived from its collection, the QCF Proposal simply shifts revenue from Pink OTC to the NASDAQ UTP Plan participants including FINRA. Nothing in Section 15A(b)(6), or any other Exchange Act provision, authorizes or requires the confiscation and reallocation of commercial revenues for this purpose.

2. The QCF Proposal Would Impose an Unnecessary and Inappropriate Burden on Competition, Hurt Capital Formation, Hinder Pricing Efficiency, and Harm Investors -- Response to FINRA Assertions to the Contrary

As noted in our prior letters, the QCF Proposal is inconsistent with the requirements of Sections 3(f) and 15A(b)(9) of the Exchange Act because it would impose an unnecessary and inappropriate burden on competition, hurt capital formation, hinder pricing efficiency, and harm investors. We are not reiterating here the arguments we and other commenters have previously made in this regard; however, we do disagree with many of the statements in the FINRA Response Letter, some of which we feel compelled to address herein.

a. The QCF is Not Necessary to Enable Competition among IQSs

FINRA states in its letter that “the QCF will spark competition by enabling new market entrants to compete directly (and immediately) with existing trading systems and inter-dealer quotation systems ...by having their quotes included in an established and widely distributed NBBO” and that “[t]rue competition in the OTC equity space may be hampered if new entrants must rely on their competitors for wide dissemination of their quotes.”<sup>28</sup> We disagree that any future IQS will need to rely on competitors in order to widely disseminate quotations in order to be successful. Pink OTC has proven it is possible to compete successfully as an IQS without relying on the dominant OTC equity IQS to distribute its quotes - Pink OTC has very successfully competed with the OTCBB without FINRA ever distributing Pink OTC’s quotations. The success of Pink OTC’s IQS has been due to hard work and capital investment to create a better platform that is more efficient and cost effective for broker-dealers. In fact, the QCF poses an impediment to the formation of any IQS because the QCF takes for itself one of the most

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<sup>28</sup> FINRA Response Letter at page 4.

valuable assets of an IQS - the ability to sell its quotation data - and certainly will not “spark” anyone to jump into the IQS business.

b. The QCF is Not Analogous to the Model for  
Dissemination of Exchange Quotations

In an attempt to address commenters’ concerns that the QCF is an anti-competitive monopoly, the FINRA Response Letters states that:

“[u]nder the proposed framework, FINRA will collect, calculate and disseminate only the NBBO for OTC Equity Securities, while each [IQS] and ATS will retain the ability to independently distribute its depth-of-book. This framework is analogous to the data distribution construct established for NMS stocks, which distinguishes between “core” and “non-core” data. Specifically, with respect to NMS stocks, “core” data, which is the best-priced quotations and last sale information of all markets in U.S.-listed equities, is consolidated and distributed to the public by a single central processor (and administered for the sole benefit of the SRO participants of the central processor committee). In contrast, “non-core” data can be independently distributed by individual exchanges and other market participants.”<sup>29</sup>

This assertion ignores that exchanges collaborate in the dissemination of the core data they collect and share proportionally in the revenue derived therefrom. In the market for NMS Securities, the collectors of quotations are the exchanges and FINRA’s alternative display facility. In the OTC market, the collectors of quotations are IQSs. The framework for dissemination of market data for NMS Securities does not require the exchanges to give up their quotation property for the public good, but requires exchanges and FINRA to combine their quotations and share the resulting revenues based upon the amount of quotation data provided. While exchanges are able to exclusively market their non-core data, U.S. exchanges derive anywhere from half to all of their market data revenue from their share of core data revenues.<sup>30</sup> It is also very clear that if revenue from core data was not provided to the exchanges that engaged in the hard work of collecting the quotations, there would be significantly less competition in the exchange space because a number of exchanges rely on this revenue to remain profitable. Despite FINRA’s statements, the exchange model for sharing revenue for the sale of core data is

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<sup>29</sup> FINRA Response Letter at page 6.

<sup>30</sup> NASDAQ OMX Group received approximately \$33 million in revenue from the sale of core data through the NMS Plans and \$30 million from proprietary non-core data in the 4th quarter of 2009. See NASDAQ OMX Group Investor Presentation, Citi Financial Services Conference, March 10, 2010. We believe the NASDAQ OMX Group to be the most successful at monetizing non-core data and that the majority of exchanges’ revenue from the sale of non-core data is an even smaller percentage of their market data revenue as compared to the NASDAQ OMX Group.

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not analogous to the QCF model. The QCF model would harm Pink OTC and any future entrants in the IQS field for OTC equities by taking quotation data without compensation, and therefore hurts competition among any such IQSs.

c. It is Not Necessary to Install FINRA as a Monopoly Consolidator

The FINRA Response Letter states that FINRA believes that “having an SRO function as the central disseminator of such data is a critical safeguard to ensure that such data is made available on a fair and reasonable basis to investors, market participants, and data vendors” and that “the Commission has little effective control over the pricing of data sold by non-SROs, and such pricing is not subject to any public process.”<sup>31</sup> There is no requirement in the Exchange Act that quotation information be consolidated and disseminated by an SRO. Broker-dealers and market data vendors are more than capable of combining quotations from multiple sources to create consolidated quotation information. This service is already offered by many of the largest retail broker-dealers and market data vendors.

FINRA has not explained why there cannot be multiple, competing consolidators - choosing a monopoly consolidator over a competing consolidator model is *per se* anti-competitive. If FINRA wishes to implement a simple rule-based approach to ensuring consolidation of OTC equity quotations, it can simply adopt a rule requiring its members to purchase quotation information from a market data vendor that consolidates such quotations<sup>32</sup> or requiring its members to consolidate quotations themselves. Moreover, there is nothing in the Exchange Act suggesting that registered securities information processors must be SROs, and it is incorrect for FINRA to assert that the Commission has no ability to control the sale of market data by non-SROs in light of the Commission’s clear authority to regulate any securities information processor under Section 11A(b) of the Exchange Act, as discussed more fully below.

d. The QCF Could Facilitate Fraud

The FINRA Response Letter dismisses those commenters, including the North American Securities Administrators Association, Inc. (“NASAA”), who asserted that disseminating through NASDAQ Level 1 the best quotes for securities of unregistered issuers may mislead investors. FINRA simply dismisses these concerns as unfounded even though NASAA said in its letter that:

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<sup>31</sup> FINRA Response Letter at pages 6 - 7.

<sup>32</sup> At the time the QCF Proposal was announced, Pink OTC was developing a feed that consolidated Pink Quote and OTCBB quotations into one normalized feed for broker-dealers and market data vendors. If FINRA continues to operate the OTCBB, Pink OTC could easily provide this service to simplify the consolidation of quotes.



“Under the QCF, the dissemination of quote information for unregistered OTC securities in the NASDAQ Level 1 feed would be likely to give the false impression to public investors and other market participants that FINRA, as an SRO, is regulating or has regulatory power over the issuers of those securities. **This is not an illusory regulatory concern.** At the state level, we have seen countless instances where fraudulent issuers on the OTC Bulletin Board have exploited that false impression by asserting that FINRA’s operation of the OTC Bulletin Board demonstrates the legitimacy of the securities traded there.”<sup>33</sup> (Emphasis added.)

FINRA does not directly address the concerns expressed by NASAA, including the experience of the state securities regulators that status as an OTCBB-quoted company (which must be a public reporting company) has been used “countless” times in furtherance of a fraud. Rather, FINRA merely asserts that such concerns are unfounded because the NASDAQ Level 1 data would identify issuers as either reporting, non-reporting, or late in their filings. We disagree that such notations will do much to put unsophisticated investors on notice that none of these companies has met any listing standards nor that any regulator has approved of its trading, especially considering the average investor likely does not understand what it means to be a public-reporting company.

e. The QCF Will Not Enhance Capital Formation

We disagree with the statement in the FINRA Response Letter that “the QCF will serve to enhance the capital raising abilities of OTC Equity issues - not dampen them.”<sup>34</sup> The basis for this FINRA assertion is that the QCF will provide “investors and market participants with best price information on these issuers.”<sup>35</sup> Best price information is already widely available through Pink OTC and many other market data providers. In fact, the QCF will very likely harm capital formation because it will lead to a decrease in the number of OTC issuers that are quoted even without the \$4/security/month QCF position fee that was originally contained in the QCF Proposal. The QCF will very likely lead to a decrease in the number of securities quoted in Pink Quote or any other IQS that may arise because IQSs will have to have higher quoting fees on market makers to offset the revenue that is lost because the QCF is taking the IQS’ quotation data without compensation. For those issuers that will have fewer if any broker-dealers quoting their securities, the reduction or absence of publicly available quotations will unquestionably harm their capital raising prospects and harm those who invest in such issuers.

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<sup>33</sup> Letter from Jack Herstein, Chairperson of NASAA Corporation Finance Section Committee and Nebraska Securities Administrator, March 4, 2010, available at <http://www.sec.gov/comments/sr-finra-2009-077/finra2009077-14.pdf>.

<sup>34</sup> FINRA Response Letter at pages 4 - 5.

<sup>35</sup> FINRA Response Letter at page 4.

C. The Commission has Full Authority to Regulate Pink OTC as a Securities Information Processor

If the Commission believes Pink OTC's ownership and sale of OTC equity quotation data needs to be regulated, Section 11A(b)(1) of the Exchange Act expressly grants the Commission the authority to regulate Pink OTC as a "securities information processor" ("SIP") as defined in Section 3(a) of the Exchange Act.<sup>36</sup> Section 11A(b) of the Exchange Act governs the regulation and registration of SIPs and was added to the Exchange Act as part of the 1975 Amendments; however, unlike other aspects of Section 11A, Section 11A(b) and the definition of SIP do not limit the Commission's authority to regulating only SIPs that process information for NMS Securities or on behalf of SROs. Thus, although Section 11A(b)(1) does not by its terms require that Pink OTC be registered and regulated as a SIP because Pink OTC is not an "exclusive processor,"<sup>37</sup> this section clearly gives the SEC the authority to require a non-exclusive processor such as Pink OTC to register with, and be regulated by, the Commission where necessary.

Congress made clear that non-exclusive processors, although initially exempt from registration, should be directly regulated by the Commission if "registration was necessary or appropriate in the public interest or to facilitate the development of a national market system."<sup>38</sup> The legislative history of the 1975 Amendments makes clear that the Commission is expected to require registration of significant non-exclusive processors, not delegate this responsibility to the self-regulatory organizations.<sup>39</sup> For

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<sup>36</sup> Section 3(a)(22)(A) of the Exchange Act defines "securities information processor" as "any person engaged in the business of (i) collecting, processing, or preparing for distribution or publication, or assisting, participating in, or coordinating the distribution or publication of, information with respect to transactions in or quotations for any security (other than an exempted security) or (ii) distributing or publishing (whether by means of a ticker tape, a communications network, a terminal display device, or otherwise) on a current and continuing basis, information with respect to such transactions or quotations." (Emphasis added.)

Section 11A(b)(1) states that "... a securities information processor not acting as the exclusive processor ... is exempt from the requirement to register in accordance with this subsection unless the Commission, by rule or order, finds that the registration of such securities information processor is necessary or appropriate in the public interest, for the protection of investors, or for the achievement of the purposes of this section."

<sup>37</sup> See Section 3(a)(22)(B) of the Exchange Act (defining the term "exclusive processor").

<sup>38</sup> Senate Report, *supra* note 18, at 10.

<sup>39</sup> See Senate Report, *supra* note 18, at 9 (stating "Regulation of securities communications systems would be accomplished ... by adding a new section 11A to the Exchange Act. This section is intended to bring under the SEC's direct jurisdiction all organizations engaged in the business of collecting, processing, or publishing information

example, the Committee reviewing the 1975 Amendments distinguished between the Commission's direct authority as granted in the Exchange Act, and its indirect authority with respect to overseeing SRO rulemaking, stating that "Section 11A(b) would clarify the Commission's direct authority over processors of market information."<sup>40</sup>

Pink OTC understands the importance to the U.S. securities markets of the availability of accurate and reliable quotation information, and Pink OTC believes it falls within the definition of "securities information processor" in Section 3(a)(22)(A) of the Exchange Act. Furthermore, Pink OTC realizes its significant volume of quotation information for OTC equities is important to investors, industry professionals such as market makers and other broker-dealers, and other industry participants. The importance of this information is what makes it a valuable asset to Pink OTC, while at the same time Pink OTC's ownership and control of this data provides the Commission with the authority necessary to regulate its sale by Pink OTC on fair and reasonable terms. Therefore, we believe that when reading the Exchange Act as a whole, when faced with the decision to regulate Pink OTC as a SIP or permit FINRA to confiscate and sell Pink OTC's quotation data, the only reasonable approach under the Exchange Act is for the Commission to regulate Pink OTC as a SIP.

D. Commission Approval of the QCF is Contrary to the Law as it Would Violate Section 11A of the Exchange Act, the Express Provisions of the NASDAQ UTP Plan, and Would Result in FINRA Violating Rule 608(c) of Regulation NMS

The Commission cannot approve the QCF under Section 19b(2)(B) of the Exchange Act because the proposed distribution under an NMS Plan (*i.e.*, the NASDAQ UTP Plan) of quotations for securities that are not designated by the Commission as NMS Securities is contrary to: 1) the express provisions of the NASDAQ UTP Plan, an NMS Plan approved by the Commission under Rule 608(b) of Regulation NMS, as promulgated by the Commission under Section 11A, 2) Rule 608(c) of Regulation NMS, as promulgated by the Commission under Section 11A, and 3) Section 11A of the Exchange Act itself.

1. The QCF Proposal Violates the Provisions of the NASDAQ UTP Plan

The Commission's approval of the QCF would violate the express provisions of the NASDAQ UTP Plan, an NMS Plan filed with, and approved by, the Commission under Rule 608(b) of the Commission's Regulation NMS. Under the QCF Proposal, FINRA plans to distribute quotations for OTC equity securities through the NASDAQ Level 1 data feed. The NASDAQ Level 1 data feed is distributed under the NASDAQ UTP Plan.

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relating to quotations for, indications of interest to purchase and sell, and transactions in securities.").

<sup>40</sup> Senate Report, *supra* note 18, at 31.

However, as discussed more fully in our letter dated March 19, 2010, the express terms of the NASDAQ UTP Plan unequivocally limit its distribution of quotations to NASDAQ securities. Not only are OTC equity securities not eligible for inclusion in the market data disseminated under the NASDAQ UTP Plan, but the plan processor is required, under the terms of the plan, to reject data for securities that are not NASDAQ securities. We, therefore, believe that the Commission simply cannot approve the QCF Proposal if the quotations for OTC equity securities that the QCF would take would be disseminated through the NASDAQ Level 1 data feed.

2. The QCF Proposal Violates Rule 608(c) of Regulation NMS and Section 11A

a. The NASDAQ UTP Plan is Limited to NMS Securities

Commission approval of the QCF Proposal would cause FINRA to violate Rule 608(c) of Regulation NMS. Rule 608(c) requires each self-regulatory organization that is a sponsor or participant of an NMS Plan to comply with the terms of such plan. FINRA is a participant in the NASDAQ UTP Plan, and is therefore required to abide by its terms, including the terms that limit participants to transmit to the plan processor data only for NASDAQ securities. As a result, FINRA is not allowed to use the NASDAQ UTP Plan to submit and disseminate quotations for OTC equity securities. Although it is possible both to amend an NMS Plan and for the Commission to grant exemptions from Rule 608(c), neither avenue is available to the Commission to permit the collection and distribution in this context because Section 11A of the Exchange Act limits NMS Plans to NMS Securities (which the Commission currently does not define to include securities traded solely in the OTC market).

As we discussed in our letter dated March 19, 2010, the NASDAQ UTP Plan is limited to handling market data with respect to NMS Securities. One of the findings by Congress included in Section 11A(a)(1) is that the “linking of all markets for **qualified securities** through communication and data processing facilities will foster efficiency, enhance competition, increase the information available to brokers, dealers, and investors, facilitate the offsetting of investors’ orders, and contribute to best execution of such orders.”<sup>41</sup> (Emphasis added.) In light of this finding, Section 11A(a)(3)(B) gives the Commission the authority to permit or require SROs to act jointly in furtherance of the objectives of the national market system.<sup>42</sup> However, the Commission’s authority in Section 11A(a)(3)(B) is expressly limited to the directive in Section 11A(a)(2) which

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<sup>41</sup> See Section 11A(a)(1)(D) of the Exchange Act.

<sup>42</sup> Section 11A(a)(3)(B) states that the Commission is authorized in furtherance of the directive in Section 11A(a)(2) “by rule or order, to authorize or require self-regulatory organizations to act jointly with respect to matters as to which they share authority under this title in planning, developing, operating, or regulating a national market system (or a subsystem thereof) or one or more facilities thereof.”

itself is limited to “qualified securities” (*i.e.*, NMS Securities).<sup>43</sup> Therefore, even if the NASDAQ UTP Plan did not already by its express terms exclude non-NMS Securities, the QCF Proposal’s planned distribution of quotations for OTC equity securities through an NMS Plan would not be permitted under Section 11A of the Exchange Act because such securities are not designated by the Commission as NMS Securities.

b. Current Information Included in the NASDAQ UTP Plan

FINRA states in its response letter that the NASDAQ UTP Plan already disseminates market data for non-NASDAQ securities, specifically OTC equity transaction reports and OTCBB quotations. Although this assertion is correct, it is clear that the Commission did not consider whether it is permissible under the terms of the NASDAQ UTP Plan or Section 11A. In any event, this assertion is irrelevant to the legal analysis of whether it is permissible to include all OTC equity quotations in the NASDAQ Level 1 data stream as contemplated by the QCF Proposal. The Commission’s approval orders regarding the dissemination of OTCBB quotations through the NASDAQ market data stream and regarding the NASD’s collection and dissemination of OTC equity transaction reports simply do not discuss at all whether it is permissible to include non-NMS Security data in such stream, and no commenters appear to have raised the issue.<sup>44</sup>

The Commission first approved the bundling of OTCBB quotations along with NASDAQ Level 1 quotation data in 1991, almost two years before the NASDAQ UTP Plan’s effective date<sup>45</sup> and at a time when the NASD owned and operated both NASDAQ and the OTCBB. Therefore, the propriety of disseminating OTCBB quotations under the NASDAQ UTP Plan could not even have been raised by commenters or considered by the Commission, because the NASDAQ UTP Plan did not yet exist.

<sup>43</sup> Section 11A(a)(2) states: “[t]he Commission is directed ... to use its authority under this title to facilitate the establishment of a national market system for securities (which may include subsystems for particular types of securities with unique trading characteristics) in accordance with the findings and to carry out the objectives set forth in paragraph (1) of this subsection. **The Commission, by rule, shall designate the securities or classes of securities qualified for trading in the national market system from among securities other than exempted securities. (Securities or classes of securities so designated [are] hereinafter in this section referred to as “qualified securities”.)**” (Emphasis added.)

<sup>44</sup> See Securities Exchange Act Release No. 29616 (Aug. 27, 1991), 56 FR 43826 (Sept. 4, 1991) (approving the bundling of the OTCBB’s best bid and ask quotations with the NASDAQ Level 1 quotations); Securities Exchange Act Release No. 32647 (July 16, 1993), 58 FR 39262 (July 22, 1993) (approving the NASD rule requiring NASD members to report transactions in OTC equity securities to NASD on a ‘real-time’ basis) (the “OTC Equity Transaction Reporting Rule Adopting Release”).

<sup>45</sup> According to the NASDAQ UTP Plan, its effective date was July 12, 1993.

Similarly, the Commission published for comment the NASD's proposal to collect and disseminate OTC equity transaction reports, and comments were due, six months before the effective date of the NASDAQ UTP Plan.<sup>46</sup> Again, no one could have addressed whether the proposal was consistent with the NASDAQ UTP Plan, because the NASDAQ UTP Plan was not yet in effect. Moreover, the OTC Equity Transaction Reporting Rule Proposing Release did not specify that the transaction reports collected by NASD under the proposed rule would be disseminated as part of the NASDAQ market data stream.<sup>47</sup> Although the Commission approved the NASD's rule requiring members to report OTC equity transaction reports to NASD four days after the effective date of the NASDAQ UTP Plan, commenters did not have a meaningful opportunity to comment on whether it was appropriate to disseminate OTC equity transaction reports under the NASDAQ UTP Plan, and the Commission did not address the issue at all in its approval order.<sup>48</sup> The lack of any discussion of this issue in the Commission's approval order means that the approval order does not constitute a precedent for FINRA's current proposal to violate the terms of the NASDAQ UTP Plan.

Whether or not the current distribution of OTC equity transaction reports and OTCBB quotations under the NASDAQ UTP Plan is appropriate or consistent with the Exchange Act, the wording of the NASDAQ UTP Plan simply does not permit plan participants to submit non-NASDAQ market data to the processor nor does that NMS Plan permit the processor to disseminate non-NASDAQ data, as contemplated by the QCF Proposal. In any event, as an NMS Plan approved under Rule 603(b), which in turn was promulgated under Section 11A(a)(3)(B), the NASDAQ UTP Plan is limited to distributing data with respect to NMS Securities. This is true regardless of whether the Commission has permitted data with respect to non-NMS Securities to be distributed in such a manner in the past. Even if the Commission has, in the past, without any discussion or analysis, approved rule proposals that today permit activity that is inconsistent with Section 11A(a)(3)(B) because they approve the distribution of data concerning non-NMS Securities, it cannot do so here. For all of these reasons, the Commission cannot approve the dissemination of OTC equity security quotations under the NASDAQ UTP Plan through NASDAQ Level 1, as contemplated by the QCF Proposal.

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<sup>46</sup> Securities Exchange Act Release No. 31695 (Jan. 6, 1993), 58 FR 4189 (Jan. 13, 1993) (publishing for comment the NASD's proposed rule requiring NASD members to report transactions in OTC equity securities to NASD on a 'real-time' basis) (the "OTC Equity Transaction Reporting Rule Proposing Release").

<sup>47</sup> *See id.*

<sup>48</sup> *See* OTC Equity Transaction Reporting Rule Adopting Release, *supra* note 44.

E. Commission Approval of the QCF Would Be an Unauthorized Violation of Pink OTC's Property Rights and Constitute an Unconstitutional Taking

Commission approval of the QCF would violate Pink OTC's property rights with respect to its quotation data and would violate Pink OTC's rights under the United States Constitution. As noted above, the Supreme Court has held repeatedly that a person who collects quotations for securities has property rights in those quotations,<sup>49</sup> and the Exchange Act does not require or authorize the Commission to vitiate Pink OTC's property rights. Congress limited the Commission's authority with respect to the consolidation of market data in Section 11A(a)(3)(B) of the Exchange Act, in which it authorized the Commission to require or permit the exchanges to act jointly in furtherance of the objectives of a national market system with respect to NMS Securities. Congress did not authorize the Commission to take the market data of the exchanges in furtherance of the purposes of the national market system, so the Commission clearly cannot permit FINRA, through the NASDAQ UTP Plan, to take and disseminate Pink OTC's quotation data.

Not only would Commission approval of the QCF Proposal exceed the authority granted to the Commission under the Exchange Act, but it would also constitute an unconstitutional taking of Pink OTC's quotation property.

By permitting the dissemination of Pink OTC's quotation data through the NASDAQ Level 1 data stream, the Commission would be depriving Pink OTC of the full value of its property in violation of the Takings Clause of the Fifth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Pink OTC operates a business whose primary purpose is to induce broker-dealers to display quotations in Pink Quote. Those broker-dealers send quotations to Pink OTC and acknowledge in written contracts that Pink OTC "has unconditional ownership, control, and rights" to the quotations. The QCF Proposal requires all broker-dealers who quote OTC equity securities in Pink Quote to submit Pink OTC's quotation data to FINRA. FINRA is not imposing an obligation on its members to quote securities generally; it is only requiring its members to give to FINRA the quotations they give to Pink OTC and any similarly situated IQS or ATS so that FINRA may distribute those quotations under the NASDAQ UTP Plan. The obligation of FINRA members to submit quotations to FINRA only arises when those quotations are displayed in an electronic IQS or an alternative trading system ("ATS") operated by a FINRA member; the quotations FINRA would be taking are the very quotations displayed in such IQS or ATS.<sup>50</sup> Thus, if the Commission approves the QCF Proposal, the Commission will be

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<sup>49</sup> See Ticker Cases, *supra* note 17.

<sup>50</sup> As noted above, the one ATS that trades OTC equities, ArcaEdge, displays its quotes on Pink Quote and the OTCBB.

approving the dissemination of Pink OTC's quotations through the NASDAQ UTP Plan without compensation to Pink OTC.

If approved, the QCF Proposal would constitute an impermissible taking under the United States Constitution. The Takings Clause of the Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." Similarly, the Due Process Clauses of the Fifth and Fourteenth Amendments prohibit the government from depriving any person "of life, liberty, or property, without due process of law." A taking occurs when the government either takes property through its eminent domain power or where the "effects [of a government regulation] are so complete as to deprive the owner of all or most of his interest in the subject matter."<sup>51</sup> As a preliminary matter, we believe Commission approval of the dissemination of Pink OTC's quotations through the NASDAQ UTP Plan, an action only the Commission could authorize, would constitute the requisite government action for purposes of implicating the Takings Clause and the Due Process Clauses. In addition to the requisite government action, the Supreme Court "has identified several factors that should be taken into account when determining whether a governmental action has gone beyond 'regulation' and effects a 'taking[,]' including] 'the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.'"<sup>52</sup>

In *Monsanto*, the Court held that a regulation very much like the one at issue here could constitute an unlawful taking. The regulation was a provision in the Federal Insecticide, Fungicide, and Rodenticide Act that permitted the EPA "to use data submitted by an applicant for registration of a pesticide in evaluating the application of a subsequent applicant, and to disclose publicly some of the submitted data."<sup>53</sup> Monsanto owned this data because it maintained it as a trade secret. The Court held that the regulation requiring disclosure of that data was so inconsistent with reasonable investment-backed expectations that it could constitute a taking of private property.<sup>54</sup> Those expectations were premised on "[t]he right to exclude others[, which] is generally 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"<sup>55</sup> Because the right to exclude "is central to the very definition of the property interest[, o]nce the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data."<sup>56</sup> That the data retained some usefulness for Monsanto even after it was disclosed was irrelevant: "The economic value of that property right lies in the competitive advantage

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<sup>51</sup> *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945).

<sup>52</sup> *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (*quoting* *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980)).

<sup>53</sup> *Id.* at 990.

<sup>54</sup> *Id.* at 990, 1013-14.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1011.



over others that Monsanto enjoys by virtue of its exclusive access to the data, and disclosure or use by others of the data would destroy that competitive edge.”<sup>57</sup>

The same result applies here. Pink OTC has a property interest in the quotation data at issue, just as Monsanto did in its trade secret data. It is well-settled that the private operator of a marketplace or system that does the work of collecting quotations owns the quotations on its system and is entitled to the protection of the law.<sup>58</sup> The Supreme Court has specifically stated that the “collection of quotations is entitled to the protection of the law. It stands like a trade secret. The [collector] has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the [collector’s work product].”<sup>59</sup>

The Commission itself has acknowledged that Pink OTC owns the quotation data that it collects. In an agreement the Commission signed on September 27, 1999, Pink OTC granted to the Commission “a non-exclusive, nontransferable, limited right and license” to receive the very same quotation data at issue here. That agreement continues in force today, and the Commission continues to pay a license fee to Pink OTC for the quotation data. Such license fees are a core part of Pink OTC’s business, and Pink OTC has invested significant time and money in developing this business.

Pink OTC’s reasonable investment-backed expectations are that it will continue to operate this business and obtain fees from the licensing of its quotation data. It is equally clear that the QCF Proposal would destroy those expectations because it would allow third parties to obtain via the NASDAQ Level 1 data stream the Pink OTC quotation data they now license from Pink OTC. Similar to the stock exchanges, market data license fees are a significant percentage of Pink OTC’s revenue.<sup>60</sup> Permitting FINRA to take Pink OTC’s quotations without compensation and distribute such information in competition with Pink OTC would dramatically decrease the value of Pink OTC’s quotations and its revenue. In fact, permitting FINRA to distribute Pink OTC’s quotations by tying them to the NASDAQ Level 1 data feed, a data feed that virtually every broker-dealer and many other market participants must buy, would practically eliminate Pink OTC’s ability to sell the Pink Quote NBBO quotations that Pink OTC itself collects (and invests time and resources in collecting) through the operation of Pink Quote.<sup>61</sup> The QCF Proposal would therefore destroy Pink OTC’s most fundamental

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<sup>57</sup> *Id.* at 1012.

<sup>58</sup> *See* Ticker Cases, *supra* note 17.

<sup>59</sup> *Bd. of Trade v. Christie Grain & Stock Co.*, 198 U.S. at 250.

<sup>60</sup> Pink OTC’s market data licensing business accounted for approximately 41% of its total revenue in 2009.

<sup>61</sup> Approximately 48% of Pink OTC’s market data licensing revenue was derived from the Pink Quote NBBO.

Secretary Murphy  
May 5, 2010  
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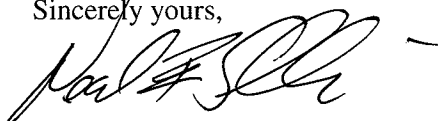
property right: its right to exclude others. The Proposed Regulation therefore constitutes an unlawful taking for the same reasons set forth in *Monsanto*.

#### IV. Conclusion

Pink OTC is a shining example of a small company in the private sector that without mandatory rule-making has created a competitive IQS that collects, distributes and publishes quotations in OTC equity securities. Its commercial success has led to the decline of its only competitor, the OTCBB, owned by FINRA, which has resources vastly greater than those available to Pink OTC. Unable or unwilling to compete in providing a competitive IQS, FINRA now seeks to take all the OTC equity quotations collected by Pink OTC and have the Commission permit FINRA and the NASDAQ UTP Plan distribute those quotations and seize the revenues earned by Pink OTC on the market data it has collected and marketed during years of competitive toil.

The QCF Proposal is not required or authorized by, and is in fact inconsistent with the provisions of, the Exchange Act and should be rejected for that reason alone. But, it also punishes Pink OTC for serving the public interest by providing a useful product that is preferred by market professionals over the product of its only competitor. The QCF Proposal is therefore unfair. Justice demands its rejection.

Sincerely yours,



Neal E. Sullivan



W. Hardy Callcott

cc: Hon. Mary Schapiro, Chairman  
Hon. Luis Aguilar, Commissioner  
Hon. Kathleen Casey, Commissioner  
Hon. Troy Paredes, Commissioner  
Hon. Elisse Walter, Commissioner  
Robert Cook, Director, Division of Trading and Markets  
James Brigagliano, Deputy Director, Division of Trading and Markets  
David Shillman, Associate Director, Division of Trading and Markets  
Nancy Sanow, Assistant Director, Division of Trading and Markets

## **APPENDIX A**

### **Screen Shots of Various Consolidated Displays of OTCBB and Pink OTC Quotations**

Pink OTC Dealer Consolidated Screen Shot  
 (Green and Yellow Quotes are Pink Quote/Blue Quotes are OTCBB)

OTC Dealer User CROMWELL logged in

Setup View Quote MarketInfo Help MQ MT SK QG News Print T.Pref Hist T.Hist CROMWELL CLOSED QOpen

ISCO Go S.Pref SK ISCO: PinkQuote/OTCBB INTL STEM CELL CORP Venue: OTCBB & PQ PBQ: Yes  
 PSID: 114514 Cusip: 460378102

NBBO: 2.37 / 2.40 ( 500 x 500 ) Last: 2.40 0.05 (2.13%) 12:28:58 Hi: 2.42 Lo: 2.35 PCL: 2.35 Vol: 74,608 Trades: 79 \$Vol: 178,982.12  
 You: / ( x ) VWAP: 2.39897  
 You2: / ( x )

Hide | More News

Add	U	.01	▼	Unprice	Remove		Send	Order	Clear
Join	HDSN	2.37	500	11:12	AUTO	2.40	500	10:39	Join
	NITE	2.36	500	10:09	NITE	2.40	500	11:54	Best
Best	ETMM	2.36	500	11:54	ETMM	2.40	500	12:36	
	BMIC	2.33	500	09:18	UBSS	2.41	500	10:34	
	CHDN	2.30	500	04/21	HDSN	2.41	500	11:24	
	UBSS	2.30	500	10:34	CHDN	2.42	500	04/21	
Away	FANCF	2.20	500	04/20	LAFC	2.42	500	07:30	Away
	DOMS	2.20	500	09:04	PERT	2.42	500	10:22	Take
Hit	ARCA	2.15	1000	11:42	BMIC	2.44	500	04/21	
Sweep	NOBL	2.10	500	04/13	NOBL	2.45	500	04/13	Sweep
	LABS	2.10	500	07:30	PUMA	2.45	500	04/15	
Max	VERT	2.10	500	10:17	DOMS	2.45	500	04/21	Max
	PERT	2.10	500	10:22	VFINF	2.45	500	04/21	

Trades Ads Trades & Ads Pop-out

Timestamp	Price	Volume	Tick Direction	Change
12:19:57	2.39	2,300	▲	+0.04
12:19:58	2.40	200	▲	+0.05
12:27:58	2.40	1,000		+0.05
12:28:58	2.40	829		+0.05

Pop-out

Kill Kill All INCM MSGS

0.16s All Alerts 12:42:30

Bloomberg  
 (Showing Consolidated Pink Quote/OTCBB Inside (K=Pink Quote, U=OTCBB))

**ISCO** US \$ ↓ **2.15** -.15 U K2.15/2.18K 5x5 EquityMDM

Screen Printed

ISCO US Equity 1) Edit Defaults Market Depth Monitor

View Detail View (MQ) Display Default

Last Trade				2.15	Volume 453930					
Ex	Time	Mmkr	Size	Bid	Ask	Size	Mmkr	Time	Ex	
K	15:15	ETMM	5	2.15	2.18	5	STXG	15:13	K	
K	14:48	NITE	5	2.15	2.19	5	NITE	14:48	K	
U	14:55	HDSN	5	2.14	2.20	5	ETMM	15:15	K	
K	14:17	CHDN	5	2.14	2.20	5	CHDN	14:17	K	
U	14:14	UBSS	5	2.13	2.20	5	PUMA	14:17	K	
K	14:17	PUMA	5	2.12	2.23	5	PERT	13:32	U	
U	11:53	ARCA	5	2.11	2.28	5	SSGI	13:42	U	
K	13:35	NOBL	5	2.10	2.29	5	BMIC	14:28	K	
U	13:32	PERT	5	2.10	2.38	5	HDSN	14:55	U	
U	10:28	VFIN	5	2.10	2.38	5	DOMS	13:42	K	
K	15:13	STXG	5	2.07	2.38	5	MURF	9:19	K	
U	13:38	VERT	5	2.07	2.39	5	UBSS	14:14	U	
K	14:28	BMIC	5	2.05	2.39	5	VFIN	10:28	U	
K	8:15	MERQ	5	2.05	2.40	5	VERT	13:38	U	
K	13:42	DOMS	5	2.04	2.42	5	NOBL	13:35	K	
K	8:23	FANC	5	1.96	2.42	5	L AFC	7:30	U	

International Stem Cell Corp 4) Show

2) Standard (BBO) 3) Detailed (MDM)

Australia 61 2 9777 8600 Brazil 5511 3048 4500 Europe 44 20 7330 7500 Germany 49 69 9204 1210 Hong Kong 852 2977 6000  
 Japan 81 3 3201 8900 Singapore 65 6212 1000 U.S. 1 212 318 2000 Copyright 2010 Bloomberg Finance L.P.  
 H187-659-1 06-Apr-10 15:21:04

Bloomberg  
 (Level 2 Showing Ranking of Quotes based on Price, Size and Time)

**ISCO** US \$ ↓ **2.15** -.15 U 2s K 2.15/2.17 K 5x5 EquityMDM

Screen Printed

ISCO US Equity **1) Edit Defaults** Market Depth Monitor

View **Detail View (MQ)** Display **Default**

		Last Trade		2.15	Volume		458130			
Ex	Time	Mmkr	Size	Bid	Ask	Size	Mmkr	Time	Ex	
U	15:32	HDSN	5	2.15	2.17	5	NITE	15:27	K	
K	15:31	ETMM	5	2.15	2.18	5	STXG	15:13	K	
K	15:27	NITE	5	2.14	2.20	5	ETMM	15:31	K	
K	14:17	CHDN	5	2.14	2.20	5	CHDN	14:17	K	
U	14:14	UBSS	5	2.13	2.20	5	PUMA	14:17	K	
K	14:17	PUMA	5	2.12	2.23	5	PERT	13:32	U	
U	11:53	ARCA	5	2.11	2.28	5	SSGI	13:42	U	
K	15:32	NOBL	5	2.10	2.29	5	BMIC	14:28	K	
U	13:32	PERT	5	2.10	2.32	5	NOBL	15:32	K	
U	10:28	VFIN	5	2.10	2.38	5	HDSN	15:32	U	
K	15:13	STXG	5	2.07	2.38	5	DOMS	13:42	K	
U	13:38	VERT	5	2.07	2.38	5	MURF	9:19	K	
K	14:28	BMIC	5	2.05	2.39	5	UBSS	14:14	U	
K	8:15	MERQ	5	2.05	2.39	5	VFIN	10:28	U	
K	13:42	DOMS	5	2.04	2.40	5	VERT	13:38	U	
K	8:23	FANC	5	1.96	2.42	5	LAFC	7:30	U	

International Stem Cell Corp 4) Show

2) Standard (BBO) 3) Detailed (MDM)

Australia 61 2 9777 8600 Brazil 5511 3048 4500 Europe 44 20 7330 7500 Germany 49 69 9204 1210 Hong Kong 852 2977 6000  
 Japan 81 3 3201 8900 Singapore 65 6212 1000 U.S. 1 212 318 2000 Copyright 2010 Bloomberg Finance L.P.  
 H187-659-1 06-Apr-10 15:34:46

Reuters 3000 Xtra  
 (Level 1 Showing both Pink Quote and OTCBB Quotes)

The screenshot displays the Reuters 3000 Xtra interface. The main window shows market data for ISCO.PQ. The data is organized into columns: ISCO.PQ, INTL STEM CELL, and PNK. The last row of data shows a bid of 2.56 and an ask of 2.57. The secondary window below shows a table with columns for RIC, Stock, PS\_OTCBB\_QUOTE, Last, Bid, Ask, USD, Size, Time, and Date.

ISCO.PQ	INTL STEM CELL	PNK	USD	CUS	460378102	Fin	St	Ind
Last u	St / /C	Quote.Time	Bid	Ask	Size	MPV		
		09:28	↑2.56	2.57	500x500	INT		
Volume	VWAP	Open	Cls.Bid	Cls.Ask	Earnings			
	Blk.Vol	High	2.50	2.59	P.E			
SpecTrade/Typ	L.Blocks	Low	Yr.High:		Ex.Date			
Spec.Vol	Options		Yr.Low:		Div.Date			
					Div.Dat			
					Yield			
					News			
					DJ.News			
					Headlines			

0#ISCO.PQ	PS_OTCBB_QUOTE	/PNK	USD	Size	Time	Date
0#ISCO.PQ	PS_OTCBB_QUOTE	/PNK	USD	Size	Time	Date
RIC	Stock	Last	Bid	Ask	Time	Date
ISCO.PQ	INTL STEM CELL	2.56	2.57	500	09:28	31MAR10
ISCO.0B	INTL STEM CELL	↓2.56	2.59	5	09:30	31MAR10

Double-click to insert an object.

You have selected the Item Display Object named Item Display 1. - Item Address: QISCO.PQ

ThomsonOne

(Level 2 Showing Ranking of Quotes based on Price, Size, and Time (p=Pink Quote, u=OTCBB))

Thomson ONE - Level 2 OTCBB and Pink Trading > Page4 Customer Support: 1

File Edit View Favorites Tools Window Help Market Overview Trading Prospecting Company Info Financials Portfolio Fixed Income

Flex Monitor Co. News Chart 4 in 1 DeMark AutEx Time & Sales Trades & Quotes Level 2 NASDAQ OrderBo... Quote Montage Volume at Price VWAP Monitor Options Options Analytics Futures

Symbol:

9:32:33 BestB		P 2.15		BestA P 2.16		Sz	1x1	Depth T:41 B:01 A:01			
PinkSheets ID: 114514		PiggyBack		Qualified: Y		Tier: 10	CE: N				
I	MM	Bid	Ask	Size	Time	I	MM	Bid	Ask	Size	Time
O	NITEp	2.15	2.20	1	9:32:33	O	STXGp	2.02	2.16	1	9:31:51
O	AUTOp	2.12	2.20	1	9:31:57	O	CHDNp	2.01	2.19	1	9:32:23
O	ETHP	2.12	2.20	1	9:32:29	O	NOBLp	2.02	2.19	1	4/07/10
O	UBSSu	2.11	2.25	5	9:31:42	O	PERTu	1.01	2.20	5	9:27:18
O	HDSNu	2.10	2.20	5	9:30:55	O	HDSNu	2.10	2.20	5	9:30:55
O	HDSNp	2.10	2.20	1	9:30:54	O	HDSNp	2.10	2.20	1	9:30:54
O	STXGp	2.02	2.16	1	9:31:51	O	AUTOp	2.12	2.20	1	9:31:57
O	NOBLp	2.02	2.19	1	4/07/10	O	ETHP	2.12	2.20	1	9:32:29
O	PUMAp	2.02	2.25	1	4/07/10	O	NITEp	2.15	2.20	1	9:32:33
O	ARCAu	2.01	2.50	10	9:31:57	O	DOMSp	1.79	2.20	1	4/07/10
O	SSGIu	2.01	2.22	5	7:30:02	O	SSGIu	2.01	2.22	5	7:30:02
O	CHDNp	2.01	2.19	1	9:32:23	O	SSGIp	2.01	2.22	1	4/07/10
O	SSGIp	2.01	2.22	1	4/07/10	O	VFINu	1.55	2.24	5	7:30:02
O	VERTu	1.98	3.00	5	9:31:41	O	VFINp	1.55	2.24	1	4/07/10
O	FANCP	1.96	2.58	1	4/01/10	O	UBSSu	2.11	2.25	5	9:31:42
O	BMICp	1.95	2.29	1	4/07/10	O	PUMAp	2.02	2.25	1	4/07/10
O	L&BSu	1.93	3.52	5	7:30:02	O	BMICp	1.95	2.29	1	4/07/10
O	MURFp	1.80	2.38	1	4/06/10	O	MURFp	1.80	2.38	1	4/06/10
O	VNDMp	1.80	5.88	1	3/30/10	O	L&FCu	1.01	2.42	5	7:30:02
O	DOMSp	1.79	2.20	1	4/07/10	O	ARCAu	2.01	2.50	6	9:31:57
O	VFINu	1.55	2.24	5	7:30:02	O	FANCP	1.96	2.58	1	4/01/10
O	VFINp	1.55	2.24	1	4/07/10	O	CSTIp	1.2004	2.8302	1	7:40:37
O	BMASp	1.46	3.38	1	3/25/10	O	BKRTu	0.51	3.00	5	7:30:02
O	CSTIp	1.2004	2.8302	1	7:40:37	O	LFCMu	1.01	3.00	5	7:30:02
O	FORTp	1.02	55.00	1	3/24/10	O	VERTu	1.98	3.00	5	9:31:41
O	L&FCu	1.01	2.42	5	7:30:02	O	BMASp	1.46	3.38	1	3/25/10
O	L&FCu	1.01	3.00	5	7:30:02	O	L&BSu	1.93	3.52	5	7:30:02

ISCO-U	↑	L 2.1500	Chg +0.0800	B 2.1100	A 2.2000	Size 5x5	VIm 3184
LTMkt U		Opn 2.0700	%Chg +3.86	PE NA	EPS -0.28	VWAP 2.1114	LTV 1000
T 9:32		Hi 2.1600	AH 2.7900	FPE	CE NA	Div 0.000	BTC 0
FSI		Lo 2.0700	AL 0.4000	PTB 83.106	AnnDt	Yld 0.000	Ex **/*
Cur USD		YC 2.0700	CUSIP 460378102	YTD%C 290.566	ShortInt	Bta 0.53	Mkt Cap 129.7
		AdvSender	AdvLTV	AdvSide	FC	Rtr TRMV	Dow
		IOISender	IOIShrs	IOISide	IOIPrice	IOINat	INTERNATIONAL ST



Fidessa  
 (Level 1 showing consolidated Pink Quote/OTCBB Inside and Tiers)

**NMS Market Depth (INTERNATIONAL STEM CELL CORP COM : ISCO)**

ISCO    Cancel All    Wide Both    Add Symbol    Remove Symbol    Portfolio    Symbol Settings...    Zero position...

0.01	0.05	0.1	0.25	<b>PINK+BB</b>	<b>VWAP: 2.2943</b>	<b>PBQ: All</b>	<b>ETB: No</b>
0.01	0.05	0.1	0.25	Last: ↑ 2.32	Vol: 440,685	0.2500	+12.1%
				High: 2.39	Low: 2.07	PCL: 2.07	
0.00		0.00		National: ↑	PK 2.32    2.33    PK	5	5
1		1		Nasdaq: ↑	0.00    0.00	0	0
EQS:				0 x 0			
OBB:				0 x 0			

OTCBB + Pink    Unsolicited

Bid     Ask     Both    Send    ...

Pos: 0@0

Fidessa

(Level 2 with ranking based on Price, Time and Size. Pink Square for a Pink Quote, Blue Square for an OTCBB Quote, and Half Pink/Half Blue Square for a Quote on Pink Quote and OTCBB)

NMS Market Depth (INTERNATIONAL STEM CELL CORP COM : ISCO)										
ISCO		Cancel All	Wide Both	Add Symbol	Remove Symbol	Portfolio	Symbol Settings...	Zero position		
0.01	0.05	0.1	0.25	PINK+BB		VWAP: 2.2943	PBQ: All	ETB: No		
0.01	0.05	0.1	0.25	Last: ↑ 2.32	Vol: 440,685		0.2500	+12.1%		
0.00		0.00		High: 2.39	Low: 2.07	PCL: 2.07				
1		bDa		National: ↑ PK 2.32	2.33	PK 5	5			
1		1		Nasdaq: ↑	0.00	0.00	0	0		
OTCBB: Pink		Unsolicited		EQS:		0 x 0				
Bid		Ask		Both		OBB:		0 x 0		
Send		...		Pos:		0 @ 0				
RB 0	RB 11	RB 51	RB 10k	RB 25k	RA 25k	RA 10k	RA 51	RA 11	RA 0	
Cpty	Price	Size								
■ NITE	2.32	5	12:49	■ NITE	2.33	5	12:49			
■ CHDN	2.31	5	12:44	■ UBSS	2.35	5	12:21			
■ PUMA	2.30	5	11:55	■ STXG	2.35	5	12:22			
■ ETMM	2.30	5	12:39	■ CHDN	2.37	5	12:44			
■ VFIN	2.28	5	12:45	■ VERT	2.38	5	12:21			
■ DOMS	2.25	5	10:45	■ VFIN	2.39	5	12:45			
■ HDSN	2.24	5	12:22	■ DOMS	2.40	5	10:45			
■ UBSS	2.20	5	12:21	■ PUMA	2.40	5	11:55			
■ NOBL	2.17	5	11:56	■ HDSN	2.40	5	12:22			
■ STXG	2.17	5	12:22	■ MURF	2.40	5	12:27			
■ FANC	1.96	5	04/01	■ LAFC	2.46	5	09:58			
■ LABS	1.93	5	07:30	■ ETMM	2.48	5	12:39			
■ SSGI	1.93	5	11:55	■ PERT	2.49	5	09:39			
■ BMIC	1.83	5	09:33	■ NOBL	2.49	5	11:56			
■ VERT	1.81	5	12:21	■ FANC	2.58	5	04/01			
■ VNDM	1.80	5	11:02	■ BMIC	2.59	5	09:33			
■ MURF	1.75	5	12:27	■ CSTI	2.8302	5	07:40			
■ BMAS	1.46	5	03/25	■ BKRT	3.00	5	07:30			
■ CSTI	1.2004	5	07:40	■ LFCM	3.00	5	07:30			
■ FORT	1.02	5	03/24	■ BMAS	3.38	5	03/25			
■ LFCM	1.01	5	07:30	■ SSGI	3.38	5	11:55			