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Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Via email to rule-comments@sec.gov

Re: File No. SR-FINRA-2021-014 – Proposed Rule Change Relating to Members' Filing Requirements Under FINRA Rule 6432 (Compliance With the Information Requirements of SEA Rule 15c2-11)

Dear Ms. Countryman:

This letter is being submitted by the Financial Industry Regulatory Authority, Inc. ("FINRA") in response to a comment received by the Securities and Exchange Commission ("SEC" or "Commission") regarding the above-referenced rule filing. The proposed rule change would amend members' filing requirements under FINRA Rule 6432 (Compliance with the Information Requirements of SEA Rule 15c2-11).

The Commission published the proposed rule change for public comment in the Federal Register on June 15, 2021.[1] The Commission received a comment letter on the rule filing from OTC Link LLC ("OTC Link").[2] OTC Link supported the Proposal, but provided comments narrowly focused on the application of FINRA Rule 5250 (Payments for Market Making) to the activities of a Qualified IDQS. FINRA does not believe that comments regarding the application of Rule 5250 are germane to the Proposal, which provides, among other things, that members are not required to separately file a Form 211 with FINRA when relying on the publicly available determination of a Qualified IDQS (and instead requires the Qualified IDQS to submit the Form 211 within a prescribed

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1 See Securities Exchange Act Release No. 92139 (June 9, 2021), 86 FR 31774 (June 15, 2021) (Notice of Filing of File No. SR-FINRA-2021-014) ("Proposal"). Any capitalized terms not otherwise defined herein shall have the meanings assigned to them in the Proposal.

2 See Letter from Daniel Zinn, General Counsel, and Cass Sanford, Associate General Counsel, OTC Markets Group Inc., Managing Member, OTC Link LLC, to Vanessa Countryman, Secretary, SEC, dated July 6, 2021.

period of time). While Rule 5250 certifications are currently required by Rule 6432, Rule 5250's prohibition of payments for market making is not part of this proposed rule change and thus not a pertinent subject for comment.

Application of FINRA Rule 5250 to a Qualified IDQS

Rule 5250 provides that no member or person associated with a member shall accept any payment or other consideration, directly or indirectly, from an issuer of a security, or any affiliate or promoter thereof, for publishing a quotation, acting as market maker in a security, or submitting an application in connection therewith (subject to specified exceptions not applicable here). As FINRA has stated previously, the prohibition against receiving payments for market making activities explicitly includes within its scope payments for submitting an application in connection therewith, including the filing of a Form 211.[3] Rule 5250, including the prohibition on payments in connection with the filing of a Form 211, is designed to further investor protection and market integrity by assuring that members act in an independent capacity when engaged in such activities.[4]

FINRA previously amended Rule 6432 to specifically require members to, as part of the Form 211 process, certify to FINRA that neither the member nor its associated persons have or will accept any payment or other consideration prohibited under Rule 5250.[5] As FINRA noted when it adopted the 2014 Amendments, this certification approach "seamlessly implements this new requirement without imposing any additional burdens on members, since both the submission of the Form 211 as well as the substantive prohibition on receipt of Rule 5250 payments already apply to members."[6]

Despite these existing requirements, OTC Link stated that it is not, and should not be, subject to Rule 5250. OTC Link is in essence proposing that FINRA amend Rule 5250

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3 See Securities Exchange Act Release No. 71720 (March 13, 2014), 79 FR 15363, 15364 (March 19, 2014) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2014-011) ("2014 Amendments").

4 See id.

5 See id.; see also *Regulatory Notice* 14-26 (June 2014). Specifically, Part 5 of the existing Form 211 contains the following certification language: "I certify that neither [member name] nor persons associated with [member name] have accepted or will accept any payment or other consideration, directly or indirectly, from the Issuer of the security to be quoted, or any affiliate or promoter thereof, for publishing a quotation or acting as market maker in the security to be quoted, or submitting an application in connection therewith, including the submission of this Form 211." The modified Form 211 filed by a Qualified IDQS would include the same language.

6 See 2014 Amendments at 15364.

to address its concerns, rather than taking issue with Rule 6432's certification requirement. FINRA does not believe that the question of whether Rule 5250 should be amended is appropriate to consider as part of this rule proposal, given that neither Rule 5250 nor the substance of the certification is being changed by this rule proposal.

Any member that submits a Form 211—which, as discussed above, is the type of "application" specifically referenced in Rule 5250—is subject to Rule 5250. While the SEC's amendments to Rule 15c2-11 expand the types of members that may perform the information reviews required under Rule 15c2-11 to include Qualified IDQSs, they do not alter the requirements of existing Rule 5250, which applies, and will continue to apply, to all members, including any Qualified IDQS that opts to step into the historic role of a quoting member in submitting a Form 211 to FINRA.[7]

OTC Link noted language from the Commission's 1997 order approving the predecessor rule to Rule 5250 that, among other things, discusses the application of the rule to market makers.[8] OTC Link suggested that this language supports its assertion that the application of Rule 5250 is limited to brokers that publish quotations or act as market makers, and does not apply to a Qualified IDQS that submits a Form 211. This analysis is incorrect. The existing text of Rule 5250 applies by its terms to a Qualified IDQS in connection with submission of the Form 211 because a Qualified IDQS engaged in such activity would be a "member…submitting an application in connection" with quotation or market making activity in a subject security. The role of Qualified IDQSs did not exist at the time of the 1997 Approval Order; thus, the absence of references to non-quoting members submitting a Form 211 in the 1997 Approval Order (or, for that matter, in any SEC or FINRA materials predating the SEC's recent amendments to Rule 15c2-11) should not be read to exclude Qualified IDQSs from the scope of Rule 5250.

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7 FINRA notes that, in its comments on the Commission's proposed amendments to Rule 15c2-11, it similarly stated that the Rule 5250 certification "would apply to all members" that submit a Form 211 to FINRA, including a Qualified IDQS. See Letter from Marcia E. Asquith, Executive Vice President, Board and External Relations, FINRA, to Vanessa Countryman, Secretary, SEC, dated February 11, 2020, at 6 n.16.

8 See Securities Exchange Act Release No. 38812 (July 3, 1997), 62 FR 37105 (July 10, 1997) (Order Granting Approval of File No. SR-NASD-97-29) ("1997 Approval Order"). Specifically, OTC Link noted that the 1997 Approval Order states "[Payments prohibited by the rule] may be viewed as a conflict of interest since they may influence the member's decision as to whether to quote or make a market in a security and, thereafter the prices that the member would quote." See id. at 37106. OTC further stated that the 1997 Approval Order "specifies that the restriction applies to compensation received 'for submitting an application *to make a market in an issuer's securities*.'" See id.

OTC Link also stated that the conflicts that Rule 5250 were designed to address are not present in the case of a "neutral market operator" such as a Qualified IDQS. Our current rule proposal does not present this policy question, and this question need not be addressed in approving our rule proposal. Nonetheless, FINRA believes that the existing text and purpose of Rule 5250 are still important and beneficial to market integrity, as FINRA recently found when it completed a retrospective review of the continued relevance and need for Rule 5250.[9] FINRA also believes that the concerns Rule 5250 was designed to address may be present when compensation from an issuer, its affiliates, or promoters factors into the submission of a Form 211, which is a necessary precursor to the ability of an issuer to facilitate a quoting market in its security (unless an exception or exemption is available). This includes where a member is acting in its capacity as a Qualified IDQS and receives payment in connection with a Form 211 to enable quoting and market making in a security.

In any event, if FINRA determined to reconsider the application of Rule 5250 to the submission of a Form 211 by a Qualified IDQS in the future, FINRA would do so separately from the instant Proposal, which does not propose any changes to Rule 5250 or the related certification requirement under Rule 6432.

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[9] See *Regulatory Notice* 20-03 (January 2020). Based on its retrospective review of Rule 5250, which involved feedback from both internal stakeholders and a wide range of external stakeholders, FINRA determined to maintain the rule without change. FINRA notes that, in conducting its retrospective review, it specifically considered comments requesting that Rule 5250 be amended to provide an exception for OTC equity securities to permit issuers to reimburse market makers for expenses incurred in connection with the filing of a Form 211. FINRA noted in response that it had previously considered and decided against providing such an exception, including due to concerns that such payments could be used inappropriately to avoid the limitations of the rule, and stated that these concerns remain relevant today. FINRA therefore determined that such an exception is not appropriate, noting that the rule continues to serve an important purpose for OTC equity securities, including that it supports the integrity of the Rule 15c2-11 information gathering process. See id. at 3-4.

FINRA believes that the foregoing responds to the material issues raised by the commenter on the rule filing. If you have any questions, please contact me at [redacted] or [redacted].

Sincerely,

/s/ Robert McNamee

Robert McNamee
Associate General Counsel
Office of General Counsel