

## MEMORANDUM

TO: File No. SR-FINRA-2009-077

FROM: The Division of Trading and Markets

DATE: April 18, 2011

RE: Staff Meeting with Representatives of OTC Markets Group, Inc.

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On March 28, 2011, staff of the Division of Trading and Markets and staff of the Office of General Counsel met with Neal Sullivan and Michael Trocchio, Bingham McCutchen LLP, to discuss FINRA's rule proposal relating to the restructuring of quotation collection and dissemination for OTC equity securities. Following the meeting, Neal Sullivan sent a follow-up e-mail, which is attached.

## Rubin, Gary

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**From:** Shillman, David S.  
**Sent:** Thursday, March 31, 2011 8:57 AM  
**To:** Sanow, Nancy J.; Pilpel, Heidi; Rubin, Gary  
**Subject:** FW: OTC Markets Group  
**Attachments:** OTC Link FINRA Response.pdf

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**From:** Sullivan, Neal E. [REDACTED]  
**Sent:** Wednesday, March 30, 2011 3:38 PM  
**To:** Cook, Robert W.  
**Cc:** Brigagliano, James A.; Shillman, David S.; Trocchio, Michael R.  
**Subject:** OTC Markets Group

Dear Robert,

Thank you for your time on Monday. As discussed, OTC Markets Group submitted its response to FINRA's membership department on the issue of whether OTC Link would meet the definition of "executing party" for purposes of FINRA's OTC Reporting Facility Rule. We believe OTC Link would not meet that definition if it were approved as a FINRA member, and our letter to FINRA (see attached) provides ample support for this position.

Also, as discussed, we intend to send a brief follow-up comment letter regarding the QCF addressing several of the items we raised during our meeting. Those items include, for example, that OTC Markets Group currently has 95% of all priced quotes in OTC equity securities and that Thomson Reuters (the last major market data distributor not to consolidate) and Yahoo! Finance are working on consolidating our market data with OTCBB data. In the meantime, I wanted to share some additional thoughts on the hypothetical questions you raised during our meeting.

First, I believe you asked how the Commission could assure that those quotation systems that display quotes for OTC equities would make those quotes available in order to be consolidated. Currently, as you know, this is not a problem. OTC equity quotes exist in two places, the OTCBB and OTC Markets Group's quotation system, and both sell their real-time quotation data for a reasonable fee. The only other party that collects orders for OTC equity securities is the ArcaEdge ECN owned by NYSE EuroNext, and it displays its priced orders through OTC Markets Group's quotation system and the OTCBB to ensure maximum exposure of such information. To the extent the OTCBB is sold to another party or yet another quotation system or ATS with OTC equity quotations arises, it would be economically irrational for any such party not to pursue the widest possible dissemination of those quotes. Those quotes are valuable market data, and the market is willing to pay to have access to this data. The widespread distribution of quotes is a significant reason why market makers and other market participants send quotations to a quotation system. It simply would not be economically rational for a person in the business of collecting OTC quotes to choose not to redistribute the quotes it collects.

You also asked a hypothetical question regarding how the Commission could assure that a party which possesses OTC equity quotations will sell such data for a reasonable fee. As you know, this is currently not a problem. The license fees charged by FINRA and OTC Markets Group are reasonable and competitive. Consistent with my point above, any entity in the business of collecting quotes has an economic incentive to widely disseminate such quotes in order to encourage market makers and broker-dealers to display their quotes with such entity. If such an entity charges excessive licensing fees for such data, the market will not purchase the data (i.e., it will not be widely distributed), and it will discourage market makers and broker-dealers from displaying their quotes with such entity. Charging excessive fees for this market data would be a recipe for failure as a collector of such data. Furthermore, to the extent necessary, if a person in the business of selling OTC equity quotations does not charge fair and reasonable rates, the Commission has the authority under Section 11A(b)(1) to require such person to register as a securities information processor subject to Commission oversight.

Although the questions you raise are interesting, it is unclear when, if ever, the facts contemplated will arise. The Commission should not regulate based on the possibility that parties may in the future engage in economically irrational behavior against their own best interests. What is certain is that the marketplace has responded to the natural demand for consolidated OTC quotation data and is providing it. Currently, any broker-dealer that wants consolidated OTC quotations can either purchase it from a number of third party market data providers or license such data directly from

FINRA and OTC Markets Group and consolidate the data itself. That the QCF is unnecessary in light of the market's natural supply of consolidated data is a point made by many of the commenters that have written to oppose the QCF proposal, including SIFMA, the Security Traders Association, the Security Traders Association of New York, Georgetown professor James Angel, E\*Trade Capital Markets, and the U.S. Chamber of Commerce.

What is also certain is that FINRA, based upon a hypothetical future need to provide consolidated data, is asking the Commission to approve FINRA's taking of my client's market data and disseminating that data with the Nasdaq market data without compensation to my client. That is an actual harm measuring millions of dollars a year. I submit that there is no basis for such Commission action under the Exchange Act, or under the Takings Clause of the Fifth Amendment.

As mentioned in our prior comment letters, to the extent Congress has spoken in this area, it directed the Commission to oversee consolidated market data for NMS securities where competition failed to lead to consolidation by the exchanges who own the data. But even then, Congress did not authorize the Commission or another SRO to appropriate the market data of others - Congress merely authorized the Commission to cause the exchanges with market data to work together to consolidate the data. Even in this case where Congress gave the Commission express authority to consolidate NMS data (but not OTC data), the parties who collect the market data are allowed to reap the benefit of the sale of the consolidated market data. In the QCF proposal, FINRA is asking the Commission to approve FINRA's taking and dissemination of OTC Markets Group's data without any compensation to my client. We do not believe it is reasonable to read the Exchange Act or the Constitution to permit this. This is especially true where open market forces currently satisfy the need for consolidated OTC equity quotations.

Best regards,  
Neal

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