FINRA

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May 20, 2024

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Joint Industry Plan; Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data (Release No. 34-99403; File No. 4-757)

Dear Ms. Countryman:

The Financial Industry Regulatory Authority, Inc. ("FINRA") welcomes the opportunity to comment on the Securities and Exchange Commission's ("SEC's" or "Commission's") notice soliciting comments on the proposed national market system ("NMS") plan regarding consolidated equity market data (the "CT Plan"),[1] which was filed by the national securities exchanges and FINRA (collectively, the "SROs") on October 23, 2023 pursuant to the SEC's September 1, 2023 order (the "Amended Order").[2] If approved, the CT Plan would replace the three NMS plans (the "Current Plans") that currently govern the public dissemination of real-time, consolidated equity market data through the securities information processors ("SIPs").[3] FINRA is submitting this letter to specifically respond to comments relating to over-the-counter ("OTC") data made by The Nasdaq Stock Market LLC ("Nasdaq") in its comment letter on the proposed CT Plan (the "Nasdaq Letter").[4]

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1 *See* Securities Exchange Act Release No. 99403 (January 19, 2024), 89 FR 5002 (January 25, 2024) (Joint Industry Plan; Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data); *see also* Securities Exchange Act Release No. 100017 (April 23, 2024), 83 FR 33412 (April 29, 2024) (Joint Industry Plan; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a National Market System Plan Regarding Consolidated Equity Market Data).

2 *See* Securities Exchange Act Release No. 98271 (September 1, 2023), 88 FR 61630 (September 7, 2023) (Amended Order Directing the Exchanges and the Financial Industry Regulatory Authority, Inc., To File a National Market System Plan Regarding Consolidated Equity Market Data).

3 The three Current Plans are the Consolidated Tape Association Plan, the Consolidated Quotation Plan, and the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for Nasdaq-listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis (the Unlisted Trading Privileges or "UTP" Plan).

4 *See* Letter from Erika Moore, Vice President and Corporate Secretary, Nasdaq, to Vanessa Countryman, Secretary, SEC, dated February 26, 2024.

I. Background

FINRA is the only securities association registered with the Commission under Section 15A of the Securities Exchange Act of 1934 (the "Exchange Act")[5] and is organized as a not-for-profit corporation. FINRA has statutory responsibility for the regulation and supervision of broker-dealers that are FINRA members, including responsibility for those broker-dealers' off-exchange activities.[6] At present, FINRA is the sole SRO responsible for the regulation and oversight of the market for OTC equity securities ("OTC Equities").[7] Among FINRA's roles in overseeing the OTC market is operating a facility—the FINRA OTC Reporting Facility ("ORF")—through which FINRA members report executed OTC Equity transactions. FINRA makes publicly available ORF transaction data for OTC Equities ("OTC Equity Data") through the Trade Data Dissemination Service ("TDDS"). Nasdaq, as the UTP Administrator under the UTP Plan, manages the administration of the TDDS data feed. The TDDS data feed is part of the Level 1 service of the UTP SIP that provides subscribers with market data for Nasdaq-listed securities. Therefore, all Level 1 entitled subscribers are able to receive OTC Equity Data via TDDS alongside Nasdaq-listed market data, pursuant to arrangements under the UTP Plan.[8]

II. Inclusion of OTC Equity Data in the CT Plan

In the Nasdaq Letter, Nasdaq argues that the revenue allocation formula in Exhibit D to the CT Plan "should be adjusted to remove a 6.25% set-aside for FINRA." Nasdaq states further:

> This set-aside is inconsistent with the overall scheme of revenue distribution, which bases revenue sharing on the contribution of each participant to market transparency. Rather than measuring FINRA's contribution to the market, the 6.25% adjustment is little more than an historical artifact. Nasdaq believes that payments to FINRA, like that of all participants, should be based on the principle of contribution to the market, and the 6.25% adjustment should therefore be removed from the calculation of Net Distributable Operating Income. Indeed,

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5 *See* 15 U.S.C. 78o-3.

6 In general, broker-dealers are required by the Exchange Act to become members of a securities association (of which currently the only one is FINRA). There are two cases where broker-dealers may instead be exchange-only SRO members. First, there is a statutory exception for a broker-dealer that transacts business solely on an exchange of which it is a member. *See* 15 U.S.C. 78o(b). Second, there is a rule-based exemption for firms that carry no customer accounts and conduct limited off-exchange business. *See* 17 C.F.R. 240.15b9-1. The exemption under Rule 15b9-1 was recently amended to narrow the conditions to the exemption, with the amendments effective on September 6, 2024. *See* Securities Exchange Act Release No. 98202 (August 23, 2023), 88 FR 61850 (September 7, 2023).

7 "OTC Equity Security" is defined in FINRA Rule 6420(f) to mean "any equity security that is not an 'NMS stock' as that term is defined in Rule 600(b)(47) of SEC Regulation NMS; provided, however, that the term 'OTC Equity Security' shall not include any Restricted Equity Security." "Restricted Equity Security" is defined in FINRA Rule 6420(k) to mean "any equity security that meets the definition of 'restricted security' as contained in Securities Act Rule 144(a)(3)."

8 Prior to the retirement of the OTC Bulletin Board in November 2021, FINRA also disseminated quotation data for OTC Equities through the Bulletin Board Dissemination Service, which was also included within Level 1 service under the UTP Plan together with the TDDS. The SEC has stated that provision of these data feeds is consistent with Section 17B of the Exchange Act. *See infra* note 17 and accompanying text.

> Nasdaq believes that OTC data should be removed from this NMS plan entirely and intends to propose that once the new plan commences operations. To preserve the options of the new Operating Committee with respect to the distribution of OTC data, and to ensure that all revenue sharing be based on contribution to market transparency, Nasdaq urges that the 6.25% adjustment be removed from the plan.[9]

Nasdaq has made this same argument before in the context of the original CT Plan filing in 2020.[10] The Commission rightly rejected Nasdaq's comment then[11] and should do so again now.[12]

The new proposed CT Plan was filed for the express purpose of fulfilling the terms of the Commission's Amended Order, which explicitly states that unchallenged provisions of the CT Plan approved in 2021 continue to be appropriate.[13] The inclusion of OTC Equity Data and the associated 6.25% revenue allocation were approved by the Commission in the original CT Plan and not challenged. The Amended Order therefore requires that these provisions remain untouched in the new CT Plan. Further, as the Commission previously noted, the Commission has adopted separate rulemaking in the Market Data Infrastructure ("MDI") Rule that addressed and will ultimately resolve the treatment of OTC Equity Data under the CT Plan.[14] FINRA continues to believe that inclusion of OTC Equity Data together with NMS stock data under the applicable NMS Plan is the most efficient and cost-effective means to provide investors with access to this important data.[15] However, the final MDI Rule will ultimately require FINRA to identify and build alternative means to distribute OTC Equity Data to investors. Therefore, implementation of the MDI Rule, not the CT Plan, is the appropriate context for consideration of the removal of OTC Equity Data, along with any associated fee adjustment or revenue allocation impacts.

In the 2020 Nasdaq Letter, Nasdaq suggested that the revenue to FINRA for OTC Equity Data "should be reallocated to investors."[16] But if the 6.25% allocation to FINRA for OTC Equity Data is removed, that additional revenue will not flow to investors. This allocation is currently made from revenues under the UTP Plan, and under the CT Plan it would come from revenues

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9 *See* Nasdaq Letter at 6 (citations omitted).

10 *See* Letter from Joan C. Conley, Senior Vice President and Corporate Secretary, Nasdaq, to Vanessa Countryman, Secretary, SEC, dated November 12, 2020, at 30 ("2020 Nasdaq Letter").

11 *See* Securities Exchange Act Release No. 92586 (August 6, 2021), 86 FR 44142 (August 11, 2021) (Joint Industry Plan; Order Approving, as Modified, a National Market System Plan Regarding Consolidated Equity Market Data), at 44201-02 ("2021 Approval Order").

12 FINRA also objected to Nasdaq's arguments at that time. *See* Letter from Marcia E. Asquith, Executive Vice President, Board and External Relations, to Vanessa Countryman, Secretary, SEC, dated November 24, 2020 ("2020 FINRA Letter").

13 *See* Amended Order at 61631.

14 *See* 2021 Approval Order at 44201.

15 *See* Letter from Marcia E. Asquith, Executive Vice President, Board and External Relations, to Vanessa Countryman, Secretary, SEC, dated May 26, 2020 (commenting on the SEC's MDI Rule proposal).

16 *See* 2020 Nasdaq Letter at 30.

received with respect to Network C Securities (*i.e.*, Nasdaq-listed securities currently disseminated under the UTP Plan) and OTC Equity Data. After payment of certain costs, those revenues flow directly into the Net Distributable Operating Income that is payable to the Plan Participants. In other words, this revenue would be re-allocated amongst the Plan Participants, including to Nasdaq, not investors. Therefore, Nasdaq's statement that the OTC Equity Data revenue "should be reallocated to investors" is inconsistent with the operation of the Current Plans and the future CT Plan, and the actual allocation of this revenue that likely would result. In addition, the disruption of the provision to investors of critical OTC Equity Data through established means in advance of the Commission-approved implementation timeline for the MDI Rule is not in the interest of investors.

Therefore, FINRA reiterates and incorporates by reference the arguments made in the 2020 FINRA Letter for the continued inclusion of OTC Equity Data in the CT Plan, as well as the historical basis for, and prior Commission approval of, such inclusion.[17] Contrary to Nasdaq's suggestions, the 6.25% revenue allocation for OTC Equity Data is not an "historical artifact," nor is it "inconsistent with the overall schedule of revenue distribution."[18] Rather it has been an integral part of the overall revenue allocation formula for many years, and reflects the Commission-approved determination that such revenue is appropriate to reflect FINRA's valuable contribution of OTC Equity Data to market transparency.

III. Conclusion

FINRA thanks the Commission for its attention to this important matter. Should you have any questions or wish to further discuss FINRA's views, please contact Racquel Russell, Senior Vice President & Director, Capital Markets Policy, FINRA, at 202-728-8363 (racquel.russell@finra.org) or Robert McNamee, Vice President & Associate General Counsel, Capital Markets Policy, FINRA, at 202-728-8012 (robert.mcnamee@finra.org).

Sincerely,

Marcia E. Asquith

Marcia E. Asquith
Corporate Secretary, EVP
Board and External Relations

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17 *See* 2020 FINRA Letter at 3-6.

18 *See* Nasdaq Letter at 6.