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

*Re: Market Data Infrastructure (Release No. 34-88216; File No. S7-03-20)*

Dear Ms. Countryman:

The Financial Industry Regulatory Authority, Inc. (“FINRA”) welcomes the opportunity to comment on the Securities and Exchange Commission’s (“SEC” or “Commission”) Market Data Infrastructure proposal (the “Proposal”).<sup>1</sup> FINRA appreciates the Commission’s continued attention to equity market structure and market data issues, and commends the Commission’s recent efforts to foster an open dialogue on potential improvements to the national market system, including through the Equity Market Structure Advisory Committee and the Commission’s Roundtable on Market Data and Market Access. FINRA strongly supports the Commission’s goals of enhancing transparency, improving the public market data feeds, reducing information asymmetries among market participants, and facilitating the ability of broker-dealers to provide best execution for their customers.<sup>2</sup> However, FINRA has concerns about some aspects of the Proposal, including that it could increase the complexity and costs of accessing equity market data, and FINRA believes that certain other aspects of the Proposal may benefit from further clarification.

## **I. Background**

FINRA is the only national securities association registered with the Commission under Section 15A of the Securities Exchange Act of 1934 (the “Exchange Act”)<sup>3</sup> and is organized as a not-for-profit corporation. FINRA has statutory responsibility for the regulation and supervision

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<sup>1</sup> See Securities Exchange Act Release No. 88216 (February 14, 2020), 85 FR 16726 (March 24, 2020) (Notice of Proposed Rule).

<sup>2</sup> See FINRA Rule 5310.

<sup>3</sup> See 15 U.S.C. 78o-3.

of member broker-dealers, including broker-dealers' off-exchange activities; in general, broker-dealers doing business with the public are required to become members of FINRA.<sup>4</sup>

FINRA is also the sole SRO responsible for the regulation and oversight of the over-the-counter ("OTC") market in NMS stocks. Among FINRA's responsibilities with respect to the OTC market in NMS stocks is to provide FINRA members with a mechanism for reporting NMS stock transactions effected otherwise than on an exchange, which is effected through the three currently active FINRA Trade Reporting Facilities ("TRFs"). The TRFs collectively account for reporting of approximately 43% of the total volume of shares traded in NMS stocks and 40% of the total notional value of NMS stock transactions.<sup>5</sup> FINRA members also have the option of reporting OTC transactions in NMS stocks through FINRA's Alternative Display Facility ("ADF"), which also provides a facility for the display of quotations and comparison of trades in NMS stocks. TRF and ADF data is provided to the securities information processors ("SIPs") for inclusion in the consolidated public equity market data feeds. FINRA does not offer or sell any proprietary data products involving NMS stocks.

In addition, FINRA is the sole SRO responsible for the regulation and oversight of the market for OTC equity securities ("OTC Equities").<sup>6</sup> Among FINRA's responsibilities with respect to the market for OTC Equities is to provide FINRA members with a mechanism for reporting OTC Equity transactions, which is effected through the FINRA OTC Reporting Facility ("ORF"). FINRA also operates an interdealer quotation system for OTC Equities, the OTC Bulletin Board ("OTCBB"). FINRA makes publically available ORF transaction data and OTCBB quotation data for OTC Equities (collectively, "OTCE Data").

## II. Increased Complexity and Costs

FINRA is concerned about the costs and complexity of the Proposal. Under the Proposal, the Commission is proposing a "decentralized consolidation model with competing consolidators and self-aggregators to replace the existing centralized consolidation model which relies on the exclusive SIPs" in order to "enhance the speed and quality of the collection,

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<sup>4</sup> In general, broker-dealers are required by the Exchange Act to become members of a national securities association (of which currently the only one is FINRA). There are two cases where broker-dealers may be exchange-only self-regulatory organization ("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, which has become used primarily by proprietary trading firms. See 17 C.F.R. 240.15b9-1.

<sup>5</sup> See Cboe U.S. Equities Market Volume Summary, *available at* [https://markets.cboe.com/us/equities/market\\_share/](https://markets.cboe.com/us/equities/market_share/) (last accessed May 20, 2020).

<sup>6</sup> "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)."

consolidation, and dissemination” of consolidated market data.<sup>7</sup> The Commission notes its preliminary belief that such a decentralized consolidation model would lead to improvements in the technology used for the transmission of consolidated market data and significantly reduce latency differentials between SIP data and proprietary data.<sup>8</sup>

FINRA appreciates the Commission’s efforts to create a more robust, transparent and equitable system for disseminating consolidated market data. However, FINRA is concerned that the Proposal to shift from exclusive SIPs to multiple competing consolidators (as well as self-aggregators) for the dissemination of consolidated market data, along with certain proposed changes to the content of consolidated market data, could introduce significant additional costs, confusion and complexity into an already complex system for equity market data, and raises a number of questions and issues.<sup>9</sup> FINRA believes that these potential impacts should be considered along with the potential benefits of the decentralized consolidation model. The downstream effects of disseminating consolidated market data through multiple competing consolidators are likely to be numerous and some may not be fully known until after such a shift is made; below are just a few examples for the Commission’s consideration.

A. *Increased Costs of Multiple Connections*

Under the Proposal, each SRO would be required to “make available to all competing consolidators and self-aggregators its information with respect to quotations for and transactions in NMS stocks, including all data necessary to generate consolidated market data.”<sup>10</sup> FINRA notes that requiring each SRO to connect and transmit data to a potentially large number of competing consolidators and self-aggregators could lead to significant cost increases for the SROs, which are likely to be ultimately borne by investors and market participants.<sup>11</sup> For

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<sup>7</sup> Proposal at 16768.

<sup>8</sup> *See id.*

<sup>9</sup> For example, under the competing consolidator model, it is highly unlikely that the timestamps associated with the national best bids and best offers (“NBBOs”) calculated across multiple competing consolidators will ever be synchronized, the NBBOs at the same point in time across the multiple competing consolidators will likely diverge because of different levels of latency, and, as noted below, the NBBOs generated by competing consolidators will never align with NBBOs calculated by self-aggregators. These different “versions” of market data have implications for broker-dealer compliance with market conduct rules.

<sup>10</sup> Proposal at 16869-70.

<sup>11</sup> One of the key factors likely to significantly impact the magnitude of SRO costs is the number of competing consolidators and self-aggregators that would enter this market. The Commission provides preliminary estimates in the Proposal, for example noting its preliminary belief that there would be up to twelve competing consolidators. *See id.* at 16775 n.510. However, these are just preliminary estimates and, if the Proposal is adopted, could vary greatly depending on a number of factors. Moreover, the number of competing consolidators and self-aggregators could vary substantially over time depending on market and other conditions, which would present the SROs with unpredictable and fluctuating costs over time. In addition, given the lower latency that self-aggregators would achieve through direct feeds from SROs, it is not unreasonable to expect that many proprietary trading firms will opt to be self-aggregators.

example, currently the ADF is connected to the exclusive SIPs to disseminate quotation and trade data. However, while some FINRA members are connected to the ADF for back-up trade reporting purposes, no members use the ADF as their primary trade reporting facility, and there are currently no quoting participants. Under the Proposal, the ADF would be required to connect and provide data to all competing consolidators and self-aggregators. FINRA could potentially incur significant costs to establish and maintain this required connectivity, despite minimal fee revenue from data disseminated from the ADF given the low (currently, no) volume of regularly reported trades and lack of current quoting participants.

#### *B. Impact of Competing Consolidator System Issues*

As the Commission notes in the Proposal, the exclusive SIPs today represent single points of failure in the system for dissemination of consolidated equity market data.<sup>12</sup> It is important to note that if either of the SIPs experiences a systems issue affecting the quality or availability of market data, all market participants are affected equally by the issue.<sup>13</sup> However, under the competing consolidator model, if one competing consolidator's data is impaired, it could severely disadvantage that competing consolidator's subscribers and their investor clients.<sup>14</sup> Further, an issue experienced at one competing consolidator could disrupt trading across the markets, as curtailed or corrupted trading by subscribers of that competing consolidator could spawn confusion in the marketplace, exacerbating the market impact of the original issue. The only way to address these concerns would be for all market participants to incur the expense of retaining a back-up competing consolidator.

Given these potential impacts, the Commission may want to consider developing standards for when a broker-dealer, or other market participant, would need to subscribe to multiple competing consolidators to mitigate the risk of harm to investors or the markets from an issue experienced by a single competing consolidator. FINRA notes that, if connections to multiple competing consolidators are required, such a market participant would then need to pay multiple fees to maintain those connections to receive data. Multiplying fees in this manner could undercut one of the key purposes of the Proposal, which is to lower market data costs for investors and market participants. Further, this potential situation raises the important question of whether a broker-dealer could potentially be held liable for a competing consolidator's system issue if the broker-dealer's customers are affected by the issue, whether due to the broker-

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<sup>12</sup> See, e.g., *id.* at 16847.

<sup>13</sup> Of course, market participants receiving only the public data feeds from the SIPs may be affected differently than market participants also purchasing proprietary data feeds.

<sup>14</sup> FINRA notes that, under the Proposal, competing consolidators would be included in the definition of "SCI entities" and therefore would be subject to the requirements of Regulation SCI. See Proposal at 16730 n.28. The Commission also notes that it considered as an alternative not extending Regulation SCI to competing consolidators. See *id.* at 16864. FINRA agrees that, if the Commission decides to adopt the Proposal, competing consolidators should be subject to the requirements of Regulation SCI, which are critical to bolster the resiliency and reliability of the infrastructure for market data dissemination.

dealer's selection of that particular competing consolidator or its failure to maintain a back-up competing consolidator connection.

On a related point, the Commission may also want to consider providing guidance on whether a broker-dealer would, or should, be evaluated—by the Commission, FINRA, or others—on its decision of which competing consolidator(s) to receive consolidated market data from, what factors a broker-dealer should consider in evaluating its choice of a competing consolidator(s) (both initially and on an ongoing basis), and how a broker-dealer's choice of a competing consolidator(s) might affect the broker-dealer's best execution obligations. For example, under the Proposal, competing consolidators would be required to publish monthly performance metrics and certain other information related to data quality issues, system issues, clock synchronization protocols and metrics, and vendor alerts.<sup>15</sup> The Commission may want to consider providing guidance on whether a broker-dealer would be expected to review and consider these metrics when initially choosing a competing consolidator, and whether a broker-dealer would be expected to periodically reevaluate its choice of competing consolidator based on such metrics or other factors.

### C. *Multiple Sources of Consolidated Market Data*

As the Commission acknowledges in the Proposal, the competing consolidator model would result in multiple entities generating consolidated market data, which would in turn result in multiple versions of consolidated market data.<sup>16</sup> The Commission notes its preliminary belief that the Proposal's requirement for competing consolidators and self-aggregators to calculate consolidated market data in a consistent manner would help ensure continuity and consistency in how consolidated market data, including the NBBO, is calculated.<sup>17</sup>

FINRA believes that, regardless of the requirements that apply to competing consolidators, having multiple competing consolidators from which consolidated market data may be sourced introduces complex compliance issues for broker-dealers. A broker-dealer would need to select the competing consolidator from which it would receive data to be used for purposes of compliance with a number of rules and regulatory obligations, many of which hinge on the availability of accurate equity market data. For example, such obligations would include, though would not be limited to, best execution obligations,<sup>18</sup> short sale requirements under Rule 201 of Regulation SHO,<sup>19</sup> trade-through protections under Rule 611 of Regulation NMS ("Reg NMS"),<sup>20</sup> vendor display obligations under Rule 603 of Reg NMS,<sup>21</sup> and rules prohibiting trading

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<sup>15</sup> See *id.* at 16870-71.

<sup>16</sup> See *id.* at 16774.

<sup>17</sup> See *id.* at 16775. The Commission also notes that some market participants currently consolidate proprietary data feeds and calculate their own consolidated data, including their own NBBO. See *id.* at 16774.

<sup>18</sup> See FINRA Rule 5310.

<sup>19</sup> See 17 C.F.R. 242.201.

<sup>20</sup> See 17 C.F.R. 242.611.

<sup>21</sup> See 17 C.F.R. 242.603.

during a halt.<sup>22</sup> The Commission may want to consider providing guidance for broker-dealers that, assuming firms establish and follow reasonable data handling policies and procedures, compliance with such obligations will be assessed based on the data provided by the firm's identified competing consolidator source, or received directly by the firm in the case of a self-aggregator.<sup>23</sup>

In addition, FINRA believes that having multiple competing consolidators could lead to different versions of consolidated market data available in the market, even if competing consolidators are required to calculate data in a consistent manner. This potential situation raises the question of which data set should be used when the data sets are different, and for which purposes. For example, market participants will need to decide—if they have multiple sources of data available—which set of instructions to follow if regulatory messages differ between multiple competing consolidator sources. If the NBBO differs among data sources, exchanges will need to decide which NBBO to use for purposes of exchange order types that look to the NBBO. In addition, as noted above, broker-dealers will need to choose which data set to use for purposes of compliance with various regulatory obligations, such as the order protection rule and the vendor display rule. Presumably, also, broker-dealers' best execution duties would prevent them from selecting a more advantageous source of market data for their own activities compared to those of their clients. The Commission may want to consider providing guidance on factors that should be considered in determining which data source should be used in various scenarios.

#### *D. Impact on Best Execution Obligations*

One of the key goals of the Proposal is to facilitate the best execution of broker-dealers' investor orders.<sup>24</sup> FINRA strongly supports this goal. However, FINRA is concerned that some aspects of the Proposal may create additional complexity and uncertainty for broker-dealers seeking to provide best execution for their customers. As discussed above, the proposed shift to a decentralized consolidation model potentially implicates best execution obligations with respect to a broker-dealer's choice of a competing consolidator(s) and source for market data in various contexts.

In addition, under the Proposal, the content of consolidated market data would be modified by, among other things, adopting a new definition of "round lot" that would be calibrated based on share price thresholds, ranging from 100 shares to one share.<sup>25</sup> These new round lot sizes would be used for calculating the NBBO and would also flow through to a

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<sup>22</sup> See, e.g., FINRA Rule 5260.

<sup>23</sup> The Commission has provided similar guidance in other contexts. See, e.g., SEC Division of Trading and Markets, Responses to Frequently Asked Questions Concerning Rule 611 and Rule 610 of Regulation NMS, available at <https://www.sec.gov/divisions/marketreg/nmsfaq610-11.htm>.

<sup>24</sup> See Proposal at 16729.

<sup>25</sup> See *id.* at 16869.

number of other requirements under Reg NMS.<sup>26</sup> However, under the Proposal, the new round lot sizes would not be used to determine which bids or offers are protected quotations for purposes of the order protection rule in Rule 611 of Reg NMS, nor would they affect the locked and crossed market provisions of Rule 610(d), both of which would instead continue to apply a 100-share quote threshold.<sup>27</sup> FINRA believes that these proposed changes, especially the proposed disconnect between the NBBO and protected quotations, could add significant complexity to broker-dealers' best execution analyses and could create confusion and uncertainty regarding the quotations that a broker-dealer should rely upon to provide best execution for its customers.<sup>28</sup>

The Commission states in the Proposal that it is not specifying minimum data elements needed to achieve best execution.<sup>29</sup> However, given the complex questions raised by the proposed changes to both the content of consolidated market data and the manner in which it would be disseminated, FINRA believes the Commission should consider providing guidance for broker-dealers to address how firms would be expected to achieve best execution under the Proposal.

#### *E. Impact of Shifting Calculations to Listing Markets*

Under the Proposal, the responsibility to calculate and disseminate price bands and reference prices for the NMS Plan to Address Extraordinary Market Volatility (the "LULD Plan") would shift from the exclusive SIPs to the primary listing exchanges.<sup>30</sup> FINRA agrees with the Commission that the LULD Plan is an important mechanism in the national market system.<sup>31</sup> However, FINRA notes that while the Proposal would not shift LULD Plan calculations to competing consolidators and self-aggregators, it would shift the dissemination of these important calculations from the exclusive SIPs to multiple listing markets. FINRA believes that the Proposal would result in this key market function becoming disaggregated, more expensive, more prone to errors, and more complex, as multiple, separate calculation methodologies would be required to align and uniformly adapt to change requests that impact the calculations. These same impacts would also apply to the calculations to activate short sale circuit breakers for individual stocks under the Proposal.<sup>32</sup>

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<sup>26</sup> See *id.* at 16743. Specifically, the Commission notes that the new proposed definition of "round lot" would affect Rules 602, 603, 604, 605, 606 and 610 of Reg NMS.

<sup>27</sup> See *id.* at 16748-49.

<sup>28</sup> FINRA recognizes that there may be a disconnect today between the NBBO and protected quotations with respect to manual quotations because the order protection rule in Rule 611 of Reg NMS applies only to automated quotations. However, in today's markets manual quotations are an extremely rare occurrence; by contrast, the Proposal would split the NBBO from protected quotations for automated quotations as well.

<sup>29</sup> See Proposal at 16734 n.90.

<sup>30</sup> See *id.* at 16761.

<sup>31</sup> See *id.*

<sup>32</sup> See *id.* at 16760.

*F. Latency Differentials Between Competing Consolidators and Self-Aggregators*

One of the key goals of the Proposal is to reduce information asymmetries between market participants, including with respect to differing levels of latency in the receipt of consolidated market data that can give some market participants an advantage over other market participants.<sup>33</sup> Indeed, one of the key aspects of the proposed competing consolidator model is that SROs would be required to provide the elements of consolidated market data to all participants—such as proprietary data subscribers, competing consolidators, and self-aggregators—in a latency-neutralized manner.<sup>34</sup>

However, FINRA notes that the Proposal has the potential to further institutionalize latency inequities in the market with the creation of two categories of entities—competing consolidators and self-aggregators—which would both receive data from the SROs at the same time. The Commission acknowledges in the Proposal that self-aggregators may have a “minor latency advantage” over other market participants that receive data instead from a competing consolidator.<sup>35</sup> Given current time increments used throughout the market (*e.g.*, picoseconds and microseconds), and the likely adoption of even finer increments over time, FINRA does not believe that these latency advantages are minor. In addition, as the Commission acknowledges, a two-step process—*i.e.*, SRO to competing consolidator to broker-dealer—will never be as fast as a one-step process—*i.e.*, SRO to self-aggregator.<sup>36</sup> FINRA also does not believe that the introduction of competitive forces through the use of a competing consolidator model will effectively minimize these inherent latencies, as the Commission suggests.<sup>37</sup> As is the case with the current dissemination of market data, FINRA believes latency differentials remain a critical issue for fair market data dissemination under the Commission’s current Proposal.

Given the potential for the Proposal to perpetuate a two-tiered market data system as between self-aggregators and others who receive data from competing consolidators, has the Commission considered the potential advantages and disadvantages of an alternative in which the self-aggregator category was eliminated and all market data was required to be provided through a consolidator of some type? For example, the Commission could consider eliminating the self-aggregator category and instead require all market participants to receive data from one or more competing consolidators, to better ensure that latencies are comparable for all market participants while still gaining the benefits of competition amongst consolidators of data. Alternatively, the Commission could consider requiring that SROs delay provision of the data to

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<sup>33</sup> See, *e.g.*, *id.* at 16729, 16774.

<sup>34</sup> See *id.* at 16771.

<sup>35</sup> See *id.* at 16791.

<sup>36</sup> A similar latency advantage would exist if a competing consolidator were to use consolidated market data internally for its own purposes, in a similar manner to a self-aggregator, while also consolidating and disseminating that data to other market participants.

<sup>37</sup> See Proposal at 16791.



self-aggregators to match the latencies introduced by competing consolidators, as the Commission originally proposed in its security-based swap data dissemination release.<sup>38</sup>

### III. Exclusion of OTCE Data

FINRA is concerned that the exclusion of OTCE Data from the mandated consolidated data would reduce investor access to OTCE Data and raise investor costs. The Proposal would add a new definition of “consolidated market data” to Rule 600 of Reg NMS,<sup>39</sup> consisting of “core data,” “regulatory data,” “administrative data,” “exchange-specific program data” and additional data elements in these categories as defined under an effective NMS plan.<sup>40</sup> As the Commission explains in the Proposal, neither core data nor any of the other specified categories of consolidated market data would include OTCE Data,<sup>41</sup> and therefore OTCE Data would be excluded from the elements of consolidated market data that would be required to be provided to “competing consolidators” and “self-aggregators” under the Proposal.<sup>42</sup> However, the Commission notes that “the exclusion of [OTCE Data] . . . from the proposed definitions of core data and consolidated market data does not preclude the provision of this data to market participants who wish to receive it.”<sup>43</sup>

Currently, FINRA provides two market data feeds: the Bulletin Board Dissemination Service (“BBDS”) for quotations posted on the OTCBB and the Trade Data Dissemination Service (“TDDS”) for transactions reported to the ORF.<sup>44</sup> Nasdaq, through the UTP SIP,

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<sup>38</sup> See Securities Exchange Act Release No. 63346 (November 19, 2010), 75 FR 75208, 75286 (December 2, 2010) (Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information; Proposed Rule) (proposing a requirement that no person other than a registered security-based swap data repository make available to one or more persons (other than a counterparty) transaction information related to a security-based swap before the earlier of 15 minutes after the time of execution of the security-based swap, or the time that a registered security-based swap data repository publicly disseminates a report of that security-based swap).

<sup>39</sup> See 17 C.F.R. 242.600.

<sup>40</sup> See Proposal at 16868.

<sup>41</sup> The Proposal refers to “OTCBB data” to describe the quotation and transaction data for OTC Equities. As noted above, such data includes both transaction data from the ORF as well as quotation data from the OTCBB, and therefore this letter refers to the OTC Equity data collectively as “OTCE Data.”

<sup>42</sup> See Proposal at 16736-37.

<sup>43</sup> *Id.* at 16737.

<sup>44</sup> The SEC has stated that provision of these data feeds is consistent with Section 17B of the Exchange Act. See *infra* note 45. Paragraph (b) of Section 17B provides for the facilitation of the widespread dissemination of reliable and accurate last sale and quotation information with respect to OTC Equities in accordance with the findings set forth in subsection (a). Among other things, as set forth in paragraph (a), Congress found that “it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to improve significantly the information available to brokers, dealers, investors, and regulators with respect to quotations for and transactions in penny stocks.” See 15 U.S.C. 78q-2.

manages the administration of the BBDS and TDDS data feeds. Both data feeds are part of the Level 1 entitlement of the UTP SIP that enables subscribers to receive market data for Nasdaq-listed securities. Therefore, all Level 1 entitled subscribers are able to receive OTCE Data via BBDS and TDDS along with Nasdaq-listed market data. The Commission approved this arrangement in the context of rulemaking by the NASD, dating back to the 1990s.<sup>45</sup>

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<sup>45</sup> In 1991, FINRA's predecessor, the National Association of Securities Dealers, Inc. ("NASD"), filed a proposed rule change to, among other things, establish a "bundled information feed and subscriber charge for receipt of both Nasdaq Level 1 and [OTCBB] quotation information." The proposed rule filing, which was filed with the SEC for immediate effectiveness and went into effect without further action, stated: "the distribution of OTCBB quotation data via the Level 1 vendor feeds will effectuate the broadest possible dissemination of quotation information on OTCBB securities. This result is fully consistent with Section 17B of the [Exchange Act] which mandates establishment of an automated quotation system for penny stocks. Subsection (b) thereunder contemplates the widespread dissemination of reliable and accurate quotation information on stocks traded through such a system. Vendor dissemination of OTCBB quotation information constitutes a further enhancement of the OTCBB service to meet the requirements of Section 17B." See Securities Exchange Act Release No. 29616 (August 27, 1991), 56 FR 43826 (September 4, 1991) (Notice of Filing and Immediate Effectiveness of SR-NASD-91-38).

In 1993, NASD filed a proposed rule change to establish requirements for real-time trade reporting and dissemination for OTC Equities. See Securities Exchange Act Release No. 31695 (January 6, 1993), 58 FR 4189 (January 13, 1993) (Notice of Filing of SR-NASD-92-48). In its order approving the proposed rule change, the SEC noted that the proposed rule change was consistent with Sections 11A(a)(1), 15A(b)(6) and 17B of the Exchange Act, stating specifically its belief that "by providing greater transparency, the proposed rule change will bring to the market for [OTC Equities] a number of the benefits envisaged by Congress. Experience with the introduction of real-time trade reporting for Nasdaq/National Market System Securities and Nasdaq securities supports this belief." See Securities Exchange Act Release No. 32647 (July 16, 1993), 58 FR 38262 (July 22, 1993) (Order Approving SR-NASD-92-48).

In 1994, NASD filed a proposed rule change to combine its Level 1 quotation data service and its last sale information service into a single, consolidated Level 1 data service. See Securities Exchange Act Release No. 35054 (December 6, 1994), 59 FR 64225 (December 13, 1994) (Notice of Filing of SR-NASD-94-70). In its order approving the proposed rule change, the SEC stated that it "finds that the rule change is consistent with the requirements of the [Exchange Act] and the rules and regulations thereunder applicable to the NASD, including the requirements of Section 15A(b)(5) of the [Exchange Act]. Section 15A(b)(5) requires, in part, that the rules of a national securities association provide for the equitable allocation of reasonable dues, fees and other charges among members, issuers and other persons using any facility or system that the Association operates or controls. While the consolidation will result in a fee increase for a small portion of subscribers, the additional cost will be partially offset by administrative savings for large subscribers and vendors. Moreover, the rule will effect a simplification in the fee structure applicable to receipt of two major data services." See Securities Exchange Act Release No. 35217 (January 11, 1995), 60 FR 3890 (January 19, 1995) (Order Approving SR-NASD-94-70).

The operating committee of the UTP Plan subsequently unanimously approved a UTP Plan amendment to formally memorialize these arrangements in the language of the UTP Plan. See Securities Exchange Act Release No. 62012 (April 30, 2010), 75 FR 27010 (May 13, 2010) (Notice of Filing of Amendment No. 21 to the Plan) (adding specific references in the plan regarding the existing arrangements for OTCE Data).

FINRA believes it is important to consider the context and background regarding the reasons why OTCE Data has historically been disseminated under the UTP Plan in the Commission's evaluation of the potential impacts on investors and market participants if OTCE Data were to be required to be provided separately. The inclusion of OTCE Data in consolidated market data was originally adopted as the most cost-effective solution to provide transparency and continuity for investors and market participants. FINRA believed, and continues to believe, that investors, market participants and regulated entities benefit significantly from the widespread distribution and enhanced transparency provided by dissemination of OTCE Data under the Level 1 entitlement. Given that OTC Equities may transition to NMS stocks or vice versa (NMS stocks can be delisted and become OTC Equities), dissemination of OTCE Data in the same distribution channels as market data for listed equity securities facilitates more orderly markets and transparency continuity in relation to transitioning issuers. Including OTCE Data together with listed NMS stock data allows investors and market participants to receive seamless pricing information for delisted securities in a single entitlement; by contrast, providing data for delisted issuers through different entitlements, sold by separate entities, could result in a disruption of market data when investors or market participants are not subscribed to both services.

As noted in the Proposal, if OTCE Data is excluded from consolidated market data as proposed, FINRA will need to establish a separate framework and process to provide OTCE Data to investors and market participants, including all of the related administrative elements to facilitate dissemination such as policies and procedures, vendor and subscriber contracts, fee schedules, entitlements and audit processes. The development and maintenance of such a separate framework for dissemination would likely result in increased costs to FINRA, particularly since FINRA would lose the economies of scale enabled by providing OTCE Data over the Level 1 feed, and would likely result in higher fees charged to vendors and subscribers. Vendors and market participants would also need to devote additional resources to retrieving data from different sources and consolidating different data feeds, which would increase the costs of separately disseminating OTCE Data that would be borne by investors and market participants. Because of the changes involved in obtaining OTCE Data, and the separate fee that would be charged for OTCE Data, it is likely that some firms will forgo obtaining this data, thus depriving their customers of current information about OTC Equities.

#### **IV. Impact on CAT**

FINRA is concerned about the impact of the proposal on the Consolidated Audit Trail ("CAT"). In the Proposal, the Commission notes that the CAT NMS Plan (the "CAT Plan") requires the Central Repository to collect SIP data from a SIP or pursuant to an NMS Plan.<sup>46</sup> The Commission observes that the proposed changes to the content of consolidated market data collected and disseminated under Reg NMS, as well as the proposed shift from the exclusive SIPs to multiple competing consolidators, could therefore have an impact on both the content and source for the data collected and maintained by the Central Repository under the CAT Plan.<sup>47</sup>

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<sup>46</sup> See Proposal at 16794.

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

The implementation of CAT has been a significant undertaking by the SROs and the industry and is still ongoing. As such, FINRA is concerned that significant changes to the content or source of data collected by CAT, such as those proposed by the Commission, could impact the CAT implementation timeline. Those concerns would be particularly acute if such changes were to come into effect while CAT implementation is still in progress. FINRA is particularly concerned about any potential for delay that this Proposal could cause in light of the Commission's recently adopted amendments to the CAT Plan.<sup>48</sup> Therefore, FINRA recommends that if the Commission decides to adopt the Proposal, it should delay the proposed changes until after CAT has been fully implemented and operating for some time to avoid any potential delays or disruptions to CAT.

The Commission also asks in the Proposal whether CAT should receive consolidated market data from one competing consolidator, all competing consolidators, or some specific subset of competing consolidators.<sup>49</sup> FINRA notes that this decision is ultimately one to be made by the Commission or the operating committee of the CAT Plan. However, FINRA believes preliminarily that one competing consolidator source for SIP data provided to CAT would likely be the simplest solution for CAT to obtain the required data, perhaps with a connection to one additional competing consolidator to be used as a back-up source for data in the event of a systems disruption at the selected competing consolidator.<sup>50</sup>

## **V. Treatment of ADF**

FINRA is concerned that the exclusion of ADF depth of book data from core data omits a potential source of important data. The Proposal would include as a component of "core data" a new category of "depth of book data" ("DOB Data"), defined as

all quotation sizes at each national securities exchange, aggregated at each price at which there is a bid or offer that is lower than the best bid down to the protected bid and higher than the best offer up to the protected offer; and all quotation sizes at each national securities exchange, aggregated at each of the next 5 prices at which there is a bid that is lower than the protected bid and offer that is higher than the protected offer.<sup>51</sup>

As the Commission notes in the Proposal, this proposed definition of DOB Data refers only to depth of book quotations on each national securities exchange, as FINRA's ADF

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<sup>48</sup> See Securities Exchange Act Release No. 88890 (May 15, 2020) (Amendments to the National Market System Plan Governing the Consolidated Audit Trail) (amendments to the CAT Plan to bring additional transparency, governance, oversight, and financial accountability to its implementation).

<sup>49</sup> See Proposal at 16794.

<sup>50</sup> Of course, CAT's choice of a competing consolidator, or multiple competing consolidators, raises some of the same complexity as the issues discussed in Section II with respect to the competing consolidator model generally.

<sup>51</sup> See Proposal at 16868.

currently does not have quotations submitted to it.<sup>52</sup> Currently, some members are connected to the ADF for back-up trade reporting purposes only; however, no members use the ADF as their primary facility for trade reporting, and, as the Commission notes, there are currently no quoting participants connected to the ADF.

FINRA believes that, if DOB Data is added to the definition of core data as proposed, the DOB Data definition should be modified to account for quotations displayed through national securities associations. While the ADF does not currently have quoting participants, it is an actively maintained FINRA facility and could readily add quoting participants in the future. In the event that quoting participants connect to the ADF in the future, FINRA believes investors and market participants should be provided ADF depth of book data, which is directly comparable to what they would receive from the exchanges under the Proposal. In other words, if there is depth of book quotation activity being displayed through the ADF, that data should be available to investors on the same terms as exchange depth of book activity, without the need for additional SEC rulemaking.<sup>53</sup> That result would be accomplished by modifying the DOB Data definition to include the ADF.<sup>54</sup>

## VI. Conclusion

FINRA thanks the Commission for its attention to FINRA's comments on the Proposal and looks forward to continuing to engage on these vital market structure matters. Should you have any questions or wish to further discuss FINRA's views, please contact Thomas Gira, Executive Vice President, Market Regulation & Transparency Services, at [REDACTED] or Stephanie Dumont, Senior Vice President and Director of Capital Markets Policy, at [REDACTED].

Very truly yours,

**Marcia Asquith**

MARCIA E. ASQUITH  
Executive Vice President,  
Board and External Relations

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<sup>52</sup> See *id.* at 16756.

<sup>53</sup> FINRA also notes that Rule 602(a)(ii) of Reg NMS, which would not be modified by the Proposal, specifically requires that each national securities association collect, process, and make available to vendors the best bid, best offer, and quotation sizes communicated otherwise than on an exchange by each member of such association acting in the capacity of an OTC market maker for each subject security and the identity of the member. See 17 C.F.R. 242.602(a)(1)(ii).

<sup>54</sup> FINRA recommends that the DOB Data definition be formulated generally and not refer specifically to the ADF, to account for the possibility that other quotation facilities may be developed in the future (*e.g.*, "all quotation sizes at each national securities exchange and on a facility of a national securities association").