

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Inter-Market Competition

The proposal does not impose an undue burden on inter-market competition. The Exchange believes its proposal remains competitive with other options markets and will offer market participants with another choice of where to transact options. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other options exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

Intra-Market Competition

Options 7, Section 1

The Exchange's proposal to relocate rule text related to the Removal of Days for Purposes of Pricing Tiers within Options 7, Section 2(6) into Options 7, Section 1, General Provisions, without change, does not impose an undue burden on competition as the rule text will continue to apply uniformly to all Participants.

Options 7, Section 2

The Exchange's proposal to adopt Block Order Mechanism and Customer Cross Order pricing does not impose an undue burden on competition as no Participant would be subject to any fees or be paid any rebates for orders executed into the Block Order Mechanism or Customer Cross Orders.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.¹⁰ At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-BX-2021-025 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-BX-2021-025. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE,

Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-BX-2021-025 and should be submitted on or before June 30, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹

J. Matthew DeLesDernier,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92105; File No. SR-FINRA-2020-031]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 2, To Adopt Proposed Rule 6439 (Requirements for Member Inter-Dealer Quotation Systems) and Rescind the Rules Related to the OTC Bulletin Board Service

June 3, 2021.

I. Introduction

On September 24, 2020, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to rescind the rules related to the OTC Bulletin Board Service and cease its operation and to adopt new requirements for member inter-dealer quotation systems that disseminate quotations in equity securities traded over-the-counter ("OTC"). The proposed rule change was published for comment in the **Federal Register** on October 7, 2020.³ On November 4, 2020, pursuant

¹¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Exchange Act Release No. 90067 (October 1, 2020), 85 FR 63314 ("Notice"). Comments on the proposed rule change can be found at: <https://www.sec.gov/comments/2020/2020031>

Continued

¹⁰ 15 U.S.C. 78s(b)(3)(A)(ii).

to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ On December 21, 2020, FINRA filed Amendment No. 1 to the proposed rule change.⁶ On December 30, 2020, the Commission published notice of Amendment No. 1 and instituted proceedings pursuant to Section 19(b)(2)(B) of the Act⁷ to determine whether to approve or disapprove the proposed rule change.⁸ On April 5, 2021, the Commission extended the period for consideration of the proposed rule change to June 4, 2021.⁹ On June 1, 2021, FINRA filed Amendment No. 2 to the proposed rule change, which replaces and supersedes Amendment No. 1 in its entirety.¹⁰ The Commission received four comment letters regarding the proposed rule change,¹¹ and two responses to comments from FINRA.¹² This order

www.sec.gov/comments/sr-finja-2020-031/srfinja2020031.htm.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Exchange Act Release No. 90335 (November 4, 2020). The Commission designated January 5, 2021, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

⁶ Amendment No. 1 may be found at: <https://www.sec.gov/comments/sr-finja-2020-031/srfinja2020031-8841399-238269.pdf>.

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ See Exchange Act Release No. 90824, 86 FR 653 (January 6, 2021).

⁹ See Securities Exchange Act Release No. 91474, 86 FR 18583 (April 9, 2021).

¹⁰ Amendment No. 2 is a partial amendment in which FINRA added a representation that the effective date for deleting the rules related to the OTCBB (as defined herein) will not occur until: (1) Proposed Rule 6439 (except for Rule 6439(d)(1)(B)) is effective; and (2) the Commission grants FINRA's request set forth in the QEQS Designation Request Letter (as defined herein) (or FINRA files a rule filing otherwise setting the implementation date for deleting the rules related to the OTCBB and the Commission approves such rule filing, if required). Because Amendment No. 2 to the proposed rule clarifies the timing of effectiveness of the proposed rule change and does not materially alter the substance of the proposed rule change, Amendment No. 2 is not subject to notice and comment. Amendment No. 2 may be found at: <https://www.sec.gov/comments/sr-finja-2020-031/srfinja2020031.htm>.

¹¹ See Letters from Christopher Bok, Chief Compliance Officer, OTC Link, LLC, dated October 28, 2020 ("OTC Link Letter 1"); Kimberly Unger, CEO and Executive Director, The Security Traders Association of New York, Inc., dated October 28, 2020 ("STANY Letter"); Sherry J. Sandler, Global OTC, dated November 9, 2020 ("Global OTC Letter"); and Cass Sanford, Associate General Counsel, OTC Markets Group, Inc., dated January 27, 2021 ("OTC Link Letter 2").

¹² See Letters from Racquel Russell, Associate General Counsel, FINRA, dated November 20, 2020 ("FINRA Letter 1") and February 12, 2021 ("FINRA Letter 2").

approves the proposed rule change, as modified by Amendment No. 2.

II. Summary of the Proposal, as Modified by Amendment No. 2

As further described below, FINRA proposes to (i) rescind FINRA's rules governing the OTC Bulletin Board Service ("OTCBB") and cease its operation; and (ii) adopt new Rule 6439 (Requirements for Member Inter-Dealer Quotation Systems) to expand the obligations of member interdealer quotation systems ("IDQSs")¹³ that disseminate quotation updates on a real-time basis in OTC Equity Securities.¹⁴

A. Rescission of Rules Governing the OTCBB

The OTCBB is a FINRA-operated IDQS available for use by broker-dealers to publish quotations in eligible OTC Equity Securities.¹⁵ FINRA has operated the OTCBB since 1990.¹⁶ FINRA states that, due to technological advancements since 1990 and the increase in alternative electronic venues with more extensive functionality than the OTCBB, the level of quotation activity occurring on the OTCBB has continued to decline over the past several years and is now nonexistent.¹⁷ FINRA represents that, as of the date that it filed the proposed rule change, the OTCBB does not display or widely disseminate quotation information on any OTC Equity Security.¹⁸

FINRA states that it does not believe that continued operation of the OTCBB serves any benefit to investors or the marketplace and that ceasing operation of the OTCBB would eliminate potential investor confusion regarding the availability of quotation information for OTC Equity Securities.¹⁹ In addition,

¹³ FINRA Rule 6420(c) defines "inter-dealer quotation system" as "any system of general circulation to brokers or dealers which regularly disseminates quotations of identified brokers or dealers." This definition tracks the Commission's definition of the same term in Exchange Act Rule 15c2-11, 17 CFR 240.15c2-11.

¹⁴ The term "OTC Equity Security" is defined in FINRA Rule 6420(f) as any equity security that is not an "NMS stock" as that term is defined in Rule 600(b)(47) of Regulation NMS; provided, however, that the term "OTC Equity Security" shall not include any Restricted Equity Security. The term "Restricted Equity Security" is further defined in FINRA Rule 6420(k) to mean any equity security that meets the definition of "restricted security" as contained in Rule 144(a)(3) under the Securities Act of 1933.

¹⁵ See Notice, *supra* note 3, at 63315.

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See *id.* at 63318. For example, FINRA states that where investors look to feeds that solely disseminate OTCBB data for quotation information on a particular OTC Equity Security, investors mistakenly may conclude that there are no current quotations in the security (when, in fact, there may

be numerous quotations available elsewhere—i.e., on member-operated IDQSs). See *id.*

As a result, FINRA proposes to rescind the FINRA Rule 6500 Series, which governs the operation of the OTCBB. Among other things, the FINRA Rule Series 6500 contains provisions regarding the securities eligible to be quoted on the OTCBB (FINRA Rule 6530), market maker obligations on the OTCBB (FINRA Rule 6540), and transaction reporting (FINRA Rule 6550). FINRA also proposes to rescind FINRA Rule 7720, which sets forth the fees applicable to a broker-dealer that displays quotations or trading interest in the OTCBB, and to amend FINRA Rule

be numerous quotations available elsewhere—i.e., on member-operated IDQSs). See *id.*

²⁰ Section 17(b)(1) of the Act, which was added by the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 ("Penny Stock Act"), directs the Commission to "facilitate the widespread dissemination of reliable and accurate last sale and quotation information with respect to penny stocks . . . with a view toward establishing, at the earliest feasible time, one or more automated quotation systems that will collect and disseminate information regarding all penny stocks." 15 U.S.C. 78q-2(b)(1). Under Exchange Act Rule 3a51-1, "penny stock" is a non-NMS stock that among other things, does not include securities that have a price of five dollars or more as determined either on a per transaction basis or, in the absence of a transaction, on the basis of the inside bid quotation for the security displayed on an automated interdealer quotation system that has the characteristics set forth in Section 17(b)(2) of the Act or such other automated interdealer system that is designated by the Commission for purposes of the rule (such a system, a "Qualifying Electronic Quotation System" or "QEQS"). See 17 CFR 240.3a51-1; Exchange Act Release No. 30608 (April 20, 1992), 57 FR 18004 (April 28, 1992) ("Penny Stock Rules Adopting Release"); 17 CFR 240.3a51-1, 15g-1 through 15g-9 and 15g-100 ("Penny Stock Rules"). The Commission, in adopting the Penny Stock Rules, set forth standards it would consider when designating a QEQS. See Penny Stock Rules Adopting Release, 57 FR at 18012 n.64. The QEQS designation criteria set forth in the Penny Stock Rules are based on the Exchange Act Section 17B characteristics of an automated quotation system that would facilitate the widespread dissemination of reliable and accurate last sale and quotation information with respect to penny stocks. See 15 U.S.C. 78q-2(b)(1) and (2). In 1992, the Commission designated the OTCBB, then operated by FINRA's predecessor the National Association of Securities Dealers, Inc. ("NASD"), as an automated interdealer quotation system and a QEQS for purposes of the Penny Stock Rules. See Letter from Margaret H. McFarland, Deputy Secretary, Commission, to Richard Ketchum, Executive Vice President, NASD, Inc., dated December 30, 1992 ("OTCBB Designation Letter"). The Commission thereafter granted the NASD's request for an extension of QEQS status. See Securities Exchange Act Release No. 38101 (Dec. 31, 1996), 62 FR 1010 (Jan. 7, 1997).

9217 (Violations Appropriate for Disposition Under Plan Pursuant to SEA Rule 19d–1(c)(2)) to remove reference to FINRA Rule 6550 (Transaction Reporting). While these proposed changes to the FINRA rulebook would cause the operation of the OTCBB to terminate, FINRA states that it would not cease operation of the OTCBB until: (1) Proposed Rule 6439 (except for proposed Rule 6439(d)(1)(B)) is effective, and (2) the Commission grants FINRA's request set forth in the QEQS Designation Request Letter (or FINRA files a rule filing otherwise setting the implementation date for deleting the rules related to the OTCBB and the Commission approves such rule filing, if required).²¹

B. Proposed Rule 6439 (Requirements for Member Inter-Dealer Quotation Systems)

FINRA states that all quotation activity in OTC Equity Securities now occurs on member-operated IDQs, rather than the OTCBB.²² FINRA proposes, in conjunction with the cessation of the OTCBB, to adopt new requirements for member IDQs that provide quotations in OTC Equity Securities in order to ensure that they have minimum standards in place.²³ FINRA states that it believes that the proposed requirements would complement the existing framework governing the form and content of quotations²⁴ and are consistent with the goals and objectives of Section 17B of the Act regarding the facilitation of widespread dissemination of reliable and accurate quotation information in penny stocks.²⁵

Proposed Rule 6439 would apply to member IDQs (whether or not such member is also an alternative trading system (“ATS”)) that permit quotation updates on a real-time basis in OTC

Equity Securities. Under proposed Rule 6439(a), member IDQs must establish, maintain and enforce written policies and procedures relating to the collection and dissemination of quotation information in OTC Equity Securities on or through their systems. Such written policies and procedures must be reasonably designed to ensure that quotations received and disseminated are informative, reliable, accurate, firm, and treated in a not unfairly discriminatory manner, including by establishing non-discretionary standards under which quotations are prioritized and displayed.²⁶ Member IDQs must also prominently disclose these written policies and procedures, along with any material updates, modifications and revisions thereto, to subscribers within five business days following the date of establishment of a policy or procedure or implementation of a material change, as well as provide them to prospective subscribers upon request.²⁷

Under proposed Rule 6439(b), member IDQs must establish non-discriminatory written standards for granting access to quoting and trading in OTC Equity Securities on their systems that do not unreasonably prohibit or limit any person with respect to access to services offered by such member IDQs.²⁸ As with the requirements under proposed Rule 6439(a), member IDQs would be required to prominently disclose these written standards relating to fair access, and any material updates, modifications and revisions thereto, to their subscribers within five business

days following the date of establishment of written standards or implementation of a material change, as well as provide them to prospective subscribers upon request.²⁹ In addition, member IDQs would be required to make and keep records of all grants of access and all denials or limitations of access. Such records must include, for all subscribers, the reasons for granting access, and, for all denials or limitations of access, the reasons for denying or limiting such access.³⁰

Proposed Rules 6439(c) and (d) would apply only to member IDQs that do not automatically execute all orders presented for execution against displayed quotations for which a member subscriber has an obligation under FINRA Rule 5220 (Offers at Stated Prices)³¹ (such a system is hereafter referred to as a “non-auto-executing member IDQ”). Under proposed Rule 6439(c), non-auto-executing member IDQs must establish, maintain and enforce written policies and procedures that are reasonably designed to address instances of unresponsiveness to orders in an OTC Equity Security. At a minimum, these policies and procedures must specify an efficient process for: (i) Monitoring subscriber unresponsiveness; (ii) subscribers to submit complaints to the non-auto-executing member IDQ regarding potential instances of order unresponsiveness; (iii) documenting the subscriber's rationale for unresponsiveness; and (iv) determining specified steps when an instance of, or repeated, order unresponsiveness may have occurred.³²

Under proposed Rule 6439(d), non-auto-executing member IDQs must report to FINRA, in a form and manner prescribed by FINRA,³³ certain aggregate and order-level information in OTC Equity Securities. Specifically, proposed Rule 6439(d)(1)(A) would require a non-auto-executing member IDQ to report to FINRA on a monthly basis the following aggregated information, categorized by FINRA

²¹ See Amendment No. 2, *supra* note 10. See also *infra* notes 46–47 and accompanying text.

²² See Notice, *supra* note 3, at 63320.

²³ *Id.* at 63316.

²⁴ FINRA currently has in place rules that govern the activity of member firms when they engage in quoting OTC Equity Securities. Specifically, the FINRA Rule 6400 Series (Quoting and Trading in OTC Equity Securities), among other things, provides a regulatory framework that governs the form and content of OTC Equity Securities' quotations, and the FINRA Rule 5200 Series sets forth rules of general applicability that govern quoting and trading practices in this market sector (hereinafter, the FINRA Rule Series 6400 and 5200 are collectively referred to as the “FINRA Quotation Governance Rules”). See Notice, *supra* note 3, at 63314–15. Rather than governing the activity of member firms, like the FINRA Quotation Governance Rules, proposed Rule 6439 would provide quotation governance standards for member IDQs on or through which quotations are displayed.

²⁵ See *supra* note 20.

²⁶ For example, FINRA states that a member IDQ would be required to address in its procedures its methodology for ranking quotations, including at a minimum, addressing factors such as price (including any applicable quote access fee), size, time, capacity and type of quotation (such as unpriced quotes and bid/offer wanted quotations). The member IDQ also would be required to include any other factors relevant to the ranking and display of quotations (e.g., reserve sizes, quotation updates, treatment of closed quotations, and quotation information imported from other systems). See Notice, *supra* note 3, at 63316.

²⁷ FINRA states that a member that is an IDQ at the time of the effective date of this proposed rule change would be required to prominently disclose the required information to its subscribers upon the effective date of the proposed rule change and, thereafter, within five business days of the implementation of any material update, modification or revision thereto. See *id.*, at n.16.

²⁸ FINRA states that this proposed requirement is consistent with the “fair access” requirements of Regulation ATS but would apply to quoting and trading in all OTC Equity Securities on the member IDQs, regardless of the percentage of average daily volume that such member IDQs had in the security. See 17 CFR 242.301(b)(5). FINRA states that while certain member IDQs may already be subject to the similar volume-based fair access requirements under Regulation ATS, proposed Rule 6439 would ensure the application of fair access requirements to all member IDQs. See Notice, *supra* note 3, at 63316.

²⁹ See *id.* at 63316–17. See also *supra* note 27.

³⁰ See proposed Rule 6439(b).

³¹ FINRA Rule 5220 and its associated Supplementary Material set forth members' firm quote obligations. Specifically, FINRA Rule 5220 provides that no member shall make an offer to buy from or sell to any person any security at a stated price unless such member is prepared to purchase or sell, as the case may be, at such price and under such conditions as are stated at the time of such offer to buy or sell.

³² See Notice, *supra* note 3, at 63317.

³³ FINRA states that following Commission approval, FINRA would announce in a *Regulatory Notice* details about the required manner and timing of the submission of this information to FINRA. See Notice, *supra* note 3, at 63317, n.27.

member subscriber market participant identifier (MPID) across all symbols quoted by the MPID during the previous calendar month: (i) Total number of marketable orders presented for execution against the MPID's quotation;³⁴ (ii) average execution (full or partial) time for marketable orders presented against the MPID's quotation based on the time an order is presented; (iii) total number of full or partial executions based on the time a marketable order is presented that are within the following execution timeframes: <5 seconds; ≥5 and <10 seconds; ≥10 and <20 seconds; and ≥20 seconds; (iv) total number of marketable orders presented against the MPID's quotation that did not receive a full or partial execution; and (v) average response time of the highest 10% and highest 50% of the MPID's response times for marketable orders (for full or partial executions).³⁵

Proposed Rule 6439(d)(1)(B) would require non-auto-executing member IDQSs to provide to FINRA the following order-level information for each order presented against an MPID's quotation during the previous calendar month: (i) Buy/sell; (ii) security symbol; (iii) price; (iv) size; (v) All or None indicator (yes or no); (vi) order entry firm MPID; (vii) order receipt time; (viii) time in force; (ix) response time; (x) order response (e.g., execute, reject cancel, etc.); (xi) executed quantity; (xii) system-generated order number (if any); and (xiii) position in queue for quote (e.g., IL1, IL2).³⁶ However, to the extent that the above order-level information is or becomes reportable under the Consolidated Audit Trail ("CAT") pursuant to FINRA Rule 6830 (Industry Member Data Reporting), non-auto-executing member IDQSs would not be required to report this order-level information under proposed Rule 6439(d)(1)(B).³⁷

Proposed Rule 6439(e) would require each member IDQS to make available to customers on its website (or its affiliate distributor's website) a written description of each OTC Equity Security order- or quotation-related data product offered by such member IDQS and related pricing information, including fees, rebates, discounts and cross-

product pricing incentives. Member IDQSs would be required to keep the relevant website page(s) accurate and up-to-date with respect to the required data product descriptions and pricing information and to make such information available at least two business days in advance of offering a data product.³⁸ Proposed Rule 6439(e) would specify that a member IDQS is not precluded from negotiating lower fees with customers, provided that the member IDQS discloses on such website page(s) the circumstances under which it may do so.

Finally, under proposed Rule 6439(f), a member IDQS must provide FINRA with prompt notification when it reasonably becomes aware of any systems disruption that is not de minimis that degrades, limits, or otherwise impacts the member IDQS's functionality with respect to trading or the dissemination of market data.³⁹ Such notification must include, on a reasonable best efforts basis, a brief description of the event, its impact, and the member IDQS's resolution efforts.⁴⁰ FINRA states that, to comply with this requirement, a member IDQS that is an SCI ATS, as defined in Rule 1000 of Regulation SCI, could provide FINRA with the same information (or a duplicate copy of any notification) submitted to the Commission as required under Regulation SCI Rule 1002(b).⁴¹ promptly after filing the notification with the Commission.⁴² FINRA states that, if a member IDQS is not an SCI ATS, it could comply with this requirement by providing FINRA prompt notification when it reasonably becomes aware of any such systems disruption, and by providing periodic updates on the event and its resolution.⁴³ Such notifications would include, on a reasonable best efforts basis, a brief description of the event, its impact, and resolution efforts.⁴⁴

FINRA states that, if the proposed rule change is approved by the Commission, FINRA will announce in a *Regulatory Notice* the effective date(s) of the proposed rule change, which may be phased in but will be no later than 365 days following Commission approval.⁴⁵ Notwithstanding the foregoing, the effective date for rescinding the rules

related to the OTCBB will not occur until: (1) Proposed Rule 6439 (except for Rule 6439(d)(1)(B)) is effective,⁴⁶ and (2) the Commission grants FINRA's request set forth in the QEQS Designation Request Letter⁴⁷ (or FINRA files a rule filing otherwise setting the implementation date for deleting the rules related to the OTCBB and the SEC approves such rule filing, if required).⁴⁸ FINRA also states that it will examine for compliance by member IDQSs with proposed Rule 6439, including by reviewing the adequacy of member IDQSs' written policies and procedures and written fair access standards required under the proposal, conducting a targeted exam of impacted member IDQSs after the initial effectiveness of the rule, and will incorporate a Rule 6439 review as part of the regular exam program for impacted member firms.⁴⁹

III. Discussion and Commission Findings

After carefully reviewing the proposed rule change, as modified by Amendment No.2, the comment letters, and the FINRA letters, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.⁵⁰ In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,⁵¹ in that it is designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. In addition, the Commission finds that the proposed rule change is consistent with Section 15A(b)(11) of the Act, in that it includes provisions governing the form and content of quotations relating to securities sold otherwise than on a national securities exchange which may

⁴⁶ FINRA states that proposed Rule 6439, with one exception related to the reporting to FINRA of order-level information, will become effective at the same time or prior to the rescission of the OTCBB rules. FINRA states that paragraph (d)(1)(B) of proposed Rule 6439 (requiring reporting of specified order-level information) may be phased at a later date within the 365-day timeframe to allow FINRA to better coordinate with the timeline for reporting information in OTC Equity Securities to the CAT under FINRA Rule 6830 (Industry Member Data Reporting). See Amendment No. 2, *supra* note 10.

⁴⁷ See *infra* note 66.

⁴⁸ See *id.*

⁴⁹ See Notice, *supra* note 3, at 63316, n.17.

⁵⁰ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁵¹ 15 U.S.C. 78o-3(b)(6).

³⁴ FINRA states that in this context, a "marketable order" refers to a message presented against a market maker's quote that is priced to be immediately executable. See *id.*, n.29.

³⁵ See proposed Rule 6439(d)(1)(A).

³⁶ See proposed Rule 6439(d)(1)(B).

³⁷ See proposed Rule 6439(d)(2). If such information is reportable to the CAT pursuant to FINRA Rule 6830, this information will be available to FINRA. Thus, separate reporting pursuant to proposed FINRA Rule 6439(d) would be duplicative.

³⁸ See proposed Rule 6439(e).

³⁹ FINRA would announce in a *Regulatory Notice* the methods and process by which members may provide systems disruption notifications to FINRA. See Notice, *supra* note 3, at 63318.

⁴⁰ See proposed Rule 6439(f).

⁴¹ 17 CFR 242.1002(b).

⁴² See Notice, *supra* note 3, at 63318.

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See Notice, *supra* note 3, at 63319.

be distributed or published by any member or person associated with a member, and the persons to whom such quotations may be supplied, and that such rules are designed to produce fair and informative quotations, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting, distributing, and publishing quotations.⁵² The Commission also finds that the proposal is consistent with Section 17B(b)(1) of the Act in that it is designed to facilitate the widespread dissemination of reliable and accurate last sale and quotation information with respect to penny stocks.⁵³

A. Rescission of Rules Governing the OTCBB

As noted by FINRA, the OTCBB currently does not display or widely disseminate quotation information on any OTC Equity Securities, and all quotation activity in OTC Equity Securities occurs on member IDQSs.⁵⁴ As a result, FINRA represents that discontinuance of the OTCBB as an IDQS will not impact the current level of quotation information available for OTC Equity Securities.⁵⁵ The Commission received two comment letters supporting FINRA's proposal to cease operation of the OTCBB.⁵⁶ These commenters agreed that the OTCBB no longer benefits investors or the marketplace due to how the market for OTC Equity Securities has evolved.⁵⁷

The Commission believes that the continued operation of the OTCBB, which FINRA represents is essentially defunct, provides no current benefit to the market and could cause investor confusion with respect to the availability of quotations in OTC Equity Securities. The Commission recently estimated⁵⁸ that, on average, there were

9,998 quoted OTC securities⁵⁹ that had published quotations per day during the calendar year 2019.⁶⁰ OTC Markets Group, which operates OTC Link ATS (a member IDQS that would be subject to proposed Rule 6439), currently identifies 81 broker-dealers that are active on the OTC Link ATS in OTC securities.⁶¹ In addition, from aggregated OTC Markets Group data for the calendar year 2019, the Commission identified 19,141 unique OTC securities for 16,059 unique companies.⁶² Of these securities, 11,542 unique OTC securities had at least one published quotation on OTC Link ATS and 9,895 unique companies had a security that was quoted at least once on OTC Link ATS during the calendar year 2019.⁶³ By contrast, the Commission understands that there currently is no quoting activity occurring on the OTCBB.⁶⁴ Given the non-existent quoting activity on the OTCBB and the emergence of member IDQSs, such as OTC Link ATS, as the dominant sources for quotation activity in OTC Equity Securities, the Commission agrees with FINRA that the continued operation of the OTCBB could result in confusion with respect to the availability of quotations in OTC Equity Securities. For example, an investor looking solely to the OTCBB for quotation data for a particular OTC Equity Security could mistakenly conclude that there are no current quotations in the security when, in fact, there may be quotations available elsewhere—i.e., on member IDQSs. Further, FINRA has represented that it will not cease operation of the OTCBB until proposed Rule 6439 (except for Rule 6439(d)(1)(B)) is effective and the Commission either grants FINRA's request set forth in the QEQS

Designation Request Letter or approves (if necessary) a subsequent rule filing from FINRA that otherwise sets the implementation date for deleting the rules related to the OTCBB.⁶⁵ Accordingly, the Commission finds that the proposed rule change to rescind FINRA's rules governing the OTCBB and cease its operation, while simultaneously implementing enhanced regulatory requirements for member IDQSs pursuant to Rule 6439, will protect investors and the public interest, consistent with Section 15A(b)(6) of the Act, by eliminating investor confusion that could arise because members no longer submit quotations to the OTCBB and, as a result, the OTCBB no longer displays any quotations in OTC Equity Securities.⁶⁶

B. Proposed Rule 6439 (Requirements for Member Inter-Dealer Quotation Systems)

The Commission finds that the proposed requirements set forth in Rule 6439 relating to member IDQSs that permit quotation updates on a real-time basis in OTC Equity Securities are consistent with the Exchange Act.

First, the Commission finds that proposed Rule 6439(a), which would require member IDQSs to establish, maintain and enforce written policies and procedures relating to the collection and dissemination of quotation information in OTC Equity Securities on or through their systems, is consistent with Section 15A(b)(11) of the Act, which requires FINRA rules relating to quotations for securities sold other than on a national securities exchange to be designed to produce fair and informative quotations, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting, distributing, and publishing quotations. The Commission believes that proposed Rule 6439(a) is designed to promote orderly procedures for collecting, distributing, and publishing quotations in OTC Equity Securities because the proposed requirements would apply to all member IDQSs that permit quotation updates on a real-time

⁵² 15 U.S.C. 78o-3(b)(11).

⁵³ 15 U.S.C. 78q-2(b)(1).

⁵⁴ See *supra* notes 18 and 22 and accompanying text.

⁵⁵ See Notice, *supra* note 3, at 63318.

⁵⁶ See OTC Link Letter 1 and STANY Letter, *supra* note 11.

⁵⁷ See STANY Letter, *supra* note 11, at 1; OTC Link Letter 1, *supra* note 11, at 1.

⁵⁸ See Securities Exchange Act Release Nos. 89891 (September 16, 2020), 85 FR 68124, 68185–86 (October 27, 2020) (“Exchange Act Rule 15c2–11 Release”). The Commission uses three sources of data on OTC securities. OTC Markets Group's “End-of-Day Pricing Service” and “OTC Security Data File” provide closing trade and quote data for the U.S. OTC equity market and include identifying information for securities and issuers. The Commission also uses information from the weekly OTC Markets Group's “OTC Company Data File.” Company Data Files include information about issuer reporting, shell, and bankruptcy status, as well as the SEC Central Index Key (CIK) identifier and whether an issuer's financial statements are audited. See *id.*, at 68185, n.640.

⁵⁹ While this data may include OTC securities that are restricted securities and thus outside of the scope of FINRA's definition of OTC Equity Securities, the Commission believes that the data is reasonably representative of quoting and trading activity in OTC Equity Securities.

⁶⁰ See *id.* at 68185. The number of securities quoted includes those securities with published priced and unpriced quotations. The Commission estimated that approximately seven percent of quoted OTC securities did not have priced quotations. See *id.* at 68185, n.641.

⁶¹ See Broker-Dealer Directory, OTC Markets Group, Inc., <https://www.otcmart.com/otc-link/broker-dealer-directory> (last visited Apr. 19, 2021, 2:16 p.m.). The Commission expects that not all of the broker-dealers included in the directory are actively engaged in quoting OTC securities. See also Exchange Act Rule 15c2–11 Release, *supra* note 58, at 68184.

⁶² See Exchange Act Rule 15c2–11 Release, *supra* note 58, at 68185.

⁶³ See *id.* at 68185, n.640. The Commission believes that OTC Markets Group data are reasonably representative of all OTC quoting and trading activity in the U.S. OTC equities market. See *id.*

⁶⁴ See *supra* note 18 and accompanying text.

⁶⁵ See Amendment No. 2, *supra* note 10.

⁶⁶ As noted above, the Commission previously designated the OTCBB as an automated interdealer quotation system and QEQS for purposes of the Penny Stock Rules. Historically, the universe of securities quoted on the OTCBB included penny stocks as well as higher priced OTC Equity Securities. See OTCBB Designation Letter, *supra* note 20. FINRA has stated that it intends to request that the Commission designate the FINRA OTC Reporting Facility (see *infra* note 109 and accompanying text), together with any FINRA-member IDQS, as a QEQS for purposes of the Penny Stock Rules (“QEQS Designation Request Letter”). See Notice, *supra* note 3, at 63116, n.15; Amendment No. 2, *supra* note 10.

basis in OTC Equity Securities. In addition, proposed Rule 6439(a) would require that a member IDQS's policies and procedures relating to collection and dissemination of quotation information must be reasonably designed to ensure that quotations received and disseminated are informative, reliable, accurate, firm and treated in a not unfairly discriminatory manner, including by establishing non-discretionary standards under which quotations are prioritized and displayed. Moreover, member IDQSs would be accountable to FINRA should their policies and procedures not meet the minimum standards set forth in proposed Rule 6439(a) and FINRA has represented that it will examine member IDQSs for compliance with the requirements of proposed Rule 6439, including by reviewing the adequacy of member IDQSs' written policies and procedures.⁶⁷ In addition, by requiring that all member-IDQSs that provide quotations in OTC Equity Securities maintain policies and procedures for collecting and disseminating quotation information, and that such policies and procedures be reasonably designed to ensure that quotations received and disseminated are informative, reliable, accurate, firm and treated in a not unfairly discriminatory manner, the Commission finds that proposed Rule 6439(a) is designed to promote just and equitable principles of trade and protect investors and the public interest, consistent with Section 15A(b)(6) of the Act.

Second, the Commission finds that proposed Rule 6439(b), which would require a member IDQS to establish non-discriminatory written standards for granting access to quoting and trading in OTC Equity Securities on its system that do not unreasonably prohibit or limit any person in respect to access to services offered by such member IDQS, is consistent with Section 15A(b)(6) of the Act, which requires that FINRA's rules be designed to promote just and equitable principles of trade and protect investors and the public interest. The Commission believes that the proposed requirements relating to fair access are designed to afford fair and non-discriminatory access for all market participants to the quotation systems of all member IDQSs that provide real-time quotations in OTC Equity Securities. Given the significant role that member IDQSs serve in the marketplace for quotations in OTC Equity Securities, the Commission believes that these requirements should improve access to quotations for these securities, which

should help to ensure that investors have the pricing information necessary to make informed investment decisions with respect to OTC Equity Securities. As a result, the Commission finds that the requirements of proposed Rule 6439(b) are designed to promote just and equitable principles of trade and protect investors and the public interest, consistent with Section 15A(b)(6) of the Act.

One commenter suggested that member IDQSs that are subject to the fair access requirements under Regulation ATS should be exempt from the fair access requirements of proposed Rule 6439(b) because such requirements are duplicative.⁶⁸ In response, FINRA stated that, to the extent that a member IDQS already is subject to Regulation ATS's fair access standards with respect to all OTC Equity Securities traded on its platform, then the proposal would only additionally require that the member IDQS prominently disclose such fair access policies and procedures to subscribers.⁶⁹ However, to the extent that a member IDQS is not already subject to the fair access standards of Regulation ATS for all OTC Equity Securities traded on its platform, FINRA stated that the proposal would fill that gap by requiring the member IDQS to expand the fair access standards to activity in all OTC Equity Securities and to prominently disclose such fair access policies and procedures.⁷⁰

As discussed, the Commission believes that the requirements relating to fair access for member IDQSs, as set forth in proposed Rule 6439(b), are consistent with the Exchange Act. The fair access requirements set forth in Rule 301(b)(5) of Regulation ATS,⁷¹ which are consistent with the requirements set forth in proposed Rule 6439(b), only apply if an ATS meets certain volume thresholds set forth Rule 301(b)(5).⁷² On the other hand, the requirements set forth in proposed Rule 6439(b) would apply to quoting and trading in all OTC Equity Securities on a member IDQS, regardless of the percentage of average daily volume that such member IDQS has in the security. Thus, FINRA's proposal would ensure the application of fair access requirements to all member IDQSs that

permit quotation updates on a real-time basis in OTC Equity Securities and to all OTC Equity Securities quoted and traded on such member IDQSs. Furthermore, as noted by FINRA in its response to comments,⁷³ proposed Rule 6439(b) sets forth an additional requirement that is not included in Rule 301(b)(5) of Regulation ATS: That a member IDQS's written standards relating to access and any material updates, modifications and revisions thereto "be prominently disclosed to subscribers within five business days following the date of establishment of the written standards or implementation of the material change and provided to prospective subscribers upon request." Accordingly, contrary to the commenter's assertion, the Commission notes that the proposed fair access requirements under Rule 6439(b) are not duplicative of the fair access requirements set forth in Rule 301(b)(5) of Regulation ATS. Further, the Commission believes that exempting member IDQSs subject to the fair access requirements under Regulation ATS from proposed Rule 6439(b), as the commenter requested, would result in such member IDQSs not being subject to a key requirement of the proposed rule and would result in disparate treatment among member IDQSs.

Third, proposed Rules 6439(c) and (d) would require non-auto-executing member IDQSs to establish, maintain and enforce written policies and procedures that are reasonably designed to address instances of unresponsiveness when orders are presented to trade with firm quotations displayed in OTC Equity Securities, and to report on a monthly basis certain aggregate and order-level information to FINRA. FINRA states that such requirements are designed to enhance compliance with the firm quote requirements for non-auto-executing member IDQSs as set forth in FINRA Rule 5220.⁷⁴ FINRA also states that the proposed information to be reported to FINRA would support its oversight of the OTC securities market by providing FINRA with additional information regarding the quotation activities occurring on non-auto-executing member IDQSs and would assist FINRA in surveilling for member compliance

⁶⁸ See OTC Link Letter 1, *supra* note 11, at 4. The Commission notes that while the commenter, in making this suggestion, referred to paragraph (c) of the proposed rule, it is paragraph (b) under proposed Rule 6439— not paragraph (c) that sets forth the proposed fair access requirements in Rule 6439. See *supra* notes 28–30 and accompanying text.

⁶⁹ See FINRA Letter 1, *supra* note 12, at 5.

⁷⁰ See *id.*, at 5–6.

⁷¹ 17 CFR 242.301(b)(5).

⁷² See *supra* note 28.

⁷³ See FINRA Letter 1, *supra* note 12, at 5–6.

⁷⁴ See Notice, *supra* note 3, at 63317. FINRA states that order unresponsiveness is an area where it regularly receives complaints. FINRA notes that in 2018, it received 119 complaints from members regarding instances of unresponsiveness to requests to execute against a displayed quotation. See *id.*, at 63318, n.26.

⁶⁷ See *supra* note 49 and accompanying text.

with firm quote obligations and unresponsiveness.⁷⁵

The Commission agrees that unresponsiveness by those who display quotations in the OTC Equity Securities market can be harmful to the market and investors in OTC Equity Securities. The principle that a displayed quotation should be “firm” is well established in the securities markets.⁷⁶ In its proposal, FINRA would require member IDQSs that provide quotations in OTC Equity Securities but do not auto-execute orders presented for execution against such quotations to adopt standards to address instances of unresponsiveness by their subscribers. Because a system that permits manual responses to orders received against displayed quotations can result in order unresponsiveness, the Commission believes that requiring such systems to establish, maintain and enforce written policies and procedures that are reasonably designed to address instances of unresponsiveness should help to ensure that market participants can reasonably rely on the displayed quotations on member IDQSs that do not auto-execute orders. In addition, the requirement for non-auto-executing member IDQSs to report aggregate and order-level information to FINRA should help FINRA surveil for unresponsiveness and “backing away” by members and to take remedial actions against such members, if necessary. As such, the Commission finds that paragraphs (c) and (d) of proposed Rule 6439 are consistent with Section 15A(b)(6) of the Act in that they are designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

Two commenters suggested that FINRA revise proposed Rule 6439(d) to exempt member-IDQSs that would have reporting obligations under proposed

paragraph (d)⁷⁷ from applicable CAT reporting obligations.⁷⁸ These commenters stated that proposed Rule 6439 would provide a reporting mechanism that is more consistent with the way in which IDQSs operate and therefore would make collection and reporting more efficient and effective than under the order-based reporting prescribed by the CAT.⁷⁹ In response, FINRA stated that the proposal was never intended to impact the outcome of whether the commenters’ order-level information should become CAT reportable and that FINRA continues to believe that it is appropriate to exempt a non-auto-executing member IDQS from reporting under proposed Rule 6439(d)(1)(B) if the IDQS’s order-level information is CAT reportable.⁸⁰

The Commission finds that FINRA’s proposal to exempt non-auto-executing member IDQSs from reporting order-level information pursuant to proposed Rule 6439(d)(1)(B) to the extent such information becomes reportable to CAT is reasonable and is designed to effectively reduce reporting redundancies. If the information required to be reported pursuant to Rule 6439(d)(1)(B) is already reportable, or becomes reportable, to the CAT pursuant to FINRA Rule 6830, it will be available to FINRA through the CAT, so separate reporting pursuant to proposed FINRA Rule 6439(d)(1)(B) would be duplicative. As a result, the Commission finds the proposed exemption is consistent with Section 15A(b)(6) of the

Act in that it is designed to promote just and equitable principles of trade.

These two commenters also requested that FINRA provide additional guidance with respect to proposed Rule 6439(c)(3) and (4), which would require non-auto-executing member IDQSs to maintain policies and procedures that specify an efficient process for documenting a subscriber’s rationale for unresponsiveness and for determining specified steps when an instance of repeated order unresponsiveness may have occurred.⁸¹ In response to these comments, FINRA provided some additional guidance specifically requested by commenters relating to the requirements of proposed Rule 6439(c)(3) and (4).⁸²

In response, one commenter raised concerns regarding the requirements of proposed Rule 6439(c)(2) and (c)(3), which would require non-auto-

⁸¹ See STANY Letter, *supra* note 11, at 3; OTC Link Letter 1, *supra* note 11, at 2–3. One commenter noted that, as the only non-auto-executing member IDQS, it would be the only IDQS that would be subject to the requirements set forth in paragraph (c) of the Rule, and requested that FINRA issue guidance confirming that its existing “saturation” feature and provision of data regarding subscriber unresponsiveness to certain order messages under its trading functionalities meet the standards set forth in paragraphs (c)(3) and (c)(4) of proposed Rule 6439. See OTC Link Letter 1, *supra* note 11, at 2–3.

⁸² See FINRA Letter 1, *supra* note 12, at 3–4. FINRA stated that it agrees that OTC Link ATS’s “saturation” feature, as FINRA understands it, is consistent with the objectives of some of the proposed requirements in Rule 6439(c), such as proposed Rule 6439(c)(1) and (c)(4), which would require that a member IDQS’s policies and procedures specify an efficient process for monitoring subscriber unresponsiveness and determining specified steps when an instance of repeated order unresponsiveness may have occurred. However, FINRA indicated that it does not believe that OTC Link ATS’s current saturation feature would meet the objectives of proposed paragraphs (c)(2) or (3) of Rule 6439, which, when combined, would require that the member IDQS provide a mechanism or process whereby one subscriber may submit or report to the non-auto-executing member IDQS a potential instance of order unresponsiveness by another subscriber and document the subscriber’s rationale in response to that event. FINRA further stated that it does not expect the member IDQS to investigate or confirm a subscriber’s rationale for the unresponsiveness, but expects that the member IDQS provide a mechanism or process that would permit a subscriber to submit or report a potential instance of order unresponsiveness and the member IDQS would be required to request that the other subscriber provide its rationale in connection with the instance. For example, the member IDQS could provide a messaging protocol or other mechanism that would permit a subscriber to submit or report to the member IDQS a potential instance of order unresponsiveness and that also would contact the other party to obtain their rationale. FINRA stated that it believes that the member IDQS is in the best position to obtain this information from the subscriber at the time of, or close in time to, the event, and to document this information and make it available to FINRA upon request. See *id.*, at 3–4.

⁷⁷ See *supra* notes 33–37 and accompanying text for a discussion of the requirements proposed under Rule 6439(d).

⁷⁸ See STANY Letter, *supra* note 11, at 2; OTC Link Letter 1, *supra* note 11, at 3–4. As proposed, non-auto-executing member IDQSs would be exempt from the reporting requirements under proposed Rule 6439(d)(1)(B) to the extent that such items are subject to reporting to the CAT under FINRA Rule 6830. See *supra* note 37 and accompanying text.

⁷⁹ See STANY Letter, *supra* note 11, at 2; OTC Link Letter 1, *supra* note 11, at 3–4. In connection with this suggested modification, one commenter stated its view that trade messages on its ATS—OTC Link ATS—are negotiations and do not constitute “orders” for purposes of Rule 6439 or with respect to any CAT reporting obligations. See OTC Link Letter 1, *supra* note 11, at 4. FINRA stated in its proposal, and again in its response to comments, that such negotiation activities are indeed “orders” for purposes of FINRA’s firm quote rule obligations and proposed Rule 6439. See Notice, *supra* note 3, at 63317, n.28 (stating that such negotiation activities are considered “orders” for purposes of firm quote rule obligations and proposed Rule 6439). See FINRA Letter 1, *supra* note 12, at 4, n.12. See also Exchange Act Rule 3b–16(c) and Rule 300(e) of Regulation ATS (defining an “order” as “any firm indication of a willingness to buy or sell a security, as either principal or agent, including any bid or offer quotation, market order, limit order, or other priced order”).

⁸⁰ See FINRA Letter 1, *supra* note 12, at 4.

⁷⁵ See *id.*

⁷⁶ See, e.g., Securities Exchange Act Release No. 60835 (October 16, 2009), 74 FR 54616 (October 22, 2009) (FINRA–2009–055) (approving proposal to adopt FINRA Rule 5220 (Offers at Stated Prices) into FINRA’s consolidated rulebook) (“The Commission believes that the proposed rule change is designed to protect investors and promote the maintenance of fair, orderly and efficient markets by prohibiting a member from publishing a report of any transaction unless the member believes that it was a bona fide purchase or sale of the security and from “backing away” from its quotations.”); Securities Exchange Act Release No. 12670 (July 29, 1976), 41 FR 32856 (August 5, 1976) (proposing Exchange Act Rule 11Ac1–1 (predecessor to Rule 602 of Regulation NMS) (“The reliability and availability of quotation information are basic components of a national market system and are needed so that broker-dealers are able to make best execution decisions for their customers’ orders, and customers are able to make order entry decisions.”)).

executing member IDQSs to maintain policies and procedures that specify an efficient process for subscribers submitting to the member IDQS complaints regarding potential instances of order unresponsiveness and documenting the subscriber's rationale for unresponsiveness.⁸³ This commenter stated that, in attempting to perform this function, its member IDQS would not have access to the necessary underlying information regarding the issue and would lack the regulatory authority to resolve the dispute.⁸⁴ This commenter further stated that these proposed requirements effectively require member IDQSs to act as a clearinghouse for subscriber complaints of non-responsiveness and blurs the distinction between SROs and commercial market operators.⁸⁵ The commenter accordingly requested that FINRA amend the proposal to only require that a member IDQS escalate instances of unresponsiveness to FINRA for review when the IDQS is informed of such cases via appropriate channels (*i.e.*, phone, email, message).⁸⁶

In response, FINRA stated that it is cognizant that IDQSs, including the commenter, lack access to certain information and lack regulatory authority and that it would not expect a member IDQS to gather extraneous information or resolve disputes (beyond steps that may be taken pursuant to proposed Rule 6439(c)(4)).⁸⁷ FINRA stated that the proposal would require that reasonable policies and procedures be developed, which could include specifying reasonable and appropriate form and methods through which a member would accept complaints from subscribers pursuant to proposed paragraph (c)(2).⁸⁸ In addition, the proposed rule would not require that member IDQSs, including the commenter, investigate or confirm a subscriber's rationale for unresponsiveness or determine whether a violation of FINRA Rule 5220 (Offers at Stated Prices) has occurred.⁸⁹ FINRA stated that the role of a member IDQS under proposed paragraph (c)(3) would be limited to information collection, and the lack of access to certain information

regarding instances of potential unresponsive would therefore not impair a member IDQS's ability to establish policies and procedures required under the proposal.⁹⁰ FINRA provided that it continues to believe that the requirements of proposed Rule 6439(c) are reasonable and appropriate for non-auto-executing member IDQSs given that order unresponsiveness only occurs on systems that permit manual response to orders received against displayed quotations and that it believed the member IDQS is in the best position to obtain this information from the subscriber at the time of, or close in time to, the event, and to document this information and make it available to FINRA upon request.⁹¹

The Commission has considered commenters' request for guidance and modifications to the proposed requirements and FINRA's responses and believes FINRA's responses support the finding that the proposed Rule 6439(c) is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, consistent with Section 15A(b)(6) of the Act. As previously noted, a system that permits manual responses to orders received against displayed quotations can result in order unresponsiveness. The Commission agrees with FINRA that requiring such systems to establish, maintain and enforce written policies and procedures that are reasonably designed to address instances of unresponsiveness, which includes requiring such systems to maintain policies and procedures that specify an efficient process for subscribers submitting to the member IDQS complaints regarding potential instances of order unresponsiveness and documenting the subscriber's rationale for unresponsiveness, should help ensure that market participants can reasonably rely on the displayed quotations on member IDQSs that do not auto-execute orders and help FINRA surveil for unresponsiveness on such systems.

Further, the Commission finds that proposed Rule 6439(e), which will require member IDQSs to publish and keep updated information about order- or quotation-related data products, is consistent with both Exchange Act Section 15A(b)(6)'s requirement that FINRA's rules be designed to protect investors and the public interest and Exchange Act Section 15A(b)(11)'s requirement that FINRA's rules contain

provisions 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. The publication of such information will provide FINRA with useful information to ensure compliance with FINRA rules and to monitor the widespread availability of OTC Equity Securities' quotation information to investors and to market participants through non-SRO sources. In addition, market participants will benefit from a better understanding of such data products when assessing a particular member IDQS as a potential trading venue.

Finally, the Commission finds that proposed Rule 6439(f), which would require a member IDQS to provide FINRA with prompt notification when it reasonably becomes aware of any systems disruption that is not de minimis that degrades, limits, or otherwise impacts the member IDQS's functionality with respect to trading or the dissemination of market data, is consistent with Exchange Act Section 15A(b)(6)'s requirement that FINRA's rules be designed to protect investors and the public interest and Section 15A(b)(11)'s requirement that FINRA's rules relating to quotations be designed to promote orderly procedures for collecting, distributing, and publishing quotations. The Commission believes that the uninterrupted operation of member IDQSs is vital to investor confidence in the OTC securities market structure and furthers the goals of Section 17B of the Act.⁹² As such, the Commission believes that proposed Rule 6439(f) should help FINRA monitor and resolve any issues that could disrupt investors' ability to quote and execute trades in OTC Equity Securities, thereby promoting orderly procedures with respect to quotations in OTC Equity Securities and protecting investors and the public interest.

FINRA has committed to examining member IDQSs for compliance with proposed Rule 6439 and has represented that it will conduct a targeted exam of impacted member IDQSs after the initial effectiveness of the rule and will incorporate a proposed Rule 6439 review as part of the regular exam program for impacted member firms.⁹³ The Commission believes that these exams should assist FINRA in reviewing

⁸³ See OTC Link Letter 2, *supra* note 9.

⁸⁴ See *id.*, at 2.

⁸⁵ See *id.*, at 3.

⁸⁶ See *id.*

⁸⁷ See FINRA Letter 2, *supra* note 12, at 3.

⁸⁸ See *id.* As an example, FINRA stated that OTC Markets may determine to accept complaints only through a specified email address or through a complaint protocol that it may establish and, in doing so, its obligations under proposed paragraph (c)(3) would be limited to complaints received through reasonable, specified, established channels. See *id.*

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *id.*, at 4.

⁹² See *infra* notes 99–101 and accompanying text.

⁹³ See *supra* note 49 and accompanying text.

for compliance by member IDQSs with the requirements of proposed Rule 6439.

The Commission notes that, despite certain suggested modifications to the proposed rule, all three commenters supported FINRA's proposal to enhance regulatory requirements for IDQSs.⁹⁴ In addition to commenters' suggested modifications discussed above,⁹⁵ two commenters also suggested that FINRA revise Rule 6437 (Prohibition from Locking and Crossing), which currently prohibits locking and crossing quotations displayed in the same IDQS, to also prohibit locking and crossing displayed quotations between connected IDQSs.⁹⁶ In its response to comments, FINRA stated that it has been actively considering whether any changes to the scope of Rule 6437 are appropriate and that it will continue to separately assess this issue outside of the context of this proposed rule change.⁹⁷ The Commission agrees with FINRA that the commenters' suggestion related to FINRA Rule 6437 is beyond the scope of the proposed rule change.

C. Section 17B of the Act

Finally, the Commission believes that the proposed rule change to rescind the rules related to the OTCBB and cease its operation and adopt proposed Rule 6439 to expand the obligations of member IDQSs that display quotations in OTC Equity Securities is consistent with Section 17B of the Act.⁹⁸ FINRA has operated the OTCBB pursuant to the Commission's obligations under Section 17B of the Act to facilitate the widespread dissemination of quotation information for penny stocks through an automated quotation system operated by a registered securities association.⁹⁹ When Congress enacted Section 17B, it found that there was a lack of reliable and accurate quotation and last sale information in the markets for penny stocks.¹⁰⁰ As such, Section 17B was designed to remedy inefficiencies and address regulatory concerns caused by this lack of reliable market information about penny stocks traded OTC, and Congress found that a fully

implemented automated quotation system for penny stocks would meet the information needs of investors and market participants and add visibility and regulatory and surveillance data to that market.¹⁰¹

Based on how the OTC market has evolved since the adoption of Section 17B,¹⁰² the Commission believes that the OTCBB no longer furthers the goals and objectives of Section 17B of the Exchange Act because it no longer is utilized as a source of quotation information for those OTC Equity Securities that meet the definition of "penny stock."¹⁰³ Rather, member IDQSs currently collect and disseminate all quotation information in OTC Equity Securities, including penny stocks, and make such quotation information available to investors and market participants.¹⁰⁴ Therefore, the Commission finds that discontinuing dissemination of potentially incomplete and misleading quotation information from the marketplace by ceasing operation of the OTCBB, while at the same time implementing enhanced requirements for member IDQSs on or through which quotations in OTC Equity Securities, including penny stocks, are currently displayed, as set forth in proposed Rule 6439, best serves and promotes the goals of Section 17B of the Act with respect to the widespread availability of quotation information in penny stocks.¹⁰⁵

FINRA has represented that, in advance of the discontinuance of the OTCBB, FINRA will take steps to ensure a smooth transition for issuers and members.¹⁰⁶ Specifically, although there are no members currently using the OTCBB, FINRA will publicize announcements through its website.¹⁰⁷ In addition, FINRA has represented that, following the cessation of the OTCBB, FINRA will continue to assess the widespread availability of quotation transparency to investors and market

participants through non-SRO sources on a regular basis, and if the availability of quotation information to investors declines, FINRA will revisit and, if necessary, file a proposed rule change to establish an SRO-operated IDQS (or other measure) to facilitate the type of widespread quotation transparency described in Section 17B of the Act.¹⁰⁸ Finally, FINRA will continue to centralize last sale transaction reporting in OTC Equity Securities, including for penny stock transactions, through the FINRA OTC Reporting Facility ("ORF"), a FINRA-operated system that provides last sale information on OTC Equity Securities.¹⁰⁹ Thus, following cessation of the OTCBB, member IDQSs subject to proposed Rule 6439 will continue to collect and disseminate quotation information for OTC Equity Securities, including penny stocks, while the ORF will continue to collect and disseminate real-time last sale price and volume information for OTC Equity Securities, including penny stocks.

IV. Conclusion

It is therefore ordered that, pursuant to Section 19(b)(2) of the Act,¹¹⁰ the proposed rule change (SR-FINRA-2020-031), as modified by Amendment No. 2, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹¹

J. Matthew DeLesDernier,
Assistant Secretary.

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DEPARTMENT OF STATE

[Public Notice: 11439]

Notice of Determinations; Culturally Significant Objects Being Imported for Exhibition—Determinations: "Impressionism to Modernism: Monet to Matisse From the Bemberg Foundation" Exhibition

SUMMARY: Notice is hereby given of the following determinations: I hereby determine that certain objects being imported from abroad pursuant to an agreement with their foreign owner or custodian for temporary display in the

¹⁰⁸ See *id.*

¹⁰⁹ See FINRA Rule 6600 and 7300 Series (OTC Reporting Facility). FINRA members generally are required to report trades in OTC Equity Securities to the ORF within 10 seconds of execution and FINRA widely disseminates this transaction information in real-time. See FINRA Rule 6622 (Transaction Reporting). See also Notice, *supra* note 3, at 63318, n.36.

¹¹⁰ 15 U.S.C. 78s(b)(2).

¹¹¹ 17 CFR 200.30-3(a)(12).

¹⁰¹ See 15 U.S.C. 78q-2(a)(3).

¹⁰² See Public Law 101-429, 104 Stat. 931 (1990).

¹⁰³ See *supra* notes 60-64 and accompanying text. As noted above, the universe of securities historically quoted in the OTCBB included penny stocks as well as higher priced OTC Equity Securities. See *supra* note 66.

¹⁰⁴ See Notice, *supra* note 3, at 63318.

¹⁰⁵ See *supra* note 20 and 66. As discussed above, the Commission previously designated the OTCBB as a QEQS for purposes of the Penny Stock Rules. In connection with FINRA's cessation of the OTCBB, FINRA has stated that it intends to request that the Commission designate the FINRA OTC Reporting Facility (see *infra* note 109 and accompanying text), together with any FINRA-member IDQS, as a QEQS for purposes of the Penny Stock Rules. See *supra* note 66.

¹⁰⁶ See Notice, *supra* note 3, at 63319.

¹⁰⁷ See *id.* FINRA represents that there currently are no OTCBB symbols. See *id.*, at 63319, n.37.

⁹⁴ See, generally, OTC Link Letter 1, STANY Letter and Global OTC Letter, *supra* note 11.

⁹⁵ See *supra* notes 68, 78-79, and 81 and accompanying text.

⁹⁶ See STANY Letter, *supra* note 11, at 3; OTC Link Letter 1, *supra* note 11, at 4-5.

⁹⁷ See FINRA Letter 1, *supra* note 12, at 6.

⁹⁸ 15 U.S.C. 78q-2. See also *supra* note 20. Section 17B was enacted by Congress as part of the Penny Stock Act, which was designed to remedy inefficiencies and address regulatory concerns caused by the lack of reliable market information on penny stocks traded OTC.

⁹⁹ See 15 U.S.C. 78q-2(b). See also OTCBB Designation Letter, *supra* note 20.

¹⁰⁰ See 15 U.S.C. 78q-2(a)(1).