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April 30, 2010  
Ms. Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-1090

**Re: File No. SR-FINRA-2009-089 -- Response to Comments**

Dear Ms. Murphy:

This letter responds to comments received by the Securities and Exchange Commission (“SEC” or “Commission”) regarding the above-referenced rule filing, a proposal to adopt FINRA Rule 6490 (Processing of Company-Related Actions), to clarify the scope of FINRA’s authority when processing documents related to announcements for Company-Related Actions for non-exchange listed securities and to implement fees for such services. The proposed rule change was published for comment in the Federal Register on December 28, 2009.<sup>1</sup> The Commission received two comment letters in response to the proposed rule change.<sup>2</sup>

One commenter expresses general support for FINRA’s efforts to clarify the scope of its regulatory authority and discretionary power when processing documents related to SEA Rule 10b-17 announcements and other Company-Related Actions, including name changes, mergers and bankruptcy, and to establish fees for such services.<sup>3</sup> The other commenter also expresses general support for FINRA’s efforts to prevent fraudulent activities in the over-the-counter (“OTC”) market.<sup>4</sup> However, the commenters raise concerns regarding the scope of the proposed authority, specific factors to be considered

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<sup>1</sup> See Securities Exchange Act (“SEA”) Release No. 61189 (December 17, 2009), 74 FR 68648 (December 28, 2009) (“FINRA Rule 6490 Proposing Release”). The comment period closed on January 19, 2010. See also the FINRA Rule 6490 Proposing Release for a definition of the term “Company-Related Action.”

<sup>2</sup> See Letter from Liz Heese, Managing Director, Issuer Services, Pink OTC Markets Inc., to Elizabeth M. Murphy, Secretary, SEC, dated January 20, 2010 (“Pink OTC”) and Letter from Stephen J. Nelson, The Nelson Law Firm, LLC, to Elizabeth M. Murphy, Secretary, SEC, dated February 18, 2010 (“Nelson Law Firm”).

<sup>3</sup> See Pink OTC.

<sup>4</sup> See Nelson Law Firm.  
Investor protection. Market integrity.

concerns regarding the scope of the proposed authority, specific factors to be considered by FINRA in finding a request to process documentation deficient, the impact of certain proposed fees on FINRA's statutory obligations and OTC issuer behavior especially in the context of "Liquidating OTC Securities," and operational issues.<sup>5</sup>

*Scope of Proposed Authority*

One commenter asserts that "[p]roposed Rule 6490 should be amended to provide that FINRA will continue to set ex-dividend dates where appropriate for the protection of investors and the public interest, whether or not it receives timely 10b-17 Notices or payments for processing corporate actions."<sup>6</sup> The commenter further raises concerns with regard to the impact the proposal will have on the market for Liquidating OTC Securities, specifically that "issuers of Liquidating OTC Securities often neglect to deliver [Rule 10b-17] notice to FINRA," or that trustees representing the issuer may be advised to not pay fees to FINRA as this may diminish the value of the estate.<sup>7</sup> The commenter argues that the proposed rule will allow FINRA not to set an ex-dividend date for a Liquidating OTC Security because notice and/or fees have not been given to FINRA and this could "burden transactions in Liquidating OTC Securities with wholly unnecessary risks and transaction costs." The commenter suggests that proposed FINRA Rule 6490 is inconsistent with FINRA's obligations under Section 15A of the Exchange Act.

FINRA believes these concerns are not valid. First, an issuer that files for bankruptcy, or a trustee acting on its behalf, faces numerous fees and charges in an effort to discharge the issuer's obligations and FINRA sees no reason that its proposed fees should not also apply to such issuers – particularly because FINRA's proposed Rule 10b-17 corporate action processing (and associated fee) will play a key role in furthering investor protection and market integrity in the market for non-exchange listed securities. Second and more importantly, the proposal includes Supplementary Material .01 (SEA Rule 10b-17 Fee Accumulations) and .02 (Requests by Third-Parties), both of which expressly address the commenter's concerns.

Specifically, FINRA recognizes that determining ex-dates for securities is a critical function that protects and promotes market integrity. For this very reason, FINRA has expressly stated in the rule text of proposed Supplementary Material .01 (SEA Rule 10b-17 Fee Accumulations), that "*notwithstanding the timeliness of SEA Rule 10b-17 Action submission or the failure to pay applicable fees*, FINRA will make its best efforts to process documentation related to SEA Rule 10b-17 Actions (which may include

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<sup>5</sup> See Nelson Law Firm, which uses the term "Liquidating OTC Securities" to mean non-exchange listed securities of issuers that are bankrupt, in liquidation or involved in various forms of reorganization.

<sup>6</sup> See Nelson Law Firm.

<sup>7</sup> See Nelson Law Firm.

establishing an ex-date) that are not otherwise deemed incomplete or otherwise deficient by FINRA because of the critical nature of this information to the marketplace.”

Moreover, FINRA recognizes that non-compliance with SEA Rule 10b-17 can have a negative impact on the marketplace. Again, for this very reason, FINRA has expressly stated in the rule text of proposed Supplementary Material .02 (Requests by Third-Parties), that when FINRA is unable to obtain notification from an issuer, FINRA may in its discretion review and process an SEA Rule 10b-17 Action or Other Company-Related Action based on information from a third-party, such as DTCC, foreign exchanges or regulators, members or associated persons, when it believes such action is necessary for the protection of the market and investors. FINRA strongly believes the proposed provisions strike the correct balance. However, FINRA notes that in all cases, it must have actual substantiated knowledge of a Company-Related Action from a credible source before it can consider announcing an action.

Finally, Section 15A of the Exchange Act, among other things, provides that a registered securities association such as FINRA, adopt rules that are “designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.”<sup>8</sup> FINRA believes that the proposed rule reflects FINRA’s commitment to this statutory requirement. By adopting formal procedures to collect and review documents related to the processing of Company-Related Actions, FINRA expects to improve compliance with SEA Rule 10b-17, which will enable FINRA to announce information more timely to the marketplace – a benefit to both investors and the securities markets.

#### *Clarification of Certain Explicit Factors*

Proposed FINRA Rule 6490 provides that where a Company-Related Action is deemed deficient, the Department of Operations may determine that it is necessary for the protection of investors, the public interest and to maintain fair and orderly markets, that documentation related to a Company-Related Action will not be processed. The Department may consider the five explicit factors set forth in the proposal in making such a determination. One commenter raises concern about the application of two such factors, specifically: (1) the issuer is not current in its reporting obligations, if applicable, to the SEC or other regulatory authority, and (2) there is significant uncertainty in the settlement and clearance process for the security.<sup>9</sup>

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<sup>8</sup> See 15 U.S.C. 78o-3(b)(6).

<sup>9</sup> See Pink OTC.

With respect to the first factor noted above, the commenter asks whether a request to process a Company-Related Action by an issuer that has a current obligation to report under the Exchange Act, but is delinquent in such obligation, would be automatic grounds for a deficiency determination by FINRA. FINRA notes that the failure of an issuer to be current in its reporting obligations, if applicable, to the SEC or other regulatory authority, is one of five explicitly enumerated factors that *may* be considered by FINRA in making a determination. Where FINRA reasonably believes that an issuer submitting a request to process documentation related to a Company-Related Action has triggered one of the explicitly enumerated factors, the Department would generally conduct an in-depth review of the Company-Related Action and seek additional information or documentation from the issuer. The Department would have the discretion not to process any such actions that are incomplete or when the Department determines that is necessary for the protection of investors, the public interest and to maintain fair and orderly markets.

With respect to the second factor discussed above, the same commenter states its view that “[t]here is significant divide today in the OTC marketplace regarding the Depository Trust Corporation’s (DTC’s) proposed rules for eligibility of transfer agents and issuers into DTC’s FAST system.”<sup>10</sup> The commenter asks whether a request to process documentation for a Company-Related Action by an issuer that is not designated by DTC as FAST eligible would be automatic grounds for a deficiency determination by FINRA. FINRA notes that the proposal does not mandate any particular mechanism of clearance and settlement for an issuer’s securities, including FAST designation by DTC. Where FINRA reasonably believes that processing documentation related to a Company-Related Action will lead to confusion or inability to settle and clear trades in that security, the Department will consider that factor in making its determination. For example, where there is uncertainty regarding the total outstanding shares of the issuer either before and after a proposed stock split, concerns regarding the validity of outstanding shares, or other similar situations, the Department would, as noted above, generally conduct an in-depth review of the Company-Related Action and seek additional information or documentation from the issuer. The Department would have the discretion not to process any such actions that are incomplete or when the Department determines that is necessary for the protection of investors, the public interest and to maintain fair and orderly markets.

### *Fees*

One commenter generally supports the establishment of fees by FINRA relating to the processing of documentation for Company-Related Actions.<sup>11</sup> However, the commenter raises concerns about the impact such fees may have on the behavior of OTC issuers in terms of their obligations to timely report. The commenter suggests that a \$200 fee for a timely submitted request to process documentation related to a Company-Related Action will cause more issuers to be non-compliant with their reporting

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<sup>10</sup> Id.

<sup>11</sup> Id.

requirements. The commenter suggests, for example, that more issuers may effect a corporate action through their transfer agent and DTC without ever notifying FINRA to avoid payment of the proposed fees.

An issuer that fails to notify FINRA of a proposed corporate action, as required by SEA Rule 10b-17, is potentially violating an anti-fraud rule of the federal securities laws. The possible sanctions for violating federal securities laws are significant. In addition, transfer agents that knowingly aid and abet such violations may also be subject to possible sanctions. Non-compliance with SEA Rule 10b-17 has been an on-going concern, and FINRA expects that the adoption of this proposed rule change will reduce such non-compliance. In addition, where FINRA staff has actual knowledge, it will use its best efforts to provide a list of non-complying issuers to the SEC staff.

Both commenters seek clarification on how FINRA will process Company-Related Actions in instances where such fees are not paid.<sup>12</sup> As described in the proposal, FINRA is proposing to adopt Supplementary Material .01 (SEA Rule 10b-17 Fee Accumulations) which would permit FINRA to process documentation for an SEA Rule 10b-17 Action even if the fee is not paid in a timely fashion. In such cases, FINRA would continue to process documentation related to a Company-Related Action (that is not otherwise deemed deficient) because of the critical nature of SEA Rule 10b-17 information to the marketplace. However, as described in the proposal, all unpaid SEA Rule 10b-17 Action fees associated with a specific OTC issuer would be accumulated and FINRA would not process Voluntary Symbol Request Changes until all unpaid accumulated fees are paid.

One commenter also raises concerns regarding the proposed \$5,000 fee for late notifications of Company-Related Actions.<sup>13</sup> The commenter notes that the late fee is intended to act as a deterrent to late notifications, but is concerned that the "\$5,000 is a significant financial burden to many OTC issuers, many of which are small businesses run by officers who are focusing on their own business needs and may not be knowledgeable about Rule 10b-17 timely notification requirements."<sup>14</sup> Ignorance of the law should not be a valid excuse to violate rules that are intended to protect investors and provide important information to the marketplace. FINRA notes that the proposed late fees are staggered. An issuer that provides notice late, but at least five days prior to the Company-Related Action Date will be charged \$1,000, at least one day prior to the Company-Related Action Date will be charged \$2,000, and issuers that provide notice generally on or after the Company-Related Action Date will be charged \$5,000. FINRA believes the late fees will create incentives to report timely and must be significant enough to discourage issuers from repeated untimely reporting.

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<sup>12</sup> See Pink OTC and Nelson Law Firm.

<sup>13</sup> See Pink OTC.

<sup>14</sup> Id.

As the proposed fees are new, FINRA cannot state with accuracy what percentage of issuers would be subject to the late fees. FINRA plans to notify issuers of the proposed rule and fees (if approved) by issuing a Regulatory Notice, sending out alerts through electronic platforms used by market participants, and posting this information on its dedicated web page for OTC Actions. FINRA is also actively reaching out to industry groups that are involved in issuer corporate actions to engage in outreach to the relevant parties that will be impacted by the proposed new rule. FINRA expects that the percentage of late notifications will decline over time.

### *Operational Issues*

One commenter offers several suggestions for improving the current processing and dissemination of Company-Related Actions.<sup>15</sup> First, the commenter recommends that FINRA limit intra-day processing of Company-Related Actions to emergency situations such as security revocations, and quotations and trading halts. As a regulator, FINRA generally believes that, where appropriate and feasible, corporate action information should be disseminated real-time to the marketplace. However, FINRA notes that its current policy generally is to process only the following Company-Related Actions intra-day: SEC security revocations, quotation and trading halts, and cancellation of securities pursuant to an effective bankruptcy court order. For routine Company-Related Actions, such as name and symbol changes, FINRA's general policy is to announce actions on the Daily List published on OTCBB.com with a future effective date. In some cases, often because of failure to receive timely notification, setting a future effective date is not possible.

Second, the commenter recommends that FINRA coordinate processing Company-Related Actions across all departments within FINRA. FINRA notes that relevant departments do work closely in this regard. However, not all systems and platforms used by market participants to access such data are controlled by FINRA, and there can be a lag in the dissemination of certain information. FINRA continues to work diligently with third-party vendors to minimize inconsistencies and/or delays.

Third, the commenter recommends that FINRA ensure information regarding Company-Related Actions is disseminated accurately and consistently on Daily Lists found on both the OTCBB.com and NasdaqTrader websites. Following a determination to process documentation related to a Company-Related Action, FINRA posts relevant information regarding such Company-Related Action on the OTCBB.com website. The NasdaqTrader website simply provides a hyperlink to the OTCBB.com Daily List and is not independently generated. As a result, FINRA believes there should be no reason for inconsistencies on the two websites regarding the Daily List for Company-Related Actions.

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<sup>15</sup> See Pink OTC.

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FINRA believes that the foregoing responds to the material issues raised by the comment letters to this rule filing. If you have any questions, please contact Stephanie Dumont, Senior Vice President and Director of Capital Markets Policy, at 202-728-8176; or me at (202) 728-6903.

Sincerely,

A handwritten signature in black ink, appearing to read "Kosha Dalal", written in a cursive style.

Kosha K. Dalal  
Associate Vice President and  
Associate General Counsel