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Via email at pubcom@finra.org

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 21-35 Order Routing Disclosures for OTC Equity Securities

Dear Ms. Mitchell,

Fidelity Investments[1] appreciates the opportunity to provide comments on FINRA's proposal to require member firms to make publicly available, for each calendar quarter, a report on their routing of non-directed orders in over-the-counter ("OTC") Equity Securities that are submitted on a held basis. The proposed new quarterly reports would be similar to those required for NMS securities under the Securities and Exchange Commission's ("SEC") Rule 606(a) of Regulation NMS, with certain modifications to reflect the different structure of the OTC market. FINRA also requests comment on possible steps to further facilitate investor access and understanding of current order routing disclosures for NMS securities (collectively, the "Proposed OTC Reports" or the "Proposal").[2]

Fidelity supports FINRA efforts to provide transparency into broker routing and economic practices in OTC Equity Securities, an asset class that has experienced significant growth but remains opaque. Standardized information about the way brokers handle OTC orders can help investors evaluate broker routing decisions, potential conflicts of interest, and the quality of trade executions. Fidelity has repeatedly supported SEC efforts to enhance

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[1] Fidelity and its affiliates are leading providers of mutual fund management and distribution, securities brokerage, and retirement recordkeeping services, among other businesses. Fidelity submits this letter on behalf of National Financial Services LLC ("NFS"), a Fidelity Investments company, a SEC registered broker-dealer clearing firm and FINRA member and Fidelity Brokerage Services LLC ("FBS"), a SEC registered introducing broker-dealer, FINRA member, and affiliate of NFS. Fidelity generally agrees with the views expressed by the Financial Industry Forum ("FIF") in their comment letter and we submit this letter to supplement the FIF letters on specific issues.

[2] *Order Routing Disclosures for OTC Equity Securities*, FINRA Regulatory Notice 21-35 (October 6, 2021) ("Regulatory Notice"), *available at:* Regulatory Notice 21-35 | FINRA.org Capitalized terms have the meanings ascribed to them in the Regulatory Notice.

transparency of broker order handling and routing practices.[3] Securities regulators should be empowering investors to make good trading decisions by creating more transparency around broker executions and execution quality statistics. While the Proposal largely accomplishes these goals, we offer the following recommendations to enhance its effectiveness:

- FINRA and the SEC should consider how various order routing disclosure reports are used in the marketplace and/or could be used together. FINRA and the SEC should coordinate their oversight of order routing reports to ensure consistency in process and interpretation;

- FINRA should make publicly available a list of OTC Equity Securities appearing in each section of the Proposed OTC Reports, and provide further clarity concerning the definition of market center and fees to be disclosed;

- FINRA should consider whether all, or part, of the Proposed OTC Reports could be populated by CAT data; and

- FINRA should work to consolidate all order routing reports on a centralized website and make this content available without cost.

Each of these points is discussed further below.

<u>FINRA and the SEC should consider how various order routing disclosure reports are used in the marketplace and/or could be used together. FINRA and the SEC should coordinate their oversight of order routing reports to ensure consistency in process and interpretation.</u>

SEC Rule 605 currently requires market centers that trade NMS equity securities to make available monthly reports containing statistical information about covered order executions. These reports provide information about each market center's: (i) execution quality on a stock-by-stock basis, including how market orders of various sizes are executed relative to the public quotes; (ii) effective spreads; and (iii) executions at prices better than the public quotes to investors using limit orders. The rule requires, among other items, that the reports are prepared in a consistent, usable, and machine-readable electronic format, and made available for downloading from a website that is free and readily accessible to the public.

Similarly, SEC Rule 606(a) requires broker-dealers that route held, non-directed customer orders in Regulation NMS stocks and listed options to prepare quarterly reports that disclose specific information about their order routing practices. These reports include a discussion of the material aspects of the member's relationship with each identified venue,

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[3] *See* Securities and Exchange Commission, Proposed Rule, *Disclosure of Order Handling Information*, Exchange Act Release No. 78309, 81 FR 49432 (July 27, 2016). Fidelity comments *available at:* https://www.sec.gov/comments/s7-14-16/s71416-26.pdf. Securities and Exchange Commission, Proposed Rule, *Regulation of NMS Stock Alternative Trading Systems* ("ATS"), Exchange Act Release No. 76474, 80 FR 80998 (Dec. 28, 2015). Fidelity comments *available at:* https://www.sec.gov/comments/s7-23-15/s72315-22.pdf

including a description of any arrangement for payment for order flow and any profit-sharing relationship and a description of any terms of such arrangement, written or oral, that may influence a member's order routing decision. The reports are required to be posted on a website that is free and readily accessible to the public for a period of three years from the initial date of posting on the website.

To ensure the Proposed OTC Reports serve their intended audience and meet intended regulatory goals, FINRA and the SEC should consider how various order routing disclosure reports are used in the marketplace and/or could be used together.[4] It would be good to determine, perhaps through investor testing or outreach, whether investors find the reports useful. For example, Rule 605 reports may not be as helpful to retail investors making broker decisions because they do not contain metrics from the perspective of the retail broker. FINRA might also review how broker-dealers use data from the reports for purposes of meeting their best execution obligations. Similarly, regulators might consider how Rule 605, Rule 606 and the Proposed OTC Reports could be used together, identifying any modifications that might be needed to accommodate that result.

FINRA and the SEC should also coordinate their oversight of order routing reports to ensure consistency in process and interpretation. Although the SEC has historically promulgated order routing disclosures under Rules 605 and 606, we do not object to FINRA promulgating rules regarding order routing disclosures for OTC Equity Securities given FINRA's previous work in the OTC market. However, this course of action will result in broker-dealers creating similar reports for two different regulators.

We would expect that the reporting framework across all three reports – Rule 605 reports, Rule 606 reports, and the Proposed OTC Reports to be consistent. Broker-dealers should not need to create duplicative reporting systems to accommodate similar FINRA and SEC requirements. Similarly, if broker-dealers undertake a new FINRA order routing report framework for OTC securities, regulatory interpretations governing that framework should be consistent, to the extent possible, with SEC interpretations regarding the Rule 605 and 606 reports.

FINRA should make publicly available a list of OTC Equity Securities appearing in each section of the Proposed OTC Reports, and provide further clarity concerning the definition of market center and fees to be disclosed.

The Proposed OTC Reports would be separated into three sections for: (i) domestic OTC Equity Securities; (ii) American Depository Receipts (ADRs) and foreign ordinaries that are

[4] The SEC's Spring 2021 Regulatory Agenda notes under the category of Market Structure Modernization, that the Division of Trading and Markets "is considering recommending that the Commission propose rule amendments to modernize rules related to equity market structure such as payment for order flow, best execution (amendments to Rule 605), market concentration, and certain other practices." This proposed rule amendment provides regulators an opportunity to consider how Rule 605, Rule 606 and the Proposed OTC Reports are currently used and could be used together.

OTC Equity Securities; and (iii) Canadian-listed securities trading in the United States as OTC Equity Securities. FINRA notes that for purposes of these sections, securities would be delineated based on the market where such securities trade, rather than on the location of the issuer.

We generally agree with the proposed three categories of OTC securities, however OTC Equity Securities are not as clearly defined as NMS securities and different firms may make different decisions regarding the reporting section in which they place an OTC Equity Security. To alleviate confusion and promote consistency in reporting, FINRA should make publicly available for free on its website a list of those OTC Equity Securities appearing in each of the proposed categories above, adjusting for ticker symbol changes and relevant corporate actions. By providing a "golden copy" of securities to be placed in each section, FINRA would promote consistency in reporting among member firms, making the reporting more useful to the marketplace. Moreover, this course of action is consistent with previous regulatory requests to report securities in specific categories, such as in the case of the SEC's Tick Size Pilot.[5]

FINRA should also clearly define what is considered a "market center" for purposes of the Proposed OTC Reports. Consistent with the SEC's approach to Rule 606, FINRA intends that a "venue" for purposes of the proposed OTC Reports would be broadly defined to cover any market centers or any other person or entity to which a member routes orders for execution. Although Regulation NMS defines the term "market center" in the context of NMS securities, FINRA should consider whether this definition is appropriate for OTC Equity Securities. The OTC market is a decentralized dealer-to-dealer market that has a different market structure than NMS securities and these differences, in the context of what is considered a market center, should be further discussed and evaluated.

Similarly, FINRA should provide further clarity on the types of fees that should be included in the Proposed OTC Reports. While retail broker economic relationships with wholesalers are straightforward, the OTC market has a variety of fees and it is not clear what other types of fees FINRA would expect to be included in the Proposed OTC Reports. For example, it is not clear how OTC quote access fees should be treated for purposes of the Proposed OTC Reports. Further guidance on fees would promote consistency in reporting and make the reports more useful to the marketplace.

Use of Consolidated Audit Trail ("CAT") data.

Broker-dealers are currently required to report to the CAT all orders or quotes in NMS equity securities, OTC equity securities and listed options. FINRA should explore obtaining data for all, or part, of the Proposed OTC Reports from broker-dealer CAT submissions.

[5] For the SEC's Tick Size Pilot, FINRA produced a Pilot Securities Daily List each day, identifying the securities included in the Tick Size Pilot, and the pilot group for each security. Additionally, FINRA produced a Pilot Securities Change List, identifying any changes made to the securities included in the pilot. Changes included name changes, symbol changes, movements from one pilot group to another, or removal from the Tick Size Pilot. *See* Securities Exchange Act Release No. 34-74892, 80 FR 27515 (May 6, 2015) *available at*: https://www.govinfo.gov/content/pkg/FR-2015-05-13/pdf/2015-11425.pdf

While certain data fields in the Proposed OTC Reports, such as the proposed requirement to disclose the material aspects of the member's relationship with each venue identified and the specific economics of order routing, would not be information currently available in the CAT, order routing information is information currently reported to the CAT that could be used to populate the Proposed OTC Reports. Given the time and expense that member firms, FINRA, the SEC and the national securities exchanges have dedicated to the CAT, we believe that this potential alternative to broker-dealers creating the Proposed OTC Reports merits further regulatory exploration. To this end, we encourage FINRA to work with the industry to determine the feasibility of deriving all, or part, of the data for the Proposed OTC Reports from the CAT.

<u>FINRA should work to consolidate all order routing reports on a centralized website and make this content available without cost.</u>

FINRA is interested in public feedback on any steps FINRA could take to facilitate investor access to, and understanding of, the existing order handling disclosures for NMS securities required by Rule 606. Today, Rule 606 and 605 reports are generally only posted on individual websites. Accessing, aggregating, and using these reports to draw meaningful conclusions is a time-consuming process. We agree that it would help customers, market participants and researchers to have these available and accessible in a central location.

We recommend that FINRA work with the SEC to consolidate Rule 605 reports, Rule 606 reports and the Proposed OTC Reports in a central location, potentially on the FINRA website. This proposed practice would be analogous to FINRA's current practice of posting different statistics on their website today.[6] We believe that consolidating all order handling information in one location on the FINRA website will make it easier for market participants to find and view this data and for investors to access and understand the reports.

Importantly, FINRA should provide the reports on this site free of charge. Allowing retail investors to access this data on a no-fee basis will provide investors insight into broker-dealers order handling practices that allows them to make better trading decisions. Broker-dealers who are required by regulation to provide OTC order routing information to FINRA should not have to pay FINRA to receive this information in return.

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[6] For example, today FINRA publishes over-the-counter (OTC) trading information on a delayed basis for each alternative trading system (ATS) and member firm with a trade reporting obligation under FINRA rules. The trading information is derived directly from OTC trades that ATSs/member firms report to FINRA's equity trade reporting facilities. *See* https://otctransparency.finra.org/otctransparency/AtsIssueData. We suggest that FINRA follow a similar publication construct for order routing reports.

Fidelity would be pleased to provide further information and to participate in any direct outreach efforts FINRA undertakes regarding the proposal.

Sincerely,

Derrick Chan