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SECURITIES AND EXCHANGE COMMISSION

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17 CFR Part 240

[Release No. 34-90769; File No. S7-23-20]

Notice of Proposed Conditional Exemptive Order Granting a Conditional Exemption from the Information Review Requirement and the Recordkeeping Requirement under the Securities Exchange Act of 1934 for Certain Publications or Submissions of Broker-Dealer Quotations on an Expert Market

AGENCY: Securities and Exchange Commission.

ACTION: Notice of proposed conditional exemptive order; request for comment.

SUMMARY: Pursuant to Section 36(a)(1) of the Securities Exchange Act of 1934 (the “Exchange Act”) and Rule 15c2-11 under the Exchange Act (as published in the Federal Register on October 27, 2020, “Amended Rule 15c2-11” or the “Amended Rule”), the Securities and Exchange Commission (the “SEC” or the “Commission”) is proposing to grant exemptive relief, subject to certain conditions, to permit broker-dealers to publish or submit proprietary quotations for securities, on a continuous basis, in a market where the distribution of such quotations is restricted to sophisticated or professional investors, without complying with the information review and recordkeeping requirements of Amended Rule 15c2-11(a)(1)(i) and (d)(1)(i)(A), respectively.

DATES: Comments should be received on or before [INSERT DATE 30 DAYS FOLLOWING THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission’s Internet comment form (<https://www.sec.gov/rules/exorders.shtml>); or
- Send an email to rule-comments@sec.gov.

Paper comments:

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

All submissions should refer to File Number S7-23-20. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<https://www.sec.gov/rules/exorders.shtml>). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549-1090 on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change. Persons submitting comments are cautioned that the Commission does not redact or edit personal identifying information from comment submissions. Commenters should submit only information that they wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: John Guidroz, Branch Chief, James Curley, Laura Gold, Theresa Hajost, Patrice Pitts, Special Counsels, Elizabeth Sandoe, Senior Special Counsel, Josephine Tao, Assistant Director, or Mark Wolfe, Associate Director, at (202) 551-5777, in the Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

SUPPLEMENTARY INFORMATION:

I. Background

A. Adoption of Amendments to Rule 15c2-11

Rule 15c2-11 specifies key, basic issuer information that must be obtained and reviewed before a broker-dealer may initiate (or resume) quotations for a security in a market other than a national securities exchange, subject to certain exceptions.¹ The Amended Rule becomes

¹ The "information review requirement" refers to the Amended Rule's requirement to obtain and review specified issuer information, and to have a reasonable basis under the circumstances for believing, based on a review of such information, together with any applicable supplemental information also specified under the Amended Rule, that the issuer information is accurate in all material respects and is from reliable sources, before a broker-dealer may publish or submit a quotation to initiate or resume a quoted market in the issuer's security.

effective on December 28, 2020. Except for paragraph (b)(5)(i)(M) of the Amended Rule, compliance is required nine months following the effective date, on September 28, 2021 (the “Compliance Date”).²

Under the Amended Rule, certain applicable issuer information must be “current” and “publicly available,” as those terms are defined in the Amended Rule,³ for a broker-dealer to initiate (or resume) a quoted market in the issuer’s security after complying with the information review requirement.⁴ Further, with respect to the “piggyback” exception, which allows a broker-dealer to rely on the quotations of the broker-dealer that initially complied with the information review requirement to maintain continuous quotations for the security in an interdealer quotation system (an “IDQS”), the amendments require that applicable issuer information also must be current and publicly available, timely filed, or filed within 180 calendar days from the end of the issuer’s most recent fiscal year or any quarterly reporting period that is covered by a report required by Section 13 or 15(d) of the Exchange Act, as applicable.⁵ As a result, on the

² See *Publication or Submission of Quotations Without Specified Information*, Exchange Act Release No. 89891 (Sept. 16, 2020), 85 FR 68124, 68172 (Oct. 27, 2020) (“Adopting Release”). The compliance date that is nine months after the effective date of the Rule is referred to herein as the “Compliance Date.” Between the effective date and the Compliance Date, broker-dealers must comply with the provisions of Rule 15c2-11 prior to amendment. The compliance date for paragraph (b)(5)(i)(M) of the Amended Rule is two years after the effective date of the Amended Rule.

³ See Amended Rule 15c2-11(e)(2) (defining the term “current”), (e)(5) (defining the term “publicly available”).

⁴ See Amended Rule 15c2-11(a)(1)(i)(B). The Rule’s recordkeeping requirement is unchanged under the amendments, except broker-dealers no longer have to preserve documents that are available on the Commission’s Electronic Data Gathering, Analysis and Retrieval System (“EDGAR”). See Amended Rule 15c2-11(d)(1)(i)(A).

⁵ See Amended Rule 15c2-11(f)(3)(i)(C) (requiring an issuer’s specified information to be, depending on the regulatory status of the issuer, one of the following: (1) current and publicly available; (2) timely filed (i.e., filed by the prescribed due date for a report or statement as required by an Exchange Act or Securities Act of 1933 (the “Securities Act”) reporting obligation); or (3) filed within 180 calendar days from a specified period); see also Amended Rule 15c2-11(e)(3) (defining the term “interdealer quotation system”). For purposes of this proposed exemptive order, these requirements with respect to the piggyback exception are referred to as the requirement to be “current and publicly available.” The amendments also (1) modify the piggyback exception’s frequency-of-quotation requirement by eliminating both the 12-business-day requirement and the 30-calendar-day window while still requiring that no more than four business days in succession elapse without a quotation, see Amended Rule 15c2-11(f)(3)(i)(A), and (2) limit the amount of time during which broker-dealers may rely on the exception to quote securities of issuers that they have a reasonable basis under the circumstances for believing are shell companies, see Amended Rule 15c2-11(f)(3)(B)(2).

Compliance Date, broker-dealers may not rely on the piggyback exception to maintain a quoted market in the securities of issuers for which information is not current and publicly available.

The Commission received comments on the proposed amendments to Rule 15c2-11 that expressed interest in the formation of an “expert market” for certain securities that become ineligible for quotation after the Compliance Date because the information required by the Rule is not current and publicly available for the issuers of those securities.⁶ In response to comments, the Commission stated that, under certain conditions and circumstances, an “expert market” could enhance liquidity for sophisticated or professional investors in grey market securities,⁷ as well as for small companies seeking growth opportunities that might prefer to be quoted in a market that is limited to such persons.⁸ The Commission stated that it “preliminarily believes that any such expert market must not have the potential to develop into a parallel market for which quotations are accessible by retail investors and the general public.”⁹

The Commission stated that it has the authority to issue exemptive relief by order, under Section 36 of the Exchange Act and under the Amended Rule,¹⁰ to facilitate the formation and implementation of such an expert market. The Commission also stated that, in doing so, it may consider certain safeguards to protect retail investors, such as (1) the types of investors who may access quotations in this market (e.g., sophisticated investors that have the ability to assess an investment opportunity, including the ability to analyze its risks and rewards), and (2) the types of securities that may be quoted in such a market (e.g., those that were quoted in reliance on the

⁶ Comments are available on the Commission’s website at <https://www.sec.gov/comments/s7-14-19/s71419.htm>.

⁷ Grey market securities are securities that trade over-the-counter but for which no quoted prices are published or submitted in a quotation medium for buyers and sellers to access.

⁸ See Adopting Release at 68145.

⁹ *Id.*

¹⁰ The exemptive authority provision of Rule 15c2-11 has been re-lettered from paragraph (h) to paragraph (g) under the Amended Rule. In addition, the standard for exemptive authority under the Amended Rule conforms to the provision for exemptive authority in Section 36 of the Exchange Act. See *id.* at 68167.

piggyback exception on the business day preceding the initial quotation that is published or submitted in any such market).¹¹

B. Request for Exemptive Relief by OTC Link LLC

In response to the Commission’s discussion, OTC Link[®] LLC (“OTC Link LLC”), a wholly owned subsidiary of OTC Markets Group Inc. (“OTC Markets Group”), has submitted a request on behalf of certain broker-dealers for an exemption from the Amended Rule’s information review requirement and recordkeeping requirement to permit such broker-dealers to publish or submit, on a continuous basis, proprietary quotations for certain securities of issuers for which there is no current and publicly available information, and in other specified circumstances, on one of its electronic platforms where the distribution of such quotations is limited to sophisticated or professional investors.

OTC Link LLC operates trading platforms on which broker-dealers provide liquidity and execution services for over 11,000 U.S. and global securities. One such platform is OTC Link ATS, an alternative trading system (“ATS”) that meets the definition of a “qualified interdealer quotation system” under paragraph (e)(6) of the Amended Rule. The securities that are quoted on OTC Link ATS are organized into market tiers based on several factors, including the public availability of current issuer information and whether an issuer meets minimum financial thresholds. These market tiers include the OTCQX[®] Best Market, the OTCQB[®] Venture Market, the Pink Open Market, and the Expert Market. The Expert Market is a distinct market tier on which OTC Link LLC’s broker-dealer subscribers (each, a “Subscriber” and collectively, the “Subscribers”)¹² can, among other things, find price transparency in certain securities that

¹¹ *See id.* at 68145.

¹² All Subscribers to OTC Link ATS are required to be broker-dealer members of the Financial Industry Regulatory Authority (“FINRA”) and must enter into a subscription agreement with OTC Link LLC that outlines the terms and conditions of their use of OTC Link ATS. All OTC Link ATS Subscribers can access all market tiers, including the Expert Market. Under the proposed conditional exemptive order, all quotations published or submitted on the Expert Market would be attributable to Subscribers at prices at which such Subscribers are prepared to trade. *See, e.g.*, FINRA Rule 5220.

may not be eligible or suitable for retail investors. Currently, the distribution of quotations for securities that are published or submitted on the Expert Market is limited to broker-dealers, and OTC Link ATS does not make such quotations available to the general public. In requesting exemptive relief on behalf of the Subscribers, OTC Link LLC plans to modify the Expert Market to include the safeguards described below.¹³

The Commission is proposing to grant OTC Link LLC's request for exemptive relief and issue a conditional exemptive order as outlined below.

1. Distribution of Expert Market Quotes and Data

Quotations published or submitted on the Expert Market are clearly identified in a data feed to which OTC Markets Group controls which Subscribers, market data distributors, and users have access. OTC Markets Group currently limits the distribution of quotations published or submitted on the Expert Market solely to broker-dealers. Under the proposed conditional exemptive order, OTC Markets Group would authorize market data distributors, including Subscribers, to be eligible to receive quotations published or submitted on the Expert Market and to distribute such data to Subscribers who comply with certain obligations and restrictions on data access. As Expert Market quotations are clearly identified in the data feed, recipients would be able to control their distribution and display.

Under the proposed exemptive relief, all entities that distribute OTC Markets Group's market data, including Subscribers, would be required to enter into a Market Data Distribution Agreement ("MDDA") directly with OTC Markets Group. OTC Markets Group would control which market data distributors are permitted to receive market data, and the MDDA would require each such market data distributor to report all end-users to OTC Markets Group. OTC Markets Group would distribute quotations published or submitted on the Expert Market to

¹³ Although OTC Link LLC is requesting relief on behalf of its Subscribers using the Expert Market on OTC Link ATS, OTC Link LLC is not requesting the same relief for OTC Link ATS, as a quotation medium, because OTC Link ATS does not publish or submit quotations on the Expert Market and, thus, does not engage in activity that is subject to the provisions of Amended Rule 15c2-11.

market data distributors that agree to the MDDA's contractual and data access restrictions that limit the distribution and display of quotations to certain eligible investors, as described below. Accordingly, real-time and delayed quotations¹⁴ published or submitted on the Expert Market would not be permitted to be distributed or displayed to the general public. Further, pursuant to the MDDA, market data distributors must require any person to whom they distribute quotations published or submitted on the Expert Market that is not party to the MDDA to agree, by contract, not to distribute such quotations to any person that is not a permitted recipient as described herein.

In operating the Expert Market under the proposed exemptive relief, OTC Link LLC would establish, maintain, and enforce written policies and procedures that are reasonably designed to allow only permitted recipients to view, and to prevent the general public from viewing, quotations published or submitted on the Expert Market. OTC Link LLC also would establish, maintain, and enforce policies and procedures to regularly surveil the use of the Expert Market data feed. Further, under its written policies and procedures, OTC Link LLC would determine whether market data distributors, including Subscribers, are complying with the terms of the MDDA. OTC Link LLC would regularly review activity on the Expert Market and would establish, maintain, and enforce policies and procedures that provide for further review and escalation of issues, including irregular quotation activities that may indicate fraudulent behavior (e.g., unusually high volumes) and non-compliance with the MDDA. Escalation of issues may include a determination of whether any market data distributor or Subscriber should be denied

¹⁴ "Delayed" quotations, for the purpose of this proposal, do not include "end-of-day" quotation information, which is defined in the MDDA, and is generally understood to mean information consisting of a snapshot of the best bid price and size and the best ask price and size for a security, taken at the close of regular trading hours. End-of-day quotation information does not include the identity of the broker-dealer(s) that published or submitted the quotation(s) that make up the "end-of-day" quotation. End-of-day information is used by broker-dealers, custodian banks, clearing firms, prime brokers and service bureaus for valuation, settlement, accounting, clearing and custody purposes because it can be more accurate, than last transaction information. Thus, end-of-day quotation information that is used by broker-dealers in providing valuation, settlement, accounting, clearing, and custody information to its customers may be viewed by retail investors and the general public; however, it is not actionable for the purposes of effecting transactions.

further access to the Expert Market or whether a detailed referral should be made to FINRA or Commission staff, or both.

2. Permitted Recipients of Quotations Published or Submitted on the Expert Market

As described above, the distribution of real-time and delayed quotations published or submitted on the Expert Market would be limited exclusively to market data distributors, including Subscribers, and certain types of sophisticated or professional investors, specifically, the following categories of market participants (each, a “Qualified Expert” and collectively, the “Qualified Experts”): (1) any qualified institutional buyer, as defined in Rule 144(A)(a)(1) under the Securities Act; and (2) any accredited investor, as defined in Rule 501(a) of Regulation D;¹⁵ and (3) any qualified purchaser, as defined in Section 2(a)(51)(A) of the Investment Company Act of 1940 (the “Investment Company Act”) and the rules thereunder.¹⁶ Qualified Experts may receive quotations published or submitted on the Expert Market directly from OTC Markets Group, from any market data distributor or Subscriber that has entered into the MDDA with OTC Markets Group, or from both.¹⁷

OTC Markets Group would also distribute quotations for an issuer’s security published or submitted on the Expert Market to the issuer of any such security if the issuer contractually

¹⁵ The term “accredited investor” includes, among other things, any bank as defined in Section 3(a)(2) of the Securities Act, broker or dealer registered pursuant to Section 15 of the Exchange Act, investment adviser registered pursuant to Section 203 of the Investment Advisers Act of 1940, and investment company registered under the Investment Company Act of 1940. *See* Rule 501(a)(1) of Regulation D. The term “accredited investor” also includes any entity of a type not listed in Rule 501(a)(1), that is not formed for the specific purpose of acquiring the securities offered, that own investments in excess of \$5,000,000, which could include a foreign bank or other non-U.S. financial institution. *See* Rule 501(a)(9) of Regulation D.

¹⁶ OTC Link LLC has requested that foreign broker-dealers, as defined in Exchange Act Rule 15a-6(b)(3), be included in the list of Qualified Experts. The Commission is seeking comment, below, regarding whether foreign broker-dealers, as defined in Exchange Act Rule 15a-6(b)(3), should be included in the list of Qualified Experts.

¹⁷ Qualified Experts that receive Expert Market data directly from OTC Markets Group would be subject to a subscriber agreement that contractually limits any further distribution.

agrees not to distribute such quotations, directly or indirectly, to any person that is not a current officer, director, or employee of the issuer.¹⁸

3. Categories of Expert Market Securities

The subject of Subscribers' proprietary quotations that can be published or submitted on the Expert Market would be restricted to the following categories of securities: (1) any security that is quoted in reliance on the piggyback exception prior to the Compliance Date and loses such eligibility upon the Compliance Date due to a lack of current and publicly available information about the issuer of the security;¹⁹ (2) any security that is quoted in reliance on the piggyback exception following the Compliance Date and subsequently loses such eligibility due to a lack of current and publicly available information about the issuer of the security, the issuer's status as a shell company, or a failure to meet the frequency-of-quotation requirement;²⁰ and (3) any security that is issued in conjunction with a Chapter 11 bankruptcy plan confirmed pursuant to Section 1129 of the U.S. Bankruptcy Code (the "Code")²¹ and is exempt from registration in accordance with Section 1145 of the Code.²²

In addition, OTC Link LLC would remove from the Expert Market quotations for any security that fits within the following two categories: (1) any security of an issuer that is the subject of a registration revocation or trading suspension order issued by the Commission pursuant to Section 12(j) or 12(k) of the Exchange Act, respectively; and (2) any security of an

¹⁸ As described above in Part I.B.1, market data distributors, including Subscribers, would be contractually required to ensure that the recipients of quotations published or submitted on the Expert Market meet the definition of a Qualified Expert.

¹⁹ A quoted market on the Expert Market for such security would have to commence within the first four business days from the date on which it loses eligibility to be quoted in reliance on the piggyback exception.

²⁰ A quoted market on the Expert Market for such security would have to commence within the first four business days from the date on which it loses eligibility to be quoted in reliance on the piggyback exception.

²¹ The issuers of such securities would be subject to oversight of the bankruptcy court. After confirmation of the bankruptcy plan, the bankruptcy courts may direct the company and others to carry out the plan. *See* 28 U.S.C. 1142.

²² A quoted market on the Expert Market for such security must commence within 90 calendar days from the date on which it is issued.

issuer that OTC Link LLC has identified as “defunct” (i.e., it has ceased operations, ceased to exist, or has failed to respond to inquiries by OTC Link LLC). Once the applicable Section 12(k) trading suspension order terminates or the subject security is re-registered with the Commission following an applicable Section 12(j) revocation order, in order to be quoted on the Expert Market, the subject security must either (1) gain and then lose eligibility to be quoted in reliance on the piggyback exception or (2) be issued in conjunction with a Chapter 11 bankruptcy plan and be quoted on the Expert Market in accordance with the timing requirements discussed above.²³

In addition, OTC Link LLC would flag on its website any “formerly” suspended security for such period of time as set forth in OTC Link LLC’s policies and procedures, which OTC Link LLC represents would be for two years following the applicable trading suspension.²⁴

II. Discussion of Proposed Relief

As a result of the amendments to Rule 15c2-11, after the Compliance Date, broker-dealers must withdraw from publishing or submitting quotations in a quotation medium for securities of issuers for which information is not current and publicly available, and such securities may migrate to the grey market, where no quoted prices are published in a quotation medium for buyers and sellers to access and transact. As the Commission stated in the Adopting Release, this may impose costs on potential and existing investors by reducing liquidity for these securities and potentially resulting in less efficient pricing. Further, the loss of a quoted market and the information embedded in share prices may adversely impact an issuer’s ability to raise capital through stock issuances or through other channels of finance, such as debt. The

²³ See *supra* notes 19 and 20.

²⁴ OTC Link LLC would remove any such flag if it becomes aware of a Commission or court order finding for the successful challenge of the applicable trading suspension.

Commission also noted that investors in securities in the grey market may be more susceptible to fraud.²⁵

As described above, the Commission also stated in the Adopting Release that it could be beneficial to establish an “expert market” that would enhance liquidity for sophisticated or professional investors and promote growth opportunities for certain small companies, although the comments received on the proposal provided insufficient detail as to how that market would function, safeguard retail investors from fraud and manipulation, and facilitate regulatory oversight.²⁶ In its December 21, 2020 request, OTC Link LLC made certain representations regarding how the Expert Market would function with safeguards to reduce the potential for certain retail investors to be harmed by fraud and manipulation, as well as representations regarding how OTC Link LLC would establish, maintain, and enforce written policies and procedures reasonably designed to facilitate the integrity and Commission oversight of the Expert Market. Based on these and other facts and representations made in OTC Link LLC’s December 21, 2020 request, the Commission preliminarily believes that it is necessary or appropriate in the public interest, and is consistent with the protection of investors, to grant, subject to the conditions described below, exemptive relief pursuant to Section 36(a)(1) of the Exchange Act and Rule 15c2-11 to permit Subscribers to publish or submit proprietary quotations on the Expert Market, on a continuous basis, without complying with the requirements of Amended Rule 15c2-11(a)(1)(i) and (d)(1)(i)(A). The Commission notes that OTC Link LLC may implement additional conditions, criteria, or noticing mechanisms for certain quotations on its platform by Subscribers as it may find appropriate, including as to whether additional quotations for securities of certain issuers should be transferred to the Expert Market because they may present more risk to certain retail investors.

²⁵ See Adopting Release at 68145, 68198.

²⁶ *Id.* at 68145.

The proposed conditional exemptive relief would allow the Expert Market to serve as a centralized location for published quotations in certain securities—that otherwise would migrate to the grey market following the Compliance Date—to be viewed exclusively by specified categories of sophisticated or professional investors. Such relief, therefore, could help to advance opportunities for more efficient pricing in such securities, enhance liquidity for sophisticated or professional investors in such securities, and promote capital formation for companies seeking growth opportunities that might prefer to be quoted in a market limited to such persons.

A. Permitted Recipients of Quotations Published or Submitted on the Expert Market

The Commission is proposing to limit the universe of market participants to whom real-time and delayed quotations published or submitted on the Expert Market are distributed. Accordingly, with one exception discussed below, real-time or delayed quotations published or submitted on the Expert Market may not be distributed, whether directly or indirectly from another source,²⁷ to any person that is not a Qualified Expert. The Commission preliminarily believes that the inability of the general public to view real-time and delayed quotations published or submitted on the Expert Market should help protect investors from incidents of fraud and manipulation in OTC securities for which no or limited publicly available information about the issuers exists to help counteract misinformation, while also allowing Subscribers to maintain a market in certain securities for certain qualified investors to interact.²⁸

The Commission preliminarily believes that including in the list of Qualified Experts (1) any qualified institutional buyer, as defined in Rule 144(A)(a)(1) under the Securities Act, and (2) any accredited investor, as defined in Rule 501(a) of Regulation D, would appropriately

²⁷ As discussed above in Part I.B, quotations published or submitted on the Expert Market would be accessible to market data distributors, including Subscribers, that have contractually agreed to not distribute quotations published or submitted on the Expert Market to persons who are ineligible to access such information (i.e., non-Qualified Experts), including to the general public.

²⁸ See, e.g., Adopting Release at 68145.

capture the types of investors who have, among other things, demonstrated the ability to assess an investment opportunity (including the ability to analyze risks and rewards), or the ability to gain access to information about an issuer or about an investment opportunity.²⁹ Such persons should be able to view quotations published or submitted on the Expert Market because they may not need the same investor protections that are afforded, in part, by current and publicly available issuer information in the same way that the general public may need it to analyze an investment opportunity or to counteract misinformation. In addition, the Commission preliminarily believes that it is appropriate to include qualified purchasers, as defined in Section 2(a)(51)(A) of the Investment Company Act and the rules thereunder, in the list of Qualified Experts because qualified purchasers are investors that have a high degree of financial sophistication who are in a position to appreciate the risks associated with investing in securities that would be quoted on the Expert Market without the protections afforded by the Amended Rule.

Notably, this list of Qualified Experts would exclude customers of broker-dealers and investment advisers (that do not fit into any of the three categories of Qualified Experts) because this market is not available to the general public.³⁰

In addition, as an exception to the Qualified Expert requirement, the Commission preliminarily believes that it is appropriate for an issuer to be able to view quotations published or submitted on the Expert Market for its own security, if the issuer agrees not to distribute such quotations, directly or indirectly, to any person that is not a current officer, director, or employee of the issuer, as described above. This is because such information could inform the issuer about the liquidity and market price of the security and allow the issuer to make informed decisions regarding future offerings to raise capital. In order for an issuer to view these quotations, the

²⁹ See, e.g., *Amending the “Accredited Investor” Definition*, Securities Act Release No. 10824 (Aug. 26, 2020), 85 FR 64234 (Oct. 9, 2020) (“Accredited Investor Release”).

³⁰ Any Subscriber that distributes quotations published or submitted on the Expert Market to any person that is not a Qualified Expert would not be eligible for the relief proposed herein and may violate Rule 15c2-11.

issuer would need to contractually agree not to distribute such quotations, directly or indirectly, to any person that is not a current officer, director, or employee of the issuer.

B. Expert Market Securities

The Commission preliminarily believes that it is appropriate for the following categories of securities to be eligible to be the subject of Subscribers' proprietary quotations on the Expert Market.

The first category is securities that lose eligibility to be quoted in reliance on the piggyback exception—either (1) upon the Compliance Date due to a lack of current and publicly available information about an issuer, or (2) following the Compliance Date due to (i) a lack of current and publicly available information about the issuer, (ii) the issuer's status as a shell company, or (iii) a failure to meet the frequency-of-quotation requirement—so long as quotations on the Expert Market commence within four business days of such loss of eligibility.³¹ As stated in the Adopting Release, the Commission recognizes that holders of such securities may incur costs related to a loss of liquidity when broker-dealers cannot rely on the piggyback exception.³² The ability of broker-dealers (i.e., Subscribers) to publish or submit proprietary quotations for those securities on the Expert Market could help to facilitate liquidity for such securities because the availability of quotations could reduce trading costs and facilitate pricing efficiency. This is because investors that are Qualified Experts would be able to view those quotations and use such information in the mix of information (e.g., in addition to their own due diligence or issuer disclosures that might not be publicly available but to which they otherwise have access) that they take into account as part of a meaningful investment analysis

³¹ This four-business-day window mirrors the time frame provided in the piggyback exception that quotations occur with no more than four business days in succession without a priced quotation. *See* Amended Rule 15c2-11(f)(3)(i). As an example, if eligibility to be quoted in reliance on the piggyback exception were lost on Monday, January 4, 2021, a Subscriber's quotations on the Expert Market must commence no later than Friday, January 8, 2021 to be eligible for this proposed exemption.

³² Adopting Release at 68141.

when making investment decisions.³³ Without the proposed exemption, as discussed above, these securities may migrate to the grey market, to which retail investors and the general public have access, without access to information embedded in prices published in a quotation medium. The ability of Subscribers to publish or submit quotations in a quotation medium for such securities could help protect retail investors and the general public from potential incidents of fraud and manipulation in the grey market and facilitate liquidity for such securities.

The second category captures securities issued in conjunction with a Chapter 11 bankruptcy plan that is confirmed pursuant to Section 1129 of the Code and are exempt from registration in accordance with Section 1145 of the Code, so long as quotations on the Expert Market commence within 90 calendar days from the date on which any such security is issued.³⁴ A bankruptcy proceeding is a significant event involving an issuer that a broker-dealer should carefully consider before it publishes or submits a quotation for the issuer's security in a quotation medium.³⁵ But, the Commission preliminarily believes that the inclusion of this category of securities as eligible to be the subject of Subscribers' quotations published or submitted on the Expert Market is appropriate given that Qualified Experts are more likely than the general public to possess the ability to evaluate the merits and risks of a prospective investment opportunity and, therefore, it would provide an efficient means to liquidate positions acquired through a bankruptcy proceeding. The inclusion of this second category could help promote capital formation opportunities for certain companies in limited circumstances while ensuring, for investor protection, that the distribution of quotations for the securities of such

³³ See, e.g., Accredited Investor Release at 64269–70.

³⁴ This 90-calendar-day window is consistent with the Amended Rule's requirement for the information of prospectus issuers (i.e., issuers that filed a registration statement under the Securities Act) to be "current" for broker-dealers to commence a quoted market in these issuers' securities in a quotation medium. See Amended Rule 15c2-11(b)(1). The Commission preliminarily believes that it is appropriate to use a measurement of time that is consistent with the Amended Rule's requirement for prospectus issuers' information because both requirements pertain to the commencement of a quoted market in securities of an issuer with which the market is unfamiliar and are designed to ensure that the Amended Rule's specified information about the issuers of these securities is not stale or outdated with respect to such issuance.

³⁵ See Adopting Release at 68171.

companies is limited to investors that have a demonstrated ability to assess such an investment opportunity.

The Commission believes that it would be appropriate for OTC Link LLC to remove from the Expert Market quotations published or submitted for any security of an issuer that is the subject of a registration revocation or trading suspension order issued by the Commission pursuant to Section 12(j) or 12(k) of the Exchange Act, respectively. Pursuant to any such registration revocation or trading suspension order and the Commission's finding that it is in the public interest and for the protection of investors,³⁶ Subscribers would not be able to effect transactions in such securities. Therefore, such quotations must be removed.

In addition, the Commission preliminarily believes that it is appropriate for OTC Link LLC to remove from the Expert Market quotations published or submitted for any security of an issuer that OTC Link LLC has identified as "defunct," to prevent the publication or submission of quotations for securities of issuers that have ceased operations, ceased to exist, or have failed to respond to inquiries by OTC Link LLC. Furthermore, the issuer of such security may not have a transfer agent to allow investors to receive or transfer their stock certificates. Thus, the quotations for such securities should be removed from the Expert Market to help prevent such securities from becoming vehicles for fraud and manipulation.

Further, the Commission preliminarily believes that requiring OTC Link LLC to flag on its website any "formerly suspended" security for such period of time as set forth in OTC Link LLC's policies and procedures (which would be for two years following the applicable trading suspension) would help to promote investor protection.³⁷ Such a flag would serve as a notice to

³⁶ See Exchange Act Section 12(j) ("The Commission is authorized, by order, as it deems necessary or appropriate for the protection of investors to . . . revoke the registration of a security, if the Commission finds . . . that the issuer of such security has failed to comply with any provision of this chapter or the rules and regulations thereunder."); Exchange Act Section 12(k)(1)(A) ("If in its opinion the public interest and the protection of investors so require, the Commission is authorized by order—summarily to suspend trading in any security . . . for a period not exceeding 10 business days . . .").

³⁷ As discussed above in Part I.B.3, this period of time would be for two years following the applicable trading suspension, unless the trading suspension is successfully challenged.

market participants that there was, in the recent past, the presence of any number of factors (such as uncertainty about the accuracy of publicly available issuer information or questions about trading in the issuer's security) that led the Commission to conclude that it was in the public interest and for the protection of investors to suspend trading in the security.³⁸ Accordingly, the Commission preliminarily believes that this flag requirement would improve the overall mix of information about issuers and their securities and would help investors make better-informed investment decisions.³⁹

C. Policies and Procedures

The Commission is proposing to condition the exemptive relief upon OTC Link LLC establishing, maintaining, and enforcing reasonably designed written policies and procedures to operate the Expert Market in a manner that is consistent with how the Expert Market is described herein. Such policies and procedures would account for the following: (1) the manner in which the distribution of real-time and delayed quotations on the Expert Market is limited, directly and indirectly, only to Qualified Experts and, as applicable, issuers of securities for which quotations are published or submitted on the Expert Market with respect to their own securities; (2) specific actions that will be taken if OTC Link LLC becomes aware that any Subscriber or market data distributor or user has violated the contractual obligations described above, and specific actions that will be taken if OTC Link LLC becomes aware that an issuer has violated its contractual obligation not to distribute, directly or indirectly, quotations published or submitted on the Expert Market for its security to any person that is not a current officer, director, or employee of the issuer; and (3) the regular surveillance of the Expert Market data feed and quotation activity on the Expert Market to determine whether a Subscriber or market data distributor or user has facilitated access, directly or indirectly, to quotations published or submitted on the Expert Market to any person that is not a Qualified Expert or, as applicable, an issuer of a security for

³⁸ See, e.g., Adopting Release at 68151.

³⁹ See *id.* at 68144.

which quotations are published or submitted on the Expert Market with respect to its own security.

The Commission preliminarily believes that the obligation to establish, maintain, and enforce such written policies and procedures as part of the proposed exemptive relief would help to prevent the general public from accessing quote information, promote the integrity of the Expert Market, and facilitate Commission oversight of the Expert Market. In particular, OTC Link LLC's reasonably designed written policies and procedures would provide transparency of, and set expectations for, the manner in which OTC Link LLC operates the Expert Market; would encompass compliance considerations relevant to the operations of the Expert Market; and would assist Commission staff in examining the Expert Market.

D. Recordkeeping Requirement

Finally, the Commission is proposing to require as part of the exemptive relief that OTC Link LLC preserve, for a period of not less than three years, the first two years in an easily accessible place, the following records:

1. Documents and information regarding OTC Link LLC's written policies and procedures related to the Expert Market, including records related to the implementation of such written policies and procedures;
2. Documents and information regarding any processes undertaken by OTC Link LLC that analyze information over time to identify whether the distribution of quotations published or submitted on the Expert Market is limited only to Qualified Experts and, as applicable, issuers of securities for which quotations are published or submitted on the Expert Market with respect to their own securities; and
3. Documents and information regarding OTC Link LLC's ongoing surveillance of the quoting activity and distribution of quotations published or submitted on the Expert Market, including any reports that identify exceptions to compliance with the written policies and procedures and the resolution of such exceptions.

The Commission preliminarily believes that this recordkeeping condition will help facilitate the Commission's oversight of the Expert Market, including of Subscribers that publish or submit quotations on the Expert Market and the distribution of such quotations. In particular, the documents and information that would be required to be maintained will provide the Commission with a record of how OTC Link LLC has (1) implemented its reasonably designed written policies and procedures described above; (2) conducted its ongoing maintenance of such written policies and procedures in response to analysis of whether quotations published or submitted on the Expert Market are distributed only to market data distributors (including Subscribers), Qualified Experts, and, as applicable, issuers of securities for which quotations are published or submitted on the Expert Market with respect to their own securities; and (3) enforced such written policies and procedures as part of its ongoing surveillance of exceptions to compliance with those written policies and procedures. The Commission also preliminarily believes that these proposed recordkeeping conditions would aid the Commission's oversight of OTC Link LLC's limitation on the distribution of quotations published or submitted on the Expert Market only to Qualified Experts (and, as applicable, issuers of securities for which quotations are published or submitted on the Expert Market with respect to their own securities).

E. Additional Considerations for Market Participants Relying on the Proposed Exemption

In addition, Subscribers that publish or submit quotations in compliance with this proposed exemption remain subject to liability under the antifraud provisions of the federal securities laws. Further, the proposed exemption would not create an exemption or change existing exemptions from the registration requirements or any other requirements under the federal securities laws, including the Securities Act, for any party. Accordingly, for example, if a Subscriber were to publish or submit a quotation on the Expert Market in reliance on the proposed exemption, the Subscriber would need to determine whether the security, or any offer or sale of such security, is registered in accordance with any applicable requirement under federal securities laws or whether an exemption from any such registration requirement exists.

III. Request for Comments

The Commission is seeking comment on all aspects of the proposed exemption. In particular, the Commission requests comment on the following questions about the proposed exemption. When responding to the request for comment, please explain your reasoning. Additionally, the Commission requests that commenters identify sources of data and information as well as provide data and information to assist the Commission in analyzing the impact of the proposed relief.

1. Are there any other categories of securities that should be eligible for Subscribers' proprietary quotations on the Expert Market? Are there any other categories of securities that should be excluded from Subscribers' proprietary quotations on the Expert Market? For example, should only those securities that meet certain reported trade thresholds be eligible for quoting? Please explain, including how this suggestion would be necessary or appropriate in the public interest and consistent with the protection of investors.
2. Are there categories of investors included in the proposed list of Qualified Experts who should be excluded? For example, should all accredited investors, as defined in Rule 501(a) of Regulation D, be considered Qualified Experts, or should the list be limited to a narrower set of sophisticated investors? What steps should broker-dealers and investment advisers be required to take, if any, to verify the accredited investor status of customers before providing them access to quotations published or submitted on the Expert Market? Should all employees of an issuer, including those who would not otherwise qualify as Qualified Experts, be allowed to view quotations published or submitted on the Expert Market? Please explain, including how this suggestion would be necessary or appropriate in the public interest and consistent with the protection of investors.

3. Are there any other categories of persons or entities that should be eligible to view real-time or delayed quotations published or submitted on the Expert Market?

The Commission understands that foreign broker-dealers, as defined in Exchange Act Rule 15a-6(b)(3), similar to broker-dealers registered under Section 15 of the Exchange Act—an entity included in the definition of “accredited investor”—may demonstrate the ability to assess an investment opportunity, the capacity to allocate investments in such a way as to mitigate or avoid risks of unsustainable loss, the ability to gain access to information about an issuer or about an investment opportunity, or the ability to bear the risk of a loss. OTC Link LLC has requested that such foreign broker-dealers be included in the list of Qualified Experts. Should foreign broker-dealers, as defined in Exchange Act Rule 15a-6(b)(3), be added to the list of Qualified Experts? Please explain why or why not, including how this suggestion would be necessary or appropriate in the public interest and consistent with the protection of investors.

4. What costs would be associated with the proposed Expert Market exemption?

Please specify the market participant(s) that would incur such costs (e.g., issuers, broker-dealers, etc.), if any. Would the cost of the proposed policies and procedures and recordkeeping conditions prevent the formation of an “expert market” for any eligible securities? Would the ability for issuers’ securities to be quoted on the Expert Market reduce incentives for relevant issuers to provide public information?

5. How active would quotations in these securities likely be if the proposed exemptive relief were granted? What degree of liquidity and price discovery would likely be facilitated by the ability of Subscribers to publish or submit quotations on the Expert Market? Where possible, please provide data or identify

sources of information the Commission could use to analyze the impact of the relief on liquidity and price discovery.

6. Does the proposed policies and procedures condition provide appropriate assurance that real-time and delayed quotations published or submitted on the Expert Market would not be accessible to the general public, including retail investors, other than the Qualified Experts? Please explain why or why not. If not, please explain how the condition should be modified, including the minimum requirements that should be included in OTC Link's policies and procedures to (1) ensure that only Qualified Experts can view quotations published or submitted on the Expert Market and (2) address concerns about fraud and manipulation?
7. Does the proposed recordkeeping condition for OTC Link LLC provide appropriate means to facilitate the Commission's oversight of the Expert Market, including of Subscribers that publish or submit quotations on the Expert Market and the distribution of such quotations? Please explain why or why not. If not, please explain how the condition should be modified.
8. Are the proposed safeguards appropriate to ensure that only investors who are able to assess the risks and merits of investment in the categories of securities proposed to be included in the Expert Market are able to access quotations? Are the proposed conditions of this exemptive order (in conjunction with FINRA rules that govern this market) sufficient to prevent the general public from accessing quotations published or submitted in the Expert Market, or should the Commission impose additional conditions? Are there any other safeguards that should be implemented in the Expert Market to protect investors?
9. Are there additional conditions that the exemptive order providing the relief proposed herein should include to help prevent persons who are not Qualified Experts from accessing quotations published or submitted on the Expert

Market? If yes, please specify such condition and explain how this suggestion would be necessary or appropriate in the public interest and consistent with the protection of investors.

10. Should the exemptive order providing the relief proposed herein include a sunset provision so that the relief would expire on a particular date? If yes, what would be an appropriate date on which the relief should expire (e.g., one year after the issuance of the exemptive order, etc.) and why? Please discuss the costs and benefits of including such a sunset provision in the exemptive order.

Additionally, please explain why such a sunset provision would be necessary or appropriate in the public interest and consistent with the protection of investors.

Alternatively, please explain why the exemptive order should omit a sunset provision, including a discussion of the benefits and costs of such omission or any distortive effects on the market. Lastly, please discuss whether there are alternative means of achieving any benefits of a sunset provision.

By the Commission.

Dated: December 22, 2020

Vanessa A. Countryman
Secretary