



BOSTON  
STOCK EXCHANGE

October 17, 2006

Nancy N. Morris  
Secretary, Securities and Exchange Commission  
Station Place  
100 F Street, NE  
Washington D.C. 20549-1090

**Re: SR-NASD-2006-108**

Dear Ms. Morris:

This letter sets forth the comments of the Boston Stock Exchange (“BSE”) regarding the above-referenced rule filing. As you know, SR-NASD-2006-108 relates to the establishment of a new NASD Trade Reporting Facility by the NASD and National Stock Exchange (“NSX”), the proposed establishment of which is based on substantially the same terms as the NASD-Nasdaq Trade Reporting Facility approved by the Securities and Exchange Commission (the “Commission”) on July 10, 2006.<sup>1</sup>

The BSE supports the establishment of the NASD-NSX Trade Reporting Facility. In fact, on September 29, 2006 the NASD filed SR-NASD-2006-115, a proposed rule change establishing a new NASD Trade Reporting Facility by the NASD in conjunction with the BSE on substantially the same terms as the NASD-NSX and NASD-Nasdaq Trade Reporting Facilities.

The BSE believes, however, that in considering whether and on what terms and conditions to approve the NSX proposal the Commission should keep in mind the fair competition demands of the Securities Exchange Act of 1934 (the “Act”). Section 11A(a)(1)(C)(ii) of the Act provides, in relevant part, that “[i]t is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly

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<sup>1</sup> 71 FR 38935 (July 10, 2006) (order approving SR-NASD-2005-087).

markets to assure . . . fair competition among brokers and broker dealers, among exchange markets, and between exchange markets and markets other than exchange markets . . .” As was pointed out to the Commission in the comments on the Nasdaq Trade Reporting Facility, Section 11A(a)(1)(C)(ii) would seem to require that the Commission approve all Trade Reporting Facility proposals submitted by Exchanges other than Nasdaq, assuming of course that such proposals are otherwise consistent with the Act.<sup>2</sup> As stated above, the BSE has submitted its own such proposal, and we understand that other Exchanges intend to do the same. In order to allow the Commission to determine whether Section 11A(a)(1)(C)(ii) does in fact require multiple Trade Reporting Facilities other than Nasdaq’s, and if so, the terms and conditions, if any, that should apply to the operations of such multiple non-Nasdaq Trade Reporting Facilities, the BSE suggests that the Commission, if it should determine to approve the NSX proposal, delay the effectiveness of such approval at least until it has determined whether to approve the BSE’s competing Trade Reporting Facility proposal.

To allow the NSX Trade Reporting Facility to become effective without having made this determination would either subject the NSX to the potential of having to cease operating its Trade Reporting Facility (if the Commission were to decide that multiple non-Nasdaq Trade Reporting Facilities were not appropriate, the choice of which Exchange would get the non-Nasdaq Trade Reporting Facility monopoly franchise could not, consistent with the Act, be made purely on the basis of which Exchange submitted its proposal first) or would give the NSX the unfair competitive advantage of starting its Trade Reporting Facility first merely because its proposal was submitted a few weeks ahead of the BSE’s. The BSE notes that, should the Commission determine to allow multiple non-Nasdaq Trade Reporting Facilities, giving the NSX a head start of a few weeks over the BSE would potentially give the NSX a competitive advantage in obtaining and retaining market share of the non-Nasdaq print volume since there is the potential that non-Nasdaq print market share will not move without significant pricing or technology differences that are not likely to exist, at least at the outset, among non-Nasdaq Trade Reporting Facilities but which may develop over time. Such differences, it would seem, provide one of the reasons for allowing multiple non-Nasdaq Trade Reporting Facilities. In other words, the BSE believes that the Commission could permanently lessen the likelihood of multiple Trade Reporting Facilities having a fair chance to obtain enough initial print volume to allow them to survive long enough to offer the competitive benefits that presumably would underlie any Commission decision to allow multiple non-Nasdaq Trade Reporting Facilities. Particularly when the BSE’s own substantially similar proposal is already out for comment and, therefore, presumably close to approval (should the Commission determine to allow multiple non-Nasdaq Trade

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<sup>2</sup> See letter from Kevin J.P. O’Hara, Chief Administrative Officer & General Counsel, Archipelago Holdings, to Jonathan G. Katz, Secretary, Securities and Exchange Commission, dated November 10, 2005.

Reporting Facilities) the potentially long-term harm to competition would seem to be outweighed by a few weeks delay in the start of NSX's Trade Reporting Facility.<sup>3</sup>

For these reasons, the BSE suggests that the SEC approve the NSX proposal but delay the effectiveness of such approval until it has had a chance, in the context of the pending, substantially similar BSE proposal, to determine whether, and on what terms and conditions, more than one non-Nasdaq Trade Reporting Facility is appropriate and consistent with the Act.

Respectfully submitted,



Alden Adkins  
Executive Vice President  
Boston Stock Exchange, Inc.

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<sup>3</sup> Alternatively, the Commission could avoid this negative competitive potential by accelerating approval of the NASD's substantially similar BSE Trade Reporting Facility, should it determine that multiple non-Nasdaq Trade Reporting Facilities are appropriate.