



September 23, 2005

**VIA EMAIL; CONFIRMATION
BY OVERNIGHT MAIL**

Mr. Jonathan G. Katz
Secretary, Office of the Secretary
Mail Stop 0609
Securities and Exchange Commission
450 Fifth Street, NW
Washington, D.C. 20549

**Re: Comments by ArcaEdge In Response to Release No. 34-52280;
File No. SR-NASD-2005-095**

Dear Mr. Katz:

This letter sets forth the comments of Archipelago Trading Services, Inc. ("ArcaEdge"), a wholly owned subsidiary of Archipelago Holdings, Inc., in response to Release No. 34-52280 filed with the Securities and Exchange Commission ("SEC" or "Commission") by the National Association of Securities Dealers, Inc. ("NASD"). The filing reflects the NASD's proposed rule changes to impose restrictions on the display of quotes and orders in sub-penny increments for non-Nasdaq OTC equity securities ("Proposal").¹ As the operator of an alternative trading system in the OTC Bulletin Board ("OTCBB") marketplace, ArcaEdge has a significant interest in this Proposal.

The NASD has stated in its Proposal that the potential harm associated with sub-penny quoting in the national market system, as described in Regulation NMS,² is essentially the same potential harm with respect to the OTCBB marketplace.³ Based on this finding, the NASD now proposes to ban sub-pennies in the OTCBB marketplace.

We generally support the NASD's effort to modernize the OTCBB market but the Proposal cannot be implemented until the NASD changes its requirement that ATSS display non-subscriber access fees in their quotes. Quite simply, access fees charged by an ATS are often in amounts less than

¹ See Exchange Act Release No. 34-52280 (August 17, 2005).

² See Exchange Act Release No. 34-49325 (February 26, 2004).

³ See Proposal at footnote 5.

Archipelago Holdings, Inc.
100 South Wacker Drive
Suite 1800
Chicago, Illinois 60606
P 312.960.1696
F 312.960.1369
www.archipelago.com



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a penny and the NASD's Rule 6540(c) requires the ATS to display these subpenny amounts. The NASD cannot ban subpennies and continue to require ATSs to display access fees when those access fees will be in subpenny amounts.

Even without the NASD's Proposal, given the Commission's adoption of Regulation NMS, the time is right for the NASD to eliminate the NASD's access fee display requirement. By way of background, Rule 6540(c) was adopted in 2002 under intense pressure from Nasdaq market makers who wanted to create barriers to entry for ATS's or ECNs from participating in the OTCBB montage by prohibiting them from charging non-subscribers for their services. In the Rule 6540(c) approval order, Nasdaq explained that "because market makers that enter quotes in the OTCBB are not permitted to charge access or post-transaction fees over and above their posted quotes, a participating ATS or ECN should be similarly prohibited from charging such fees, unless such fees were incorporated in its posted quote."⁴ Given the fact that the Commission in Regulation NMS has validated the concept of access fees for both OTC market makers and ECNs/ATSs in the national market system (and given the fact that Nasdaq market makers have been paid a 2/10 cent/share access fee for years in Nasdaq SuperMontage), we do not believe there is a legitimate rationale to support keeping Rule 6540(c) in place for the OTCBB market.

If the NASD moved forward with the Proposal without first removing Rule 6540(c), its rule set would discriminate between members. Market makers rely on the lucrative spreads between their quotes and are not impacted by the inconsistent and unjustifiable Rule 6540(c), which by its terms only apply to ECNs and ATSs. The securities laws do not permit the Commission to sanction a rule set which permits this type of unfair discrimination between members.⁵

If you have any questions concerning our views, please contact me at 312-442-7146.

Very truly yours,

Kevin J. P. O'Hara
Chief Administrative Officer &
General Counsel

⁴ See Exchange Act Release No. 34-45915 (May 10, 2002).

⁵ Section 15A(b)(6) of the Securities Exchange Act of 1934 requires the Commission to ensure that the rules of a national securities association "are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, to fix minimum profits, to impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members, or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the association."



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Copies to: Christopher Cox, Chairman
Cynthia A. Glassman, Commissioner
Paul S. Atkins, Commissioner
Roel C. Campos, Commissioner
Annette L. Nazareth, Commissioner

Division of Market Regulation