

## Archipelago Trading Services, Inc.

100 S. Wacker Drive, Suite 1800  
Chicago, IL 60606  
P 312.960.1696  
F 312.960.1369  
www.nyse.com

June 1, 2007

### VIA ELECTRONIC MAIL

Ms. Nancy M. Morris  
Secretary, Office of the Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549

**Re: Comments by ArcaEdge in Response to Release No. 34-55717;  
File No. SR-NASD-2007-029**

Dear Ms. Morris:

Archipelago Trading Services, Inc. (“ArcaEdge”) submits this comment letter in response to Securities and Exchange Commission (“SEC” or “Commission”) Release No. 34-55717 concerning the recent filing by the National Association of Securities Dealers, Inc. (“NASD”), file number SR-NASD-2007-029.<sup>1</sup> ArcaEdge strongly supports the NASD’s efforts to modernize the over-the-counter bulletin board (“OTCBB”) market, and allow its participants to benefit from some of the improvements advanced by Regulation NMS.<sup>2</sup>

In their recent filing, the NASD proposes to amend Rule 6540(c), which currently prohibits an alternative trading system (“ATS”) from charging an access or post-transaction fee to non-subscribers unless such fee is included in the ATS’s posted quote. As amended, Rule 6540(c) would exclude access fees that are less than or equal to \$.003 per share (or 0.3% of the published quotation price on a per-share basis in the case of published quotations below \$1.00 per share). The NASD noted that the specified levels of this proposed rule change directly correspond to the access fee limits set forth in Rule 610(c) of Regulation NMS. According to the filing, the NASD believes that this approach successfully addresses the practical difficulties of incorporating the access fee in a quotation, while also mollifying concerns regarding excessive fees. We agree.

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<sup>1</sup> ArcaEdge submitted two prior comment letters in response to the NASD’s previous filings concerning Rule 6540(c). See letter from Kevin J.P. O’Hara of Archipelago Trading Services, dated September 23, 2005, and letter from Andrew B. Stevens and Greg O’Connor, dated February 14, 2007.

<sup>2</sup> See SEC Final Rule Release No. 34-51808 (June 9, 2005).

The NASD's proposed rule amendment accomplishes many significant goals, including: (i) eliminating an unfair competitive advantage currently enjoyed by market makers; (ii) enhancing liquidity by fostering increased competition amongst additional ATSS or ECNs who will likely join the OTCBB marketplace, when they are no longer encumbered by the rule's current restriction; and (iii) fostering a modernized, competitive and innovative OTCBB market. Indeed, as amended, Rule 6540(c) no longer inhibits ATSS's or ECN's from offering greater liquidity to the OTCBB market; rather it encourages greater transparency and competition that will lead to greater price discovery for investors.

At the time of this submission, ArcaEdge is aware of two comment letters<sup>3</sup> previously received by the Commission in response to the proposed NASD rule filing. ArcaEdge respectfully takes this opportunity to discuss the concerns raised within those letters.

*Fees:*

Both comment letters raised the concern that permitting an ATS or ECN to charge access fees without displaying these fees within their posted quotation "effectively imposes hidden transactions costs on market participants."<sup>4</sup> This concern fails to account for the logic supporting Regulation NMS and its fee limitation provision. The Commission, through Regulation NMS, approved similar fees for market participants that effect transactions within national market system ("NMS") securities,<sup>5</sup> stating: "(t)he purpose of the fee limitation is to ensure the fairness and accuracy of displayed quotations by establishing an outer limit on the cost of accessing such quotations. The adopted rule thereby assures order routers that displayed prices are, within a limited range, true prices."<sup>6</sup> The Commission recognized the inherent fairness of charging access fees, while also recognizing the salutary effect of limiting the fees. The NASD is employing the same measured, uniform approach to securities excluded from Regulation NMS.

Additionally, one commenter argued that un-displayed access fees would create a "multi-tiered" marketplace.<sup>7</sup> The Commission also addressed this fear within Regulation NMS, noting in its discussion regarding access fees: "(c)ompetition will determine which strategy is most successful," and would cause other participants to follow suit. We believe this amendment will encourage other NASD members, otherwise dissuaded by the current rule, to participate within the OTCBB marketplace, leading to greater competition and price discovery.

ATSS and ECNs, by design, are quasi market centers. Unfortunately, they are uniquely disadvantaged within the OTCBB marketplace by the burden of NASD Rule 6540(c) and their exclusion from the provisions of Regulation NMS. In the case of the OTCBB market, market

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<sup>3</sup> See letter from Randy Hechler of Hudson Securities, Inc., dated May 23, 2007; and letter from Samuel Guidetti, III of Hill, Thompson, Magid & Co., Inc., dated May 29, 2007.

<sup>4</sup> See letter from Samuel Guidetti, III of Hill, Thompson, Magid & Co., Inc., dated May 29, 2007.

<sup>5</sup> For the purposes of Regulation NMS, an NMS Security is defined as any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.

<sup>6</sup> See footnote 2, *supra*.

<sup>7</sup> See footnote 4, *supra*.

makers<sup>8</sup> may mark up shares from their inventory prior to effecting a transaction with a customer, whereas an ATS or ECN may only display the full interest of its subscriber at the price and size submitted. Other restrictions imposed on ATSs, but not on market makers, require the ATS to grant fair access to its quotation, thereby allowing non-subscribers to benefit from the liquidity offered by the ATS, with little or no cost associated. In stark contrast, “(m)arket makers (are) permitted to charge fees for executions of orders against their quotations, irrespective of whether the order executions are effected on an (ECN or ATS) or directly by the market maker.”<sup>9</sup> The NASD’s proposal will eliminate this discrepancy and thereby promote competition which will, in turn, foster greater liquidity and price discovery.

*Transparency:*

Another and related argument raised by the commenters concerns the transparency of un-displayed access fees. We believe the immediacy of our market, representing the true displayed price and size of our subscriber’s order within all displayed quotations, is an example of pure transparency. Market makers, on the other hand, may draw from inventory, mark up the corresponding shares, and display at the prevailing market conditions benefiting from a historical lower price while limiting their display to the required minimum size. Indeed, ATSs such as ArcaEdge offer greater transparency than other OTCBB market participants, for two reasons:

1. The quotation displayed within the systems of the ATS represent the immediate interest of the ATS’s subscriber, and are the true intention of the subscriber to effect transactions at the displayed price and size; and
2. An ATS, pursuant to Commission Rule 301(b)(10), must maintain any functions other than that of the ATS separate, including proprietary trading. Therefore, all quotations represented on or by the ATS are only those of its subscribers at the subscriber’s full indication of interest.

In addition, we believe true transparency will continue to emerge with the transformation from a dealer-driven market to an order order-driven market. The NASD’s proposal is an important step in that evolution. As noted within our previous comment letter,<sup>10</sup> the SEC’s intention in allowing the creation of ATSs was to “strengthen the public markets for securities, while encouraging innovative new markets.”<sup>11</sup> We believe that ATSs provide this innovation by offering a best-execution model. Unfortunately, ECNs and ATSs are hindered by rules that permit other market participants, not registered in such capacity, to utilize the services of the ATSs and ECNs at no cost. The current restriction upon ECNs and ATSs to charge access fees

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<sup>8</sup> For the purposes of its rules, the NASD has construed the term “market maker” to include a participating ATS or ECN; however, an ATS or ECN may not benefit from the ability of proprietary trading as other market makers, but is included within the definition mainly for trade reporting purposes.

<sup>9</sup> See footnote 2, *supra*.

<sup>10</sup> See letter from Andrew B. Stevens and Greg O’Connor, Archipelago Trading Services, Inc., dated February 14, 2007.

<sup>11</sup> See SEC Final Rule Release No. 34-40760 (S7-12-98) (December 8, 1998).

only to subscribers defeats the incentive to enter this marketplace and generate additional innovation and competition.

With the original adoption of its Rule 6540(c), the NASD made an accommodation for the prevailing participants to allow new entrants, such as ECNs and ATNs into the marketplace. We believe the proposed amendment to Rule 6540(c) is the first step in further modernization of the OTCBB marketplace, which we believe should eventually include additional provisions, such as limit order display and prohibitions against locked or crossed markets. We commend the Commission for modernizing the securities marketplace with the implementation of Regulation NMS, and we welcome the NASD's efforts to expand the same or similar provisions to the OTCBB market. We look forward to the approval of this proposal by the Commission, and the benefits that should be realized by all participants and investors. It is an advancement long overdue.

If you have any questions concerning our views, please contact either Andrew Stevens at (312) 442-7632 or me at (312) 442-7149.

Sincerely,

A handwritten signature in black ink, appearing to read "G. O'Connor", with a long horizontal flourish extending to the right.

Greg O'Connor  
Chief Compliance Officer  
Archipelago Trading Services, Inc.