

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-55717; File No. SR-NASD-2007-029)

May 7, 2007

Self-Regulatory Organizations: National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change Relating to Access Fee Display Requirements for the OTCBB

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on April 20, 2007, the National Association of Securities Dealers, Inc. (“NASD”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

NASD is proposing to amend NASD Rule 6540(c) to exclude from the access fee display requirements access fees below a specified level.

Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

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6540. Requirements Applicable to Market Makers

(a) through (b) No Change.

(c) A participating ATS or ECN shall reflect non-subscriber access or post-transaction fees in its published quotation [the ATS’s or ECN’s posted quoted] in the OTC Bulletin Board montage if:

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

(1) the published quotation is priced equal to or greater than \$1.00 and such fees exceed or accumulate to more than \$0.003 per share; or

(2) the published quotation is less than \$1.00 and such fees exceed or accumulate to more than 0.3% of the published quotation price on a per share basis.

(d) through (e) No Change.

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASD Rule 6540(c) requires an alternative trading system ("ATS")³ or electronic communications network ("ECN")⁴ to reflect non-subscriber access or post-transaction fees in its posted quotation in the OTC Bulletin Board ("OTCBB"). NASD established the requirements in Rule 6540(c) to permit ATSS and ECNs to participate in the OTCBB in the same way that

³ See Rule 300(a) of Regulation ATS under the Act (defining "alternative trading system").

⁴ See Rule 600(b)(23) of Regulation NMS under the Act (defining "electronic communication network").

market makers participate.⁵ Specifically, because a market maker does not charge access or post-transaction fees over and above its posted quotation, a participating ATS or ECN is prohibited from charging such fees, unless such fees are incorporated in the ATS's or ECN's posted quotation. Concerns have been raised about the practical difficulties of complying with Rule 6540(c) for ATSs and ECNs that choose to charge such fees.

First, NASD Rule 2320(g)(2) requires a member that displays priced quotations for the same non-exchange-listed security⁶ in two or more quotation mediums⁷ that permit quotation updates on a real-time basis to display the same priced quotation in each system. NASD established this requirement because members that display differently priced quotations in different quotation mediums for the same security can be confusing and misleading to other market participants and, more importantly, to public investors.⁸ Moreover, NASD believes that requiring that members display consistently priced quotations in multiple quotation mediums

⁵ See Securities Exchange Act Release No. 45915 (May 10, 2002), 67 FR 35171 (May 17, 2002) (approving SR-NASD-2001-44).

⁶ The term “non-exchange-listed security” means any equity security that is not traded on any national securities exchange and does not include a “restricted security,” as defined by Commission Rule 144(a)(3) under the Securities Act of 1933, nor any security designated in the PORTAL Market, the Rule 6700 Series. See NASD Rule 6610(c).

⁷ The term “quotation medium” means any inter-dealer quotation system or any publication or electronic communications network or other device that is used by brokers or dealers to make known to others their interest in transactions in any security, including offers to buy or sell at a stated price or otherwise, or invitations of offers to buy or sell. See NASD Rule 2320(g)(4). The term quotation medium includes, without limitation, the OTCBB, the Electronic Pink Sheets, an ATS, and an ECN.

⁸ See Securities Exchange Act Release No. 43319 (September 21, 2000), 65 FR 58589 (September 29, 2000) (approving SR-NASD-00-20).

enhances the ability of other market participants to ascertain the best inter-dealer market for a security.⁹

Rule 2320(g)(2), in conjunction with Rule 6540(c), results in certain unintended consequences. Specifically, the effect of these rules is to require an ATS or ECN that charges an access fee to incorporate such access fee in its internal system quotation, notwithstanding the fact that internal subscribers of such system will not be charged that fee. NASD does not believe such a result furthers the goals of Rule 2320(g)(2) or Rule 6540(c).

Second, by requiring an ATS or ECN to incorporate its access fee in its quote, the ATS or ECN may be forced to effect two trades at different prices rather than one trade at a single price: (1) the transaction with the subscriber that placed the original limit order at the limit order price, with no access fee charged; and (2) the transaction with the non-subscriber at the quoted price inclusive of the access fee charged to the non-subscriber. This has the unintended consequence of requiring two separate trade reports to the tape at each price for what previously was reportable as one trade and may also require the ATS or ECN to trade on a principal basis to effectuate the trade.

In a prior rule filing (SR-NASD-2005-095) relating to restrictions on sub-penny quoting that was later withdrawn, NASD had proposed to eliminate Rule 6540(c), primarily because it was in direct conflict with the proposed sub-penny quotation restriction, given that most access fees are in sub-penny increments.¹⁰ In the context of that filing, several commenters opposed the

⁹ See id.

¹⁰ See Securities Exchange Act Release No. 53024 (December 27, 2005), 71 FR 159 (January 3, 2006) (notice of filing of proposed rule change and Amendment No. 2 to SR-NASD-2005-095).

proposed elimination of the requirements in Rule 6540(c), generally raising concerns that such elimination would lead to hidden and unregulated access fees because the deletion of Rule 6540(c) eliminates the practical disincentive to charge excessive fees.

In response to both the concerns raised regarding the practical difficulties with compliance with Rule 6540(c) and that ATs and ECNs might charge hidden and excessive access fees, NASD is proposing to amend Rule 6540(c) to exclude from the requirements only those access fees that are less than or equal to \$0.003 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).¹¹ NASD believes this approach addresses the practical difficulties with incorporating the access fee in a quotation, while also addressing the concerns relating to possible excessive access fees raised by commenters in response to proposed rule change SR-NASD-2005-095.

In addition, NASD is proposing a non-substantive change to replace the term “posted quote” with the term “published quotation.” As noted above, the effective date of the proposed rule change would be the date of Commission approval. NASD would publish a Notice to Members announcing Commission approval no later than 30 days following any such approval.

¹¹ The specified levels in this proposed rule change correspond to the access fees limits set forth in Rule 610(c) of Regulation NMS under the Act. Rule 610(c) of Regulation NMS, among other provisions, generally limits the fees that any trading center can charge (or allow to be charged) for accessing its protected quotation in an NMS stock priced equal to or greater than \$1.00 per share to no more than \$0.003 per share. If the price of a protected quotation is less than \$1.00 per share, the fee cannot exceed 0.3% of the quotation price. See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (Regulation NMS Adopting Release).

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,¹² which requires, among other things, that NASD rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule change is a reasonable means to ensure that access fees over a specified level are transparent to the marketplace.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASD does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received. However, as noted previously, the Commission published for comment proposed rule change SR-NASD-2005-095 and several comments concerning access fees were received.¹³ The comments are summarized above.

¹² 15 U.S.C. 78o-3(b)(6).

¹³ See Letter from Andrew B. Stevens, Assistant General Counsel, NYSE Group, Inc., and Greg O'Connor, Director of Compliance, Archipelago Trading Services, Inc., to Nancy M. Morris, Secretary, Commission, dated February 14, 2007; Letter from Julian Rainero, on behalf of Pershing LLC, to Nancy M. Morris, Secretary, Commission, dated March 6, 2006; Letter from Patrick E. Brake, Jr., General Counsel, Hill, Thompson, Magid & Co., Inc., to Nancy M. Morris, Secretary, Commission, dated February 21, 2006; Letter from Jerry O'Connell, Chairman, Trading Committee, Securities Industry Association, to Nancy M. Morris, Secretary, Commission, dated February 17, 2006; Letter from William Yancey, Chairman, and John C. Giese, President and Chief Executive Officer, Security Traders Association, to Nancy M. Morris, Secretary, Commission, dated February 8, 2006; Letter from R. Cromwell Coulson, Chief Executive Officer, Pink Sheets LLC, to Nancy M. Morris, Secretary, Commission, dated January 26, 2006; Letter from Phylis M. Esposito, Executive Vice President, Chief Strategy Officer, Ameritrade, Inc., to Nancy

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- A. by order approve such proposed rule change, or
- B. institute proceedings to determine whether the proposed rule change should be disapproved.

M. Morris, Secretary, Commission, dated January 24, 2006; Letter from Leonard J. Amoruso, Knight Capital Group, Inc., to Nancy M. Morris, Secretary, Commission, dated January 24, 2006; Letter from Michael Santucci, President, Kimberly Unger, Executive Director, and Stephen J. Nelson, Co-Chair, Security Traders Association of New York, Inc., to Nancy M. Morris, Secretary, Commission, dated January 24, 2006; Letter from Phylis M. Esposito, Executive Vice President, Chief Strategy Officer, Ameritrade, Inc., to Nancy M. Morris, Secretary, Commission, dated October 31, 2005; and Letter from Kevin J. P. O'Hara, Chief Administrative Officer & General Counsel, Archipelago Trading Services, Inc., to Nancy M. Morris, Secretary, Commission, dated September 23, 2005.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASD-2007-029 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NASD-2007-029. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of NASD. All

comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASD-2007-029 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Florence E. Harmon
Deputy Secretary

¹⁴ 17 CFR 200.30-3(a)(12).