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February 21, 2006

Via E-Mail to rule-comments@sec.gov

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-2001

Re: File No. SR-NASD-2005-095
Release No. 34-53024 (December 27, 2005)

Dear Ms. Morris:

Hill, Thompson, Magid & Co., Inc. ("Hill") appreciates this opportunity to comment on the NASD Proposed Rule Change and Amendment No. 2 Thereto Relating to Sub-Penny Restrictions for Non-Nasdaq Over-the-Counter Equity Securities. Since 1932, Hill's core business has been making markets in non-Nasdaq OTC equity securities. Consequently, Hill has a substantial interest in the proposed rule change.

Hill supported the NASD's original proposal to limit quoting in non-Nasdaq equity securities to \$0.01 for securities priced at or better than \$1.00 and to \$0.0001 for securities priced less than \$1.00.¹ Hill respectfully opposes the proposed amendment to eliminate current NASD Rule 6540(c) ("Rule 6540(c)"), *i.e.*, the rule which requires a participating ATS or ECN to reflect non-subscriber access or post-transaction fees in their posted quotes on the OTC Bulletin Board ("OTCBB").²

¹ National Association of Securities Dealers, Inc., Notice of Filing of a Proposed Rule Change and Amendment No. 1 Thereto Relating to Sub-Penny Restrictions for Non-Nasdaq Over-the-Counter Equity Securities, Securities Exchange Act Release No. 53024 (August 17, 2005).

² National Association of Securities Dealers, Inc., Notice of Filing of Proposed Rule Change and Amendment No. 2 Thereto Relating to Sub-Penny Restrictions for Non-Nasdaq Over-the-Counter Equity Securities, Securities Exchange Act Release No. 53024 (December 27, 2005).

The proposed elimination of Rule 6540(c) is intended to address the issues raised in the comment letter submitted by Archipelago Trading Services, Inc. (“Archipelago”).³ Archipelago contended that sub-penny access fees could not be displayed, as required by NASD Rule 6540(c), if sub-penny quoting was prohibited. Archipelago further contended that no legitimate policy rationale exists for keeping Rule 6540(c) for the OTCBB in light of the recent adoption of Regulation NMS.⁴ The NASD agreed with Archipelago’s comment that, “absent eliminating the access fee display requirement [of] Rule 6540(c), it would conflict with the proposed amendments to Rule 6750.”⁵ Consequently, the NASD has proposed to delete Rule 6540(c).⁶

Hill generally concurs with the NASD that the adoption of the proposed amendments to Rule 6750 would conflict with Rule 6540(c).⁷ Hill, however, does not believe that eliminating the requirement that ECNs and ATNs include all fees in their displayed OTCBB quotes is the correct solution to the conflict between the rules. Rule 6540(c) serves an important purpose in that it avoids the discordance historically associated with unregulated, hidden access fees and avoids regulatory imposition of access fee caps.

The elimination of Rule 6540(c) would create a regulatory vacuum resulting in unregulated OTCBB access fees. Historically, unregulated, hidden access fees have caused marketplace dislocations. Unregulated, hidden access fees gave rise to a spectrum of difficult and, at times acrimonious, market issues relating to price discovery, best execution, backing away, locked and crossed markets, and access fee gaming. If the NASD deletes Rule 6540(c), the OTCBB should expect similar disruptions to return. Additionally, permitting an ATS or an ECN to have hidden fees places market makers such as Hill at a competitive disadvantage to ATNs and ECNs who will be permitted to charge non-subscribers hidden access fees while market makers will not be able to do so.

Finding an acceptable solution to replace Rule 6540(c) may prove difficult. When the Securities and Exchange Commission (the “Commission”) adopted Regulation NMS, the Commission stated:⁸

Perhaps more than any other single issue, the proposed limitation on access fees splintered the commenters. Some supported the proposal as a worthwhile

³ Letter of Kevin J.P. O’Hara, Chief Administrative Officer and General Counsel, Archipelago Trading Services, Inc., dated September 23, 2005.

⁴ 17 CFR PARTS 200, 201, 230, 240, 242, 249, and 270.

⁵ See supra note 2.

⁶ Id.

⁷ The sub-penny proposal permits decimal quotations under \$1.00. To this extent Rule 6540(c) does not impact the proposed amendment to Rule 6750.

⁸ Regulation NMS, Securities Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37502 (June 29, 2005).

compromise on an extremely difficult issue. They believed that it would level the playing field in terms of who could charge fees, as well as give greater certainty to market participants that quoted prices will, essentially, be true prices. Others were strongly opposed to any limitation on fees, believing that competition alone would be sufficient to address high fees that distort quoted prices. Still others were equally adamant that all access fees of electronic communications networks ("ECNs") charged to non-subscribers should be prohibited entirely, although they did not see a problem with fees charged to a market's members or subscribers. Although consensus could not be achieved on any particular approach, commenters expressed a strong desire for resolution of a difficult issue that has caused discord within the securities industry for many years.

The potential for disruption to the OTCBB due to unregulated access fees speaks strongly against the abandonment of Rule 6540(c), as there is no ready alternative to replace it. Hill suggests that the NASD conduct further review to develop a solution that would not pose the adverse consequences of deleting Rule 6540(c). As one possibility for further review, Hill recommends convening the OTC Bulletin Board Committee ("the Committee").⁹ The Committee's collective experience and expertise has historically provided the NASD with a valuable resource, and the Committee has demonstrated its skill and beneficial impact to the regulatory process in the initial crafting of Rule 6540(c). The Committee may prove equally valuable toward a workable solution to this and future OTCBB market structure issues. In the absence of a better alternative, Rule 6540(c) should not be eliminated for the sake of the adoption of the proposed amendments to Rule 6750.

Please contact the undersigned at 201.434.6900 with any questions you may have.

Very truly yours,

/s/

Patrick E. Brake, Jr.
General Counsel

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⁹The status of the Committee is to the best of our knowledge unresolved. The Committee, when last active, was comprised of market participants, state regulators, members of the academic community, representatives of the issuer community, and independent representatives.