



DIVISION OF  
TRADING AND MARKETS

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC 20549

November 27, 2012

Eric J. Swanson  
Senior Vice President and General Counsel  
BATS Y-Exchange, Inc.  
8050 Marshall Drive  
Suite 120  
Lenexa, KS 66214

Re: Request for No-Action Relief From Rule 602 of Regulation NMS Submitted In Connection With Proposal To Establish A Retail Liquidity Improvement Program (SR-BYX-2012-019)

Dear Mr. Swanson:

This responds to your letter dated November 19, 2012, wherein you request that the staff of the Division of Trading and Markets provide you with written assurance that it will not recommend enforcement action to the Securities and Exchange Commission (the "Commission") pursuant to Rule 602 of Regulation NMS<sup>1</sup> (the "Quote Rule") with respect to certain activity contemplated by the operation of a Retail Liquidity Improvement Program (the "Program") proposed by BATS Y-Exchange, Inc. (BATS or Exchange).<sup>2</sup> Specifically, you request that the staff not recommend enforcement action against: (1) the Exchange for failing to collect, process, and make available to vendors the best bid, best offer, and quotation sizes communicated by members of the Exchanges pursuant to Commission Rule 602(a) or (2) the liquidity providers pursuant to Commission Rule 602(b)(1).<sup>3</sup>

---

<sup>1</sup> 17 CFR 242.602.

<sup>2</sup> See Securities Exchange Act Release Nos. 67734 (August 27, 2012), 77 FR 53242. The Exchange has amended its proposed rule change. The amendment, filed on November 13, 2012 does not materially alter the substance of the proposed rule change or raise any novel regulatory issues, and therefore was not noticed for public comment.

<sup>3</sup> On November 27, 2012, the Commission approved the proposed rule change. See Securities Exchange Act Release No. 68303.

As you described in your letter and the proposed rule change, the Program would establish an alternative venue for the execution of retail orders. The Program would create a new class of market participants (Retail Member Organizations) and two new order types (Retail Orders and Retail Price Improvement Orders). Retail Member Organizations would submit Retail Orders<sup>4</sup> representing orders from retail investors to the Exchange. All Exchange Users<sup>5</sup> would be permitted to submit Retail Price Improvement Orders that would execute against the Retail Orders. Retail Price Improvement Orders would express firm interest to price-improve on the best protected bid or offer (“PBBO”) by at least \$0.001 or more per share. The Exchange proposes to disseminate a Retail Liquidity Identifier through the Consolidated Quotation System and the Nasdaq UTP Plan to notify market participants of the existence of Retail Price Improvement Orders. The identifier would reflect the symbol for a particular security and the side (buy or sell) of the Retail Price Improvement Order interest, but it would not include the price or size of such interest.

The Quote Rule requires national securities exchanges to, among other things, make available to vendors the best bid, the best offer, and aggregate quotation sizes for each subject security listed or admitted to unlisted trading privileges which is communicated on any national securities exchange by any responsible broker or dealer.<sup>6</sup> The Quote Rule also requires each responsible broker or dealer to promptly communicate to its national securities exchange or national securities association, pursuant to the procedures established by that exchange or association, its best bids, best offers, and quotation sizes for any subject security.<sup>7</sup> A “bid” or “offer” is defined as the bid price or the offer price communicated by a member of a national securities exchange or member of a national securities association to any broker or dealer, or to any customer, at which it is willing to buy or sell one or more round lots of an NMS security, as either principal or agent, but shall not include indications of interest.<sup>8</sup> You state that the Retail Price Improvement Orders, considered on their own or together with the Retail Liquidity Identifier that indicates their existence, do not meet the definition of “bid” or “offer” in Commission Rule 600(b)(8) because they do not communicate a specific price.

Based on the terms of the Program and the facts and representations contained in your letter, the staff will not recommend enforcement action to the Commission, either against the Exchange or against liquidity providers, under the Quote Rule relating to the kind of information disseminated through the Retail Liquidity Identifier. This no-action position is premised on the

---

<sup>4</sup> The definition of Retail Order would be limited to immediate or cancel agency orders that originate from a natural person rather than a trading algorithm or any other computerized methodology.

<sup>5</sup> A “User” is defined in BYX Rule 1.5(cc) as any member or sponsored participant of the Exchange who is authorized to access the BATS System.

<sup>6</sup> 17 CFR 242.602(a)(1).

<sup>7</sup> 17 CFR 242.602(b)(1).

<sup>8</sup> 17 CFR 242.600(b)(8).

Program's operation pursuant to a pilot or permanent status approved by the Commission. If the pilots expire without the Commission permanently approving the Program, the staff's no-action position will be withdrawn immediately upon expiration of the pilot.

You should understand that this is a staff position with respect to enforcement only and is provided solely to respond to your request. This letter does not purport to state or imply any legal conclusions, including any conclusion as to whether your receipt of this letter was necessary or appropriate in order to operate the Program or any conclusions relating to the issues addressed in the Commission's proposed rulemaking regarding the regulation of non-public trading interest.<sup>9</sup> The staff's position is based on the facts and representations you have made concerning the operation of the Program. The no-action position stated herein is subject to modification or revocation at any time.

Sincerely,



David S. Shillman  
Associate Director

---

<sup>9</sup> See Securities Exchange Act Release No. 60997 (November 13, 2009), 74 FR 61208 (November 23, 2009).



November 19, 2012

Robert Cook, Esq.  
Director  
Division of Trading and Markets  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-1090

RE: Request for No-Action Relief from Rule 602 of Regulation NMS (“Quote Rule”)

Dear Mr. Cook:

BATS Y-Exchange, Inc. (the “Exchange”) for the reasons set forth below requests assurance from the staff of the Division of Trading and Markets (the “staff”) that the staff will not recommend enforcement action pursuant to Regulation NMS Rule 602 (the “Quote Rule”) with respect to the proposed Retail Price Improvement (“RPI”) Program’s (the “Program”) dissemination of a Retail Liquidity Identifier (the “liquidity flag” or “RLI”) or the Retail Price Improvement Orders (“RPI Orders”) advertised by the RLI upon implementation of the Program after receiving approval from the Securities and Exchange Commission (“Commission”) or the staff pursuant to delegated authority. In particular, the Exchange asks for assurance that the staff will not recommend such action against: (1) the Exchange for failing to collect, process, and make available to vendors the best bid, best offer, and quotation sizes communicated by members of the Exchange pursuant to Rule 602(a), or (2) liquidity providers pursuant to Rule 602(b)(1).

### **Background**

On August 14, 2012, the Exchange filed with the Commission a proposed rule change to establish on a one-year pilot basis the RPI Program. The Program seeks to establish a venue for the execution of retail orders with greater price competition and transparency than existing execution arrangements.<sup>1</sup> Following a notice and comment period and a designation by the

---

<sup>1</sup> See Securities Exchange Act Release No. 67734 (August 27, 2012), 77 FR 53242 (SR-BYX-2012-019).

Commission on October 12, 2012 of a longer period for Commission action,<sup>2</sup> the Exchange submitted a response on November 13, 2012 to the one comment letter received.<sup>3</sup> The Exchange filed an amendment to the proposal on November 13, 2012, proposing to gradually phase-in the Program and to make certain technical amendments.

Concurrently with the initial filing of the proposal, the Exchange filed a request for exemptive relief under the Sub-Penny Rule describing the Program's consistency with the policy objectives of the Sub-Penny Rule and its furtherance of the public interest and protection of investors.<sup>4</sup>

This letter discusses the proposed liquidity flag and its consistency with the Quote Rule, and seeks no action relief from the staff with respect to the Quote Rule's potential application to the liquidity flag and the orders it advertises.

### **The Retail Price Improvement Program**

The proposed Program seeks to attract retail order flow to the Exchange by creating a venue that would offer enhanced price competition and transparency and thereby deliver better prices to retail investors. Before summarizing the relevant features of the Program, it is worth underscoring a basic premise of the Program: the execution of retail orders today occurs in a largely segmented environment. Specifically, broker-dealers executing retail orders today do not compete for those orders by offering aggressive prices in a competitive market mechanism, but rather through bilateral internalization arrangements.<sup>5</sup>

The Commission has recognized this segmentation and its underlying economics, stating that “[l]iquidity providers generally consider the orders of individual investors very

---

<sup>2</sup> See Securities Exchange Act Release No. 68049 (October 12, 2012), 77 FR 64180 (October 18, 2012).

<sup>3</sup> See Letter from Eric J. Swanson, SVP, General Counsel and Secretary, BATS Global Markets, Inc. to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, dated November 13, 2012 (“Exchange’s Response Letter”).

<sup>4</sup> See Letter from Eric J. Swanson, SVP, General Counsel and Secretary, BATS Global Markets, Inc. to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission dated August 14, 2012 (“Sub-Penny Rule Exemption Request”).

<sup>5</sup> See Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594, 3606 (“Equity Market Structure Release”) (“[B]rokers with significant retail customer accounts send the great majority of non-directed marketable orders to OTC market makers that internalize executions, often pursuant to payment for order flow arrangements.”).

attractive to trade with because such investors are presumed on average not to be as informed about short term price movements as are professional traders.”<sup>6</sup> While continuing to express broad market structure concerns with respect to internalization arrangements, the Commission has specifically noted that the arrangements offer certain benefits to retail investors.<sup>7</sup>

The Program would establish a new class of market participants (Retail Member Organizations) and two new order types (Retail Orders and RPI Orders). Retail Member Organizations would submit Retail Orders to the Exchange. As proposed, all Exchange Users<sup>8</sup> will be permitted to provide potential price improvement for Retail Orders in the form of non-displayed interest that is better than the national best bid that is a Protected Quotation (“Protected NBB”) or the national best offer that is a Protected Quotation (“Protected NBO”, and together with the Protected NBB, the “Protected NBBO”).<sup>9</sup>

A Retail Order is strictly defined under the Program as an agency order that originates from a natural person and is submitted to the Exchange by an RMO, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. In order to become a Retail Member Organization, an Exchange member organization must conduct a retail business or handle retail orders on behalf of another broker-dealer. The member organization must submit an application with supporting documentation and an attestation to the Exchange that the order flow would qualify as Retail Orders. Retail Member Organizations must obtain annual written representations from broker-dealers sending Retail Orders and monitor whether its broker-dealer customer’s Retail Order flow continues to meet the applicable requirements. Retail Member Organizations are subject to disqualification for failure to comply with the

---

<sup>6</sup> Id. at 3612.

<sup>7</sup> Id. at 3597.

<sup>8</sup> A “User” is defined in BYX Rule 1.5(cc) as any member or sponsored participant of the Exchange who is authorized to obtain access to the System.

<sup>9</sup> The term Protected Quotation is defined in BYX Rule 1.5(t) and has the same meaning as is set forth in Regulation NMS Rule 600(b)(58). The terms Protected NBB and Protected NBO are defined in BYX Rule 1.5(s). The Protected NBB is the best-priced protected bid and the Protected NBO is the best-priced protected offer. Generally, the Protected NBB and Protected NBO and the national best bid (“NBB”) and national best offer (“NBO”, together with the NBB, the “NBBO”) will be the same. However, a market center is not required to route to the NBB or NBO if that market center is subject to an exception under Regulation NMS Rule 611(b)(1) or if such NBB or NBO is otherwise not available for an automatic execution. In such case, the Protected NBB or Protected NBO would be the best-priced protected bid or offer to which a market center must route interest pursuant to Regulation NMS Rule 611.

requirements of the proposed rule. Each of these requirements stems in large part from Program's premise of the segmentation of execution of retail order flow.

RPI Orders would be defined as non-displayed interest on the Exchange that is better than the Protected NBB or Protected NBO by at least \$0.001 and that is identified as an RPI Order in a manner prescribed by the Exchange ("RPI interest").<sup>10</sup> The price of an RPI Order would be determined by a User's entry of the following into the Exchange: (1) RPI buy or sell interest; (2) an offset, if any; and (3) a ceiling or floor price. The Exchange expects that RPI sell or buy interest typically would be entered to track the Protected NBBO. The offset would be a predetermined amount by which the User is willing to improve the Protected NBBO, subject to a ceiling or floor price. The ceiling or floor price would be the amount above or below which the User does not wish to trade. RPI Orders in their entirety (the buy or sell interest, the offset, and the ceiling or floor) will remain non-displayed. The Exchange will also allow Users to enter RPI Orders which establish the exact limit price, which is similar to a non-displayed limit order currently accepted by the Exchange today except the Exchange will accept sub-penny limit prices on RPI Orders with three numbers after the decimal. The Exchange's System<sup>11</sup> will monitor whether RPI buy or sell interest, adjusted by any offset and subject to the ceiling or floor price, is eligible to interact with incoming Retail Orders

Users and RMOs will be permitted to enter odd lots, round lots or mixed lots as RPI Orders and as Retail Orders respectively. RPI Orders will be ranked and allocated according to price and time of entry into the System consistent with Exchange Rule 11.12 and therefore without regard to whether the size entered is an odd lot, round lot or mixed lot amount. Similarly, Retail Orders will interact with RPI Orders according to the Priority and Allocation rules of the Program and without regard to whether they are odd lots, round lots or mixed lots. In accordance with rules of the consolidated tape plans, executions less than a round lot will not print to the consolidated tape or be considered the last sale.

---

<sup>10</sup> Exchange systems would prevent Retail Orders from interacting with RPI Orders if the RPI Order is not priced at least \$0.001 better than the Protected NBBO. The Exchange notes, however, that price improvement of \$0.001 would be a minimum requirement and Users could enter RPI Orders that better the Protected NBBO by more than \$0.001. Exchange systems will accept RPI Orders without a minimum price improvement value; however, such interest will execute at its floor or ceiling price only if such floor or ceiling price is better than the Protected NBBO by \$0.001 or more.

<sup>11</sup> The "System" is defined in BYX Rule 1.5(aa) as "the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when applicable, routing away."

Importantly, liquidity providers under the Program would compete for execution priority with respect to incoming Retail Orders. A given liquidity provider, in other words, would not be assured of its ability to interact with an incoming order because a competing liquidity provider entering a larger offset—that is, offering greater price improvement to the Retail Order— would achieve execution priority with its more competitive order. So, while the tracking component of the RPI Order would be derived from prices made outside the Program, the offset component, the competition between liquidity providers, and the price-time priority of the Program would incentivize liquidity providers to *make new, more aggressive prices* than those currently available to retail investors.<sup>12</sup>

In order to attract Retail Orders to the Program and to fuel price competition among liquidity providers, the Exchange has proposed to disseminate a liquidity flag called a Retail Liquidity Identifier. The RLI would reflect the presence but not the price or size of RPI Orders. In particular, the Exchange initially would disseminate the liquidity flag through Exchange proprietary data feeds and through consolidated data streams (i.e., pursuant to the Consolidated Tape Association Plan/Consolidated Quotation Plan, or CTA/CQ, for Tape A and Tape B securities, and the Nasdaq UTP Plan for Tape C securities). The liquidity flag will contain the symbol for the particular security and the side (buy or sell) of the trading interest, but will not include the price or size of the RPI interest. As noted above, there is no minimum size for RPI Orders or Retail Orders; round lots, odd lots, and mixed lots are all accepted without distinction under the Program.

## **Applicable Law**

### **Origin and Purpose of the Quote Rule.**

---

<sup>12</sup> Contrast the incentive of liquidity providers in the Program to be first at the best price, with the “last mover” advantage afforded to participants in the flash order process as described by the Commission. “For example, the flash process provides a vehicle for certain market participants to match displayed prices on an order-by-order basis by responding to flashes. It therefore gives these participants a ‘last-mover’ advantage over displayed orders in other markets. Rather than displaying their orders or quotations in advance of incoming marketable order flow to attract an execution, these market participants can wait to receive the flashed order and program their systems to pick and choose when to execute.” Securities Exchange Act Release No. 60684 (September 18, 2009), 74 FR 48632, 48636. Liquidity providers under the Program have no opportunity to interact with Retail Orders if they do not enter the best-priced RPI Order in advance of incoming marketable order flow to attract an execution. Moreover, in point of further contrast, the Program does not disseminate any information about the existence of a marketable order on a pre-trade basis.

In summarizing the Quote Rule as originally adopted in 1978, the Commission stated simply that it required exchanges and other specified market centers “to make available quotations (including size) in all reported securities in which that market center is making a market” and made clear that “quotations made available pursuant to the Rule [were] required to be ‘firm,’ subject to certain exceptions.”<sup>13</sup> The Quote Rule’s adoption followed “largely unsuccessful” private efforts to develop a composite quotation system and the continued dissemination by exchanges of “bid and asked price data which [did] not represent ‘firm’ quotations. . . .”<sup>14</sup> More fundamentally, the Rule sought to meet the need identified by the 1975 Amendments “for a prompt, accurate and reliable central quotation reporting system.”<sup>15</sup>

The Quote Rule underwent significant and impactful amendments in conjunction with the Commission’s adoption of the Limit Order Display Rule in 1996.<sup>16</sup> Designed “to ensure that more comprehensive quotation information is made available to the public[.]” those amendments were a response to the Commission’s concern following an exhaustive investigation and investigative report concerning trading practices in the Nasdaq market about the development of private markets with better prices for professionals than those visible and accessible to the public:

Over the course of the last decade, certain trading systems that allow market makers and specialists to widely disseminate significant trading interest to certain market participants without making this trading interest available to the public market at large have become significant markets in their own right. Although offering benefits to some market participants, widespread participation in these hidden markets has reduced the completeness and value of publicly available quotations contrary to the purposes of the NMS.<sup>17</sup>

The 1996 amendments had the effect of requiring specialists and market makers to reflect in their public quotes any better-priced orders they broadly displayed by market makers through ECNs.<sup>18</sup>

---

<sup>13</sup> Securities Exchange Act Release No. 14415 (January 26, 1978), at \*1.

<sup>14</sup> Id. at \*2.

<sup>15</sup> S. Rep. No. 75, 94th Cong., 1st Sess. 8-9 (1975).

<sup>16</sup> See Securities Exchange Act Release No. 37619A (September 6, 1996), 61 FR 48290 (“Order Execution Obligations Release”).

<sup>17</sup> Id. at 48290, 48307.

<sup>18</sup> Id. at 48291.

## **Discussion**

The Exchange appreciates the profoundly positive impact that the Quote Rule, as amended, has had on the National Market System, and understand the Commission's caution with respect to the definitions that determine the scope of the rule. With the above background and this recognition in mind, we discuss below why the Program is consistent with the Quote Rule.

The obligations of exchanges to disseminate quotations under Regulation NMS Rule 602(a), and those of responsible brokers and dealers to communicate prices and quotation sizes to exchanges under 602(b) depend on the definition of "bid" or "offer" under Rule 600(b)(8) which states in pertinent part:

*Bid or offer* means the bid price or the offer price communicated by a member of a national securities exchange . . . to any broker or dealer, or to any customer, at which it is willing to buy or sell one or more round lots of any NMS security, as either principal or agent, but shall not include indications of interest.<sup>19</sup>

The Exchange believes that the non-displayed trading interest entered into the Exchange's system in the form of RPI Orders, considered either on their own or together with the liquidity flag that indicates their existence, do not meet the definition of "bid" or "offer" in Rule 600(b)(8).

To meet the definition, a bid or offer must include a price. Neither the RPI Orders nor the liquidity flag that advertises them communicate a specific price to any broker-dealer or customer: the RPI Order remains at all times non-displayed and the liquidity flag does not contain a specific price. The Exchange understands that the Commission's Proposed Rule on Regulation of Non-Public Trading Interest ("the Dark Liquidity Proposal") would amend the definition of bid or offer set forth in Rule 600(b)(8) to include "actionable IOIs," which apparently would include messages without prices but where pricing information can be inferred from market conditions.<sup>20</sup> Importantly, however, the Dark Liquidity Proposal does not

---

<sup>19</sup> 17 C.F.R. 242.600(b)(8).

<sup>20</sup> The Dark Liquidity Proposal describes actionable IOIs as effectively alerting "the recipient that the dark pool currently has trading interest in a particular symbol, side (buy or sell), size (minimum of a round lot of trading interest), and price (equal to or better than the national best bid for buying interest and the national best offer for selling interest)." Securities Exchange Act Release No. 60997 (November 13, 2009), 74 FR 61208, 61211 ("Dark Liquidity Proposal").

express a Commission view that actionable IOIs are quotes under current regulation and must be treated as such pending adoption of the Dark Liquidity Proposal. Rather, the Proposal characterizes actionable IOIs as “functionally similar” to displayed quotes.<sup>21</sup>

In addition, the Program as proposed has the potential to produce better prices for retail investors, a core goal of the National Market System in general and the Quote Rule in particular. As set forth in the Exchange’s Sub-Penny Rule Exemption Request, the Program would enhance price competition for retail orders and increase the level of order interaction experienced by retail investors.<sup>22</sup> Specifically, as noted above, the Program’s multiple liquidity providers would compete for execution priority with respect to incoming Retail Orders by being ranked first at the best price. Moreover, because liquidity providers would not be able to see competing orders, they would be incentivized to *make new, more aggressive prices* rather than simply match existing prices.

The Exchange believes this introduction of price competition into what are currently bilateral, and relatively static, internalization arrangements has the potential to produce better prices for retail investors. The Exchange further believes that the RLI as proposed will be an important component of the effort to attract liquidity providers and Retail Orders to the Program. Given the longstanding nature of many internalization arrangements, the identification of liquidity, including side, may be necessary to attract the attention of those handling retail flow and lead them to consider becoming Retail Member Organizations. Moreover, because liquidity providers will be required to compete based on price improvement for execution priority under the Program, the Program’s success will depend almost entirely on the attraction of a viable stream of Retail Orders. In other words, the absence of the guaranteed ability to interact with a particular stream of retail order flow that exists in current internalization arrangements will have to be offset by the presence of multiple streams of Retail Orders in the Program.

Second, the Program, and in particular the proposed RLI, would enhance the quality of pricing information available to market participants. Current internalization arrangements do not depend in any meaningful way on the displayed quotes of the broker-dealers interacting with retail order flow. There is, consequently, relatively little quotation or pre-trade pricing

---

<sup>21</sup> See id.

<sup>22</sup> The Sub-Penny Exemptive Request also argues in favor of relief from the Sub-Penny Rule because the Exchange offers a robust regulatory and surveillance alternative to existing oversight of internalization. This ground, while not discussed herein, also favors relief from the Quote Rule. We ask that pages 8 to 10 of the Sub-Penny Exemption Request be incorporated by reference into this request for relief.

information related to those arrangements currently available to those routing retail orders. The Program's dissemination of a liquidity flag identifying the presence of RPI Orders would represent an important advance in pre-trade transparency within the current retail order execution segment.

The Commission, in adopting the 1996 amendments to the Quote Rule, referenced the Congressional mandate of quote transparency and its underlying rationale:

Congress considered the public availability of quotation information to be critical to fair and competitive markets because published quotations provide investors, their brokers, and other market participants with essential information about the condition of the market. This information assists investors in making investment decisions and in finding the best market for a security, while making it possible for investors to evaluate the quality of their executions.<sup>23</sup>

In summarizing the amendments, the Commission stated that they were "designed to ensure that more comprehensive quotation information is made available to the public."<sup>24</sup>

Among the market structure conundrums produced by the segmentation of retail order flow is that liquidity providers interacting with retail orders will not bid as aggressively for orders that do not originate with natural persons. The reason is plain: professional traders are more likely to be highly informed as to short term price movements than natural persons. A highly informed counter party means, in the short term, a less profitable trading opportunity. Liquidity providers, therefore, will not enter quotations, which would require them to "execute any order to buy or sell" presented to it by "another broker dealer"<sup>25</sup> at price levels they are willing to provide a retail investor. As a practical matter, this means that the interest of internalizing broker-dealers typically will not make its way into a displayed quote. For precisely this reason, the Program could not function if RPI Orders (assuming away sub-penny complications) were required to be displayed as quotes.<sup>26</sup>

The Program does not and cannot, in other words, transform internalizing trading interest into firm, displayed quotes. What the liquidity flag does offer in its proposed form (including symbol and side, but not price and size), is the opportunity to integrate *more comprehensive*

---

<sup>23</sup> Order Executions Obligations Release at 48291.

<sup>24</sup> *Id.* at 48291.

<sup>25</sup> 17 CFR 242.602(b)(2).

<sup>26</sup> This is another way of saying the premise of segmentation is critical to the Program.

*pricing* information into the public quote. This advance in transparency squarely favors relief from the Quote Rule that would allow the Program to operate as proposed.

Third, the Program represents a competitive response on the part of the Exchange to bilateral internalization arrangements, and offers the potential of continued and beneficial competition in the retail execution segment. As stated in the Exchange's Response to Comments, the Exchange regards the Program as an important but structurally modest effort by the Exchange to attract retail order flow. As proposed, the participants, structure, and economics of the Program would parallel practices that have operated in more or less their current form for well over a decade.<sup>27</sup> The RLI in its proposed form is an important component of the Program's effort to attract liquidity providers and Retail Orders to the Program, and to stimulate price competition within the Program. To the extent that liquidity providers decide to compete with the Program rather than within the Program for retail orders, that competition, presumably fuelled with execution quality data, will present brokers handling retail orders with choices. If, for example, liquidity providers wish to provide either proprietary or more generally disseminated liquidity flags such as the RLI to advertise appropriately liquidity they are willing to provide, those choices will be even more fully informed. With more execution choices and more information, brokers handling retail orders will be in a position to drive a higher level of price competition for retail orders.

Echoing the belief expressed during the 1996 amendments to the Quote Rule that the "private" display of better prices "reduces the reliability and completeness of consolidated quotations,"<sup>28</sup> the Commission has recently focused on related concerns with respect to flash orders<sup>29</sup> and non-public trading interest<sup>30</sup> more generally. With respect to the former, the Commission has warned that "[t]he flashing of order information could lead to a two-tiered market in which the public does not have access, through the consolidated quotation data streams . . . ."<sup>31</sup> With respect to dark pools, an analogous concern has been expressed regarding actionable IOIs being "lit" to a select group of market participants and dark with respect to the rest of the public."<sup>32</sup> As stressed throughout, the RLI bears none of the features giving rise to

---

<sup>27</sup> We ask that pages 2 to 14 of the Exchanges' Response Letter be incorporated by reference into this request for relief.

<sup>28</sup> Order Execution Obligations Release at 48308.

<sup>29</sup> Securities Exchange Act Release No. 60684 (September 18, 2009), 74 FR 48632 ("Flash Order Release").

<sup>30</sup> See Dark Liquidity Proposal.

<sup>31</sup> Flash Order Release at 48633.

<sup>32</sup> Dark Liquidity Proposal at 61210.

these concerns. As proposed, the RLI would be disseminated to the public through the public quote stream. No order prices would be “lit” selectively or otherwise. In addition the exchange would grant fair access to the trading interest advertised by the RLI that is based on reasonable factors “principally that only retail orders are entitled to such access” that have been approved by the Commission pursuant to an approved rule change.

### **Request for Relief**

For the reasons set forth above, the Exchange requests assurance that the staff will not recommend enforcement action pursuant to Regulation NMS Rule 602 with respect to the proposed Program’s dissemination of an RLI or with respect to the RPI Orders advertised by the RLI. In particular, the Exchange asks for assurance from the staff that it will not recommend such action with respect to: (1) the Exchange with respect to collecting, processing, and making available to vendors the best bid, best offer, and quotation sizes communicated by members of the Exchange, or (2) liquidity providers entering RPI Orders under the Program.

Please feel free to contact me at (913) 815-7000 if you have any additional questions related to the information provided in this response.

Sincerely,



Eric J. Swanson  
Senior Vice-President and General Counsel