



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
TRADING AND MARKETS

March 25, 2014

Janet McGinness
EVP & Corporate Secretary
General Counsel, NYSE Markets
20 Broad Street
New York, NY 10005

Re: Request for No-Action Relief From Rule 602 of Regulation NMS Submitted In Connection With NYSE Arca's Proposal To Establish A Retail Price Improvement Program

Dear Ms. McGinness:

This responds to your letter dated December 20, 2013, 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 NMS¹ (the "Quote Rule") with respect to certain activity contemplated by the operation of a Retail Liquidity Program (the "Program") proposed by NYSE Arca, Inc. ("NYSE Arca" or "Exchange").² Specifically, you request that the staff not recommend enforcement action against: (1) the Exchanges 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 Commission Rule 602(a) or (2) the liquidity providers pursuant to Commission Rule 602(b)(1).³

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 two new classes of market participants (Retail Member Organizations and Retail Liquidity Providers) and two new order types (Retail Orders and Retail Price Improvement Orders). Retail Member

¹ 17 CFR 242.602.

² See Securities Exchange Act Release No. 70824 (November 6, 2013), 78 FR 68116 (November 13, 2013).

³ On December 23, 2013, the Commission approved the proposed rule change. See Securities Exchange Act Release No. 71176 (December 23, 2013), 78 FR 79524 (December 30, 2013).

Organizations would submit Retail Orders⁴ representing orders from retail investors to the Exchange. Retail Liquidity Providers and other members of the Exchange would 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, the UTP Quote Data Feed, and the Exchange's proprietary data feed 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 that is communicated on any national securities exchange by any responsible broker or dealer.⁵ 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.⁶ 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.⁷ 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 information disseminated through the Retail Liquidity Identifier. This no-action position is premised on the Program's operation pursuant to a pilot or permanent status approved by the Commission. If the pilot expires without the Commission permanently approving the Program, the staff's no-action position will be withdrawn immediately upon expiration of the pilot.

⁴ The definition of Retail Order would be limited to agency or riskless principal orders that originate from a natural person rather than a trading algorithm or any other computerized methodology.

⁵ 17 CFR 242.602(a)(1).

⁶ 17 CFR 242.602(b)(1).

⁷ 17 CFR 242.600(b)(8).

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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.⁸ 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

⁸ See Securities Exchange Act Release No. 60997 (November 13, 2009), 74 FR 61208 (November 23, 2009).

December 20, 2013

VIA FEDERAL EXPRESS

John Ramsay
Acting 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. Ramsay:

NYSE Arca, Inc. (“NYSE Arca” or 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 Liquidity Program’s (the “Program”) dissemination of a Retail Liquidity Identifier (the “Identifier”) or otherwise with respect to the the Retail Price Improvement Orders (“RPI”) advertised by the Identifier, upon implementation of the Program after receiving approval from the Securities and Exchange Commission (the “Commission”). In particular, the Exchange asks for assurance that the Staff will not recommend such action against (1) the Exchange or its facilities 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 October 22, 2013, the Exchange filed with the Commission a proposed rule change to establish on a one-year pilot basis a Retail Liquidity Program.¹ The Program seeks to establish a venue for the execution of retail orders with greater price competition and transparency than existing execution arrangements.² 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

¹ Securities Exchange Act Release No. 70824 (Nov. 6, 2013), 78 FR 68116 (Nov. 13, 2013) (SR-NYSEArca-2013-107).

² Substantially similar retail liquidity programs have been approved for other exchanges. See Securities Exchange Act Release No. 67347 (July 3, 2012), 77 FR 40673 (July 10, 2012) (SR-NYSE-2011-55; SR-NYSEAmex-2011-84); Securities Exchange Act Release No. 68303 (Nov. 27, 2012) (SR-BYX-2012-19).

the public interest and protection of investors.³ This letter discusses the proposed Identifier 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 Identifier and the orders it advertises.⁴

The Retail Liquidity 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.⁵

The Commission has recognized this segmentation and its underlying economics, stating that “[l]iquidity providers generally consider the orders of individual investors very 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.”⁶ 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.⁷

The Program would establish two new classes of market participants, (Retail Member Organizations (“RMOs”) and Retail Liquidity Providers (“RLPs”)), a new order type (Retail Orders), and a new form of price-improving interest (RPIs). RMOs would submit Retail Orders to the Exchange. RLPs would be required to submit RPIs, which provide potential price improvement in the form of non-displayed interest that is priced better than the best protected bid or offer (“PBBO”).

³ See Letter from Janet M. McGinness, Corporate Secretary, Office of the General Counsel, NYSE Euronext to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission dated October 22, 2013 (“Sub-Penny Rule Exemption Request”).

⁴ The Commission granted similar no-action relief to other exchanges with the implementation of their respective retail liquidity programs. See Letter from David S. Shillman, Associate Director, Securities and Exchange Commission, to Janet McGinness, Corporate Secretary, Office of the General Counsel, NYSE Euronext dated July 3, 2012; letter from David S. Shillman, Associate Director, Securities and Exchange Commission, to Eric J. Swanson, SVP & General Counsel, BATS Y-Exchange, Inc. dated November 27, 2012.

⁵ See Securities Exchange Act Release No. 61358 (Jan. 14, 2010), 75 FR 3594, 3606 (“Equity Market Structure Concept 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.”).

⁶ *Id.* at 3612.

⁷ *Id.* at 3597.

A Retail Order is strictly defined under the Program as an agency order or a riskless principal order that meets the criteria of FINRA Rule 5320.03 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 an RMO, an ETP Holder must conduct a retail business or handle retail orders on behalf of another broker-dealer. The ETP Holder must submit an application with supporting documentation and an attestation to the Exchange that substantially all orders submitted would qualify as Retail Orders. RMOs must obtain yearly written representations from broker-dealers sending Retail Orders and monitor the broker-dealers' orders flows to meet the requirements of the Program. RMOs are subject to disqualification for failure to comply with the requirements of the proposed rule. Each of these requirements stems in large part from the Program's premise of the segmentation of retail order flow.

Retail Liquidity Providers ("RLPs") also would have to be approved by the Exchange. An RLP would be required to submit RPIs, priced better than the Exchange's protected best bid or offer ("PBBO") by at least \$0.001, for securities that are assigned to the RLP. More than one ETP Holder could act as an RLP for a security, and an ETP Holder could act as an RLP for more than one security. Other ETP Holders would be allowed, but not required, to provide liquidity under the Program by submitting RPIs. The principal benefit of becoming an approved RLP would be lower fees paid to the Exchange under the Program. An RLP must maintain RPIs that are better than the PBBO at least 5% of the trading day for each assigned security.⁸

The Exchange would rank RPIs according to price and then time of entry. Both Retail Orders and RPIs could be odd lots, round lots, or mixed lots. RPIs would be ranked without regard to whether the size entered is an odd lot, round lot, or mixed lot amount, and Retail Orders would interact with RPIs according to the priority and allocation rules of the Program without regard to whether they were odd lots, round lots, or mixed lots.

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 amount of price improvement would achieve execution priority with its more competitive order. The price 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.⁹

⁸ An ETP Holder acting as an RLP for a security could enter RPIs into Exchange systems and facilities for securities to which it was not assigned; however, the ETP Holder would not be eligible for execution fees that are lower than non-RLP rates for securities to which it was not assigned.

⁹ 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. *See* Securities Exchange Act Release No. 60684 (Sept. 18, 2009), 74 FR 48632, 48636 (Sept. 23, 2009) ("For example, the flash

In order to attract Retail Orders to the Program and to fuel price competition among liquidity providers, the Exchange has proposed to disseminate the Identifier. The Identifier would reflect the presence but not the price or size of RPIs. In particular, the Exchange would disseminate the liquidity flag through the Consolidated Quotation System, the UTP Quote Data Feed, and the Exchange's proprietary data feed. 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 RPIs 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.

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."¹⁰ 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. . . ."¹¹ More fundamentally, the Rule sought to meet the need identified by the 1975 Amendments "for a prompt, accurate and reliable central quotations reporting system."¹²

The Quote Rule underwent significant and impactful amendments in conjunction with the Commission's adoption of the Limit Order Display Rule in 1996.¹³ 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

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."). Liquidity providers under the Program have no opportunity to interact with Retail Orders if they do not enter the best-priced RPI *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.

¹⁰ See Securities Exchange Act Release No. 14415 (January 26, 1978), 43 FR 4342 (Feb. 1, 1978).

¹¹ *Id.*

¹² S. Rep. No. 75, 94th Cong., 1st Sess. 8-9 (1975).

¹³ See Securities Exchange Act Release No. 37619A (Sept. 6, 1996), 61 FR 48290 (Sept. 12, 1996) ("Order Execution Obligations Release").

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.¹⁴

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.¹⁵

Discussion

The Exchange appreciates the profoundly positive impact that the Quote Rule, as amended, has had on the National Market System, and understands 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 Reg. 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.¹⁶

The Exchange believes that the non-displayed trading interest entered into the Exchange's systems in the form of RPIs, considered either on their own or together with the liquidity flag that indicates their existence, does 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 RPIs nor the liquidity flag that advertises them communicate a specific price to any broker-dealer or customer: the RPI remains at all times non-displayed and the liquidity flag does not contain a specific price. The

¹⁴ *Id.* at 48290, 48307.

¹⁵ *Id.* at 48291.

¹⁶ 17 C.F.R. 242.600(b)(8).

Exchange understands that the Commission's Proposed Rule on the 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.¹⁷

Importantly, however, the Dark Liquidity Proposal does not 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.¹⁸

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 Exemptive Application Pursuant to Rule 612(c) ("the Sub-Penny Exemptive Application"), the Program would enhance price competition for retail orders and increase the level of order interaction experienced by retail investors.¹⁹ 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 Identifier 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 RMOs. 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.

¹⁷ 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)." See Securities Exchange Act Release No. 60997 (Nov. 13, 2009), 74 FR 61208, 61211 (Nov. 23, 2009) ("Dark Liquidity Proposal").

¹⁸ See *id.*

¹⁹ The Sub-Penny Exemptive Request identifies two other grounds favoring relief from the Sub-Penny Rule: (1) the liquidity maintenance obligations of the Program offer a framework for more stable liquidity provision to Retail Orders; and (2) the Exchange offers a robust regulatory and surveillance alternative to existing oversight of internalization. Both of these grounds, while not discussed herein, also favor relief from the Quote Rule.

Second, the Program, and in particular the proposed Identifier, 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 information related to those arrangements currently available to those routing retail orders. The Program's dissemination of a liquidity flag identifying the presence of RPIs 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 quoting 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.²⁰

In summarizing the amendments, the Commission stated that they were "designed to ensure that more comprehensive quotation information is made available to the public."²¹

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 counterparty 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"²² at prices 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 RPIs (assuming away sub-penny complications) were required to be displayed as quotes.²³

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 pricing*

²⁰ Order Executions Obligations Release at 48291.

²¹ *Id.*

²² 17 C.F.R. 242.602(b)(2).

²³ This is another way of saying the premise of segmentation is crucial to the Program.

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. 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. The Identifier 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 Identifier 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,"²⁴ the Commission has recently focused on related concerns with respect to flash orders²⁵ and non-public trading interest²⁶ 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 . . ."²⁷ 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."²⁸ As stressed throughout, the Identifier bears none of the features giving rise to these concerns. As proposed, the Identifier 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 Identifier 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

²⁴ Order Execution Obligations Release at 48308.

²⁵ Securities Exchange Act Release no. 60684 (Sept. 18, 2009), 74 FR 48632 ("Flash Order Release").

²⁶ See Dark Liquidity Proposal.

²⁷ Flash Order Release at 48633.

²⁸ Dark Liquidity Proposal at 61210.

John Ramsay
Securities and Exchange Commission
December 20, 2013
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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 Identifier or with respect to the RPIs advertised by the Identifier. 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 RPIs under the Program.

Thank you in advance for your consideration of this request.

Sincerely,

A handwritten signature in blue ink that reads "Janet McInnes". The signature is written in a cursive style with a large initial 'J'.