

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71457; File No. SR-FINRA-2013-052]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving the Proposed Rule Change Relating to Alternative Display Facility New Entrant

January 31, 2014.

#### I. Introduction

On December 2, 2013, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to add a new entrant to the Alternative Display Facility (the "Proposal"). The Proposal was published for comment in the **Federal Register** on December 17, 2013.<sup>3</sup> The Commission received no comments on the Proposal. This order approves the proposed rule change.

#### II. Description of the Proposed Rule Change

The Alternative Display Facility ("ADF") is a quotation collection and trade reporting facility that provides ADF Market Participants (*i.e.*, ADF-registered market makers or electronic communications networks ("ECNs"))<sup>4</sup> the ability to post quotations, display orders and report transactions in NMS stocks<sup>5</sup> for submission to the Securities Information Processors for consolidation and dissemination to vendors and other market participants.<sup>6</sup> The ADF is also designed to deliver real-time data to FINRA for regulatory purposes, including enforcement of requirements imposed by Regulation NMS.<sup>7</sup>

In particular, Rule 610 of Regulation NMS<sup>8</sup> requires that a trading center displaying quotations in an NMS stock through a self-regulatory organization ("SRO") display-only facility (such as the ADF) "provide a level and cost of access to such quotations that is substantially equivalent to the level and cost of access to quotations displayed by

SRO trading facilities in that stock."<sup>9</sup> Rule 610 also requires that a trading center displaying quotations in an NMS stock through an SRO display-only facility not impose unfairly discriminatory terms that prevent or inhibit any person from obtaining efficient access to such quotations through a member, subscriber, or customer of the trading center.<sup>10</sup> In articulating this standard, the Commission noted that the level and cost of access would "encompass both (1) the policies, procedures, and standards that govern access to quotations of the trading center, and (2) the connectivity through which market participants can obtain access and the cost of such connectivity."<sup>11</sup> The nature and cost of connections for market participants seeking to access the ADF participant's quotations would need to be substantially equivalent to the nature and cost of connections to SRO trading facilities.<sup>12</sup>

In determining whether ADF participants have satisfied the access standards under Rule 610, Regulation NMS also requires FINRA to submit a proposed rule change under Section 19(b) of the Act in order to add a new ADF participant.<sup>13</sup> Accordingly, FINRA is proposing to add LavaFlow ("FLOW") as a new ADF Market Participant.<sup>14</sup> FLOW provided FINRA with a summary of its policies and procedures regarding access to its quotations in an NMS stock displayed on the ADF, and a summary of its proposed fees for such access.<sup>15</sup> According to FINRA, FLOW has proposed policies and procedures that are designed to ensure that the level of access to its quotations is substantially equivalent to the level of access to quotations displayed by SRO trading facilities, and to ensure that FLOW does not impose unfairly discriminatory terms that prevent or inhibit any person from obtaining efficient access to such quotations.<sup>16</sup>

In particular, FINRA states that FLOW allows firms to access its liquidity in a variety of ways.<sup>17</sup> FLOW also allows a subscriber to determine its level of

connectivity, and does not have any tiers or rules regarding execution of orders based upon Market Participant Identification.<sup>18</sup> Additionally, the FLOW matching engine does not give priority to any participant and is blind to a participant's identity, with the exception of orders using the anti-internalization feature.<sup>19</sup> FLOW also maintains policies and procedures that require FLOW to respond to orders by non-subscribers as promptly as it responds to orders by subscribers, and allow for non-subscribers to be able to automatically execute against quotations displayed by the system.<sup>20</sup>

In addition, FINRA states that FLOW has established, and regularly maintains, policies and procedures designed to maintain a linkage with at least one SRO trading facility, or SRO display-only facility (together, "SRO Facility").<sup>21</sup> FLOW also maintains policies and procedures to transmit to such SRO Facility for display either the best priced order of those orders entered by OTC market makers and exchange market makers for those securities in which they make markets (or act as specialists) or the best priced orders entered by all ECN subscribers.<sup>22</sup> Moreover, FLOW has represented to FINRA that it has policies and procedures to provide, to any broker or dealer, access to such orders that is functionally equivalent to the access that is generally available for quotes displayed by an SRO Facility, at a level and cost of access that is substantially similar to the level and cost of access to quotations displayed by SRO trading facilities in that stock.<sup>23</sup> FLOW also has policies and procedures to conduct continuous monitoring of its connections with SRO Facilities and regular periodic system capacity reviews and tests to ensure future capacity and system integrity.<sup>24</sup>

Furthermore, FINRA states that FLOW has policies and procedures designed to ensure that the cost of access to its quotations is substantially equivalent to the cost of access to quotations displayed by SRO trading facilities, and that FLOW will not charge a fee for accessing its quotations that exceeds the maximum fee permitted by Rule 610 of Regulation NMS.<sup>25</sup> Specifically, the cost of accessing the quotations of a trading center may involve several distinct

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 71042 (December 11, 2013), 78 FR 76341 ("Notice").

<sup>4</sup> See FINRA Rule 6220(a)(3).

<sup>5</sup> See 17 CFR 242.600.

<sup>6</sup> See Notice, 78 FR at 76341.

<sup>7</sup> See 17 CFR 242.600.

<sup>8</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) ("NMS Adopting Release").

<sup>9</sup> 17 CFR 242.610(b)(1).

<sup>10</sup> 17 CFR 242.610(b)(2).

<sup>11</sup> NMS Adopting Release, 70 FR at 37549.

<sup>12</sup> *Id.*

<sup>13</sup> See Notice, 78 FR at 76342.

<sup>14</sup> According to FINRA, there have been no ADF Market Participants since the second quarter of 2010. See *id.*

<sup>15</sup> See Notice, 78 FR at 76341.

<sup>16</sup> See Notice, 78 FR at 76342.

<sup>17</sup> Firms that are FLOW subscribers may connect to FLOW via the FLOW Smart Order Router, or through the FLOW Gateway. Non-FLOW subscribers may connect via a third party vendor or connectivity provider, or through an exchange or a third-party broker-dealer subscriber. See *id.*

<sup>18</sup> See *id.*

<sup>19</sup> See *id.*

<sup>20</sup> See *id.*

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

costs, such as port fees,<sup>26</sup> market data fees,<sup>27</sup> general connectivity fees,<sup>28</sup> and transaction fees,<sup>29</sup> and FLOW proposes to assess costs in these respects that are substantially equivalent to the costs assessed by SRO trading facilities.<sup>30</sup>

FINRA also notes that the FLOW fee structure is currently a maker-taker model where FLOW pays a rebate for added executed liquidity and charges a fee for removed liquidity.<sup>31</sup> FLOW charges a standard rate of \$0.0030 to remove liquidity.<sup>32</sup> Pricing is subject to change with advance notice provided to subscribers, and for non-subscribers, notice of a price change is published on the FLOW Web site in advance of such price change.<sup>33</sup> In addition, FLOW charges subscribers and non-subscribers the same fees for utilizing its system, and monitors the average fee charged to non-subscribers and compares it to the average fee paid by subscribers in order to ensure the prices are the same.<sup>34</sup>

Finally, FINRA states that all members in good standing of an SRO are

eligible to become FLOW subscribers, and will be subject to credit limits set by FLOW.<sup>35</sup>

### III. Discussion and Commission Findings

After carefully considering the Proposal, the Commission finds that the Proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.<sup>36</sup> In particular, the Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>37</sup> which requires, in part, that FINRA 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.

Specifically, the Commission believes that the Proposal is consistent with Section 15A(b)(6) of the Act because the fees and the policies and procedures governing access to protected quotations displayed on the ADF by FLOW as described above should provide market participants with fair and efficient access, and are not unfairly discriminatory such that they would prevent a market participant from obtaining efficient access to such quotations. All members in good standing of an SRO are eligible to become FLOW subscribers, and both subscribers and non-subscribers may access FLOW liquidity. FLOW offers both subscribers and non-subscribers multiple options to access FLOW liquidity. In addition, FLOW also has policies and procedures that require FLOW to respond to orders by non-subscribers as promptly as it responds to orders by subscribers, and allow for non-subscribers to be able to automatically execute against quotations displayed by the system. Finally, the Commission notes FINRA's representation that the proposed level and cost of access is, in relative terms, substantially equivalent to the level and cost of access provided by SRO trading facilities.<sup>38</sup>

For these reasons, the Commission believes that the proposed rule change is consistent with the Act.

### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>39</sup> that the proposed rule change (SR-FINRA-2013-052), is hereby approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>40</sup>

**Kevin M. O'Neill,**  
Deputy Secretary.

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71454; File No. SR-NYSE-2014-06]

#### Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Its Price List To (i) Increase the Credit for Agency Cross Trades; (ii) Increase the Fee for Certain Executions at the Close; (iii) Increase the "Tier 1 Adding Credit;" (iv) Increase the Fee for Certain Floor Broker Discretionary e-Quotes; (v) Increase the Credit for Certain Floor Broker Executions That Add Liquidity; (vi) Increase the Credit for Certain Supplemental Liquidity Provider Executions; and (vii) Increase the Fee for Executions in Crossing Session II

January 31, 2014.

Pursuant to Section 19(b)(1) <sup>1</sup> of the Securities Exchange Act of 1934 (the "Act") <sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on January 23, 2014, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. 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

The Exchange proposes to amend its Price List to (i) increase the credit for agency cross trades; (ii) increase the fee for certain executions at the close; (iii) increase the "Tier 1 Adding Credit;" (iv) increase the fee for certain Floor broker

<sup>26</sup> FLOW charges port fees to subscribers based upon the number of ports requested. Fee-eligible port connections may be charged \$400 per connection, per month. In comparison, exchange port fees on average range from \$100 to \$1,000 per port, per month. *See id.*

<sup>27</sup> According to FINRA, FLOW has represented that it does not have any plans to charge its subscribers or non-subscribers for access to FLOW's market data. In comparison, market data fees vary by exchange, with some exchanges charging fees that range from under \$100 per month to \$750 to \$2,500, and some exchanges charging \$5,000 for external distribution. *See Notice*, 78 FR at 76342-43.

<sup>28</sup> According to FINRA, FLOW is connected in its production environment to most outbound routers via intranets, cross connects and other direct connections. FLOW has also represented to FINRA that the cost to establish connections to FLOW for users of these services and for individual firms not using these services should be substantially the same as the costs to connect to an exchange. Both FLOW subscribers and non-subscribers are responsible for paying for their own external telecommunications costs to connect to FLOW. FLOW has represented to FINRA that such fees would be equivalent to the costs to connect to other trading center. *See Notice*, 78 FR at 76342.

<sup>29</sup> Exchanges currently charge a range of other fees, including but not limited to membership fees, trading rights fees, risk gateway fees and other miscellaneous fees. According to FINRA, FLOW has represented that it does not assess similar charges. *See Notice*, 78 FR at 76343.

<sup>30</sup> *See Notice*, 78 FR at 76342.

<sup>31</sup> *See Notice*, 78 FR at 76343.

<sup>32</sup> FLOW also pays a current base rebate of \$0.0024 per share for added executed visible liquidity and \$0.0010 per share of added executed non-visible liquidity. There are increased rebate incentives for FLOW subscribers that maintain higher volumes on a daily basis. *See Notice*, 78 FR at 76343, n. 20.

<sup>33</sup> *See Notice*, 78 FR at 76343.

<sup>34</sup> FINRA states that in the event that FLOW makes a material change to its policies and procedures governing access to FLOW, including a change to its fees, FLOW will submit to FINRA, and FINRA will post on its Web site, an amended description of FLOW's policies, procedures and fees governing access. *See Notice*, 78 FR at 76343, n. 21.

<sup>35</sup> *See Notice*, 78 FR at 76343.

<sup>36</sup> In approving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>37</sup> 15 U.S.C. 78o-3(b)(6).

<sup>38</sup> *See Notice* at 78 FR at 76343 for a more detailed comparison of FLOW fees against those of other SROs.

<sup>39</sup> 15 U.S.C. 78s(b)(2).

<sup>40</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.