

January 13, 2022

Via Electronic Mail (rule-comments@sec.gov)

Ms. Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Notice of Filing of a Proposed Rule Change Relating to Alternative Display Facility
New Entrant, File No. SR-FINRA-2022-032¹

Dear Ms. Countryman:

The Healthy Markets Association² writes to express our concerns with the ADF Proposal, which would add IntelligentCross as a participant for publishing quotations to FINRA's generally abandoned Alternative Display Facility (ADF).

We begin by noting that we are sympathetic to concerns raised by IntelligentCross that some brokers may be essentially ignoring better prices that may be available on IntelligentCross's ASPEN fee/fee platform (and thus potentially violating their duties of best execution).³

Unfortunately, bestowing upon any non-exchange trading center the benefits of having a protected quotation – without basic, essential investor and market protections – could enable significant abuses and investor harm. It is also inconsistent with the Commission's past interpretation that "any proposed application of an access delay would ... be subject to notice, comment, and the Commission's separate evaluation."⁴ Further, if the ADF Proposal were to be granted as proposed, it would establish a dangerous precedent that could enable significant additional investor harms and market

¹ *Notice of Filing of a Proposed Rule Change Relating to Alternative Display Facility New Entrant*, SEC, Exch. Act Rel. No. 34-96550, Dec. 20, 2022, available at <https://www.sec.gov/rules/sro/finra/2022/34-96550.pdf> ("ADF Proposal").

² The Healthy Markets Association is a not-for-profit member organization focused on improving the transparency, efficiency, and fairness of the capital markets. Healthy Markets promotes these goals through education and advocacy to reduce conflicts of interest, improve timely access to market information, modernize the regulation of trading venues and funding markets, and promote robust public markets. Its members include public pension funds, investment advisers, broker-dealers, exchanges, and data firms. To learn about HMA or our members, please see our website at <http://healthymarkets.org>.

³ Telephone conversation between Ari Burstein and John Palazzo, IntelligentCross, and Tyler Gellasch and Chris Nagy, HMA, Jan. 3, 2022. We also note that some market participants – including members of HMA – have determined that they receive excellent execution quality for trades on IntelligentCross.

⁴ *Commission Interpretation Regarding Automated Quotations Under Regulation NMS*, SEC, Exch. Act Rel. No. 34-78102, at 20, June 17, 2017, available at <https://www.sec.gov/rules/interp/2016/34-78102.pdf>.



distortions by other trading centers seeking to exploit the benefits of having a protected quotation.

If the Commission chooses to permit any trading center (including IntelligentCross) to disseminate quotations using the ADF, the Commission must condition it upon the imposition of significantly greater protections for investors, including limitations that are consistent with the limitations that are imposed upon other trading venues whose quotations are awarded protected quotation status.

For the present Proposal, the Commission should expressly condition any approval upon IntelligentCross:

- continuing to not charge for market data or connectivity,
- having fees and rebates (if adopted) that are at or below those charged by exchanges,
- notifying the Commission and FINRA of all changes related to the ASPEN fee/fee order book, and
- expressly describing how any such changes are consistent with the ASPEN fee/fee order book quotations continuing to be included as protected quotations, the Exchange Act, and protection of investors.

Further, both the Commission and FINRA should expressly detail how they would gather, review, analyze, and publish for public consideration changes to IntelligentCross's policies, procedures, and practices upon which the ADF Proposal is hinged, as well as how they would intervene to either block a change by IntelligentCross regarding its policies, procedures, and practices, or alternatively disallow the trading venue from disseminating its quotations via the ADF. This description should include a legal analysis of the underlying authority used to make and effectuate such determinations.

Because the ADF Proposal is not accompanied by these essential safeguards, and the Proposal does not include sufficient information for the Commission to reasonably conclude that the Proposal would comply with the Exchange Act and Commission rules, it should be disapproved.

Proposal Summary

FINRA has proposed to let IntelligentCross publish quotations on its ASPEN fee/fee limit order book to the ADF. The effect of this inclusion would be to have those quotations be considered "protected," and included in the National Best Bid and Offer (NBBO).



Because the ADF does not have routing or execution capabilities, brokers would be essentially compelled to separately connect to IntelligentCross directly or through a third party so they could access the ASPEN fee/fee order book.⁵

IntelligentCross Representations

IntelligentCross is registered as a NMS Stock ATS. Unlike all other venues that currently enjoy having protected quotations, it is not a registered securities exchange, and therefore does not generally have its operational rules (including for trading, data, and fees) subject to Commission review and disapproval. Further, its operations are not generally bound by the statutory protections against abuses by registered securities exchanges and FINRA, such as the explicit statutory obligations to ensure that its costs are (1) “reasonable” and “equitably allocated,” (2) non-discriminatory, or (3) not unduly burdensome on competition.

As a result, the ADF Proposal is uniquely and expressly dependent upon several material representations made to FINRA by IntelligentCross, including representations regarding IntelligentCross’s current policies, procedures, and practices regarding its connectivity, data, and matching.⁶ These representations included a number of essential elements for the Proposal’s consideration by FINRA and the Commission.⁷

In fact, FINRA was unambiguous when it submitted the Proposal to the Commission that it was relying upon those representations (*i.e.*, “Based on IntelligentCross’ representations, FINRA believes that IntelligentCross’ proposed level and cost of access to quotations on ASPEN Fee/Fee is substantially equivalent to the level and cost of access to quotations displayed by an SRO trading facility, both in absolute and relative terms.”).⁸ For example, the Proposal uses some variation of the phrase “IntelligentCross has represented” a stunning 20 times in its 20 pages.⁹

Unfortunately, the policies, procedures, and practices reflected in the IntelligentCross Representation Letter could change at any time. And neither the IntelligentCross Representation Letter nor the ADF Proposal meaningfully address to what extent and how FINRA or the SEC would review those changes for compliance with the existing ADF rule requirements, much less protection of investors. Rather, IntelligentCross

⁵ Notably, as the Commission has separately recognized as part of its Regulation Best Execution proposal, connecting through a third party may introduce additional costs and latencies that brokers would have to consider as part of their best execution obligations.

⁶ See, Letter from Ari Burstein, Imperative Execution to Brendan K. Loonam, FINRA, Dec. 15, 2022, available at <https://www.sec.gov/rules/sro/finra/2022/34-96550-ex3.pdf> (“IntelligentCross Representation Letter”).

⁷ IntelligentCross Representation Letter, at 1.

⁸ ADF Proposal, at 12 n. 37.

⁹ ADF Proposal, at 6, 6 n.22, 6 n.23, 7 n.28, 8, 8 n.28, 9, 11, 12, 12n.38, 14, 15 n.43, and 17.



simply represents that it would, consistent with Form ATS-N, file “material changes” with the Commission and “provide the changes made to FINRA.”¹⁰

However, simply providing notice of changes to a regulator does not establish a regulatory process to review the filing, much less analyze it for any impacts on the inclusion of the ATS’s quotations in the ADF. And that, of course, is a far cry from providing the regulator with clear, enforceable legal authority to disapprove the change or exclude the ATS’s quotations from being included in the ADF.

There are also complexities introduced by how orders on IntelligentCross’s ASPEN fee/fee order book are matched. Matching is not instantaneous or on a fixed, delayed schedule. Rather, on any given day, order matching occurs on a randomized schedule within certain time bands that are established overnight.

Specifically, according to the Proposal,

Match schedules are defined by minimum/maximum time bands for each security, and these bands can have a minimum time of 150 microseconds and a maximum time of 900 microseconds (i.e., the maximum time for scheduling a match event is capped at 900 microseconds). For example, on a particular day, the match event band for XYZ stock may have a minimum time of 450 microseconds and a maximum time of 600 microseconds. The time of the actual match event is randomized within the match event band throughout the course of the trading day.¹¹

Put another way, the matching schedule on the ASPEN fee/fee order book is determined, in part, based upon prior trading in not just that book, but also the other two order books that are not part of this Proposal.

Notably, during the period between an order’s submission and execution, IntelligentCross permits a broker to modify or cancel the order.¹² As a result, much like with the dominant registered securities exchanges, a market participant with a resting order on the ASPEN fee/fee book who may wish to cancel or modify an order as a result of price movements at other venues would be strongly incentivized to have as fast of a connection and fast market data as possible, so that it may cancel or modify the order prior to the next randomized match.

While not directly addressed in the Proposal, the delayed randomized match creates some challenges regarding the operations of intermarket sweep orders (“ISOs”). That

¹⁰ IntelligentCross Representation Letter, at 8 n. 14.

¹¹ ADF Proposal, at 6.

¹² ADF Proposal, at 6-7; *Id.*, at 6 n.23.



said, if the Proposal is approved, the “ASPEN Fee/Fee will accept incoming intermarket sweep orders (“ISOs”).”¹³

Further, “[i]f the Commission approves the proposed rule change, the effective date of the proposed rule change will be the date of Commission approval.”¹⁴ Given the magnitude of the change, including material changes to order routing technology, we are surprised that neither the IntelligentCross Representation Letter nor the ADF Proposal materially addressed the relative costs and burdens on market participants of implementing it on what is essentially no notice.

Lastly, there are issues raised by many of the representations by IntelligentCross that could have complex consequences on how market participants interact with the ATS, but are generally not addressed in the ADF Proposal. For example, while its distinct order books do not interact, they all operate with the same MPID. How would this interact with existing Rule 605 and the proposed Rule 605? Would this lead to misleading execution quality statistics reporting?

Put simply, IntelligentCross has made a number of representations on its operations that are essential for consideration of the ADF Proposal, some of which it analyzes for potential impacts, and some of which it doesn’t.

Background on the FINRA Alternative Display Facility

The Alternative Display Facility is a vestige of an unnecessary pilot program that had been largely abandoned in recent years. As part of Nasdaq’s then-pending application to register as a securities exchange, the NASD initially filed with the Commission to create the Alternative Display Facility (ADF) in December 2001.¹⁵ The proposal was amended¹⁶ and received robust public comment¹⁷ before it was ultimately adopted as a months-long pilot program.¹⁸

¹³ ADF Proposal, at 6.

¹⁴ ADF Proposal, at 15.

¹⁵ *Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Nasdaq's Proposed Separation from the NASD and the Establishment of the NASD Alternative Display Facility*, SEC, Exch. Act Rel. No. 34-45156, Dec. 14, 2002, available at <https://www.sec.gov/rules/sro/34-45156.htm>.

¹⁶ See, e.g., *Notice of Filing of Amendment No. 2 to a Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Nasdaq's Proposed Separation from the NASD and the Establishment of the NASD Alternative Display Facility*, SEC, Exch. Act Rel. No. 34-45991, May 28, 2002, available at <https://www.sec.gov/rules/sro/34-45991.htm>.

¹⁷ See, *Comments on NASD Rulemaking*, SEC, available at <https://www.sec.gov/rules/sro/nasd200190.shtml>.

¹⁸ *Notice of Filing and Order Granting Accelerated Approval on a Pilot Basis to a Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Operation of the Alternative Display Facility for Quoting and Trading in Securities of The Nasdaq Stock Market, Inc.*, SEC, 67 Fed. Red. 49822 (July 31, 2002), available at <https://www.sec.gov/rules/sro/34-46249.htm>.



The ADF was first intended to address Commission concerns that Nasdaq's registration as a securities exchange and creation of its SuperMontage facility would essentially compel brokers to use that system in order to "satisfy their order display and execution access obligations under the Order Handling Rules and Regulation ATS."¹⁹

Accordingly, the Commission expressly demanded, prior to or simultaneously with the implementation of SuperMontage:

1. that the NASD will offer a quote and trade reporting alternative that satisfies the Order Handling Rules, Regulation ATS, and other regulatory requirements for ATSS, ECNs, and market makers;
2. that NASD quotes disseminated through the exclusive securities information processor ("SIP") for Nasdaq-listed securities will identify the ATS, ECN, or market maker source of the quote; and
3. that participation in SuperMontage will be entirely voluntary, because NASD quotes will be included in the Nasdaq quotation management system while Nasdaq is the exclusive SIP, but only for display purposes, and the NASD will provide access to its quotes on a market-neutral basis.²⁰

Many thought the ADF was (or should be) dead on arrival.²¹

The ADF offers (1) quote processing, display, and distribution, (2) trade report handling, display, and distribution, and (3) trade comparison.²² Thus, in order for a broker to access a quotation disseminated using the ADF, a user must be separately connected to the venue whose quotes are posted on it. The ADF is not an exchange and does not have routing functionality.

Notably, the Commission did not require that a non-exchange trading venue that has the privilege of a protected quotation submit its rules, policies, procedures, or practices to

¹⁹ *Order with Respect to the Implementation of Nasdaq's SuperMontage Facility*, SEC, Exch. Act Rel. No. 34-46429, Aug. 29, 2002, available at https://www.sec.gov/rules/sro/34-46429.htm#P25_3376.

²⁰ *Order with Respect to the Implementation of Nasdaq's SuperMontage Facility*, SEC, Exch. Act Rel. No. 34-46429, Aug. 29, 2002, available at https://www.sec.gov/rules/sro/34-46429.htm#P25_3376.

²¹ Editorial, *Is ADF Dead on Arrival? Some Skepticism Over the Future of System*, Traders Magazine, May 31, 2002, available at <https://www.tradersmagazine.com/news/is-adf-dead-on-arrival-some-skepticism-over-the-future-of-system/>.

²² *Fact Sheet: Alternative Display Facility*, FINRA, available at https://www.finra.org/sites/default/files/ADF_Fact_Sheet.pdf.



the Commission for review and potential disapproval. The Commission also did not specifically restrict operations or fees on trading centers providing protected quotations.

The ADF was never materially relied upon for the stated purpose (of addressing a potential monopolistic pricing power from Nasdaq). Rather, the ADF was largely ignored until after the adoption of Regulation NMS.

With the adoption of Regulation NMS, rather than scrap the ADF, the Commission created some modest regulatory structures to continue to permit its existence. The Commission was concerned, amongst other things, that “a competitive problem could arise if a least preferred market was allowed to charge exorbitant fees to access its protected quotations, and then pass most of the fee on as rebates to liquidity providers to offset adverse selection costs.”²³

Ultimately, the Commission adopted a rule that a trading center displaying quotations in an NMS stock through an SRO display-only facility must not impose unfairly discriminatory terms that prevent or inhibit a person from obtaining efficient access.²⁴ The Commission further argued 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.’”²⁵

Over time, some Electronic Communications Networks (ECNs) and other trading centers used the ADF to display their quotations and report trades.²⁶

Unfortunately, the ADF appeared to introduce significant risks to investors for latency arbitrage (and information leakage). Specifically, brokers or investors seeking to access those protected quotations were often unable to execute against them, or if they were, they would immediately find that they were subject to poor execution quality. Some of this was likely a result of the ADF itself being a much slower data dissemination mechanism than the trading venues’ proprietary data streams.

²³ *Regulation NMS*, SEC, Exch. Act Rel. No. 34-51808, at 114 n.243, available at <https://www.sec.gov/rules/final/34-51808.pdf>.

²⁴ See, *Order Approving the Proposed Rule Change Relating to Alternative Display Facility New Entrant*, SEC, Exch. Act Rel. No. 34-71457, at 2, Jan. 31, 2014, available at <https://www.sec.gov/rules/sro/finra/2014/34-71457.pdf> (citing 17 CFR 242.610(b)(2)).

²⁵ *Order Approving the Proposed Rule Change Relating to Alternative Display Facility New Entrant*, SEC, Exch. Act Rel. No. 34-71457, at 2, Jan. 31, 2014, available at <https://www.sec.gov/rules/sro/finra/2014/34-71457.pdf> (citing *Regulation NMS*, SEC, 70 Fed. Reg. 37496, 37549, (June 29, 2005)).

²⁶ See, e.g., *Order Approving the Proposed Rule Change Relating to Alternative Display Facility New Entrant*, SEC, Exch. Act Rel. No. 34-71457, Jan. 31, 2014, available at <https://www.sec.gov/rules/sro/finra/2014/34-71457.pdf> (adding LavaFlow as an ADF Participant).



Over time, FINRA has attempted to upgrade the system,²⁷ but it is unclear to what extent it has materially improved.²⁸ We understand that the ADF is Regulation SCI compliant, as are all other entities who enjoy having protected quotations. There is no express restriction on the ADF that submitters would need to be SCI compliant, and we understand that IntelligentCross is not today.²⁹

As FINRA's website makes clear, while the ADF (somehow) hasn't been shut down by FINRA or the Commission, it has been largely abandoned by market participants.

Inactive ADF Participants

- Instinet
- Track Data Securities Corp (7/16/07)
 - TRAC, DATA
- Direct Edge
 - EDGA in Nasdaq Listed Issues (5/15/09)
 - EDGX in Nasdaq Listed Issues (6/1/09)
 - EDGX in CQS Listed Issues (7/1/09)
 - EDGA in CQS Listed Issues (7/1/09)
- LavaFlow (2/2/15)
- Luminex (11/16/20)
- Jane Street (11/16/21)
 - MPIDs: JSCA & JSEB

Active ADF Participants

Trade Reporting Only (TRO)

- JP Morgan Securities, LLC (11/13/2017)
 - MPIDs: JPMS, JPMX & JPBX

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The only current user is JP Morgan Securities, and that's for trade reporting only – not quotation dissemination. We suspect that this lack of usage of the ADF may explain why neither FINRA nor the Commission have updated their rules to reflect the risks posed by using the ADF for quotation dissemination in the current national market system.

The ADF Proposal Depends Upon IntelligentCross Representations That May Change

²⁷ Editorial, *NSX Blasts FINRA's ADF Proposal*, Traders Magazine, Sept. 17, 2013, available at <https://www.tradersmagazine.com/news/nsx-blasts-finras-adf-proposal/>.

²⁸ We are not aware of the ADF generally publishing latency statistics (unlike other quotation and trade dissemination mechanisms). We understand that some of the ADF's systems may have been modernized. However, if any material improvements have been made, they have not been publicly detailed.

²⁹ If the Commission approves the Proposal, it should expressly condition such approval on the ATS being compliant with Regulation SCI, like all other trading centers with protected quotations. If not, the purposes of Regulation SCI could be materially undermined.

³⁰ ADF Participants, FINRA, available at <https://www.finra.org/filing-reporting/adf/participants> (last viewed Jan. 5, 2023).



As mentioned above, the ADF Proposal is extraordinarily dependent upon IntelligentCross's representations of its policies, procedures, and practices – none of which are generally subject to direct Commission review and disapproval like exchange rules.³¹

Thus, even were we to conclude that IntelligentCross would do its best to not exploit market participants via monopoly pricing powers or enable abuses, it would unquestionably open the door for other NMS Stock ATs to try to get their quotations protected without having to comply with all of the SEC's rules regarding transaction fees, connectivity, data provision, or other elements related to access.

The Proposal Would Grant IntelligentCross Monopoly Powers Subject to Fewer Limitations Than Current Exchanges

If the SEC approves the Proposal, it would be difficult, if not impossible, for the Commission to practically constrain IntelligentCross's fees and potential limitations for accessing the newly protected quotations.

SEC Rule 610(b) would require IntelligentCross to (1) "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;" and (2) "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."³²

These limitations are facially not identical to the restrictions imposed on exchanges by the Exchange Act, which include that an exchange's rules must:

- provide for an equitable allocation of reasonable dues, fees, and other charges;³³
- generally allow for any broker-dealer to become a member;³⁴
- "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of" the Act;³⁵
- "promote just and equitable principles of trade;"³⁶

³¹ ADF Proposal, at 12 n. 37 ("Based on IntelligentCross' representations, FINRA believes that IntelligentCross' proposed level and cost of access to quotations on ASPEN Fee/Fee is substantially equivalent to the level and cost of access to quotations displayed by an SRO trading facility, both in absolute and relative terms.").

³² 17 CFR 242.610(b)(1) and (2).

³³ 15 U.S.C. § 78f(b)(4).

³⁴ 15 U.S.C. § 78f(b)(2).

³⁵ 15 U.S.C. § 78f(b)(8).

³⁶ 15 U.S.C. § 78f(b)(5).

- “in general, to protect investors and the public interest;”³⁷ and
- be designed to not “permit unfair discrimination between customers, issuers, brokers, or dealers.”³⁸

It is not clear precisely what “substantially equivalent” “level and cost” for access actually means. They are not defined by statute, rule, or guidance.

Further, while Rule 610(c) would ostensibly subject IntelligentCross to the same transaction fee caps as exchanges, given that fees and rebates often vary by 40% or more across different trading venues, it is unclear what level of variability would be viewed as “substantially equivalent.” Some trading venues charge nothing at all to take liquidity. Others generally charge 30 cents per 100 shares. Some venues charge less. And many venues – including IntelligentCross³⁹ – charge different fees to different customers. Some also pay different rebates to different customers. What would be a “substantially equivalent” fee cap that could be reasonably enforced against IntelligentCross? How would that be enforceable across different customers or subscribers of IntelligentCross?

We understand IntelligentCross’s current fee structure for the ASPEN fee/fee order book, and understand from its executive that they currently have no plans for changing those fees.⁴⁰ And while the IntelligentCross Representation Letter asserts that the fees are non-discriminatory, we note that they do, in fact, discriminate against some subscribers, in favor of subscribers with greater trading volumes.⁴¹ That said, we appreciate that IntelligentCross’s subscriber discrimination on fees does not appear – based upon the limited information that we have available – to be materially different from that permitted by exchanges today.

We also understand that the ADF Proposal is conditioned in part upon that representation. What happens if that changes? Neither the Proposal nor any existing rule would require a trading center relying upon the ADF to disseminate quotations to notify FINRA of a change and evaluate it for compliance with the conditions imposed by Rule 610.

What if IntelligentCross tweaks its fees, as it expressly contemplated in the IntelligentCross Representation Letter? Is the Commission or FINRA somehow volunteering to collect that information and analyze in perpetuity to ensure that it will continue to be consistent with the admittedly loose standards set forth by the Commission? How? How would either regulator intervene, if it identified a concern?

³⁷ 15 U.S.C. § 78f(b)(5).

³⁸ 15 U.S.C. § 78f(b)(5).

³⁹ IntelligentCross Representation Letter, at 8.

⁴⁰ Telephone conversation between Ari Burstein and John Palazzo, IntelligentCross, and Tyler Gellasch and Chris Nagy, HMA, Jan. 3, 2022.

⁴¹ IntelligentCross Representation Letter, at 8.



What would be the basis and mechanism for challenging the change? The Commission likely does not have clear authority to block a fee change under Regulation ATS. So what would the Commission or FINRA practically do?

None of these questions are even raised, much less answered in the ADF Proposal.

We understand that IntelligentCross does not currently charge for its market data or for connectivity to the ASPEN fee/fee limit order book.⁴² However, it could begin charging for these products. What would be the actual limits? Given that its quotations would now be protected, there would likely be significant demand for (and value of) these products – which would provide faster data and access to the trading book.

What would be the pragmatic restrictions on the fees it assesses to different customers?

Unlike a registered securities exchange, the practical limitations on access, including data and connectivity products, on a trading center disseminating quotations through the ADF are not statutorily defined. Rather, as discussed above, the only potentially useful protections relate to the “substantially equivalent” language in Rule 610 and the Commission’s “guidance” associated with the adoption of Regulation NMS.⁴³ That’s not a practical, enforceable limit.

IntelligentCross currently charges nothing for connectivity. Some exchanges charge \$7500 per month,⁴⁴ while others charge substantially less. Would \$500 per month be “substantially equivalent?” How about \$5,000? How about \$10,000?

While IntelligentCross might not abuse that freedom to exploit brokers, data vendors, exchanges, and investors, we are deeply concerned that another ATS (or ATSS) would, or that IntelligentCross might, after approval, change its mind, given the fundamental change to its economic analysis and position. If any of these happened, how would FINRA or the Commission be able to intervene? How would it defend such intervention in court (likely before the Court of Appeals for the DC Circuit)?

If the Commission approves the Proposal, as drafted, what would happen if the trading center (or another who follows with a similar application) decides to charge for connectivity or market data subsequent to receiving approval?

Is the Commission or FINRA somehow implicitly volunteering to collect that information and analyze all subsequent changes (including those for which it may not otherwise be

⁴² IntelligentCross Representation Letter, at 8; *Accord*, ADF Proposal, at 14 (“IntelligentCross has represented that it does not currently charge connectivity fees to access ASPEN and has offered to pay for certain of subscribers’ cross-connect fees at NY4. IntelligentCross also currently pays for one primary connection and one back-up connection, and any direct subscriber is eligible for this payment.”).

⁴³ *Supra*, at 5 (citing *Regulation NMS*, SEC, 70 Fed. Reg. 37496, 37549, (June 29, 2005)).

⁴⁴ *See, e.g., Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Physical Port Fees for BYX*, SEC, Exch. Act Rel. No. 34-83441, June 14, 2018, available at <https://www.sec.gov/rules/sro/cboebyx/2018/34-83441.pdf>.



aware) in perpetuity to ensure that the trading center will continue to be consistent with the admittedly loose standards set forth by the Commission well over a decade ago? How?

How would either the Commission or FINRA intervene, if either identified a concern? What would be the basis and mechanism for challenging the change? Would the recourse be to block the change, disapprove the ATs ability to disseminate quotations using the ADF, or something else? What would be the trading center's recourse to contest that action? Would the public have the opportunity to weigh in?

These factors are especially challenging, given that the Commission likely does not have clear authority to block such a change under Regulation ATS. Put simply, what would the Commission or FINRA practically do if IntelligentCross or a subsequent firm relying upon the ADF to disseminate quotations enables abuses or adopts rules that may be consistent with their ATS obligations, but are not consistent with obligations of a registered securities exchange?

The ADF Proposal does not raise, much less answer, any of these concerns.

Matching Concerns

Similar to the representations regarding IntelligentCross's trading costs, connectivity, and data practices, the ADF Proposal also hinges upon the "IntelligentCross [representation] that it utilizes a matching process that provides fair and efficient access to its quotations."⁴⁵

While the ADF Proposal goes into reasonable detail (considering that the whole filing is just twenty pages long) into the matching process used by IntelligentCross for its ASPEN fee/fee trading book, the proposal includes no analysis of how that process is actually "fair and efficient." It does not compare and contrast the process to that of other trading venues that currently enjoy protected quotation status.

Further, just like with the other essential representations upon which the ADF Proposal is hinged, there is nothing to ensure that, over time, those policies, procedures, and practices don't change in a way that would warrant discontinuation of its access to the ADF. Put another way, what if IntelligentCross tweaks its matching engine? Is the Commission or FINRA somehow volunteering to collect that information and analyze in perpetuity to ensure that it will continue to be consistent with the admittedly loose standards set forth by the Commission? How? How would they intervene, if they identified a concern? What would be the basis and mechanism for challenging the rule? The Commission likely does not have clear authority to block a change under Regulation ATS. So what would the Commission or FINRA practically do?

⁴⁵ ADF Proposal, at 12.



Again, the ADF Proposal does not raise, much less answer, any of these concerns.

Further, there are also significant questions about whether the randomized delayed matching on the ATS would mean that the quotations on the ATS would be predictably and automatically accessible.

In particular, if a broker sees a resting order on an exchange, it can knowingly direct an order to that exchange with the intent to match against that order, and have a reasonable degree of confidence in the match occurring. For IntelligentCross's ASPEN fee/fee book, a broker could route to the ATS with the intention of matching against a displayed order, but then not match.

The Commission wrestled with determining whether an intentional delay on IEX inhibited access to quotations on that exchange. At that time, the Commission adopted an interpretation that "In the context of Regulation NMS, the term 'immediate' does not preclude all intentional delays regardless of their duration, and such preclusion is not necessary to achieve the objectives of Rule 611."⁴⁶ Further, the Commission noted that:

Even the most technologically advanced market participants today encounter delays in accessing protected quotations of other "away" automated trading centers that either are transitory (e.g., as a result of message queuing) or permanent (e.g., as a result of physical distance). Furthermore, as noted above, any market participant co-located with the major exchanges' data centers in northern New Jersey necessarily encounters delays of 3-4 milliseconds – due to geography alone – in accessing the protected quotations of securities traded on the Chicago Stock Exchange's matching engine.⁴⁷

Interestingly, the Commission did not appear to contemplate at the time that there were or could be protected quotations on venues that were not registered securities exchanges. To the contrary, the interpretation expressly noted that "[a]ny proposed application of an access delay would therefore be subject to notice, comment, and the Commission's separate evaluation of the proposed rule change."⁴⁸

That, of course, is not applicable to an ATS who would be afforded the same benefit of having a protected quotation. It is also particularly challenging for the Commission to assess the impact of the delay in this context, given that the delay in matching is changed by IntelligentCross and is randomized. Thus, even if the Commission were to

⁴⁶ *Commission Interpretation Regarding Automated Quotations Under Regulation NMS*, SEC, Exch. Act Rel. No. 34-78102, at 14, June 17, 2017, available at <https://www.sec.gov/rules/interp/2016/34-78102.pdf>.

⁴⁷ *Id.*, at 15.

⁴⁸ *Id.*, at 20.



become comfortable with the current delays contemplated by the bands currently applied by IntelligentCross, there is currently nothing to prevent IntelligentCross from changing them. And while IntelligentCross would presumably notify the Commission of any “material” changes in its Form ATS-N, that is not subject to “notice, comment, and the Commission’s separate evaluation of the proposed rule change,” as the Commission previously determined was essential for determining whether to permit a quotation to be considered accessible, which is itself essential for it to be afforded protected status.

Latency and ADF Systems Concerns

As mentioned above, market participants have had to try to access protected quotations from non-exchanges using the ADF before. And it generally didn’t go well for them. To the contrary, many market participants found that by attempting to access the liquidity, they ultimately experienced inferior executions – often as a result of latencies in the dissemination mechanisms.

Interestingly, when the Commission approved the application of IEX to become a registered exchange and have protected quotations, part of that analysis hinged upon the latency introduced by the coil being of a fixed duration. Accordingly, brokers could knowingly sequence their market sweeping orders so that they would minimize the risks of information leakage. However, in this instance, the randomized nature of the delayed match doesn’t allow for predictable staging of order sending activity by brokers across multiple venues. As a result, there could be significant risk of material information leakage and quote fading – leading to materially worse execution quality for investors.

We recognize that some of these concerns could be addressed by market participants obtaining the proprietary data and connectivity from IntelligentCross directly, but that would then give IntelligentCross significant pricing power over those services. Even beyond that, the latency built into the delayed, randomized matching process creates significant challenges for best execution for brokers.

Somewhat oddly, we do not yet know the details of the ADF’s systems capabilities. It hasn’t been used for quotation dissemination in years, and we are not aware of any public details regarding the details of its operations, including systems specifications and latencies. Are the intake, processing, and dissemination systems up to 2023 speed and capacity standards? None of these details are included in the filing, and the only meaningful documents we were able to obtain regarding the system appear to be nearly a decade old.

For example, using an internet search, we were able to identify the FIX Specifications for Quoting to the Alternative Display Facility that were dated from 2014. That document suggests that the timing increment for the ADF could be whole seconds, although “FIX



allows milliseconds as well.”⁴⁹ This would be wholly unacceptable in a modern trading environment that is often measured in nanoseconds, much less microseconds, much less milliseconds. Seconds aren’t even in the ballpark.

We don’t understand how the Commission could reasonably approve a proposal to ensure timely dissemination of quotations without knowing the details of the dissemination mechanisms.

Unfortunately, the ADF Proposal does not even address these potential concerns. FINRA has not proposed providing detailed latency statistics. There is no analysis of the built in latencies or the impacts on investor costs and routing strategies.

Timing of the Proposal and Implementation

The ADF Proposal was filed with the Commission just two days after the Commission’s own market structure proposals were released, and the Commission staff promptly put the incredibly short, 20-page proposal out for public comment. It also follows the adoption of new rules related to the collection and dissemination of market data, but precedes the implementation of those reforms.

Resurrecting the use of the ADF for quotation dissemination would unquestionably introduce significant complexities and risks for market participants. Given the already complex jumble of changing rules, this proposal is particularly poorly timed. Frankly, the debate over IEX being a protected quotation (even though it, unlike IntelligentCross, has to submit all of its rule changes to the Commission for approval) was less controversial than this filing. IEX’s application faced years of public scrutiny, consideration, and negotiations. And because of its delay, the Commission was divided in determining whether to award its quotations protected status.⁵⁰ The Commission ultimately demanded that “any proposed application of an access delay would ... be subject to notice, comment, and the Commission’s separate evaluation.”

Oddly, without any discussion of this limitation, IntelligentCross and the ADF Proposal would essentially be asking the Commission to abandon that restraint.

The ADF Proposal, which we understand has been quietly in the works for over a year, is likely to receive just a few days of public scrutiny. It was put out for public comment

⁴⁹ FIX Specifications for Quoting to the Alternative Display Facility (ADF), FINRA, at 13, Feb. 2, 2014, available at https://www.finra.org/sites/default/files/2021-08/ADF_FIX_Specification_Quoting_v1.2.pdf.

⁵⁰ Chuck Mikolajczak, *U.S. regulator approves IEX as national stock exchange*, Reuters, June 17, 2016, available at <https://www.reuters.com/article/us-usa-sec-iex/u-s-regulator-approves-iex-as-national-stock-exchange-idUSKCN0Z32NM> (noting that Commissioner Michael Piwowar opposed granting IEX’s quotations protected status under Regulation NMS).



just before Christmas and comments are due just after Martin Luther King Jr. Day. This is not an appropriate vetting of a complex issue.

Lastly, we find the Proposal conceptually at odds with many of the Commission's other equity market structure objectives. Specifically, the ADF Proposal would bestow upon IntelligentCross a privilege afforded to exchanges (the protected quotation), but without the regulatory burdens and investor protections that the Commission imposes upon exchanges in exchange for that same benefit.

This seems inconsistent with the Commission's recent equity market structure proposals, which generally seem intended to level the playing field for different trading venues, such as by demanding quotation and trading increment parity across trading venues. Not surprisingly, this inconsistency isn't mentioned in the Proposal.

Transparency Concerns

Finally, the proposal adds a new layer of complexity to the SEC's recently proposed reforms to Rule 605.⁵¹ As drafted, it appears as though IntelligentCross would report all transactions through Rule 605, even though the ADF portion would represent a completely disparate model. The confusion that would likely be created by this co-mingling of statistics could undermine a brokers' abilities to pursue best execution (in addition to having the firm disseminating misleading statistics).

Conclusion

The Commission should deny the ADF Proposal, as drafted.

If the Commission chooses to permit any trading center (including IntelligentCross) to disseminate quotations using the ADF, the Commission must condition it upon the imposition of significantly greater protections for investors, including limitations that are consistent with the limitations that are imposed upon other trading venues whose quotations are awarded protected quotation status.

For the present Proposal, the Commission should expressly condition any approval upon IntelligentCross:

- continuing to not charge for market data or connectivity,
- having fees and rebates (if adopted) that are at or below those charged by exchanges,
- notifying the Commission and FINRA of all changes related to the ASPEN fee/fee order book, and

⁵¹ See *Disclosure of Order Execution Information* Release No. 34-96493; File No. S7-29-22, December 14, 2022 available at <https://www.sec.gov/rules/proposed/2022/34-96493.pdf>.



- expressly describing how any such changes are consistent with the ASPEN fee/fee order book quotations continuing to be included as protected quotations, the Exchange Act, and protection of investors.

Further, both the Commission and FINRA should expressly detail how they would gather, review, analyze, and publish for public consideration changes to IntelligentCross's policies, procedures, and practices upon which the ADF Proposal is hinged, as well as how they would intervene to either block a change by IntelligentCross regarding its policies, procedures, and practices, or alternatively disallow the trading venue from disseminating its quotations via the ADF. This description should include a legal analysis of the underlying authority used to make and effectuate such determinations.

Put simply, any changes to the ASPEN fee/fee book rules and operations should be treated the same for regulatory purposes as if they were changes made by an exchange, including that they are put out for notice and public comment, and subject to Commission disapproval.

Lastly, the Commission and FINRA should consider whether to finally wind down the two-decades-old "trial" that is the ADF. If FINRA is to maintain the ADF for quotations, it should work with the Commission to establish clear rules for more effective oversight and examination of trading centers whose quotations are included in the ADF, improve the system for timeliness, and ensure that FINRA publishes latency and other relevant statistics, like other quotation dissemination mechanisms.

If you have any questions, please contact me at [REDACTED] [REDACTED] or [REDACTED]. Thank you for your consideration.

Sincerely,

President and CEO

Cc: Hon. Gary Gensler, Chair
Hon. Hester Peirce
Hon. Caroline Crenshaw
Hon. Mark Uyeda
Hon. Jaime Lizarraga