

January 17, 2023



VIA ELECTRONIC MAIL

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

Brett Kitt
Associate Vice President and
Principal Associate General
Counsel

805 King Farm Blvd, Suite 100
Rockville, MD 20850 / USA

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Nasdaq.com

Re: Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change Relating to Alternative Display Facility New Entrant (Release No. 34-96550; File No. SR-FINRA-2022-032)

Dear Ms. Countryman:

Nasdaq, Inc. (“Nasdaq”) writes to comment on the proposal that the Financial Industry Regulatory Association (“FINRA”) has filed with the Securities and Exchange Commission (“SEC” or “Commission”) to amend its rules to add Intelligent Cross ATS (“IC”) as a new entrant to the Alternative Display Facility (“ADF”) that FINRA administers.¹ Nasdaq urges the Commission to consider whether this Proposal is compatible with the intended purpose of the ADF, which itself has been rendered obsolete by changed market conditions.

Although Nasdaq welcomes the prospect of new competition from IC, it is concerned that the Proposal seeks to do so by exploiting a long-dormant facility in the ADF that no longer serves its intended purpose. As FINRA notes in the Proposal, the Commission approved the ADF in 2002² to assuage concerns of electronic communications networks (“ECNs”) that the Commission’s rules would have otherwise compelled them to participate in Nasdaq’s SuperMontage facility for displaying orders in Nasdaq-listed securities.³ Much has changed since 2002. SuperMontage no longer exists and the competitive landscape has blossomed such that no longer do ECNs or any other competitors need the Commission to provide for them an alternative venue to display their quotes. Accordingly, as FINRA notes in the Proposal, the ADF has not been used to actively display quotes since 2015.⁴ Indeed, the ADF is a relic of a bygone

¹ See Securities Exchange Act Release No. 34-96550 (December 20, 2022), ___ FR _____ (SR-FINRA-2022-032) (the “Proposal”).

² See Securities Exchange Act Release No. 46249 (July 24, 2002), 67 FR 49822 (July 31, 2002) (Order Approving File No. SR-NASD-2002-97).

³ See Proposal at 2.

⁴ See *id.* at 4.

era that persists in a zombie-like state – it continues to exist in form only, while serving no productive function.

Nasdaq is concerned that the Proposal would offer few benefits and has the potential for regulatory arbitrage. Through the Proposal, IC would leverage the ADF to gain trade-through protection for its displayed quotes⁵ – and accordingly, to gain access to a share of SIP revenues – without undertaking the obligations associated with registration as a national securities exchange. Moreover, IC seeks to attain these benefits despite the fact that the quotes it displays from its ASPEN Fee/Fee order book may not be immediately accessible to market participants due to the operation of match band events.⁶

Balanced against these modest and uncertain benefits are the potential for additional costs to participants and complexity to the market. Nasdaq notes that it has been many years since broker-dealers were configured to access the ADF.

At a time when the Commission is proposing to overhaul and modernize equity market structure,⁷ as well as to limit evasions of regulatory oversight and responsibility,⁸ Commission approval of this Proposal may undermine its efforts. Nasdaq notes that the path for IC or others to become exchanges has eased considerably over time, such that resort to the ADF is no longer necessary or appropriate to compete with exchanges. Whereas in 2002, there were only a handful of national and regional exchanges and one market center, now there are 16 exchanges (three of which launched within the last several years) and 32 active non-display ATSes.

⁵ Rule 611 of Regulation NMS, 17 CFR 242.611 (the “Order Protection Rule”), provides that a trading center “shall establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trade-throughs on that trading center of protected quotations in NMS stocks.”

⁶ See Proposal, supra (describing batch band events of between 150-900 microseconds).

⁷ See Proposed Rule, Order Competition Rule, Securities Exchange Act Release No. 34-96495 (December 14, 2022), 88 FR 128 (January 3, 2023); Proposed Rule, Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders, Securities Exchange Act Release No. 34-96494 (December 14, 2022), 87 FR 80266 (December 29, 2022); Proposed Rule, Regulation Best Execution, Securities Exchange Act Release No. 34-96496 (December 14, 2022); Proposed Rule, Disclosure of Order Execution Information, Securities Exchange Act Release No. 34-96493 (December 14, 2022).

⁸ See Proposed Rule, Amendments to Exchange Act Rule 3b-16 Regarding the Definition of “Exchange”; Regulation ATS for ATSs That Trade U.S. Government Securities, NMS Stocks, and Other Securities; Regulation SCI for ATSs That Trade U.S. Treasury Securities and Agency Securities, Securities Exchange Act Release No. 34-94062 (January 26, 2002), 87 FR 15496 (March 18, 2022) (proposing to amend the definition of an “exchange” under the Rule 3b-16, and expand the associated definition of an alternative trading system, to address disparities and gaps in regulation that provide opportunities for arbitrage).

Approval of the Proposal has the potential to also encourage further exploitation of the ADF for questionable market value while increasing costs to the industry. Thus, the SEC needs to consider carefully whether the proposal is consistent with the Securities Exchange Act of 1934.⁹

In addition, Nasdaq recommends that the Commission explore whether the ADF is still needed or should be eliminated entirely.

Sincerely,

A handwritten signature in black ink that reads "Brett Kitt". The signature is written in a cursive, slightly slanted style.

Brett Kitt
Associate Vice President & Principal
Associate General Counsel

Cc: The Honorable Gary Gensler, Chairman, SEC
The Honorable Caroline A. Crenshaw, Commissioner, SEC
The Honorable Hester M. Peirce, Commissioner, SEC
The Honorable Jaime Lizárraga, Commissioner, SEC
The Honorable Mark T. Uyeda, Commissioner, SEC
Director Haoxiang Zhu, Division of Trading and Markets

⁹ 15 U.S.C. 78a, et seq.