February 8, 2023

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

Re: ***SIFMA Comment Letter on FINRA Proposed Rule Change Relating to Alternative Display Facility New Entrant; File No. SR-FINRA-2022-032***

Dear Ms. Countryman:

On behalf of our member firms, the Securities Industry and Financial Markets Association ("SIFMA")[1] respectfully submits this comment letter to the U.S. Securities and Exchange Commission ("Commission") to comment on the proposed rule change ("Proposal") by the Financial Industry Regulatory Authority ("FINRA") to allow IntelligentCross ATS ("IntelligentCross") to become a new entrant on FINRA's Alternative Display Facility ("ADF"), which would allow IntelligentCross to display orders on the ADF.[2] SIFMA members have supported Imperative Execution's innovative matching technology, which is used by many of them to execute customer orders in IntelligentCross through a number of distinct order books. Nonetheless, as discussed below, we continue to have concerns with the ability of our members to interact with IntelligentCross trading interest displayed in the ADF that we believe should be further addressed prior to any Commission consideration of whether the Proposal meets the standards governing FINRA rule filings under Section 15A(b) of the Securities Exchange Act of 1934 ("Exchange Act").

---

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] See Release No. 34-96550 (December 20, 2022), 87 FR 79401 (December 27, 2022). With part of the comment period falling during the end of year holidays, we were delayed in submitting this comment letter, but request that the Commission give due consideration to the concerns raised in it.

Proposal Overview

As noted, FINRA's Proposal will allow IntelligentCross to display orders from their ASPEN fee/fee book on FINRA's ADF. Through the ADF, such interest would be displayed to the market by the Securities Information Processors (SIPs) and be subject to various provisions under the Commission's Regulation NMS, including the Order Protection Rule in Rule 611 of Regulation NMS. Rule 611 of Regulation NMS provides for price protection across markets against trade-throughs for "automated quotations" in NMS stocks. Under Regulation NMS, an "automated quotation" is one that, among other things, can be executed "immediately and automatically" against an incoming IOC order.[3]

As indicated in the Proposal, IntelligentCross ASPEN operates three separate limit order books, although only its ASPEN fee/fee limit order book will be able to display orders in the ADF. The ASPEN fee/fee book currently accepts limit orders (with an option to display in their direct market data feed), immediate or cancel (IOC) orders, and pegged orders. Once orders become displayed on the ADF, intermarket sweep orders ("ISOs") will also be allowed. According to IntelligentCross, the ASPEN fee/fee limit order book establishes a matching schedule using an overnight optimization process that uses historical performance measurements from prior days' matches across all three IntelligentCross ASPEN books. 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).[4] While incoming orders will be subject to this execution delay, the Proposal indicates that orders posted on the ASPEN fee/fee limit order book can be cancelled at any time without a delay.

Discussion

A number of SIFMA members use Imperative Execution's innovative matching technology to execute customer orders in IntelligentCross, including its ASPEN fee/fee limit order book, which is proposed to be displayed and protected as FINRA's quotation on the ADF. SIFMA members who have experience with IntelligentCross since its launch several years ago support the view that IntelligentCross provides for a novel method of order matching using optimization to set matching schedules. Certain members have found that it allows them to efficiently handle certain types of customer orders. However, when using IntelligentCross to execute their customer orders, members are opting into and accepting its matching logic. Members understand the rules of engagement and how their customer orders will be handled and potentially executed.

A. Concerns about the IntelligentCross Matching Process

[3] See Rule 600(b)(6) of Regulation NMS.

[4] It is worth noting that these time bands do not take into account the latency to and from the venue including transport time (networking) and ingest time (system processing time in front of the matching engine).

One of the primary concerns that members have with the Proposal is the way in which orders will be treated when they are required to interact with IntelligentCross trading interest displayed in the ADF under the Commission's Order Protection Rule. For instance, members may be required to send an ISO / IOC order to IntelligentCross's ASPEN fee/fee limit order book when it is displaying an order at the national best bid or offer ("NBBO") in the ADF. They are concerned that in such a scenario, the resting limit order could be canceled at any time (even after the incoming order is received), including when such incoming orders are routed to IntelligentCross consistent with regulatory obligations under the aforementioned Order Protection Rule.

SIFMA has long expressed concern about such asymmetrical "speed bumps" in which one of the orders and/or messages on one side of the market are subject to a delay whereas others are not. For instance, we previously challenged proposals by the Chicago Stock Exchange ("CHX") in which they were seeking to apply speed bumps to incoming orders, cancels, and cancel/replace messages but proposed to exempt certain liquidity providers/order types from these same delays.[5] As we noted in comments regarding these proposals, the differential treatment of certain market participants raises basic questions about fairness in the marketplace as well as unnecessary market structure complexity. Similarly, we challenged a proposal from CBOE EDGA Exchange ("EDGA") seeking to impose an asymmetrical speed bump on incoming liquidity taking orders but not on incoming liquidity providing orders.[6] Among other things, SIFMA noted that the up to four millisecond delay proposed for incoming liquidity taking orders was not consistent with SEC guidance related to the Order Protection Rule (this guidance is further discussed below). SIFMA also challenged a proposal from the Investors Exchange ("IEX") in which incoming orders were subject to a delay but repricing of IEX's proposed discretionary limit order ("D-Limit Order"), which represented IEX's protected quote, was not subject to such a delay when it is automatically re-priced by IEX's programmed logic .[7] While the Commission ultimately approved the IEX D-Limit proposal, it disapproved the EDGA proposal and the two CHX proposals were withdrawn.

While this ADF Proposal is different in certain respects, it raises similar fairness, regulatory compliance and complexity concerns. In this regard, under the Proposal, order posters in the IntelligentCross ASPEN fee/fee limit order book have the ability to immediately cancel their orders, whereas order transmitters seeking to interact with that interest at the NBBO do not have that ability due to their regulatory obligation to attempt to access the protected quote. In other words, while order posters and order transmitters may have the same ability to cancel their

[5] See, e.g., (https://www.sifma.org/wp-content/uploads/2017/05/File-No-SR-CHX-2017-04-CHX-LEAD-Proposal-SIFMA-Comment-Letter_May-17-2017_v2.pdf) and (https://www.sifma.org/wp-content/uploads/2017/05/sifma-submits-comments-to-the-sec-on-proposed-rule-change-to-implement-a-liquidity-taking-access-delay.pdf).

[6] See (https://www.sec.gov/comments/sr-cboeedga-2019-012/srcboeedga2019012-5832536-188127.pdf).

[7] See (https://www.sec.gov/comments/sr-iex-2019-15/sriex201915-6775258-208127.pdf). It is important to note that it is programmed exchange logic repricing the quotation that is not subject to IEX's speedbump and not the (human) participant that posted the D-Limit order, as such cancellations by a participant would still have to go through the speedbump.

orders from a technical perspective, this equal ability is illusory because of the order transmitters' regulatory obligations.

Like other commenters, SIFMA is questioning whether an order displayed in the ADF under this Proposal meets the Commission's definition of an automated quotation and thus is eligible to receive protected quotation status. As support for the Proposal, FINRA noted that the Commission in 2016 interpreted Regulation NMS's immediacy requirement to allow for "an intentional access delay that is de minimis—i.e., a delay so short as to not frustrate the purposes of Rule 611 by impairing fair and efficient access to an exchange's quotations," and that the staff subsequently took the position that, "delays of less than a millisecond are at a de minimis level that would not impair fair and efficient access to a quotation, consistent with the goals of Rule 611."[8] Like other commenters, we continue to struggle with how this Proposal is consistent with the plain language in the Commission's definition of "automated quotation," which includes a requirement that the quotation be "immediately" executable against an incoming order.

As noted, the IntelligentCross ADF Proposal contemplates that displayed orders can be cancelled at any time. In this regard, IntelligentCross states in the Proposal that that 4.2% of matches on the system did not complete because a displayed order was canceled after an incoming order was received. The ability to cancel displayed ADF orders through IntelligentCross's functionality at any time creates an order execution process that causes us to question whether this functionality is consistent with prior Commission guidance.[9]

We note that we would welcome the opportunity to further discuss with IntelligentCross ideas to address our concerns noted above.[10]

B. Implementation Concerns

The Proposal provides that IntelligentCross intends to begin quoting listed securities on the ADF on or after Monday, March 27, 2023. If the Proposal is approved, we believe this is far too short an implementation timeframe to allow SIFMA members to establish any needed connectivity, development work, and routing logic changes. We also note such a brief period contrasts with the treatment of new exchanges, which are allowed to become operational no

[8] See Proposal at 79403.

[9] This cancellation functionality appears to be inconsistent with prior Commission guidance that for a quotation "[t]o qualify as 'automatic,' no human discretion in determining any action taken with respect to an order may be exercised after the time an order is received," and that "a quotation will not qualify as 'automated' if any human intervention after the time an order is received is allowed to determine the action taken with respect to the quotation." See Release No. 34-78102 (June 17, 2016), 81 FR 40785 (June 23, 2016).

[10] Areas to explore could include instituting a delay regarding the ability to cancel a posted order that mirrors the delay for incoming orders seeking to interact with that posted order or removing the delay on incoming ISO / IOC orders attempting to access the ADF protected quote.

sooner than 90 days following their approval by the SEC.[11] Accordingly, if the Proposal is approved, we recommend that market participants be given at least 90 days from the approval date to prepare for the addition of IntelligentCross trading interest in the national market system through the ADF.

*   *   *

SIFMA greatly appreciates the opportunity to comment on the Proposal and also the Commission's consideration of our comments. We urge the Commission to require IntelligentCross and FINRA to address our concerns discussed above prior to any consideration of whether the Proposal meets the standards governing FINRA rule filings under the Exchange Act. If you have any questions or require additional information, please do not hesitate to contact us by calling Ellen Greene at [redacted].

Sincerely,

Ellen Greene

Ellen Greene
Managing Director
Equities & Options Market Structure

---

[11] See, e.g., (https://www.sec.gov/rules/other/2020/34-88806.pdf) ("The Commission believes that it would be a reasonable policy and procedure under Rule 611(a) to require that industry participants begin treating MEMX's best bid and best offer as a protected quotation as soon as possible but no later than 90 days after the date of this order, or such later date as MEMX begins operation as a national securities exchange," and that it "has taken the same position with other new equities exchanges.").