

March 14, 2023

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 supplement our prior submission³ regarding FINRA's proposal to add IntelligentCross's ASPEN fee/fee platform to its generally abandoned Alternative Display Facility (ADF).

We appreciate the Commission staff's determination that the issues raised by the ADF Proposal are sufficiently complex so as to warrant further consideration.⁴

We also appreciate Imperative Execution's attempts to further address some of the very complex, market-wide impacts of the ADF Proposal.⁵ Unfortunately, the IntelligentCross Response Letter does not allay our concerns, but rather materially increases them. We wish to focus on three key issues:

- How IntelligentCross would be held to a materially different (lower) standard than other venues with protected quotations;

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 Letter from Tyler Gellasch, HMA, to Vanessa Countryman, SEC, Jan. 13, 2023, available at <https://www.sec.gov/comments/sr-finra-2022-032/srfinra2022032-20154755-323003.pdf> ("Initial HMA Letter").

⁴ *Notice of Designation of Longer Period for Commission Action on a Proposed Rule Change Relating to Alternative Display Facility New Entrant*, SEC, Exch. Act Rel. No. 96864, Feb. 9, 2023, available at <https://www.sec.gov/rules/sro/finra/2023/34-96864.pdf>.

⁵ Letter from Ari Burstein, Imperative Execution, to Vanessa Countryman, SEC, Feb. 16, 2023, available at <https://www.sec.gov/comments/sr-finra-2022-032/srfinra2022032-20157506-325781.pdf> ("IntelligentCross Response Letter").



- How IntelligentCross’s quotation dissemination and matching process would be inconsistent with existing practices and Commission interpretations; and
- How the application seems focused on simply exploiting the ADF as a mechanism to offer a protected quotation to the ATS, rather than a legitimate means to disseminate market information to market participants.

While the Commission should deny the ADF Proposal, as drafted, we hope that IntelligentCross and FINRA will withdraw it, and seek to materially address our concerns.

IntelligentCross Would Be Held to a Lower Standard Than Other Venues with Protected Quotations

The IntelligentCross Response Letter unmistakably defends the firm’s ability to materially change its rules from what it had represented in the IntelligentCross Representation Letter (upon which the ADF Proposal is explicitly conditioned).⁶ For example, the IntelligentCross Response Letter declares “it is unclear why an ATS such as IntelligentCross displaying quotes through the ADF should be held to a higher standard than exchanges in this regard, e.g., never charge for market data or connectivity, particularly when the basis under Rule 610 is ‘substantially equivalent.’”⁷

We question why IntelligentCross is so aggressively defending its ability to change its rules away from what it represented to FINRA. We also wonder what other changes may be in store.

Our central concern is that, if the ADF Proposal were to be approved, IntelligentCross would be held to a much lower standard than any other venue whose quotations are protected. As we asked in our Initial HMA Letter,

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? What would be the basis and mechanism for challenging the change? The Commission likely does not have clear

⁶ 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.”).

⁷ IntelligentCross Response Letter, at 12.

authority to block a fee change under Regulation ATS. So what would the Commission or FINRA practically do?⁸

Unlike any other venue with a protected quotation, IntelligentCross would not need regulators' blessings for changes, such as to its operations, governance, or fees. While FINRA's consideration of the IntelligentCross's interest to be included in the ADF is expressly conditioned upon numerous representations by IntelligentCross of its current policies, procedures, and practices regarding its connectivity, data, and matching,⁹ These representations included a number of essential elements for the Proposal's consideration by FINRA and the Commission.¹⁰ Many of those representations are repeated in the IntelligentCross Response Letter, even though the same letter also clearly seeks to protect IntelligentCross from being regulatorily compelled to continue to comply with those representations.¹¹ However, IntelligentCross Response Letter makes it clear that the firm would like to avoid even being held to its voluntary representations upon which the ADF Proposal is conditioned.

Relatedly, unlike any other venue with a protected quotation, there is currently no formalized process or procedures through which the Commission or FINRA could take action to disapprove a change by IntelligentCross, or, alternatively, exclude the venue from having its quotations treated as protected.

A protected quotation is a commercially valuable thing for a trading venue (which is presumably why IntelligentCross is seeking it). Once the Commission provides that value to IntelligentCross, how would the Commission or FINRA – as a matter of legal process or procedure – remove it? Could that happen at any time, such as instantly? What if the Commission determines that IntelligentCross's fees are of a nature that it shouldn't be included as a protected quotation one year after it first is included? How could that determination be appealed? None of these procedural issues are addressed in the ADF Proposal. Instead, the IntelligentCross Letter makes vague claims about regulatory authority that do not appear to be supported by the Exchange Act, Commission Rules, or the Administrative Procedures Act.

Additionally, unlike any other venue with a protected quotation, there is no concrete, enforceable standard that would be applied by regulators to IntelligentCross's changes. The "substantially equivalent" language has not been fleshed out by Commission Rules or guidance. Nor has it been fleshed out by FINRA Rules or guidance. To the contrary, as discussed above, the procedures for reviewing and approving operational, governance, or fee changes are fundamentally different. But worse, it remains unclear

⁸ HMA Letter, at 10-11.

⁹ 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"); see also, ADF Proposal, at 12 n. 37.azazzzza

¹⁰ IntelligentCross Representation Letter, at 1.

¹¹ See Supra, at 1 n.6.



whether or how the specific substantive requirements imposed by the Exchange Act might apply (e.g., regarding whether fees are “reasonable” or “equitably allocated”, or whether rules are “discriminatory” or place undue burdens on competition).

The Matching and Quotation Dissemination Mechanisms Are Inconsistent With Other Protected Quotations and Existing Legal Interpretations

We agree with other commenters that, unlike any other venue with a protected quotation, market participants could not interact with the venue with predictable certainty, due to the mechanism for its randomized matching timeframes. Put simply, while market participants can stage orders for predictable interactions with all venues that currently enjoy protected quotation status, they cannot with IntelligentCross. That feature may provide advantages for the venue as an ATS today, but it could have disastrous consequences for investors if it was a protected quotation.

Further, as we noticed in the Initial HMA Letter,

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.”¹²

Put simply, once again, IntelligentCross would be subject to materially lower standards (and lesser procedural and substantive obligations) than all venues that currently provide protected quotations.

We disagree with the assertion that “commenters have failed to point to any inconsistency between Commission interpretation and later Staff guidance, nor have they pointed to any changes in latency statistics that upend the viability of the Staff’s application of the Commission’s interpretation.”¹³ The Commission’s *de minimis* interpretation required a market center to immediately and automatically execute or cancel, and transmit a response to the customer. That’s not what would happen for protected quotations on IntelligentCross, if the ADF Proposal is approved.

Further, the *de minimis* exemption depended, in part, upon the delay in matching being predictable. This is essential for routing brokers to be able to adjust their systems to time their orders to different venues in ways that minimize information leakage. However, because the matching delay on IntelligentCross is randomized, that would be

¹² HMA Letter, at 13.

¹³ IntelligentCross Response Letter, at 9.



impossible for market participants. Put simply, the ADF Proposal would thus be inconsistent with the Commission's past interpretations related to protected quotations.

Amongst the long list of items not clarified by IntelligentCross nor FINRA in the Proposal is ensuring that quotes received from IntelligentCross would be disseminated via the SIP in less than one millisecond. While we might assume that FINRA would and could make that representation, it hasn't yet, and that should be confirmed.

The Proposal Isn't About the ADF, But Is Instead a FINRA Tollbooth for Obtaining the Privilege of a Protected Quotation

Since the ADF was established, the vast majority of sophisticated market participants have come to access the markets through the faster proprietary data feeds from trading venues (or indirectly, through other market intermediaries who do). Those market participants are extremely unlikely to seek to engage with IntelligentCross based on the quotations as they may be seen in the ADF. This is particularly likely, given the unknown details regarding latencies in the dissemination of information pursuant to the proposed process.

But this isn't really about the ADF providing new information to market participants. Rather, the ADF is being used simply as a means to an end for IntelligentCross. It's the way that IntelligentCross could become a protected quotation without having to subject itself to the investor protections and obligations of being an exchange – nothing more. The inclusion of quotations on the ADF is effectively worthless for market participants who would very likely be accessing the venue in reliance upon the venue's own proprietary data. The reality is that this whole process is little more than a ruse through which FINRA may confer a valuable regulatory privilege (the protected quotation) in exchange for what amounts to little more than a toll.

Conclusion

The Commission should deny the ADF Proposal, as drafted. However, we still hope that IntelligentCross and FINRA will withdraw and revise the proposal to address our concerns.

If you have any questions, please contact me at (202) 909-6138 or ty@healthymarkets.org. Thank you for your consideration.

Sincerely,

President and CEO