

March 24, 2025

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

Hon. Mark Uyeda, Acting Chairman
Hon. Hester Peirce, Commissioner
Hon. Caroline Crenshaw, Commissioner
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 and Notice of Filing of Partial Amendment No. 1 to Proposed Rule Change Relating to Alternative Display Facility New Entrant, File No. SR-FINRA-2022-032¹

In the Matter of the Financial Industry Regulatory Authority, Inc., Exch. Act Rel. No. 34-98642

Dear Acting Chairmen Uyeda and Commissioners Peirce and Crenshaw:

The Healthy Markets Association² writes to offer our fifth letter objecting to FINRA's proposal to include IntelligentCross in its Alternative Display Facility ("ADF Proposal").³

This letter is remarkably similar to our prior letters, as the First ADF Amendment fails to adequately address material deficiencies we previously identified. For the reasons

¹ Notice of Filing of a Proposed Rule Change Relating to Alternative Display Facility New Entrant, SEC, Exch. Act Rel. No. 96550, Dec. 20, 2022, available at <https://www.sec.gov/rules/sro/finra/2022/34-96550.pdf> ("ADF Proposal"); Notice of Filing of Partial Amendment No. 1 to Proposed Rule Change Relating to Alternative Display Facility New Entrant, SEC, Exch. Act Rel. No. 102542, Mar. 7, 2025, available at <https://www.sec.gov/files/rules/sro/finra/2025/34-102542.pdf> ("First ADF Amendment").

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 See, 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> ("First HMA Letter"); Letter from Tyler Gellasch, HMA, to Vanessa Countryman, SEC, Mar. 14, 2023, available at <https://www.sec.gov/comments/sr-finra-2022-032/srfinra2022032-20159679-327732.pdf> (Second HMA Letter"); and Letter from Tyler Gellasch, HMA, to Hon. Gary Gensler et. al, SEC, Oct. 27, 2023, available at <https://www.sec.gov/comments/sr-finra-2022-032/srfinra2022032-283479-692102.pdf>, ("Third HMA Letter"); and Letter from Tyler Gellasch, HMA and Chris Iacovella, American Securities Association, to Hon. Gary Gensler, SEC, January 5, 2024, available at <https://www.sec.gov/comments/s7-18-23/s71823-356059-881262.pdf> ("Fourth HMA Letter").



outlined below, urge you to disapprove the ADF Proposal, as amended by the First ADF Amendment.

Standard of Commission Review and Consideration of FINRA ADF Proposal

The Commission shall approve FINRA's rules only if it finds that such rules are consistent with the Exchange Act,⁴ including that the rules:

- “are designed to prevent fraudulent and manipulative acts and practices;”⁵
- “are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers;”⁶
- provide for the “equitable allocation of reasonable dues, fees, and other charges;”⁷
- “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter”;⁸ and
- are designed to protect investors and the public interest.

As the Commission has previously acknowledged:

Rule 700(b)(3) of the Commission's Rules of Practice states that the “burden to demonstrate that a proposed rule change is consistent with the [Exchange Act] and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change” and that a “mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient.” Rule 700(b)(3) also states that “the description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding.” Any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations. **Moreover, “unquestioning reliance” on an SRO's representations in a proposed**

⁴ 15 U.S.C. § 78s(b)(2)(C); *see also, Susquehanna Int'l Group LLP, et al, v. SEC*, 866 F.3d 442, 445 (D.C. Cir. 2017)(vacating a Commission approval of a SRO filing for failure by the Commission to make such a finding).

⁵ 15 U.S.C. § 78o-3(b)(6).

⁶ 15 U.S.C. § 78o-3(b)(6).

⁷ 15 U.S.C. § 78o-3(b)(5).

⁸ 15 U.S.C. § 78o-3(b)(9).

rule change is not sufficient to justify Commission approval of a proposed rule change.⁹

Notably, in 2017, the Court of Appeals for the District of Columbia Circuit invalidated a Commission order approving another SRO's rule change, explaining "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"¹⁰

That Court further ruled that the Commission must, when approving an SRO rule, "find" or "determine" that the rule meets the requirements of the Exchange Act.¹¹

While that is what must happen here, the regulatory record of the ADF Proposal and the First ADF Amendment precludes it.

The First ADF Amendment Doesn't Materially Resolve Any of the Concerns Raised in HMA's Prior Objections

Days after the Presidential Election, IntelligentCross sent FINRA a letter revising the discussion of the display capabilities of the IntelligentCross ASPEN Fee/Fee matching engine (which is the one for which the protected quotation status is being sought).¹²

Specifically, we understand that IntelligentCross changed its matching engine processes. As FINRA described it:

IntelligentCross has implemented certain changes to the match priority criteria impacting the ASPEN Fee/Fee matching model to move to a price/display/time priority regime throughout the matching process. IntelligentCross represents that this change simplifies the matching process, brings it more in line with trading venues with displayed liquidity and protected quotes, responds to issues raised by certain commenters relating to, among other things, the IntelligentCross "price-sliding mechanism" and the accessibility of the IntelligentCross displayed quote,

⁹ *Order Disapproving Proposed Rule Change To Introduce a Liquidity Provider Protection Delay Mechanism on EDGA*, SEC, Exch. Act Rel. No. 34-88261, Feb. 21, 2020, available at <https://www.sec.gov/files/rules/sro/cboeedga/2020/34-88261.pdf> (emphasis added) (citing 17 C.F.R. § 201.700(b)(3)).

¹⁰ *Susquehanna*, at 445 (internal citations omitted).

¹¹ *Id.*, at 446.

¹² First ADF Amendment, at 6.

and addresses any uncertainty and lack of clarity over the IntelligentCross matching priority criteria, as described in the IntelligentCross Summary and the Proposal. IntelligentCross has represented in the Supplemental Summary that ASPEN Fee/Fee will continue to operate as described in the IntelligentCross Summary and the Proposal, except for the modifications to the match priority criteria described in the Supplemental Summary.¹³

Further, as FINRA described:

IntelligentCross represents that this change brings the ASPEN Fee/Fee matching process more in line with other price-time trading venues with displayed liquidity and protected quotes. IntelligentCross states that this modification also addresses concerns raised by commenters relating to the IntelligentCross “price-sliding mechanism” and the resulting executions that may occur; specifically, concerns regarding a scenario where an IntelligentCross displayed order would lock displayed contra-side interest on the ATS and be displayed one minimum price variation less aggressive than the price of the displayed contra-side interest on the ATS. IntelligentCross states that these commenters claimed that, due to the operation of the previous ASPEN Fee/Fee match priority criteria, the resulting IntelligentCross displayed quote (that was slid) “would be inaccessible to incoming orders.” IntelligentCross represents that the change to the matching process eliminates such concerns.¹⁴

Rather than address all – or even most – of the numerous significant deficiencies we and others had identified in the filing, IntelligentCross sought to narrowly revise its matching priority, and offered five examples as to how its matching might work under the revised process.

FINRA thereafter dutifully accepted the fig leaf change, and offered the First ADF Amendment in December 2024. The SEC staff released the amendment for public comment three months later.

¹³ First ADF Amendment, at 6-7.

¹⁴ First ADF Amendment, at 7-8.



Notably, the matching process used by IntelligentCross is **still** not the same as those used by registered national securities exchanges, and would **still** be inconsistent with the law and existing Staff interpretations.

But our more foundational concern remains that the Commission's oversight of IntelligentCross's rules (and changes) is materially lower than for all other venues with protected quotations, creating massive opportunities to exploit the government sanctioned monopoly on data and access attendant with having a protected quotation.

Further, because the ATS would be receiving the benefit of having the federal government compel private market participants to access it without the burdens of being subject to the same level of oversight and limitations as exchanges, the Commission would be creating an un-level playing field – discriminating against existing regulated exchanges, while also subjecting other market participants to new risks and costs.

The Staff ADF Approval Order Was “Arbitrary and Capricious” Because It Failed to Meaningfully Consider Essential Issues

The Commission cannot reasonably rely upon the since set-aside Staff ADF Approval Order¹⁵ or that document's perfunctory discussions of the issues.

As the Court of Appeals for the District of Columbia Circuit has reminded the Commission, the agency “must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”¹⁶ It should go without saying that that the Commission “may not ‘entirely fail[] to consider an important aspect of the problem.’”¹⁷ Yet, that is precisely what happened in the Staff ADF Approval Order – only it wasn't just one aspect of the problem, but many.

¹⁵ *Order Approving Proposed Rule Change Relating to Alternative Display Facility New Entrant*, SEC, Exch. Act Rel. No. 34-98212, Aug. 24, 2023, available at <https://www.sec.gov/files/rules/sro/finra/2023/34-98212.pdf> (“Staff ADF Approval Order”).

¹⁶ *Cboe Futures Exchange LLC, v. SEC*, 77 F.4th 971 (D.C. Cir. 2023), available at [https://www.cadc.uscourts.gov/internet/opinions.nsf/AE71F05E317FB70C852589FA00516D8A/\\$file/21-1038-2009980.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/AE71F05E317FB70C852589FA00516D8A/$file/21-1038-2009980.pdf) (citing *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))).

¹⁷ *Cboe Futures Exchange LLC v. SEC*, at 9 (citing *State Farm*, 463 U.S. at 43).

The Staff ADF Approval Order Failed to Address the Commission's Disparate Processes and Powers Related to Exchange Filings Versus ATS Rule Changes

Similarly, rather than materially address the commenters' significant concerns related to the disparity in regulatory treatment of a potential non-exchange being awarded a protected quotation, the ADF Approval Order summarily mischaracterized a cursory list of them, and sought to dismiss them out of hand, such as with the statement that "[t]hese comments raise issues that are beyond the scope of the Commission's consideration of whether the present Proposal is consistent with the Exchange Act and the rules and regulations thereunder."¹⁸ The ADF Approval Order did not say why these issues are "beyond the scope" of the instant action.

As part of the comment process, IntelligentCross asserted that, despite its numerous representations regarding its connectivity, data, and matching,¹⁹ (upon which the ADF Proposal is explicitly conditioned),²⁰ it reserved the right to change its market data and connectivity fees.²¹

As we wrote over two years ago,

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 authority to block a fee change under Regulation ATS. So what would the Commission or FINRA practically do?²²

Unlike any other trading venue with a protected quotation, IntelligentCross would not need regulators' blessings to implement changes to its operations, governance, or fees. But worse, unlike any other venue with a protected quotation, there is currently no formalized process or procedures through which the Commission or FINRA could take

¹⁸ ADF Approval Order, at 12, n.63.

¹⁹ 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").

²⁰ 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.").

²¹ IntelligentCross Response Letter, at 12.

²² First HMA Letter, at 10-11.



action to disapprove a change by IntelligentCross, or, alternatively, exclude the venue from having its quotations treated as protected.

For example, when the Cboe family of exchanges sought to raise their physical port fees in September 2023,²³ the Commission staff exercised its delegated authority to suspend those filings and initiate proceedings to disapprove them pursuant to a process laid out in the Exchange Act and Commission Rules.²⁴

However, ATS rule changes are not included in that process.

There is no formalized process for the Commission or its staff to disapprove an ATS rule change.

As Regulation ATS is currently structured, it's not clear that the Commission has even reserved itself any authority to suspend or disapprove an ATS rule change (such as imposition of connectivity fees).

Further, because an ATS is not a registered exchange, it is unclear to what extent the venue would even be required to comply with the structures of the Exchange Act (e.g., that the fees be reasonable and equitably allocated, and that its rules not be discriminatory or undue burdens on competition).

While we understand that access to IntelligentCross would purportedly need to be “substantially equivalent” to the exchanges, there is no clarity or standard process to make such a determination. That 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, the procedures for reviewing and approving operational, governance, or fee changes are fundamentally different. Unfortunately, we know there are many areas where an ATS’s governance and operations are not “substantially equivalent” to exchanges. For example, many ATSS explicitly operate in ways that are facially discriminatory – albeit, often, to the benefit of their target customers, which may include investors.

Again, as we previously explained:

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

²³ See, e.g., *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98396, Sep. 14, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98396.pdf>.

²⁴ See, e.g., *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend its Fee Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98653, Sep. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98653.pdf>.

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 Procedure Act.²⁵

The ADF Approval Order’s failure to address this regulatory disparity between exchanges and IntelligentCross is a fatal flaw.

The Commission Staff, FINRA, and Intelligent Cross Have Failed to Adequately Address Disparate Regulatory Surveillance By Exchanges Versus IntelligentCross

The Staff, FINRA, and Intelligent Cross have failed to address surveillance of trading on IntelligentCross. Under the Exchange Act, registered securities exchanges are obligated to undertake significant surveillance efforts on their venues. This surveillance may be performed in-house, but is often outsourced to FINRA. This surveillance is essential to protecting investors and maintaining fair, orderly, and efficient markets. It is also essential, given that their protected quotation status compels participation by investors and other market participants. While IntelligentCross being awarded a protected quotation by regulators would similarly compel participants to engage with the ATS, neither the ATS nor FINRA have offered any meaningful details regarding the venue’s surveillance program to ensure that it is of the same scope, breadth, depth, and efficacy as the existing exchange programs.

Put simply, we don’t know who would be providing what level of surveillance services for IntelligentCross, if it were to become a protected quotation.

Of course, the Commission could condition any approval on a written agreement between FINRA and IntelligentCross laying out exactly when FINRA would need to make a rule filing for SEC review to ensure that the surveillance would be the same as that performed on all other venues with protected quotations (including for things like wash trading, frontrunning, manipulation, etc.), but this disparity hasn’t yet been meaningfully addressed.

The Staff’s, FINRA’s, and Intelligent Cross’s failures to address this regulatory disparity in oversight by exchanges and IntelligentCross is a fatal flaw.

²⁵ Second HMA Letter, at 3.

The Commission Staff, FINRA, and Intelligent Cross Have Failed to Adequately Address Commenters' Concerns Regarding the Uniqueness of its Randomized Delay

The Commission Staff, FINRA, and Intelligent Cross have offered near-zero policy, regulatory, or legal analysis to support an approval. Instead, the Commission Staff in its ADF Approval Order almost exclusively relied upon inapposite and conclusory statements by IntelligentCross or FINRA. For example, pages 12 through 14 addressed concerns raised by commenters that IntelligentCross's quotation delay mechanism does not fall within the parameters previously laid out by the Commission for providing for an "automated quotation."²⁶ It then asserted:

Because the delay imposed by IntelligentCross is well within geographic and technological latencies experienced today that do not impair fair and efficient access to an exchange's quotations or otherwise frustrate the objectives of Regulation NMS, the Commission believes that such intentional delay will not frustrate the purposes of Regulation NMS by impairing fair and efficient access to IntelligentCross' quotations. Accordingly, the delay in IntelligentCross' matching functionality (a randomized delay of up to 900 microseconds) is de minimis and thus IntelligentCross can maintain a protected quotation.²⁷

Disturbingly, the Commission staff declined to engage in any analysis regarding one of the key concerns with the nature of the delay: that the duration of the delay randomly changes. There are no other "automated quotations" that receive protected quotation status that have intentionally randomized delays. Geographical latencies are largely known and fixed, as is the latency attendant to IEX. Known, fixed delays allow for market participants to effectively plan for them when making routing decisions.

IntelligentCross's randomized delay is fundamentally different. While randomized delays may mitigate some risks (and so be preferred in some contexts by some market participants), they may also preclude investors from timing their orders in ways that minimize information leakage, as well as give rise to potentially abusive practices. Put simply, the introduction of a randomized, variable delay of any length fundamentally changes how access to the quotation will work – and gives rise to significant considerations for investors and their brokers well beyond their interactions with just that venue.

Today, many market participants want the option to access quotations on IntelligentCross when it makes the most sense for them or their customers. We are not

²⁶ Staff ADF Approval Order, at 12-14.

²⁷ Staff ADF Approval Order, at 14.

surprised by IntelligentCross's assertions that it already has a large number of broker-dealers that are connected to it.²⁸ However, because IntelligentCross is not a protected quotation, market participants may also avoid the venue, if they determine that the risks posed by it (and particularly, its randomized delay) outweigh the potential benefits of an execution on the venue.

There is a significant difference for market participants between having an option to trade on a venue and being compelled by regulators to connect to it and attempt to access quotations on it.

Rather than engage in any meaningful analysis of its own, the Commission Staff simply regurgitated claims made by IntelligentCross that do not directly address the concerns raised, noting:

IntelligentCross responds that the randomization of the matching process “is what contributes to [the] matching process not discriminating in favor of a particular market participant or category of participants, and also makes any would-be manipulation of the matching process difficult by reducing the potential for ‘systematical gaming.’” In addressing commenter concerns regarding any difficulties for market participants to adapt to an IntelligentCross protected quote, IntelligentCross states it is already widely used by most major broker-dealer and electronic trading firms. ***IntelligentCross states*** that these firms and others “make routing decisions every day in response to the numerous order types already in place by exchanges, as well as implement a plethora of routing strategies to interact with, and respond to, the displayed liquidity in the markets.” ***IntelligentCross further states*** that “brokers must currently consider and account for technological and geographic differences and latencies when routing.” Additionally, ***IntelligentCross points*** to the “technological capabilities of order routers today” and believes that a market participant “should not have difficulties in configuring their routers to adopt to the IntelligentCross matching process.” ***IntelligentCross states*** that market participants already use “tools to manage order routing and repricing on the scale of hundreds of microseconds” such as “mechanisms that adapt to the changing technology on

²⁸ Letter from Ari Burstein, Imperative Execution, to Vanessa Countryman, SEC, at 2, Feb. 16, 2023, available at <https://www.sec.gov/comments/sr-finra-2022-032/srfinra2022032-20157506-325781.pdf> (“IntelligentCross Response Letter”).

trading venues,” including adaptations that address delay periods. Accordingly, **IntelligentCross believes** that any market participants should be able to account for the IntelligentCross protected quote without significant or material changes to its technology and without adopting any change that would frustrate the purposes of Regulation NMS.²⁹

Oddly, the Staff Approval Order didn’t make any explicit determinations related to these claims. Rather, the Order summarily moved on to “[t]he other concerns related to the IntelligentCross matching process and the qualification of its displayed quotes as a protected quotation,” which it argued had “been adequately addressed in the response letters by IntelligentCross and FINRA, as well as in the Proposal, such that the Proposal is consistent with the requirements of the Exchange Act and the rules and regulations applicable to a national securities association.”³⁰

As a result, the Staff ADF Approval Order did not address, for example, whether or why the difference between a known, fixed delay is – in the view of the Commission – identical for regulatory purposes as one that may change randomly. The Staff ADF Approval Order did not even acknowledge that different types of delays (fixed versus random) give rise to very different concerns and risks for market participants. For example, randomized delays may effectively preclude brokers seeking to access the venue from being able to reliably time their orders across multiple venues so as to minimize information leakage to other, potentially predatory, market participants.

Similarly, what factors are considered in the determinations of the duration and nature of the delay? And what impacts does that delay have on different types of traders? We don’t know with any degree of specificity, and the Staff ADF Approval Order failed to address why more transparency is not provided.

Of course, neither FINRA nor Intelligent Cross stepped in to fill the void.

By way of contrast, years ago, Nasdaq published a white paper that identified over 140 factors in connection with its methodology to establish holding periods for its M-ELO order type – even though this involved a dark order type and not a protected quotation.³¹ In fact, Nasdaq also agreed to seek prior approval before changing any of the identified factors or other aspects of its methodology, agreed to publish ongoing data, and agreed

²⁹ Staff ADF Approval Order, at 22-24 (internal citations omitted) (emphasis added).

³⁰ Staff ADF Approval Order, at 25.

³¹ See, *Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 2, To Amend Rules 4702(b)(14) and (b)(15) Concerning Dynamic M-ELO Holding Period*, SEC, Exch. Act Rel. No. 98321, September 7, 2023, available at <https://www.sec.gov/files/rules/sro/nasdaq/2023/34-98321.pdf>. HMA makes no representations about the adequacy of the Nasdaq filing, but rather seeks to contrast the depth of information provided from the dearth of information provided in this instant (yet far more impactful) filing by FINRA.



to conduct specified market surveillance.³² Yet, here, the Commission is again being asked to approve awarding a venue a protected quotation without that basic information, and without IntelligentCross or FINRA being held to *any* enforceable continuing oversight obligations.

The Commission Staff's, FINRA's, and Intelligent Cross's failures to adequately address the unique nature of IntelligentCross's delay mechanism is a fatal flaw.

The Commission Staff, FINRA, and Intelligent Cross Failed to Meaningfully Address the Inconsistency Between the Staff's Existing "De Minimis" Interpretation and the IntelligentCross Delay

IntelligentCross has erroneously asserted 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."³³

First, as described above, the delay contemplated for IEX and all existing geographical delays are fixed. IntelligentCross's delay changes over time, and is randomized.

Second, when the Commission adopted its "de minimis" interpretation to effectively permit the fixed-duration IEX delay, it explicitly acknowledged 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."³⁴ However, as described above, that would also not be true for IntelligentCross – because it is not an exchange.

Third, 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.

The Staff's, FINRA's, and Intelligent Cross's failures to address this inconsistency between the Commission's past interpretations regarding delays and the facts of IntelligentCross's delay is a fatal flaw.

The Staff, FINRA, and Intelligent Cross Failed to Address the Disparate Impacts of the IntelligentCross Delay on Different Trading Firms

While both parties are "blind" to the length of the delay,³⁵ the Commission Staff, FINRA, and Intelligent Cross each ignore a key element of the unique variability of the delay –

³² *Id.*, at 62855-57.

³³ IntelligentCross Response Letter, at 9.

³⁴ *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>.

³⁵ Staff ADF Approval Order, at 26.



that is to say, its disparate impact on different types of traders. Not all parties are equally well positioned to cancel during that delay.

In sharp contrast to the Staff ADF Approval Order, the Commission has previously rejected an exchange filing for a delay because, among other reasons, the exchange did not show that its delay would not have a discriminatory impact, nor that the delay was narrowly tailored to achieve its stated purpose.³⁶ In that instance, the Commission noted that the exchange had asserted

that “the LP2 delay mechanism would promote liquidity provision without unfairly discriminating against specific segments of the market” and that it is appropriate to provide protection for orders that provide liquidity because these orders provide an important service to the market and face asymmetric risks due to the fact that the market may move while they are posted to the order book.³⁷

The Commission rightly rejected these claims, and yet, here, the Commission is being asked to approve such a delay for a protected quotation with even less information provided.

Nevertheless, the Staff, FINRA, and Intelligent Cross inexplicably fail to address the asymmetric impact of IntelligentCross’s delay mechanism. That is a fatal flaw.

The ADF Proposal Is About IntelligentCross and FINRA, Not Investors

We understand why both IntelligentCross and FINRA may be interested in this proposal, as both have something to gain. IntelligentCross would suddenly have the privilege of having market participants being effectively compelled to connect and attempt to trade on it. And it would be able to enjoy these benefits without the significant restrictions that apply to all other venues that enjoy protected quotations, including being subject to having its rules suspended and disapproved through a statutorily-mandated, formalized, and tested process.

But FINRA also has something to gain. It would gain the ability to essentially grab market oversight powers from the SEC, as it would now be the primary regulator for a

³⁶ *Order Disapproving Proposed Rule Change To Introduce a Liquidity Provider Protection Delay Mechanism on EDGA*, SEC, Exch. Act Rel. No. 34–88261, Feb. 21, 2020, available at <https://www.sec.gov/files/rules/sro/cboeedga/2020/34-88261.pdf> (internal citations omitted)(emphasis added). (stating that “In particular, the Commission does not believe that the Exchange has supported its assertions and demonstrated that the LP2 delay mechanism is appropriately tailored to address latency arbitrage and not permit unfair discrimination.”).

³⁷ *Order Disapproving Proposed Rule Change To Introduce a Liquidity Provider Protection Delay Mechanism on EDGA*, SEC, Exch. Act Rel. No. 34–88261, at 12 n.48, Feb. 21, 2020, available at <https://www.sec.gov/files/rules/sro/cboeedga/2020/34-88261.pdf>.



venue with a protected quotation (which it isn't today). And it would gain reporting revenues.

But what would investors gain?

The ability to see IntelligentCross quotations on the alternative display facility is of near-zero practical value to investors. As we wrote previously:

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.³⁸

The reality is that investors have the option to trade on IntelligentCross today, if they want. And many investors trade there today. But many do not.

If the First ADF Amendment is approved, however, the Commission would be effectively compelling investors to try to route orders to a venue that does not have the same protections as exchanges (including unique risks of information leakage and rules changes). It would compel them to comply with any rule IntelligentCross may want to impose upon access to data or trading on the venue, including market data costs.

The ADF Proposal isn't focused on providing investors or other market participants with new information, or a new trading venue. IntelligentCross is already doing that today. Rather, this entire application is about IntelligentCross and FINRA seeking government-sanctioned rents from market participants without the same competitive and investor protections as apply to all other venues who enjoy the privilege of having protected quotations.

Conclusion

Given the paucity of information provided by FINRA and IntelligentCross, and the lack of independent analysis by the Commission and its Staff, the agency has no choice but to disapprove the ADF Proposal, as amended by the First ADF Amendment.

As the Commission should have learned from *Susquehanna*, it cannot simply rely upon the representations of a SRO when it evaluates a rule filing by that SRO. And yet, not only would the Commission be effectively doing that if it were to approve the ADF

³⁸ Second HMA Letter.



Proposal, but it would also be inappropriately relying upon the representations of an ATS upon which the SRO's submission of the ADF Proposal entirely relies³⁹ – despite the fact that the ATS has explicitly acknowledged that its rules forming the basis of those representations may change– and already have.⁴⁰

While we had hoped that FINRA and IntelligentCross would withdraw and revise the ADF Proposal to address our concerns, the First ADF Amendment instead attempts to ignore the filings' glaring deficiencies with a tweak.

The Commission must ensure that it upholds the law, and should see through the ruse and disapprove the ADF Proposal, as modified by the First ADF Amendment.

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

³⁹ See, 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.”).

⁴⁰ IntelligentCross Response Letter; First ADF Amendment.