

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97195; File No. SR–FINRA–2022–032]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change Relating to Alternative Display Facility New Entrant

March 24, 2023.

I. Introduction

On December 16, 2022, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”) ¹ and Rule 19b–4 thereunder,² a proposed rule change to add IntelligentCross ATS (“IntelligentCross”) as a new entrant to the Alternative Display Facility (“ADF”) (“Proposal”). The proposed rule change was published for comment in the **Federal Register** on December 27, 2022.³ On February 9, 2023, the Commission extended the time period within which to approve, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to March 27, 2023.⁴ The Commission has received eight comment letters on the proposed rule change, two of which were received after the Extension.⁵ On February 16, 2023, IntelligentCross submitted a letter responding to the commenters.⁶ On March 13, 2023, FINRA submitted a letter responding to certain commenters.⁷ Under Section 19(b)(3)(C) of the Exchange Act,⁸ the Commission is hereby instituting proceedings to determine whether to approve or disapprove File Number SR–FINRA–2022–032.

II. Description of the Proposed Rule Change

The ADF is a quotation collection and trade reporting facility that provides ADF market participants (*i.e.*, ADF-registered market makers or electronic communications networks)⁹ the ability to post quotations, display orders and report transactions in NMS stocks¹⁰ for submission to the securities information processors (“SIP”) for consolidation and dissemination to vendors and other market participants.¹¹ The ADF is also designed to deliver real-time data to FINRA for regulatory purposes, including enforcement of requirements imposed by Regulation NMS.¹²

In particular, Regulation NMS includes an order protection rule that 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” that do not fall within one of the exceptions set forth in the rule (“Order Protection Rule”).¹³ For quotations to be protected under the rule, they must be, among other things, executable “immediately and automatically” against an incoming immediate-or-cancel (“IOC”) order.¹⁴ In 2016, the Commission 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.”¹⁵ The Commission stated that “[i]n 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. As long as any intentional delay is *de minimis*—*i.e.*, does not impair fair and efficient access to an exchange’s protected quotations—it is consistent with both the text and purpose of Rule 611.”¹⁶ Commission staff guidance has further stated that “consistent with the Commission’s interpretation regarding automated quotation under Rule 600(b)(3) of

Regulation NMS, 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.”¹⁷

In addition, Rule 610 of Regulation NMS requires that a trading center displaying quotations in an NMS stock through a self-regulatory organization (“SRO”) display-only facility (such as the ADF) “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.”¹⁸ Rule 610 also requires that a trading center displaying quotations in an NMS stock through an SRO display-only facility 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.¹⁹ In articulating this standard, the Commission noted 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.”²⁰ The nature and cost of connections for market participants seeking to access an ADF participant’s quotations would need to be substantially equivalent to the nature and cost of connections to SRO trading facilities.²¹

In evaluating whether ADF participants are meeting the access standards under Rule 610, Regulation NMS also requires FINRA to submit a proposed rule change under Section 19(b) of the Exchange Act in order to add a new ADF participant.²² Accordingly, FINRA is proposing to add IntelligentCross as a new ADF Market Participant.²³ IntelligentCross is an NMS stock alternative trading system (“ATS”) operating pursuant to an effective Form ATS–N.²⁴

¹⁷ See Staff Guidance on Automated Quotations under Regulation NMS available at <https://www.sec.gov/divisions/marketreg/automated-quotations-under-regulation-nms.htm>.

¹⁸ 17 CFR 242.610(b)(1).

¹⁹ 17 CFR 242.610(b)(2).

²⁰ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37549 (June 29, 2005) (“NMS Adopting Release”).

²¹ See *id.*

²² See Notice, *supra* note 3, at 79401.

²³ According to FINRA, there have been no ADF Market Participants since the first quarter of 2015. See *id.*

²⁴ See Form ATS–N Filings and Information page on the Commission’s website, at <https://www.sec.gov/divisions/marketreg/form-ats-n-filings.htm>.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release No. 96550 (December 20, 2022), 87 FR 79401 (“Notice”).

⁴ See Securities Exchange Act Release No. 96864, 88 FR 9945 (February 15, 2023) (“Extension”).

⁵ All comments received by the Commission on the proposed rule change are available at: <https://www.sec.gov/comments/sr-finra-2022-032/srfinra2022032.htm>.

⁶ See Letter from Ari Burstein, General Counsel, Imperative Execution, dated February 16, 2023 (“IntelligentCross Letter”).

⁷ See Letter from Faisal Sheikh, Assistant General Counsel, FINRA, dated March 13, 2023 (“FINRA Letter”).

⁸ 15 U.S.C. 78s(b)(3)(C).

⁹ See FINRA Rule 6220(a)(3).

¹⁰ See 17 CFR 242.600.

¹¹ See Notice, *supra* note 3, at 79401.

¹² See 17 CFR 242.600.

¹³ See 17 CFR 242.611.

¹⁴ 17 CFR 242.600(b)(6).

¹⁵ Commission Interpretation Regarding Automated Quotations Under Regulation NMS, Securities Exchange Act Release No. 78102 (June 17, 2016), 81 FR 40785, 40792 (June 23, 2016) (“Commission Interpretation of Automated Quotations”).

¹⁶ See *id.* at 40789.

IntelligentCross currently operates three separate limit order books with optional display capability distinguished by different fee structures—the ASPEN fee/fee limit order book (“ASPEN Fee/Fee”), ASPEN maker/taker limit order book, and ASPEN taker/maker limit order book (collectively, “IntelligentCross ASPEN”).²⁵ FINRA states that the ASPEN Fee/Fee book would be the only order book displaying orders on the ADF.²⁶

IntelligentCross provided FINRA with a summary of its policies and procedures regarding access to its quotations in an NMS stock displayed on the ADF, and a summary of its proposed fees for such access.²⁷ Based on IntelligentCross’ representations, FINRA believes that IntelligentCross’ proposed level and cost of access to quotations on the ASPEN Fee/Fee book is substantially equivalent to the level and cost of access to quotations displayed by an SRO trading facility, both in absolute and relative terms.²⁸ FINRA also believes that the quotations displayed on ASPEN Fee/Fee book would meet the definition of an “automated quotation” under Regulation NMS.²⁹

In particular, FINRA states that IntelligentCross only permits registered broker-dealers to be subscribers to IntelligentCross, and subscribers can interact with ASPEN Fee/Fee book using conventional order types.³⁰ The ASPEN Fee/Fee book will accept incoming intermarket sweep orders (“ISOs”)³¹ once it displays orders on the ADF.³²

²⁵ See Notice, *supra* note 3, at 79402. FINRA states that all three IntelligentCross ASPEN order books act independently of each other (*i.e.*, orders resting in one book do not rest on or interact with orders resting in another book). *See id.* In addition to IntelligentCross ASPEN, FINRA states that IntelligentCross also operates a midpoint book that only accepts non-displayed midpoint orders, which is distinct from and does not interact with the IntelligentCross ASPEN. *See id.* at n.17. All activity on IntelligentCross is identified and reported under the “INCR” market participant identifier (“MPID”). *See id.* at 79402.

²⁶ *See id.* at 79402. FINRA states that the effective date of the Proposal would be the date of the Commission’s approval. *See id.* at 79404.

²⁷ *See id.* at 76341.

²⁸ *See id.* at 79404, n.37.

²⁹ *See id.* at 79403.

³⁰ *See id.* at 79402. FINRA states that ASPEN Fee/Fee book accepts limit orders with optional display instructions, immediate or cancel orders, and pegged orders (which are treated as regular orders with an automated repricing to the national best bid or offer (“NBBO”). *See id.* Only limit orders and primary peg orders (with or without a limit price) are eligible to be displayed on the ASPEN Fee/Fee book, and therefore on the ADF. *See id.*

³¹ 17 CFR 242.600(b)(38).

³² See Notice, *supra* note 3, at 79402.

IntelligentCross has represented to FINRA that the ASPEN Fee/Fee book will be the only

FINRA states that the ASPEN Fee/Fee book establishes a matching schedule³³ using an overnight optimization process based on historical performance measurements from prior days’ matches across all three IntelligentCross ASPEN books.³⁴ The match event time is randomized within the time band throughout the course of the trading day and any order that arrives prior to a match event (and that has not been cancelled, become unmarketable, or repriced)³⁵ is eligible to participate in the next match event for that security.³⁶

IntelligentCross has represented to FINRA that, in the following cases, an incoming order on ASPEN Fee/Fee may not execute against a resting order at match event time when: (i) an existing resting order cancels prior to the next match event; (ii) an incoming order is canceled prior to the next match event; (iii) the NBBO moves between the time an order is received and the next match event takes place, making either the incoming order or the resting order non-marketable; or (iv) the NBBO changed before the next match event and pegged orders were repriced to the new NBBO, making the incoming order or the resting pegged order non-marketable.³⁷

FINRA states that ASPEN Fee/Fee’s matching engine operates near-continuously and that, when a new order arrives in the ASPEN Fee/Fee book, it would participate in the next scheduled match event by interacting with existing orders in the order book within a maximum time capped at 900 microseconds.³⁸

IntelligentCross ASPEN order book that will accept ISOs. *See id.* at 79402, n.22.

³³ *See id.* at 79402. FINRA states that the ASPEN Fee/Fee 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. *See id.* 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. *See id.*

³⁴ *See id.*

³⁵ *See id.*

³⁶ *See id.* at 79402. According to FINRA, IntelligentCross has represented that both sides of the trade (buyers and sellers) are on equal footing for the next scheduled match event, while maintaining full control of their orders, *i.e.*, both sides can cancel or update their orders at any time prior to the match. *See id.* at n.24. In addition, the ASPEN Fee/Fee book automatically updates its quotations, and all quotation updates, including those due to new or cancelled orders, are immediate. *See id.*

³⁷ *See id.* at 79402, n.23. IntelligentCross has represented to FINRA that non-match events on ASPEN Fee/Fee occur in a minority of cases. *See id.* at 79403. For a more detailed discussion of examples regarding situations where an incoming order may not execute against a resting order at match event time, *see id.* at 79403.

³⁸ *See id.* at 79403. FINRA states that the quotations displayed on ASPEN Fee/Fee are handled on an automated basis and that there is no

FINRA states that for each match event time, ASPEN Fee/Fee retrieves the NBBO and processes all the orders that have arrived and have not been cancelled in price-time priority.³⁹ No subscriber to IntelligentCross (or non-subscriber accessing IntelligentCross through a subscriber) is given any priority through the matching process and the matching process is blind to the identity of the subscriber.⁴⁰ All matches are reported immediately to subscribers and the SIPs via a FINRA trade reporting facility and disseminated on IntelligentCross’ market data feed.⁴¹

FINRA further states that IntelligentCross utilizes a fee/fee pricing model for activity on ASPEN Fee/Fee book where both sides are charged the same fee⁴² for transactions.⁴³ Eligible displayed orders are published via a free market data feed (“IQX market data feed”).⁴⁴ IntelligentCross does not charge connectivity fees to its subscribers.⁴⁵ FINRA states that firms wishing to access liquidity on ASPEN Fee/Fee may connect in a variety of ways.⁴⁶ Firms that are IntelligentCross subscribers can connect to ASPEN Fee/Fee via a Financial Information Exchange (“FIX”) connection.⁴⁷ Such access is available to subscribers through an internet protocol address via communications that are compliant

human discretion in determining any action taken with respect to an order after the order is received. *See id.*

³⁹ *See id.* FINRA states that IntelligentCross uses a combination of SIP and proprietary direct feeds from national securities exchanges to determine the NBBO and protected quotes, and to price executions. *See id.* at 79402, n.27.

⁴⁰ *See id.*

⁴¹ *See id.* IntelligentCross has represented to FINRA that displayed orders from all three IntelligentCross ASPEN order books are available in the IQX market data feed. *See id.* 79402, n.28.

⁴² *See id.* at 79404. FINRA states that the IntelligentCross’ fee schedule is published in the IntelligentCross Form ATS-N and advance notice is provided to its subscribers prior to a pricing change. *See id.*

⁴³ *See id.* at 79404. FINRA states that the base rate charged by IntelligentCross is \$0.0008 per share for each side of a transaction on ASPEN Fee/Fee. *See id.*

⁴⁴ *See id.*

⁴⁵ *See id.* IntelligentCross has represented to FINRA that it is not involved in the installation of cross-connects. *See id.* Further, IntelligentCross does not currently charge connectivity fees to access ASPEN Fee/Fee and has offered to pay for certain of subscribers’ cross-connect fees at NY4. *See id.* IntelligentCross also currently pays for one primary connection and one back-up connection, and any direct subscriber is eligible for this payment. *See id.* IntelligentCross’ network provider and other similar network providers may charge fees relating to connectivity. *See id.* IntelligentCross has represented to FINRA that any such connectivity fees would be substantially equivalent to the costs to connect to any other trading center, such as an exchange. *See id.*

⁴⁶ *See id.*

⁴⁷ *See id.*

with the FIX application programming interface (“API”) provided by IntelligentCross.⁴⁸ IntelligentCross does not accept orders via any other forms of communication (e.g., telephone, email, instant message).⁴⁹ IntelligentCross allows a subscriber to determine its level of connectivity and does not tier or discriminate among subscribers.⁵⁰

Additionally, FINRA states that IntelligentCross has established and maintains policies and procedures related to periodic system capacity reviews and tests to ensure future capacity, as well as policies and procedures to identify potential weaknesses and reduce the risks of system failures and threats to system integrity.⁵¹ FINRA also states that, for purposes of displaying orders through the ADF, IntelligentCross’ policies and procedures require continuous monitoring of ASPEN Fee/Fee’s connections with an SRO display-only facility and, in the event that ASPEN Fee/Fee loses connection with the ADF, IntelligentCross has contingency plans in place, including removing (i.e., “zeroing out”) all quotes previously published by the system to the ADF and notifying its subscribers of such interruption.⁵²

Finally, FINRA states that all members in good standing of an SRO would be eligible to become a subscriber to ASPEN Fee/Fee, and would be subject to eligibility requirements set by IntelligentCross.⁵³

III. Summary of Comments and Responses by IntelligentCross and FINRA

The Commission received seven comment letters opposing the Proposal,⁵⁴ and one comment letter supporting the Proposal.⁵⁵ Commenters

opposing the Proposal generally state the Proposal lacks sufficient detail necessary for the Commission to approve the Proposal and point to several areas of concern.⁵⁶ In particular, commenters raise concerns about whether the Proposal: (1) complies with the requirements of Regulation NMS; (2) should condition Commission’s approval on additional representations by IntelligentCross; (3) provides a sufficient implementation period for the industry to adopt changes from the addition of IntelligentCross to the ADF; and (4) raises concerns about the ADF’s technological infrastructure.⁵⁷

1. Compliance With Regulation NMS

Some commenters raise concern that IntelligentCross’ displayed quotations do not meet the Commission’s definition of “automated quotations” due to the intentional delay built into IntelligentCross’ delayed matching process.⁵⁸ In particular, some commenters state that the Proposal does not demonstrate how the intentionally delayed matching process is *de minimis*.⁵⁹ Two commenters states that the Proposal wrongly assumes that any delay under a millisecond is *de minimis*.⁶⁰ One commenter states that

LLC, dated January 17, 2023. This commenter states that adding IntelligentCross’ displayed liquidity to the public quote would enable market participants to interact with better prices, enhance price discovery, and minimize pricing errors. *See id.*

⁵⁶ *See supra* note 54.

⁵⁷ Some commenters also raise issues that are beyond the scope of the Commission’s consideration of whether the present Proposal is consistent with the Exchange Act. In particular, one commenter states that the Commission should reconsider and withdraw the Commission Interpretation of Automated Quotations. *See Citadel Letter* at 1–4, 8 (stating, among other things, that the Commission Interpretation of Automated Quotations is “inconsistent with the plain text of Regulation NMS and therefore invalid”). Some commenters question the appropriateness of the ADF in today’s market structure, including the need for the ADF given the number of exchanges and active non-display ATS’ in the marketplace. *See Nasdaq Letter* at 2; *Healthy Markets Letter* at 8. One commenter recommends that the Commission should consider “whether the ADF is still needed or should be eliminated entirely.” *Nasdaq Letter* at 1, 3 (stating that the ADF “continues to exist in form only, while serving no productive function”). Finally, some commenters state that approval of the Proposal may undermine the recent Commission proposals to modernize equity market structure. *See Healthy Markets Letter* at 16; *Nasdaq Letter* at 2. One of these commenters also questions how recent reforms to Rule 605 of Regulation NMS would apply to the Proposal, particularly in relation to the single MPID that IntelligentCross uses to identify and report its transaction activity. *See Healthy Markets Letter* at 5, 16.

⁵⁸ *See Citadel Letter* at 1; *SIFMA Letter* at 3; *FIA PTG Letter* at 1–2; *FIA PTG Letter II* at 1–2; *Nasdaq Letter* at 2; *Healthy Markets Letter* at 13.

⁵⁹ *See Citadel Letter* at 1; *FIA PTG Letter* at 1–2; *FIA PTG Letter II* at 1–2; *SIFMA Letter* at 4.

⁶⁰ *See Citadel Letter* at 4; *FIA PTG Letter* at 2. One of these commenters further states that the Proposal

the “novel features” of the Proposal have not been adequately assessed to provide the Commission with sufficient basis to make an affirmative finding that the Proposal is consistent with the Exchange Act.⁶¹ One commenter states that the randomized nature of the matching process “creates significant challenges for best execution for brokers” and prevents “predictable staging of order sending activity by brokers across multiple venues,” resulting in “significant risk of material information leakage and quote fading—leading to materially worse execution quality for investors.”⁶²

Some commenters state that the ability for liquidity providers to cancel displayed ADF orders through IntelligentCross’ functionality at any time raises questions about whether its functionality is consistent with Regulation NMS and prior Commission guidance.⁶³ For example, some commenters state that they are concerned that a resting limit order could be canceled at any time (even after the incoming order is received) prior to the match, including when such incoming orders are routed to IntelligentCross consistent with regulatory obligations under the Order Protection Rule.⁶⁴ One commenter states that the non-match event data stated in the Proposal is a “material”

lacks basic information regarding the intentionally delayed matching process, such as whether it is symmetric or asymmetric and how it operates in practice. *See FIA PTG Letter* at 2.

⁶¹ *See Citadel Letter* at 4. This commenter states that the “required assessment of whether or not an intentional delay is *de minimis* must consider the impact of the intentional delay on fill rates and execution quality and whether it operates to frustrate the purposes of Rule 611 by impairing fair and efficient access to displayed quotations.” *Id.* at 8. The commenter further states that based on the data presented in the Proposal, “nearly 9% of executable transactions do not occur” because of the reasons described by the commenter in its letter, which the commenter states is “certainly not *de minimis*.” *Id.* The commenter also states that granting “protected quotation” status for the first time to a matching process that uses discrete match events would treat the IntelligentCross displayed quote as equivalent to those on other market centers, even though the matching of counterparties and the execution of transactions only occurs after the match event is conducted. *Id.* at 7.

⁶² *See Healthy Markets Letter* at 14. This commenter also states that the delayed randomized match creates challenges regarding the operation of ISOs. *See id.* at 4. *See also Healthy Markets Letter II* at 4; *Citadel Letter* at 6–7 (stating that market participants could have difficulty adopting routing strategies to account for IntelligentCross’ randomized intentional delay).

⁶³ *See SIFMA Letter* at 3–4.

⁶⁴ *See SIFMA Letter* at 3–4; *Citadel Letter* at 4. One of these commenters discusses prior SRO proposals considered by the Commission that raised similar concerns related to 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. *See SIFMA Letter* at 3.

⁴⁸ *See id.*

⁴⁹ *See id.*

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² *See id.*

⁵³ *See id.* at 79405.

⁵⁴ *See Letter* from Tyler Gellasch, President and CEO, Healthy Markets Association, dated January 13, 2023 (“Healthy Markets Letter”); *Letter* from Brett Kitt, Associate Vice President & Principal Associate General Counsel, Nasdaq, Inc., dated January 17, 2023 (“Nasdaq Letter”); *Letter* from Joanna Mallers, Secretary, FIA Principal Traders Group, dated January 17, 2023 (“FIA PTG Letter”); *Letter* from Stephen John Berger, Managing Director, Global Head of Government & Regulatory Policy, Citadel Securities, dated January 23, 2023 (“Citadel Letter”); *Letter* from Ellen Greene, Managing Director, Equities & Options Market Structure, SIFMA, dated February 8, 2023 (“SIFMA Letter”); *Letter* from Joanna Mallers, Secretary, FIA Principal Traders Group, dated March 8, 2023 (“FIA PTG Letter II”); *Letter* from Tyler Gellasch, President and CEO, Healthy Markets Association, dated March 14, 2023 (“Healthy Markets Letter II”).

⁵⁵ *See Letter* from Nataliya Bershova, Head of Execution Research, Sanford C. Bernstein & Co.,

figure that “likely understates expected cancellation rates” if market participants are required to route order flow to IntelligentCross.⁶⁵ Another commenter emphasizes that order posters in ASPEN Fee/Fee book have the ability to immediately cancel their orders, whereas order transmitters seeking to interact with that interest at the NBBO do not have the same ability to cancel their orders due to their regulatory obligation to attempt to access the protected quote.⁶⁶

In its response letter, IntelligentCross states that it disagrees with the characterizations made by commenters of the IntelligentCross matching process.⁶⁷ Specifically, IntelligentCross states that its matching process is “completely symmetric in nature and does not favor a particular side of the trade; there is no differential treatment of certain market participants.”⁶⁸ IntelligentCross states that both sides of the trade “can cancel or update their orders at any time prior to a match” and “must equally wait for the next scheduled match event to occur.”⁶⁹ IntelligentCross also emphasizes that the regulatory obligations attendant to “protected quotations” under Regulation NMS do not provide a guarantee of an execution.⁷⁰ Accordingly, IntelligentCross states that a market participant that routes an order to any market with the intention of matching against a displayed order may not ultimately receive an execution.⁷¹ Moreover, IntelligentCross disagrees with a commenter’s statement that non-match events on IntelligentCross are “material” and states that there is no evidence to the effect that non-match rates would increase if market participants are required to route order flow to IntelligentCross.⁷²

IntelligentCross also disagrees with commenters that express concern regarding the ability for liquidity

providers to cancel their order in IntelligentCross prior to a match event and believe it to be detrimental to the markets and investors.⁷³

IntelligentCross points to its own user experience on the platform, and data specifying that “in January 2023, ASPEN Fee/Fee improved the NBBO over 5.3 million times per day (for orders of round-lot size or larger on arrival).”⁷⁴ Additionally, IntelligentCross states that any “trade-offs” due to the manner of IntelligentCross’ matching process “certainly do not frustrate the purpose of Regulation NMS by impairing fair and efficient access to IntelligentCross’ displayed quotations.”⁷⁵ Moreover, IntelligentCross states that there is no basis for the assumption that there is a significant risk of information leakage and quote fading due to an IntelligentCross protected quote.⁷⁶

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, and that any market participants should be able to account for the IntelligentCross protected quote without significant or material changes to its technology. 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.”⁷⁷

Finally, IntelligentCross states that its matching process is consistent with the Commission Interpretation of Automated Quotations.⁷⁸ IntelligentCross states that, while the Commission did not establish a “bright line de minimis threshold,” the ASPEN Fee/Fee matching engine “operates near-continuously and when a new order arrives in the ASPEN Fee/Fee book, it will participate in the next scheduled match event by interacting with existing orders in the order book within a maximum time capped at 900 microseconds.”⁷⁹

⁷³ *Id.* at 5.

⁷⁴ *Id.*

⁷⁵ *Id.* at 6.

⁷⁶ *See id.* For the proposition that its system is designed to provide for best execution, IntelligentCross states that in the past year, it has grown from 70 basis points of the market on average in January 2022 to 110 basis points during January 2023. *See id.*

⁷⁷ *Id.* at 7.

⁷⁸ *See id.* at 9.

⁷⁹ *Id.*

2. Additional Conditions to Approval of the Proposal

Two commenters raise questions regarding the regulatory process in connection with proposed changes to IntelligentCross’ operations and fees associated with displaying protected quotations on the ADF.⁸⁰ One commenter states that there is currently no process for ongoing operational changes at non-exchange venues with protected quotes and intentional access delays.⁸¹ This commenter states that without the exchange notice and comment process in connection with changes to operations, it seeks additional information on the process for managing such changes at IntelligentCross and the ADF.⁸²

One commenter states that if the Commission chooses to permit any trading center to disseminate quotations using the ADF, it must condition approval with limitations that are consistent with limitations imposed upon other trading venues (*i.e.*, exchanges) whose quotations have protected quotation status.⁸³ In particular, this commenter states that approval of the Proposal should be conditioned upon IntelligentCross: (1) continuing to not charge for market data or connectivity; (2) having fees and rebates (if adopted) that are at or below those charged by exchanges; (3) notifying the Commission and FINRA of all changes related to the ASPEN Fee/Fee book; and (4) describing how any such changes are consistent with the ASPEN Fee/Fee book quotations continuing to be included as protected quotations is consistent with the Exchange Act and protection of investors.⁸⁴ This commenter also states that both the Commission and FINRA should detail how they would “gather, review, analyze, and publish for public consideration” any changes to IntelligentCross’ policies and procedures related to the Proposal, as well as describe how they would

⁸⁰ *See* Healthy Markets Letter at 2; FIA PTG Letter at 2; FIA PTG Letter II at 2.

⁸¹ *See* FIA PTG Letter at 2; FIA PTG Letter II at 2–3.

⁸² *See* FIA PTG Letter at 2; FIA PTG Letter II at 2–3.

⁸³ *See* Healthy Markets Letter at 2. This commenter states that if the Commission approves the Proposal, “it would be difficult, if not impossible, for the Commission to practically constrain IntelligentCross’ fees and potential limitations for accessing the newly protected quotations.” *Id.* at 9. *See also* Healthy Markets Letter II.

⁸⁴ *See* Healthy Markets Letter at 2. This commenter also states that if the Commission approves the Proposal, it should expressly condition the approval on IntelligentCross being compliant with Regulation SCI like other trading centers with protected quotations. *See id.* at 8, n.29.

⁶⁵ *See* Citadel Letter at 5.

⁶⁶ *See* SIFMA Letter at 3. This commenter states that areas to explore in addressing its concerns with the Proposal 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.” *Id.* at 4, n.10.

⁶⁷ *See* IntelligentCross Letter at 3.

⁶⁸ *See id.* at 4.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* IntelligentCross also states that, in the case of ISOs, commenter “concerns are misplaced as once the ISO is sent to a trading center displaying a protected quotation, a broker’s obligations under the Rule 611 have been met.” *Id.* at 5.

⁷² *Id.* at 8. IntelligentCross believes that “it is just as likely that cancellations will decrease” as “the IntelligentCross order book will be in a matchable state more frequently.” *Id.*

intervene to block or disallow any concerning changes in IntelligentCross' policies and procedures related to the ADF.⁸⁵ Overarching this commenter's concerns with the Proposal are that any changes to the ASPEN Fee/Fee 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.⁸⁶

In its response letter, IntelligentCross points to its current regulatory responsibilities associated with being a registered broker-dealer and an ATS, as well as the Regulation NMS obligations attached to being an ADF Participant.⁸⁷ IntelligentCross also states that, while an ATS is not subject to the same requirements as exchanges, it also does not share the same benefits as exchanges.⁸⁸ However, IntelligentCross states that it does not object to notifying the Commission and FINRA in advance if changes are made to the level and cost of access to the ASPEN Fee/Fee book impacting the display of IntelligentCross' protected quotations on the ADF, or the operation of the ASPEN Fee/Fee book impacting the provision of the protected quote.⁸⁹ IntelligentCross also states that it does not object to an "appropriately structured process" to engage the Commission in evaluating and commenting on such changes.⁹⁰ But IntelligentCross disagrees with the commenter's recommendation to condition IntelligentCross' approval on "continuing to not charge for market data or connectivity" given that it believes such a requirement would not be consistent with the limitations imposed on exchanges.⁹¹

3. Implementation Period

Two commenters suggest that the proposed implementation period for the Proposal is too short given the connectivity arrangements that the industry would need time to establish.⁹² One commenter suggests an implementation period of no less than 120 days following the date of

Commission approval.⁹³ Another commenter suggest a period of no less than 90 days following the date of Commission approval.⁹⁴

In its response letter, IntelligentCross states that it has been working with industry participants to ensure that they have all the information necessary to prepare for the IntelligentCross protected quote.⁹⁵ IntelligentCross also notes that most major broker-dealers and electronic trading firms are already connected to, and trading with, the IntelligentCross ATS.⁹⁶ Moreover, IntelligentCross believes that a reasonable implementation timeframe would be to require that industry participants begin treating IntelligentCross' quotes as a protected quotation no later than 90 days after the date of the Commission's approval order.⁹⁷

4. ADF Technological Infrastructure

One commenter states that the Commission and FINRA should consider whether to "wind down" the ADF due to concerns regarding the latency and technological infrastructure of the ADF.⁹⁸ Specifically, this commenter states that the Proposal does not provide any details of the ADF's systems capabilities and questions whether the "intake, processing, and dissemination systems [are] up to 2023 speed and capacity standards."⁹⁹ This commenter also expresses concern regarding the speed at which the ADF disseminates quotation data compared to the speed at which IntelligentCross' proprietary quotation feed is disseminated to market participants.¹⁰⁰ This commenter states that it is unclear the extent to which "FINRA has attempted to upgrade the system" to address the latency gap.¹⁰¹

In its response letter, FINRA states that it has made technological updates to the ADF infrastructure that make it "well-equipped to support use of the ADF by multiple market participants for quoting and trading purposes."¹⁰²

FINRA also asserts that its recent technological updates to the ADF have significantly reduced the ADF's processing latency times as compared to when the ADF was last operational in 2015.¹⁰³ FINRA also represents that it continues to conduct capacity requirement testing with IntelligentCross and "aim[s] to address any potential areas identified for further improvement prior to IntelligentCross becoming an ADF Participant and sending quotes to the ADF (subject to SEC approval)."¹⁰⁴ Accordingly, FINRA believes that any processing latency for the ADF would generally be in line with exchange processing latencies once IntelligentCross begins quoting on the ADF.¹⁰⁵

IV. Proceedings To Determine Whether To Approve or Disapprove SR-FINRA-2022-032 and Grounds for Disapproval Under Consideration

The Commission hereby institutes proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act¹⁰⁶ to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposal. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Exchange Act,¹⁰⁷ the Commission is providing notice of the grounds for possible disapproval under consideration. As described above, FINRA has proposed to add IntelligentCross to the ADF. The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to,

and quoting functionality were migrated onto a new platform in November 2021 and March 2022, respectively. *See id.*

¹⁰³ *See id.*

¹⁰⁴ *Id.*

¹⁰⁵ *See id.*

¹⁰⁶ 15 U.S.C. 78s(b)(2)(B).

¹⁰⁷ 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Exchange Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. *See id.* The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the self-regulatory organization consents to the longer period. *See id.*

⁹³ *See* FIA PTG Letter at 2; FIA PTG Letter II at 3.

⁹⁴ *See* SIFMA Letter at 4–5.

⁹⁵ *See* IntelligentCross Letter at 10.

⁹⁶ *See id.*

⁹⁷ *See id.*

⁹⁸ *See* Healthy Markets Letter at 14–17.

⁹⁹ *See id.* at 14. This commenter asserts that it is "not aware of any public details regarding the details of [the ADF's] operations, including systems specifications and latencies." *Id.*

¹⁰⁰ *See id.* at 7.

¹⁰¹ *See id.* at 8.

¹⁰² *See* FINRA Letter at 3. FINRA states that in 2021 it began a multi-year effort to update the technological infrastructure for several of its facilities, relevant data vendor feeds, and related reference data. *See id.* The ADF's trade reporting

⁸⁵ *See id.* at 2.

⁸⁶ *See id.* at 17.

⁸⁷ *See* IntelligentCross Letter at 11.

⁸⁸ *See id.*

⁸⁹ *See id.* IntelligentCross also states that it would not object to describing how such changes are consistent with the ASPEN Fee/Fee book quotations continuing to be included as protected quotations, consistent with the Exchange Act. *See id.*

⁹⁰ *See id.*

⁹¹ *See id.* at 11–12. IntelligentCross also states that it currently does not charge for market data and connectivity. *See id.* at 12.

⁹² *See* FIA PTG Letter at 2; FIA PTG Letter II at 3; SIFMA Letter at 4.

the consistency of the proposal with the Section 15A(b)(6) of the Exchange Act,¹⁰⁸ which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Commission believes that there are questions as to whether FINRA has provided sufficient information to demonstrate that the proposal to add IntelligentCross to the ADF is consistent with the Exchange Act and the rules thereunder.

Under the Commission's Rules of Practice, 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 [SRO] that proposed the rule change."¹⁰⁹ 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,¹¹⁰ and 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.¹¹¹ The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein.

V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written view of interested persons concerning whether the proposal is consistent with Section 15A(b)(6) of the Exchange Act, or any other provision of the Exchange Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any

request for an opportunity to make an oral presentation.¹¹²

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by April 20, 2023. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by May 4, 2023.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-FINRA-2022-032 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090. All submissions should refer to File Number SR-FINRA-2022-032. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal

¹¹² Section 19(b)(2) of the Exchange Act, as amended by the Securities Act Amendments of 1975, Public Law 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2022-032 should be submitted on or before April 20, 2023. Rebuttal comments should be submitted by May 4, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹³

Sherry R. Haywood,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-97194; File No. SR-NASDAQ-2022-077]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Withdrawal of Proposed Rule Change To Amend Rule 4702 To Establish New "Contra Midpoint Only" and "Contra Midpoint Only With Post-Only" Order Types

March 24, 2023.

On December 22, 2022, The Nasdaq Stock Market LLC ("Nasdaq") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend Rule 4702 to establish new "Contra Midpoint Only" and "Contra Midpoint Only with Post-Only" order types. The proposed rule change was published for comment in the **Federal Register** on January 11, 2023.³ The Commission received three comment letters on the proposed rule change.⁴ On February 23, 2023, pursuant to Section 19(b)(2) of the Act,⁵ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute

¹¹³ 17 CFR 200.30-3(a)(57).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 96601 (Jan. 5, 2023), 88 FR 1616.

⁴ See Letter from Joseph Saluzzi, Partner, Themis Trading LLC, to Vanessa Countryman, Secretary, Commission, dated February 21, 2023; Letter from John Ramsay, Chief Market Policy Officer, Investors Exchange LLC, to Vanessa Countryman, Secretary, Commission, dated February 27, 2023; Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, to Vanessa Countryman, Secretary, Commission, dated March 8, 2023.

⁵ 15 U.S.C. 78s(b)(2).

¹⁰⁸ 15 U.S.C. 78o-3(b)(6).

¹⁰⁹ 17 CFR 201.700(b)(3).

¹¹⁰ See *id.*

¹¹¹ See *id.*