

November 1, 2022

Via Electronic Mail

Hon. Gary Gensler, Chair
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: File No. SR-FINRA-2019-008 and Remanded FINRA Rule to Establish a Corporate Bond Reference Database

Dear Chair Gensler:

The Healthy Markets Association (“HMA”)¹ writes to supplement our prior letters to the Commission regarding the now remanded Commission approval of FINRA’s rule to establish a corporate bond reference data service.

Given the evolution of the corporate bond markets in the years since FINRA proposed to create a government-mandated corporate bond reference database, the Commission should use this opportunity to re-evaluate the issues underpinning the proposal and its relative costs and benefits. Unless modified significantly, we fear the proposal could create significant new risks and costs to market participants, and may ultimately lead to less timely, consistent, and reliable information.

Procedural Background

Over four years ago, the SEC’s Fixed Income Market Structure Advisory Committee (FIMSAC) recommended that FINRA set up a corporate bond reference service that would compete with and likely supplant the current private services (e.g., Bloomberg, DirectMarkets, and S&P Global).² The FIMSAC argued that:

Access to accurate and timely reference data is of growing importance as fixed income market participants increasingly rely on electronic trading platforms. To support the trading of newly issued bonds on electronic platforms, it is necessary

¹HMA is a not-for-profit member organization of public pension funds, investment advisers, broker-dealers, exchanges, and market data firms focused on reducing conflicts of interest and improving the transparency, efficiency, and fairness of the capital markets. To learn more about HMA or our members, please see our website at <http://healthymarkets.org/about>.

² *Recommendation for the SEC to Establish a New Issue Reference Data Service for Corporate Bonds*, Fixed Income Market Structure Advisory Committee, SEC, Oct. 29, 2018, available at <https://www.sec.gov/spotlight/fixed-income-advisory-committee/fimsac-corporate-bond-new-issue-reference-data-recommendation.pdf> (“FIMSAC Recommendation”).

that all platform participants price and trade bonds based on consistent and accurate information.³

The FIMSAC then argued (with few details or limited analysis) that:

the corporate bond market would benefit from having a single central source of new issue reference data like that available in the municipal bond market. New issue reference data, and updates to reference data for seasoned issues, should be disseminated in real time to all reference data vendors and market participants, ensuring that everyone has access to the same data at the same time.⁴

Following up on the FIMSAC recommendation, in March 2019 FINRA initially proposed a rule to mandate brokers report information to a database and then distribute that information.⁵ In July, the Commission issued an Order Instituting Proceedings on whether to approve or disapprove the filing.⁶

HMA objected to the proposal in letters dated April 2019,⁷ July 2019,⁸ and October 2019,⁹ largely on the grounds that the proposed rule was both unsupported by the record and not consistent with the Exchange Act. Specifically, HMA has focused on the proposal's failure to:

- “provide sufficient details to support why FINRA is making the proposal in the first place”;
- provide data illustrating the alleged challenges to electronic trading, settlement, and clearing;
- provide data supporting the conclusion that the proposed centralized data firm should be FINRA (as opposed to the Commission itself);

³ FIMSAC Recommendation, at 1.

⁴ FIMSAC Recommendation, at 2.

⁵ *Notice of Filing of a Proposed Rule Change to Establish a Corporate Bond New Issue Reference Data Service*, SEC, Release No. 34-85488, Apr. 2, 2019, available at <https://www.sec.gov/rules/sro/finra/2019/34-85488.pdf>.

⁶ *Order Instituting Proceeding to Determine Whether to Approve or Disapprove a Proposed Rule Change to Establish a Corporate Bond New Issue Reference Data Service*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 86256; July 1, 2019, available at <https://www.sec.gov/rules/sro/finra/2019/34-86256.pdf>.

⁷ Letter from Tyler Gellasch, HMA to Vanessa Countryman, SEC, Apr. 29, 2019, available at <https://www.sec.gov/comments/sr-finra-2019-008/srfinra2019008-5423848-184599.pdf>.

⁸ Letter from Tyler Gellasch, HMA to Vanessa Countryman, SEC, July 29, 2019, available at <https://www.sec.gov/comments/sr-finra-2019-008/srfinra2019008-5879134-188731.pdf>.

⁹ Letter from Tyler Gellasch, HMA to Vanessa Countryman, SEC, Oct. 25, 2019, available at <https://www.sec.gov/comments/sr-finra-2019-008/srfinra2019008-6346067-195294.pdf>.

- articulate whether the proposal was to be a regulatory or a business function;
- explain why the rule's burden on competition is necessary or appropriate;
- address concerns about the accuracy of the limited information FINRA currently collects in TRACE;
- provide essential cost data, which not only frustrates any cost-benefit analysis, but also opens a back door to approval of significant rule changes prior to scrutiny of fees.

Further, HMA expressed concerns that approving FINRA's offering could unwittingly establish a monopolistic data provider, without any protections on the governance or pricing for the service. HMA also warned that the DC Circuit's opinion in *Susquehanna* "should be a clear warning to the Commission as it reviews the FINRA Data Filing."¹⁰

Unfortunately, the Commission elected to ignore our warning.

In December 2019, despite objections from HMA and many others, the Commission staff approved the proposal via delegated authority.¹¹ That staff approval was appealed to the Commission by Bloomberg,¹² and the full Commission approved the rule in January 2021.¹³

Bloomberg thereafter filed suit challenging the SEC approval, and FINRA delayed the rule's implementation while the case was pending. HMA submitted an amicus brief in support of Bloomberg's petition.¹⁴

On August 16, 2022, the Court of Appeals for the DC Circuit noted that:

during the rulemaking process, various commenters raised concerns about FINRA's proposed data service. In relevant part, Bloomberg commented that FINRA did not provide any information about how much it will cost to build and maintain

¹⁰ Letter from Tyler Gellach, HMA to Vanessa Countryman, SEC, at 2, July 29, 2019, *available at* <https://www.sec.gov/comments/sr-finra-2019-008/srfinra2019008-5879134-188731.pdf>; see also *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442, 446 (D.C. Cir. 2017).

¹¹ Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 2, to Establish a Corporate Bond New Issue Reference Data Service, SEC, Exch. Act Rel. No. 34-87656, Dec. 4, 2019, *available at* <https://www.sec.gov/rules/sro/finra/2019/34-87656.pdf>.

¹² *In the Matter of the Application of Bloomberg, L.P.*, SEC, Exch. Act Rel. No. 34-87656, Dec. 20, 2019, *available at* <https://www.sec.gov/rules/sro/finra/2019/34-87656-petition-for-review.pdf>.

¹³ *Order Setting Aside Action by Delegated Authority and Approving a Proposed Rule Change, as Modified by Amendment No. 2, to Establish a Corporate Bond New Issue Reference Data Service*, SEC, Exch. Act Rel. No. 34-90939, Jan. 15, 2021, *available at* <https://www.sec.gov/rules/sro/finra/2021/34-90939.pdf>.

¹⁴ *Bloomberg L.P. v SEC*, Final Brief of Healthy Markets Association as Amicus Curiae in Support of Petitioner, Civ. No. 21-1088 (D.C. Circuit 2021), *available at* <https://healthymarkets.org/wp-content/uploads/2022/10/2021.11.05-HMA-Final-Brief.pdf>.

the database, and to what extent FINRA will pass those costs along to market participants.¹⁵

It then held that:

For the reasons explained below, we find that pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), the Commission’s approval of FINRA’s proposal was arbitrary and capricious because the Commission neglected to give a reasoned explanation in response to Bloomberg’s significant concerns about the costs that FINRA, as well as market participants, will incur in connection to the creation and maintenance of the data service.¹⁶

This was a highly unusual rebuke. In the prior twelve years, more than 550 FINRA rules have been approved or made effective, none of which were vacated or remanded by the DC Circuit Court of Appeals.¹⁷

Current State of Play and Recommendation

At a basic level, the rule would seek to supplement (or supplant) existing, for-profit corporate bond reference data providers with a compulsory corporate bond reference data provider. Years ago, some market participants argued that this quasi-governmental intervention was in the public interest because it could (1) standardize the data to avoid “confusion,” (2) reduce the latency between when the issue was priced and secondary electronic trading could begin, and (3) reduce costs for market participants.

The intervening years have called into question these underlying premises.

There does not appear to be a material discrepancy on the relevant terms of corporate bonds, or industry confusion in trading these instruments. Further, there appears to have been no material latency between when an issue is priced and the initiation of secondary trading in the electronic trading venues, such as ATSS. In a sharp contrast to 2018, today, a whopping 68% of new issues that traded in the secondary market on the day that they were priced also traded electronically on an ATS.

Since the FIMSAC proposal to establish a mandatory corporate bond reference database to compete with the private providers, there has been more than a six-fold increase in electronic trading. Very specifically, during the record new issuances at the outset of the Covid 19 pandemic, every aspect of the corporate bond market’s workflows and infrastructure was tested, and it demonstrated no material challenges with the existing corporate bond reference data infrastructure. In fact, at the very last

¹⁵ *Bloomberg L.P. v. SEC*, at 3, No. 21-1088 (D.C. Cir. 2022).

¹⁶ *Id.*

¹⁷ This does not include rules for which FINRA is one of several filers, such as governance of the NMS Plans.

FIMSAC meeting on October 5, 2020, it was noted that there were “no noteworthy outages or issues for the electronic bond markets despite record updates, record transactions, settlements.”¹⁸ Apparently, timely access to corporate bond reference data wasn’t the problem the FIMSAC had feared.¹⁹

With respect to cost, it’s undisputed that FINRA has not yet developed the systems to collect, scrub, and disseminate in real time the information under the rule. That is not what TRACE was designed to do. So building the new systems will have costs.

And while FINRA hasn’t yet provided a detailed cost projection and analysis, it’s clear that existing private data providers have already incurred the costs to engage in a similar technological buildout. They are already collecting, scrubbing, and disseminating corporate bond reference data.

Without significantly greater details regarding the operations, costs, and governance of a FINRA-controlled Corporate Bond Reference Database, we do not believe it is likely that the proposal is likely to meet the SRO’s burdens under the Exchange Act.

Conclusion

Thank you for your consideration. Please feel free to have your staff contact me by email at [REDACTED] or telephone at [REDACTED] for any follow up.

Sincerely,



Tyler Gellasch
President and CEO

Cc: Hon. Hester Peirce, Commissioner
Hon. Caroline Crenshaw, Commissioner
Hon. Mark Uyeda, Commissioner
Hon. Jaime Lizarraga, Commissioner
Haoxiang Zhu, Director, Division of Trading and Markets

¹⁸ See Transcript of the October 5, 2020, Meeting of the Fixed Income Market Structure Advisory Committee, SEC, at 48, available at <https://www.sec.gov/spotlight/fixed-income-advisory-committee/fimsac-100520-transcript.pdf>.

¹⁹ We note that some institutional investors have argued that a mandatory, public utility providing corporate bond reference data may potentially improve access and reduce costs. And while the FINRA proposal could perform that function, the Commission lacks sufficient details about it to make an informed decision as to whether that would be the case. To the contrary, as detailed, the FINRA proposal could arguably exacerbate potential access and costs concerns, while introducing new quality and other concerns.