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April 23, 2024

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Via Email to: rule-comments@sec.gov

Re: Proposed Rule Change to Establish a Corporate Bond New Issue Reference Service (File No. SR-FINRA-2019-008)

Dear Ms. Countryman:

The Financial Industry Regulatory Authority, Inc. ("FINRA") is submitting this letter to the Securities and Exchange Commission ("SEC" or "Commission") to respond to comments submitted in response to the Commission's December 20, 2022 Order Scheduling Filing Statements on Review (the "Order").[1] FINRA previously submitted a response to the Order on January 19, 2023, and the Commission thereafter received seven additional comment letters.[2]

Background

After an extensive notice and comment period, and proceedings before both the Division of Trading and Markets and the Commission itself, this Rulemaking is on remand from the U.S. Court of Appeals for the District of Columbia Circuit. *See Bloomberg L.P. v. SEC*, 45 F.4th 462, 466 (D.C. Cir. 2022). The scope of that remand is very limited because the Commission has already addressed the vast majority of the issues raised by

1 *See* Securities Exchange Act Release No. 96541 (December 20, 2022), 87 FR 79014 (December 23, 2022) (Order Scheduling Filing of Statements on Review in File No. SR-FINRA-2019-008).

2 *See* Letter from John Gulliver, Committee on Capital Markets Regulation (February 16, 2023); Letter from Gregory Babyak and Gary Stone, Bloomberg L.P. (February 21, 2023); Letter from Christopher B. Killian, Securities Industry and Financial Markets Association (February 21, 2023); Letter from David R. Burton, The Heritage Foundation (February 21, 2023); Letter from Tyler Gellasch, Healthy Markets Association (February 21, 2023); Letter from Michael Decker, Bond Dealers of America (February 21, 2023); Letter from Tom Quaadman, U.S. Chamber of Commerce (April 6, 2023).

commenters with respect to the proposed rule change, and the Commission's findings were affirmed by the Circuit.

The Circuit remanded this matter – without vacating the Commission's approval order – for a narrow purpose: so that the Commission may "respond adequately to Bloomberg's concerns about the costs of building and maintaining the program and the extent to which those costs – which could conceivably amount to millions, or tens of millions, of dollars – will be borne by market participants." *Bloomberg*, 45 F.4th at 478. The Circuit explained more specifically that "the [SEC] did not provide a reasoned response to Bloomberg's comments that FINRA failed to quantify the direct and indirect costs of its proposed data service (or explain why certain costs could not be quantified), and failed to explain how the costs incurred for building the service will be paid if the Commission disapproves FINRA's proposed fee structure in subsequent proceedings." *Id.* at 466. The Circuit further explained that "'the Commission can redress its failure of explanation'" by analyzing two issues: "the costs FINRA will incur in building and maintaining its data service and how the costs of building the data service will be remunerated if the fee proposal is ultimately disapproved by the Commission." *Id.* at 477.

In response, the Commission issued its Order inviting FINRA to submit "any additional statements or information that it considers relevant to the Commission's analysis of the issue on remand, including the costs FINRA expects to incur in building and maintaining its data service and how the costs of building the data service would be remunerated if the fee proposal is ultimately disapproved by the Commission."

FINRA's January 19, 2023 Submission Addressed The Narrow Scope Of The Remand

FINRA's January 19, 2023 submission addressed directly the two narrow issues raised by the Circuit and the Commission's corresponding Order. As FINRA's submission made clear, the financial impact on FINRA of building the systems required to implement the New Issue Reference Data Service (the "Service") is effectively *de minimis*. The establishment and operation of FINRA's New Issue Reference Data Service will not involve costs on the scale of "millions, or tens of millions, of dollars." Rather, FINRA estimates that the system modifications and improvements necessary to implement the Service will cost approximately $1.3 million. On an ongoing basis, FINRA expects to incur annual costs of approximately $700 thousand.

FINRA proposes to offset these costs by assessing use-based fees on those who access the New Issue Reference Data Service. Those use-based fees will be determined on a utility basis, using a cost-based formula and will be the subject of a separate fee proposal.[3]

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[3] *See* FINRA's Statement In Support of Proposed Rule Change to Establish a Corporate Bond New Issue Reference Data Service (SR-FINRA-2019-008), https://www.finra.org/sites/default/files/2020-03/SR-FINRA-2019-008_Reference-data-response-brief.pdf; *see also* Securities Exchange Act Release No. 85488 (April 2, 2019), 84 FR 13977 (April 8, 2019) (Notice of Filing of File No. SR-FINRA-2019-008).

The fee proposal will have to be separately filed with the SEC and subject to notice and comment. The Circuit expressly endorsed this approach, "reject[ing] Bloomberg's argument that the Commission arbitrarily allowed FINRA to evade review of the fee component of its data service," and recognizing that "the SEC will consider fees in a future rulemaking." Thus, the question of whether the fee FINRA may charge for the Service provides for the "equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons"[4] is not now before the Commission – that question will be the subject of a future rulemaking subject to notice and comment, as provided for under the Exchange Act.

Following FINRA's submission of a comment letter addressing the narrow issues on remand, Bloomberg submitted a comment letter restating arguments that were previously made and dismissed by the Circuit, including that the New Issue Reference Data Service will provide "minimal"[5] benefit and that it will impose an undue "burden on competition."[6] But the Commission has already rejected these arguments, and the Circuit affirmed that finding. The Circuit specifically found that "Bloomberg's argument that FINRA's data service will impose an unnecessary burden on competition lacks merit." *Bloomberg*, 45 F.4th at 475. The Circuit agreed with the Commission that FINRA's proposed Service was supplementary, would foster competition and improve efficiency and timeliness in the reference data market, and that Bloomberg had "mischaracterize[d] FINRA's proposed data service as a competitive endeavor that will displace incumbent data vendors." *Id.*

Given the Circuit's explicit approval of the procedure to consider proposed fees for the New Issue Reference Data Service in a future rulemaking and its findings in favor of the Commission related to the proposal's burden on competition, the Circuit was clear that the two issues for the Commission to reconsider and respond to at *this* stage are "the costs FINRA will incur in building and maintaining its data service and how the costs of building the data service will be remunerated if the fee proposal is ultimately disapproved by the Commission." *Bloomberg* 45 F.4th at 477.

FINRA's January 19, 2023 submission responded directly to those questions. First, with respect to the costs FINRA will incur in building and maintaining the New Issue Reference Data Service, FINRA provided estimates for the initial development and deployment of the Service ($1.3 million) and annual, ongoing costs to support the Service ($700 thousand). FINRA also provided descriptions of relevant categories of costs for purposes of the estimates.[7] As stated previously in connection with FINRA's proposal to

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4 15 U.S.C. 78o-3(b)(5).

5 *See* Letter from Gregory Babyak and Gary Stone, Bloomberg L.P. (February 21, 2023) at 4.

6 *Id.* at 10.

7 Specifically, related to development and deployment, FINRA identified costs associated with (1) the development of a cloud-based user interface for intake of new filings, an application programming interface submission process, and submission validations; (2) system requirements maintenance, quality assurance, and user acceptance testing of system implementation; (3)

adopt the New Issue Reference Data Service,[8] FINRA reiterated in its submission that a separate fee filing would be submitted to the Commission to adopt use fees for the Service that would offset the costs to FINRA of building and maintaining the Service. FINRA then responded to the question of how costs would be recovered if the fee filing was unsuccessful, in which case FINRA explained that the costs incurred to that point would be covered from FINRA's financial reserves without raising member dues or fees.

In that respect, FINRA also notes that commenters appear to misunderstand FINRA's reference to its strategic reserve. FINRA's proposal is not to use its strategic reserve to "absorb the costs if they exceed the claimed amounts."[9] As discussed above, FINRA's plan is to offset the costs of the New Issue Reference Data Service through a use-based fee assessment, to be proposed in a future rulemaking. The reference to FINRA's strategic reserve was to respond directly to the second question raised on remand – namely, how the initial development costs would be covered if the Commission disapproved FINRA's proposed fee structure in subsequent proceedings. FINRA does not intend to use its strategic reserves to offset costs for the New Issue Reference Data Service; however, if FINRA is ultimately unable to recoup initial development costs from fees established through the rulemaking process, these costs could be offset by FINRA's strategic reserves without a material impact to its reserves that would require FINRA to adjust the fees that are assessed on members. FINRA believes that such a use of its strategic reserves would be consistent with its Financial Guiding Principles, which specifically contemplate the use of reserve funds to "support FINRA's regulatory operations . . . or otherwise improve markets."[10] FINRA is not "hiding" its costs, it is disclosing them.[11] But the costs must also be viewed in context. And that context is that FINRA would not require an additional funding source to absorb the costs for developing the New Issue Reference Data Service in the event that a subsequent fee filing is ultimately unsuccessful.

Finally, and notably, even if it were the case that certain costs of the New Issue Reference Data Service would be borne by FINRA members, that would not preclude the Commission from approving the proposed rule. *See Nasdaq Stock Mkt. LLC v. SEC*, 34 F.4th 1105, 1113 (D.C. Cir. 2022) ("This court has 'never required anything more' of an

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development of the reference data files for subscribers; (4) enhancements to regulatory programs; and (5) necessary infrastructure upgrades, among other things; and related to annual, ongoing costs to support the New Issue Reference Data Service, FINRA identified costs associated with "personnel costs for data vendor support, billing support, project management support and other internal systems support, among other things."

8 *See* Securities Exchange Act Release No. 87232 (October 4, 2019), 84 FR 54712, 54713-14 (October 10, 2019) (Notice of Filing of Amendment No. 2 to File No. SRFINRA-2019-008).

9 *See* Letter from Gregory Babyak and Gary Stone, Bloomberg L.P. (February 21, 2023) at 17.

10 *See* FINRA Financial Guiding Principles, para. 6, https://finra.org/sites/default/files/finra_financial_guiding_principles_0.pdf.

11 Separate from FINRA's January 19, 2023 submission, FINRA regularly provides transparency regarding its budget in its Annual Budget Summary and regarding its revenue, expenses, and use of reserves in its Annual Financial Report.

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agency than to weigh costs and benefits and to make 'reasonable trade-offs.'") (quoting *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 543 (D.C. Cir. 2006)).

The limited remand in this case was not an invitation for commenters to rehash their objections to the grounds on which the proposed rule has already been approved. FINRA's January 19, 2023 response fully addressed the issues relevant to the Commission on remand. The level of detail called for by commenters is neither required by the Court's remand order[12] nor precedent. *See, e.g.*, *Allied Loc. & Reg'l Mfrs. Caucus v. E.P.A.*, 215 F.3d 61, 80 (D.C. Cir. 2000) ("For an agency's decision making to be rational, it must respond to significant points raised during the public comment period."). Nonetheless, below FINRA reiterates its cost estimates and categories of costs, along with supplemental information on cost assumptions relevant to the establishment and ongoing operation of the New Issue Reference Data Service.

FINRA's Cost Estimates Are Well Supported

In its January 19, 2023 submission, FINRA provided estimates of the costs FINRA will incur in building and maintaining the New Issue Reference Data Service, including an estimate of the cost for the initial development and deployment of the Service ($1.3 million) and an estimate for annual, ongoing costs to support the Service ($700 thousand). FINRA explained that its estimate for the initial development and deployment of the Service involved costs associated with (1) the development of a cloud-based user interface for intake of new filings, an application programming interface submission process, and submission validations; (2) system requirements maintenance, quality assurance, and user acceptance testing of system implementation; (3) development of the reference data files for subscribers; (4) enhancements to regulatory programs; and (5) necessary infrastructure upgrades, among other things. Related to annual, ongoing costs to support the New Issue Reference Data Service, FINRA's cost estimate included personnel costs for data vendor support, billing support, project management support and other internal systems support, among other things.

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12 In its comment, Bloomberg argues that the D.C. Circuit "rejected" the Commission's view that it "does not have to consider FINRA's costs because they are internal to FINRA" on the basis that "all the costs come back to members or users, in some form or another and at one point or another." Letter from Gregory Babyak and Gary Stone, Bloomberg L.P. (February 21, 2023), at 17. That is not what the Circuit held. Rather, the Circuit's holding was much more narrow: that the Commission "fail[ed] to respond adequately to Bloomberg's comments." Bloomberg, 45 F.4th at 476. Indeed, the Circuit declined to reach the question of "whether Section 3(f) of the Exchange Act, 15 U.S.C. § 78c(f), imposed on the Commission a requirement to include costs incurred by FINRA in a cost-benefit analysis of FINRA's proposed rule." *Id.* FINRA's January 19, 2023 response provided an estimate of FINRA's costs and explained that the proposed rule will not impose any unreasonable costs on FINRA or market participants because those costs will either be offset through fees or, in the event a future fee filing is unsuccessful, are *de minimis* and would be absorbed by FINRA. This response is sufficient to "respond adequately" to Bloomberg's comments, and those of other commenters, particularly in the context of a rulemaking where the Circuit has already held that the "Commission had substantial evidence to support its determination that FINRA's proposal is consistent with Section 3(f) and 15A(b)(9) of the Exchange Act," and expressly rejected Bloomberg's arguments to the contrary. *Id.* at 475.

Commenters suggested that FINRA's estimates appeared to insufficiently account for the likely costs of the New Issue Reference Data Service. In some cases, commenters included assumptions and speculated as to alternative cost levels in connection with the Service. For multiple reasons, those comments are not persuasive. First, FINRA – a not-for-profit self-regulatory organization that currently operates a variety of technology-based services – is better positioned to estimate the incremental costs associated with the Service than is any other third-party, including commercial parties like Bloomberg with presumably significantly different operations and profit-based financial approaches. Second, because the new Service will largely expand upon existing systems and processes, FINRA's costs are not comparable to costs that would be incurred in connection with a top-to-bottom build, which may be a key misunderstanding underlying commenters' unsupported assertions that FINRA has underestimated its costs. In particular, Bloomberg referred to costs related to the initial development and deployment of the TRACE system and the annual budget for Transparency Services as a baseline for assessing FINRA's cost estimates.[13] However, estimates of the incremental costs that FINRA will incur to develop and maintain the Service cannot be drawn from costs related to the development or operation of the TRACE system as a whole, let alone costs related to the operation of the entire Transparency Services department, which oversees multiple trade reporting facilities and systems, as well as other programs.

Importantly, for FINRA, the Service leverages and builds upon existing TRACE systems and related processes. As described in FINRA's prior filings,[14] FINRA already collects and distributes certain information when a TRACE-eligible security is set up in TRACE for trade reporting purposes. For example, FINRA members are currently required to provide to FINRA the CUSIP number or other security identifier, the issuer name, the coupon rate, the maturity, whether Rule 144A applies, and a brief description of the bond, among other things. This reference data is currently made available by FINRA to members with a TRACE reporting obligation as well as to subscribers of applicable TRACE data products.[15] To provide the Service, members would report additional data fields to FINRA and FINRA would enhance the TRACE system to distribute this data.

Thus, the cost estimates that FINRA has provided reflect the reality of the incremental nature of the cost drivers estimated by FINRA related to the build and operation of the New Issue Reference Data Service, which is an incremental expenditure from a personnel, technology, and financial perspective. More specifically, FINRA already has an internal system that it uses to manage reference data for TRACE, and, as noted above, this system already captures many of the relevant data fields today. Contrary to Bloomberg's assertion, FINRA will not be developing "a new system similar to

13 *See* Letter from Gregory Babyak and Gary Stone, Bloomberg L.P. (February 21, 2023) at 13, Appendix A.

14 *See, e.g.,* Securities Exchange Act Release No. 85488 (April 2, 2019), 84 FR 13977, 13978 (April 8, 2019) (Notice of Filing of File No. SR-FINRA-2019-008).

15 *See id.*

TRACE."[16] Rather, FINRA will largely be expanding upon existing systems and applications; thus, new development is more limited in scope to (1) the development of a cloud-based user interface for intaking new filings; and (2) enhancing the application used for distribution of the reference data to market participants to support a new Application Programming Interface ("API").

Efforts related to the new cloud-based user interface for intaking new filings represent approximately half of the $1.3 million estimate for the initial development and deployment of the New Issue Reference Data Service. These efforts include development of the cloud-based platform and related user interfaces as well as development related to reference data management, such as programming FINRA's existing reference data system to interact with, and validate data from, the new cloud-based intake platform. The majority of the remaining costs related to the initial development of the Service are split between development work related to building out the new API and other development projects that are more minor undertakings. To build out the new API, FINRA will make enhancements to the existing application infrastructure that it currently uses to manage entitlements and data subscriptions, and FINRA's estimate includes costs for quality assurance ("QA") and user acceptance testing ("UAT"). The other development projects are related to programming changes to the existing reference data system to support the Service (*e.g.*, programming to implement the new data fields, enhancements to automated data validation processes, and other infrastructure upgrades).

With respect to support costs, FINRA is similarly not staffing initial and ongoing support for the New Issue Reference Data Service from scratch. While FINRA's estimates include hiring a very small number of additional staff, FINRA will largely rely on existing, experienced staff to support the Service. Specifically, FINRA's cost estimate of $1.3 million for the initial deployment of the Service considers that project management support will be required to launch the system and coordinate onboarding, QA, and UAT with market participants. However, these efforts will leverage existing support infrastructure at relatively minor additional cost (less than $75 thousand) to FINRA. For example, FINRA has existing processes to track any software bugs and fixes identified during UAT, and such technology support related to the Service will be integrated into these existing processes.

In addition, on an ongoing basis, FINRA's estimate of $700 thousand for annual, ongoing costs to support the New Issue Reference Data Service reflects incremental personnel costs for data vendor support, billing support, project management support and other internal systems support, among other things. FINRA has a well-established support structure for TRACE, and FINRA expects to realize significant efficiencies by modifying and leveraging existing staffing and processes. For example, once the Service is deployed, FINRA expects that incremental billing support costs will be insignificant. FINRA does not expect that dedicated billing staff will be needed to support the Service as FINRA

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[16] *See* Letter from Gregory Babyak and Gary Stone, Bloomberg L.P. (February 21, 2023), Appendix A at 2.

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already manages billing functions, and the process for generating invoices for the Service will be largely automated. Similarly, FINRA plans to incorporate the additional fields to be collected and distributed for the Service into existing QA processes; therefore, FINRA's estimate does not assume material incremental support costs associated with ongoing QA. Other support costs, such as internal systems support, are likewise expected to be insignificant, as the infrastructure and processes for these functions are well established for other activities and can be effectively leveraged. Accordingly, the costs assumed for FINRA's estimate of ongoing costs to support the Service mainly represent data product support necessary to onboard and support new subscribers.

Bloomberg's comment letter also suggests that FINRA's estimates omitted costs for cybersecurity entirely and underestimated costs associated with data validation. These costs have not been omitted: they are included in the cost estimates described above and will leverage existing infrastructure. With respect to cybersecurity, the New Issue Reference Data Service will utilize existing security operational, technical, and managerial controls provided by FINRA's broader Cyber and Information Security program. This includes the security of the supporting infrastructure and the security of operations processes. Likewise, FINRA has existing data validation processes, both automated and related to reporting compliance. The additional information fields submitted as part of the new issue notification will be incorporated into these existing processes, with minor enhancements, and will not require new systems to be built or significant added resources to validate. It is also important to note that, from a validation perspective, unlike voluntary data submission to non-self-regulatory organization entities, FINRA members are required to report to the Service in accordance with FINRA rules, which we largely expect to result in timely and accurate reporting with a relatively small percentage of submissions requiring follow-up.

Conclusion

The estimates provided were thoroughly considered, accurate and reasonable—reflecting the leveraging of existing systems, personnel, and processes consistent with FINRA's structure as a not-for-profit self-regulatory organization. FINRA respectfully submits that its January 19, 2023 response, along with the additional information provided above, more than adequately responds to the two narrow issues before the Commission on remand. Accordingly, FINRA requests that the Commission enter an order addressing the matters discussed above and confirming its approval of the proposed rule.

Sincerely,

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