



April 29, 2019

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

Vanessa Countryman
Acting Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Release No. 34-85488; File No. SR-FINRA-2019-008

Dear Ms. Countryman:

Healthy Markets Association¹ appreciates the opportunity to offer our comments to the above-referenced proposal to expand the information required to be provided pursuant to FINRA Rule 6760.² We begin by offering our thanks to the Commission's Fixed Income Market Structure Advisory Committee and FINRA for looking for ways to expand accessibility to important corporate debt securities data (including the data sought to be covered by the filing).

However, we are nevertheless concerned that the proposal does not provide sufficient information for the Commission to establish that FINRA has fulfilled its obligations under the Exchange Act and Commission rules. Accordingly, we respectfully urge the Commission to deny the proposal.

Background on Commission Review and the Exchange Act

The Commission shall approve rules of self-regulatory organizations (SROs), such as FINRA, only if it finds that such rules are consistent with the Exchange Act.³ Further, the

¹ The Healthy Markets Association is an investor-focused not-for-profit coalition working to educate market participants and promote data-driven reforms to market structure challenges. Our members, who range from a few billion to hundreds of billions of dollars in assets under management, have come together behind one basic principle: Informed investors and policymakers are essential for healthy capital markets. To learn more about Healthy Markets or our members, please see our website at <http://healthymarkets.org>.

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

³ *Susquehanna Int'l Group LLP, et al, v. SEC*, 866 F.3d 442, 445 (D.C. Cir. 2017).

burden is on the SRO to establish that its rules meet the requirements set forth by the Exchange Act. These requirements include that an SRO's rules must:

- provide for the equitable allocation of reasonable dues, fees, and other charges;
- not be designed to permit unfair discrimination;
- not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act; and
- be designed to protect investors and the public interest.

Although the Commission has not historically insisted upon significant showings by SROs to establish compliance with the Exchange Act, spurred by the DC Circuit decision in *Susquehanna*, the Commission has recently enhanced its scrutinization of SRO filings.⁴

The court's decision in *Susquehanna* is particularly instructive here. While invalidating the Commission's approval of another SRO's rule change, the court explained that the Administrative Procedures Act

requires us to hold unlawful agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or that is "unsupported by substantial evidence." To satisfy the "arbitrary and capricious" standard, "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.'⁵

The court ruled that the Commission must, when approving an SRO rule, "find" or "determine" that the rule meets the requirements of the Exchange Act.⁶ Further, the court held that "the SEC's Order reflects little or no evidence of the basis for the [SRO]'s own determinations—and few indications that the SEC even knew what that evidence was."⁷

Background on the Commission's Fixed Income Market Structure Advisory Committee Recommendation

On October 29, 2018, the Commission's Fixed Income Market Structure Advisory Committee (FIMSAC) adopted a recommendation that FINRA establish a centralized,

⁴ See, e.g., *Order Disapproving Proposed Rule Changes to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network*, SEC, Exch. Act Rel. No. 34-85459, Mar. 29, 2019, available at <https://www.sec.gov/rules/sro/box/2019/34-85459.pdf> (citing *Susquehanna v. SEC*).

⁵ *Susquehanna*, at 445 (internal citations omitted).

⁶ *Id.*, at 446.

⁷ *Id.*

new issue reference data service for corporate bonds.⁸ In adopting the recommendation, the FIMSAC found that:

Reliable and timely reference data is necessary to support the efficient trading and settlement of corporate and municipal bonds as thousands of new issues come to market each year. 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 that all platform participants price and trade bonds based on consistent and accurate information.⁹

The FIMSAC continued, “[t]he lack of a universal means of disseminating new issue reference data for the corporate bond market is further exacerbated by the lack of regulation mandating impartial access to corporate bond reference data.”¹⁰ Ultimately, the FIMSAC proposed that FINRA provide a single, centralized source for the collection and dissemination of key information, provided that FINRA:

- make the data available in a real-time electronic format to reference data vendors and other market participants as determined by FINRA; and
- [] provide subscribers with access to the service on an impartial basis at fees determined on a commercially reasonable basis, subject to applicable regulation.¹¹

The two dozen data fields that the FIMSAC recommended that FINRA collect and distribute¹² was intended to cover information that is commonly used by market participants looking to value and trade corporate bonds. That said, the six-page recommendation did not seek to identify and address all potential issues and considerations necessary to implement its recommendation.

Concerns with the FINRA Data Filing

On March 27, 2019, FINRA proposed changing Rule 6760 (Obligation to Provide Notice) to expand the information that underwriters of an initial offering of a

⁸ Recommendation to Establish a New Issue Reference Data Service for Corporate Bonds, SEC Fixed Income Market Structure Advisory Cmte, 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).

⁹ Id., at 1.

¹⁰ Id., at 2.

¹¹ Id., at 3.

¹² Id., Schedule A.

TRACE-Eligible Security are required to submit to FINRA prior to the execution of the first transaction.¹³ Specifically, FINRA proposed to expand the information beyond the fields typically used to establish TRACE reporting “(e.g., the CUSIP number, the issuer name, the coupon rate, the maturity, whether Rule 144A applies, and a brief description of the bond)” to include information that is more often used to identify a security for trading, such as what is often required by electronic trading platforms.¹⁴ In total, FINRA proposed to require underwriters to provide 26 data fields.¹⁵ FINRA has also proposed revising the definition of corporate debt security under Rule 2232.¹⁶

In general, we do not question the value of any of the proposed data fields. Nor do we question whether FINRA could collect this information pursuant to its regulatory function. We also have no concerns with the proposed revised definitions of corporate debt security under Rule 2232.¹⁷ Lastly, we do not disagree with FINRA’s determination to require uniform pre-first trade reporting.¹⁸

We do, however, have significant concerns regarding the adequacy of the FINRA Data Filing. Put simply, FINRA has not provided sufficient evidence to establish and justify its choices, nor has the Commission been equipped with sufficient information to evaluate the relevant facts and articulate its reasoning.¹⁹

Primary Purpose: The Purported Need for Consolidation of Reference Data

We begin by noting that the FINRA Data Filing does not provide sufficient details to support why FINRA is making the proposal in the first place. Is the purpose of a regulatory or commercial nature?

Unfortunately, when outlining the purpose of the changes, the filing relies almost exclusively on the FIMSAC Recommendation and FINRA’s subsequent “outreach”, neither of which appears to rely on significant data or analysis. The FIMSAC Recommendation appears to be based upon a quick review of the current marketplace, with disparate data providers, and suggests that a more centralized framework could reduce some market complexities and costs for market participants. That may well be true.

But what data is used to support that conclusion? What data shows that there are the

¹³ FINRA Data Filing.

¹⁴ *Id.*, at 3-4.

¹⁵ *Id.*, at 6.

¹⁶ *Id.*, at 4, n.6.

¹⁷ *Id.*, at 4, n.6.

¹⁸ *Id.*, at 7.

¹⁹ See, *Susquehanna v. SEC*, at 445 (arguing that “[t]o satisfy the ‘arbitrary and capricious’ standard, ‘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.’”) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, (1983)) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, (1962))).

purported challenges in electronic trading, settlement, or clearing? And how will the proposed new service will make the market more efficient? Further, what data is used to support the conclusion that the centralized data firm should be FINRA, as opposed to any of the existing for-profit data firms, or some other firm? Is this collection and distribution of data a regulatory function or a business function? If it is a governmental function, should this be provided to the public for free, or on an “at cost” basis? Alternatively, if this deemed to be a commercial function, is it appropriate for FINRA to be essentially pre-empting other data providers? What is the likely impact on the firms who use the data, or may use the data in the future? What is the likely impact on firms who currently provide data and services to market participants?

Ultimately, we and the Commission may conclude that FINRA could, within its authority, collect and redistribute the data that is the subject of the FINRA Data Filing. However, the FINRA Data Filing does not establish why it is doing so, or why that is part of its regulatory function. It must.

Data Costs

If the primary objective is to provide data as part of a regulatory function, then we might think the data could be provided in a centralized, and free way, similar to FINRA’s OTC Transparency Data.²⁰ On the other hand, if the objective is primarily commercial in nature, then we understand the expectation that it be at a “commercially reasonable” cost. However, the standard to which FINRA must be held is not simply commercial reasonability. Rather, it is the entirety of the Exchange Act obligations, including that the fees be not just reasonable, but also equitably allocated, non-discriminatory, and not undue burdens on competition.

The FINRA Data Filing is also deficient in supporting FINRA’s proposed costs. In particular, the filing would make the

data available to any person or organization for a fee of \$250 per month for internal purposes only, and for a fee of \$6,000 per month where the data is retransmitted or repackaged for delivery and dissemination outside the organization.²¹

As with the exchanges’ data and connectivity filings, FINRA’s filings must establish, inter alia, that fees are reasonable and equitably allocated. The FINRA Data Filing has not done that. It does not appear as though FINRA has determined either the \$250 or \$6000 fee levels based upon its own internal costs of production and maintenance of the service. Nor does it appear to be tied to the costs of the already existing for-profit market competitors. Nor does the filing offer details regarding the expected usage of

²⁰ See, OTC Transparency Data, FINRA, *available at* <https://otctransparency.finra.org/otctransparency/AtsIssueData>.

²¹ FINRA Data Filing, at 8.

each type, or the potential impact of those fees on market participants. Again, it must.

In one area, we wish to acknowledge one important element of the proposal's treatment of redistributed data. According to the filing,

FINRA would not assess any charge on firms that receive the data from data vendors or other market participants that have subscribed for redistribution rights, nor would FINRA increase the amount charged to the subscriber based on how often it redistributes the data.²²

This stands in sharp contrast to how some exchanges treat market data in other contexts, such as redistribution of equities market data. We greatly appreciate FINRA's efforts in this regard to allow for greater dissemination of this important data, without unreasonable, overly burdensome, and anti-competitive barriers. That said, FINRA must still justify its fees.

Data Elements

The FINRA Data Filing would require 26 data fields, all but one of which was included in the FIMSAC Recommendation.²³ It also includes a handful of additional data fields, which FINRA included based upon its feedback from market participants during an "outreach" prior to the proposal.²⁴ Some of these data fields are currently required by FINRA, whereas most are new. We do not disagree with the selection of those data fields, and agree that many, if not all of these fields may provide potentially relevant information for trading corporate bonds.

But why was each selected? Simply saying the FIMSAC recommended them is inadequate. But there is also a larger set of questions--which are similar to those the Commission is wrestling with in the equities markets--is it the proper role of a regulator to provide all potentially relevant information, or just "essential" information? Where is the line of "essential" information versus "potentially relevant" information? Has the Commission considered the impact on current market participants, who may get the information from other, for-profit sources today? FINRA is obligated to provide detailed information to support each of the fields selected. That should include questions about how it is used (or not), by whom, for what, and at what cost. Further, the Commission is obligated to review the relevant information before exercising its reasoned judgment on the matter. That has not yet occurred.

²² FINRA Data Filing, at 8.

²³ Id., at 5.

²⁴ Id., at 7.



Conclusion

We support the objective of providing market participants with greater data and with easing potential inhibitions on trading of corporate bonds. That said, the Commission must still apply the Exchange Act's standards to the FINRA Data Filing, as it is beginning to do with other SRO filings. When measured against that standard, the FINRA Data Filing is deficient, and should be denied.

Thank you for your consideration. Should you have any questions or would like to discuss these matters further, please call me at ([REDACTED])

Sincerely,

A handwritten signature in black ink, appearing to read "Tyler Gellasch", written in a cursive style.

Tyler Gellasch
Executive Director