HEALTHY MARKETS
TRANSPARENCY & TRUST

July 29, 2019

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

Vanessa Countryman
Director of the Office of the Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Release No. 34-86256 File No. SR-FINRA-2019-008

Dear Ms. Countryman:

The Healthy Markets Association[1] appreciates the opportunity to offer our additional comments to the above-referenced proposal to expand the information required to be provided pursuant to FINRA Rule 6760.[2]

Healthy Markets applauds the Commission for issuing an order to institute proceedings to determine whether to approve or disapprove of the proposal ("OIP").[3] The OIP solicited comments regarding whether "the proposal is consistent with Sections 15A(b)(5), 15A(b)(6), and 15A(b)(9) of the Act, or any other provision of the Act or rule or regulation thereunder."[4] After a brief review of the standards for reviewing SRO filings, we explain why the FINRA Data Filing is deficient in each area identified by the OIP.

As the FINRA Data Filing fails to meet its burdens under the Exchange Act or Commission Rules, we urge the Commission to disapprove it.

---

[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. and Exch. Comm'n, Exch. Act Rel. No. 85488; Apr. 2, 2019, *available at* https://www.sec.gov/rules/sro/finra/2019/34-85488.pdf ("FINRA Data Filing"). Healthy Markets submitted a comment on April 29, 2019, which walks through many of our specific concerns with the proposal. Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, Sec. and Exch. Comm'n, Apr. 29, 2019, *available at* https://www.sec.gov/comments/sr-finra-2019-008/srfinra2019008-5423848-184599.pdf.

[3] *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.

[4] OIP, at 8.

Commission Standards for Reviewing SRO Filings

The Commission is obligated to review SRO filings and determine that those filings are consistent with the Exchange Act.[5] For FINRA, these requirements include, inter alia, that its rules

- "provide for the equitable allocation of reasonable dues, fees, and other charges;"[6]
- not be "designed to permit unfair discrimination";[7]
- be designed "to protect investors and the public interest"; and.[8]
- "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of" the Act.[9]

The Commission's Rules of Practice clearly place the "burden to demonstrate that a proposed rule change is consistent with the [Exchange Act] and the rules and regulations issued thereunder" on the SRO proposing a rule change.[10] In addition

> [t]he 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, 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 Act and the applicable rules and regulations.[11]

Importantly, the DC Circuit has clearly 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

[5] See *Susquehanna Int'l Grp., LLP v . SEC*, 866 F.3d 442 (D.C. Cir. 2017).
[6] 15 U.S.C.§ 78o-3(b)(5).
[7] 15 U.S.C.§ 78o-3(b)(6).
[8] 15 U.S.C.§ 78o-3(b)(6).
[9] 15 U.S.C.§ 78o-3(b)(9).
[10] Rule 700(b)(3), Commission Rules of Practice, Sec. and Exch. Comm'n, 17 CFR 201.700(b)(3).
[11] *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change Amending the Fee Schedule Assessed on Members to Establish a Monthly Trading Rights Fee*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 86236, at 7, June 28, 2019, *available at* https://www.sec.gov/rules/sro/cboeedga/2019/34-86236.pdf.

> satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'[12]

In *Susquehanna*, while reversing a Commission approval order of another SRO's rule change, 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." [13] This language should be a clear warning to the Commission as it reviews the FINRA Data Filing.

Lastly, to assist the Commission staff in reviewing and making these important determinations for SRO fee filings, on May 21, 2019, the staff released the Staff Fee Guidance.[14] While that guidance does not have the force of law or Commission rules, it provides the staff with a framework with which to consider a filing's compliance with the Exchange Act and Commission rules.

FINRA has not provided sufficient evidence demonstrating that the proposed fees and revenues are consistent with §15A(b)(5)

Section 15A(b)(5) requires FINRA rules "provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the association operates or controls."[15]

According to the filing, FINRA 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.[16]

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 existing for-profit providers of this information. The FINRA Data Filing similarly doesn't offer details regarding the expected usage of each type, or the potential impact of those fees on various market participants, including consumers of the data or other data service providers.

---

[12] *Susquehanna*, at 445 (internal citations omitted).
[13] Id., at 446
[14] Staff Guidance on SRO Rule Filings Relating to Fees, Sec. and Exch. Comm'n, May 21, 2019, *available at* https://www.sec.gov/news/public-statement/statement-division-trading-and-markets-staff-fee-guidance.
[15] 15 U.S.C. § 78o-3(b)(5).
[16] FINRA Data Filing, at 8.

Without such information, we struggle to understand how the Commission would be capable of finding that FINRA has established that such costs were (1) reasonable or (2) equitably allocated.

FINRA has not provided sufficient justification to support the need for the creation of the new issue reference service as required under §15A(b)(6)

Section 15A(b)(6) requires that FINRA rules "promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market, and, in general, protect investors and the public interest."[17]

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 purported challenges in electronic trading, settlement, or clearing? And how will the proposed new service 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, or even the Commission itself?[18] 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 is 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

[17] 15 U.S.C. § 78o-3(b)(6).

[18] Letter from Larry Harris, USC Marshall School of Business, to Vanessa Countryman, Sec. and Exch. Comm'n, at 4, May 17, 2019, *available at* https://www.sec.gov/comments/sr-finra-2019-008/srfinra2019008-5533902-185252.pdf (Explaining that "[t]he SEC should collect and disseminate bond reference through EDGAR or a similar system because these data are no different in principle from the other XML-formatted disclosures that the SEC already collects and disseminates through EDGAR. The SEC manages EDGAR for the public good as a free utility provided at the public expense. The benefit-to-cost ratio of this project is overwhelming. Few, if any, other projects that the government undertakes have such a strong cost-benefit foundation.").

the likely impact on firms who currently provide data and services to market participants?

We understand that FINRA's TRACE data contains some relevant corporate bond data, but we have significant questions about the quality of the data. The Tabb Group recently examined the quality of the TRACE data that is currently maintained by FINRA. Even though the current data set is relatively simple compared to the FINRA's proposed collection, the Tabb Group found that there were reconciliation differences in more than 20% of new issues.[19] What data supports the conclusion that FINRA would be the appropriate entity to perform this service based on its current data management? Have alternatives been considered? Why do we believe this error rate will dramatically improve? The FINRA Data Filing offers no details on how FINRA would implement a system that would effectively collect, scrub, and distribute the information in a way that would meet -- much less improve -- the stated objectives of the proposal.

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, why that is part of its regulatory function, and why it would be in the public interest for it to do so. We believe that this would necessarily include a discussion of the process it would undertake to ensure that its service would benefit the markets and public interest. None of that has been done.

FINRA's proposal does not adequately explain why the rule's burden on competition is necessary or appropriate

Section 15A(b)(9) of the Act requires that FINRA rules not "impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act]."[20]

The proposal facially would supplant existing for-profit competition with a regulator-provided service. The extent to which the new service would or would not compete with those existing services is not established in the filing. It must be.

In addition, we find the questions identified above to be relevant here. What data shows that there are the purported challenges in electronic trading, settlement, or clearing? How will the proposed new service make the market more efficient? 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, some other firm, or the Commission itself? Is this collection and distribution of data a regulatory function or a business function? If this is

[19] See *An SEC-Mandated Corporate Bond Data Monopoly Will Not Help Quality*, TabbFORUM, May 21, 2019, *available at* https://login.tabbgroup.com/login?service=https://tabbforum.com/wp-login.php?redirect_to=https%3A%2F%2Ftabbforum.com%2Fopinions%2Fan-sec-mandated-corporate-bond-data-monopoly-will-not-help-quality%2F.

[20] 15 U.S.C. § 78o-3(b)(9).

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?

But there are also significant questions about the usage of the data. Market participants use TRACE data today differently than they would, if the proposal was approved. And their reliance on it could be much greater. At the same time, as referenced above, there are questions regarding the accuracy of the limited information that FINRA currently collects in TRACE. To be effective, the new service would need to take steps to ensure a very high degree of accuracy.

Because FINRA has not explained how it would collect, scrub, and disseminate the new data, we have essentially no information upon how FINRA would work with its broker-dealers who submit data to ensure accuracy. That essential new process burden is completely unknown. Further, how would liability apply (or not) for errors in the information disseminated? How would that differ from the existing for-profit providers?

Without information on these core questions, the burdens on competition can't be assessed, just as any possible benefits of the proposal can't be assessed.

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 contact Chris Nagy at [redacted] or me at [redacted].

Sincerely,

Tyler Gellasch
Executive Director