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Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Submitted via email: rule-comments@sec.gov

Re: Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Establish a Corporate Bond New Issue Reference Data Service (Release No. 34-86526; File Number SR-FINRA-2019-008)

Dear Ms. Countryman:

Bloomberg L.P. ("Bloomberg") applauds the decision by the Securities and Exchange Commission ("SEC" or "Commission") to institute proceedings to determine whether to approve or disapprove the rule proposed by the Financial Industry Regulatory Authority, Inc. ("FINRA") to require corporate bond underwriters to submit data to a new FINRA-run data service. The market already provides several options for market participants seeking reference-data services for new issues. FINRA has nevertheless submitted a proposal that would oust existing market-based providers in favor of its own regulatory monopoly. This outcome would contradict the goals of the Securities Exchange Act and the mandates of the Commission and FINRA.

Bloomberg submitted extensive comments in opposition to FINRA's proposal, urging the Commission to institute these proceedings. This letter incorporates by reference those previous comments and focuses specifically on the grounds that the Commission identified as determinative under the Exchange Act.

Background

FINRA has proposed to amend its rules as a Self-Regulatory Organization to collect, aggregate, and market a service for new issue reference data for corporate bonds. Release No. 34-85488 (Apr. 2, 2019). This Proposal[1] would require underwriters to submit a substantial amount of data to FINRA before the initial offering of a TRACE-Eligible Corporate Debt security. The Proposal would also authorize FINRA to sell this data back to market participants at a FINRA-prescribed

[1] *See* Notice of Filing of a Proposed Rule Change to Establish a Corporate Bond New Issue Reference Data Service, Release No. 34-85488 (April 2, 2019) ("Proposal"), available at https://www.sec.gov/rules/sro/finra/2019/34-85488.pdf.

fee: $250 per month for a subscriber that does not disseminate the data, and $6,000 per month for a subscriber that does.

Many commenters opposed the Proposal. They provided arguments and evidence showing how the Proposal fails to satisfy the standards of the Exchange Act. Bloomberg pointed out that the Proposal would expand a key regulator's commercial role into new lines of heretofore competitive private business, disrupting and chilling innovation in important market services.

On July 1, 2019, the Commission instituted proceedings under Section 19(b)(2) of the Act to determine whether the Proposal should be disapproved. The Commission identified three particular grounds it was considering for disapproval: possible noncompliance with Sections 15A(b)(5), 15A(b)(6), and 15A(b)(9) of the Act. The Commission also invited comment on whether the Proposal is inconsistent with any other law or rule under the Act.

Discussion

Before approving FINRA's proposal, the Commission would have to determine that the rule is consistent with the requirements of the Exchange Act and Commission regulations. 15 U.S.C. § 78s(b)(2)(C)(i); *Susquehanna Int'l Grp. LLP v. SEC*, 866 F.3d 442, 445 (D.C. Cir. 2017). If such a determination is missing or inadequate, the Proposal may not be approved. *See* 15 U.S.C. § 78s(b)(2)(C)(ii); *Susquehanna*, 866 F.3d at 447 ("To approve the Plan, the SEC must make 'find[ings]' and 'determin[ations]'" that the rule "complies with specified requirements.").

FINRA bears the burden of proving the Proposal's consistency with the Act and regulations. 17 C.F.R. § 201.700(b)(3); *In re BOX Options Exchange LLC*, Release No. 34-84168, at 7 (Sept. 17, 2018). A "mere assertion that the proposed rule change is consistent with those requirements, or that another self-regulatory organization has a similar rule in place, is not sufficient" to meet that burden. 17 C.F.R. § 201.700(b)(3). FINRA's Proposal must provide details about the purpose, operation, and effect of the proposed rule, and must include a legal analysis that is "sufficiently detailed and specific to support an affirmative Commission finding." *Id.* The Proposal must be supported with sufficient concrete evidence to justify the conclusions that purportedly support FINRA's proposal. *See, e.g., In re SIFMA*, Release No. 34-84432 (Oct. 16, 2018). As we explain below, the Proposal plainly fails to meet these standards.

1. The Proposal does not provide for the equitable allocation of reasonable fees and charges.

Under Section 15A(b)(5) of the Act, the Commission cannot approve any FINRA rule that does not "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 FINRA operates or controls." 15 U.S.C. § 78o-3(b)(5). FINRA has not shown that the proposed fees and charges would be equitably allocated as Section 15A(b)(5) requires. *See* Order Instituting Proceedings, Release No. 34-86256 (July 1, 2019) at 8.

Arbitrary and unsupported charges: First, FINRA has set an arbitrary schedule of charges—$250 per month for a user that does not disseminate the data, and $6,000 per month for a user that does. FINRA asserts that it is basing these prices on costs. Proposal at 13. But its price schedule is unaccompanied by any evidence of expected costs, relevant inputs, anticipated demand, or any other baseline against which purportedly cost-based charges could be assessed. FINRA's "mere assertion" that the prices will be based on cost "is not sufficient." 17 C.F.R. § 201.700(b)(3). The Commission has recently and repeatedly refused to approve rules that lacked evidentiary support on this point. *See, e.g.*, *In re Bloomberg*, Release No. 34-83755 (July 31, 2018), at 14–16; *In re SIFMA*, Release No. 34-84432 (Oct. 16, 2018), at 17–54; *In re BOX*, Release No. 34-85459 (Mar. 29, 2019), at 23.

For example, the Commission has repeatedly disapproved a 2018 fee proposed by the BOX Exchange because the Commission "cannot have an 'unquestioning reliance' on an SRO's representations in a proposed rule change." *In re BOX*, Release No. 34-85459, at 12, 22–23 (quoting *Susquehanna*, 866 F.3d at 446–47). In March 2019, the Commission set aside fees because the exchange only "stat[ed] the categories of costs and that the fees will offset those costs." *Id.* at 23. "[W]ithout more," the Commission explained, "it does little to inform the analysis into the level of the particular fees at issue here … and whether they are reasonable and equitable." *Id.* at 23. FINRA's Proposal includes no more data about costs than these proposals that the Commission properly rejected.

In fact, FINRA has not even tried to justify its proposed fees on the requisite cost basis. The Proposal says FINRA will offer its service on a "commercially reasonable basis." *Id.* at 10, 34. That standard is wrong, undefined, and entirely inconsistent with the Commission's teachings on SRO fees over the past two years. Whether the fees are commercially reasonable might be relevant to the advisability, as a policy matter, of FINRA operating this sort of compulsory commercial reporting service. But once FINRA undertakes to run its own data service, it must charge fees that are reasonably related to its actual costs.

Cross-subsidization and cost-shifting: Even if FINRA's revenue proves lower than its costs, that is no answer. Under Section 15A(b)(5), FINRA cannot simply undercharge: if FINRA does not substantially recover the cost of its service from users, then other funding sources will be subsidizing the service. FINRA will have inequitably allocated the cost of its data service onto other market participants.

The Proposal masks another important inequity in the allocation of the costs for a market reference data service. At present, underwriters and data providers have established arrangements—regarding the data itself, the collection methods, and timing of dissemination—according to market signals. FINRA, by contrast, proposes to force underwriters, by rule, to provide their regulator with a host of data fields, using methods, timing, and technology that FINRA prescribes. Underwriters will incur costs to comply with FINRA's rule, with no apparent compensation for those costs. FINRA's Proposal thus would shift costs from other market participants onto underwriters, who may or may not be able to pass these heretofore unnecessary costs onto their own customers. The Proposal acknowledges (at 18) the prospect of disproportionate costs being imposed on smaller underwriters, yet makes no effort to justify their distorted re-allocation within a market already skewed against smaller firms.

Certain costs and unknown benefits: Tellingly, the Proposal does not even acknowledge the disruption and countervailing costs. FINRA cannot possibly establish, and the Commission cannot assess, whether the charges it proposes would bear any relationship to its costs unless FINRA has estimated both the costs and the demand for its new service. And it cannot make that estimate because—among other flaws—its Proposal is flatly inconsistent about its expected effect on existing market data providers. In some places, the Proposal asserts that the new service will be consistent with competition, because underwriters will continue to provide data to the existing data aggregators. *See* Proposal at 19 ("data providers will likely continue to collect a range of bond reference data beyond the limited fields provided in the proposed service"). In other places, the Proposal says underwriters will stop providing data, thus saving on that process the amounts they will have to spend complying with the new rule. *Id.* at 18 ("reporting to FINRA would reduce or eliminate the need for underwriters to report to other parties").

This inconsistency is fatal to any effort FINRA might make to justify its charges. *See Business Roundtable v. SEC*, 647 F.3d 1144, 1153 (D.C. Cir. 2011). FINRA cannot say coherently whether users will still seek or maintain access to competing data services. Proposal at 18. As an estimate of impact on market participants, the cavalier assertion that underwriters will face no net cost because vendors will stop receiving data is woefully inadequate. It is also entirely without evidentiary support regarding foregone costs or increased burdens. How much will it cost to comply with FINRA's rule, and how much does it cost underwriters to provide data to the existing data services? The Proposal offers no information on this point; it just baldly speculates that eliminating the latter cost will balance the addition of the former.

Another particular cost that FINRA does not consider is the cost of updating or correcting bond data. At present, the market has worked out what underwriters do when data they have provided turns out to be incorrect or outdated. By contrast, the Proposal would significantly increase the burden on underwriters to ensure their new reporting is accurate, timely, and in compliance with their regulator's expectations—which are of course backed by the prospect of fines. FINRA has made no assessment of how that will happen as a practical matter, how large that cost would be, whether the benefit to investors is worth the cost, or whether it makes sense to impose the cost on underwriters (particularly smaller ones).

2. The Proposal does not promote equitable principles of trade or foster cooperation in the handling of market information.

Under Section 15A(b)(6) of the Act, the Commission cannot approve the Proposal unless FINRA shows it will "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." 15 U.S.C. § 78o-3(b)(6). FINRA has not made that showing.

Unjustified regulatory intervention: A regulator should use its coercive powers to displace private actors with a government-backed service only in response to a demonstrated need and market failure.[2] But a robust private market for reference data services already exists, with multiple firms competing on price and quality. And FINRA has not shown any market deficiency or failure warranting the intrusion of a self-regulatory organization into that market.

FINRA asserts that a new central source demanding and redistributing issue reference data would give market participants access to more complete, accurate, and timely data. *See* Proposal at 11–12. As with its costs and pricing assertions, FINRA provides no empirical or other objective evidence or analysis; it relies on (at most) a handful of anecdotal and anonymous reports that may reflect narrow private interests rather than optimal market-structure policy. No evidence indicates, for example, that a new central source for collecting and disseminating new issue reference data would improve trading and error rates, which the Proposal does not meaningfully address. *See id.* at 16 (assuming, without analysis, that service would "reduc[e] broken trades and errors"). FINRA reports a single anecdote: an anonymous trading platform that apparently had difficulties accessing its data source. *Id.* at 12 n.17. That example presents (again, at most) a narrow commercial issue between two parties, not a market-structure problem justifying one-size-fits-all regulatory intervention. The Proposal certainly includes no actual data or representative market-wide evidence about any deficiencies in the existing services, whether any deficiencies appear disproportionately, or how a new FINRA system would compare.

Even if improvements were warranted, moreover, FINRA is required to "foster cooperation and coordination" with data providers, the "persons engaged in . . . processing information" about securities. 15 U.S.C. § 78o-3(b)(6). Ousting the market data services in favor of a government-based service is hardly a way to "foster cooperation" among them.

More costly, less accurate: More broadly, centralized data reporting to FINRA is unlikely to reduce costs or duplicated efforts. Receiving, handling, maintaining, and disseminating data is a matter of market understanding, technology, and systems design. The market services compete on these points, and as a consequence are continually innovating and improving their systems.

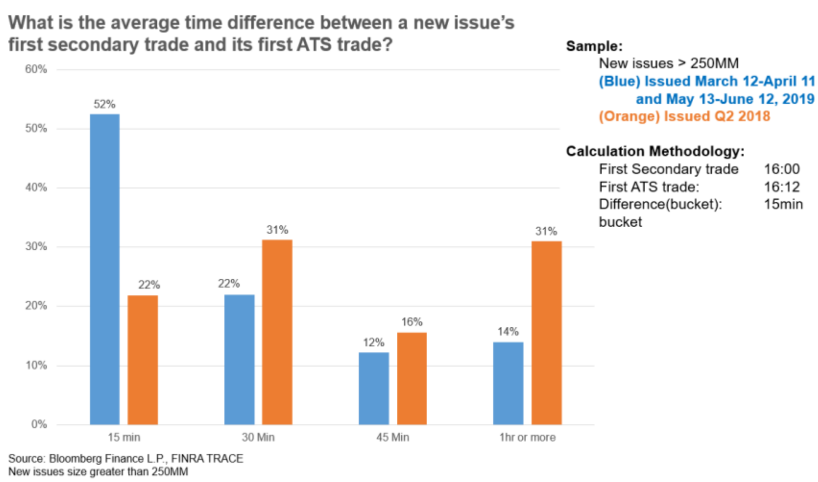
FINRA offers no reason to think its centralized data repository will be more accurate or timely than the existing market-based data services. Operating its mandatory system, FINRA will have no market incentive to improve its technology for collecting or distributing bond data. In the

[2] This proposition has been a core aspect of SEC and regulatory policy for decades. *See generally* Remarks of Comm'r Kathleen L. Casey, *SEC Speaks* (Feb. 5, 2010) ("the Commission should regulate only when there is a demonstrated market failure and the market has proved incapable of solving the problem. Indeed, those promoting new regulations should be required to show that the regulations are necessary, not the other way around."); Interagency White Paper on Structural Change in the Settlement of Government; Securities, SEC Release No. 34-45879 (May 6, 2002) ("Commission generally prefer[s] private-sector solutions to policy problems unless a market failure suggests a clear need for government intervention."); Stephen G. Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reforms*, 92 HARV. L. REV. 547, 565 (1979) ("insofar as one advocates price regulation ... as a 'cure' for market failure, one must believe the market is working very badly before advocating regulation as a cure.").

existing and far simpler TRACE system, about 20% of entries have errors.[3] No private-sector entity in a competitive market would survive for long with an error rate approaching that. FINRA has offered no basis to expect that rate to improve for FINRA's more complicated issue reference data system.[4]

Undermining existing progress in electronic trading: Indeed, quality bond reference data is already widely available and in use facilitating electronic trading. Without empirical support, FINRA has suggested that electronic corporate bond trading in new issues has been undermined by lack of new issue corporate bond reference data. This lack of bond reference data, the argument goes, may be due to data vendors favoring their own electronic trading venues. The alleged consequences are a lack of electronic trading on day of issuance, as well as settlement and clearing problems. No problems with settlement and clearing have been demonstrated, however.

Indeed, recent trading data shows that electronic trading platforms can readily access new issue bond reference data. *See* G. Babyak letter to V. Countryman at 4–6 (July 2, 2019). Over the past year, the number of larger-sized new issues (those above $250 million, which are most conducive to electronic trading) that trade electronically on the day they are priced has more than doubled, to 30%. And a substantial number of new issues trade electronically during the "hours" and "days" after pricing. Proposal at 2.[5] When an ATS participates in a new issue's secondary market trading on the day that the bond is priced, 90% of the time an ATS' first trade occurs within an hour of the first secondary market trade and an astounding 52% occurs within the first 15 minutes.

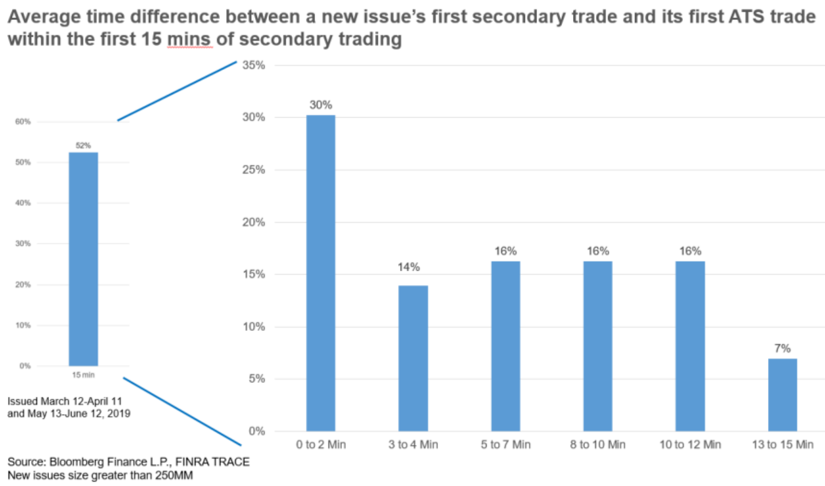


[3] *See* Larry Tabb, Tabb Forum, "An SEC-Mandated Corporate Bond Monopoly Will Not Help Quality" (Mar. 21, 2019) (attached).

[4] FINRA says it is modeling its proposal on the New Issue Information Dissemination Services operated by DTCC. As Bloomberg and the U.S. Chamber previously explained, that service differs significantly from what FINRA is proposing. *See* G. Babyak (Bloomberg) letter to V. Countryman at 16–20 (Apr. 29, 2019); T. Quaadman (U.S. Chamber Ctr. for Capital Market Competitiveness) letter to V. Countryman at 3 (Apr. 29, 2019).

[5] *See also* FIMSAC Letter at 2 (June 11, 2019) (claiming "significant challenges" can affect accurate reporting to "the variety of corporate bond reference data providers in the "immediate hours and days following a bond offering").

In fact, 30% of the time when an ATS is active in a new issue within the first 15 minutes, its first trade actually occurs within the first 2 minutes of the first secondary market trade. More than half (53%) of the executions during the first 15 minutes occur within the first 5 minutes of the first secondary-market trade. These facts are inconsistent with the notion that information providers are hampering the growth of electronic trading by restricting the flow of information.



This data hardly reflects a market failure. Rather, the data shows that the market is healthy and already evolving in the manner that the SEC's advisory committee wants, with an increasing percentage of trades—now 30% of new issue corporate bonds—occurring on electronic platforms. *See generally* FINRA Regulatory Notice 2019-22 (July 9, 2019) (seeking to publish ATS market share data in light of growing trading activity: 25–30% of total corporate-bond transactions occurred through ATS trades, with 59% of all corporate bonds trading on at least one ATS each month); Kate Duguid, *MarketAxess Earnings Miss, Revenue Solid as Bond Traders Go Electronic*, Reuters (July 24, 2019) ("Over a quarter of all corporate U.S. bonds are now traded electronically .... Growth has been astronomical…").[6] That existing market trend cannot now justify a disruptive new regulatory intervention.

No conflict exists between data providers, electronic trading platforms, and electronic messaging systems that could justify the proposal. FIMSAC asserted as much, but only on the hypothesis that one or more vendors would withhold bond reference data in order to favor their affiliated trading platforms. *See* FIMSAC Comment on Release No. 34-85488, at 3 (June 11, 2019). That hypothesis is incorrect, and neither FIMSAC nor FINRA has offered any support for it. According to data published in 2018 by Greenwich Associates (a leading provider of data and analytics to the financial services industry), the share of U.S. institutional corporate electronic bond trading held by entities affiliated with information providers is 3%—a share dwarfed by the 85% share of the leading electronic trading platform, which is not affiliated with a data vendor. *See* G. Babyak letter to V. Countryman at 3 (July 1, 2019). That low market share is not consistent with the notion that

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[6] *Available at* https://www.reuters.com/article/marketaxess-results/marketaxess-earnings-miss-revenue-solid-as-bond-traders-go-electronic-idUSL2N24O145.

affiliated entities get ahead of other platforms thanks to improper treatment from affiliated data providers.

Commercially conflicted regulator: A significant conflict of interest, moreover, would arise as a result of the Proposal. The non-profit market regulator would become a financially dependent market participant. This is disturbing, and inconsistent with the Act's focus on "promot[ing]" and "foster[ing]" a "free and open market." 15 U.S.C. § 78o-3(b)(6). Market-based providers must compete for customers to buy their information services, so they must provide data that is accurate, convenient, timely, and have other qualities that data customers need. Market-based providers must also compete for the information they gather, by providing convenient, cost-effective mechanisms for underwriters to provide it.

By contrast, FINRA will have no need to compete for business or for information. It can simply mandate what information underwriters give it, and what technology and methods they use to communicate the information. If this information proves insufficient or untimely, FINRA could just change its rules to demand more information at an earlier time. Indeed, the incentives are backwards: instead of innovating to make data submission as easy and efficient as possible for underwriters, FINRA naturally will have an incentive to serve its own interests in fee revenues: investing relatively little while using its regulatory power to shift input costs onto underwriters. And compliance officers in entities regulated by FINRA will have a powerful incentive to use their regulator's product offerings, regardless of quality.

3. The Proposal would impose unnecessary burdens on competition.

Under Section 15A(b)(9) of the Act, the Commission cannot approve FINRA's Proposal if it would "impose any burden on competition not necessary or appropriate in furtherance of the purposes" of the Act. The Proposal unquestionably imposes a burden on competition: FINRA would inject a mandatory data-collection program alongside (and really as a substitute for, *see* Proposal at 18) data collection and distribution already occurring, without compulsion, in the marketplace. FINRA has made no showing that this burden on competition is consistent with § 78o-3(b)(9).

No empirical basis for competitive burdens. The Proposal is full of anonymous anecdotes and conclusory assertions, but it offers no empirical evidence that the existing competition in this area is problematic. Private actors in competitive markets are presumptively the best means of providing goods and services. *See Iroquois Gas Transmission Sys., L.P. v. FERC*, 145 F.3d 398, 403 (D.C. Cir. 1998) (J. Wald, Concurrence) ("competition is presumed to make products both cheaper and better."); 15 U.S.C. § 78w (Commission must consider effect of its rules on competition). That presumption is foundational under the Securities Exchange Act, and it is also rooted in sound economic experience and logic. Having a government-sanctioned monopoly provide a service will inevitably result in costs, such as lower efficiency and less innovation. Before intervening in the existing bond market and granting itself a potentially lucrative franchise to provide this information with little or no collection costs, FINRA should be required to demonstrate, with evidence, that the benefits to users are substantial and clearly outweigh those costs. *See Susquehanna*, 866 F.3d at 445.

FINRA suggests the nature of bond data available, the timing of that data, and other characteristics vary between providers. Proposal at 14. That is not a market failure. Different data services offer different products with different features. They compete. It is not surprising that their services are not identical. The opportunity for users to choose among differing products is ordinarily regarded as a positive good, not a market failure. *See* T. Quaadman (U.S. Chamber Ctr. for Capital Market Competitiveness) letter to V. Countryman at 1–2 (Apr. 29. 2019). Differing market choices among data vendors—or among broker-dealers, butchers, bakers or candlestick makers, for that matter—is generally not seen as the sign of a market failure but rather as a hallmark of a competitive market.

FINRA evidently has a different view. It may have a position on the ideal dataset (or at least a "good enough" dataset). But imposing that view through its own product, rather than setting forth its ideas or standards for market participants, would reduce rather than promote competition. *See* 15 U.S.C. § 78o-3(b)(9). FINRA offers no claim that the FINRA dataset is the best, or most appropriate, or least costly one; indeed, FIMSAC's recommendation depended on FINRA's *not* displacing market-based providers. This only further obscures what problem, exactly, FINRA is trying to solve for.

Increased burdens and reduced choice: In fact, creating a U.S.-centric government database would be detrimental to the global bond market. Unlike the municipal-bond market, which is overwhelmingly domestic, corporate bonds are global; about 30% of bonds are foreign-held. The FINRA proposal could create a silo for U.S. bond reference data—leading investors to either buy and manage multiple data sets, trade with diminished information and incentives regarding U.S. bond investments, or utilize a less innovative and integrated set of data products (particularly from smaller vendors whose businesses or customers will not automatically subscribe).

The Proposal also lacks a serious assessment of alternatives, which undoubtedly exist. Could FINRA conduct a competitive bidding process to select a service provider instead of exploiting regulatory power to launch its own service? Could FINRA set standards to regulate what data underwriters share and when, instead of mandating that underwriters give data to FINRA's government-backed service? Other approaches are also conceivable. Given the availability of less burdensome alternatives, FINRA has failed to show that the burden on competition from its proposal would be necessary or appropriate under Section 15A(b)(9).[7] Establishing a FINRA-operated monopoly protected by regulations ought to be the last resort.

Chilling investment and competition. Instead, in FINRA's proposal, a government-sponsored monopoly on new issue reference data is not just the first resort, but also the first step of a creeping mission. FINRA has said openly that "[b]ased on implementation of this proposal, FINRA would evaluate a potential expansion of the new issue reference data service to include other debt

[7] Because the alternatives suggested here are "neither frivolous nor out of bounds," considering them is both mandatory and prudent. *See Chamber of Commerce v. SEC*, 412 F.3d 133, 145 (D.C. Cir. 2005).

products." Proposal at 9.[8] It is easy to see how this regulatory encroachment on adjacent services would chill private investment——and private competition—with a government regulator poised to enter efficiently functioning markets. As a number of commenters have observed, it is imperative that the Commission articulate standards to govern when a market regulator entity should be permitted to use its rulemaking authority to absorb commerce from a competitive market.

The cost to underwriters of providing FINRA the required data will also reduce competition. As FINRA acknowledges in the Proposal, acquiring the systems and technology needed to submit data in compliance with the rule will be costly. Large underwriters will be best placed to incur that cost and spread it over multiple issuances. Smaller underwriters will be at a competitive disadvantage. Such smaller underwriters are currently responsible for about 25% of bond offerings, and they play a key role in a healthy, competitive market for underwriting. *See* Proposal at 18. The Commission has regularly taken account of how additional compliance burdens will affect competition by driving consolidation in the market. *See*, *e.g.*, SEC Investor Advisory Committee Meeting (July 25, 2019) (considering, among other things, the Commission's approach to regulation in areas with limited competition).[9] But FINRA has not addressed that impact here. Instead, FINRA assumes it away, on the ground that underwriters will make up for the added compliance cost by reducing the costs of sharing information with existing data collectors. Proposal at 18. The Proposal offers no evidentiary support for that assumption, and no evidence or analysis to suggest the supposed savings will fully compensate for the new compliance costs. FINRA says it talked to three underwriters. Whether those discussions focused only on larger underwriters, and ignored the Proposal's effect on smaller underwriters, remains open to speculation.

FINRA also suggests costs will fall because underwriters can leverage existing investments in reporting technology. *Id.* The comments of IHS Markit, however, debunk that claim.[10] Existing technology is not sufficient for reporting the 26 fields that the Proposal would mandate, or for the conditions (such as timing) that the Proposal would mandate. Many smaller underwriters simply do not use or cannot afford such technology.

Here, too, FINRA's inconsistency about whether existing data services will continue is fatal to its analysis. When arguing that underwriters won't see data fees increase, FINRA conveniently assumes competitive services will diminish or disappear. But when arguing that vendor competition will increase and mitigate risk of a single point of failure, FINRA conveniently assumes competitive vendors will continue to invest in markets that the regulator has entered (or

[8] *See also* FIMSAC Recommendation at 3–4 (conceding that "seasoned issues do *not* currently present the market with the same concerns regarding timeliness and impartial access," but nevertheless recommending further future action to "expan[d] the new service" to "exten[d] to seasoned issues") (emphasis added).

[9] *Available at* https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac072519-agenda.htm.

[10] The IHS Markit submission indicates that technology solutions do not necessarily exist yet for all market participants. *See* S. Banaei letter to V. Countryman at 3 (Apr. 29, 2019) (identifying services that "could help create solutions for submitting information to the [reference data service], identifying errors in reported data, and rectifying errors, before the first TRACE-eligible trade").

stated an interest in expanding into). *Compare* Proposal at 16 *with id.* at 19. No data or evidence supports either assumption. This sort of inconsistency is the hallmark of arbitrary and capricious decisionmaking. *See Business Roundtable,* 647 F.3d at 1153.

FINRA attempts to square that circle by suggesting that data services will simply take their data from the central FINRA source and resell it with other value-added services. That argument is inadequate. Collecting and maintaining the data, efficiently and effectively, is itself a service, currently provided by market competitors that FINRA would supplant. And if data services continue to provide additional information—an assumption on which the Proposal relies—the government cannot simply presume that FINRA's data would be available in a timely fashion at half the cost. Even partial displacement of a private-sector service would still have a deleterious effect on competition, even if FINRA thinks it is sufficient that data services can "compete on other dimensions." Proposal at 20.

A further harm to competition would be the entrenchment of existing monopolies in related fields. FINRA proposes to require underwriters to report both CUSIPs and ISINs—indirectly requiring underwriters to *obtain* CUSIPs and ISINs. Thus the Proposal would strengthen the CUSIP monopoly and newly incorporate ISIN into the FINRA rulebook. Users must pay licensing fees that are themselves far in excess of competitive rates, an additional cost that the Proposal would impose. FINRA does not address these costs or the market consequences of mandating further usage of CUSIPs and ISINs.

Conclusion

The rule change that FINRA has proposed would mark an unprecedented and unwarranted displacement of a well-functioning market for information with a mandatory service delivered by a government-backed regulator. Even when thoroughly vetted and justified, the Commission should be reluctant to approve such a proposal and invite its unknowable future dislocations. And this Proposal has not remotely been thoroughly vetted or justified. Thin on analysis and utterly lacking in data, FINRA's Proposal cannot satisfy the standards for approval. Giving a pass to this novel and unsupported new mandate and fee would set a worrisome precedent given the Commission's recent and welcome focus on market data.

We appreciate the opportunity to provide our comments on the Proposal, and would be pleased to discuss any questions that the Commission may have with respect to this letter.

Very truly yours,

Gregory R Babyak

Gregory Babyak
Global Head of Regulatory Affairs, Bloomberg L.P.