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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: Partial Amendment No. 2 to Proposed Rule Change to Establish a Corporate Bond New Issue Reference Data Service (Release No. 34-87232; File Number SR-FINRA-2019-008)

Dear Ms. Countryman:

Bloomberg L.P. ("Bloomberg") appreciates the opportunity to offer these comments in response to FINRA's "partial amendment" to its proposal to require corporate bond underwriters to submit data to a new FINRA-run data service. As Bloomberg's prior submissions have explained, the market already provides several options for market participants seeking reference-data services for new issues. Since FINRA's initial filing and the Commission's decision to institute proceedings, competition in the bond-data space has only increased, as discussed below. Yet FINRA has nevertheless submitted another proposal that would privilege central regulatory control over private investment, innovation, and competition. Furthermore, FINRA has not responded to prior evidence and criticism offered by commenters regarding its proposal, and has utterly failed to justify the fee component of that proposal—thereby abandoning any attempt to justify the Proposal's indisputable burden on competition. Because this Amended Proposal would contravene the mandates imposed by the Securities Exchange Act on the Commission and FINRA, the Commission should not approve it.

During the prior rounds of comments on FINRA's proposal, Bloomberg (like other commenters) has submitted extensive comments in opposition. To avoid repeating those critiques, the vast majority of which remain pertinent to the proposal, this letter incorporates them by reference and focuses on the Partial Amendment's failure to respond to, much less overcome, those previous shortcomings.

Background

FINRA proposed in April 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).[1] The Proposal would have required 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 have authorized FINRA to sell this data back to market participants at a FINRA-prescribed fee: $250 per month for a subscriber that does not disseminate the data, and $6,000 per month for a subscriber that does. The stated reason for the "cost plus margin" fee was the need "to meet ongoing operating costs." Proposal at 10.

Many commenters responded with arguments and evidence showing that the Proposal was unnecessary, counterproductive, and unlawful under the Exchange Act. In particular, Bloomberg noted that the Proposal would use coercive regulatory powers to expand the commercial role of a quasi-governmental organization in a space where private businesses were competing and investing. The Fixed Income Market Structure Advisory Committee, which originally suggested the service to FINRA, offered comments in support of the Proposal, but did not offer any justification for the proposed fees.[2]

After the Commission instituted proceedings in July under section 19(b)(2) of the Act, commenters including Bloomberg again offered several legal, factual, and policy reasons why the Commission should disapprove the Proposal, paying particular attention to the three grounds on which the Commission sought comment: the requirements of sections 15A(b)(5), 15A(b)(6), and 15A(b)(9) of the Act. This time, neither FINRA nor anyone else offered a response to the commenters' objections, despite the announcement of an August 12th deadline for rebuttal comments.

Finally, on the eve of the Commission's October deadline to approve or deny the proposal, FINRA submitted two "partial amendments." Partial Amendment No. 2, at issue here, is partial in two senses: it does not abandon the proposal and restart new proceedings, but rather extends the proceedings that have been underway since April; and it does not respond to most of the critiques levied against FINRA's proposal since April.

Discussion

In order to approve FINRA's Amended Proposal, the Commission would have to determine that the rule changes are 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 Amended 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.").

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[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.

[2] *See* Letter to Vanessa Countryman (June 11, 2019), available at https://www.sec.gov/comments/sr-finra-2019-008/srfinra2019008-5662650-185795.pdf.

FINRA bears the burden of proving the Partial Amendment'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 Amended Proposal must be supported with concrete evidence that justifies the conclusions purportedly supporting FINRA's action. *See, e.g.*, *In re SIFMA*, Release No. 34-84432 (Oct. 16, 2018). It also must reflect FINRA's considered response to the comments and data in the rulemaking record, for "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977). As we explain below, this proposal—even as amended—plainly fails to meet these standards.

1. The Partial Amendment ignores the reasoning and data in the record showing that the Proposal does not promote equitable principles of trade, foster cooperation in the handling of market information, or avoid unnecessary burdens on competition.

FINRA declined to defend its proposal against the critical commentary submitted in response to the Commission's institution of proceedings to review the potential rule change. In addition to the comments offered in response to FINRA's initial proposal, six commentators offered their views -- all critical -- in response to the Commission's order instituting proceedings by that order's July 29 deadline. The Commission's order also provided a two-week window for the submission of rebuttal comments. That August 14 rebuttal deadline, however, came and went without comment from FINRA.

Then, just before the Commission's deadline for action, FINRA filed a partial amendment of its rule, which triggered a new two-week comment period.[3] An accompanying letter from FINRA stated that it filed its Partial Amendment in the comment file "as a courtesy to commenters," and that it would "be submitting by separate letter its response to comments on the proposed rule change."[4] As far as Bloomberg is aware, however, that responsive letter has not been published in the comment file. Obviously, this seriously limits commenters' ability to respond meaningfully to FINRA's Amended Proposal and also (as a direct result) the Commission's ability to review the soundness of that proposal.[5]

[3] *See* Release No. 34-87232, Notice of Filing of Amendment No. 2 to Proposed Rule Change (Oct. 4, 2019).

[4] Letter from A. Ellenberg to V. Countryman (Oct. 3, 2019), available at https://www.sec.gov/comments/sr-finra-2019-008/srfinra2019008-6252424-192827.pdf.

[5] *See, e.g.*, *Chamber of Commerce of the United States v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006) (Commission failed to provide adequate notice and opportunity to comment); *Sprint Corp. v. FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003) (same); *Small Refiner Lead Phase-Down Task Force v. EPA*,

Aside from that procedural failing, the proposal also fails substantively. Under section 15A(b)(6) of the Act, the Commission cannot approve the Amended Proposal because FINRA has not shown it will "promote just and equitable principles of trade," or "foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities." 15 U.S.C. § 78o-3(b)(6). And under section 15A(b)(9) of the Act, the Commission cannot approve FINRA's proposal because it would "impose [a] burden on competition not necessary or appropriate in furtherance of the purposes" of the Act.

The same substantive flaws in the April proposal continue to afflict the Partial Amendment. Since FINRA has not responded to these points raised by Bloomberg and others during the July round of comments, Bloomberg presents them here in summary fashion, incorporating its prior comments (attached) in full.[6] FINRA still has not justified its Proposal, even as amended, in light of these problems:

1. **Unjustified regulatory intervention** (July letter at 4–5) – FINRA has not established a baseline need for centralizing and coercing bond-reference functions that private actors are already performing without the government coercion.[7] The Amended Proposal rests on a handful of unsupported critiques of the current marketplace, which features multiple firms competing on price and quality.
2. **More costly and less accurate data** (July letter at 5) – FINRA has not confronted the data (prepared by the Tabb Forum and submitted by Bloomberg in this proceeding) indicating the higher-than-expected (and higher-than-acceptable) error rate that plagues FINRA's comparably simple TRACE reporting data.[8] As a protected regulatory monopoly, FINRA will have little incentive to improve its technology or performance for collecting and distributing bond data.
3. **Inherently conflicted regulatory and commercial roles** (July letter at 7–8) – If FINRA begins

705 F.2d 506, 547 (D.C. Cir. 1983) (notice "improves the quality of agency rulemaking" by exposing regulations "'to diverse public comment,'" ensures "'fairness to affected parties,'" and provides a well-developed record that "enhances the quality of judicial review.") (citations omitted). Section 19(b)'s notice-and-comment requirements are effectively identical to those contained in the Administrative Procedure Act.

[6] *See* Letter from G. Babyak to V. Countryman (July 29, 2019) ("July letter"), available at https://www.sec.gov/comments/sr-finra-2019-008/srfinra2019008-5881954-188778.pdf.

[7] *See, e.g.,* 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.").

[8] These data, which FINRA has not addressed, are discussed in Bloomberg's July letter, and in Larry Tabb, Tabb Forum, "An SEC-Mandated Corporate Bond Monopoly Will Not Help Quality" (Mar. 21, 2019) (describing 20% error rate).

acquiring and re-selling market data on the back of its regulatory authority, this would create a significant conflict of interest and reduce FINRA's standing as an independent regulatory force. A financially dependent regulator participating in the marketplace is fraught with risk for competitors, regulated entities, and the regulator itself.

4. **No empirical basis to displace competition** (July letter at 8–9) – Regardless of any critiques of the current system, no evidence or well-reasoned assessment indicates that the centralized, top-down system FINRA proposes would perform *better* than the (largely unexamined) alternatives.[9] Nor does any basis appear in the record for displacing competition among existing private firms in favor of a central data-reporting service. A government-sanctioned monopoly provider, not subject to the discipline of competition and market signals, poses a serious risk of higher costs, lower efficiency, and reduced innovation.

5. **Increased regulatory burdens and reduced marketplace choice** (July letter at 9) – The variety of services, timing, price points, and features available to data consumers in the marketplace is not evidence of market failure. It is proof of competition. A single, standard dataset offered by a regulator at a non-market cost is no substitute for competitive choice. Particularly when that regulator would offer a siloed, U.S.-specific product in an increasingly global bond market. The regulatory compliance obligation imposed on underwriters, moreover, will inevitably favor larger firms with a more robust compliance operation over newer and smaller firms.[10]

6. **Undermining innovation and competition in electronic trading** (July letter at 6–7, 9–11) – Quality bond reference data is already widely available and in use facilitating electronic trading. FINRA's suggestion that a lack of new-issue data is undermining electronic trading is inconsistent with recent and sustained growth in same-day electronic trading, as shown empirically in Bloomberg's prior submissions. Nothing in the record supports FINRA's apparent position that a lack of data or distribution is holding back trading; to the contrary, the market is already heading where FIMSAC is pointing. And unaffiliated electronic trading platforms dwarf those affiliated with a data vendor. Perhaps the fastest way to chill this innovation and investment is to pledge that a regulator will "evaluate a potential expansion of the new issue reference data service to include

[9] *See, e.g.*, OMB Circular A-4, at 6 (Sept. 17, 2003) ("Even where a market failure clearly exists, you should consider other means of dealing with the failure before turning to Federal regulation."); *id.* at 26 ("A good regulatory analysis should include . . . a statement of the need for the proposed action, [and] . . . an examination of alternative approaches . . . ."), available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.

[10] Notably, the Partial Amendment fails to address concerns that the proposed rule would disproportionately burden smaller underwriters. To the contrary, the Amended Proposal would mandate additional fields without addressing the timing, technological, and compliance challenges previously raised by commenters. *See, e.g.*, SIFMA letter (April 29, 2019) at 1–2; IHS Markit letter (April 20, 2019) at 3. Despite its "outreach," Proposal at 13 n.18, FINRA has not attempted to assess the disproportionate impact its burdensome rule and lack of a technological solution may have on competition among underwriters. Bloomberg's 2019 new-issue league table for "U.S. Investment Grade Corporate Bonds" shows that, through October 7, 33 underwriters have each underwritten more than $1 billion (notional) year to date, while 59 other underwriters also have priced issues during 2019—overwhelmingly for small issues of less than $25 million. The differential impact of the proposed new compliance burden on different-sized underwriters is a concern that the Exchange Act compels FINRA and the Commission to consider.

other debt products." Proposal at 9.

Indeed, since FINRA first proposed its effort to standardize and centralize bond-reference data reporting, competition in this area has only increased. This very month, for example, leading financial institutions announced an effort to streamline communications and data among market participants by connecting underwriters and investors. Participants include J.P. Morgan, Bank of America, Barclays, Citi, BNP Paribas, Goldman Sachs, Deutsche Bank, Morgan Stanley, BlackRock, and Wells Fargo.[11] Any FINRA proposal to perform many of the same functions by regulatory fiat must account for why its coercive option is superior to this and other private alternatives, and why it would not deter future capital-markets collaboration and investment. *See* 15 U.S.C. § 78o-3(b)(9).

2. The Partial Amendment does not provide for the equitable allocation of reasonable fees and charges.

Under section 15A(b)(5) of the Act, the Commission cannot approve the Partial Amendment because FINRA has not "provide[d] 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).

As set forth in Bloomberg's earlier submissions, FINRA set forth an arbitrary and unsupported 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 asserted that these prices rested on costs. Proposal at 13. But the price schedule was 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), as evidenced by the Commission's recent and repeated (and correct) refusals to approve fee filings that lacked evidentiary support.[12]

FINRA's assertion that it would offer its service on a "commercially reasonable basis," *id.* at 10, 34, was wrong, undefined, and entirely inconsistent with the Commission's teachings on SRO fees over the past two years.[13] It also ignores the uncompensated costs incurred by regulated

[11] *See, e.g.*, Press Release, Global Bank Consortium Creates Capital Markets Syndication Platform, Directbooks™ (Oct. 11, 2019).

[12] *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. FINRA's proposal certainly fared no better. *See, e.g.*, *In re BOX*, Release No. 34-85459, at 12, 22–23 (Commission "cannot have an 'unquestioning reliance' on an SRO's representations in a proposed rule change") (quoting *Susquehanna*, 866 F.3d at 446–47).

[13] *See, e.g.*, *In re SIFMA*, Release No. 34-84432 (Oct. 16, 2018); *In re BOX*, Release No. 34-85459 (Mar. 29, 2019), at 23; Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019). Even if FINRA's revenue proves lower than its costs, moreover, section 15A(b)(5) would not

underwriters and displaced data providers by compliance with FINRA's rule, with no apparent compensation for those costs.

Unable to quantify, much less justify, these direct and indirect costs, FINRA has simply tried to hide them from the Commission. The Partial Amendment purports to "withdra[w] the fees proposed in the current Proposal," noting that "a separate proposed rule change will be filed to establish fees related to the corporate bond new issue reference data service at a future date prior to implementing the service." Partial Amendment at 4. By withdrawing the fee portion of the rule in the face of criticism, FINRA has effectively conceded that, just as the commenters noted, it has not and cannot justify the fees on the record.

FINRA is quite plainly trying to claim all the *benefits* and none of the *costs* of its new data service. This is antithetical to the most foundational principles of administrative law and cost-benefit analysis. And that inconsistency is fatal to any effort FINRA might make to justify its charges. As in *Business Roundtable v. SEC,* the failure to "apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation" renders a rule arbitrary and capricious. 647 F.3d 1144, 1148 (D.C. Cir. 2011) (citing *Chamber of Commerce v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005)). And like *Business Roundtable*, here FINRA has followed a course that "inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters." *Id.* at 1148-49.

The fees, though unsupportable, form a critical part of FINRA's proposed bond-reference data service. Indeed, FINRA concedes that its service will not take effect until it can impose these fees on market participants. *See* Partial Amendment at 4; Release No. 34-87232 at 5 ("[T]he effective date of the proposed rule change [will] be published no later than 90 days following publication of the Regulatory Notice [and] no later than 270 days following Commission approval."). FINRA is a regulatory body funded by charges on market participants, and the Exchange Act mandates that its costs be fairly apportioned. For the Commission to assess whether the asserted (though highly contested) benefits of the proposed rule would outweigh the costs and competitive burdens, the Commission must at a minimum know what those costs are.

If SROs and agencies were permitted to ignore regulatory burdens in this manner, agencies could propose laudable programs heedless of their pricetags, seek their provisional approval without respect to cost, and then—once established—propose a fee that was by now necessary to sustain an already approved program. By a trick of sequencing, therefore, the agency would have effectively flipped its burden to support agency action at the outset.[14] Agency action must be supported by the grounds articulated when the agency made its decision. *Chenery v. SEC*, 318 U.S.

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permit FINRA to *under*charge bond-reference data customers thanks to a subsidy from fees paid by other market participants.

[14] "[A] court reviewing an agency action may only affirm that action on the grounds articulated by the agency when it made its decision.").

80, 87 (1943). Gerrymandering a decision to avoid its most costly and controversial component is plainly not what the law demands of agencies in reviewing and justifying their actions.

The D.C. Circuit's recent decision in *Carlson v. Postal Regulatory Commission* illustrates the point. No. 18-1328, 2019 U.S. App. Lexis 27630 (D.C. Cir. Sep. 13, 2019). Lacking a contemporaneous justification for a rate hike, the Commission contended it could satisfy the statute "by deferring consideration of the statutory factors and objectives" until a later time. This flipped the burden in the favor of the agency and against the rate-paying public: "post-implementation review of rates shifts the burden of proof to the public to demonstrate the unreasonableness of rates that have already been adopted, instead of requiring the Commission to demonstrate through reasoned rulemaking that its proposed rates comply with the APA …." *Id.* (citing *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 433 (D.C. Cir. 1980)) ("[A]n initial burden of promulgating and explaining a non-arbitrary, non-capricious rule rests with the [a]gency.").

More pernicious still is the apparent gamesmanship the Commission would tolerate if it approved the strategy set forth in the Partial Amendment. As the Commission knows all too well, given its recent proposal to eliminate effective-upon-filing fee changes for NMS plans, fee-only filings short-circuit Commission review and public input by allowing fees to take effect *before* (and indeed without) the agency's approval.[15] What is more, some SROs have sought to overcome agency suspension orders by purporting to reimpose new "immediately effective" fee filings even after a suspension order. Even setting aside the bad substantive precedent FINRA's approach would set, the Commission has every reason not to condone this procedural maneuver, which could substantially hinder agency oversight and public input.

FINRA's own actions undermine this proposed approach. It still has offered no response to comments by Bloomberg, the U.S. Chamber of Commerce, SIFMA, the Committee on Capital Markets Regulation, the Healthy Markets Association, the Heritage Foundation, and others regarding its lack of cost-justification for the proposed fees. Nor has it offered any justification for rushing through a Swiss-cheese bond-reference proposal while deferring consideration of the necessary fees. There is no question the fees are an essential part of the program: FINRA itself said they were necessary "to meet ongoing operating costs." Proposal at 10. The current amendment underscores that point, purporting not to implement the reference data service until "a future date" after the fees are approved. Partial Amendment at 4. If FINRA will not implement the data service till that point, the Commission has no reason or basis to approve part of the program in advance.

Conclusion

As market participants have observed throughout these proceedings, FINRA's proposed rule change would cause the unprecedented and unwarranted displacement of a well-functioning

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[15] SEC, *Rescission of Effective-Upon Filing Procedure for NMS Plan Fee Amendments*, 84 Fed. Reg. 54,794 (Oct. 11, 2019), available at https://www.federalregister.gov/documents/2019/10/11/2019-21770/rescission-of-effective-upon-filing-procedure-for-nms-plan-fee-amendments.

market in favor of a mandatory service delivered by a government-backed regulator. The investment and innovation that market has induced, just since April, belies any market failure or regulatory gap. And even if such a need existed, the Commission should be reluctant to approve a proposal with such readily apparent chilling effects and unknown future disruptions. Given the holes in FINRA's support for and explanation of its proposal, particularly the fees, no basis exists for approving the Amended Proposal.

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

Very truly yours,

Gregory Babyak
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