UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of the Financial Industry Regulatory Authority, Inc.	Admin. Proc. File No. SR-FINRA-2019-008

STATEMENT OF BLOOMBERG, L.P. IN OPPOSITION TO APPROVAL OF THE PROPOSED RULE CHANGE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Under SEC Rule of Practice 431, Bloomberg, L.P. ("Bloomberg") respectfully asks the Commission to reject the proposed FINRA rule creating a compulsory new collection and sales regime for bond-reference data. *See* File No. SR-FINRA-2019-008, Release No. 85488 (Apr. 2, 2019) ("Proposal"). The Division of Trading and Markets approved FINRA's proposal, as modified, Release No. 87656 (Dec. 4, 2019) ("Order"), and the Commission granted Bloomberg's petition for review, Release No. 34-88214 (Feb. 14, 2020). Given the lack of legal and factual support for this significant regulatory intrusion into a competitive marketplace, the Commission should set aside the Division's Order and reject the Amended Proposal. In the alternative, Bloomberg urges the Commission to hold this proceeding in abeyance until FINRA issues a fee proposal that the Commission can review in connection with the service those fees would finance.

I. INTRODUCTION

The proposed rule under review concerns a self-regulatory organization's attempt to use regulatory authority to compel, centralize, and sell bond-reference data that competitive vendors currently offer in the private marketplace. Traders, underwriters, and others have for years used reference data to trade and price newly issued corporate bonds. Vendors operating in a competitive marketplace bring together underwriters and investors by providing an accurate, attractive, and price-competitive data platform.

Yet this information, according to FINRA, is insufficiently accessible to trading platforms and market participants that use it to facilitate electronic trading. FINRA's Amended Proposal would empower it to compel underwriters to supply more than 30 bond-reference data fields for each new corporate-bond issue. FINRA would then re-sell that information, at prices not subject to competitive forces, to its regulated broker-dealers, traders, and the public. Regulatory compulsion, the proposal contends, is necessary to resolve a market failure.

Yet the unrebutted evidence before the Commission shows electronic fixed-income trading is occurring more frequently and rapidly than ever before. No evidence indicates that current methods of consensual information distribution are impeding electronic trading. FINRA's proposal to replace this cooperative regime with a compulsory regulatory mandate is unnecessary, unsupported, and likely ineffective.

The Order below nevertheless approved the proposal, as amended, on the ground that it created a supposedly benign "regulatory utility." Order at 53, 54. In doing so, the Division's analysis ignored three fundamental flaws in the Amended Proposal: its fees are not reasonable (or even articulable), its concrete costs outweigh its speculative benefits, and its burdens on competition are not justified by sound reasoning or substantial evidence. *See* Amended Proposal, Release No. 87232 (Oct. 4, 2019). Aside from the Order's troublesome policy consequences and precedential effect, each error provides an independent basis for setting aside the Order and Amended Proposal under basic principles of administrative law and provisions of the Exchange Act.

First, the Amended Proposal fails to satisfy the Exchange Act's requirement, enforced by numerous Commission actions, that FINRA's fees must be reasonable. FINRA has not offered *any* information on its fees, costs, or "margins"—all of which market participants would bear. Exchange Act § 15A(b)(5)[1]; *see* Proposal at 10, 15. This silence alone requires reversal of the Order. The Division could not possibly have assessed the costs of the Amended Proposal, as the Exchange Act required it to do, without any evidence of the cost of FINRA's new data service. Lacking that information, the Order simply declined to determine whether the proposed

[1] This submission generally refers to relevant statutory requirements by reference to the Exchange Act. Section 15A(b)(5) corresponds to 15 U.S.C. § 78o-3(b)(5).

"regulatory utility" complied with the Exchange Act's express statutory requirement that fees be reasonable and equitably allocated. But the Division cannot merely side-step statutory requirements based on the hope that a future proposal will comply. If so, any self-regulatory organization could announce a rule change, ignore its costs, survive Commission review, and subsequently impose immediately effective and unconstrained fees at a time of the SRO's choosing.

Second, FINRA's proposed data service fails to promote free and open markets and coordination among market participants. Exchange Act § 15(b)(6).[2] The rule change rests on vague concerns about "leveling the playing field" for vendors and making the market more conducive to electronic bond trading. FINRA Response to Comments at 4–5, 8–9 (Oct. 29, 2019), *available at* https://www.sec.gov/comments/sr-finra-2019-008/srfinra2019008.htm ("FINRA Response Letter"). The Order, however, declined to find barriers to entry for vendors *or* a negative impact on electronic trading caused by lack of information. *See* Order at 31–32 (endorsing the nebulous goal of "consistent and accurate information" without concluding whether or how the Amended Proposal would attain that goal). That omission is undoubtedly due to the unrebutted evidence set forth by Bloomberg and other commenters showing a competitive bond-data marketplace, and indeed a significant and ongoing expansion of the electronic fixed-income trading marketplace. The Order nevertheless approved FINRA's attempt to replace this competitive marketplace with a a FINRA-operated conscription-and-subscription service designed to supplant the current market of private data providers. Order at 53, 54. Displacing existing vendors and their consensual methods of verifying and distributing information would undoubtedly impose costs on the market, yet the Amended Proposal's countervailing benefits are entirely speculative.

[2] Section 15A(b)(6) corresponds to 15 U.S.C. § 78o-3(b)(6).

Third, the Order's approval of a service designed to co-opt the current market was unnecessary and contrary to its mandate to avoid unjustified burdens on competition. Exchange Act § 15A(b)(9).[3] Neither FINRA nor the Division identified any market failure that might require implementation of a government-mandated replacement. The expansion of private market-data and electronic-trading services are already achieving—without compulsion—FINRA's policy aims. That reality undermines the premise of this rule change: that a lack of timely access to bond-reference data has stunted the fixed-income marketplace.

Accordingly, Bloomberg, whose competing data service would suffer directly from FINRA's effort to supplant the private marketplace with a quasi-public utility, respectfully asks the Commission to reject the proposed new bond-reference rule. Bloomberg also notes that the Commission's consideration of this rule change remains premature: FINRA concedes it cannot implement the service until the Commission reviews and approves a fee structure that no one has yet seen. In the alternative, therefore, Bloomberg requests that the Commission hold this proceeding in abeyance until FINRA issues a fee proposal that the Commission (and affected market participants) can review in connection with the service those fees would finance.

II. FACTUAL BACKGROUND

The history of this proceeding, FINRA's proposals, and the underlying market realities described below are set forth more fully in Bloomberg's petition and the many submissions to the Commission's comment file from Bloomberg, the U.S. Chamber of Commerce, the Heritage Foundation, Healthy Markets, SIFMA, the Credit Roundtable, and the Committee for Capital Markets Regulation, among others. Comments on FINRA Rulemaking, *available at*

[3] Section 15A(b)(9) corresponds to 15 U.S.C. § 78o-3(b)(9).

https://www.sec.gov/comments/sr-finra-2019-008/srfinra2019008.htm (collecting 29 letters submitted in response to the proposed change).

1. Initial Proposal. FINRA's proposed rule change did not begin as a data-supported solution to any market failure faced by the SRO or its members. Rather, it emerged as an undertheorized proposal from private firms that sought to use government coercion to acquire access to commercially available information. Back in 2018, before trends in electronic trading had accelerated (as discussed below), a subcommittee of the Fixed Income Market Structure Advisory Committee (FIMSAC) recommended that FINRA establish a new issue reference data service for corporate bonds. Recommendation to Establish a New Issue Reference Data Service for Corporate Bonds, (Oct. 29, 2018), *available at* https://www.sec.gov/spotlight/fixed-income-advisorycommittee/fimsac-corporate-bond-new-issue-reference-data-recommendation.pdf. That panel included competitors to Bloomberg—which runs a popular bond-reference data service used by bond-market participants—though Bloomberg itself was not chosen to participate on the committee.[4]

The panel learned from FINRA that a bond reference data service would be a new undertaking requiring substantial technology development and investment by FINRA. FIMSAC's recommendation did not attempt to evaluate that cost, but simply indicated a wish for a data service. FINRA's own representative acknowledged that FINRA's current TRACE system could

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[4] FIMSAC is an advisory committee whose Commission-appointed members offer "solely . . . advisory functions" without affecting the Commission's "full authority to determine actions to be taken." FIMSAC Charter, at §§ 4, 11. The committee heard from two vendors that compete with Bloomberg's bond-reference data service (ICE Data Services and Refinitiv) about the proposal. *See* FIMSAC Agenda (Oct. 29, 2018), *available at* https://www.sec.gov/spotlight/fixed-income-advisory-committee/fimsac-agenda-102918.htm.

not support a new data service; instead FINRA would need to build new reporting, validation, and distribution infrastructure.[5]

The Initial Proposal required underwriters to submit an extensive amount of data to FINRA before the initial offering of a TRACE-Eligible corporate debt security. *Id*. at 59. . *See* Proposed Rule Change to Establish a Corporate Bond New Issue Reference Data Service at 59 (Mar. 27, 2019), *available* at https://www.finra.org/sites/default/files/rule_filing_file/SR-FINRA-2019-008.pdf. This "Initial Proposal" offered two justifications.

First, FINRA asserted that the current arrangements for market data lead to inefficiencies in trading. In the Initial Proposal, FINRA submitted no evidence for that assertion. The only purported support was an anonymous complaint from a trading platform claiming its (unidentified) data vendor did not make bond-reference data available until the second day of trading. *Id*. at 15 n.6.[6]

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[5] FINRA's Ola Persson told the FIMSAC that:

> ***[S]peaking for FINRA, we would have some work to do. The technology today does not lend itself very well to this.*** We would need to create the ability for underwriters to come in, give us partial information and have the ability to edit their own records, et cetera. Today, that is a -- as I said, it is a bit of a one-way street….We would also ***need to create a separate distribution channel*** for this.… That also explains where ***we can only today grant very limited usage rights*** to the data we distribute. So, this would have to be a service that would ***be a service that would be entirely sourced from underwriters*** we know common link vendor data, and then ***we would have to build that*** obviously, the amounts of fields.

Tr., Meeting of the Fixed Income Market Structure Advisory Comm., Oct, 29, 2018, pp. 88-89, available at https://www.sec.gov/spotlight/fixed-income-advisory-committee/fimsac-102918transcript.txt ("FIMSAC Tr.") (emphasis added).

[6] The Initial Proposal said nothing about whether that single actor tried or failed to use a competing vendor for same-day access. FINRA noted (again without support) that "reference data completeness" varies among different providers—merely assuming that such differentiation in the marketplace was a bug, not a feature. *Id*. at 15.

Second, FINRA claimed that its new data service would "promote fair and reasonable pricing for reference data by introducing an alternative source." *Id.* at 18. The Initial Proposal did not assess current pricing of the existing service providers, discuss recent entrants into the data market, or explain why the current offerings were not priced competitively (unlike the proposed FINRA fees). Nor—as discussed more fully below—did FINRA explain the basis for the pricing of its own proposed offering: FINRA could sell this data back to market participants at a FINRA-prescribed fee of $250 per month for a subscriber that did not disseminate the data, and $6,000 per month for a subscriber that did. *Id.* at 60–61.

In short, FINRA posited a "gap" in access to timely, accurate, and comprehensive data for new corporate issues. Instead of seeking to better regulate or incentivize the current market for data services, FINRA proposed simply to *take over* the market and do a better job itself.

2. Market response and amended proposal. After robust public criticism, the Commission instituted proceedings to review the Initial Proposal. FINRA submitted no comments or evidence during the Commission-designated window.

On the eve of the Commission's statutory deadline to approve or deny the Proposal, FINRA submitted a "partial amendment" that purported to "withdra[w] the fees proposed in the current Proposal." FINRA, Amendment No. 2 to Proposed Rule Change at 4 (Oct. 3, 2019), *available at* https://www.finra.org/sites/default/files/2019-10/sr-finra-2019-008-amendment2.pdf ("Amendment"). FINRA stated that it would establish fees by filing a "separate proposed rule change … at a future date" before implementing the new data service. *Id.* at 4.

3. The Order below. The Division of Trading and Markets approved the Proposal as amended—though on reasons that differed significantly from FINRA's. Indeed, its reasons ran in the opposite direction. Order at 55. Instead of finding that FINRA's service would "exert disciplinary pressure on the current pricing for the data," *see* Initial Proposal at 19, the Order concluded that FINRA's new data service "would *not* supplant the demand for a more comprehensive reference database with enhanced data sets that contain additional fields not reported to or disseminated by FINRA," Order at 48 (emphasis added). The Order also declined to conclude that the Amended Proposal imposed reasonable and equitable fees under the Exchange Act—a required determination rendered impossible by FINRA's decision to withdraw the proposed fees. *See id*. at 26 (finding compliance with §§ 15A(b)(6) and (b)(9), but not § (b)(5)).

Bloomberg filed a petition for review of the Order. Under the Commission's Rules of Practice, this stayed the effectiveness of the Proposed Rule. *See* SEC Rule of Practice 431(e). FINRA has not sought to implement the rule change in any event, pending its revelation of a new fee structure and (presumably) its creation of or mandate for the infrastructure necessary to collect and report new-issue reference data. On February 14, the Commission granted the Petition and stayed the Order "pending further order of the Commission." Order Granting Petition for Review, *available at* https://www.sec.gov/rules/other/2020/34-88214.pdf.

III. STANDING

Bloomberg's petition explained that it is a "person aggrieved" by the Order. *See* SEC Rules 430, 431. Bloomberg is a provider of robust financial data disseminated electronically to underwriters, traders, and other market participants. As to the corporate bond reference data at issue, Bloomberg employs a dedicated team responsible for gathering information from underwriters and other market participants, organizing and correcting that data in a consistent and reliable way, and disseminating it in a useful form to investors and broker-dealers.

FINRA explicitly acknowledged the Proposal's likely effect on services such as Bloomberg's, and on the market participants who rely on those services. *See* Initial Proposal at 18 ("[R]eporting to FINRA would reduce or eliminate the need for underwriters to report to other parties."). Indeed, the entire purpose of the rule change is to create a FINRA-run service that serves as an alternative to (or replacement for) other vendors in this market, such as Bloomberg.

IV. LEGAL STANDARD

A. Standard of Review

The Commission reviews the Division's decision *de novo*. *See* 17 C.F.R. § 201.431; *cf. In re SIFMA*, Release No. 84432, at 17–18 (Oct. 16, 2018) (collecting sources imposing *de novo* Commission review).The Commission's ultimate decision must respect the requirements, enforceable under the Administrative Procedure Act, to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) (discussing review under 5 U.S.C. § 706) (internal quotation marks omitted). "[S]ubstantial evidence" must support any decision approving a rule change. 15 U.S.C. § 78y(a)(4); *Susquehanna Int'l Grp. v. SEC,* 866 F.3d 442, 447 (D.C. Cir. 2017).

Before approving a proposed rule by FINRA, the Commission must determine that the rule is "consistent with the requirements of" the Exchange Act and relevant Commission regulations. 15 U.S.C. § 78s(b)(2)(C)(i); *Susquehanna,* 866 F.3d at 445. FINRA bears the burden of proving, by a preponderance of the evidence, that the rule change satisfies those requirements. 17 C.F.R. § 201.700(b)(3) ("The burden to demonstrate that a proposed rule change is consistent with the Exchange Act ... is on the self-regulatory organization...."); *see Dir., Office of Workers' Compensation Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 280 (1994) ("burden of proof" presumed to mean preponderance of the evidence); *Steadman v. SEC*, 450 U.S. 91 (1981) (similar); "Under the Commission's Rules of Practice, the 'burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder ... is on the [SRO] that proposed the rule change.'" *In re BOX Options Exchange LLC,* Release No. 34-84168, at 7 (Sept. 17, 2018).

An SRO's "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); *NetCoalition v. SEC,* 615 F.3d 525, 541 (D.C. Cir. 2010) ("The self-serving views of the regulated entities . . . provide little support."). Rather, FINRA 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." 17 C.F.R. § 201.700(b)(3). Compliance with the Exchange Act also requires FINRA in the first instance (and the Commission here) to assess the economic consequences of the proposed regulation. *See, e.g., Bus. Roundtable v. SEC,* 647 F.3d 1144 (D.C. Cir. 2011); *Am. Equity Inv. Life Ins. Co. v. SEC,* 613 F.3d 166 (D.C. Cir. 2010); *Chamber of Commerce v. SEC,* 412 F.3d 133 (D.C. Cir. 2005). Fulfilling that mandate requires estimating and comparing the costs and benefits of a proposed rule.

B. Statutory Requirements for SRO Rulemaking.

The Commission's Order initiating proceedings identified the three most relevant statutory criteria FINRA must satisfy for its proposed rule to gain Commission approval and take effect: Exchange Act §§ 15A(b)(5), (b)(6), and (b)(9). *See* Order Instituting Proceedings at 8 (July 1, 2019). These three requirements provide the basis for Bloomberg's challenge here.

First, the Amended Proposal must provide for the "equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls." Exchange Act § 15A(b)(5). Meeting this standard requires more than mere "unsupported declarations." *In re Bloomberg,* Release No. 34-83755, at 14–16 (July 31, 2018). FINRA must demonstrate, by a preponderance of the evidence, that charges and costs are reasonable and equitably allocated.

Second, the Amended Proposal must "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." Exchange Act § 15A(b)(6).

Third, the Proposal must "not impose any burden on competition not necessary or appropriate in furtherance of the purposes" of the Exchange Act. Exchange Act § 15A(b)(9). In assessing these factors, the Commission must consider whether FINRA's rule "will promote efficiency, competition, and capital formation." 15 U.S.C. § 78c(f); *see* Order at 26 n.111.

V. ARGUMENT

The Amended Proposal violates the Exchange Act's requirements for SRO rules in three distinct and dispositive ways.

A. The Amended Proposal's failure to address fees violates Section 15A(b)(5)'s requirement to ensure "equitable allocation of reasonable dues, fees and other charges."

1. Exchange Act review is mandatory. The Commission must determine whether FINRA's current Proposal provides for equitable allocation of reasonable charges. Section 15A(b)(5) of the Act requires that the rules of a national securities association 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." § 78s(b)(2)(B) (emphasis added); *see also* Order Instituting Proceedings at 7–8 (noting that "the Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with: (1) Section 15A(b)(5) of the Act . . ."). Indeed, Congress mandated that "the Commission *shall disapprove* a proposed rule change … *if it does not make a finding"* that the rule change is consistent with § 15A(b)(5). 15 U.S.C. § 78s(C) (emphasis added).

FINRA initially 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, "plus margin." Initial Proposal at 10, 15–16. But the price schedule was unaccompanied by any evidence of expected costs, relevant inputs, anticipated demand, or any other basis for estimating those purportedly cost-based charges. Many commenters criticized this position (*see* Order Instituting Proceedings at 6 n.21) particularly in light of recent Commission rulings. *See, e.g., In re SIFMA*, Release No. 34-84432 (Oct. 16, 2018); *In re BOX*, Release No. 34-85459 at 23 (Mar. 29, 2019); Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019).

Rather than respond with data or analysis, FINRA merely "represented" that a "separate fee filing" would be submitted "at a future date" and impose a fee schedule consistent with a "regulatory utility" model. Order at 50, 53. The Order below accepted the truncated Proposal without further inquiry. That was wrong: Lacking any information about costs or fees, the Division sidestepped the Commission's statutory obligation to find that the Proposal's fees would be reasonable. 15 U.S.C. § 78s(b)(2)(C). Tellingly, the Order failed to reach any conclusion with respect to Exchange Act § 15A(b)(5), even though it expressly approved the proposal under §§ 15A(b)(6) and (9). Lacking any evidence from FINRA about the costs of its proposed data service, the Commission cannot approve the Amended Proposal consistent with the requirements of the Exchange Act. FINRA filed the Amendment for the *express purpose* of omitting the statutorily deficient fees.

The Order below suggested that the reasonable-and-equitable requirement applies only to a "proposed fee filing." Order at 52. This bare assertion is unsupported. Section 15A(b)(5) is not so limited; it applies to *all* "[t]he rules of the association." 15 U.S.C. § 78o-3(b)(5). There is no basis in the statute for concluding that an SRO rule is exempt from this requirement so long as it does not state an amount of fees. To the contrary, "the Commission may not approve a proposed rule change absent a finding 'that such proposed rule change is consistent with the requirements of [the Exchange Act] and the rules and regulations thereunder applicable to such organization.'" *Standard Inv. Chartered, Inc. v. NASD*, 2007 U.S. Dist. LEXIS 32566, at *11–12 (S.D.N.Y. May 2, 2007). Even rules that do not impose fees remain subject to § 15A(b)(5). *See e.g.*, *PennMont Sec. v. Frucher*, 586 F.3d 242, 247 (3d Cir. 2009) (reviewing "equitable allocation" of attorney fee-shifting provision of an SRO); *see also* Order Approving Proposed Rule Change by the Pacific Stock Exchange, Inc., Relating to the Liability of the Exchange and its Governors, Officers and Agents, Release No. 37563, 62 S.E.C. Docket 1527, 1996 SEC Lexis 2199 (Aug. 14, 1996) (similar).

2. The Amended Proposal cannot satisfy § 15A(b)(5). The Amended Proposal is devoid of any evidence that could support a conclusion that the Amended Proposal complies with § 15(A)(b)(5). In fact, the Amended Proposal fails to include any information about fees *at all;* instead it merely explains that the final fees associated with the service will come later—after the Commission approves the rule. But § 15A(b)(5) does not permit such legerdemain. FINRA's purposeful withdrawal of the parts of the Proposal related to fees leaves the Commission with nothing to assess in this regard—much less rely on to support a reasoned decision approving the Proposal.

Critically, FINRA has never offered any specific information about fees or costs other than the fee rates that it has withdrawn. It has not said, even in general terms or the vaguest estimate, how much it will cost to run the new data service. Nor has FINRA provided a hint about how much it might spend to build the new data system—though FINRA has conceded, from the outset, that it must build a new system. *See supra* at XX. This omission is particularly notable because one of FINRA's key premises was that competition for data services suffers because the cost of building a system is high enough to present a barrier to entry. Initial Proposal at 19. Yet FINRA proposes to incur that same cost—and, necessarily under the Exchange Act, pass it on to market participants—without any notion of just how expensive it might be.

The Order, to the extent it considered this issue at all, glossed over the lack of evidence by taking for granted FINRA's self-serving representation that its costs will be reasonable. According to FINRA, that is because its fee structure will reflect a "regulatory utility" model. The Order simply regurgitated (at 53) that "FINRA has stated that the proposal was modeled as a regulatory utility." *See also id.* at 18, 54. The Order's *entire reasoning*—with respect to cost/benefit impact, competition, burden on underwriters, and capital formation—rests on this unsupported and unelaborated statement: "The Commission's consideration of the proposal, including the burden on underwriters, the proposal's impact on competition among market participants, including other data vendors, and its impact on efficiency and capital formation, *is based upon the understanding that the fees assessed will be consistent with these representations*." *Id.* at 53 (emphasis added). "[B]ased on that understanding" alone, the Order summarily concludes that the Commission could "fin[d] that the proposal is consistent with the Act." *Id.*

But FINRA's bare representations regarding a "regulated utility" model, without more, cannot carry an SRO's burden of justifying a rule change.

First, FINRA's representation is just that—a mere assertion. The proposals presented no evidence on how the fees associated with a "regulatory utility" would work or how such fees would be allocated. FINRA's self-serving declaration simply cannot carry the day. *See, e.g.*, *Susquehanna*, 866 F.3d at 447 (explaining there is "little supporting value in the self-serving views of the regulated entity") (internal quotation marks omitted); *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*).

Second, even if the Commission were to determine the fees were reasonably related to the costs of operating a "regulatory utility," nothing in the Act suggests the costs of a utility are automatically reasonable and equitably allocated, or that they provide any benefit to consumers. Indeed, regulated utilities can often result in increased costs and inefficiencies for consumers. *See, e.g.*, Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 Colum. L. Rev. 1323, 1401 (1998) (explaining reasons for encouraging competition among utilities; noting how the old "Bell monopoly gold-plated its physical plant").[7]

Third, FINRA has failed to offer any argument or evidence that it can lawfully claim a "margin" on its sale of data commandeered from its regulated members and re-sold to many of those same members. *See, e.g.*, *In re Bloomberg*, Release No. 34-83755 (July 31, 2018), at 14–16 (refusing to approve fee filings lacking evidentiary support). Whatever FINRA's "regulatory utility" model might ultimately resemble, FINRA must include information regarding the cost of

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[7] Notably, FIMSAC and FINRA originally proposed "commercially reasonable" fees based on "cost plus margin" pricing. *See* Text of Proposed Rule Change at 10, 15, 34, *available at* https://www.finra.org/sites/default/files/rule_filing_file/SR-FINRA-2019-008.pdf; FIMSAC-recommendation at 1. This made little sense, given the lack of any commercial or historical benchmark for costs or margins associated with a centralized source of information commandeered from underwriters.

building and operating a new reference data service (not to mention underwriters' costs of preparing for new infrastructure and compliance obligations, which may be incurred even before any fee filing). To date, FINRA has failed to suggest even the roughest approximation of those costs.

The Commission cannot approve the program without critical cost information. As with consolidated core data subject to single-source collection and distribution by the SIPs, no one has ever claimed FINRA's centralized fees would be disciplined by market competition. *See id.* at 4 ("Because the [SIPs] responsible for disseminating required NMS core data are monopolistic providers of such data, there is no market competition that can be relied upon to set prices."); Notice of Proposed Order Directing the Exchanges and FINRA to Submit a New NMS Plan Regarding Consolidated Equity Market Data (Release No. 34-87906; File Number 4-757) (Jan. 8, 2020).

FINRA's Amended Proposal—even one that rests on a regulated utility model for fees and charges—certainly fares 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").[8] Without an analysis regarding the reasonableness of the costs, there can be no finding that the associated fees and charges are also reasonable as required by the statute. *See Susquehanna*, 866 F.3d at 447 (questioning the Commission's contention that a proposed rule "pays dividends to shareholder exchanges at a reasonable rate," when no data showed how the Rule "measure[d] the cost and risks").

[8] If FINRA seeks to introduce additional evidence regarding the costs of its regulated utility model, Bloomberg respectfully requests leave to introduce relevant rebuttal evidence. *See* Rule of Practice 452.

3. FINRA's approach would allow SROs to evade timely Commission review of fees imposed for crucial market data. By segregating and delaying the fee justification, the Amended Proposal would relieve FINRA of the burden of proving the reasonableness of the fees and charges associated with its new service. This establishes the untenable precedent of allowing an SRO to defer showing equitable and reasonable fees until *after* a substantive rule is approved. Practically speaking, this policy will tolerate a regime in which objecting parties must show the *un*reasonableness of the fee proposal. Such burden-shifting sets bad policy and precedent for the Commission and other rule-making bodies.

FINRA is statutorily obliged to demonstrate that its fees and costs are reasonable *before* the Proposed Rule is approved. The careful wording of the proposal and Order tacitly recognize this: "FINRA stated that any new fees would be *filed with* [not approved by] the Commission *in advance of the implementation* [not after the notice and-comment period] of the newly issued corporate bond new issue reference data service." Order at 21–22. Had FINRA left the fees in its Proposal, they would have been subject to the Commission's regular approval process in this proceeding, not shifted to the "effective upon filing" regime. The Commission is currently seeking to limit that regime, while FINRA is trying to exploit it to get its data service approved. *See* Proposed Rule, Rescission of Effective-Upon-Filing Procedure for NMS Plan Fee Amendments (Oct. 1, 2019), *available at* https://www.sec.gov/rules/proposed/2019/34-87193.pdf.[9]

Such burden-shifting turns the regulatory process on its head. SROs surely always believe their proposed fees comply with the Act, but that has not stopped the Commission from

[9] Whether FINRA intends to file its fees as effective upon filing, and whether the Commission would tolerate that approach, remains unclear. The Order (at p. 52) states that "[r]egardless of whether a fee proposed by FINRA is effective upon filing with the Commission, the Commission assesses whether or not the fee proposal is consistent with the Act."

disagreeing. *See, e.g.*, *In re SIFMA*, Release No. 34-84432 (Oct. 16, 2018); *In re BOX*, Release No. 34-85459 at 23 (Mar. 29, 2019). FINRA should not be allowed to circumvent the Act's requirement of an affirmative finding of compliance with § 15A(b)(5) by dodging the many comments critical of its unjustified fees. Shifting this burden has pernicious effects that a later notice-and-comment process cannot mitigate: by then, the fees are in effect and remain so absent Commission intervention. Although the legal burden for justifying a fee filing technically remains with the SRO, Order at 51, the procedural and practical burdens change significantly. As Bloomberg has explained in the Rule 608 context, that process:

> allows fees to take effect without a Commission determination that the … Plan has met its burden. Indeed, the burden counterintuitively falls on the Commission to take action to intervene and disturb the new status quo as dictated by the NMS Plan. And if the Commission exercises its limited resources to review and suspend any fee or instituting proceedings, like any agency, it does so subject to reasoned decision-making requirements. In effect, the Plan's burden to justify a fee transforms into the agency's burden to justify a suspension.

Comment letter of G. Babyak, Release No. 34-87193 (Dec. 10, 2019) (citations omitted).

Moreover, gerrymandering a decision to avoid its most costly and controversial component is inconsistent with what the law demands and what policy considerations dictate. The D.C. Circuit's recent decision in *Carlson v. Postal Regulatory Commission* illustrates the point. 938 F.3d 337 (D.C. Cir. 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. The Court held that this improperly flipped the burden in the favor of the agency and against the rate-paying public. "[P]ost-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.* at 350 (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."). No justification supports the Commission tolerating the same gamesmanship here.

On a practical level, even FINRA recognizes that moving forward with the Amended Proposal without fees in place would be untenable. Fees for bond reference information are unquestionably necessary "to meet ongoing operating costs." Initial Proposal at 13. The Amended Proposal underscores that point; FINRA explicitly explained that it will not implement the reference data service until "after those fees are adopted." Amended Proposal at 4. Yet the proposed rule states only that underwriters must provide data to FINRA at some yet-to-be-determined date.[10]

If FINRA will not implement the service yet anyway, there is no need for the Commission to approve the Proposal now in its provisional form. Given the volume of comments critical of the Initial Proposal's cost-plus pricing, it is entirely plausible that the Commission could see a second proceeding and potential appeal inextricably intertwined with the Order under review. At a minimum, therefore, the Commission should hold the proceeding in abeyance pending submission of a fee proposal subject to Division approval. Only then would the Commission be presented with a fully formed proposal to review.

B. The Amended Proposal violates Section 15A(b)(6)'s mandate to remove impediments to a free and open market by co-opting the market for data services rather than cooperating with existing services.

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[10] Absent guidance to the contrary, underwriters must also prepare the infrastructure to provide this data, though they lack any indication whether and when the service will take effect. Underwriters are therefore likely to bear significant costs long before formal fees are filed and imposed.

FINRA's rules must "remove impediments to and perfect the mechanism of a free and open market and a national market system," "protect investors and the public interest," and in particular "foster cooperation and coordination with persons engaged in . . . processing information with respect to . . . transactions in securities." Exchange Act §15A(b)(6). It is obvious that bond reference data services are engaged in processing securities information.[11] Neither FINRA nor the Division has denied it. These services are gathering information about new issues, organizing the information into useful formats, and distributing the collected information to users—in exactly the ways FINRA plans to do. The Commission cannot approve FINRA's Amended Proposal unless it determines that the proposed rule does, indeed, foster cooperation with existing data vendors and providers. 15 U.S.C. § 78s(c). No serious consideration of this factor could reach that conclusion: FINRA said explicitly that the purpose of the Proposal as to establish a rival data service that would serve as an alternative to the existing services. *See* Initial Proposal at 18.

Moreover, FINRA's service would be more than a mere competitor; it would be a government-privileged quasi-monopoly enjoying the advantage of compulsory access to data that market-based services must compete for. Existing data providers obtain information through voluntary interactions with underwriters. Vendors must ensure that providing data is convenient and economical, and that data shared with them will be distributed effectively to traders; otherwise an underwriter will get little benefit from sharing it. FINRA, by contrast, wants to order underwriters to submit data in a government-mandated format, at a government-mandated time, using government-mandated data systems built by their regulator. Firms will undoubtedly feel pressure to purchase that regulator's data product, regardless of its pricing or quality—which

[11] Examples include Bloomberg, ICE Data Services, Refinitiv, IHS Markit, and others such as new entrants like DirectBooks. *See, e.g.*, https://www.businesswire.com/news/home/20191011005089/en/Global-Bank-Consortium-Creates-Capital-Markets-Syndication.

would be insulated from the disciplining pressures of competition. Supplanting the current competitive system in favor of a compulsory government service is precisely the opposite of "fostering coordination and cooperation" with persons engaged in the securities market. This is a truly significant departure from the general presumption, embodied in § 15A(b)(6) and throughout the Exchange Act, that market competition generally represents the most efficient way to deliver services. The Commission should pause and reconsider before endorsing this alternative presumption.

1. The Amended Proposal fails to demonstrate any market failure justifying a coercive regulatory utility. FINRA should not be allowed to oust market-based providers in favor of a regulatory utility without showing a substantial market failure. *See Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1508–09 (D.C. Cir. 1984) ("It is of course elementary that market failure . . . [is a] central rational[e] for the imposition of rate regulation."); *see also* 15 U.S.C. § 78w(a)(2) (SEC cannot impose a burden on competition "not necessary or appropriate in furtherance of the purposes of the . . . Act"). FINRA has not made that showing.

First, FINRA has no basis for its theory that the market for data services is uncompetitive. The Proposal asserted that barriers prevent competitors from entering the market. Yet it mentioned only one such supposed barrier, namely the investment required to build a system to manage the bond data. *See* Initial Proposal at 19.

As a legal matter, the mere fact that building a new business would require investment is not a barrier to entry, and certainly not one that inherently makes a market uncompetitive. *See e.g., Advo, Inc. v. Phila. Newspapers*, 51 F.3d 1191, 1200–01 (3d Cir. 1995) ("High capital requirements also pose no barrier to entry. The total start-up investment … is a couple of million dollars. While this sum is not trivial, it is not so high that it would prevent new competitors from jumping in if PNI tried to charge supracompetitive prices."); *DeSoto Cab Co. v. Uber Techs., Inc.*, No. 16-cv-06385-JSW, 2018 U.S. Dist. LEXIS 226261, at *21 (N.D. Cal. Sep. 24, 2018) ("The fact that entering a market requires a large capital investment, without more, does not constitute a barrier to entry.") (citing Areeda & Hovenkamp, Antitrust Law, § 409e at 303 (1992 Supp.)).[12]

And as a factual matter, FINRA has never offered any evidence, or even an estimate, of the scale of investment required and how that would serve to dissuade market entrants. It simply stated that costs are a barrier, failing to offer the Commission any basis on which to conclude that investment challenges do indeed deter entry. Not only does FINRA ignore that the market already has multiple competitors and new competitors have in fact entered the market. *See* Bloomberg Oct. 21, 2019 Letter at 6, n.11 (highlighting DirectBooks).[13] FINRA also, ironically, commits to making the same investment (funded by compulsory fees, not outside investment) that is purportedly too great for market competitors to bear.

Second, FINRA has contended that the customers for data services are dissatisfied. FINRA engaged in supposed "outreach" to traders whom it did not identify and whose actual input it did not provide. On the basis of that outreach, FINRA asserted that "accurate, complete, and timely data" "*may* be lacking." Order at 33 (emphasis added). No evidence is to be found indicating data

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[12] FINRA's assertion that data services can continue to sell add-ons and to distribute the FINRA data is no answer to this point. *See* Order at 18 & n.71. Instead of "cooperat[ing]" with existing data services, FINRA will be establishing its own service with a competitive advantage (the compulsory data).

[13] FIMSAC was well aware that there are multiple services competing. For example, a representative from one vendor, ICE, testified that "ICE Data Services, as well as Refinitiv and probably other data vendors do service a lot of third-party providers of content, value-added content," and he described ICE's "reference data services" that are "stronger and more competitive in the market." FIMSAC Tr. at 67, 92. A representative from another vendor, Refinitiv, testified about how Refinitiv collects reference data, and then explained that Refinitiv is "an international vendor" that "provide[s] information to global participants." FIMSAC Tr. at 76.

inaccuracies, gaps, or untimeliness. The Division in turn relied on FINRA's anonymous third-hand anecdotes. *Id*. The Commission cannot do the same, however: these self-interested anecdotes are not *evidence* that can support reasoned agency decision-making. In *Susquehanna*, the D.C. Circuit invalidated the Commission's approval of an SRO rule because of the Commission's unquestioning reliance on the SRO's defense of its own actions. 866 F.3d at 447. As the court explained, the Commission cannot "rely on statements by the self-regulatory organization," because there is "little supporting value in the self-serving views of the regulated entity." *Id.* (alteration and quotation marks omitted). FINRA's report of anonymous anecdotes is another sort of information that *Susquehanna* criticized. *See* 866 F.3d at 446-47 (criticizing SEC's reliance on an SRO's report of input from anonymous "independent experts"). Thus, FINRA's framing its position as a curated summary of "outreach" to preferred respondents renders it no more reliable.

Third, FINRA's anecdotes are themselves irrational and inadequate. If traders need more accurate, complete, and timely data, they can switch to one of several major data providers. Ordinarily providers would compete—even in the absence of new entry—for that business by providing the quality and timing that traders demand. FINRA cited an anonymous trader that complained its data provider did not make data available soon enough. *See supra* at XX n.YY. FINRA appears not to have wondered why that trader did not simply switch to a different vendor.

Even if these anecdotes were evidence of a problem, moreover, they do not support this particular solution.[14] The Division inferred from these anecdotes the existence of a "regulatory

[14] The Order treats FINRA's new data service as a "regulatory utility." The federal agencies that regulate government-sanctioned utilities on a regular basis would not approve a new facility based on the sort of speculation and second-hand anecdote that the Division considered sufficient. For example, to obtain Federal Energy Regulatory Commission for a new gas pipeline, an applicant must submit evidence of the public benefits to be achieved by the proposed project." 88 F.ER.C. ¶ 61,227, ¶¶ 61,748, 61,750 (Sept. 15, 1999). "Vague assertions of public benefits will not be sufficient." *Id.*

gap." But "saying that there was not a regulation in place . . . cannot justify the adoption of a particular rule based solely on th[at] assertion." *Am. Equity Life*, 613 F.3d at 177–78. To approve the Proposal, the Commission must justify displacement through the proposed government-sanctioned utility. *See id.* at 178 (noting that the Securities Act "does not ask for an analysis of whether *any* rule would have an effect on competition . . . it asks for an analysis of whether the *specific rule* will promote efficiency, competition, and capital formation").

Fourth, the Division statement that the market needs a "uniform source" of data is mere ipse dixit. It never explains why uniform (as opposed to accurate and accessible) data is necessary or desirable in a competitive market. And even assuming uniformity were an important goal (despite the single-point-of-failure risks the Order acknowledges (at 18)), neither FINRA nor the Division has explained why that justifies a sole-source provider. FINRA could develop certification criteria for vendors, or common data standards for underwriters, at far less cost than the construction of a new service, and at far less risk of a single point of failure. *See* Bloomberg Apr. 29 Letter at 2. If the market truly demands a uniform, accurate, and timely new-issue corporate reference service, nothing prevents FINRA from attempting to fill that alleged gap without this degree of coercion and displacement of the Amended Proposal.

2. The Amended Proposal fails to address contrary evidence set forth by Bloomberg that undermines the premise of the rule change. Unrebutted facts in the record show that the bond markets are healthy and growing robustly using existing market-based data services. FINRA's initial claim of an information gap related principally to electronic trading. *See, e.g.*, Order at 11 & n.40. Data set forth by Bloomberg, unrebutted by any data or evidence from FINRA, shows that such trading is already flourishing and continues to grow rapidly.[15] For example, analysis from Greenwich Associates shows explosive growth and record high market share in ATS electronic corporate bond trading overall.[16]

FINRA did not provide any countervailing data or reasoning. No evidence shows that electronic trading faces any serious impediment. FINRA has not contested that this sector is growing rapidly, despite the asserted lack of information that the Amended Proposal cited as an obstacle. Instead, FINRA submitted a graph based on 2018 data purporting to show that most first-day trades do not occur on ATSs, a supposed fact that supposedly "suggests" a lack of access to new issue bond reference data. FINRA Response at 6–7.

Bloomberg, however, demonstrated that FINRA's analysis shows little: FINRA used the wrong denominator. It asserted that only 3% of new bonds traded on ATSs on their first day, and it contended that this figure confirms ATSs lack timely access to data about new issuances. FINRA Response Letter at 6. But as Bloomberg pointed out, ATSs ordinarily only trade larger issues, over $250 million in size. Among those larger issues, during the time period FINRA studied, 12% of bonds traded on ATSs on their first day. July 1, 2019 letter from Greg Babyak at 5. FINRA's

[15] Bloomberg presented data regarding alternative trading system ("ATS") trading on pricing day to show that electronic trading platforms can presently access new issue bond reference data, and that the market for new issue corporate bonds is healthy and evolving in the manner that FIMSAC desires. *See* Bloomberg Apr. 29 letter at 12–13. Data for new issues between March and April 2019, moreover, demonstrates that ATSs arranged a trade in 43% of the new Jumbo-sized issues, 28% of the new Benchmark-sized issues, and 11% of medium-sized issues on the day the bond was free to trade. *Id*. In addition, over the past year, the number of Jumbo-sized new issues that traded electronically on the day they were priced more than doubled. *See* Bloomberg July 1 letter at 4-6; Bloomberg July 29 letter at 6; and Bloomberg Oct. 24 letter at 4–5.

[16] Kevin McPartland, New Issue and Volume Drop, E-Trading Hits New Record (Again) (Nov. 15, 2019), Greenwich Associates, *available at* https://www.greenwich.com/market-structuretechnology/november-spotlight-new-issuance-and-volume-drop-e-trading-hits-new.

data are also simply outdated. It analyzed the second quarter of 2018; in the same period in 2019, fully 30% of larger issues traded on ATSs on the first day.

Even on its own terms, FINRA's charts do not support its arguments. FINRA presented a graph showing, for various individual ATSs, that the proportion of bonds *that have been* traded on a given ATS increases over time. This is inevitable (because an electronically traded bond never falls out of the count), and proves nothing.[17] FINRA inferred that "*some* ATSs *may* have been delayed when setting up new issues to trade on their platforms," FINRA Response Letter, at 6, and further inferred that this possibility "helps illustrate the *potential* impact of overall information asymmetry." FINRA Response Letter at 6 (emphasis added). But FINRA could not claim that its graphs actually show that ATSs have been delayed, much less that these supposed delays are the result of deficiencies in reference-data services. If these charts show anything about access to data, they show that most market participants do have adequate data to make first-day trades—which contradicts FINRA's claim of a market failure.

The Division did not address Bloomberg's criticism. Instead, it discarded the data about ATSs as "not reflective of the market as a whole." Order at 33 n.130. Market participants other than ATSs, the Division hypothesized, "*may* not have timely access" to new-issue reference data. *Id.* That response is arbitrary and inadequate. *First*, regardless of whether Bloomberg's data represent the market as a whole, the data certainly shows that a substantial proportion of bonds trade on electronic platforms on the first day of issuance, and that electronic trading is growing rapidly. Recently available data confirm Bloomberg's prior assertions on this point. For example, data (compiled by Bloomberg from its market information) from last month show that in mid-2018

[17] FINRA said the graph showed "the percentage of newly issued corporate bonds that started to trade" on an ATS. Response Letter at 6.

(the period on which FINRA's analysis was based) the percentage of first-day trades over $250 million that were on ATSs increased to 39%. The electronic trading of the largest issues has steadily grown from 16% to over 48%. *Compare* July 1, 2019 Bloomberg letter at 5 (16% secondary market ATS trading by day two). An interview with the Head of European Product at MarketAxess (a rapidly growing electronic fixed-income trading platform whose representative chaired the FIMSAC committee that recommended this rule) also confirms that the global trends towards automated credit markets (an outcome FINRA said would depend on its Proposal) are accelerating.[18]

Likewise, FIMSAC initially claimed—as a primary rationale for the bond reference data proposal—that data providers affiliated with trading or electronic messaging platforms had leveraged their data services to benefit their affiliated bond trading or messaging platforms. As Bloomberg demonstrated to the Division, however, *only 3.2%* of electronic corporate bond trading takes place on platforms affiliated with a data provider. *See* Greenwich Associates at XX. By contrast, *85%* takes place on a single platform: MarketAxess. *Id.* No concerns regarding affiliations between vendors and platforms, therefore, could support this proposal (which no longer relies on this original basis).

Second, FINRA has consistently said that supporting trading on ATSs is a principal reason for the proposed rule. Initial Proposal at 12–13 ("[R]eliable, consistent and timely reference data is . . . increasingly important as market participants rely more on electronic trading platforms."); *id*. at 29 (similar); Response Letter at 5 (asserting that "leading e-trading venues are not able to offer trading in newly issued bonds on a timely basis"). Bloomberg's data refute that justification.

[18] *See* The Desk, A Practical Guide to Buyside Automation in Credit Markets (June 14, 2019), *available at* https://www.fi-desk.com/a-practical-guide-to-buyside-automation-in-credit-markets/ (discussing U.S. markets).

To sweep them aside means ignoring that one of FINRA's major justifications—for this significant market intervention—is contrary to the record.

Third, the Division simply hypothesized that other market participants, besides ATSs, "may" lack adequate access to data. Order at 33 n.130. As a basis for concluding there is a market failure, this supposition is wholly inadequate. Bloomberg pointed out that FINRA had provided no evidence that any trader or platform cannot get the information it demands, or that lack of information is impeding trading.[19] FINRA responded with a mistaken analysis of ATS trading, and proving the supposed information gap is FINRA's burden. No basis exists to assume a gap exists for ATSs, or for other traders about which FINRA provided no evidence. Moreover, it is irrational to suppose that, despite FINRA's failure to make its proof for ATS trading, the problem is more real for other traders for which FINRA did not even make the attempt.

Thus, the record demonstrates an indisputable fact that the bond market is already, without FINRA's intervention, headed strongly in the direction that FINRA said the Proposal was needed to achieve. The Division made no decision to the contrary, and the Commission has no evidence on which it could do so. Thus the factual and policy premise of FINRA's rule change is unsupported. If FINRA submits new evidence now, after failing to submit even its flawed statistics until the last minute before the Division, Bloomberg respectfully submits that it should be permitted to provide rebuttal evidence. *See* SEC Rule of Practice 452 (allowing consideration of newly submitted evidence on motion of a party).

3. The Order fails to address inaccuracies in FINRA's current data highlighted by commenters throughout this proceeding. Despite relying on a purported need for more accurate

[19] As noted above, *supra* at _, one anonymous person told FINRA that it could not get the data it wanted from its current vendor. FINRA has not reported any reason that the person could not fulfill its needs with a different, competing vendor.

market data, FINRA provided no evidence to support its claim that its new service would improve on the work of existing vendors competing in the marketplace. It would of course be counterproductive to replace market-based data services with a regulatory utility that does not achieve even the current level goal of accuracy that supposedly falls short and justifies a market intervention in the first place.

Bloomberg and other commenters submitted substantial and unrebutted evidence that FINRA's existing data service, TRACE, features an unaccountably high error rate. Errors affect about 20% of the three entries reviewed in this far simpler system (the proposed system would feature more than 30). *See* Order at 14 nn. 52–53 (citing comments and evidence, including Tabb Study ("An SEC-Mandated Corporate Bond Monopoly Will Not Help Quality" (Mar. 21, 2019))). FINRA did not refute that evidence. In fact FINRA said it was unable to provide a "meaningful response," and merely speculated about what might have caused some of the inaccuracies. Order at 19 ("FINRA believes a number of the differences found in the analysis may have resulted from data fields that are not currently system-validated.").

In its FIMSAC testimony, moreover, FINRA *acknowledged* that its existing technology would not "lend itself very well" to the new data service; on this critical score, FINRA would "have some work to do" to develop a reliable data service. *See* FIMSAC Transcript at 87:18–89:1.[20] For the one system of transaction data that FINRA does run, on which it expressly relies as the precedent for this intervention, FINRA has been unable to provide accurate and reliable data. Instead it relies on vendors and underwriters to correct errors and lacks any system that could perform any better for new-issue data.

[20] *See supra* at n.2 ("[S]peaking for FINRA, we would have some work to do. The technology today does not lend itself very well to this …. We would also need to create a separate distribution channel ….") (quoting Ola Persson).

These facts should be dispositive. The best predictor of whether FINRA will be able to run an accurate data system is its experience with the TRACE system, an existing system that is simpler than the as-yet-unbuilt system FINRA proposes.[21] Nothing in the record supports any inference that FINRA's new system would outperform the 20% error rate cited in the in the Tabb Study before the Commission (noted above).

FINRA's only answer has been to promise that it will "engage with market participants on the appropriate business requirements for the reporting process," "allow . . . underwriters to correct previously submitted data," and maybe to "take a phased approach to implementation." Order at 47 n. 162. These promises reflect hope rather than reality. FINRA offered no evidence of how any of these notions will actually reduce error rates. For example, why would underwriters take the effort to monitor FINRA's database and spot-check its reporting? Market-based data vendors today have mechanisms and incentives to ensure the accuracy and quality of their data, and it takes real work to achieve those standards. Even a fervent and sincere desire on the part of FINRA for its brand-new system to deliver data more accurately than that provided by experienced vendors—disciplined by competition—falls far short of evidence FINRA can actually accomplish that. *See Susquehanna*, 866 F.3d at 449 (arbitrary and capricious to "accept OCC's claims at face value").

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[21] Neither TRACE's current workings nor FINRA's prior attempts to expand TRACE provide support for FINRA's current contentions. When FINRA proposed a far more modest expansion of TRACE in 2007 (offering 18-month-old data to users), the results were not encouraging; it took two years and four amendments before the Commission approved that limited change.

Nor is NIIDS—a reporting system for municipal bonds—an answer to these concerns about accuracy and functionality. When the Commission approved a rule establishing that service, the service provider, DTCC, had already been running a highly reliable service generating CUSIPs for bonds. Underwriters already were providing basic bond information to DTCC, and paying the associated fees, to obtain their CUSIP numbers. Instead of requiring underwriters to send data to the existing or future private-sector data processors, FINRA's current Proposal insists that FINRA run the data service itself. DTCC, moreover, built the data system for the expanded flow of reference data before the rule was proposed—not, as FINRA plans, after the rule is approved.

The Division flatly ignored the inaccuracies in the TRACE system. *See* Order at 49 n.168 (refusing to take account of TRACE error rates, "whatever they may be"). Instead, the Division focused on the asserted need for "uniform" data. This is irrational. Uniform data that are 20% inaccurate are not useful. And FINRA's own reasons for the Proposal relied heavily on the assertion that traders need accurate data. If FINRA's data service proves less accurate than current offerings (as the current record indicates), then FINRA's entire proposal—with its attendant disruption and cost to underwriters, traders, markets, and existing data providers—takes a giant step backwards.

4. The Proposal would create a commercial conflict for a public regulator. The Amended Proposal also fails to "foster" cooperation because it creates an inherent conflict between a public regulator and the private parties it regulates. *See* Order at 15 (describing comments). In transactions that directly benefit FINRA's bottom line, the regulator would coerce underwriters to surrender bond-reference data and would (at least implicitly) compel broker-dealers to buy FINRA's data. *See* Bloomberg July 29 letter at 8. FINRA has not tried to mitigate this fundamental conflict. To the contrary, it offers only the soothing assurances that "as a non-profit registered securities association and self-regulatory organization, it *does not intend to compete* with or displace private data vendors." Order at 16–17 (emphasis added). That, too, directly contradicts the asserted reasons for the Proposal. FINRA originally said it needed to create a data service precisely for the purpose of competing with private vendors: "the data service will promote fair and reasonable pricing for reference data," FINRA said, "*by introducing an alternative* source in addition to what is provided by the incumbent data providers." Initial Proposal at 18 (emphasis added).

Having failed to acknowledge the conflict, FINRA cannot address the many other risks it presents. FINRA proposes to undertake a major technology investment—one that, it bears repeating, it believes is so massive it deters private competitors from entering the market for bond data. *See supra* at XX. FINRA does so with no plans it is willing to disclose publicly to support the approval of its rule, and with so little information about the costs that, when commenters pushed back on its fees, it withdrew the fees to avoid having to substantiate them. In these circumstances, there is a real possibility that FINRA's system-building project will not work; that it will take longer than expected or cost more; or that the resulting database will not achieve the goals of accuracy and timeliness that FINRA proclaims. If that happens, what steps will FINRA be motivated to take to save its own finances—steps that, as the regulator, it is uniquely empowered to take? Meanwhile FINRA will have damaged the existing market-based system of data services, a fact that raises the stakes yet further for the outcome of FINRA's project.

C. The Amended Proposal violates Section 15A(b)(9) by imposing unjustified burdens on competition.

1. The Amended Proposal would unquestionably burden competition for access to market data. A FINRA rule must not "impose any burden on competition not necessary or appropriate" given the purposes of the Exchange Act. Section § 15A(b)(9). The Amended Proposal, however, would undoubtedly burden competition. FINRA candidly stated that by running a centralized data service supported by compulsory data submissions, it would constrain the prices of private data vendors. Initial Proposal at 18. Even assuming FINRA achieves its goal of lower prices, any short-term "benefit" from artificially suppressing market prices would harm competition. This would cause direct loss to market-based services crowded out by FINRA's service. It would increase costs to underwriters (especially smaller underwriters) that must navigate a data system that faces no competitive pressure to improve its operations. Perhaps most insidiously, the Amended Proposal would signal that investing in innovative services is not worthwhile; if FINRA deems them important or lucrative, it could always decide to co-opt the market for itself.

FINRA has thus far ignored the value of market competition. It offered no real evidence of the costs and benefits of its Proposal, failing to provide any quantitative estimate for any cost that its rule change would impose. The Commission must insist on more. Under Exchange Act § 3(f), the review of FINRA's Proposal must include an assessment of its overall costs and benefits. *See Business Roundtable*, 647 F.3d at 1149 (SEC's "failure to apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation makes promulgation of the rule arbitrary and capricious and not in accordance with law"); 15 U.S.C. § 78c(f) (imposing the same requirement for review of FINRA rules). In such assessments, the Commission must actually estimate the amount of the costs and benefits. *See Business Roundtable*, 647 F.3d at 1149 (invalidating rule because the Commission "failed adequately to quantify the certain costs or to explain why those costs could not be quantified"); *Chamber of Commerce*, 412 F.3d at 143 (SEC must "determine as best it can the economic implications" even if it "can determine only the range within which a . . . cost . . . will fall"); *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1220 (D.C. Cir. 2004) (agency must "make tough choices about which of the competing estimates [of a cost] is most plausible").

FINRA has yet to face up to those choices. It inconsistently claimed that underwriters would, on the one hand, continue to provide data to existing vendors and, on the other hand, that underwriters would save money by no longer doing so. *See* Order at 18; Initial Proposal at 18. The Division made the same mistake: asserting that parallel reporting would continue (to mitigate error risk) and that it would end (to save smaller underwriters money). *Compare* Order at 45 & *id.* at 47 n.162. The Commission cannot have it both ways. Truly estimating the costs of the Proposal to data vendors requires the Commission to acknowledge losing some access to information from underwriters— a genuine cost.

Nor can approval rest on addressing purported imbalances among market-data providers. FINRA previously pointed to competing data services, for example, complaining that "some of the vendors have access to information much earlier than other vendors." Order at 31 n.124. Nothing in the record, aside from anecdotal supposition, bears that out. And nothing about differences among competing vendor services reflects market failure, as opposed to market competition.

The Division, attempting to explain away the Amended Proposal's burden on competition, hypothesized a handful of services that vendors might still be able to offer after FINRA enters the market. Order at 48. Some vendors, it noted, offer services that include more information than the FINRA data fields. That some speculative services may (or may not) remain viable, however, is no answer to the Exchange Act's requirement that FINRA rules not unduly burden competition. More ironic is the supposition that vendors may supply a *new* service: scrubbing FINRA's data for accuracy. If we assume that the new regulatory utility is *less accurate* than existing data services, however, we have bigger problems: the principal justification for a government-sponsored quasi-monopoly is traders' supposed need for *more accurate* data. Why compel underwriters to submit data to a centralized repository just so the existing vendors can repurpose their efforts from careful up-front fact gathering to after-the-fact error correction?

2. The Initial Proposal affords the Commission no basis for performing an adequate cost-benefit analysis. By withdrawing the fee portion of the Initial Proposal in the face of criticism, FINRA effectively conceded that it lacks evidence to justify the fees—whether considered on a cost-plus or regulatory-utility basis. This tactic is fatal to its request for approval, though, because the fees were the only information provided about a major category of cost. In essence, FINRA is trying to claim all the benefits of its new data service without acknowledging the costs.

FINRA suggested a number of hypothetical benefits that might flow from the Proposal, such as the contested and unsupported notion that traders will receive more accurate data. To determine whether those benefits outweigh the corresponding burdens on competition, the Commission must at least estimate the costs and fees that FINRA members and traders will face. If SROs and agencies were permitted to ignore regulatory burdens in this manner, agencies could propose laudable programs heedless of their price tags, seek their provisional approval, and then—*once established*—propose a fee that was necessary to sustain an already approved program. *See, e.g., Business Roundtable,* 647 F.3d at 1148. That sort of gamesmanship surely cannot stand. Along with crediting the alleged benefit of any expanded data access, the Commission must account for costs as well. *Id.* at 1148–49 (arbitrary and capricious to "inconsistently and opportunistically frame the costs and benefits of [a] rule").

Without this information about the fees, the Commission cannot know whether to treat the potential market-price impact as a benefit or a cost. Existing data services currently gather information from underwriters, verify it, organize it, maintain it, and provide it to users. FINRA says it will take these same steps—but if it follows the "regulatory utility" model (as it planned to do) FINRA would of course lack the financial incentive to do so in a cost-effective manner. Other vendors, meanwhile, will have a diminished incentive to provide the service well (not to mention innovate and provide new services). The Division assumed (in some parts of its analysis) that the Proposal would make it more difficult to maintain existing services: because underwriters will be disinclined to bear the incremental costs of providing information to data vendors they have already provided to FINRA. Several factors, therefore, would tend to make the price of bond reference data higher, not lower, under FINRA's proposed regime.

Meanwhile, FINRA must cover the cost of an all-new data handling system it must build. FINRA expressly excluded this crucial component—the cost of FINRA's developing and operating a new data system—from the equation, and provided no information about whether the costs of the service for the traders that use it will be higher or lower than current prices. That lack of evidence, in itself, prevents the SEC from completing the cost-benefit analysis it must do before approving the Amended Proposal.

3. The Proposal would chill innovation and investment in market-data services, undermining the Exchange Act's goal of broad dissemination and access. FINRA's desire to enter new markets and provide new services also undermines the incentives for private actors to invest and innovate in the industry. Companies like Bloomberg have spent tens of thousands of hours and millions of dollars over decades building attractive bond-reference data services. FINRA's attempt to appropriate the space would cause incumbent providers to hesitate before investing more in capital-markets innovation. *See, e.g.*, Bloomberg Nov. 27 letter at 4 & n.11 (proposal "would discourage competition . . . by discouraging entry into the market . . . because one of the primary revenue streams . . . would be usurped by FINRA") (quoting criticism of FINRA's unsuccessful effort to supplant the Pink OTC Markets business). Simply shifting gains from market participants to FINRA is of course just a transfer, not a benefit.[22]

[22] Circular A-4 from the Office of Management and Budget, the leading directive on how to perform cost-benefit analyses, stresses that transfers are distributional effects that must be distinguished from true costs and benefits. Circular A-4, at p.38.

The Proposal also would chill innovation in a second and more direct way. As things stand, private data services compete to get information from underwriters and disseminate it to traders. Whichever provider performs the best—on whatever metrics of accuracy, timing, ease of communication, and price prove most important to market participants—can win the most business. The Proposal would displace that system with a centralized data service, which could achieve a dominant position regardless of whether an innovating company could have done a better job. A regulatory utility is therefore likely to produce a service that is not as valuable as what market-based providers would produce. Both FINRA and the Division have this principle backward, positing—contrary to the Exchange Act—that creating a regulatory utility is presumptively a good thing.

VI. CONCLUSION

Bloomberg respectfully requests that the Commission reject FINRA's Amended Proposal or, in the alternative, hold this proceeding in abeyance until it can review FINRA's future fee filing in connection with the data service those fees would support.

Respectfully submitted,

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/s/Benjamin Beaton

Benjamin Beaton
Keith Bradley
Rachael Harris
Squire Patton Boggs (US) LLP
2550 M Street, NW
Washington, DC 20037
Phone: (202) 457 6000
Fax: (202) 457 6315
benjamin.beaton@squirepb.com
keith.bradley@squirepb.com
rachael.harris@squirepb.com

Counsel for Bloomberg L.P.

CERTIFICATE OF SERVICE

I certify that on March 16, 2020, copies of Bloomberg's Statement in Opposition to the Approval of the Proposed Rule Change were served by first-class mail on the following recipients:

FINRA:
Alexander Ellenberg
Associate General Counsel
Financial Institutions Regulatory Authority, Inc.
1735 K Street, NW
Washington, DC 20006

Division of Trading and Markets:
Brett Redfearn, Director
Division of Trading and Markets
Securities Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

March 16, 2020

Benjamin J. Beaton