

**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC**

In the Matter of

**Financial Industry Regulatory Authority,
Inc.**

File no. SR-FINRA-2019-008

**FINRA’S OPPOSITION TO MOTION OF BLOOMBERG L.P.
FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE**

I. SUMMARY

Having made six earlier submissions opposing FINRA’s proposed corporate bond new issue reference data service, Bloomberg L.P. now belatedly moves to adduce additional evidence after the deadline for written statements in this proceeding. The additional evidence is not offered to address any new factual information submitted by FINRA, but merely to challenge statements by the Securities and Exchange Commission (the “Commission”) Fixed Income Market Structure Advisory Committee (“FIMSAC”) or others that have long been in the record and which FINRA cited in its written submission of March 16, 2020. There are no reasonable grounds for Bloomberg to have failed to address these points earlier if it wished to do so. More importantly, the additional evidentiary submissions—which consist of two carefully worded declarations by Bloomberg executives that skirt the very assertions they purport to refute—are neither material nor helpful to Bloomberg’s position.

Rule 452 is not intended to permit a party to prolong a proceeding before the Commission simply because it failed to recognize the import of existing record evidence until cited in another party's brief. That would be a recipe for never-ending administrative litigation, especially in cases where the moving party has, as here, already made numerous submissions in the matter. Even less is it intended to permit a party to extend the proceeding by submitting declarations that fail to address the central issue before the Commission—in this case, the manifest and documented consistency of FINRA's proposed new issue bond reference service with the requirements of the Securities Exchange Act of 1934 (the "Exchange Act").

At its core, Bloomberg's motion, like its prior submissions, appears to reflect a fundamental misunderstanding of this regulatory process. Bloomberg suggests the Proposal¹ cannot be approved without an affirmative finding that Bloomberg is presently benefitting from anti-competitive conduct. This self-referential strawman, however, is both misguided and incorrect. Despite Bloomberg's attempts to transform this into an adversarial proceeding, this is not a litigation dispute between two parties, and FINRA does not "tak[e] sides between competitors" as Bloomberg complains in its latest motion. Rather, as has been exhaustively established in the record, FINRA's Proposal is designed to meet a clear regulatory need and to benefit the corporate bond market in furtherance of the goals of the Exchange Act.

II. BACKGROUND

As the Commission is aware, FINRA's Proposal is supported by a substantial regulatory record that begins with the unanimous Recommendation adopted in 2018 by FIMSAC.² The full

¹ *Proposed Rule Change to Establish a Corporate Bond New Issue Reference Data Service*, Securities Exchange Act Release No. 85488, 84 Fed. Reg. 13977 (April 8, 2019) (SR-FINRA-2019-008) ("Proposal")

² *See Recommendation to Establish a New Issue Reference Data Service for Corporate Bonds*, (October 29, 2018), available at <https://www.sec.gov/spotlight/fixed-income->

record is discussed at length in FINRA’s Proposal and the Approval Order of the Division of Trading and Markets (the “Division”),³ as well as in FINRA’s Statement of March 16, 2020.⁴ Among other things, that record includes comment letters, notices, FIMSAC recommendations and other statements developed over a number of years, in a process in which Bloomberg has been an active participant, having submitted extensive written comments before the instant Motion.

FINRA’s Proposal, consistent with FIMSAC’s Recommendation, was designed to address a particular problem in today’s market—namely that a number of market participants are not reasonably able to gain access to timely, comprehensive, and accurate corporate bond new issue reference data when bonds begin trading. The creation of a corporate bond new issue reference data service, as proposed, fits precisely within the responsibilities assigned to FINRA under the Exchange Act, including removing impediments to a free and open market and fostering clearance, settlement and information processing with respect to corporate bonds and other securities.

As described in FINRA’s rule filings and other submissions, SRO regulation of new issue reference data is not novel. FINRA’s Proposal, moreover, is narrowly tailored to include only basic items essential for trading and settling new issues of corporate bonds, thereby ensuring that it would not interfere with private data vendors’ ability to compete to provide more enriched and

advisory-committee/fimsac-corporate-bond-new-issue-reference-data-recommendation.pdf (“Recommendation”).

³ *Order Granting Approval of a Proposed Rule Change to Establish a Corporate Bond New Issue Reference Data Service*, Securities Exchange Act Release No. 87656, 84 Fed. Reg. 67491 (December 10, 2019) (“Approval Order”).

⁴ *FINRA’s Statement in Support of Proposed Rule Change to Establish a Corporate Bond New Issue Reference Data Service*, March 16, 2020 (the “Statement”).

value-added data. FINRA’s Statement highlights these points, as well as the record evidence that the Proposal has been widely supported as a means to level the competitive playing field and enhance competition among market participants.

III. ARGUMENT

Under Commission Rule 452, a party seeking to adduce additional evidence must show “with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously.” Neither of these requirements is satisfied here. On the contrary, Bloomberg’s proposed “additional evidence” seeks solely to address information already in the record, available well before the Commission’s March 16, 2020 deadline for statements in this proceeding, and is not material to any relevant aspect of that record, on which it has had more than adequate opportunity to comment.

a. The Purported “New Allegations” Reflect Nothing More than Citations to the Existing Record: They Offer No Grounds for Bloomberg’s Failure to Adduce Its Evidence Earlier

Bloomberg grounds its Motion in the assertion that FINRA, in its March 16, 2020 Statement, made “allegations that are new” and that Bloomberg “has not previously had a chance to respond to them.”⁵ Yet Bloomberg fails to mention that every ostensible “new allegation” that it identifies is, in fact, nothing more than a statement of what FIMSAC or others have *already* asserted in the record long before FINRA’s Statement—which in each case, moreover, provides an *explicit citation* of where in the record the statement can be found.

Bloomberg’s selective quotations merit note in this regard.

- In claiming a “new allegation” *by FINRA* regarding Bloomberg’s “dominant position in the market for corporate bond new issue reference data . . . ,” the Motion omits the

⁵ *Motion of Bloomberg L.P. for Leave to Adduce Additional Evidence* (the “Motion”) at 5.

first words of the relevant sentence in FINRA’s Statement: “In this case, *the FIMSAC heard explanation*” (of Bloomberg’s dominant position).⁶

- Similarly, where Bloomberg writes “*FINRA says* Bloomberg ‘has limited market participants’ access to its data for anti-competitive purposes,’” the Motion also omits the beginning of the sentence: “*And the FIMSAC expressed particular concern,*” (that a dominant reference data vendor has limited market participants’ access).⁷
- Again, in quoting language that a dominant vendor has “refused to license data, or has withheld it selectively, for anti-competitive reasons,” the Motion omits the lead-in language: “*the FIMSAC expressed particular concern that a dominant private data vendor*” (has refused to license data . . .).⁸

In short, every one of these purported “new allegations” reflects concerns and comments of FIMSAC or others available to Bloomberg well before FINRA’s Statement, as thoroughly documented in detailed footnotes.

Indeed, dating back to the earliest stages of the FIMSAC hearings, the record is replete with references to the concerns that Bloomberg seeks to characterize as “new allegations.” To take merely one example, the observation regarding how underwriters “undertake getting our securities set up on the Bloomberg trading platform”—which the Declaration of David Miao now quotes and seeks, unsuccessfully, to address⁹—is contained at pages 80-81 of a transcript

⁶ Motion at 5; FINRA Statement at 26 and note 70, citing to notes 17 through 19 and accompanying discussion (emphasis supplied).

⁷ Motion at 5; FINRA Statement at 26 and note 71 (emphasis supplied).

⁸ Motion at 5; FINRA Statement at 2 and note 3 (emphasis supplied).

⁹ *Declaration of David Miao*, April 16, 2020 (“Miao Declaration”), paragraph 4 (on the second page of the declaration numbered 2).

that dates back to *October 29, 2018*.¹⁰ And there can be no doubt that Bloomberg was well aware of that document, since it cited language from pages 88-89 of that very transcript in its own submission of March 16, 2020.¹¹ Bloomberg might also have taken earlier notice of this statement, like others Bloomberg now seeks to characterize as “new,” as the statement was cited in the Division’s Approval Order that Bloomberg petitioned for review.¹²

Bloomberg has had ample opportunity to address every one of these elements of the record. The responsibility for Bloomberg’s decision not to address them sooner falls entirely upon Bloomberg, not FINRA or anyone else. FINRA’s citation of statements long in the record—offered in response to particular arguments Bloomberg raised for review—is not a change in position that excuses Bloomberg’s decision to ignore them earlier. On the contrary, it is the essence of reasoned rulemaking to articulate how the existing record supports an SRO’s decision-making. In any event, it surely offers no “reasonable grounds” to grant leave to introduce additional evidence under the standard set out in Rule 452—particularly after Bloomberg’s six previous submissions in this very rulemaking.

b. The Carefully Circumscribed Statements of Current Bloomberg Executives Offer No “Material” New Information

Bloomberg’s Motion also fails to meet the requirement under Rule 452 that it must show “with particularity that the additional evidence is material.” The carefully crafted declarations of its executives do not, in fact, directly address the specific statements by FIMSAC and others

¹⁰ *Transcript of FIMSAC Meeting* (October 29, 2018), available at: <https://www.sec.gov/spotlight/fixed-income-advisory-committee/fimsac-102918transcript.txt>; see also FINRA Statement at 8, note 17.

¹¹ *Statement of Bloomberg L.P. in Opposition to Approval of the Proposed Rule Change*, 8, note 5 (March 16, 2020).

¹² Approval Order at 67489-99, note 124.

cited by FINRA, nor are they material in light of the well-developed record and statutory questions before the Commission in this proceeding.

1. Declaration of Mr. Miao

The declaration of Mr. Miao takes issue with FINRA's Statement which "asserts" that "given current underwriter practices, Bloomberg often gains access to new issue reference data before other vendors and market participants" and "that a number of market participants are not reasonably able to gain access to timely, comprehensive, and accurate corporate bond new issue reference data when the bonds begin trading."¹³

These statements, of course, are not mere "assertions" of FINRA. They are instead, as noted above, reflections of concerns expressed by FIMSAC and market participants that have long been available to Bloomberg for its consideration and review.

More importantly, Mr. Miao's declaration does not specifically address the particular concerns raised at FIMSAC that underlie FINRA's Proposal: that private vendors may gain access to new issue reference data before other market participants, with no regulatory obligations concerning their provision of that data to the marketplace, and that as a result, a number of market participants are not reasonably able to gain access to reference data when bonds begin trading. Instead, the declaration simply notes Mr. Miao's lack of "aware[ness]" of any "legal or structural barrier" that prevents others from accessing new issue reference data and comments that "[t]o my knowledge," nothing prevents them from accessing the new issue reference data in the same "voluntary manner" in which Bloomberg acquires it.¹⁴ This of course

¹³ Miao Declaration, paragraph 2 (on the first and second pages of the declaration, both numbered 2).

¹⁴ Miao Declaration, paragraph 3 (on the second page of the declaration numbered 2).

wholly misses the point: the declaration does *not* actually deny that Bloomberg may in fact gain access to the new issue reference data before other market participants.

The remainder of Mr. Miao’s declaration strains unsuccessfully to explain away the “disparity” in access to reference data that “favors Bloomberg,” as it was described by an underwriter at the FIMSAC hearings. Specifically, the underwriter’s comment, cited both in FINRA’s Statement and the Division’s Approval Order, noted with respect to a competitive data advantage for Bloomberg that “there is no question that we do undertake getting our securities set up on the Bloomberg trading platform because that is what the industry predominantly uses to book our tickets.”¹⁵ Yet rather than refute the existence of a disparity or even address that statement, the declaration literally chooses to *ignore* its import (“Whatever the import of that single statement . . .”). The declaration then proceeds to try and obscure a related point made by this underwriter at the FIMSAC hearings, which was also cited in the Division’s Approval Order—namely, that the underwriter “tend[s] to not disseminate data to third party vendors off the corporate platform.”¹⁶ Mr. Miao’s proffered explanation of why underwriters like this one provide reference data to Bloomberg and not to other vendors is merely speculation, based on his “understanding.”¹⁷ This is not material evidence, or evidence at all; it is Bloomberg’s self-interested, belated interpretation of a fact that has been in the record for years.

2. *Declaration of Mr. Flatman*

Mr. Flatman’s declaration also carefully avoids any direct factual contradiction of the statements in the existing record. The declaration recites Mr. Flatman’s review of items that

¹⁵ See *supra* notes 10, 12.

¹⁶ See Approval Order at 67498, note 123.

¹⁷ Miao Declaration, paragraph 9 (on the third page of the declaration numbered 2).

FINRA “asserted” on pages 2 and 26 of its Statement.¹⁸ While quoting excerpted text from those pages of the Statement, the declaration (like the Motion itself) omits the lead-in language which makes clear that “*FIMSAC expressed particular concern*” that (i) a “dominant private data vendor has refused to license data, or has withheld it selectively, for anti-competitive reasons” and (ii) “a dominant reference data provider has limited other market participants’ access to its data for anti-competitive purposes.”

The declaration does not dispel those concerns expressed by FIMSAC. Although Mr. Flatman offers his opinion that the underlying assertions by FIMSAC are “wrong,”¹⁹ his detailed declarations studiously steer clear of a flat denial that Bloomberg has, in the past, refused to license data, or withheld it selectively, or otherwise limited other market participants’ access to its data.

In paragraph 3, while noting that Bloomberg “has offered to license and does license its bond reference data broadly” (a statement that does not contradict the concerns expressed by FIMSAC), the declaration simply avers—in the present tense—that Bloomberg “does not” limit access for anti-competitive purposes.²⁰ In paragraph 4, again the declaration addresses a point notably distinct from FIMSAC’s concerns (by disclaiming that Bloomberg’s electronic trading service “enjoys anticompetitive benefits” from its reference data service) and does so solely in the present tense.²¹ In paragraphs 5 through 7, the declaration continues to offer observations

¹⁸ *Declaration of Mark Flatman*, April 17, 2020 (the “Flatman Declaration”), paragraph 2 (on the first page numbered 3).

¹⁹ Flatman Declaration, paragraph 3 (on the second page numbered 3).

²⁰ *Id.*

²¹ Flatman Declaration, paragraph 4 (on the second page numbered 3).

about the circumstances currently surrounding Bloomberg’s business, including what “we” found after an analysis of files for a one-week period only last month.²²

None of these statements refutes the concerns expressed by FIMSAC about what has happened in the past—and could happen in the future—as a result of a reference data provider’s ability to manage its data and trading business in a coordinated fashion.²³

3. Neither Declaration Contains Evidence Shown to be Material

Even apart from the specific defects noted above, neither declaration submitted by Bloomberg contains evidence material to this proceeding. The declarations raise no doubts about the adverse consequences to the market arising from the absence of a centralized and impartial corporate bond new issue reference data service. They offer no suggestion that the Proposal would not “remove impediments to free and open markets” or “foster clearance, settlement, and information processing.” They offer no basis to conclude that the narrowly-tailored Proposal would interfere with competition by existing market participants. Nor indeed, apart from conclusory statements in the introductory and final sections of the Motion, has Bloomberg even made an effort to meet its burden of showing “with particularity” how the declarations are “material” to these proceedings.

In sum, the Motion offers an insufficient basis to conclude that the declarations are “material” evidence that may be introduced under the standards established under the Commission’s rules.

²² Flatman Declaration, paragraphs 5-7 (on the second and third pages, both numbered 3).

²³ *See Recommendation Regarding FINRA Proposal to Establish a Corporate Bond New Issue Reference Data Service*, at 4 (June 11, 2019), available at <https://www.sec.gov/spotlight/fixed-income-advisory-committee/fimsac-comment-letter-new-issue-reference-data-service.pdf>.

IV. CONCLUSION

For the reasons set out above, the Commission should deny Bloomberg's Motion to adduce additional evidence under Rule 452.

Respectfully submitted,

Date: April 24, 2020

/s/ Stephanie Dumont

Stephanie Dumont
Senior Vice President and Director of
Capital Markets Policy

Alexander Ellenberg
Associate General Counsel

FINRA
1735 K Street, N.W.
Washington, DC 20006
(301) 590-6500

CERTIFICATE OF SERVICE

I, Alexander Ellenberg, certify that on April 24, 2020, a true and correct copy of the foregoing **Opposition to Motion of Bloomberg L.P. for Leave to Adduce Additional Evidence** (File No. SR-FINRA-2019-008) was filed and served via email upon the following:

:

Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F St., NE
Room 10915
Washington, DC 20549-1090
apfilings@sec.gov
rule-comments@sec.gov

Benjamin Beaton
Squire Patton Boggs (US) LLP
2550 M Street, NW
Washington, DC 20037
Counsel for Bloomberg L.P.
Benjamin.beaton@squirepb.com

Respectfully submitted,

Date: April 24, 2020

/s/ Alexander Ellenberg
Alexander Ellenberg
Associate General Counsel
FINRA
1735 K Street, N.W.
Washington, DC 20006