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

REPLY OF BLOOMBERG L.P. IN SUPPORT OF ITS MOTION
FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE

FINRA's proposal seeks to offer a bond reference data service that would "level the competitive playing field" among current market-data competitors. FINRA Opposition to Motion for Leave ("Opp.") at 4. It would do so by compelling underwriters to provide FINRA with data, free of charge, which FINRA would then sell to the public at a price FINRA will set. The Exchange Act, the Commission's Rules, and basic principles of administrative law, however, all require a reasoned explanation, based on substantial evidence, justifying a rule's burden on competition and interference with existing services. Because Bloomberg's additional evidence explains why FINRA's latest justification falls short of that standard, the motion for leave should be granted.

BACKGROUND

FINRA's original proposal promised to "provid[e] market participants in the corporate bond markets with reliable and timely new issue reference data to facilitate secondary trading in and settlement of these instruments," particularly in "increasingly important … electronic trading platforms." Proposed Rule Change to Establish a Corporate Bond New Issue Reference Data Service (Mar. 27, 2019) at 12–13. Bloomberg demonstrated through empirical evidence that a centralized source of data was unnecessary and unwise, particularly given robust growth in electronic fixed-income trading.[1]

Then, at the thirteenth hour, FINRA's statement to the Commission offered a new justification. It alleged that anticompetitive conduct by Bloomberg distorts the market for corporate bond new-issue reference data. FINRA Statement in Support of Proposed Rule Change ("FINRA Statement") at3–4.(Mar. 16, 2020). FINRA described a triple bank shot that supposedly gives Bloomberg an unearned advantage in electronic bond trading: Bloomberg allegedly leverages its position in the market to "set up" underwriters' securities (apparently Bloomberg's new bond issue functionality, though FINRA did not identify it) in order to gain superior access to reference data, which Bloomberg allegedly then leverages to benefit its electronic bond trading services. *Id.* at 8–9. This theory is creative, but wrong. FINRA lacked any evidence that Bloomberg somehow ties the new bond issue feature of the Bloomberg Terminal service to the Bloomberg

[1] *See, e.g.*, G. Babyak letter to V. Countryman (Apr. 29, 2019) (demonstrating infrequency of broken trades due to lack of data, and showing that a large and growing proportion of new issues are traded on ATSs on the same afternoon as pricing). FINRA has never provided any further evidence to explain why traders on secondary markets—on electronic platforms or otherwise—need a centralized source of reference data. It tentatively attempted to show that ATS trading is thin on the first day after issue. FINRA Response to Comments (Oct. 29, 2019). But Bloomberg demonstrated that FINRA's analysis was flawed and that FINRA's data showed affirmatively that many ATS issues trade robustly on their first days. Bloomberg Statement in Opposition to Proposed Rule Change at 24–28 ("Bloomberg Statement") (Mar. 17, 2020) (corrected).

bond-reference data service or leverages its data service to benefit features of the Bloomberg Terminal service. *See* Bloomberg Motion for Leave to Adduce Additional Evidence ("Mot.") at 5–10.

Nevertheless, FINRA told the Commission its proposal would "provide … data as a public market utility … to anyone who chooses to receive it" in lieu of the entrenched "dominant private data vendor" (Bloomberg), which "has refused to license data … for anti-competitive reasons." FINRA Statement at 2. This supposed dynamic—FINRA rescuing the market from a dominant vendor—thus emerged as FINRA's new justification for the burden on competition its subsidized service would undoubtedly cause. *Id.* at 29. Notably, the Division of Trading and Markets had not relied on this theory.

In response to FINRA's late-breaking assertions, Bloomberg moved under Rule 452 to offer evidence refuting FINRA's latest position. Bloomberg asked leave to submit two declarations: one from David Miao demonstrating that Bloomberg does not use data entered into its new bond issue functionality as a source for its corporate bond reference data; and one from Mark Flatman explaining that Bloomberg does not restrict access to its bond reference data service in an anticompetitive manner to help its electronic corporate bond trading service. In short, Bloomberg does not engage in the anticompetitive behavior of which FINRA accused it.

Crucially, FINRA's opposition to the Motion does not deny that FINRA changed its position in the March 16 filing, and does not deny that allegations of anticompetitive conduct now provide the core support for FINRA's proposal. *See* Mot. 5–7. Instead, FINRA offers two arguments in response to the motion: Bloomberg's evidence is not timely and not material. Opp. 1. The fundamental flaw in FINRA's approach, however, is its unwillingness to acknowledge a self-regulatory organization's burden to support regulatory intervention with reasoned explanation

and evidence. *See, e.g., In re BOX Exchange LLC*, Rel. No. 88493, at 9–10 (Mar. 27, 2020). The Opposition, by contrast, asserts that "Bloomberg suggests the Proposal cannot be approved without an affirmative finding that Bloomberg is presently benefitting from anti-competitive conduct." Opp. at 2. This has it backwards: this proceeding has always turned on *FINRA's* inability to support an affirmative Commission finding that the proposal offers a cost-justified and well-reasoned regulatory intervention in a competitive market. Mot. at 1–2.

ARGUMENT

1. As to timeliness, Bloomberg's motion is justified by FINRA's change in position. *See* Mot. at 5–7. FINRA's principal response is to change the subject from its own reasoning in 2020 to the contents of a FIMSAC meeting transcript from 2018. To be sure, FINRA's latest statement cited comments (albeit inaccurately, *see* below at p. 6 n.3) that appeared in the FIMSAC record. But what is relevant is not the mere existence of remarks to FIMSAC (which is not the rulemaking body, after all), but the justification FINRA offers based on that record. That justification now rests on allegations of anti-competitive conduct that did not appear in FINRA's proposal or the Division's Order. FINRA tries to pour this new wine into old skins by citing the 2018 FIMSAC meeting. But incanting "*FIMSAC expressed*…," *see* Opp. 4–5, 9, cannot insulate what *FINRA said* from rebuttal. Indeed, the statements that FINRA loosely ascribes to "FIMSAC" were in fact merely the remarks of individual speakers representing private firms on a panel—not the conclusions of FIMSAC or even the statements of committee members. *See* FINRA Statement at 8.

The reality is that before March 16, 2020, FINRA had never attempted to justify its proposal based on the allegation that "a dominant private vendor's ability to restrict access to new issue reference data has immediate and direct downstream impacts on the ability of other market

participants to perform critical market functions ....” FINRA Statement at 2–3. This fully explains the timing of Bloomberg’s motion to adduce new evidence. *See* Mot. at 5–7. FINRA drew improper inferences and offered new justifications at the Commission-review stage that hadn’t previously featured in its reasoning. That it did so citing statements that were in some sense already part of the record is beside the point; FINRA still drew belated and improper inferences from the record, which Bloomberg is entitled to rebut. It is not the Commission’s (or Bloomberg’s) task to comb the record for, and offer *pre*-buttal to, bits of evidence that FINRA might later decide support its action. Rather, the Commission’s role is to “‘critically evaluate the representations made and the conclusions drawn’ by the self-regulatory organization” in the actual proposal. *See In re BOX* at 8–9 (quoting Exchange Act Release No. 85121 (Feb. 13, 2019)).

2. As to materiality, FINRA again attempts to shift the focus to FIMSAC. But the Bloomberg declarants did not respond to FIMSAC commentators; they directly rebutted FINRA’s own March 16th submission to the Commission. David Miao refuted FINRA’s assertion that, because of Bloomberg’s access to bond reference data, “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.” FINRA Statement at 3.[2] Bloomberg’s reference data service, Miao explained, does not use the information that underwriters enter into the new bond issue features of the Bloomberg Terminal service. Miao Decl. ¶¶ 5–6. The Opposition does not

[2] FINRA’s leaps of market illogic undermine its case. It worries “that private vendors may gain access to new issue reference data before other market participants,” Opp. at 7, without explaining why speedy disclosure and dissemination of financial data is something to be avoided in the fixed-income context. It fears that “no regulatory obligations concern[] [vendors’] provision of that data to the marketplace,” *id.*, without making any case for common-carrier treatment of data vendors. And it frets that “a number of market participants are not reasonably able to gain access to reference data when bonds begin trading,” *id.*, without addressing the contrary empirical data repeatedly provided during this proceeding.

mention this central fact. The Miao declaration, therefore, offers directly contrary evidence on a factual question at the heart of the justification FINRA belatedly asked the Commission to endorse.

The Flatman declaration likewise rebuts FINRA's assertion that Bloomberg has exploited a dominant position or has withheld access to bond reference data for anti-competitive reasons. To be clear, these are FINRA's claims, not FIMSAC's; neither FIMSAC statement included the word "dominant," which the Opposition improperly attributes to FIMSAC *three times*.[3] Rather, FINRA asserted—for the first time in its March 16th submission—that a new bond reference data service was a necessary response to Bloomberg's anticompetitive conduct. The Flatman declaration unequivocally rebuts the assertion that Bloomberg withheld data on an anticompetitive basis, and gives plenty of counterexamples, explaining that Bloomberg has offered to widely license its reference data—including licensing competing trading services. *See* Mot. at 10; Flatman Decl. ¶ 6. FINRA faults the declaration for not going further and stating that Bloomberg operates like a common carrier, Opp. at 9, without offering any reason why that was required or why its absence would prove any market failure.

The reason for this new evidence, therefore, is to show that supposed anticompetitive conduct cannot provide the reasoned evidentiary support for FINRA's regulatory intervention, just as its earlier assertions regarding electronic trading could not. As a government-sanctioned self-

[3] FIMSAC never made the assertion regarding a "single dominant" vendor that FINRA ascribes to it. The March 16th submission cited page 4 of FIMSAC's June 2019 recommendation for the proposition that "a dominant private data vendor has refused to license data, or has withheld it selectively, for anti-competitive reasons." FINRA Statement at 2 & n.3. But FIMSAC referred to multiple "large reference data providers," and was arguing against using a private vendor in lieu of FINRA to provide the proposed new service. It made a prediction that some unnamed vendor might leverage a hypothetical government contract in the future, not a historical statement that a specific vendor had leverage its private market position in the past. *See* FIMSAC Recommendation at 4 (June 11, 2019). Correcting such a significant error is the very reason for public scrutiny of and input into SRO actions, and amply justifies Bloomberg's motion.

regulatory organization, FINRA is not entitled to dive into a new market—at the cost of its members and the compulsion of underwriters—unless its evidence and reasoning shows that the proposal is necessary and appropriate, does not unduly burden competition, and produces benefits that outweigh its costs. "The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements, must all be sufficiently detailed and specific to support an affirmative Commission finding." *In re BOX* at 9–10. The only way in which Bloomberg's declarations could be considered immaterial, therefore, is if FINRA were to walk away from its unsupported allegations of anticompetitive conduct.

In the end, FINRA's opposition is yet another symptom of its allergic reaction to data and evidence throughout this proceeding. FINRA began by expressing concerns about electronic trading of new issues. Bloomberg offered data showing the market was performing well, and FINRA moved on. *See supra* at n.1. FINRA announced arbitrary fees it attempted to base on an undescribed "regulatory utility" model. Bloomberg noted the lack of data supporting these fees, and FINRA abandoned them. *See* Bloomberg Statement at 24–28. The remaining rump proposal would incur major capital costs on behalf of FINRA's members, without any assessment of whether the costs are justified in reality. Now, FINRA has rested its proposal on remedying anticompetitive conduct, whose existence and effects FINRA only recently alleged and has never proven. Bloomberg offered directly responsive evidence, yet FINRA asks the Commission to follow its lead and simply pretend the evidence is immaterial.

FINRA cannot have it both ways. If it believes Bloomberg is engaged in anticompetitive distortion of the market for collecting and selling corporate bond reference data, then FINRA must acknowledge that Bloomberg's declarations are material evidence to the contrary. If it abandons this aspect of its March 16 submission, then FINRA is left with no justification for a government-

sanctioned compulsory data service that displaces existing competition. Regardless of FINRA's total failure to support its fees, its lack of a reasoned justification for this substantial regulatory intervention is grounds enough for the Commission to grant the motion and disapprove FINRA's proposal.

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CERTIFICATE OF SERVICE

I certify that on April 29, 2020, copies of Bloomberg's Reply in Support of its Motion to Adduce Additional Evidence were served by electronic mail and by facsimile on the following recipients:

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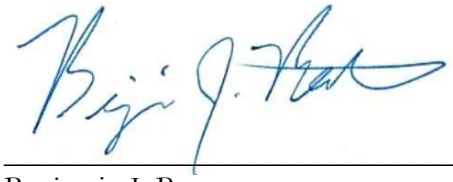

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