RECEIVED
DEC 30 2019
OFFICE OF THE SECRETARY

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of the Application of: BLOOMBERG L.P.	Admin. Proc. File No. ___ Release No. 87656

Petition of Bloomberg, L.P. for review of an Order, taken by delegated authority, granting approval of a Proposed Rule

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

PETITION FOR REVIEW

Under SEC Rules of Practice 430 and 431, Bloomberg, L.P. ("Bloomberg") hereby asks the Commission to review and reverse the decision of the Division of Trading and Markets, issued on December 4, 2019, Exchange Act Release No. 87656 ("Order"). The Division issued this Order pursuant to delegated authority, 17 C.F.R. § 200.30-3(a)(12), approving a proposal by FINRA (the "Proposal") to establish a new issue corporate bond reference database. *See* File No. SR-FINRA-2019-008, Exchange Act Release No. 85488 (Apr. 2, 2019) ("*Notice*").

I. INTRODUCTION

This petition concerns a self-regulatory organization's attempt to use regulatory authority to compel, centralize, and sell bond-reference data that competitive private vendors currently offer in the marketplace. FINRA proposed a new compulsory bond-reference data service that rests on vague concerns about "leveling the playing field" for vendors and making the market more conducive to electronic bond trading. The Division's Order, however, declined to find barriers to entry for vendors *or* a negative impact on electronic trading caused by lack of information. That is undoubtedly due to the unrebutted evidence set forth by Bloomberg and other commenters showing a competitive bond-data marketplace and a significant expansion of the electronic fixed-income trading marketplace.

The Order nevertheless approved FINRA's attempt to replace this competitive marketplace with a "regulatory utility." Order at 53. That Proposal would allow FINRA to acquire, through coercion, more than 30 bond-reference data fields simply because FINRA orders underwriters to surrender them. FINRA would then re-sell that information, at prices not subject to competitive forces, to its regulated broker-dealers, traders, and the public. Other data suppliers, by contrast, must attract bond-reference data by providing an accurate, attractive, and price-competitive data platform for issuers to reach investors.

Crucially, FINRA has not offered any information on its fees, costs, or margins—all of which market participants would bear. This silence itself makes the Proposal improper. The Division could not possibly have assessed the costs of the Proposal, as the Exchange Act required it to do, without any evidence of the cost of FINRA's new data service. And, lacking that information, the Order simply declined to determine whether the Proposal complied with the Exchange Act's express statutory requirement that fees and costs be reasonable and equitably allocated.

The Order therefore fell short of the Commission's responsibility, imposed and reaffirmed by Congress and the courts, to critically assess that Proposal, its factual support, and its economic consequences. Instead, the Division trusted FINRA's unsupported speculation, failed to confront contrary data, and ignored important costs and repercussions, all because the Order accepted at face value FINRA's assertion that its data service will be a "regulatory utility"—as if a single regulator supplanting competing providers is presumptively a good thing.

The Order was unnecessary. The expansion of private market-data and electronic-trading services are already achieving—without compulsion—FINRA's policy aims. That reality undermines the notion that a lack of timely access to bond-reference data has stunted the fixed-income marketplace. The Order was also premature: FINRA concedes it cannot implement the service until the Commission reviews and approves a fee structure that no one has yet seen. Therefore Bloomberg, whose competing data service would suffer directly from FINRA's incursion into the private marketplace, respectfully asks the Commission to review and reject the Proposal. In the alternative, Bloomberg requests that the Commission 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.

II. FINRA's (Amended) Proposal

On October 29, 2018, the Fixed Income Market Structure Advisory Committee ("FIMSAC") considered a preliminary recommendation from its Technology and Electronic Trading Subcommittee on the collection and dissemination of corporate bond new issue data. 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 meeting featured members of the subcommittee and panelists chosen specifically for the topic, including representatives from FINRA and two vendors that compete with Bloomberg's successful bond-reference data service (ICE Data Services and Refinitiv). *See* FIMSAC Agenda (Oct. 29, 2018), *available at* https://www.sec.gov/spotlight/fixed-income-advisory-committee/fimsac-agenda-102918.htm. Bloomberg was not involved as a panelist or as a member of FIMSAC. While some vendors expressed support for a FINRA new-issue reference service, FINRA's own representative acknowledged this could not be accomplished through the existing TRACE system and would instead require new reporting, validation, and distribution infrastructure. *See infra* at n.20 (quoting FINRA's Ola Persson). 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), https://www.sec.gov/spotlight/fixed-income-advisorycommittee/fimsac-corporate-bond-new-issue-reference-data-recommendation.pdf.

Months later, FINRA submitted a proposed rule to implement a new data service. FINRA, "Proposed Rule Change to Establish a Corporate Bond New Issue Reference Data Service (Mar. 27, 2019), *available at* https://www.finra.org/sites/default/files/rule_filing_file/SR-FINRA-2019-008.pdf ("*Initial Proposal*"). FINRA identified two specific benefits. *First*, FINRA asserted that the current arrangements for market data led to inefficiencies in trading. "Incomplete new issue reference data," FINRA said, "prevents traders from identifying and evaluating newly issued bonds for trading." *Id.* at 15. FINRA did not provide any statistics or trade data, but cited a discussion with one anonymous trading platform which said that an anonymous data provider "would only provide data relating to new issues the morning after issuance." *Id.* at 15 n.16. FINRA's proposal did not explore why a data provider would anger its clients that way, or why the unidentified trading platform had not switched its business to a different provider. FINRA noted (again without support) that "reference data completeness" varies among different providers. *Id.* at 15. According to the proposal, "small traders who cannot afford multiple data providers" are therefore at an (unspecified) disadvantage. *Id.* (not citing any input from small traders).

Second, FINRA took aim at existing vendors by claiming that its new data service would "promote fair and reasonable pricing for reference data by introducing an alternative source in addition to what is provided by the incumbent data providers." *Id.* at 18. FINRA did not assess current pricing, however, or explain why that would not be "fair and reasonable." Instead, FINRA asserted that offering bond reference data is "complex" and presents a "relatively high barrier to entry." *Id.* at 19. It did not assess the scale or nature of the investment required, or any recent entrants into the market, despite the fact that FINRA itself proposed to undertake just such an investment.

In short, FINRA posited a "gap" in access to timely, accurate, and comprehensive data for new corporate issues, and proposed to fill that alleged gap by taking over the market. Its Proposal would have required underwriters to submit a substantial amount of data to FINRA before the initial offering of a TRACE-Eligible Corporate Debt security. *Id.* at 59. The Proposal also would have authorized FINRA to sell this data back to market participants at a FINRA-prescribed fee: $250 per month for a subscriber that does not disseminate the data, and $6,000 per month for a subscriber that does. *Id.* at 60–61. The stated reason for the "cost plus margin" fee was the need "to meet ongoing operating costs." *Id.* at 13.

Many commenters, including Bloomberg, Healthy Markets, Heritage Foundation, the U.S. Chamber of Commerce, the Committee on Capital Markets Regulation, SIFMA, and others responded with arguments and evidence showing that the Proposal was (at least in part) unnecessary, counterproductive, and unlawful. In July, the Commission instituted proceedings to determine whether to approve the proposed rule change, and commenters again filed critical responses. Neither FINRA nor anyone else offered a rebuttal during the Commission-designated window. Then, on the eve of the Commission's October deadline to approve or deny the proposal, FINRA submitted a "partial amendment" that purported to "withdra[w] the fees proposed in the current Proposal," noting that "a separate proposed rule change will be filed to establish fees related to the corporate bond new issue reference data service at a future date prior to implementing the service." FINRA, Amendment No. 2 to Proposed Rule Change, p.4 (Oct. 3, 2019), *available at* https://www.finra.org/sites/default/files/2019-10/sr-finra-2019-008-amendment2.pdf ("*Amendment*").

The Division of Trading and Markets, acting pursuant to delegated authority, approved FINRA's Proposal (as amended) in a December 4th Order. Order at 55. That Order accepted FINRA's position that a "regulatory gap" existed for market participants seeking new-issue bond-reference data. But it did not find that regulatory intervention was necessary to overcome high barriers to entry among market-data suppliers or, as FINRA had suggested (*Initial Proposal* at 19), "exert disciplinary pressure on the current pricing for the data." The Order merely 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. Nor did the Division's Order conclude that the Amended Proposal imposed reasonable fees and costs under the Exchange Act—a required determination rendered impossible by FINRA's decision to withdraw and resubmit its proposed fees. *See id.* at 26 (finding compliance with § 15A(b)(6) and (b)(9), but not (b)(5)).

III. Standing

Bloomberg is a "person aggrieved" by the Order, and thus permitted to seek the Commission's review under Rule 430. Bloomberg is in the business of gathering corporate bond reference data from underwriters and other market participants, organizing and correcting that data, and disseminating it in a useful form to investors and broker-dealers. FINRA acknowledged that if the Proposal takes effect, underwriters may cease or diminish providing such information directly to data providers like Bloomberg. *See Notice* at 18 (Apr. 2, 2019) ("[R]eporting to FINRA would reduce or eliminate the need for underwriters to report to other parties."). Indeed, FINRA relied on that assumption to balance the cost of the rule to underwriters: their increased costs of reporting to FINRA would allegedly be offset, at least in part, by savings from no longer reporting information to existing vendors. Order at 45. Some vendors supported the Proposal, noting it could benefit them competitively relative to others like Bloomberg. *See* FIMSAC Transcript at 78:5-8 (Oct. 29, 2018) (comment of Refinitiv).

Any such loss would amount to a harm to Bloomberg that flows directly from the Division's decision to approve FINRA's proposed rule. It is a harm that the Exchange Act directs FINRA (and the Commission in approving FINRA's rules) to avoid. *See* 15 U.S.C. § 78o-3(b)(6) (FINRA rules must "foster cooperation and coordination with persons engaged in . . . processing information with respect to . . . transactions in securities"). Worse, FINRA's rule is openly intended to supplant the business of data vendors with what the Division calls a "regulatory utility." Order at 53. "[A]n actual or imminent increase in competition . . . will almost certainly cause an injury in fact" sufficient to confer standing. *Am. Inst. of Certified Pub. Accountants v. IRS*, 804 F.3d 1193, 1197 (D.C. Cir. 2015); *see also In re SIFMA*, Exchange Act Release No. 72182, ¶¶ 26-27 (May 16, 2014) (assessing standing under Exchange Act § 19(d) by analogy to Article III standing cases).

IV. STANDARD FOR GRANTING THE PETITION

The Division approved FINRA's Proposal as an exercise of authority delegated under Rule 200.30-3. Order at 55 (citing 17 C.F.R § 200.30-3(a)(12)). SEC Rules 430 and 431 provide for Commission review of such decisions. 17 C.F.R. §§ 201.430 and 201.431. Under Rule 411(b)(2)(ii), the Commission may grant review of a decision that embodies: (1) "[a] finding or conclusion of material fact that is clearly erroneous;" (2) "[a] conclusion of law that is erroneous;" or (3) "[a]n exercise of discretion or decision of law or policy that is important and that the Commission should review." 17 C.F.R. § 201.411(b)(2). The Commission reviews a Division order de *novo.* § 201.411(a).[1]

The Division's decision, and the Commission's review of it, will be reversible if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Commission should assess whether the Division "examine[d] the relevant data and articulate[d] 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) (internal quotation marks omitted). Similarly, "substantial 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). *See Koch v. SEC*, 793 F.3d 147, 151–52 (D.C. Cir. 2015) ("such relevant evidence as a reasonable mind might accept as adequate to support a conclusion").

The Exchange Act requires the Commission to determine, before approving a proposed FINRA rule, 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. Before the Commission, FINRA bears the burden of proving the Proposal Rule satisfies those requirements. 17

[1] The Commission has made clear that even though a clear error of fact is among the factors that might warrant review, the Commission's review when undertaken is *de novo* even on factual matters. *In re Secs. Indus. & Fin. Markets Ass'n*, Exchange Act Release No. 84432, p.18 (Oct. 16, 2018).

C.F.R. § 201.700(b)(3); *In re BOX Options Exchange LLC*, Release No. 34-84168, at 7 (Sept. 17, 2018). FINRA'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."). Instead, 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).

The Commission's Order Instituting Proceeding in this matter 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).

First, the 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." 15 U.S.C. § 78o-3(b)(5). Meeting this standard requires more than mere "unsupported declarations." *In re Bloomberg*, Exchange Act Release No. 34-83755, pp. 14-16 (July 31, 2018).

Second, the Proposal must also "promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market, and, in general, protect investors and the public interest." 15 U.S.C. § 78o-3(b)(6).

Third, the Proposal must "not impose any burden on competition not necessary or appropriate in furtherance of the purposes" of the Exchange Act. *Id.* § 78o–3(b)(9). In assessing these public-interest 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. To do so, the Commission must estimate and compare the costs and benefits of a proposed rule. *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).

V. Reasons for Granting the Petition

A. FINRA's creation of a mandatory bond-data "utility" represents an "exercise of discretion or decision of law or policy that is important and that the Commission should review."

The Order addresses a policy question of great importance to U.S. capital markets: whether an SRO may use coercive regulatory power to displace private-sector service providers with a "regulatory utility," despite robust bond-data competition and the lack of any market failure. FINRA's attempt to offer a bond reference-data service for new corporate issues would represent a substantial expansion of its role in the marketplace, even setting aside the coercion it would use to acquire data and the fees it would charge market participants to distribute the data. Today, market participants receive that information from a variety of vendors and broker-dealers. The Division has authorized FINRA to replace those sources with a single, centralized source, relying on an unbuilt data platform of unknown costs and dubious accuracy.

That novel plan—and its associated disruption to corporate bond markets—should not go forward without the full Commission's consideration. Regardless of the Order's legal and factual errors, the expansion of FINRA's role would undoubtedly carry significant consequences, some known and others unknown. This alone would amount to an "exercise of discretion or decision of law or policy that is important and that the Commission should review." Rule 411(b)(2)(ii)(C).

The corporate-bond market, after all, is enormous. In recent years, annual new corporate issues have exceeded 2,400 TRACE-eligible offerings, together worth more than $1.4 trillion. *See*

SIFMA, "Fixed Income Issuance," *available at* https://www.sifma.org/resources/research/fixed-income-chart/. Detailed and dynamic information about those bonds is necessary to sell them into the market and execute trades. FINRA's ambitious Proposal, however, inserts the primary regulator of broker-dealers—twice—in every new TRACE-eligible issue: once on the front end taking information with the underwriter, and again on the back end distributing it to vendors and traders. In the process, FINRA's yet-to-be-designed system (theoretically a more complex and time-sensitive extension of TRACE, whose high error rate for simpler data has never been rebutted or explained) would create a single, centralized point of failure for bond-reference data. The issuers, underwriters, vendors, broker-dealers, and traders who would depend on that system employ millions of Americans and ensure access to capital for millions more. No wonder that so many voices—Healthy Markets, the Heritage Foundation, the U.S. Chamber, SIFMA, the Committee on Capital Markets Regulation and other academics and commentators—criticized various aspects of the Proposal.

B. The Order embodies erroneous conclusions of law and clearly erroneous **conclusions of material fact.**

Even if the stakes for market-structure policy weren't so high, the Order below included numerous legal and factual errors that independently warrant the Commission's review. Most of those errors flow from a single erroneous premise: that a supposedly benign entry by a "regulatory utility" into the private bond marketplace would not crowd out private competition, investment, and innovation.

FINRA's Proposal, however, would encroach on existing providers by offering a sole-source data service that can compel submission of reference data, not compete for it. An agency whose mandate is to promote competition, *see, e.g.*, Exchange Act § 15A(b)(6), should presumptively respect competing market-based services. FINRA therefore should face a high threshold for supplanting market-based services with a government-sanctioned utility. The Division, however, went the other direction by ***lowering*** the standard for intervention precisely because FINRA proposed a regulatory monopoly. Order at 53. Despite the evidence and law indicating FINRA cannot satisfy the Exchange Act's requirements for this sort of intervention, the Division approved the Order "based on the understanding" that it would be modeled as a "regulatory utility." *Id.*

This utility-model concept, however, remains amorphous and undefined. Numerous errors of law and fact continue to afflict it. The Division made no finding, for example, that FINRA's unannounced fee structure satisfies Exchange Act § 15A(b)(5)—a required criterion for Commission approval. The Division also purported to assess the competitive impact of the Proposal, under § 15A(b)(6), but never acknowledged the most significant effect on data providers—the loss of their existing business regarding corporate bond reference data. Nor could the Order include a reasonable assessment of costs and benefits by considering its upside alone. *See* Exchange Act § 15A(b)(9). These concerns amply warrant the Commission's review under Rule 411(b)(2)(ii).

1. By omitting fees, the FINRA Order precluded Commission approval under § 15A(b)(5).

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. Proposal at 13. 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 at n.21, particularly in light of recent Commission rulings, litigation positions, and staff guidance.[2]

[2] *See, e.g.*, *In re SIFMA*, Release No. 34-84432 (Oct. 16, 2018); *In re BOX*, Release No. 34-85459 (Mar. 29, 2019), at 23; Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019). Even if FINRA's revenue proves lower than its costs, moreover, section 15A(b)(5) would not permit FINRA to undercharge bond-reference data customers thanks to a subsidy from fees paid by other market participants.

Rather than respond with data and reasoning, however, 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 simply accepted the truncated Proposal on this basis. Lacking any information about costs or fees, the Order sidestepped the Commission's obligation to find that the Proposal's costs and fees would be reasonable—and then approved the Proposal anyway. That decision was wrong for at least four reasons.

a. The Order failed to make a statutorily required finding that fees and costs are reasonable and equitably allocated. Under § 15A(b)(5), the Commission cannot approve the Amendment because FINRA has not "provide[d] for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which FINRA operates or controls." 15 U.S.C. § 78o-3(b)(5). According to the Order Instituting Proceedings in this case, "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).[3] 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) and, as relevant, (b)(6) and (b)(9). § 78s(C).

The FINRA Order erred in purporting to approve the Proposal without making the required finding regarding FINRA's fees. To the extent the Order suggests that requirement applies only to a

[3] The Order (at pp. 7–8) provided that:

> "In particular, 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, which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues fees and other charges among members and issuers and other persons using any facility or system which FINRA operates or controls . . . ."

"proposed fee filing," Order at 52, it is wrong. 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). On its face, therefore, the Order violates § 15A(b)(5) by failing to offer any assessment or finding regarding the new fees.[4] (The Order is also necessarily arbitrary and capricious based on that failure to confront an important aspect of the problem. *See, e.g., State Farm*, 463 U.S. at 43.) On this basis alone, the Order violates the plain terms of the Exchange Act and cannot be approved.

b. The Order improperly relied on an SRO's unsupported and self-interested representations. The Order's fee consideration erred for the independent reason that it placed unquestioning reliance on FINRA's representation that its future fee structure would reflect a "regulatory utility" model. Order at 53 ("FINRA has stated that the proposal was modeled as a regulatory utility."); *see also id.* at 18, 54.[5] Indeed, by the Division's own admission, 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. It was only "based on that understanding" that the Commission could "fin[d] that the proposal is consistent with the Act." *Id.*

This is far too slender a reed on which to rest so significant an expansion of FINRA's intrusion

---

[4] 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 (often inefficient and subject to review for this very reason) are automatically reasonable and equitably allocated. The Order simply reflected no information on this point at all.

[5] FINRA's latest Oct. 29 submission, however, used this term only once. Ellenberg letter at 10. Notably, FIMSAC and FINRA originally proposed "commercially reasonable" fees based on "cost plus margin" pricing. *See* Test 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

into the marketplace. FINRA's "mere assertion" that the prices will be based on its own cost "is not sufficient," 17 C.F.R. § 201.700(b)(3), as evidenced by the Commission's recent and repeated (and correct) refusals to approve fee filings that lacked evidentiary support.[6] *See, e.g.*, *In re BOX*, Release No. 34-85459, at 12, 22–23 (Commission "cannot have an 'unquestioning reliance' on an SRO's representations in a proposed rule change") (quoting *Susquehanna*, 866 F.3d at 446–47).

c. By segregating and delaying the fee justification, the FINRA Proposal would risk imposing immediately effective fees on unwitting market participants before Commission approval. Approving a fee-dependent order without knowing the fees is problematic for a separate procedural reason: it potentially allows SROs to impose "immediately effective" fees before they have been scrutinized by the Commission or even noticed to market participants. The careful wording of FINRA and the Order are noteworthy here: "FINRA stated that any new fees would be *filed with* [not approved by] the Commission *in advance of the implementation* [not after the notice-

---

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. Suffice it to say, neither FINRA nor the Order offered any argument that FINRA can lawfully claim a "margin" on its sale of data commandeered from its regulated members and re-sold to many of those same members.

Whatever the "regulatory utility" model might ultimately resemble, it must at a minimum include information regarding the cost of building and operating a new reference data service (not to mention underwriters' costs of infrastructure and compliance, which may be incurred even before any fee filing). To date, FINRA has not offered the roughest approximation of that cost. If they are high—exceeding what the market will bear in fees or what FINRA's operating budget will support—it is hard to imagine FINRA ever surviving the Commission's cost-benefit review. And under Commission and D.C. Circuit precedent, the Commission cannot approve the program without cost information: as with the 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.

[6] *See, e.g.*, *In re Bloomberg*, Release No. 34-83755 (July 31, 2018), at 14–16; *In re SIFMA*, Release No. 34-84432 (Oct. 16, 2018), at 17–54; *In re BOX*, Release No. 34-85459 (Mar. 29, 2019), at 23. FINRA's proposal certainly fared no better. *See, e.g.*, *In re BOX*, Release No. 34-85459, at 12, 22–23 (Commission "cannot have an 'unquestioning reliance' on an SRO's representations in a proposed rule change") (quoting *Susquehanna*, 866 F.3d at 446–47).

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, the fees would have been subject to the Commission's regular approval process *before* implementation. But by segregating the fees and taking advantage of the "effective-upon-filing" provision for market-data fees,[7] FINRA could potentially impose entirely new fees without any affirmative SEC approval: the fees could take effect immediately and persist unless the Commission intervened to suspend them.

As the Commission has recognized in the context of SIP fee filings under Rule 608, this effective-upon-filing regime has pernicious effects.[8] Nor are those mitigated by the mere opportunity for payors to participate in a notice-and-comment process whose default allows the fees to remain in effect absent Commission intervention. In a practical sense, the burden of action would now fall on the Commission and objecting market participants, not on FINRA.[9] A world of difference separates

[7] 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." This uncertainty embedded in both FINRA's Proposal and the Division's Order is itself a question justifying the Commission's review of this unorthodox proceeding.

[8] *See* Notice of Proposed Rulemaking, *Rescission of Effective-Upon-Filing Procedure for NMS Plan Fee Amendments* (Exchange Act Release No. 34-87193; File Number S7-15-19).

[9] Although the legal burden for justifying a fee filing technically remains with the SRO, Order at 51, the practical burden changes significantly under "Rule 608's immediate-effectiveness regime," which "effectively flips that burden." Comment letter from G. Babyak, Release No. 34-87193 (Dec. 10, 2019). As Bloomberg 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.

Id. (citations omitted). FINRA's strategic omission could achieve the same result here.

affirmative Commission approval before a new fee takes effect, on the one hand, and FINRA's mere obligation not to "charge fees for the proposed data service until the Commission *receives a proposed rule change that complies with the Act and Commission rules* concerning proposed fee changes." *Id.* at 50 (emphasis added). SROs surely always believe their fees comply with the Act when submitted, but that has not stopped the Commission from disagreeing when put to the question. *See infra* nn.2, 5 (collecting examples). 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.

Gerrymandering a decision to avoid its most costly and controversial component is plainly not what the law demands of agencies in reviewing and justifying their actions. The D.C. Circuit's recent decision in *Carlson v. Postal Regulatory Commission* illustrates the point. No. 18-1328, 2019 U.S. App. Lexis 27630 (D.C. Cir. Sep. 13, 2019). Lacking a contemporaneous justification for a rate hike, the Commission contended it could satisfy the statute "by deferring consideration of the statutory factors and objectives" until a later time. This flipped the burden in the favor of the agency and against the rate-paying public: "post-implementation review of rates shifts the burden of proof to the public to demonstrate the unreasonableness of rates that have already been adopted, instead of requiring the Commission to demonstrate through reasoned rulemaking that its proposed rates comply with the APA . . . ." *Id.* (citing *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 433 (D.C. Cir. 1980)) ("[A]n initial burden of promulgating and explaining a non-arbitrary, non-capricious rule rests with the [a]gency."). No justification supports the Commission tolerating this apparent gamesmanship.[10]

[10] As the Commission knows, some SROs have reimposed "immediately effective" fee increases even after a suspension order. *In re BOX,* Release No. 34-85459 (Mar. 29, 2019).

d. The Order could not adequately assess the Proposal's costs and benefits without crucial fee and cost information. By withdrawing the fee portion of the rule in the face of criticism, FINRA effectively conceded that it has not and cannot justify the fees on the record. FINRA is trying to claim all the benefits and none of the costs of its new data service. For the Commission to assess whether the asserted (though highly contested) benefits of the proposed rule would outweigh the costs and competitive burdens, the Commission must at least estimate and analyze those costs. Otherwise, this one-sided approach would deem any proposal a win. 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 by now necessary to sustain an already approved program. *See, e.g.*, *Business Roundtable,* 647 F.3d at 1148. Along with crediting the alleged benefit of any expanded data access, it must take account of its costs as well. Without that, the Commission cannot conduct a rational assessment under clause (5), (6), or (9), or a rational cost-benefit analysis under section 3(f).

This is antithetical to the most foundational principles of administrative law and cost-benefit analysis. That inconsistency is fatal to any effort FINRA might make to justify its charges. As in *Business Roundtable v. SEC*, the Division's failure to "apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation" renders the Orderarbitrary and capricious. 647 F.3d 1144, 1148 (D.C. Cir. 2011) (citing *Chamber of Commerce v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005)). And like *Business Roundtable*, here the Division has "inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters." *Id.* at 1148-49.

* * *

Data fees for bond reference information is unquestionably an essential part of the FINRA Proposal: FINRA itself said they were necessary "to meet ongoing operating costs." *Initial Proposal* at 13. The Amendment underscored that point; FINRA said it will not to implement the reference data service until "after those fees are adopted." *Amendment* at 4. Yet as approved by the Division, FINRA's new rule states only that underwriters must provide data to FINRA (and, in the meantime, prepare the infrastructure to do so, without knowing whether and when the service will take effect). No one can access the data (the entire point of the Proposal) unless and until FINRA sets a rule saying how that will happen and at what cost.

If FINRA will not implement the service yet anyway, there is no need to approve the Proposal now in its provisional form. Given the volume of comments critical of FINRA's cost-plus pricing, it is entirely plausible that the Commission could see a second proceeding and potential appeal inextricably intertwined with this Order. At a minimum, therefore, the Commission should grant this petition and hold the proceeding in abeyance pending submission of a fee proposal the Division deems acceptable. At that time, the Commission will have a fully formed proposal before it. If, as the Division apparently believes, fee information is necessary for assessing compliance of the rule with § 15A(b)(5), the Commission will then have that information. Until that time, however, the question remains unripe, and the Commission has no need or basis to approve part of the program in advance. FINRA has advanced no reason or precedent why the Commission can or should approve its Proposal now that its fee component has been jettisoned until some unspecified time before the Proposal would take effect. Response at 11–12.[11]

---

[11] Regardless of any justifications for adopting this roundabout approach to fee filings by the not-for-profit FINRA (which has articulated none), approving it would set a worrisome precedent that could be exploited by other for-profit SROs filing fees under the same Rule 19 standards. *See* Peirce, The Financial Industry Regulatory Authority: Not Self-Regulation after All, Mercatus Working Paper (Jan. 2015), *available at* https://www.mercatus.org/system/files/Peirce-FINRA.pdf (describing FINRA's

2. The Order violated § 15A(b)(6) because the Proposal does not promote equitable trade or foster cooperation in the handling of market information.

FINRA's rules must "foster cooperation and coordination with persons" engaged in the securities markets; "remove impediments to and perfect the mechanism of a free and open market and a national market system"; and, "in general, . . . protect investors and the public interest." 15 U.S.C. § 78o-3(b)(5). Unless the Commission affirmatively finds that an amendment accomplishes these objectives, the Proposal "must be disapproved." 15 U.S.C. § 78s(C).

Bloomberg and other commenters raised at least four critical deficiencies of the Proposal under § 15A(b)(6). FINRA failed to demonstrate a market failure limiting timely access to accurate data; it failed to explain why its centralized data service, based on the error-riddled TRACE system, would outperform market competition; it ignored data showing electronic trading is rapidly expanding without regulatory intervention; and it failed to acknowledge the conflict between roles as a private data vendor and public market regulator.[12] In response, the Order asserted the Proposal would "provid[e] all market participants with basic information concerning a newly issued bond," "improve the corporate bond market's overall function by enabling a broader array of market participants and service providers to engage in this market," and do so "on the day a newly issued corporate bond begins trading in the secondary market." Order at 28. These high-level hopes are fit for Pollyanna, not

high revenues, balance sheet, and expenditures) ("Concerns about FINRA's lack of accountability loom even larger as FINRA seeks to regulate additional facets of the financial markets…").

[12] Bloomberg presented data regarding alternative trading system ("ATS") trading on pricing day to show that electronic trading platforms can already readily 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.

a public regulator. On each point, the Order rests on serious legal and factual errors that demand the Commission's review.

a. No market failure justifying a coercive regulatory utility. Neither FINRA nor the Order disputes the reality that multiple private-sector companies already provide FINRA's proposed "new" service: gathering information about new corporate bond issues, organizing the information into useful databases, and distributing the information to users (especially bond traders). These companies (like Bloomberg, ICE Data Services, Refinitiv, IHS Markit, and others, including new entrants like DirectBooks[13]) are clearly "engaged in . . . processing information" regarding securities transactions under § 15A(b)(6). The crucial difference between their service and FINRA's proposal is that vendors obtain information through voluntary interactions in the marketplace, while FINRA proposes to mandate that underwriters submit it in a government-mandated format at a government-mandated time. FINRA therefore has the burden to prove—and the Division had to determine—that FINRA's coercive rule would appropriately cooperate and coordinate with (rather than supplant) existing consensual data services.

Instead, the Order makes only a very limited claim: FINRA's outreach to anonymous, cherry-picked market participants "lends credence" to its assertion that access to "accurate, complete, and timely" data on the date of issuance "may be lacking." Order at 33. The Order includes no discussion of whether and how existing data providers are already seeking to provide the market with this data, nor did it acknowledge how laying a quasi-public utility atop those services would "foster cooperation" with them. The Order repeatedly asserts a purported need for a "uniform source" of accurate data, but never explains why uniform (as opposed to accurate and accessible) data is necessary or desirable in a competitive market. It never unpacks, for instance, why the interests of underwriters seeking to

[13] *See* https://www.businesswire.com/news/home/20191011005089/en/Global-Bank-Consortium-Creates-Capital-Markets-Syndication.

sell newly issued bonds are not already aligned with the interests of vendors seeking to provide bond information to the broker-dealers the underwriters want to buy those bonds.

All that supports the Order's acceptance of FINRA's purported "regulatory gap"[14] are anecdotal comments from market participants, many of whom compete with Bloomberg's successful data offerings. *See* Order at 33. These self-interested anecdotes, however, are not evidence that can support reasoned agency decisionmaking.[15] 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). The Division reliance on FINRA's report of its "outreach" is exactly the same sort of error that the D.C. Circuit criticized. That FINRA framed its position as a curated summary of "outreach" to preferred respondents renders it no more reliable.

[14] The idea of a "regulatory gap" is misnomer. FINRA wishes to sell, not regulate, bond data. In any event, merely noting the absence of a requirement that underwriters submit new corporate issue data to a central source just begs the question. *See Am. Equity Life*, 613 F.3d at 177–78 ("[S]aying that there was not a regulation in place . . . cannot justify the adoption of a particular rule based solely on th[at] assertion . . . .").

[15] 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.*

b. The Order ignores recent data indicating electronic bond trading is flourishing under the current regime. Indeed, the most recent data before the Commission (from 2019) indicates the bond-trading market is already headed in the direction FINRA supports—without its intervention. The Order's assertion that "many market participants . . . do not have accurate, complete, and timely access" to new-issue information, Order at 27–29, is belied by unrebutted data and reporting showing rapidly expanding electronic bond trading. The market's particular need for data facilitating electronic trading was the principal justification for FINRA's initial claim that an information gap needed to be filled. *E.g.*, Order at 11 & n.40. Yet data set forth by Bloomberg, based on respected reporting and unrebutted by any data or evidence from FINRA, shows that such trading is already flourishing.[16] The Order allows FINRA to rely on opaque "outreach", anecdotes, and 2018 data to justify this rulemaking. These flaws demonstrate the value of the Commission's pursuit of data-supported rulemaking.[17] In this case, the 2019 data and reporting show a clear acceleration in the marketplace toward electronic trading of new issues.

FINRA did not submit evidence showing that lack of access to data is impeding trading. At best, it 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

---

[16] The Order offers no explanation of how its effort to supplant competition among bond-reference data providers with a "regulatory utility" consisting of a "single source" for data, Order at 31, 53, would serve FINRA's mandate to "perfect the free and open market," § 15A(b)(6).

[17] *See generally* U.S. Securities and Exchange Commission, "Our Goals" at Goal 3, available at https://www.sec.gov/our-goals; *see also* Chairman Jay Clayton, "Testimony on 'Oversight of the U.S. Securities and Exchange Commission' Before the United States Senate Committee on Banking, Housing, and Urban Affairs, *available at* https://www.sec.gov/news/testimony/testimony-clayton-2017-09-26 ("I believe that a thoughtful and methodical, data driven approach to market structure will help us fulfill our mission to protect investors, maintain fair, orderly and efficient markets and facilitate capital formation"); U.S. Securities and Exchange Commission, Press Release: SEC Proposes Transaction Fee Pilot for NMS Stocks, *available at* https://www.sec.gov/news/press-release/2018-43 (explaining that a rule proposal is "designed to generate data that will provide the Commission, market participants, and the public with information to facilitate an informed, data-driven discussion.").

reference data. FINRA Response at 6–7. Bloomberg demonstrated that FINRA's analysis is uninformative because FINRA used the wrong denominator, so that ATS trading represents a substantially larger proportion of first-day trading (in 2019, about 30% of first-day trades in issues sizable enough for an electronic platform) than FINRA suggested. Bloomberg July 1 letter at 5. The Order properly concluded that FINRA's analysis—the only concrete evidence it offered—was "not reflective of the market for newly issued corporate bonds as a whole." Order at 33 n.130. But the Order offered no basis for rejecting Bloomberg's evidence from more recent data, showing that a substantial and increasing amount of electronic bond trading occurs on the day of issuance, and analysis from Greenwich Associates showing explosive growth and record high market share in ATS electronic corporate bond trading overall.[18] Regardless of whether this ATS evidence "reflect[s] … the market … as a whole," such evidence directly rebuts FINRA's central claim that growth in electronic trading is hindered by a lack of essential access to bond reference data.

c. **The Order fails to address inaccuracies in FINRA's current data.** The Order also made a critical factual error in its assessment of FINRA's plan to run its own data service. The Proposal sought to give traders access to "reliable and timely" data. If FINRA's data service proves less accurate than current offerings, however, then the whole exercise—with its attendant disruption and cost to underwriters, traders, markets, and existing data providers—is for naught.

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-

[18] 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.

Mandated Corporate Bond Monopoly Will Not Help Quality" (Mar. 21, 2019)).[19] FINRA did not refute that evidence; instead FINRA said it was unable to provide a "meaningful response," Order at 19, and it 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 testimony to FIMSAC, moreover, FINRA had already acknowledged that its existing technology would not "lend itself very well" to the new data service and FINRA would "have some work to do" to develop a reliable data service. *See* FIMSAC Transcript at 87:18-89:1.[20] In sum, the record evidence demonstrates that for the one system of transaction data that FINRA does run, it has been unable to provide accurate and reliable data, it relies on vendors and underwriters to correct any errors, and it currently lacks any system to do better for new-issue data.

The Order did not deny the 20% error rate cited in the Tabb Study. Order at 49 n.168 (refusing to take account of TRACE error rates "whatever they may be"). Nor did it reject the criticism that

---

[19] This study sampled just three fields (Coupon, Maturity and 144A status) broadcasted in each morning's release of FINRA's full master file during April 2019; errors in these fields affected about 20% of the bonds issued the prior day.

[20] 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. It is set up on TRACE and anything that changes from there, we either source from a vendor or the underwriter calls us up to correct it. So, we would need to do that.
>
> "We would also ***need to create a separate distribution channel*** for this. And the reason being, today, since the only thing that really matters is that the security gets on TRACE, we actually do have contracts with vendors that allows us to take certain records or certain elements of records and incorporate those into the database and distribute that. 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." FIMSAC Transcript at 88–89 (emphasis added).

FINRA's system would risk creating a single point of failure. *Id.* at 47 n.162.[21] The Order simply accepted FINRA's promise to do better next time: to "engage with market participants on the appropriate business requirements for the reporting process," to "allow . . . underwriters to correct previously submitted data," and maybe to "take a phased approach to implementation." *Id.* In light of these promises, the Division "believe[d] that . . . FINRA is committed to establishing a reliable reference database." *Id.* In short, the Order chose hope over reality: the desire for a brand-new single-source system to deliver data that is ***more accurate*** than that provided by experienced vendors competing for market data. Nothing in the Order or in common sense supports this conclusion. Such credulity abandoned the Division's duty to grapple for itself with the contrary evidence. *See Susquehanna*, 866 F.3d at 449 (arbitrary and capricious to "accept OCC's claims at face value").

In any event, the notion that the Proposal is merely an incremental extension of TRACE is simply wrong. *Contra* Order at 17 & n.67 (describing FINRA views); *id.* at 45. The Order, in describing the supposed gaps in the bond-information marketplace, tacitly acknowledges this. *Id.* at 30 n.120 ("electronic trading platforms generally require more information to make new issues available to trade"). And the Order itself (at p. 46) acknowledges that the burden on underwriters will exceed that imposed by TRACE—though without responding to SIFMA's and IHS Markit's comments regarding the lack of any indication about how underwriters actually were to supply all this new data.[22] FINRA

---

[21] As discussed above, the Order's supposition that data vendors will continue operating parallel reference-data systems, Order at 47 n.162, directly contradicts its supposition that many underwriters will save money by reporting only to FINRA, *id.* at 45 ("reporting to FINRA would reduce or eliminate the need for underwriters to report to other parties") (quoting FINRA Notice at 13982). Both cannot be true.

[22] FINRA's current 6760 Notice is a manual process completed by faxing a form or filling out a webform. FINRA does not have an API or other web-based capability for electronic dissemination of new issue information. This represents more than "an incremental burden on underwriters," because—contrary to the Order's suggestion, no "current reporting infrastructures to FINRA" actually exist. Order at 46. Perhaps relatedly, given the disconnect between market realities and FINRA's Proposal, FINRA did not survey members for their input on this Proposal.

would offer its new reference data stream to any user or vendor, and must build new systems for time-sensitive reporting, error correction, and distribution, as it acknowledged to FIMSAC. *See* n.20 (quoting Persson). 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. The existing TRACE system, moreover, does not compete with existing data vendors in the same way as envisioned for the proposed service. Even setting aside the data errors, TRACE offers little reason for optimism about the accuracy and timeliness of a new comprehensive FINRA data service.[23]

d. The Order creates a commercial conflict for a public regulator. Bloomberg and other commentators also objected to the conflict inherent in the commercial relationships the Proposal would create between a public regulator and the private parties it regulates. Order at 15 (describing comments). In transactions that directly benefit FINRA's bottom line, the regulator would overtly coerce underwriters to surrender bond-reference data and would (at least) implicitly cause broker-dealers to feel compelled to buy FINRA's data. *See* Bloomberg July 29 letter at 8.

The Order simply fails to respond to this fundamental objection. No mitigating factors, insulating steps, or limiting principles appear in the Order. It simply repeats FINRA's self-serving assertions that "as a non-profit registered securities association and self-regulatory organization, it

[23] 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 were already 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 eschews cooperation and insists that it 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 based on hopeful speculation that FINRA's data system will work.

does not intend to compete with or displace private data vendors." Order at 16–17. That intent, of course, is belied by the Proposal's assertion that underwriters would save money by working with fewer vendors. *id.* at 45, and that "the data service will *promote fair and reasonable pricing for reference data by introducing an alternative* source in addition to what is provided by the incumbent data providers," FINRA Proposal at 18. FINRA's intent is also irrelevant to the Commission's duty to independently assess an SRO's representations and actions. The Order's failure to respond can hardly amount to reasoned decisionmaking. *See, e.g., State Farm*, 463 U.S. at 43.

None of the Order's analysis supported the conclusion that a single quasi-public source is a preferable or appropriate way to achieve the purported goal of improving access to "reliable and timely reference data," Order 31. If nothing else, at other alternatives might have achieved that goal with less harm to competition. To the extent disuniformity is a problem, FINRA or the Commission could develop standards for underwriters and vendors to use within a competitive marketplace. A rule could also establish criteria for qualified data services. Such a rule could, in theory, expand the interoperability and innovation among data vendors and users, while avoiding coercive fees and reporting mandates. Or, FINRA could have offered a competing not-for-profit bond data service, based on its preferred "regulatory utility" model, without requiring compulsory and comprehensive reporting and re-sale of the data. If the market truly demanded a uniform, accurate, and timely new-issue corporate reference service, nothing prevented FINRA (or any other provider) from attempting to fill that gap without this degree of coercion and displacement.

The Division did not consider whether market-based alternatives like these would be appropriate, or why FINRA's compulsory data service should be preferable. Having agreed with FINRA that a new data source is desirable, the Division accepted uncritically the anticompetitive method FINRA proposed. The Exchange Act "requires more than this." *Am. Equity Life*, 613 F.3d 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").

3. The Order violated § 15A(b)(9) by imposing unjustified burdens on competition.

Finally, a FINRA rule must not "impose any burden on competition not necessary or appropriate" given the purposes of the Exchange Act. 15 U.S.C. § 78o-3(b)(9). Previous submissions from Bloomberg and many other commenters explained how the Proposal would harm competition—both by crowding out current vendors and smaller underwriters burdened by the Proposal, and by chilling future innovation and investment through the threat of SROs commandeering private markets.

By ignoring, minimizing, or overlooking these and other important costs, the Order failed to acknowledge the Proposal's true burden on competition. Without recognizing those burdens, it could not possibly assess whether they are justified by the supposed benefits. Although FINRA had claimed that a principal goal of the Proposal was to "level the playing field" and "remove barriers to entry" for market-data providers, FINRA Response at 8-9 (Oct. 29, 2019), the Order made no finding that the Proposal would achieve this. Rather than enhancing competition, the most the Order claimed was that FINRA's Proposal "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. That conclusion, however, fails (even on its own terms) to justify FINRA's substantial burden on competition, and is wrong in any event.

a. The Proposal would, by its very design, "supplant demand" for bond reference data. If the Order is correct that FINRA's offering would have no impact on demand, then the Proposal would be pointless. The Proposal's principal aim was to supply the market with adequate data to meet trading needs. Doing so would both limit vendors' demand and make it harder for vendors to obtain and distribute information from underwriters mandated to provide the information to FINRA. FINRA has, incoherently, said both that underwriters would continue to provide data to existing vendors and that underwriters would save money by no longer doing so. *See* Order at 18; Notice at 13982. The Order made the same mistake: asserting that parallel reporting would continue (to mitigate error risk) and end (to save smaller underwriters money). *Compare* Order at 45 & 47 n.162. The Order's competitive-impact analysis cannot have it both ways. *See supra* n.21.

Earlier iterations of FINRA's Proposal also addressed supposed imbalances among market-data providers. Competing data services, for example, complained 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. In any event, differences among competing vendors reflects competition, not market failure. The Order mistakenly inferred that "gaps in the availability of new issue reference data" would "imped[e] competition in the corporate bond markets." Order at 31. This says nothing about whether and when *investors* receive data. Presumably any data vendors with earlier access strive to supply that information to more and more customers in the marketplace. The Order made no finding to the contrary.

The Order 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.

Some of those hypothetical services, moreover, border on the absurd. The Order posits that the value-added services vendors may continue to provide include (remarkably) scrubbing FINRA data for accuracy. If this were true, it plainly undermines FINRA's assertion that it can build a timely and accurate data service that can facilitate same-day trading. *See supra* p.27. It also shows a glaring disconnect with basic market forces: why any vendor could or would work with underwriters to market a backup data service is never explained, though it certainly reveals FINRA's intent for its regulatory utility to occupy a privileged, government-granted position in the market.

b. The Proposal would chill innovation and investment in market-data services, undermining the Exchange Act's goal of broad dissemination and access. As Bloomberg and other commenters repeatedly explained, FINRA's willingness to enter new markets and provide new services undermines the incentives for private actors to invest and innovate. The Order contains no response. The original FIMSAC recommendation and Proposal hinted that this Proposal may not mark the outer bounds of FINRA's ambition in the market-data space. Services like Bloomberg, having spent years of time and millions of dollars building a bond-reference data service, only to see FINRA attempt to appropriate the space, would certainly 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).[24]

The Order, moreover, completely fails to assess the costs and benefits of the proposed data service to traders who use reference data. Existing data services currently do the work of gathering

[24] Notably, FINRA's original Proposal stated that it "would evaluate a potential expansion of the new issue reference data service to include other debt products" based on the implementation of the bond-reference data offering. 84 Fed. Reg. 13977, 13979 (April 8, 2019). *See also* Peirce, *supra* n.11, at 27 ("FINRA's plan for such extensive data collection about individual accounts suggests a far-reaching

information from underwriters, verifying it, organizing it, maintaining it, and providing it to users. FINRA says it will take these same steps—but if it follows the "regulatory utility" model it 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. And the Division assumed, as noted above, that the Proposal will make it more difficult to maintain the existing data services, because underwriters will be disinclined to provide information to data vendors that they will already have provided under compulsion to FINRA.

The Division seems to have taken for granted that the net result will be a benefit to traders. But that central assumption is unsupported. Traders' cost for bond reference data may well increase, not decrease. As discussed above, FINRA expressly excluded a crucial component of the costs—the cost of FINRA's developing and operating a new data system—from the equation. So the Division had no information about whether FINRA's system will be more or less costly to run or to access than the current market-based services. In *American Equity Life* a rule was arbitrary and capricious because the "SEC could not accurately assess any potential increase or decrease in competition" having not "assess[ed] the baseline level." 613 F.3d at 178–79. Here, the Division had no evidence about either the baseline *or* the new costs. It approved the Proposal without even knowing whether the change in traders' (and investors') cost for reference data would be a cost or a benefit.

regulatory vision.") (discussing a 2013 FINRA plan to require firms to provide FINRA with specific retail customer data).

c. **The Division did not actually estimate the costs and benefits.** Under Exchange Act § 3(f), the review of FINRA's Proposal had to 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). The D.C. Circuit has said repeatedly that in such assessments, an agency 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").

The Division entirely failed to do so. There is not a single cost or benefit for which the Division provided any quantitative information. The Division simply asserted that the cost of the Proposal to underwriters "would be limited," but made no other estimate. Order at 46.[25] The Division likewise recognized that the Proposal would have adverse effects on existing data vendors, but it asserted that impact would be "minimal" without making any effort to quantify it. Order at 50.

---

[25] The Division did not even respond to SIFMA's comment that it is unclear how underwriters will actually supply all this new data. And, thanks to its uncritical reliance on FINRA's evidence-free assertions, the Division made a critical error regarding the cost of the rule to underwriters. The Division said underwriters already send data to FINRA, so expanding that process will not cost much. But FINRA's manual 6760 process, contrary to the Order's suggestion (at 46), would not be appropriate for the larger volume of automated reporting that the Proposal would necessitate. *See supra* n.22.

On the benefit side, the Order repeatedly accepts FINRA's speculation that there "may" be or "could" be net benefits to the market. *See, e.g.,* Order at 27 ("could promote improved liquidity"); *id.* at 27 n.114 ("may result in a reduction of costs . . . and potentially a reduction in trading errors"). Here too, the Division made no attempt at (and FINRA provided no evidence to support) an actual estimate of the magnitude of these benefits, or even the likelihood that they will occur. *See id.* ("could promote" and "may result" rather than "will"). The Division asserted that "the *potential* benefits of the proposal . . . justify the minimal competitive burden on reference data vendors"—overlooking the other costs—without having any idea how large either the "potential" benefits or the costs will be. Order at 50. This sort of handwaving is inadequate, especially for a rule that will develop and inject a new, anti-competitive "regulatory utility" into an existing market. *See Chamber of Commerce*, 412 F.3d at 143 (emphasizing the Commission's "statutory obligation to determine as best it can the economic implications of the rule").

VI. CONCLUSION

Bloomberg respectfully requests that the Commission grant this petition for review, set a briefing schedule, and reverse the Order below.

Respectfully submitted,

Date: Dec. 18, 2019

/s/Benjamin Beaton

Benjamin Beaton
Keith Bradley
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

Counsel for Bloomberg L.P.