

October 23, 2019

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File Number SR-FINRA-2019-008 [Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 2 to a Proposed Rule Change to Establish a Corporate Bond New Issue Reference Data Service and Designation of a Longer Period for Commission Action on Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, to Establish a Corporate Bond New Issue Reference Data Service]

Submitted via rule-comments@sec.gov

Dear Ms. Countryman:

I am pleased to provide these comments in connection with the above-captioned notice¹ regarding the proposed rule change, as modified by amendment no. 2, to establish a monopoly corporate bond new issue reference data service operated by the Financial Industry Regulatory Authority (FINRA). Specifically, FINRA is proposing is to Amend Rule 6760 to force underwriters to provide information² to FINRA (without reimbursing them for the cost of doing so) and then FINRA would then sell that information to market participants. This would replace the current private, competitive market for this information. The Commission is seeking comment regarding whether the proposed rule change is consistent with section 15A(b) of Securities Exchange Act of 1934. It is not.

The amendment does not materially change the analysis of the rule. The amendment simply delays the time of decision with respect to how much FINRA will charge for access to the data service, creating uncertainty, and adds six more fields to the data that must be reported.

¹ *Federal Register*, Vol. 84, No. 197, October 10, 2019 <https://www.govinfo.gov/content/pkg/FR-2019-10-10/pdf/2019-22142.pdf>.

² The 32 fields that would be required are: (A) The International Securities Identification Number (ISIN); (B) the currency; (C) the issue date; (D) the first settle date; (E) the interest accrual date; (F) the day count description; (G) the coupon frequency; (H) the first coupon payment date; (I) a Regulation S indicator; (J) the security type; (K) the bond type; (L) the first coupon period type; (M) a convertible indicator; (N) a call indicator; (O) the first call date; (P) a put indicator; (Q) the first put date; (R) the minimum increment; (S) the minimum piece/ denomination; (T) the issuance amount; (U) the first call price; (V) the first put price; (W) the coupon type; (X) rating (TRACE Grade); (Y) a perpetual maturity indicator; (Z) a Payment-In-Kind (PIK) indicator; (AA) first conversion date; (BB) first conversion ratio; (CC) spread; (DD) reference rate; (EE) floor; and (FF) underlying entity ticker.

The Proposed Rule Would Burden Competition [§15A(b)(9)]

FINRA asserts its proposed rule would make markets more efficient. This is highly doubtful. In general, private actors in competitive markets provide goods and services more efficiently³ than government, quasi-governmental organizations⁴ or, often, not for profit organizations. Thus, there should be a strong presumption against permitting government or a quasi-governmental organization like FINRA, which is granted regulatory authority by government, entering a business currently served by private businesses.

Before intervening in the existing market for information and granting itself a potentially lucrative monopoly on providing this information to market participants, FINRA should be required to factually demonstrate that (1) there is an actual market failure that needs to be addressed; (2) that the benefits to information purchasers would materially outweigh the unrecompensed costs imposed on underwriters and (3) that these benefits are so substantial and clear to overcome the strong presumption that private actors in competitive markets are the best means of providing goods and services. FINRA has provided no data and only the most rudimentary qualitative argument attempting to establish that it, for some reason, will provide superior services or a lower price than private businesses and that a monopoly provider would be superior to a competitive market. It has neither demonstrated an actual market failure nor conducted even the most rudimentary cost-benefit analysis. It has simply made bald assertions. That should not be sufficient for the Commission. The amendment does not change these facts.

Moreover, any assertion made by FINRA in this situation should be taken with a proverbial grain of salt. FINRA has a serious conflict of interest. It has a pecuniary interest in promulgating this rule. It can use its regulatory authority to force underwriters to provide it with information and then sell the information to market participants at a profit. Earning a profit should not be too difficult when others (in this case the underwriters) are incurring the bulk of the costs.

The Proposed Rule Would Impose Unequitable and Unreasonable Fees [§15A(b)(5)]

Presumably, there are those who will benefit from the proposed FINRA rule. But that does not mean that the market intervention inherent in the rule is warranted. Even if FINRA were to price its information at its marginal cost and make no economic profit,⁵ FINRA's marginal cost will not reflect the true social cost since the underwriters would be forced to incur costs for which

³ By more efficiently, in this context, I mean providing goods and services of higher quality or lower cost or both.

⁴ FINRA is nominally a private not-for-profit organization but has been delegated government-like regulatory authority by Congress and the Securities and Exchange Commission. Courts have ruled FINRA and its predecessor organizations to be state actors for some purposes and not for others. See David R. Burton, "Reforming FINRA," Heritage Foundation Backgrounder No. 3181, February 1, 2017 <https://www.heritage.org/sites/default/files/2017-02/BG3181.pdf>.

⁵ In its original filing FINRA stated that "FINRA is proposing to price the reference data as a utility, using cost plus margin pricing." Proposed Rule Change to Establish a Corporate Bond New Issue Reference Data Service, p. 42 http://www.finra.org/sites/default/files/rule_filing_file/SR-FINRA-2019-008.pdf. This probably means *average* (not marginal) cost plus some arbitrary "margin" that in the case of a true utility would provide a return to investors. FINRA, however, has no investors providing capital to the enterprise. In fact, Internal Revenue Code 501(c)(6) provides that no part of the net earnings of a tax-exempt organization may inure to the benefit of any private shareholder or individual. Ergo, it is unclear why ANY "margin" should in principle be included in its pricing other than to permit FINRA to profit from this monopoly to support other activities.

they are not compensated. In other words, there is a negative externality associated with the rule that FINRA's analysis mentions but does not materially address.

FINRA's original proposed fee structure was arbitrary and appears to have had no theoretical, analytical or factual predicate. It would have enriched FINRA and, potentially, certain customers at the expense of other customers and underwriters. It would have, of course, harmed those firms that are currently in the business of providing data in a competitive market. FINRA has yet to provide any meaningful analysis of these affects. Nor has it justified them.

The amendment defers the decision with respect to pricing. It is, therefore, manifestly unclear what FINRA intends to do. It is not clear why anyone should regard the indeterminacy created by the amendment as an improvement. Certainly the Commission should not.

FINRA, as a tax-exempt organization, is accorded a long list of competitive advantages over tax-paying private businesses. Tax-exempt organizations do not pay taxes, are accorded privileged postal rates and are exempted from many regulatory requirements. There is a social cost of moving commercial activities to tax-exempt organizations. Pushing commercial activities into the tax-exempt sector distorts the marketplace and raises the taxes that must be paid by commercial enterprises that are not tax-exempt. It therefore increases the excess burden (or deadweight loss) that society must bear.

The Proposed Rule Would Create Impediments to a Free and Open Market [§15A(b)(6)]

As discussed above in the §15A(b)(9) "Burden Competition" section above, the proposed rule would reduce competition. A regulatory mandate of a monopoly provider is the very antithesis of a "free and open market." A free and open market in corporate bond data is what exists currently.

Sincerely,

A handwritten signature in black ink, appearing to read "D. R. Burton".

David R. Burton
Senior Fellow in Economic Policy
The Heritage Foundation