

February 21, 2023

Sherry R. Haywood
Assistant Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Order Scheduling Filing of Statements on Review Proposed Rule Change, as Modified by Amendment No. 2, to Establish a Corporate Bond New Issue Reference Data Service (File No. SR-FINRA-2019-008)

Dear Ms. Haywood:

I am pleased to provide these comments with respect to the Commission “Order Scheduling Filing of Statements on Review Proposed Rule Change, as Modified by Amendment No. 2, to Establish a Corporate Bond New Issue Reference Data Service” (File No. SR-FINRA-2019-008).¹

In *Bloomberg L.P. v. SEC* (2022),² the D.C. Circuit Court of Appeals found that the Commission’s approval of FINRA’s proposed reference data service was arbitrary and capricious in that the Commission “failed to respond adequately to Bloomberg’s concerns about the cost of building and maintaining the program and the extent to which those costs—which could conceivably amount to millions, or tens of millions, of dollars—will be borne by market participants.”

The *entirety* of FINRA’s *substantive* response is found on page 3 of its January 19 letter³ in a three sentence paragraph.⁴ The first sentence list various categories of costs. The second sentence

¹ “Order Scheduling Filing of Statements on Review Proposed Rule Change, as Modified by Amendment No. 2, to Establish a Corporate Bond New Issue Reference Data Service,” File No. SR-FINRA-2019-008 <https://www.sec.gov/rules/other/2022/34-96541.pdf>.

² *Bloomberg L.P. v. SEC* (August 16, 2022) [https://www.cadc.uscourts.gov/internet/opinions.nsf/A1390C785B2A244B852588A000517586/\\$file/21-1088-1959474.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/A1390C785B2A244B852588A000517586/$file/21-1088-1959474.pdf). (“First, we find that on remand, “the Commission can redress its failure of explanation” by analyzing the costs FINRA will incur in building and maintaining its data service and how the costs of building the data service will be remunerated if the fee proposal is ultimately disapproved by the Commission. See *id.* at 1332. Second, we find that vacatur of the order would “needlessly disrupt” the Commission and FINRA’s efforts to address market inefficiencies resulting from untimely, inconsistent, and inaccurate collection and dissemination of new issue reference data in the corporate bond market.

In sum, we find that the Commission’s approval of FINRA’s proposed reference data service was arbitrary and capricious in one respect: the Commission failed to respond adequately to Bloomberg’s concerns about the cost of building and maintaining the program and the extent to which those costs—which could conceivably amount to millions, or tens of millions, of dollars—will be borne by market participants. As such, the Commission violated the Administrative Procedure Act and failed to engage in reasoned decisionmaking. In this regard, Bloomberg’s petition for review is granted.”) pp. 26-27.

³ FINRA letter to Vanessa Countryman, January 19, 2023 <https://www.sec.gov/comments/sr-finra-2019-008/srfinra2019008-20155240-323579.pdf>.

⁴ The entire paragraph is:

adds a few more categories of costs. And the third sentence reads “FINRA currently estimates initial costs of approximately \$1,300,000 and ongoing annual costs of approximately \$700,000.”

That is it. There is no analysis. There is no factual basis for this estimate. There are no sources or data provided. There are no footnotes citing additional material. There is not methodology discussed. **There is a one sentence bald assertion as to cost. Period. Full stop.**

The Commission cannot accept this. It is an insult to the Commission and to the Court. It is arbitrary in the extreme. It is not a good faith attempt to address the issue identified by the Court. It reads as if someone took a drag on their cigarette, looked at the ceiling, then wrote down a number and forwarded it to the lawyers to dress up this non-analysis as something serious. The entire rest of the verbiage in the letter is just background material or irrelevant.

If FINRA does not take the court’s admonition seriously, neither should the Commission take FINRA’s attempt to monopolize this market seriously. FINRA has not even attempted to establish that this proposal makes economic sense notwithstanding being accorded many opportunities to do so and the DC Circuit opinion. One can guess as to the reasons for FINRA’s abject failure to even attempt to meet the Court’s concerns, but the most likely reason is that this proposal simply makes no sense unless one’s primary objective is to maximize FINRA’s revenue and power. That, with nothing more, and there is nothing more, does not constitute a legitimate reason to approve FINRA’s proposal.

The Commission should not approve FINRA’s proposal. If it does so, it is highly likely that the outcome will be same as in the previous litigation since FINRA and the Commission will have utterly failed to address the Court’s concerns. The facts will not have changed. To pretend otherwise and to approve FINRA’s proposal would be seriously irresponsible.

Substantive analysis of FINRA’s one sentence assertion is difficult since there is nothing to analyze except two numbers apparently grabbed out of thin air. It seems intuitively clear to me to that FINRA’s guess or assertion as to cost is very low for a database involving about 100 major underwriters, many smaller underwriters and broker-dealers, and an immense number of transactions for which the data providers and FINRA must examine a large number of fields per transaction. FINRA’s guess or assertion is probably wrong by an order of magnitude or two. This could be evaluated if there were serious data sources or the costs and revenues of existing market participants were available. But nothing is available to the Commission or the public except a one sentence assertion by FINRA as to costs.

Specifically, the New Issue Reference Data Service involves a combination of costs, including: (1) the development of a cloud-based user interface for intake of new filings, an application programming interface submission process, and submission validations; (2) system requirements maintenance, quality assurance, and user acceptance testing of system implementation; (3) development of the reference data files for subscribers; (4) enhancements to regulatory programs; and (5) necessary infrastructure upgrades, among other things. Additional ongoing associated costs relate to personnel costs for data vendor support, billing support, project management support and other internal systems support, among other things. FINRA currently estimates initial costs of approximately \$1,300,000 and ongoing annual costs of approximately \$700,000.

I direct you to my previous letters in this file for substantive reasons why allowing FINRA to monopolize this market is a bad idea as a matter of policy.

This comment letter is timely since February 18, 2023 fell on a Saturday and Monday February, 20, 2023 was a Federal Holiday.

Sincerely,

A handwritten signature in black ink, appearing to read 'D.R. Burton', with a long horizontal flourish extending to the right.

David R. Burton
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