

COMMITTEE ON CAPITAL MARKETS REGULATION

July 25, 2019

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

VIA ELECTRONIC MAIL: rule-comments@sec.gov

Re: File Number SR-FINRA-2019-008: Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change to Establish a Corporate Bond New Issue Reference Data Service (the “**Bond Data Service Proposal**”)

Dear Madam:

The Committee on Capital Markets Regulation (the “**Committee**”) appreciates the opportunity to comment on the Bond Data Service Proposal by the Financial Industry Regulatory Authority, Inc. (“**FINRA**”) with the Securities and Exchange Commission (the “**SEC**”).¹ The Committee has strong reservations about the Bond Data Service Proposal given the lack of cost data supporting a rule change that would significantly affect the system for collecting and disseminating market data for TRACE-eligible corporate bonds.

Founded in 2006, the Committee is dedicated to enhancing the competitiveness of U.S. capital markets and ensuring the stability of the U.S. financial system. Our membership includes thirty-five leaders drawn from the finance, investment, business, law, accounting, and academic communities. The Committee is chaired jointly by R. Glenn Hubbard (Dean, Columbia Business School) and John L. Thornton (Chairman, The Brookings Institution) and led by Hal S. Scott (Emeritus Nomura Professor of International Financial Systems at Harvard Law School and President of the Program on International Financial Systems). The Committee is an independent and nonpartisan 501(c)(3) research organization, financed by contributions from individuals, foundations, and corporations.

Under existing FINRA Rule 6760, underwriters in a primary offering of TRACE-eligible corporate bonds must report eight specific characteristics of the security to FINRA prior to the first transaction in the security, subject to certain exceptions.² Under the Bond Data Service Proposal, FINRA seeks to amend Rule 6760 with respect to new issues of corporate debt securities to require bond underwriters to report additional attributes of the security to FINRA prior to the first

¹ U.S. SEC. & EXCH. COMM’N, *Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change To Establish a Corporate Bond New Issue Reference Data Service*, 84 FED. REG. 13977 (April 8, 2019), available at [https://www.federalregister.gov/documents/2019/04/08/2019-06786/self-regulatory-organizations-financial-industry-regulatory-authority-inc-notice-of-filing-of-a-\["FINRA Proposal"\]](https://www.federalregister.gov/documents/2019/04/08/2019-06786/self-regulatory-organizations-financial-industry-regulatory-authority-inc-notice-of-filing-of-a-[).

² FINRA, RULE 6760 (2015).

transaction in the security.³ Under the proposal, FINRA would also begin selling this data back to market participants at a FINRA-prescribed fee, up to \$6,000 per month if the data is retransmitted or repackaged for dissemination.⁴ FINRA states that these fees would be calculated on a cost-plus-margin basis.⁵

Under Section 15A(b)(5) of the Securities Exchange Act, as amended (the “**Exchange Act**”),⁶ FINRA rules (like those of exchanges)⁷ 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 which the association operates or controls.”⁸ FINRA believes that the Bond Data Service Proposal, including the proposed cost-plus-margin pricing, is “fair, equitable, reasonable, and not unfairly discriminatory,”⁹ “reasonably designed to cover FINRA’s ongoing operational costs,”¹⁰ and “commercially reasonable.”¹¹

The Committee is concerned that FINRA did not offer cost data in support of its assertion that the proposed fees are fair and reasonable as required by the Exchange Act. Although FINRA asserts that the proposed fees are calculated on a cost-plus-margin basis, FINRA has not provided any information as to the projected cost or target margin of the new reference data service. Without this information, neither the SEC nor the public is in any position to determine whether the proposed fees are consistent with the Exchange Act.

The Committee has long supported the provision of cost data for similar services in the equity markets. The Committee previously communicated our view that the U.S. stock exchanges, that provide critical equity market data services should be required to disclose the underlying cost of providing stock market data to enable the SEC and public to determine whether fees are appropriate and consistent with the requirements of the Exchange Act.¹² As held by the D.C. Circuit, the SEC “cannot simply accept what [a self-regulatory organization] has done.”¹³ Rather, the SEC must “make an independent review”¹⁴ and “critically evaluate the representations made and the conclusions drawn” by the self-regulatory organization in determining whether a proposed rule is consistent with the Exchange Act.¹⁵ The SEC acknowledged as much in March 2019 when

³ FINRA Proposal, *supra* note 1, at 4-5.

⁴ FINRA Proposal, *supra* note 1, at 4-5.

⁵ FINRA Proposal, *supra* note 1, at 10.

⁶ 15 U.S.C. § 78o-3(b)(5).

⁷ *Cf.* 15 U.S.C. § 78f(b)(4).

⁸ 15 U.S.C. § 78o-3(b)(5).

⁹ FINRA Proposal, *supra* note 1, at 10.

¹⁰ FINRA Proposal, *supra* note 1, at 11.

¹¹ FINRA Proposal, *supra* note 1, at 8.

¹² COMM. ON CAPITAL MARKETS REGULATION, *Stock Market Data: A Call for Transparency to Assess Impact on U.S. Investors* (Sept. 24, 2018), available at <https://www.capmktreg.org/2018/09/24/committee-releases-statement-on-stock-market-data-a-call-for-transparency-to-assess-impact-on-u-s-investors/>.

¹³ *Susquehanna International Group v. SEC*, 866 F.3d 442 (D.C. Cir. 2017).

¹⁴ 866 F.3d at 442.

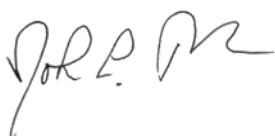
¹⁵ U.S. SEC. AND EXCH. COMM’N, *Self-Regulatory Organizations; The Options Clearing Corporation; Order Disapproving Proposed Rule Change Concerning The Options Clearing Corporation’s Capital Plan*, 84 FED. REG. 5157 (Feb. 20, 2019), available at <https://www.federalregister.gov/documents/2019/02/20/2019-02731/self-regulatory-organizations-the-options-clearing-corporation-order-disapproving-proposed-rule> (“The D.C. Circuit’s *Susquehanna* Opinion makes clear that relying on such representations, without more, is insufficient. Rather, the Commission must critically evaluate the representations made and the conclusions drawn by OCC.”).

it disallowed Box Exchange LLC’s proposal to establish new connectivity fees.¹⁶ Although Box Exchange LLC did provide some data as to comparably priced products, the SEC still found that “the information before us is insufficient to support a finding that the proposed rule changes” are consistent with the Exchange Act.¹⁷ Here, FINRA has provided no underlying data, so the Bond Data Service Proposal should likewise be disallowed.

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Thank you very much for your consideration of the Committee’s position. Should you have any questions or concerns, please do not hesitate to contact the Committee’s President, Prof. Hal S. Scott (hscott@law.harvard.edu), or Executive Director, John Gulliver (jgulliver@capmksreg.org), at your convenience.

Respectfully submitted,



John L. Thornton
Co-CHAIR



Hal S. Scott
PRESIDENT



R. Glenn Hubbard
Co-CHAIR

¹⁶ U.S. SEC. AND EXCH. COMM’N, *Self-Regulatory Organizations; BOX Exchange LLC; Order Disapproving Proposed Rule Changes To Amend the Fee Schedule on the BOX Market LLC Options Facility To Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network*, 84 FED. REG. 133363 (April 4, 2019), available at <https://www.federalregister.gov/documents/2019/04/04/2019-06519/self-regulatory-organizations-box-exchange-llc-order-disapproving-proposed-rule-changes-to-amend-the> [“**Box Group Decision**”].

¹⁷ *Box Group Decision*, *supra* note 16, at 13367. Compare 15 U.S.C. § 78o–3(b)(5)(applicable to FINRA) with 15 U.S.C. § 78f(b)(4)(applicable to exchanges).