

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of the
Financial Industry Regulatory Authority, Inc.

Admin. Proc. File No.
SR-FINRA-2019-008

MOTION OF BLOOMBERG L.P. FOR LEAVE TO
ADDUCE ADDITIONAL EVIDENCE

Under SEC Rule of Practice 452, Bloomberg L.P. respectfully moves the Commission for leave to adduce additional evidence. In FINRA’s March 16 statement in support of its bond reference-data proposal, FINRA shifted course and attempted to justify its proposed rule on the ground of new, unsupported accusations that Bloomberg has engaged in anti-competitive conduct. These assertions did not form the basis of FINRA’s initial or amended proposals, or the Division’s order under review. Bloomberg, therefore, quite reasonably did not address this issue or offer evidence on the point in its statement in opposition, filed the same day as FINRA’s.

As the Commission has recognized, a self-regulatory organization such as FINRA bears the “burden to demonstrate that a proposed rule is consistent with the Exchange Act” under Rule 700(b)(3), and must do so with a “sufficiently detailed and specific” analysis to support an

affirmative Commission finding. *See In re BOX Exchange LLC*, Rel. No. 88493, at 9–10 (Mar. 27, 2020). FINRA’s new allegations—which are false in any event, as shown by the attached declarations—cannot support such a finding by the Commission. Given the materiality of Bloomberg’s rebuttal evidence to the questions raised by FINRA’s proposed rule and to FINRA’s new and shifting justifications, therefore, Bloomberg respectfully requests that the Commission allow the submission of this additional evidence for consideration in this proceeding.

I. BACKGROUND

FINRA’s proposed rule would create a compulsory new collection and sales regime for reference data on new corporate bond issues. *See* File No. SR-FINRA-2019-008, Release No. 85488 (Apr. 2, 2019) (“Initial Proposal”). Bloomberg has consistently and diligently opposed FINRA’s proposal, with argument and with substantial evidence, including quantitative evidence. *See* Bloomberg Pet. for Review, pp. 5-6 (Dec. 20, 2019) (describing factual record).

FINRA persistently offered no defense of the proposal. On the eve of the final comment deadline, extended because of FINRA’s partial withdrawal of the fee component of the proposal, FINRA provided a brief letter in support of its new venture. That letter explained that FINRA’s proposal was motivated and justified by inconsistencies in the timing and content of bond reference data as distributed to and used by traders. *See* Ltr. from Alexander Ellenberg, Assoc. Gen. Counsel at FINRA, p.4 (Oct. 29, 2019) (“FINRA October Comment”).

The Division of Trading and Markets approved FINRA’s Amended Proposal on that same factual assumption: that many market participants do not have “accurate, complete and timely access” to bond reference data. *See* Order at 27. The existence of “current gaps” in the “market for fixed income reference data,” according to the Division, justified creating a “regulatory utility” for that service. *Id.* at 18, 53. To explain that supposed gap, the Order pointed to assertions of

regulatory and technical insufficiencies, not anticompetitive conduct. *Id.* at 34 (proposal addresses “regulatory gap in the current market”).

Bloomberg’s petition for review of the Division’s decision cited record evidence showing that electronic trading in corporate bond markets is healthy and growing. Its March 16 statement to the Commission, moreover, reiterated that the factual record before the Commission “cannot carry an SRO’s burden of justifying a rule change.” Bloomberg Corrected Statement at 14 (collecting authorities rejecting “unquestioning [SEC] reliance on an SRO’s representations”).

FINRA’s statement in support, filed the same day, offered a new, last-minute justification for the rule change. It asserted that FINRA needs to introduce a new product to provide bond-reference data on “timely, reasonable, and non-discriminatory terms to anyone.” This service is necessary, FINRA now says, because Bloomberg has restricted access to data for anti-competitive reasons. FINRA Statement at 2-3. Specifically, FINRA alleged that:

the private data vendors that today provide corporate bond new issue reference data are not bound by similar obligations, and the FIMSAC expressed particular concern that a *dominant private data vendor has refused to license data, or has withheld it selectively, for anti-competitive reasons*. Importantly, the FIMSAC was concerned that a dominant private vendor's *ability to restrict access to new issue reference data has immediate and direct downstream impacts on the ability of other market participants to perform critical market functions* such as pricing, trading, clearing, and settling new issues once the bonds begin trading in the secondary market.

Id. at 2–3 (emphasis added).

FINRA cited the FIMSAC recommendations in support of this new position. But in fact, neither of FIMSAC’s submissions suggested that one dominant private data vendor engaged in anti-competitive activity. FIMSAC, Recommendation for the SEC to Establish a New Issue Reference Data Service for Corporate Bonds, p.2 (Oct. 29, 2018) (“[M]arket participants will use reference data that varies based on their choice of reference data provider”; “reference data *providers* [plural] can significantly tilt the playing field for trading platforms and market

participants.”) (emphasis added); FIMSAC, Recommendation Regarding FINRA Proposal to Establish a Corporate Bond New Issue Reference Data Service, p.4 (June 11, 2019) (noting “*several* of the largest bond reference data providers own, or are affiliated with, electronic trading platforms”) (emphasis added) (“FIMSAC June Comment”).

Thus, for the first time in these proceedings, FINRA now asserts that Bloomberg is a “dominant” vendor engaged in suppressing competition. FINRA’s recent statement also plainly described the Amended Proposal “as a means to level the competitive playing field” against Bloomberg. *Id.* at 4.

II. STANDARD OF REVIEW

The Commission may allow the submission of new evidence upon a motion filed by a party “at any time prior to issuance of a decision.” 17 C.F.R. § 201.452. “Such motion shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously.” In granting a motion, the Commission “may accept or hear additional evidence,” “remand the proceeding” to an SRO, or “refer the proceeding to a hearing officer for the taking of additional evidence.” *Id.* Bloomberg is a “party” to the current proceeding based on its petition “seeking Commission review of a decision.” *See* 17 C.F.R. § 201.101 (defining “party”).

III. ARGUMENT

Under sections 15A(b)(6) and (b)(9) of the Exchange Act, the Commission may not approve FINRA’s proposal unless it finds the rule would “foster cooperation and coordination with persons engaged in . . . processing information with respect to . . . transactions in securities” and “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].” 15 U.S.C. § 78o-3(b)(6), (9). As the Commission just recently emphasized, an SRO

must provide actual evidence and analysis to prove this point by a preponderance; assertions unsubstantiated by evidence are not enough. *BOX Exchange*, Release No. 88493, at 9–10, 14, 17.

FINRA’s belated response contends, for the first time, that its interference and burden on competition are necessary because Bloomberg has distorted the market for reference-data services. On the one hand, FINRA says Bloomberg has a “dominant position in the market for corporate bond new issue reference data, given that Bloomberg gains earlier access to reference data because of other services it provides underwriters.” FINRA Statement at 16. Meanwhile, FINRA says Bloomberg “has limited other market participants’ access to its data for anti-competitive purposes.” *Id.*; *see also id.* at 2 (“refused to license data, or has withheld it selectively, for anti-competitive reasons”).

These allegations are new, and Bloomberg has not previously had an opportunity to respond to them. In reality, FINRA’s accusations are unfounded and mistaken; Bloomberg should be allowed to submit the enclosed evidence to show they are wrong.

A. FINRA’s allegations represent a material change in position raising a new issue

FINRA’s statement claims that Bloomberg is a “dominant private data vendor [that] has refused to license data, or has withheld it selectively, for anti-competitive reasons.” FINRA Statement at 2. It also alleges that Bloomberg “gains earlier access to reference data because of other services it provides underwriters.” *Id.* at 26. By “other services,” FINRA seems to refer to certain features of the Bloomberg Terminal service that underwriters sometimes use to set up their securities for sales. FINRA cites a comment by one underwriter that the Bloomberg system “is what the industry predominantly uses to book our tickets.” *Id.* at 8.

This new allegation, that Bloomberg obtains early and exclusive access to bond reference data, which it then withholds from the market for anti-competitive reasons, was not the basis for FINRA’s proposal, however. There, FINRA asserted that “incumbent data providers”—plural—

“face less competition because of the complexity of building the database” needed to provide reference data, while “underwriters have relatively few incentives to report to data providers other than the prevalent incumbent data providers,” plural. Proposed Rule Change to Establish a Corporate Bond New Issue Reference Data Service at 18 (Mar. 27, 2019), *available* at https://www.finra.org/sites/default/files/rule_filing_file/SR-FINRA-2019-008.pdf (“Initial Proposal”).

Neither FINRA, nor FIMSAC, nor the Division previously relied on the new theory. FINRA’s short statement during the comment period said that “some of the vendors”—plural—“have access to information much earlier than other vendors.” FINRA Response Letter at 5. FIMSAC’s June 11 comment said that various competing reference data providers, plural, “collect and disseminate new issue reference data at different speeds.” FIMSAC June Comment at 2. And the Division purported to identify “gaps in the availability” of new-issue data, suggesting that a trader would need to buy data services from multiple providers, using different formats and data fields, to cover the market of available bonds. Order at 31 & n.124.

None of these accounts suggested that Bloomberg is a “dominant” provider of reference data that has somehow leveraged features of the Bloomberg Terminal service to enhance its position as a data vendor, or vice versa. To the contrary, the Division cited testimony that traders must “source the information from *multiple* vendors” in order to see the whole bond market. Order at 31 n.124 (emphasis added). This belies the notion that Bloomberg has exclusive or restricted access to bond data based on any other service it provides. Indeed, FINRA’s new accusation is logically inconsistent with what it said previously and what the Division found—that the market suffers for lack of uniformity, a problem not usually associated with the dominance of one provider. Order at 33.

And none of these documents went further, as FINRA has now done, by asserting that Bloomberg is dominant in some “other service” and uses such “dominance” to restrain competition for reference data services. That assertion is crucial to FINRA’s position, but factually incorrect.

B. Bloomberg does not leverage Bloomberg Terminal new-bond issuance functions to support its reference-data service.

FINRA's case for its government-backed data-service now rests on the notion that Bloomberg somehow gets information that others cannot. In support, it relies on the statement by the underwriter representative who said “we do undertake getting our securities set up on the Bloomberg trading platform because that is what the industry predominantly uses to book our tickets.” FINRA Statement at 8. This, according to FINRA’s Statement, resulted in “a disparity favoring Bloomberg over its competitors[,] in their access to new issue reference data provided by underwriters.” *Id.*

FINRA’s understanding of Bloomberg’s access to new-issue corporate bond reference data is incorrect and merits rebuttal. The evidence Bloomberg seeks to submit consists of declarations by David Miao and Mark Flatman. These declarants are senior executives with extensive experience, respectively, in producing Bloomberg’s reference-data service and selling Bloomberg’s services. They are knowledgeable about Bloomberg’s relevant business operations and practices implicated by FINRA’s positions. As the declarations explain, Bloomberg’s reference data service does not use the information that underwriters enter into the new bond issuance features of the Bloomberg Terminal service. Miao Decl. ¶¶ 5-6. Far from taking advantage of such new issuance functionality to generate reference data, Bloomberg segregates the services. Miao Decl. ¶ 6.

To collect information for its reference-data service, Bloomberg employs a staff of researchers who engage in direct contact—separate from the new bond issuance features of the Bloomberg Terminal service—with underwriters and gather information from them. Miao Decl. ¶ 7. For many, this has been the most essential and innovative characteristic of Bloomberg since its beginning: gathering, organizing, and digitizing disparate data that previously was dispersed across institutions. No underwriter is obligated to provide reference data in order to use—or as a consequence of using—the Bloomberg Terminal service in the course of placing its bonds. Underwriters provide their information to the Bloomberg reference-data service voluntarily, and underwriters are free to provide the same data to other vendors as well. Miao Decl. ¶¶ 7-9. The statement from which FINRA selectively quoted reveals a particular reason that underwriters provide data to Bloomberg: Its data service has a well-deserved reputation for accuracy, a critical feature for a reference-data service. FIMSAC Tr. at 34; Miao Decl. ¶ 8.

Indeed, what the underwriter representative said is consistent with these facts. The representative did not claim that Bloomberg transfers data entered by a client or underwriter into Bloomberg’s new-bond issuance functionality to Bloomberg’s reference-data service. He did not even state that his company supplies reference data only to Bloomberg because of the new bond issuance functionality on the Bloomberg Terminal service. He acknowledged that his company makes sure to get its bonds set up on the system. FIMSAC Tr. at 34. And he then proceeded to say that the company chooses to provide reference data consistently to Bloomberg to “ensure it is accurate.” *Id.* Accuracy is a quality towards which Bloomberg’s bond reference data service strives, by means of serious effort and attention, and a basis on which other services can compete. This illustrates how Bloomberg’s access to data is based on healthy competition, rather than leveraging the Bloomberg Terminal service.

Aside from this one statement, FINRA simply recites assertions by two of Bloomberg's competitors that they cannot successfully compete for access to data. Neither competitor identified any activity by Bloomberg that improperly excludes their access, or even explained why they could not collect underwriters' information using the same strategy and means that Bloomberg does (namely, basic investment in the business and well-known competence). Indeed, one of those companies told FIMSAC that the company had "initiated an investment program in reference data" and the "result has made our reference data services stronger and more competitive in the market."¹ FINRA has elevated these generalized complaints into an accusation that Bloomberg somehow engages in anticompetitive behavior. Taking sides between competitors is unseemly for a supposedly neutral market regulator, and it is especially improper to do so without material supporting evidence. *Cf. BOX Exchange*, Release No. 88493, at 8 (noting the Commission cannot "reach a conclusion unsupported by substantial evidence").

Thus, Bloomberg's new evidence would conclusively rebut the notion that Bloomberg engages in an anticompetitive leveraging of the new bond issuance functionality on the Bloomberg Terminal service to gain preferential access to reference data.

C. Bloomberg does not restrict access to its reference-data service to benefit its trading-related services.

FINRA's Statement also accuses Bloomberg of "limit[ing] other market participants' access to its data for anti-competitive purposes." FINRA Statement at 26. This too is a new—and unfounded—accusation. Previously FIMSAC pointed to structural concerns that because "several of the largest bond reference data providers own, or are affiliated with, electronic trading platforms," those providers could theoretically "refuse to license their leading reference data products" to competing trading platforms; FIMSAC's recommendation asserted generally that

¹ FIMSAC Tr. 68.

“certain of the[m]” had done so in the past. FIMSAC June Comment at 4. That generalized notion, applicable in theory to multiple vendors “affiliated wit[h] electronic trading platforms,” was hardly a suggestion that Bloomberg itself has and is engaged in anticompetitive conduct. And the Division certainly did not find that Bloomberg has done so.

FINRA’s statement, and any finding to that effect, would be wrong, and likewise merits rebuttal. The additional evidence that Bloomberg proposes to submit on this point is contained in the declarations of David Miao and Mark Flatman. The declarations demonstrate that Bloomberg does not restrict access to its reference data service based on firms’ willingness to use any of its trading services, or for any other anticompetitive reasons. Flatman Decl. ¶¶ 3-4, 6. To the contrary, Bloomberg makes its reference data service broadly available on standard terms for standard use cases. Flatman Decl. ¶ 6. Indeed, it has offered to license (and has licensed) such data to multiple firms that compete against Bloomberg’s electronic U.S. corporate bond trade-messaging service, and many companies represented at FIMSAC are subscribers to Bloomberg’s reference data service. *Id.*

FINRA’s contrary accusation is entirely unsupported. Nowhere does FINRA specify a single “anticompetitive” action by Bloomberg. To the extent that FINRA contends that Bloomberg is leveraging its bond reference data service to benefit its electronic trade-messaging service, such a contention is disproven by additional facts that FINRA ignores. Bloomberg’s electronic trading service has only 3.2% of the market for electronic corporate bond-trading.² The market leader, MarketAxess, has 85% of that market. Flatman Decl. ¶ 5; Babyak July 1 Ltr. at 3-4. That was true in 2017, again in 2018, and remains true today. *Id.* Nothing suggests Bloomberg has tried—

² Ltr. from Gregory Babyak, Global Head of Regulatory Affairs at Bloomberg, p.3 (July 1, 2019).

much less succeeded—in using its successful bond-reference data service to unfairly compete against other electronic bond-trading services. *See* Flatman Decl. ¶¶ 3-5.

FINRA’s accusation is also at odds with prevailing legal principles. As the Supreme Court recognized in the similar context of predatory pricing, “the success of such schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition.” *Cf. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) (predatory pricing); *Verizon Commc’ns v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (adopting version of predatory pricing test as standard for antitrust treatment of refusals to deal). The Supreme Court also has observed that generalized allegations about a company’s anti-competitive plans cannot overcome real empirical evidence. 475 U.S. at 587 (“[I]f the factual context renders respondents’ claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.”). Indeed, the record evidence showing that Bloomberg has a 3.2% market share among electronic corporate-bond trading services is “strong evidence” that it is not engaged in the anticompetitive conduct FINRA alleges. *Cf. id.* at 592 (“The alleged conspiracy’s failure to achieve its ends . . . is strong evidence that the conspiracy does not in fact exist.”); *BOX Exchange*, Release No. 88493, at 26-27 (using economic principles to analyze BOX’s unsupported claims about pricing for data connectivity).

IV. CONCLUSION

Bloomberg respectfully asks the Commission to consider the declarations of David Miao and Mark Flatman, evidence that is material to the Commission’s consideration of FINRA’s allegations of anticompetitive conduct as a basis for its Amended Proposal.

Date: April 17, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 17, 2020, copies of Bloomberg's Motion to Adduce Additional Evidence was served by first-class mail and by facsimile on the following recipients:

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April 17, 2020



Benjamin J. Beaton

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of the
Financial Industry Regulatory Authority, Inc.

Admin. Proc. File No.
SR-FINRA-2019-008

DECLARATION OF MARK FLATMAN

I, Mark Flatman, make this declaration regarding the above-captioned proceeding:

1. I am the Global Head of Core Product at Bloomberg L.P. (“Bloomberg”). I have held senior management positions at Bloomberg for nearly a decade, and I have been at the company for more than two decades. I am familiar with the operations, protocols, and practices of the company, as well as with the manner in which Bloomberg data products are produced and made available to subscribers.

2. I have reviewed the statement that FINRA provided to the Commission on March 16 in this proceeding. That statement asserted, at page 26, that Bloomberg “limits other market participants’ access to its data for anti-competitive purposes,” and, at page 2, “that a dominant private data vendor has refused to license data, or has withheld it selectively, for anti-competitive reasons.”

3. This assertion is wrong. In fact, Bloomberg has offered to license and does license its bond reference data broadly and it does not limit such access for anticompetitive purposes.

4. Separate from the bond reference data service, Bloomberg offers an electronic trading service for traders of corporate bonds. That service enjoys no anticompetitive benefits from Bloomberg's separate reference-data service business.

5. I am also familiar with the availability of Bloomberg's corporate bond reference data service. The reference data service is widely available, and is used much more broadly than Bloomberg's electronic trading service. According to an analysis of the market for electronic bond trading by a leading industry authority, Greenwich Associates, only about 3% of electronic corporate bond fixed-income trading has taken place using Bloomberg's services. The market leader for corporate bond electronic trading is MarketAxess, which has a market share of about 85%.

6. Bloomberg's bond reference data is available to companies that provide trading services that compete with Bloomberg's. Some competing trading services currently have licenses in place today for Bloomberg's reference data service. In fact, many companies represented at FIMSAC are subscribers to the service. To the best of my knowledge, we continue to offer similar licenses to similarly situated trading services.

7. We have analyzed data in Bloomberg's files regarding bonds issued and traded since March 16, 2020. Between March 16 and March 27, there were 161 new corporate bond issues that were above \$250 million in size. Of these new issues, among those that had a secondary market trade on the first day after pricing, our analysis of TRACE data indicates that 50% had a first-day trade on an alternative trading service. This figure is even higher than reported in the

previous submissions in this proceeding, e.g. Babyak July 1, 2019 Letter, and the vast majority of these trades did not involve Bloomberg's services.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on 17/04/20
Mark Flatman
Mark Flatman

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of the
Financial Industry Regulatory Authority, Inc.

Admin. Proc. File No.
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DECLARATION OF DAVID MIAO

I, David Miao, make this declaration regarding the above-captioned proceeding:

1. I am the Global Head of Fixed Income Data at Bloomberg L.P. (“Bloomberg”). I have held this position since January 2018. Previously, I was the Head of Global Data Asia Pacific for three years, and before that I was the Government Global Data Head. I have executive responsibility for producing Bloomberg’s corporate bond reference data service. I am familiar with the operations, protocols, and practices of that business.

2. I have reviewed the statement that FINRA provided to the Commission on March 16 in this proceeding. That statement asserts, at page 3, that “given current underwriter practices, Bloomberg often gains access to new issue reference data before other vendors and market participants.” FINRA went on to assert “that a number of market participants are not reasonably

able to gain access to timely, comprehensive, and accurate corporate bond new issue reference data when the bonds begin trading.”

3. I am not aware of any legal or structural barrier that prevents other vendors and market participants from accessing new issue reference data, and FINRA cites none. To my knowledge, nothing prevents other vendors and market participants from accessing corporate bond new issue reference data in the same voluntary manner in which Bloomberg acquires it.

4. In support, FINRA later cites (at p. 8) a purported “disparity” in access to reference data that favors Bloomberg, because, according to one market participant, underwriters “undertake getting our securities set up on the Bloomberg trading platform . . . to book our tickets.”

5. Whatever the import of that single statement, FINRA is wrong to conclude from it that Bloomberg’s reference data business obtains data from the Bloomberg service where underwriters “book their tickets.” That is not how the reference data business obtains data.

6. That statement on page 8 appears to refer to the new bond issuance functionality on the Bloomberg Terminal service that another division of Bloomberg provides. Underwriters put information into that system as part of the selling process. Entry of that new issuance information by users of our Bloomberg Terminal service does not give Bloomberg the right or authorization to distribute it through the reference data business. That data is private, non-public customer data. Bloomberg’s reference-data service is separate and distinct from the new bond issuance functionality on the Bloomberg Terminal service.

7. To gather data for the reference data service, Bloomberg employs a team of more than a dozen bond researchers who contact underwriters to obtain, review, and confirm bond reference data. This effort is partly automated and partly manual; Bloomberg’s team communicates with counterparts at underwriters. In our experience, personal communication is important to ensure


the accuracy of the reference data that Bloomberg maintains. Purely automated data, such as information gathered from emails and machine-readable PDFs, is prone to various types of error. Bloomberg's team manually verifies and validates that the automated data is consistent with their communications with underwriters.

8. Bloomberg employs metrics for accuracy and speed, and its reference data collection operations are designed to achieve targets of high accuracy and timeliness in an efficient and effective manner. Bloomberg's ability to achieve those goals is based on experience over time that has enabled repeated refinements to its practices.

9. Bloomberg does not pay underwriters for reference data, and it does not give their issues privileged or preferential treatment in Bloomberg services in exchange for reference data. My understanding, based on conversations with underwriters over the years and observations of the market, is that underwriters consistently provide reference data to Bloomberg because they are confident that Bloomberg will verify, maintain and disseminate accurate data, and thereby facilitate market access to the bonds that issuers and underwriters seek to sell.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on APRIL 16 2020.



David Miao