ORAL ARGUMENT NOT YET SCHEDULED
No. 21-1088

In the United States Court of Appeals for the District of Columbia Circuit

BLOOMBERG LP,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent,

FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.,
Intervenor.

On Petition for Review of a Final Order of the
United States Securities and Exchange Commission

FINAL BRIEF OF HEALTHY MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to D.C. Circuit Rules 15(c)(3) and 28(a)(1), the following is a list of the parties, intervenor, *amici*, ruling under review, and related cases.

Parties, intervenor, and amici

Petitioner: Bloomberg, LP.

***Amicus curiae* for petitioner:** Healthy Markets Association.

Respondent: U.S. Securities and Exchange Commission.

Intervenor: Financial Industry Regulatory Authority, Inc.

Ruling under review

Petitioner seeks review of the SEC's final order, entitled "Self-Regulatory Organization; Financial Industry Regulatory Authority, Inc.; Order Setting Aside Action by Delegated Authority and Approving a Proposed Rule Change, as Modified by Amendment No. 2, To Establish a Corporate Bond New Issue Reference Data Service," entered on January 15, 2021, and published at 86 Fed. Reg. 6922 (Jan. 25, 2021).

Related cases

Amicus is unaware of any related cases before this Court or any other Court.

November 5, 2021

/s/ Thomas Burns
Thomas A. Burns

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and D.C. Circuit Rules 27(a)(4) and 28(a)(1)(A), *amicus curiae* Healthy Markets Association submits the following corporate disclosure statement:

Healthy Markets Association, a finance industry trade association, represents U.S. and Canadian pensions and asset managers along with leading brokers, data and technology providers, and execution venues. Healthy Markets Association has no parent corporation, and no publicly held company has 10% or greater ownership in it.

November 5, 2021

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF COUNSEL

Pursuant to D.C. Circuit Rule 29(d), counsel certifies that separate briefing is necessary. Healthy Markets Association submits its brief from the perspective of a trade organization that represents pensions and assets managers along with leading brokers, data and technology providers, and execution venues. *Amicus* is aware of no other planned *amicus* brief in support of petitioner. *See* D.C. Cir. R. 29(d).

November 5, 2021

/s/ Thomas Burns
Thomas A. Burns

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STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the briefs for Bloomberg LP, the SEC, and FINRA.

STATEMENT OF *AMICUS CURIAE*'S IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

Launched in September 2015, *amicus curiae* Healthy Markets Association is an investor-focused nonprofit coalition that provides independent information and analysis to investors and regulators so as to promote transparency, reduce conflicts of interest, and ultimately reduce the costs of trading for investors.[1]

Healthy Markets members manage the retirement savings of millions of North Americans (including U.S. and Canadian pensions and asset managers with trillions of dollars in assets under management).[2] In addition, Healthy Markets also has working group members (including

[1] All parties and intervenor have consented to *amicus* filing this brief. No party's counsel authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made any monetary contribution to its preparation or submission. *See* Fed. R. App. P. 29(a)(4)(E).

[2] The buyside members include the Arizona State Retirement System, Brandes Investment Partners, CalPERS, Colorado PERA, Federated Hermes, The London Company of Virginia, Macquarie Investment Management, Ontario Municipal Employees Retirement System, PSP Investments, Quantitative Investment Management, Sands Capital Management, and the State of Wisconsin Investment Board. Collectively, those investment fiduciaries control the retirement accounts of millions of Americans and currently have trillions of dollars in assets under management.

leading brokers, data and technology providers, and execution venues).[3] Its staff and board include a former senior SEC official, current and former senior industry officials, and a securities regulation law professor.[4] It is frequently invited to opine in congressional testimony, regulatory panels, industry events, and the press. In doing so, Healthy Markets often submits comment letters in agency rulemaking proceedings, and regulators have cited its work hundreds of times in proposed and final rules.[5]

Healthy Markets is keenly interested in this case because it submitted three comment letters against FINRA's proposal. *See* Docs. 9 (JA20–26); 21 (JA109–114); 30.[6] As explained in great detail in those letters, Healthy Markets asserted FINRA hadn't sufficiently justified the

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[3] Its working group members include Barchart, Bloomberg LP, BMO Capital Markets, DTN, LLC, Investors Exchange, IHS Markit, Maystreet, Miax, Minneapolis Grain Exchange, LLC, and UBS Securities, LLC.

[4] *See* James D. Cox *et al.*, SECURITIES REGULATION: CASES AND MATERIALS (2020).

[5] All positions taken by Healthy Markets Association are taken by the organization itself and may not be reflective of specific interests or positions of any individual member.

[6] The joint appendix inadvertently excluded this third letter (Doc. 30), but it's available on the SEC's website. *See* Letter from Tyler Gellasch, Executive Director, Healthy Markets Association, to Vanessa Countryman, Acting Secretary, SEC (Oct. 25, 2019), *available at* https://www.sec.gov/comments/sr-finra-2019-008/srfinra2019008-6346067-195294.pdf (visited Nov. 5, 2021).

need to create the new issue reference service as required under § 15A(b)(6) of the Exchange Act, didn't adequately explain why the rule's burden on competition was necessary or appropriate under § 15A(b)(7), offered no evidence that the proposed fees and revenues were consistent with § 15A(b)(5), and—after FINRA stripped out the fee considerations—didn't justify doing so. *See generally* Docs. 9 (JA20–26); 21 (JA109–114); 30 (*see supra* note 6). Further, Healthy Markets argued that by stripping proposed costs out of the proposed rule prior to its ultimate approval, FINRA rendered a thorough analysis of the rule's compliance with the Exchange Act's requirements effectively impossible. Doc. 30 at 2 (*see supra* note 6).

Now that the SEC approved FINRA's proposed rule (Doc. 56 (JA191–204)), Healthy Markets must once again explain how the SEC failed to fulfill its obligation to review and ensure that this FINRA rule complies with the substantive requirements of the Exchange Act. *See* 15 U.S.C. § 78o-3(b)(5), (6), (9) (fees must be reasonable, equitably allocated, not an undue burden on competition, and not discriminatory). Healthy Markets' members, comprising leading pensions and asset management companies, brokers, data and technology providers, and execution venues

(*see supra* notes 2 & 3), are also likely to have the costs, availability, and quality of essential market data impacted by the rule. Further, Healthy Markets has unique substantive expertise. These factors necessitate Healthy Markets submitting its own brief.

ARGUMENT

In administrative law as in other contexts, "'with great power there must also come—great responsibility.'" *Kimble* v. *Marvel Entm't, LLC*, 576 U.S. 446, 465 (2015) (quoting Stan Lee & Stephen J. Ditko, Amazing Fantasy No. 15: "Spider-Man," p. 13 (1962)). That is, agencies—which are entrusted with tremendous delegated powers to regulate huge swaths of American life and commerce—can't issue permits or approve regulated entities' proposed rules willy-nilly. No, before agencies arrive at any conclusion and exercise their delegated powers within the constraints of the Peter Parker Principle[7] of administrative law, *see id.*, they must not only do their own homework—they must also *show their own work*.

[7] *Cf. United States* v. *Irey*, 612 F.3d 1160, 1197 (11th Cir. 2010) (en banc) (describing 18 U.S.C. § 3553(a) as "'the Goldilocks principle'" of criminal sentencing "because the goal is to lock in a sentence that is not too short and not too long, but just right").

This Court has already clearly told the SEC that it cannot simply rubberstamp its regulated entities' homework and disguise their conclusions as the product of the SEC's independent factfinding and decision-making. *E.g.*, *Susquehanna Int'l Group, LLP* v. *SEC*, 866 F.3d 442, 446–47 (D.C. Cir. 2017) (SEC must make its own "findings and determinations" and can't "abdicate that responsibility" to regulated entities).

Alas, in this case, the SEC has failed to take this Court's lessons to heart. Although it drew conclusions about the purported costs and benefits of FINRA's proposed rule, the SEC didn't do its own homework and didn't show its own work. Instead, it copied FINRA's homework (which itself primarily reflected FINRA's curated summary of the FIMSAC meeting and its anecdotal outreach, not data) and disguised FINRA's desired conclusions as the product of its own independent factfinding and decision-making. And that's a pity, because had the SEC done its job to collect and analyze the relevant facts, it could conceivably have properly exercised its authority to create a database similar to what FINRA has proposed. *See infra* note 9.

At any rate, Healthy Markets believes the SEC's failures fall into three broad categories.[8] First, the SEC never engaged in a meaningful assessment of the rule's compliance with the Exchange Act. *See infra* Argument I. Second, the SEC never engaged in a meaningful assessment of the rule's costs and benefits. *See infra* Argument II. Third, the SEC improperly allowed FINRA to evade administrative review of its fees. *See infra* Argument III.[9]

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[8] In fairness to the SEC, its failures directly followed from the inadequacies of FINRA's proposal and supporting materials.

[9] So far, so good: Healthy Markets is completely aligned with Bloomberg on those three arguments. *See* Bloomberg Br. 34–59. But where Healthy Markets and Bloomberg might part ways is whether a public takeover of a private space could ever be appropriate. *See* Bloomberg Br. 21–34. Unlike Bloomberg, although Healthy Markets has its own skepticisms and doubts about the propriety of public takeovers of private spaces, it's ultimately agnostic about that issue and takes no position.

Fortunately, however, that's not an issue this Court needs to take up in this case. Although sound and principled arguments could be made for both sides of that public-takeover issue, this Court can and should resolve this petition for review solely on the basis of the SEC's failure to do its own homework and show its own work. *See infra* Arguments I–III. Indeed, there's no indication on this administrative record at this time—other than FINRA's and the SEC's wishful thinking—that FINRA will provide data any more efficiently, accurately, and inexpensively than private vendors like Bloomberg or its competitors.

I. The SEC never engaged in a meaningful assessment of the rule's compliance with the Exchange Act

The SEC never engaged in a meaningful assessment of the rule's compliance with the Exchange Act. The SEC is supposed to disapprove proposed rules by FINRA unless it finds that such rules are consistent with the Exchange Act. *See Susquehanna Int'l Group, LLP*, 866 F.3d at 445. As the SEC's rules make clear, the burden was on a self-regulatory organization (in this case FINRA) to establish that its rules meet the requirements set forth by the Exchange Act. 17 C.F.R. § 201.700(b)(3) (SEC rules of practice); *see also* SEC, *Staff Guidance on SRO Rule Filings Relating to Fees*, *at* https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees (visited July 16, 2021). These requirements include that FINRA's rules must: provide for the equitable allocation of reasonable dues, fees, and other charges; not be designed to permit unfair discrimination; not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act; and be designed to protect investors and the public interest. 15 U.S.C. § 78o-3(b)(5), (6), (9) (fees must be reasonable, equitably allocated, not an undue burden on competition, and not discriminatory).

While the SEC must make a determination that a FINRA rule would meet those requirements, such determination must be based upon a reasonable collection of relevant facts and the SEC's own analysis. The SEC failed to do that in this case.

Based upon the limited record at hand, for example, how could the SEC determine that the rule was not an "undue burden on competition"? At root, the rule would take a business run by for-profit entities and establish a new "competitor" that could compel other market participants to provide data and also effectively compel customers to use it. Similarly, how could the SEC determine that the costs are "reasonable" or "equitably allocated," when it isn't clear what's being offered, much less for how much?

II. The SEC never engaged in a meaningful assessment of the rule's costs and benefits

The SEC never engaged in a meaningful assessment of the rule's costs and benefits. It never attempted to calculate or even estimate them. It didn't look to various potential classes of market participants who would be impacted by the rule and assess the impacts upon them in anything more than cursory fashion.

Instead, the SEC seemed to accept FINRA's analysis without comment, which itself seemed to rely heavily upon the determination of an industry advisory committee to the SEC—which included a member from FINRA. At no point did the SEC or FINRA appear to comprehensively collect data, analyze it, or base its conclusions on it. The SEC essentially blindly accepted FINRA's outreach for anecdotes as hard data and drew conclusions about purported costs and benefits without collecting the relevant facts, analyzing them, and showing how those facts reasonably support the regulatory approach taken.

A. FINRA's initial proposal raised more questions than answers

The language of the SEC's summary of FINRA's initial proposal was revealing, because it used some variation of the phrase "FINRA believes" over a dozen times. Doc. 1 at 5 n.6, 7 (three times), 9 (twice), 10 (three times), 11 (twice), 15, 16, 18, 19 (JA5 n.6, 7, 9, 10, 11, 15, 16, 18, 19). Unsurprisingly, because the proposal was replete with a self-serving summary of the FIMSAC meeting, mere anecdotes, "outreach," and beliefs instead of supported by hard data, many commenters, including Healthy Markets, pounced on those shortcomings. As Healthy Markets put it, "FINRA has not provided sufficient evidence to establish and

justify its choices, nor has the Commission been equipped with sufficient information to evaluate the relevant facts and articulate its reasoning." Doc. 9 at 4 (JA23). Indeed, FINRA's proposal "raise[d] more questions than it answers." *Susquehanna Int'l Group, LLP*, 866 F.3d at 447.

For instance, Healthy Markets complained that FINRA's anecdotes "may well be true," but they raised more questions than answers:

> But what data is used to support that conclusion? What data shows that there are the purported challenges in electronic trading, settlement, or clearing? And how will the proposed new service will make the market more efficient? Further, what data is used to support the conclusion that the centralized data firm should be FINRA, as opposed to any of the existing for-profit data firms, or some other firm? Is this collection and distribution of data a regulatory function or a business function? If it is a governmental function, should this be provided to the public for free, or on an "at cost" basis? Alternatively, if this deemed to be a commercial function, is it appropriate for FINRA to be essentially pre-empting other data providers? What is the likely impact on the firms who use the data, or may use the data in the future? What is the likely impact on firms who currently provide data and services to market participants?

Doc. 9 at 4–5 (JA23–24).

And the biggest question of all concerned FINRA's initially proposed costs for building the data system and its proposed fees for subscribing to it, which it stated would be $250 per month or $6,000 per month (depending on how the data was used and shared). Doc. 9 at 5–6

(JA24–25). Suggesting those figures were plucked out of thin air, Healthy Markets pointed out it didn't appear FINRA had determined those fee levels "based upon its own internal costs of production and maintenance of the service." Doc. 9 at 5 (JA24). The proposed fees also didn't seem to be "tied to the costs of the already existing for-profit market competitors." Doc. 9 at 5 (JA24). Lastly, FINRA's filing didn't "offer details regarding the expected usage of each type, or the potential impact of those fees on market participants." Doc. 9 at 5–6 (JA24–25).

Things largely remained the same after the SEC issued its order to institute proceedings. Doc. 45 (https://www.sec.gov/rules/sro/finra/2019/34-86256.pdf (visited Nov. 5, 2021). For instance, because FINRA never supported its proposed costs with data, Healthy Markets still "struggle[d] to understand how the Commission would be capable of finding that FINRA has established that such costs were (1) reasonable or (2) equitably allocated." Doc. 21 at 4 (JA112). Healthy Markets also still questioned whether the proposal was commercial or regulatory in nature. Doc. 21 at 4 (JA112). And Healthy Markets questioned how FINRA would ensure its data system's accuracy. Doc. 21 at 6 (JA114). FINRA hadn't bothered to explain "how it would collect, scrub, and disseminate the new data," so

it was "completely unknown" how FINRA would "work with its broker-dealers who submit data to ensure accuracy." Doc. 21 at 6 (JA114). Relatedly, it was unclear who (if anyone) would be liable in case FINRA or a broker-dealer disseminated inaccurate information and how that might "differ from the existing for-profit providers." Doc. 21 at 6 (JA114).

Ultimately, Healthy Markets concluded, "Without information on these core questions, the burdens on competition can't be assessed, just as any possible benefits of the proposal can't be assessed." Doc. 21 at 6 (JA114).

B. FINRA's amended proposal fared no better

FINRA didn't remedy the problem when it amended its proposal to, *inter alia*, "strip out the discussion of fees until after the initial approval." Doc. 30 at 2 (*see supra* note 6). Indeed, this procedural maneuver was "deeply problematic." Doc. 30 at 2 (*see supra* note 6).

That's because, without fee information, it'd be impossible for the SEC to assess whether FINRA's proposal complies with the Exchange Act. Doc. 30 at 2 (*see supra* note 6). On one hand, if FINRA intended to provide its service for free, it should have "clearly disclose[d] that intent." Doc. 30 at 2 (*see supra* note 6). On the other hand, if FINRA intended to

charge for its new data product, it should have "explain[ed] its fee structure—both in terms of levels and application." Doc. 30 at 2 (*see supra* note 6).

How can the SEC—or anyone, for that matter—assess whether fees for a product is "reasonable," "equitably allocated," not an undue burden on competition, or discriminatory (as required by the Exchange Act) without knowing who's expected to pay how much for what?

Instead, to avoid scrutiny, FINRA simply kicked the can down the road by "[s]egregating the cost discussion, and promising to revisit it later (as part of a less-scrutinized filing process)." Doc. 30 at 2 (*see supra* note 6). Alas, that approach wouldn't "permit market participants or the Commission to engage in any reasonable analysis of the costs and benefits of the collective proposal." Doc. 30 at 2 (*see supra* note 6). And, it left "unclear what, if any, limitations on *future* costs may be imposed." Doc. 30 at 2 (*see supra* note 6) (emphasis added).

This approach makes it impossible to assess the impact of the rule on market participants.

Ultimately, Healthy Markets concluded from this state of affairs, "Without this key information, it is impossible for the Commission to

conclude that FINRA has met the burdens of the Exchange Act and Commission rules." Doc. 30 at 2 (*see supra* note 6).

C. The SEC drew conclusions about costs and benefits, but never showed its work

Based on that threadbare administrative record composed of curated summary of a meeting and limited outreach for anecdotes instead of hard data, the SEC drew conclusions about FINRA's proposed rule's costs and benefits. Doc. 47 at 26–55 (JA216–45). But it never actually performed its duty by showing its own work.

For starters, with respect to the proposal's justification, the SEC concluded "the record provides ample evidence" that "many market participants, including investors, trading platforms, and data vendors, do not have accurate, complete and timely access to corporate bond new issue reference data on the day a new issue begins trading in the secondary market." Doc. 47 at 27 (Supp. JA220). But that conclusion wasn't based on data from investors, trading platforms, and data vendors; instead, it was based on FINRA's supposition and inference from the FIMSAC meeting (which didn't include significant data about the availability, reliability, and cost of bond reference data) and limited FINRA outreach, which the SEC accepted at face value. *See* Bloomberg Br. 23–30. By contrast,

Healthy Markets members include investors, trading platforms, and data vendors (*see supra* notes 2 & 3)—and we have argued to the SEC that we are not aware of those purported concerns. Docs. 9 at 4–5 (JA23–24); 21 at 4–6 (JA112–14); 30 at 2–3 (*see supra* note 6). As this Court has previously held, anecdotes, self-serving statements of regulated entities, and third-party discussions can't substitute for cold, hard data. *Susquehanna Int'l Group, LLP*, 866 F.3d at 447–48.

More importantly, there was no reason to believe, on this record, that investors lack access to bond data. After all, investors can currently purchase the data from data vendors, including at least one member of Healthy Markets. *See supra* note 3; *see also* Bloomberg Br. 24. Neither the SEC nor FINRA have previously or concurrently with this rulemaking offered evidence of significant errors in bond data and, more importantly, how this proposed rule would resolve those problems. To the contrary, the record reflects that FINRA's existing fixed income database has significant rates of error in its few fields of reference data, which are generally much greater than those identified in Bloomberg data. Doc. 19 at 5–6 (JA100–01); 32 at 2–3 (JA186–87).

III. The SEC improperly allowed FINRA to evade administrative and judicial review of its fees

Bloomberg has already persuasively argued how the SEC improperly allowed FINRA to evade administrative and judicial review of its fees by misreading the plain language of section 15A(b)(5) of the Exchange Act, mistakenly allowing FINRA to shift the burden for approval in a practical (albeit not legal) sense, and depriving Bloomberg and other market participants of judicial review of whatever fee schedule FINRA ultimately proposes. Bloomberg Br. 53–59. It's thus not necessary for Healthy Markets to repeat those arguments here.

Nevertheless, Healthy Markets wishes to make it clear that if this Court were to permit FINRA's "novel" procedural maneuver, it might create a "potential precedential impact" that encourages other self-regulatory organizations "to avoid scrutiny of other significant changes to their rules by simply tabling fees discussions until later on in the process." Doc. 30 at 2 (*see supra* note 6). This would have dramatic, negative impacts on Healthy Markets members and other market participants. If the Court allows this procedural maneuver here, it could open the floodgates to future procedural maneuvers that would immunize agency actions from judicial review. And ultimately, it is judicial review—and the threat of

judicial review—that is the primary bulwark that prevents agencies from abdicating their responsibilities.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rules of Appellate Procedure 29(a)(5)'s and 32(a)(7)(B)'s type-volume requirements. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1), this brief contains 3,415 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century Schoolbook font.

November 5, 2021

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and eight copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 5th day of November, 2021, to:

Mark Langer, Clerk of Court
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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 5th day of November, 2021, to all counsel of record.

November 5, 2021

/s/ Thomas Burns
Thomas A. Burns