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September 30, 2021

Ms. Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Submitted via email: pubcom@finra.org

Re: Short Interest Position Reporting Enhancements and Other Changes Related to Short Sale Reporting
FINRA Regulatory Notice 21-19[1]

Dear Ms. Mitchell:

Bloomberg L.P.[2] respectfully submits this letter in response to the above-referenced Regulatory Notice issued by the Financial Industry Regulatory Authority ("FINRA"). Bloomberg thanks FINRA for considering modifications to its short sale reporting program, including consolidating the publication of short interest data for both unlisted and listed equities and publishing the information free of charge to the public. Public interest and demand for greater market transparency and access to data are high, and as this year's events have shown, timely, accurate, and complete short sale data is especially important for investor protection and market integrity.

Overview

The current system by which short interest information is collected and disseminated to the market lacks transparency and imposes fees on market participants that do not comport with the requirements of the Securities Exchange Act of 1934 ("Exchange Act"). The short interest position information for OTC equity securities is currently made available on FINRA's website. The data for exchange-listed securities – which FINRA's members are also required to provide for free to FINRA – is apparently sold by FINRA to the exchanges on which they are listed, and then re-sold by the exchanges back to FINRA's members and the broader market. This seems to be an exclusive distribution arrangement between FINRA and the exchanges. Bloomberg has

[1] Short Interest Position Reporting Enhancements and Other Changes Related to Short Sale Reporting, FINRA Regulatory Notice 21-19 (June 4, 2021), *available at* https://www.finra.org/sites/default/files/2021-06/Regulatory-Notice-21-19.pdf.

[2] Bloomberg – the global business, financial information, and news leader – increases access to market data by connecting market participants of all stripes to a dynamic network of information, people, and ideas. The company's strength – quickly and accurately delivering data, news, and analytics through innovative technology – is at the core of the Bloomberg Terminal. The Terminal provides financial market information, data, news, and analytics to banks, broker-dealers, institutional investors, government bodies, and other business and financial professional worldwide.

been unable to obtain this data directly from FINRA, and we are not aware of any other vendor which has succeeded in doing so.

There is no transparency as to the terms and conditions of this transfer from NYSE and Nasdaq, and neither FINRA nor the exchanges have filed a rule with the Securities and Exchange Commission ("SEC" or the "Commission") covering this arrangement. Little attempt, if any, is made by FINRA or the exchanges to justify these fees or to demonstrate how they are consistent with the Exchange Act. In fact, neither FINRA nor NYSE files these fees with the Commission at all.

We believe any new system for gathering short interest information should include the following: (1) the rules, which should cover all aspects of the data collection and dissemination process, should be included in FINRA's rulebook and appropriately filed with the Commission; (2) if data is to be distributed via exclusive arrangements and no-bid contracts, the justification for those arrangements – including a description of how such arrangement comports with the Act – should be offered; (3) for any fees associated with the collection and dissemination of information, FINRA should provide sufficient information in the filing with the Commission that would allow the Commission to determine that the fees are compliant with the Exchange Act – that they are fair, reasonable, equitably allocated, and not discriminatory; and (4) if regulatory data collected from FINRA members is to be distributed by SROs, those SROs should file those fees with the Commission and justify those fees under the Act.

At present, there is no other way to obtain the short interest data without paying the fees set by the exchanges. Making the short interest data for listed equity securities available on FINRA's website for the public is a welcome improvement.[3]

The Exchanges Monopolize the Short Interest Data under the Current Method of Dissemination

The ongoing volatility in meme stocks has led to an increased scrutiny over short selling. There is a wide public demand for the short interest data, especially in an economic climate where greater transparency in the marketplace is called for.

FINRA gathers the short interest information from its members pursuant to FINRA Rule 4560. While this rule contains provisions on reporting the short interest information to FINRA, it does not address how such data would be redistributed or what FINRA may do with it. Bloomberg is unaware of any existing rule or regulation governing the dissemination of the short interest data. In practice, FINRA provides the short interest data for exchange-listed securities to the applicable listing exchange for publication, which the exchanges disseminate for a fee.

[3] The Exchange Act does not require that data be free as it allows data fees to be charged by self-regulatory organizations as long as they are fair, reasonable, equitably allocated, and not discriminatory. Self-regulatory organizations are required to make proper disclosures regarding such fees.

Currently, the Nasdaq Stock Market LLC ("Nasdaq") is the only source of short interest data for securities listed on Nasdaq. The New York Stock Exchange LLC ("NYSE") is the only source for the short interest data for securities listed on NYSE. Fees for the short sale data increased for the first time in 2007, after FINRA (then known as the National Association of Securities Dealers, Inc. or "NASD") increased the frequency of the short sale reporting requirements from monthly to twice a month.[4] However, fees for the data were not addressed anywhere in rule filings pertaining to the change in reporting frequency and, while fees did increase as a result, no rule filings were made with respect to those changes. Fee increases were simply communicated privately to those obtaining the short interest data from the exchanges.

Nasdaq raised the fees it charges for the short interest data on two additional occasions. In 2014, Nasdaq replaced its pricing model based on the frequency of data distribution based on the number of subscribers with a fee based on internal or external distribution.[5] In 2017, it increased its fees by replacing the fee structure that used to be based on the frequency of distribution with a subscription service based on the number of subscribers.[6] These changes not only increased the fees for the short interest data, but also unnecessarily restricted the re-distribution of the data. Even as we speak, both exchanges are actively continuing to try to increase the fees they derive from the short interest data and effectively turning it into entitlement data. This in turn segments access to this data, which runs contrary to the regulatory objective of requiring the short interest reporting in the first place. This is why this data should be published directly on FINRA's website.

Nasdaq attributed the impetus for the fee increase in 2017 to FINRA's increase of its annual charges for receipt of short interest data, which purportedly resulted in an increase to Nasdaq's cost in producing the report.[7] While we are able to glean from the 2017 Nasdaq Filing that Nasdaq pays FINRA for the right to distribute the short interest data, no one knows the specifics of the arrangement, including the amount of the fee charged by FINRA and the cost to Nasdaq for disseminating the data. The fees that Nasdaq charges for the short interest data cannot be

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[4] *See* Order Approving Proposed Rule Changes to Increase the Frequency of the Short Interest Reporting Requirements, SEC Release No. 34-55406, File No. SR-NASD-2006-131; SR-NYSE-2006-111; SR-Amex-2007-05 (Mar. 6. 2007), *available at* https://www.sec.gov/rules/sro/nasd/2007/34-55406.pdf. *See also* Nasdaq to Increase Frequency of Short Interest Reports in September of 2007, Nasdaq Data News #2007-53, (Aug. 22, 2007), *available at* https://www.nasdaqtrader.com/TraderNews.aspx?id=nva2007-053.

[5] *See* Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Short Interest Reports, SEC Release No. 34-73662, File No. SR-NASDAQ-2014-016 (Nov. 20, 2014), *available at* https://www.sec.gov/rules/sro/nasdaq/2014/34-73662.pdf ("2014 Nasdaq Filing").

[6] *See* Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Alter the Exchange's Fee Schedule for the Short Interest Report, SEC Release No. 34-81256, File No. SR-NASDAQ-2017-077 (July 28, 2017), *available at* https://www.sec.gov/rules/sro/nasdaq/2017/34-81256.pdf ("2017 Nasdaq Filing").

[7] *Id.* at p. 5. For an unlimited external distribution of the short interest data, a distributor paid $2,500 per month (a total of $30,000 annually) prior to the 2017 Nasdaq Filing. Nasdaq increased this fee by twofold to $7,500 per month (a total of $60,000 annually) in 2017, citing an increase to its own undisclosed cost of getting the data from FINRA.

justified without knowing the costs it incurs to produce the information – costs which materially include FINRA's own undisclosed fees to Nasdaq.

The commercial arrangements between FINRA and the exchanges with respect to the short interest data are entirely unknown to the public. To our knowledge, the 2017 Nasdaq Filing is the only public document that indicates that the exchanges pay any fees to FINRA for the short interest data. Nasdaq considers the short interest data as a type of data product used as a means by which it competes to attract order flow and its position is that subscribers can simply choose not to obtain the data if they are not satisfied with it.[8] But FINRA, as the sole authority responsible for collecting the short interest information, provides the data for the listed equity securities only to the exchanges and the exchanges face no competition from any substitute data product.[9] Is it appropriate for regulatory data – which broker-dealers are compelled to provide for free in furtherance of regulatory objectives – to be sold by one regulator to an exchange to help the exchange attract order flow?

While Nasdaq at least files any proposed increases to its short interest data fees with the Commission, NYSE does not. Even though NYSE has increased its short interest data fees over the years, it failed to file such changes with the SEC.[10] There is zero transparency with respect to NYSE's handling of the short interest data and no stated reasoning behind the fees it charges. The SEC has been deprived of the opportunity to review any NYSE fees to ensure they meet the requirements of the Exchange Act and for the public to submit comments.

We note that Nasdaq and NYSE currently require their non-FINRA members to also report their short positions in all customer and proprietary firm accounts to FINRA.[11] This means that the current short interest information disseminated by the exchanges contain information beyond what is gathered by FINRA. Should FINRA assume the responsibility for disseminating the short interest data to the public, it needs to make sure that the information collected separately by the exchanges continues to be included in FINRA's offering and make provisions for them in its rule filings with the SEC. The quality and content of the short interest data should not be reduced by the changes contemplated by FINRA.

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[8] *Id.* at p. 8.

[9] It is not possible to purchase the short interest data directly from FINRA as FINRA does not provide short interest information for listed securities to anyone other than the exchanges. Further, the exchanges do not compete with one another over the short interest data as the information for exchange-listed securities is disseminated by each applicable exchange on which they are listed.

[10] In fact, NYSE does not even publicly publish its fees it charges for the short interest data anywhere, not even on its own website. The only way to know the amount of fees incurred for the short interest data and any subsequent increases is to fill out an order form that requires a log-in and generate what the data would cost.

[11] NYSE requires its non-FINRA members to report their short positions to FINRA as described in FINRA Rule 4560 while Nasdaq requires its non-FINRA members to report the information directly to Nasdaq. *See* NYSE Rule 4560 and Nasdaq Rule 3360.

Rules Pertaining to the Collection and Dissemination of the Short Interest Data, Including Any Associated Fees, Should Be Filed with the SEC

Bloomberg supports FINRA in its preliminary decision to make the short interest data available directly to the public. We continue to believe that the rules of a self-regulatory organization, including those pertaining to fees, should comport with the requirements of the Exchange Act. Self-regulatory organizations should provide sufficient information to Commission with respect to these filings.

Under the Exchange Act Section 19(b) and Rule 19b-4 thereunder,[12] self-regulatory organizations are required to file proposed rule changes with the Commission on Form 19b-4.[13] This is intended to elicit information necessary for the public to provide meaningful comment on the proposed rule change and for the Commission to determine whether the proposed rule change is consistent with the requirements of the Exchange Act and the rule and regulations thereunder as applicable to the self-regulatory organization and in accordance with the requirements of each type of filing.[14]

Self-regulatory organizations have the burden to demonstrate that a proposed rule change is consistent with the Exchanges and the rules and regulations issued thereunder.[15] Thus a fee filing proposal should fully and fairly describe the operation of the applicable fee – including its effect on market participants – and do so in sufficient detail so that the public can understand the fee filing proposal sufficiently to provide meaningful comment and the Commission can determine whether the proposal is consistent with the Exchange Act.[16] A fee filing must also address all relevant statutory requirements, including the requirements that the fees are: (1) reasonable;[17] (2)

[12] *See* Exchange Act Section 19(b) and Exchange Act Rule 19b-4.

[13] *See* 17 CFR 249.819.

[14] *See* SEC Staff Guidance on SRO Rule Filings Relating to Fees at Section II (May 21, 2019), *available at* https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees ("SEC Guidance on SRO Fee Filings").

[15] *See* SEC Rules of Practice, Rule 700(b)(3) (17 CFR 201.700(b)(3)).

[16] *See* Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change Amending the Fee Schedule Assessed on Members to Establish a Monthly Trading Rights Fee, Exchange Act Release No. 86236, at 7 (June 28, 2019) *available at* https://www.sec.gov/rules/sro/cboeedga/2019/34-86236.pdf. *See also* SEC Staff Guidance on SRO Rule Filings Relating to Fees at Section II (May 21, 2019), *available at* https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees.

[17] Exchange Act Sections 6(b)(4) and 15A(b)(5).

equitably allocated;[18] (3) not unfairly discriminatory;[19] and (4) do not unduly burden competition.[20]

The exchanges have failed to meet these statutory requirements for fee filings related to the short interest data. As detailed above, NYSE failed to make any filings for fee changes at all and Nasdaq made inadequate filings that did not fully or fairly describe the reasons for the fee increases. In addition, the dissemination of the short interest data took place pursuant to no existing rule. Undisclosed arrangements between the exchanges and FINRA regarding the short interest data are inconsistent with the Act and detrimental to the public.

Given the above, it is commendable for FINRA to contemplate publishing the short interest data for free on its website. However, questions about the equitable distribution of costs associated with such a change remain including questions regarding the impact of the proposed change on FINRA's operating revenue, how it proposes to account for any shortfalls caused by the change, who will pay the costs of the proposed change, and whether the proposed change complies with the Exchange Act, among others. Even though the data is to be made available for "free," the costs are in essence being borne by the industry as a transparency promoting service. FINRA needs to address why it is proposing to offer this type of data for "free" to the public and not others, such as the TRACE data.

Therefore, we ask that the rules pertaining to the short interest data – covering all aspects of the data collection and dissemination process – be included in FINRA's rulebook and appropriately filed with the Commission. Any fees associated with the collection and dissemination of the short interest information likewise should be filed with the SEC and contain sufficiently detailed information to meet all statutory requirements that would allow the SEC to determine that the fees are compliant with the Exchange Act.

Conclusion

For all the reasons discussed above, we urge FINRA to make the short interest data for both listed and unlisted securities available on its website so that the public may access the data without paying the current monopoly prices set by the exchanges. FINRA is taking a useful and overdue step in the right direction. As a data provider, we support measures to increase access to data and transparency in the marketplace and the short interest data is an area where such measures are greatly needed. We appreciate FINRA's willingness to consider our comments and would be pleased to discuss any questions FINRA may have with respect to this letter.

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[18] Exchange Act Sections 6(b)(4) and 15A(b)(5).

[19] Exchange Act Sections 6(b)(5) and 15A(b)(6), Rule 603 of Regulation NMS.

[20] Exchange Act Sections 6(b)(8) and 15A(b)(9).

Thank you.

Very truly yours,

Gregory Babyak
Global Head of Regulatory Affairs, Bloomberg L.P.