UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT FRANKFORT

Electronically Filed

NATIONAL ASSOCIATION OF MANUFACTURERS and KENTUCKY ASSOCIATION OF MANUFACTURERS,

Plaintiffs,

vs.

U.S. SECURITIES AND EXCHANGE COMMISSION and GARY GENSLER, in his official capacity as Chair of the Securities and Exchange Commission,

Defendants.

Case No: _____

COMPLAINT

1. This lawsuit invokes the Court's authority under the Administrative Procedure Act (APA), 5 U.S.C. § 702, to remedy an egregious abuse of federal regulatory power.

2. Over thirty years ago, the Securities and Exchange Commission adopted a rule permitting privately-held companies to access the debt markets without publicly disclosing their financial information. That rule—termed "Rule 144A"—restricts resales of these securities to sophisticated institutional investors, defined as those managing at least $100 million in assets. And Rule 144A entitles these sophisticated institutional investors to obtain company financial information from the issuers of these debt securities on a confidential basis, rather than requiring the companies issuing the debt securities to disclose that information publicly.

3. Businesses, like other types of organizations, have a strong interest in maintaining the confidentiality of information about their operations and financial affairs. Many businesses decide not to offer shares to the public—in other words, to remain private companies—in order to

preserve that confidentiality. That is particularly true of many family-owned enterprises, because disclosure of information about the business may reveal private information about family members. Private companies also choose to keep their financial information private to prevent competitors from acquiring sensitive financial and product information.

4. Private companies, which include very large businesses as well as smaller enterprises, frequently issue fixed-income securities pursuant to Rule 144A. (Fixed-income securities are securities in which an investor provides funds to a corporation or a government in return for the payment of interest and the return of principal. Fixed-income securities include debt securities, such as bonds, notes, or debentures.) Rule 144A fixed-income issuances from private companies exceed more than $150 billion annually and comprise 9% of the entire U.S. bond market.

5. The Commission adopted a separate rule, Rule 15c2-11, in 1971 to protect small, retail investors trading in the over-the-counter (OTC) market for equity securities against fraud in that market. (Equity securities—for example, stocks—represent an ownership interest in the corporation.) The Commission has only applied Rule 15c2-11 to equity securities and never applied it to fixed-income securities.

6. The Commission recently amended Rule 15c2-11 to condition secondary-market trading[1] of these OTC equity securities on public disclosure of an issuer's financial information.

7. One year after the amendments to Rule 15c2-11 were finalized, the Commission staff announced, for the first time, that Rule 15c2-11, including the new public-disclosure

[1] The secondary market involves trading in securities that already are outstanding, rather than transactions involving new issuances.

requirement, applies to fixed-income securities—including those offered pursuant to Rule 144A.

8. That determination effectively nullifies Rule 144A, which expressly rejected public disclosure of issuer financial information. And it does so even though the Commission's stated goal in adopting Rule 15c2-11 and the amendments thereto—protecting small, retail investors—is wholly inapplicable to the Rule 144A market, which is limited by law to large sophisticated institutional investors who already are entitled to obtain an issuer's financial information.

9. The extension of Rule 15c2-11 and its new public-disclosure requirement to cover Rule 144A fixed-income securities violates the APA in multiple ways:

- Interested parties were not given prior notice and opportunity to comment on the application of Rule 15c2-11's new public-disclosure requirement to Rule 144A securities;
- Neither the Commission staff nor the Commission explained, or even acknowledged, the direct conflict between the new standards and Rule 144A; and
- Neither the Commission staff nor the Commission attempted to justify the application of Rule 15c2-11's public-disclosure requirement to the very different Rule 144A fixed-income securities market.

10. This Court should therefore invalidate the SEC actions expanding Rule 15c2-11 to cover Rule 144A fixed-income securities.

* * *

11. Rule 15c2-11 (the "Rule"), 17 C.F.R. § 240.15c2-11, regulates broker-dealers' issuance of price quotations for securities that are traded "over-the-counter," that is, not on national exchanges such as the New York Stock Exchange. These price quotations provide the

OTC markets' retail investors with the information needed to enable secondary-market trading of these securities.

12. Prior to 2020, Rule 15c2-11 required a broker-dealer issuing a price quotation with respect to a security to obtain from the security's issuer certain specified information about the security and the issuer.

13. In 2020, the Commission amended the Rule (the "2020 Amendments") to impose additional requirements, permitting broker-dealers to issue a price quotation only if the company issuing the security made detailed financial information available to the public. The Commission justified this new public-disclosure requirement by referring to the importance of protecting small investors participating in the OTC equity securities market, stating that it was "part of [the Commission's] overall efforts to protect retail investors from fraud and manipulation." Publication or Submission of Quotations Without Specified Information, 85 Fed. Reg. 68124, 68,125 (Oct. 27, 2020).

14. In September 2021, one year after promulgation of the 2020 Amendments, the SEC announced an unprecedented expansion of Rule 15c2-11: the SEC staff issued a "no-action letter" stating that the Rule applies to fixed-income securities. The letter also stated that the staff would not recommend enforcement actions with respect to fixed-income securities until January 3, 2022. (On December 16, 2021, a second no-action letter extended that deadline to January 3, 2023.) In the more than fifty years since Rule 15c2-11 was first promulgated, the Commission never applied Rule 15c2-11 to fixed-income securities.

15. Commissioner Hester Peirce—in response to the 2021 staff action—stated that "[n]othing in the" 2020 Amendments "suggests that the Commission considered the application

of these rules to the fixed-income markets." In subsequent remarks, she stated that "[t]he application to the fixed income market was, frankly, not something that we had thought about as a Commission."

16. This novel expansion of Rule 15c2-11 will have a dramatic impact on private companies, fundamentally changing their ability to raise funds through debt offerings. Most notably, it would for the first time require *public* financial disclosures from these *privately held* businesses. Before this unlawful expansion of the Rule, businesses whose securities were not publicly traded were expressly permitted to keep their financial information private.

17. There is a long tradition—at both the state and federal levels—recognizing the importance of permitting private companies to preserve the confidentiality of their business information. Companies choose to remain private—rather than offering their equity securities to the public—in order to keep their financial and operational information confidential. That prevents competitors from learning about the company's business plans and financial capabilities. And, because many private companies are family owned, it protects the confidentiality of information about family members. The businesses that operate as private companies typically have done so for their entire existence, which can span many decades. Requiring public disclosure of financial and other confidential information would work a fundamental change in their operating practices and deprive them of the basic right to protect the privacy of their business information.

18. The SEC itself has long recognized the importance of permitting private companies to keep their financial information private. The Commission in 1990 promulgated Rule 144A, 17 C.F.R. § 230.144A, for the express purpose of enabling private companies to access the capital

markets outside the public-offering process. Rule 144A allows issuers to offer fixed-income securities to a limited pool of highly sophisticated institutional investors (those managing over $100 million in assets, known as "qualified institutional buyers" or "QIBs"). It also allows for the secondary trading of those securities among these institutional investors. Crucially, Rule 144A does not require public disclosure of issuers' financial information, instead requiring that issuers make such information available to QIBs on a confidential basis if requested.

19. Rule 144A is an essential avenue for private companies to raise the funds they need to create new products, build new facilities, purchase new equipment, and otherwise expand their businesses. These securities include asset-backed securities, high-yield bonds, and investment grade debt. Private companies issued more than $315 billion in Rule 144A securities in 2020 and 2021. *See* EY, Macroeconomic Impacts of Applying Rule 15c2-11 to Rule 144A Debt Issued by Private US Companies at 3 (Sept. 2023) (EY Study), https://bit.ly/3RgpPgv. These securities are thus a significant component of the U.S. financial system and a key tool funding the corporate growth that expands our economy and produces new jobs.

20. The 2021 expansion of Rule 15c2-11 effectively nullifies Rule 144A. Although Rule 144A permitted broker-dealers to issue quotations for secondary trading without public disclosure of the issuing company's financial information, the new interpretation of Rule 15c2-11 requires public disclosure of that information. Rule 144A issuers would be subjected to this requirement even though small, individual investors are not able to purchase Rule 144A securities (and thus would not experience any increased "protect[ion]" from "fraud and manipulation") and despite the fact that the QIBs who *can* participate in the Rule 144A market already have access to issuers' current financial information because Rule 144A requires issuers to make that information

available upon request.

21. When the Commission amended Rule 15c2-11 in 2020, it did not specify any expansion of the Rule's scope. Nor did it discuss the very significant impacts on issuers of fixed-income securities—including, in particular, privately held businesses—that would result if the amended Rule were applied to those securities. Neither did the Commission address the conflict that requiring public disclosure would create with respect to its decision years earlier specifically *declining* to impose a public-disclosure obligation on these issuers when it promulgated Rule 144A.

22. Subjecting private companies that issue Rule 144A fixed-income securities to the public-disclosure requirements of amended Rule 15c2-11 would leave these companies with three options, each of which will subject them to significant economic harm: (1) publicly disclose proprietary financial information, placing their business at a competitive disadvantage and imposing significant compliance costs; (2) forgo public financial disclosures, making it difficult if not impossible for their securities to be traded on the secondary market and therefore substantially increasing their funding costs; or (3) abandon the Rule 144A market and raise funds via inferior avenues that impose increased costs and limit their access to financing.

23. The institutional investors that participate in the Rule 144A market also will face significant harm if Rule 15c2-11 is applied to Rule 144A fixed-income securities. Current holders of Rule 144A securities issued by companies that choose not to disclose information publicly will see the value of their holdings decrease, because their ability to resell those securities will be significantly hampered by the absence of broker-dealer price quotations. More broadly, the Rule 144A market as a whole will experience a decrease in liquidity (as certain issuers' securities cannot

easily be resold), new limits on price discovery (as broker-dealers are prohibited from providing quotations for certain securities), and fewer investing options (as issuers flee to seek alternative methods to raise funds). These changes will directly reduce the value of Rule 144A securities held by institutional investors. Moreover, institutional investors will face increased compliance costs of their own, as the lack of published quotations will impose a new, heavy burden in connection with reporting the value of their holdings to their clients.

24. The increased costs and decreased liquidity resulting from subjecting Rule 144A fixed-income securities to the requirements imposed by the 2020 Amendments to Rule 15c2-11 will therefore inflict significant harm on the entire U.S. economy. An Ernst & Young (EY) study found that the application of Rule 15c2-11 to the Rule 144A market will result in:

- 30,000 fewer jobs being created in each of the next five years,
- 50,000 fewer jobs being created in each of the five years after that, and
- 100,000 fewer jobs being created each year thereafter.

The EY study also found that the application of Rule 15c2-11 to the Rule 144A market will decrease U.S. gross domestic product (GDP) by $100 billion over the next ten years. EY Study at 8.

25. Not surprisingly, given these very substantial harms, the 2021 announcement applying Rule 15c2-11 to fixed-income securities produced widespread protest. Members of Congress, trade associations (including Plaintiff National Association of Manufacturers, the U.S. Chamber of Commerce, the Securities Industry and Financial Markets Association, and the American Bankers Association, among others), and individual companies and broker-dealers explained that the Commission had never before applied the Rule to fixed-income securities; the

industry's consistent practice is to apply the Rule only to equity securities; subjecting fixed-income securities to the Rule's requirements is wholly unjustified in light of the differences between the fixed-income and equity markets; and applying the Rule to the fixed-income market, and particularly the Rule 144A market, would harm issuers, investors, the capital markets, and the U.S. economy.

26. These submissions, as well as discussions with the Commission staff and individual Commissioners, continued through the fall of 2022. Several parties directly asked the Commission to reverse the application of Rule 15c2-11 to fixed-income securities.

27. Plaintiffs in November 2022 filed a formal rulemaking petition requesting that the Commission initiate a rulemaking proceeding to expressly exempt Rule 144A fixed-income securities from Rule 15c2-11. Plaintiffs also filed a petition seeking emergency interim relief delaying application of Rule 15c2-11 to Rule 144A fixed-income securities pending the completion of such rulemaking or judicial review.

28. The sole response to these submissions was issuance of a third no-action letter, in November 2022, delaying until January 2025 any enforcement action with respect to fixed-income securities—but reiterating the application of the Rule to the fixed-income market. The Commission has not taken any action with respect to Plaintiffs' rulemaking petition and has evinced no willingness to reconsider the novel expansion of Rule 15c2-11 embodied in the no-action letters.

29. The APA's judicial review provision, authorizing courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), is designed to prevent unlawful assertions of regulatory authority such as the

application of Rule 15c2-11's requirements to Rule 144A fixed-income securities. Plaintiffs accordingly commence this action for judicial review under the APA.

30. Plaintiffs seek review of three agency actions, because the Commission has not made clear which agency action or actions actually apply Rule 15c2-11 and its 2020 Amendments to Rule 144A fixed-income securities. The three no-action letters are the first ever indication that the Rule applies to fixed-income securities, yet the SEC claims that this expansion of the Rule is not new—suggesting, but not explicitly stating, that either the Rule has always applied to fixed-income securities or the 2020 Amendments made this change. Plaintiffs' claims are asserted in the alternative in order to ensure that the novel expansion of the Rule does not escape judicial review, because the Commission may contend that any one, or all, of these actions is what applies Rule 15c2-11 and the 2020 Amendments thereto to Rule 144A fixed-income securities:

- First, Plaintiffs seek review of the three no-action letters, which constitute the final agency action applying Rule 15c2-11 to Rule 144A fixed-income securities. They are invalid because (a) affected parties were not given either notice or an opportunity to comment; (b) the letters do not explain the reason for reaching a conclusion that directly contradicts the Commission's determination in promulgating Rule 144A; (c) the letters fail to consider an important aspect of the problem—the adverse consequences of applying Rule 15c2-11 to Rule 144A fixed-income securities; and (d) the letters lack any rational justification for applying Rule 15c2-11 to those securities.
- Alternatively, if the Rule has always applied to fixed-income securities as the no-action letters assert (a contention that Plaintiffs dispute), then Plaintiffs seek review

of the 2020 Amendments' application of the public-disclosure requirement to Rule 144A fixed-income securities, which violates the APA because (a) the Commission did not explain its reason for reaching a conclusion opposite from its determination in promulgating Rule 144A; (b) the Commission failed to consider an important aspect of the problem—the adverse consequences of applying the public-disclosure requirement to Rule 144A fixed-income securities; and (c) the Commission lacked any rational justification for applying the public-disclosure requirement to those securities.

- Alternatively, if the 2020 Amendments are what applies Rule 15c2-11 to Rule 144A fixed-income securities, then Plaintiffs seek review of the Amendments' application of the Rule to those securities, which violates the APA because (a) the Commission did not explain its reason for reaching a conclusion opposite from its determination in promulgating Rule 144A; (b) the Commission failed to consider an important aspect of the problem—the adverse consequences of applying the Amendments to Rule 144A fixed-income securities; and (c) the Commission lacked any rational justification for applying the Amendments to those securities.
- Plaintiffs also seek review of the Commission's failure to act on Plaintiffs' rulemaking petition.

31. No matter which agency action applies Rule 15c2-11 and its 2020 Amendments to Rule 144A securities, the agency action should be set aside, as explained in detail below.

32. ***First***, if, as Plaintiffs assert, the application of Rule 15c2-11 to Rule 144A fixed-income securities rests entirely on the three no-action letters, those letters are final agency action

that should be set aside. The Commission has never applied the Rule to Rule 144A securities. The Commission's justifications for Rule 15c2-11 relate entirely to over-the-counter trading by small investors in equity securities and are wholly inapplicable to the large institutional investors eligible to purchase Rule 144A securities. And the Commission itself confirmed that the Rule does not apply to these securities through its approval of a Financial Industry Regulatory Authority (FINRA) rule implementing the 2020 Amendments to the Rule. FINRA is a membership-based organization that creates and enforces rules for broker-dealers under the Commission's oversight and approval. FINRA's proposed rule implementing the 2020 Amendments was expressly limited to equity securities. Thus, by approving the FINRA rule, the Commission made clear that Rule 15c2-11applies only to equity securities.

33. The no-action letters qualify as final agency action ripe for judicial review because they are the Commission's final say on the matter, and they have immediate effects on private parties' legal obligations. *See, e.g.*, *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021-22 (D.C. Cir. 2000) (explaining that an agency action is "final" if it is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow'"). The new standard announced by these letters will subject Rule 144A fixed-income securities to an entirely new compliance regime. Given the significant penalties for broker-dealers that violate Commission rules, Plaintiffs' members and the other participants in the Rule 144A fixed-income market will be forced by the no-action letters to conform their conduct to the requirements of Rule 15c2-11 in order to access the Rule 144A market. As a result, Plaintiffs' members will be compelled to undertake significant expense to prepare the newly required disclosures—which in turn will subject them to significant competitive harm. Alternatively, Plaintiffs' members will be forced to

accept less favorable financing terms and therefore will incur additional costs and have reduced funds available to invest in their business.

34. The no-action letters assert that the Rule has always applied to fixed-income securities, but that is simply wrong. In the fifty years since the Commission adopted the Rule, the Commission has *never* applied it to fixed-income securities. The Commission's statements in promulgating the Rule and its 2020 Amendments make clear that the Rule does not apply to those securities. And other Commission actions—including its approval of the FINRA rule expressly limiting the Rule's application to equity securities—further confirm the Rule's limitation to equity securities. If Rule 15c2-11 now applies to fixed-income securities, that new legal obligation can only flow from the no-action letters.

35. The no-action letters' extension of Rule 15c2-11 to Rule 144A fixed-income securities is invalid under the APA because only a rule promulgated after notice and comment may support the imposition of a new legal duty. *See Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 716-17 (D.C. Cir. 2015) ("Agency actions that 'impose legally binding obligations or prohibitions on regulated parties'" must "be promulgated pursuant to notice and comment" under the APA) (citations omitted). Because the no-action letters were not promulgated with notice and comment in accordance with the APA, they are invalid. Nor may the agency escape the notice-and-comment requirement by claiming that the no-action letters merely interpret Rule 15c2-11. "'It is well-established that an agency may not escape . . . notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation.'" *Maple Drive Farms Ltd. P'ship v. Vilsack*, 781 F.3d 837, 857 (6th Cir. 2015) (quoting *Appalachian Power Co.*, 208 F.3d at 1024).

36. The no-action letters' extension of Rule 15c2-11 to Rule 144A fixed-income securities is invalid for the additional reason that the letters neither acknowledge nor explain the agency's change in position—rejecting the Commission's prior conclusion that it reached in promulgating Rule 144A as well as other actions by the Commission demonstrating that it did not believe that Rule 15c2-11 applied to fixed-income securities. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) ("[T]he agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'") (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

37. The letters are also invalid under the APA because they do not consider an important aspect of the problem: the adverse consequences resulting from applying Rule 15c2-11 to Rule 144A fixed-income securities. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (agency decision must be set aside when agency fails to "consider [an] important aspect of the problem").

38. The letters' extension of the Rule to fixed-income securities is also arbitrary and capricious under the APA because they lack any reasoned explanation for adding public-disclosure requirements to issuances of Rule 144A securities. In fact, no investor protection benefits result from requiring public disclosures from issuers with respect to securities that cannot be purchased by retail investors, particularly because the institutional investors that are permitted to purchase the securities can access issuers' financial information upon request. *See State Farm*, 463 U.S. at 43 (agency action is arbitrary and capricious when there is no "'rational connection between the facts found and the choice made'") (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

39. The Court therefore should issue a declaratory judgment that the no-action letters applying Rule 15c2-11 to Rule 144A fixed-income securities are invalid and that Rule 15c2-11 does not apply to Rule 144A fixed-income securities, vacate the no-action letters, and provide such additional declaratory or injunctive relief as the Court deems appropriate.

40. The Court has jurisdiction to review the no-action letters under the APA, 5 U.S.C. § 702.

41. ***Second, and alternatively***, if Rule 15c2-11 has always applied to fixed-income securities, as the no-action letters assert, then the application of the 2020 Amendments' disclosure requirements to Rule 144A fixed-income securities is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), for multiple reasons.

42. The SEC did not acknowledge or explain the reversal of its decision that disclosure of issuer information to institutional investors on a confidential basis is appropriate for Rule 144A securities. In adopting Rule 144A, the SEC considered and rejected a public-disclosure requirement, instead adopting the "available upon request" framework, stating that it did not wish to "impose a significant burden on . . . issuers." Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities Under Rules 144 and 145, 55 Fed. Reg. 17,933, 17,939 (Apr. 30, 1990).

43. An "agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars, LLC*, 579 U.S. at 221 (quoting *Fox Television Stations*, 556 U.S. at 515). The Commission failed to acknowledge or explain the reversal of its determination, reached when promulgating Rule 144A, that public disclosure of issuer financial information was not warranted for Rule 144A securities. *See id.* (While "[a]gencies

are free to change their existing policies," they may only do so "as long as they provide a reasoned explanation for the change."). If the 2020 Amendments did indeed impose public-disclosure obligations on Rule 144A fixed-income securities, then it expressly contradicted the Commission's determination embodied in Rule 144A. The SEC was obligated by the APA to expressly recognize that fact and to explain its change of position—which it did not do.

44. The 2020 Amendments' public-disclosure requirement cannot be applied to Rule 144A fixed-income securities for the additional reason that at no point in its consideration of the 2020 Amendments did the Commission evaluate the consequences of applying the new public-disclosure requirement to Rule 144A fixed-income securities. If the Commission understood Rule 15c2-11 to apply to fixed-income securities, then it should have discussed the potential costs and benefits of applying the Amendments to those securities, and the rationale for doing so. The Commission's failure to conduct this analysis is a clear failure to "consider [an] important aspect of the problem" that bars application of the 2020 Amendments to Rule 144A fixed-income securities. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (agency decision must be set aside when agency fails to "'consider [an] important aspect of the problem'") (quoting *State Farm*, 463 U.S. at 43).

45. Indeed, as already explained, Commissioner Peirce publicly stated that "[t]he application to the fixed income market was, frankly, not something that we had thought about as a Commission." Joseph Corcoran & Christopher Killian, *The Detriment of Rule 15c2-11's Application to Fixed Income Markets*, SIFMA (Sept. 12, 2022), http://bit.ly/3UXLzfC (describing Commissioner Peirce's statement at SIFMA's C&L Annual Seminar in March 2022).

46. Imposing a public-disclosure requirement on Rule 144A fixed-income securities

also is arbitrary and capricious because there is no "'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (citation omitted). As detailed above, the 2020 Amendments are designed to protect retail investors in the OTC equities market, and the Commission has justified their adoption entirely on that basis. But retail investors cannot participate in the Rule 144A market. Only QIBs—sophisticated institutional investors with assets under management exceeding $100 million—can purchase Rule 144A securities. And those sophisticated institutional investors already can obtain information pursuant to the separate requirements imposed by Rule 144A itself. There accordingly is no possible rational justification for instituting a public-disclosure requirement for Rule 144A securities—and the 2020 Amendments do not even attempt to offer one.

47. The Court therefore should issue a declaratory judgment invalidating the 2020 Amendments to the extent that they apply to Rule 144A fixed-income securities and provide such additional declaratory or injunctive relief as the Court deems appropriate.

48. ***Third, and alternatively***, if the application of Rule 15c2-11 to fixed-income securities, including Rule 144A securities, flows not from the no-action letters or prior versions of Rule 15c2-11 but rather from the 2020 Amendments—in other words, if the 2020 Amendments for the first time subjected fixed-income securities to Rule 15c2-11—then those Amendments are likewise invalid to the extent they apply to Rule 144A fixed-income securities. As just discussed, the Amendments do not acknowledge the SEC's change in position, consider the impact on the fixed-income market (which is an "important aspect of the problem"), or provide a rational connection between the facts found and the choice made. For all three of those reasons, the 2020 Amendments violate the APA. The Court therefore should issue a declaratory judgment

invalidating the 2020 Amendments to the extent they apply to Rule 144A fixed-income securities and provide such additional declaratory or injunctive relief as the Court deems appropriate.

49. Section 78(y)(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. § 78y(b)(1), states that "a person adversely affected by a rule of the Commission promulgated pursuant to" specified sections of the Exchange Act "may obtain review" in the courts of appeals. Such challenges must generally be brought within sixty days of the promulgation of the rule in question. Otherwise, actions seeking review of SEC rules must be brought in district court. 5 U.S.C. §§ 702-703.

50. The majority (five out of seven) of the statutory provisions cited as authority for the 2020 Amendments do not trigger review in the courts of appeals. In particular, the statutory provision underpinning the public-disclosure requirement is among the five not implicated by Section 78(y)(b)(1). Plaintiffs therefore believe that review is proper in this Court. However, because the remaining two statutory provisions are specified in Section 78(y)(b)(1), Plaintiffs have simultaneously filed a petition for review in the United States Court of Appeals for the Sixth Circuit seeking, in the alternative, review by that Court of Plaintiffs' challenges to the 2020 Amendments.

51. Finally, Plaintiffs seek review of the Commission's failure to act on their rulemaking petition requesting that the Commission institute a rulemaking proceeding to make clear that Rule 15c2-11 does not apply to Rule 144A fixed-income securities. The APA authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The Commissioners and staff have been aware of this issue since issuance of the first no-action letter in September 2021, which generated shock and a tremendous outpouring of pushback about

the application of Rule 15c2-11 to fixed-income securities. The Commission and staff have received many requests from issuers and members of Congress, as well as Plaintiffs' November 2022 rulemaking petitions, asking the Commission to address this issue through rulemaking. In light of the Commission's settled practice of virtually never responding to rulemaking petitions, and the long timeline for agency rulemaking proceedings and subsequent judicial review, the Commission has acted unreasonably in failing to act on the rulemaking petition—particularly because the enforcement suspension specified in the third no-action letter expires on January 3, 2025. The Court therefore should order the Commission to make a decision on the petition within ninety days.[2]

PARTIES

52. Plaintiff the National Association of Manufacturers (NAM) is the largest manufacturing trade association in the United States, representing manufacturers of all sizes and in all 50 states. Manufacturing is a capital-intensive industry, requiring significant investments for equipment purchases, working capital, and research and development. Numerous manufacturers, including both publicly traded and privately held companies within the NAM's membership, issue

[2] Plaintiffs have also filed in the Sixth Circuit a petition for a writ of mandamus or, in the alternative, for review with respect to the SEC's refusal to respond to the rulemaking petition. When "administrative enabling statutes . . . grant exclusive jurisdiction to a particular court to review past actions of an agency, that court necessarily has the exclusive jurisdiction to review inaction as well." *Oil, Chemical & Atomic Workers Union v. Occupational Safety & Health Admin.*, 145 F.3d 120, 123 (3d Cir. 1998) (citing *Telecommc'ns Rsch. & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984)). Here the inaction that has been unreasonably delayed is the SEC's order on the rulemaking petition. Review of such orders is entrusted to the courts of appeals pursuant to 15 U.S.C. § 78y(a), so the refusal to issue an order on the rulemaking petition should equally be reviewed by a court of appeals. *See, e.g.*, Order, *In re: Coinbase Inc.*, No. 23-1779 (3d Cir. June 6, 2023) (ordering the SEC to explain its progress in responding to a rulemaking petition). If, however, the Sixth Circuit disagrees, Plaintiffs have sought relief here to ensure that Plaintiffs can obtain review in some court.

Rule 144A fixed-income securities in order to fund these pro-growth activities, which support economic expansion, innovation, and job creation.[3] The funding enabled by Rule 144A often has important beneficial downstream economic effects, because many Rule 144A issuances are designed to finance acquisitions, job-creating projects, groundbreaking research, capital investments, and other forms of corporate growth and expansion, which can produce significant business efficiencies and enhance job creation, product availability, and consumer choice.

53. Prior to 2022, the NAM did not devote staff time or resources to advocacy regarding Rule 15c2-11 or the 2020 Amendments to Rule 15c2-11, because at the time, Rule 15c2-11 had never been applied to Rule 144A fixed-income securities and it was commonly believed not to so apply. Since the NAM first learned that the SEC might issue a no-action letter expanding Rule 15c2-11 to apply to Rule 144A fixed-income securities, it has spent considerable staff time and resources to: (a) analyze the justifications for the SEC's position, prepare legal arguments against that position, and develop explanations—including commissioning an analysis and report by third-party experts—of the adverse policy and real-world consequences of that position; (b) educate its members about the expansion of Rule 15c2-11 and its adverse effects; (c) work with other interested parties and trade associations to create a broad coalition opposing expansion of the Rule; (d) explain to the Commission staff and individual Commissioners the reasons why the expansion of Rule 15c2-11 is invalid as a matter of law and wrong as a matter of policy and adverse real-world consequences; (e) petition the Commission to overturn its application of Rule 15c2-11 to

[3] A list of the public and/or private companies that have issued Rule 144A securities, which includes members of the NAM and KAM, is available through Bloomberg Finance LP by running a search of Rule 144A securities (based on CUSIP/ISN) issued in the last three years that remain outstanding.

Rule 144A fixed-income securities; and (f) explain to members of Congress and congressional staff the reasons why the expansion of the Rule is unjustified as a matter of law, wrong as a matter of policy, and harmful to the U.S. economy. If Rule 15c2-11 is applied to Rule 144A fixed-income securities, the NAM expects that it will spend additional staff time and resources to educate its members about the change, to advocate before legislators and regulators for the change to be reversed, and to advocate for other mechanisms for its members to raise needed funding in a cost-effective manner that preserves the confidentiality of their businesses' sensitive financial and strategic information as well as the privacy of the owners of those companies. The NAM is a 501(c)(6) nonprofit organization headquartered in Washington, D.C.

54. Plaintiff the Kentucky Association of Manufacturers (KAM) is one of the oldest state manufacturing organizations in America, founded in 1911. Through its advocacy efforts, the KAM seeks to foster business growth and economic prosperity in Kentucky by promoting the best interests of Kentucky manufacturers. The KAM's members include publicly traded and privately held manufacturers that issue Rule 144A securities to finance their growth. Prior to issuance of the SEC no-action letters, KAM devoted no resources or staff time to the consequences of applying Rule 15c2-11 to Rule 144A fixed-income securities. Since then, the KAM has spent considerable staff time and resources to educate its members about the expansion of Rule 15c2-11 and its adverse effects and petition the Commission to overturn its application of Rule 15c2-11 to Rule 144A fixed-income securities. If Rule 15c2-11 is applied to Rule 144A fixed-income securities, the KAM expects that it will spend additional staff time and resources to educate its members about the change, to advocate before legislators and regulators for the change to be reversed, and to advocate for other mechanisms for its members to raise needed funding in a cost-effective

manner that preserves the confidentiality of their businesses' sensitive financial and strategic information as well as the privacy of the owners of those companies. The KAM is a 501(c)(6) organization headquartered in Frankfort (Franklin County), Kentucky.

55. Defendant U.S. Securities and Exchange Commission is a federal government agency headquartered in Washington, D.C., charged with enforcing the nation's securities laws. It is subject to the APA pursuant to 5 U.S.C. § 551(1).

56. Defendant Gary Gensler is the Chair of the Commission. He is sued in his official capacity and is subject to the APA pursuant to 5 U.S.C. § 551(1).

JURISDICTION AND VENUE

57. Plaintiffs bring this action under the APA, 5 U.S.C. § 500 *et seq.*, and this Court therefore has federal question jurisdiction under 28 U.S.C. § 1331.

58. Plaintiffs have direct organizational standing to bring this action because they have spent staff time and resources to respond to the no-action letters announcing that Rule 15c2-11, and the 2020 Amendments thereto, will apply to Rule 144A fixed-income securities. That expenditure of time and resources includes advocating before legislators, legislative staff, the Commission, and Commission staff; preparing and distributing advocacy materials; educating members about the regulatory change; and coalition-building. Plaintiffs would not have expended their resources in this manner if the no-action letters had not announced that Rule 15c2-11's requirements will be applied to Rule 144 fixed-income securities, and if the Commission and its staff had not continued to ignore the groundswell of opposition to the changes to Rule 15c2-11's reach. If the change to Rule 15c2-11's reach is not overturned, Plaintiffs will be required to spend additional staff time and resources to educate their members about the change and its effect and to

continue to advocate for the change to be reversed; Plaintiffs additionally expect to spend staff time and resources to research and advocate for alternative means for their members to raise funding in cost-effective ways. *See, e.g.*, *Online Merchants Guild v. Cameron*, 995 F.3d 540, 547-48 (6th Cir. 2021) (holding that plaintiff had direct organizational standing when it "diverted resources that could have been expended elsewhere to address" the defendant's actions).

59. Plaintiffs have associational standing to bring this suit on behalf of their members. The application of Rule 15c2-11, and the 2020 Amendments thereto, to Rule 144A fixed-income securities directly and adversely affects Plaintiffs' members. Each Plaintiff has members that routinely issue Rule 144A fixed-income securities and those members will be harmed by the additional costs and other burdens resulting from the application of Rule 15c2-11 to such securities. The interests Plaintiffs seek to protect are germane to their purposes in supporting and promoting the job-creating, pro-growth activities of manufacturers, many of whom rely on the Rule 144A market. Plaintiffs therefore have, among other things, urged the SEC to make clear that Rule 15c2-11 does not apply to Rule 144A fixed-income securities. Finally, neither the claim asserted nor the relief requested requires an individual member to participate in the suit.

60. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e)(1)(C) because this is an action against an agency and officer of the United States, no real property is involved, and Plaintiff KAM resides in this district.

FACTUAL BACKGROUND

A. History and Purpose of Rule 15c2-11

61. The Commission first adopted Rule 15c2-11 in 1971 to protect retail investors against fraud in the OTC equities market—the market for equity securities not listed on a national

securities exchange. A retail investor is a nonprofessional individual investor who buys and sells securities through brokerage firms. The Rule barred broker-dealers from publishing quotations for an equity security traded in the OTC market unless the broker-dealer received from the issuer certain specified information about the security and the issuer. *See* Initiation or Resumption of Quotations by a Broker or Dealer Who Lacks Certain Information, 36 Fed. Reg. 18,641 (Sept. 18, 1971).

62. The Commission amended the Rule in 1991 to impose additional requirements on broker-dealers, requiring them to review the required information submitted by issuers and to have a reasonable basis for believing that the information was obtained from reliable sources and was accurate in all material respects. *See* Initiation or Resumption of Quotations Without Specified Information, 56 Fed. Reg. 19,148 (Apr. 25, 1991).

63. In promulgating the 1991 amendments, the Commission stated:

> "In the past few years, the Commission has become increasingly concerned about instances of fraudulent and manipulative conduct involving transactions in low-priced securities, commonly referred to as 'penny stocks' . . . . [T]he Commission has focused on the role of market makers in facilitating the trading of certain penny stocks where, for example, available information about the issuer suggests that a fraudulent or manipulative scheme may be present."

56 Fed. Reg. at 19,148. The Commission's entire focus was "penny stocks"—in other words, lower-cost equity securities purchased by retail investors. *See also* FINRA, *Notice to Members 91-36: Adoption of Amendments to SEC Rule 15c2-11 Regarding Initiation or Resumption of Quotations Without Specified Information* (June 1, 1991), bit.ly/3TKIJtu ("The initiative to amend Rule 15c2-11 followed the SEC's establishment of the Penny Stock Fraud Task Force to combat

abusive sales and trading practices involving low-priced non-Nasdaq and non-exchange-listed securities.").

64. In 2020, the Commission again amended Rule 15c2-11. The 2020 Amendments require broker-dealers to maintain up-to-date issuer information and for the first time mandate that the issuer information be made "publicly available." *See* 85 Fed. Reg. at 68,124.

65. The Commission's justification for the 2020 Amendments again focused entirely on the characteristics of *equity* securities. It stated:

> Securities that trade in the OTC market are primarily owned by retail investors. . . . A lack of current and public information about these companies discourages retail investors because it may prevent them from estimating return possibilities and generating positive returns in OTC stocks. It can contribute to incidents of fraud and manipulation by preventing retail investors from being able to counteract misinformation. A majority of the Commission enforcement cases involving allegations of fraudulent behavior in the OTC securities markets has involved delinquent filings, which result in a lack of current, accurate, or adequate information about an issuer.

85 Fed. Reg. at 68,125 (footnotes omitted).

66. Not only did the Commission refer expressly to "OTC *stocks*," which makes clear that the Commission was referring to equity securities, but each of its observations justifying the 2020 Amendments relates only to equity securities and is wholly inapplicable to Rule 144A securities:

a. The Commission's repeated references to "retail investors" are inapplicable to the Rule 144A market, which is limited to highly sophisticated institutional investors, and off limits to retail investors.

b. While retail investors in the OTC equity market may not have had access to

current, accurate information about issuers in that market, that is not true of participants in the Rule 144A market—because Rule 144A provides that institutional investors must be given access, upon request, to issuers' financial and operational information. That financial and operational information must be "reasonably current," meaning that, depending on the precise information at issue, it must be 16-months-old or less. Institutional investors in the Rule 144A market accordingly cannot lack access to pertinent financial and operational information or be misled by misinformation. The entire justification for the Commission's addition of a public-disclosure requirement to Rule 15c2-11 therefore is wholly inapplicable to Rule 144A securities.

c. The reference to enforcement actions based on allegations of fraud relates entirely to equity securities. There is no such history of enforcement actions with respect to trading in Rule 144A securities.

67. In sum, the sole focus of the 2020 Amendments was to update disclosure rules for "[s]ecurities that trade on the OTC market [that] are primarily owned by retail investors." Press Release, SEC, SEC Adopts Amendments to Enhance Retail Investor Protections and Modernize the Rule Governing Quotations for Over-the-Counter Securities (Sept. 16, 2020), http://bit.ly/3Oku8UI; *see also id*. ("Because broker-dealers play an integral role in facilitating access to OTC securities and serve an important gatekeeper function, Rule 15c2-11 requires broker-dealers to review key, basic issuer information before initiating or resuming quotations for the issuer's security in the OTC market."); Jay Clayton, Chairman, SEC, *Statement on Commission Action to Enhance Investor Protections in the OTC Market* (Sept. 16, 2020), http://bit.ly/3ZeJ5v6

("The amendments adopted today will substantially enhance investor protection by generally requiring such information to be more current and publicly available for a broker-dealer to publish quotations for an OTC issuer's security . . . .").

68. As Commissioner Elad Roisman put it in a public statement, the 2020 Amendments' goal was "moderniz[ing] the OTC equity market." Elad L. Roisman, Comm'r, SEC, *Statement on Adoption of Amendments to Rule 15c2-11* (Sept. 16, 2020), http://bit.ly/3tGVISg. And in Commissioner Hester Peirce's words, "[t]he policy analysis" in the 2020 Amendments "focuses entirely on the need for additional disclosure in the OTC equity markets." Hester M. Peirce, Comm'r, SEC, *Statement on Staff No-Action Letter Regarding Amended Rule 15c2-11 in Relation to Fixed Income Securities* (Sept. 24, 2021), http://bit.ly/3hT0kT2 (Peirce Statement).

69. Moreover, in justifying the 2020 Amendments, the Commission relied on data relating only to equity securities. This data, the Commission stated, was "reasonably representative of all OTC quoting and trading activity in the U.S." 85 Fed. Reg. at 68,185 n.640.

70. But the overall fixed-income market, and in particular the Rule 144A securities market, differs dramatically from the equity securities market:

a. The fixed-income market is far larger than the OTC equity market. The OTC equity market sees approximately $2 billion in daily trading volume, while the Rule 144A market's daily trading volume averages $10 billion—five times greater than the equity market. Meanwhile, the fixed-income market's daily trading volume (which includes Rule 144A securities), is *$290.4 billion*, so the Commission's assertion that the equity data relied upon in the 2020 adopting release was "reasonably representative" of the impacted market makes

absolutely no sense—unless the Commission never intended Rule 15c2-11 or the 2020 Amendments to apply to the fixed-income markets.

b. The Commission stated that "the average OTC [equity] security issuer is smaller, and its securities trade less, on average" than equity securities traded on national exchanges. 85 Fed. Reg. at 68,185. But applying Rule 15c2-11 to fixed-income securities would encompass *all* fixed-income securities, many of which are issued by large companies and have a high trading volume.

71. The Commission did not assess, or even identify, these differences between the equity and fixed-income markets. As Commissioner Peirce recognized, the "economic analysis" underlying the 2020 Amendments addresses only "the effects and incentives the rule creates in the OTC equity markets." Peirce Statement, *supra*.

72. The Commission's approval of a rule promulgated by FINRA implementing the 2020 Amendments to Rule 15c2-11 also made clear that the Rule does not apply to fixed-income securities.

73. In 2021, FINRA promulgated—and sought Commission approval of—its own rule to ensure compliance with the provisions of Rule 15c2-11 added by the 2020 Amendments. The FINRA rule states that "[c]ompliance with the Information Requirements of SEA Rule 15c2-11" applies to "any equity security, other than a Restricted Equity Security, that is not traded on any national securities exchange." FINRA, Rule 6432 (2021). The FINRA rule does not mention fixed-income securities, and no other FINRA rule applies Rule 15c2-11 to the fixed-income market.

74. Indeed, when FINRA sought the Commission's approval for the amendments to FINRA Rule 6432 made "in light of the SEC's amendments to [Rule 15c2-11]," FINRA stated

that Rule 15c2-11 applies to "non-exchange-listed securit[ies]," defined as "any *equity* security, other than a Restricted Equity Security, that is not traded on any national securities exchange." Notice of Filing of a Proposed Rule Change Relating to Members' Filing Requirements Under FINRA Rule 6432 , 86 Fed. Reg. 31,774, 31,774, 31,775 & n.13 (June 15, 2021) (emphasis added). Further, FINRA cited 17 C.F.R. § 230.144(a)(3), which defines "restricted securities," for the definition of FINRA's term "Restricted Equity Security"—*i.e.*, FINRA's term for the securities to which Rule 15c2-11 does *not* apply. Section 230.144(a)(3) specifically includes "[s]ecurities acquired in a transaction . . . meeting the requirements of [17 C.F.R.] § 230.144A"—the regulation governing Rule 144A securities—as a restricted security. *See* 17 C.F.R. § 230.144(a)(3).

75. The FINRA submission to the Commission thus made clear, through that express exclusion, that FINRA exempted Rule 144A securities from its own rule implementing the Commission's 2020 Amendments to Rule 15c2-11.

76. The Commission approved FINRA's changes to Rule 6432, finding "that the proposed rule changes are consistent with the requirements of the Exchange Act and the rules and regulations thereunder." Order Granting Approval of a Proposed Rule Change Relating to Members' Filing Requirements Under FINRA Rule 6432, 86 Fed. Reg. 51,700, 51,702 (Sept. 16, 2021). This action by the Commission clearly demonstrates the Commission's recognition that the Rule does not apply to Rule 144A securities.

77. Given this history, it is wholly unsurprising that for more than fifty years—from the initial promulgation of Rule 15c2-11 through the present date—the Commission has never taken enforcement action applying the Rule to fixed-income securities.

78. In addition, the universal, consistent practice of industry participants has been to

follow the Rule's requirements only with respect to equity securities—and not for fixed-income securities. The absence of any enforcement actions in the face of that uniform practice further confirms that the Commission did not interpret the Rule to apply to fixed-income securities.

B. Rule 144A

79. The Commission adopted Rule 144A in 1990 to enable companies to access the capital markets outside of the public-offering process, which requires registration with the Commission and public disclosure of significant amounts of information—and therefore carries substantial initial and ongoing costs.

80. Securities on the Rule 144A market may be purchased only by highly sophisticated institutional investors that are certified as QIBs. To qualify as a QIB, an entity must manage at least $100 million in securities. *See* 17 C.F.R. § 230.144A(a)(1), (d)(1). QIBs are highly sophisticated institutional investors, including insurance companies such as MetLife, and investment banks such as Goldman Sachs.

81. Participating in the Rule 144A market requires issuers to make an express tradeoff. In exchange for having access to only a limited number of sophisticated institutional investors, the issuers remain exempt from public-disclosure requirements.

82. In adopting Rule 144A, the Commission specifically considered what information-sharing requirements should apply in the Rule 144A market, and ultimately implemented an "available upon request" disclosure system under which holders and prospective purchasers of Rule 144A securities are entitled to obtain certain financial and operational information from issuers. Issuers typically make this information available through a password-protected web portal, providing a password to QIBs seeking to review the information.

83. The information that QIBs may request under Rule 144A includes financial information that "is the same as that required by subparagraphs (xii) and (xiii) of Rule 15c2-11(a)(5)." 55 Fed. Reg. at 17,939. By expressly referring to Rule 15c2-11 but requiring only that financial information be "available upon request," the Commission distinguished Rule 144A securities from the securities subject to Rule 15c2-11, making clear that the Rule 144A market was not directly subject to Rule 15c2-11's requirements. And, of course, a key purpose of Rule 144A was to exempt issuers from the public-disclosure requirements that otherwise would apply. Indeed, the Commission specifically explained that it "d[id] not believe that the limited information requirement [ultimately adopted] should impose a significant burden on those issuers subject to the requirement." *Id.*

84. Moreover, the 1991 amendments to Rule 15c2-11 imposed additional requirements on broker-dealers, requiring them to review the required information submitted by issuers and to have a reasonable basis for believing that the information was obtained from reliable sources and accurate in all material respects. Although the Commission promulgated Rule 144A around the same time that it amended Rule 15c2-11, Rule 144A did not subject broker-dealers to such review or reliability requirements in order to publish quotations with respect to Rule 144A securities. Rule 144A required only that specified financial and operational information be available upon request. *Compare* 56 Fed. Reg. at 19,148, *with* 55 Fed. Reg. at 17,934, 17,939. That provides further evidence that the Commission did not intend Rule 15c2-11 to apply to Rule 144A fixed-income securities.

85. Nothing in the 1991 amendments to Rule 15c2-11 addresses, let alone provides a reason for overturning, the Rule 144A standards—which the Commission had adopted just one

year earlier. If the Commission were displacing the Rule 144A standards, it would have been obligated by the APA to expressly recognize that fact and to explain its change of position. The only logical—and only legally permissible—conclusion is that the Commission did not displace the Rule 144A standards. As such, the Commission's promulgation of the 1991 amendments codified the pre-existing understanding that Rule 144A securities are not subject to Rule 15c2-11.

C. The No-Action Letters' Expansion of Rule 15c2-11

86. In 2021, the Commission's staff—for the first time ever—indicated that fixed-income securities, including Rule 144A securities, are subject to Rule 15c2-11. The September 2021 no-action letter announced that Rule 15c2-11 applies to fixed-income securities, but stated that the Commission staff would not recommend enforcement action before January 3, 2022. *See* Letter from Josephine J. Tao, Assistant Director, Office of Trading Practices, Division of Trading and Markets to Racquel Russell, Senior Vice President and Director of Capital Markets Policy, Office of the General Counsel, FINRA (Sept. 24, 2021), http://bit.ly/3g9RD64.

87. The Commission typically uses no-action letters to provide interpretative guidance to regulated entities. These letters sometimes state that the Commission will not take a particular enforcement action in a particular factual situation, even though it has the legal authority to act. Accordingly, such no-action letters provide informal interpretive guidance. No-action letters may not be used to announce new substantive rules never recognized by the Commission. But that is precisely what the September 2021 letter did. For the first time ever, the no-action letter required affected parties to completely revamp their fixed-income securities systems and policies to account for Rule 15c2-11's requirements or face enforcement actions. In doing so, the no-action letter went beyond mere guidance or agency interpretation, and instituted a legislative rule imposing new

duties and obligations.

88. Both before and after issuance of the no-action letter, numerous parties advised the Commission—through written submissions and meetings with Commissioners and Commission staff—that:

a. The staff's interpretation was unprecedented; that the Commission had never applied the Rule to fixed-income securities;[4]

b. Industry participants therefore had a longstanding, consistent practice of complying with the Rule's requirements only with respect to equity securities and not fixed-income securities;[5]

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[4] *See* Letter from Chris Netram, Managing Vice President, Tax and Domestic Economic Policy, NAM, to Gary Gensler, Chairman, SEC and Haoxiang Zhu, Director, Div. of Trading and Markets, SEC, at 2 (July 18, 2022), http://bit.ly/3XcM9Ij (NAM Letter) ("The result of the Division's actions is that Rule 15c2-11 will soon be enforced for fixed income securities, including Rule 144A securities, for the first time in its 50-year history."); Letter from Lindsey Weber Keljo, Managing Dir. and Assoc. Gen. Couns., Securities Industry and Financial Markets Association (SIFMA), et al., to Gary Gensler, Chair, U.S. SEC at 3 (Sept. 23, 2021), http://bit.ly/3EgakwR (SIFMA Sept. 23 Letter) ("We also understand that the Rule has never been applied to, or enforced in, the [fixed-income] markets throughout its entire 50-year history."); Letter from Justin M. Underwood, Exec. Dir., Am. Bankers Ass'n, to Vanessa Countryman, Sec'y, U.S. SEC at 1 (Sept. 23, 2021), http://bit.ly/3Am35lW (Am. Bankers Ass'n Letter) ("[T]he Rule has never been applied to fixed-income securities since its inception in 1971"); Letter from Kristi Leo, President, Structured Fin. Ass'n, to Gary Gensler, Chair, U.S. SEC at 4 (Dec. 9, 2021), http://bit.ly/3GmOhY4 (Structured Fin. Ass'n Letter) ("There is no history of the Rule ever being applied to products other than equity securities"); Letter from Christopher B. Killian, Managing Dir., SIFMA, and Michael Decker, Senior Vice President for Rsch. & Pub. Pol'y, Bond Dealers of Am., to Vanessa Countryman, Sec'y, U.S. SEC at 3 (Aug. 26, 2021), http://bit.ly/3V67tNN (SIFMA Aug. 26 Letter).

[5] *See* NAM Letter, *supra*, at 2 ("This change will effectively impose a new compliance mandate on the issuers themselves, who will be forced to expose private, competitively sensitive information to the public for the first time."); Am. Bankers Ass'n Letter, *supra*, at 3 ("Until recently, industry participants were given no reason to believe that the Rule would be applied to fixed-income products."); Letter from the Bond Dealers of Am. to Vanessa Countryman, Sec'y, U.S. SEC at 2 (May 5, 2021), https://bit.ly/3O9ZeOA (Bond Dealers of Am. Letter) ("Many firms' internal compliance procedures, all effectively approved by SEC and FINRA examiners, make no mention of fixed income in the context of the Rule.").

c. Application of the Rule to fixed-income securities was wholly unjustified in light of the differences between the equity and fixed-income markets;[6]

d. Extension of the Rule to fixed-income markets was not necessary to protect investors;[7] and

e. Subjecting fixed-income securities to the requirements of Rule 15c2-11 would harm issuers, investors, the capital markets, and the U.S. economy.[8]

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[6] *See* NAM Letter, *supra*, at 2 ("The 2020 amendments clearly were not designed to apply to the fixed income markets generally or to Rule 144A securities specifically. The amendments were justified on retail investor protection grounds, and fixed income securities did not merit a single mention in the adopting release."); SIFMA Sept. 23 Letter, *supra*, at 7 ("[T]he Rule was not designed to apply to the [fixed-income] markets and, as it is currently written, should not be applied to the [fixed-income] markets. It would not mitigate fraud or achieve other policy objectives, the costs and benefits of its application to the [fixed-income] markets have not been analyzed, and it has not been enforced in the [fixed-income] markets in the 50 years since it was implemented."); Am. Bankers Ass'n Letter, *supra*, at 2 ("However, it is well established and accepted that, with respect to securities issuance and trading, the fixed-income markets are vastly different and distinct from the equity markets."); SIFMA Aug. 26 Letter, *supra*, at 5 ("These concerns [regarding fraud], while clearly relevant to the OTC equity markets, have much less salience in the fixed income markets, which are dominated by institutional investors, not retail investors, and which do not have a history of fraud and manipulation aimed at retail investors that is at issue in the OTC equity markets."); Structured Fin. Ass'n Letter, *supra*, at 3-4 ("Unlike the equity markets which include substantial retail investment, the fixed income markets are largely institutional. . . . Such distinctions underscore the fact that Rule 15c2-11 was adopted for the purpose of protecting retail investors in equity securities."); Bond Dealers of Am. Letter, *supra*, at 2 ("It is also true that many fixed income dealers did not recognize that the Rule applies to OTC quotations in bonds because it is so obviously written with retail trades in very small-cap equities as its focus.").

[7] NAM Letter, *supra*, at 2 ("[T]he retail investor protections found in the 2020 amendments are completely extraneous to Rule 144A issuances. Not only are these requirements irrelevant to retail investors, but they also do not provide any new information for the QIBs who are actually allowed to purchase Rule 144A securities given that these sophisticated institutions are already able to access issuer information upon request."); SIFMA Aug. 26 Letter, *supra*, at 11 ("Fixed Income Investors Are Fully Protected By Existing Regulations"); Bond Dealers of Am. Letter, *supra*, at 4 ("[N]o investors have been harmed by not having applied the Rule to fixed income. The fixed income markets are extraordinarily safe.").

[8] *See* NAM Letter, *supra*, at 3 ("[T]he amendments would force private companies to make sensitive information public, increase the cost of capital, and decrease the utility of Rule 144A issuances to finance manufacturing growth and innovation."); SIFMA Sept. 23 Letter, *supra*, at 7 (con't.)

89. A subsequent no-action letter, issued in December 2021, reaffirmed the position that the Rule applies to fixed-income securities, but delayed enforcement until January 3, 2023. *See* Letter from Josephine J. Tao, Assistant Dir., Office of Trading Practices, Div. of Trading and Markets to Racquel Russell, Senior Vice President and Dir. of Capital Markets Pol'y, Office of the Gen. Couns., FINRA (Dec. 16, 2021), http://bit.ly/3EDmGR7.

90. Submissions by multiple parties, including Members of Congress, and meetings continued.[9] Members of the Commission and Commission staff indicated that the possibility of

("The application of the Rule may drive market fragmentation, reduce electronic trading, and reduce price transparency and market efficiency, while increasing costs to retail and institutional investors alike."); Am. Bankers Ass'n Letter, *supra*, at 3 ("Application of the amended Rule to the fixed-income markets will lead to increased compliance costs for dealers and reduced liquidity for affected bonds, which in turn will lead to increased transaction costs for investors and higher funding costs for affected issuers."); SIFMA Aug. 26 Letter, *supra*, at 12 ("To the extent that liquidity and activity in fixed income markets is harmed [by applying the Rule to fixed-income markets], the costs will be borne not only by broker-dealers and their investor customers, but also by corporate issuers and consumers seeking to obtain credit."); Structured Fin. Ass'n Letter, *supra*, at 6 ("Application of Rule15c2-11 on [asset-backed securities, which are part of the fixed-income market] will immediately result in market illiquidity.").

[9] *See* Sept. 2021 No-Action Letter, *supra*, at 1 ("In response to requests from industry representatives . . . through telephonic meetings with Commission staff . . . ."); Dec. 2021 No-Action Letter, *supra*, at 1 ("In response to requests from industry representatives . . . through telephonic meetings with Commission staff . . . ."); SIFMA July 21 Letter, *supra*, at 1 ("SIFMA appreciates the Webex meeting we had with your staff on June 28, 2022 and the smaller, follow-up Webex meeting on June 30, 2022 with your staff to discuss our concerns . . . ."); *see also* Bond Dealers of America, *BDA Requests Exemption from SEC Rule 15c2-11*, BDA (May 5, 2021), http://bit.ly/3EBYD47 ("SEC staff have informally confirmed with BDA that the Rule applies equally to equities and fixed income."); Letter from Senators Bill Hagerty and Thom Tillis to Gene Dodaro, Comptroller Gen., U.S. G.A.O. at 1 (Oct. 12, 2022), http://bit.ly/3tCyn4w (stating that the staff no-action letters were the "first time" there was any indication that Rule 15c2-11 would be enforced with respect to fixed-income securities); Letter from Representatives Josh Gottheimer & David Kustoff et al., to Gary Gensler, Chair, SEC at 1 (July 26, 2022), http://bit.ly/3ApisdA (Letter from Representatives to Gensler) ("Since 1971, Rule 15c2-11 has never been enforced in the debt markets by the SEC.").

providing some sort of relief was under consideration, yet no action occurred.[10]

91. On November 22, 2022, Plaintiffs filed two Petitions for Rulemaking with the Commission. One Petition sought immediate relief from the January 3, 2023 deadline. *See* Petition for Emergency Interim Relief and Emergency Request for a Stay Pending Commission Action or Judicial Review With Respect to Application of Rule 15c2-11 to Rule 144A Securities (Nov. 22, 2022). The second Petition requested that the Commission institute a rulemaking proceeding to make clear that the Rule does not apply to Rule 144A fixed-income securities or to exempt Rule 144A fixed-income securities from Rule 15c2-11 pursuant to the exemptive authority set forth in Rule 15c2-11(g). *See* Exhibit 1, Petition for Rulemaking and Application for Exemption With Respect to Rule 15c2-11 (Nov. 22, 2022).

92. On November 30, 2022, the Commission staff issued yet another no-action letter. *See* Letter from Josephine J. Tao, Assistant Dir., Office of Trading Practices, Div. of Trading and Markets to Racquel Russell, Senior Vice President and Dir. of Capital Markets Pol'y, Office of the Gen. Couns., FINRA (Nov. 30, 2022), https://bit.ly/3XPZg1p. That letter again reiterated that the Rule applies to fixed-income securities, but further extended the enforcement moratorium until January 4, 2025.

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[10] *See Gensler Pounces on FTX Debacle to Push His Crypto Agenda*, Capitol Account (Nov. 9, 2022), http://bit.ly/3Ehxt27 ("Gensler indicated that there may be some relief on the horizon. . . . In his remarks, Gensler didn't announce another extension. But he did say he has asked the staff to address some of the issues that have been raised by market participants.").

D. Significant Harm Will Result From Subjecting Rule 144A Fixed-Income Securities To The Rule 15c2-11 Requirements.

93. Rule 144A offerings are a significant, if not the primary, method by which private companies issue asset-backed securities, high-yield bonds, and investment grade debt. More than $900 billion in Rule 144A securities were issued in 2021 by public and private companies combined—nearly 50% of U.S. corporate bond market issuances—and there are $5 trillion of these securities outstanding. Rule 144A trading volume averaged $10 billion per day in 2021. Rule 144A securities issued by private companies—which will be most affected by the application of Rule 15c2-11—totaled $315 billion over the last two years, and in 2021 represented approximately 20% of the entire Rule 144A market and 9% of the entire U.S. bond market. Rule 144A securities are thus a significant component of the U.S. financial system.

94. Applying Rule 15c2-11 to Rule 144A fixed-income securities will force privately held companies, including Plaintiffs' members, into one of several alternative pathways for raising funds, each of which will subject those companies to multiple adverse consequences compared to the current robust, liquid, and well-functioning market for Rule 144A issuances: (1) comply with the new expansion of Rule 15c2-11 and publicly disclose proprietary financial and operational information, and as a result face both competitive harm from the disclosure and significantly increased costs; (2) remain in the Rule 144A market but forgo public financial disclosure, which would make it difficult if not impossible for the company's new issuances to be traded on the secondary market and thus increase their cost of capital; or (3) abandon the Rule 144A market and raise funds via inferior avenues that impose increased costs. Each of these pathways will directly harm the issuers that rely on Rule 144A to raise funds—increasing the cost of capital, hampering

job creation, and limiting growth.

95. Public companies that issue Rule 144A fixed-income securities also will be harmed by the expansion of Rule 15c2-11, because the overall increase in the cost of Rule 144A securities will affect their offerings as well.

1. Harm from Public Disclosure

96. Forcing private Rule 144A issuers to make their financial information public in order for broker-dealers to be able to continue to provide quotations for their securities (despite the fact that the public cannot purchase Rule 144A securities) will entirely undercut one of the primary reasons that private companies use Rule 144A in the first place—it allows them to raise funds without disclosing their confidential and competitively sensitive information.

97. Businesses have a strong, inherent interest in maintaining the confidentiality of their financial and operational information, strategic plans, and all other information relating to the conduct of the business. Many companies are family-owned enterprises, and disclosure of information about the business may reveal private information about family members. For these and many other reasons, there is a long tradition—at both the state and federal levels—of permitting private companies to preserve the confidentiality of their business information.

98. Maintaining competitive advantage by keeping financial and operational information confidential is another reason why many companies choose to remain private. After all, a "public company's competitors can learn much more about the company's business plans, product development, and perceived risks than they ever could about a private company." William K. Sjostrom Jr., *Carving a New Path to Equity Capital and Share Liquidity*, 50 B.C. L. Rev. 639, 645 (2009).

99. Competitors often take advantage of public disclosures to gain insight into their peers' finances, operations, and profitability. Rule 144A limits issuers' investor base to just sophisticated financial institutions—and, in exchange, private companies are able to avoid the significant competitive costs associated with public disclosure. Applying Rule 15c2-11 to Rule 144A issuances would expose proprietary information to the public—harming private companies and undermining a key benefit of Rule 144A.

100. Private Rule 144A issuers forced to make public financial disclosures will face increased costs in addition to those associated with the exposure of their proprietary information. That is because ongoing public disclosure is costly. It makes up a substantial portion of the costs of becoming and remaining a public issuer, and takes up valuable management time. For the median public U.S. company, the annual cost of complying with mandatory disclosures is about $293,000. For large businesses, those costs are much higher. A private company can avoid these costs of the public spotlight and instead devote its full attention to the company's business, its vendors, and its customers. Requiring public reporting from private Rule 144A issuers will impose these costs despite a complete lack of investor benefit.

101. Applying Rule 15c2-11 to Rule 144A fixed-income securities will also impose significant new compliance obligations (and their associated costs) on broker-dealers, which will also ultimately harm Plaintiffs and their members. Because Rule 15c2-11 has never before been applied to the Rule 144A market, broker-dealers will have to design and implement new compliance procedures—and do so in the face of considerable uncertainty about what the Rule now requires. Moreover, the issuers of such securities do not have the internal infrastructure to efficiently provide broker-dealers with the information they need in order to comply with Rule

15c2-11's requirements. To cover the costs of new compliance efforts and the risks that they would be taking on due to the uncertain regulatory environment, broker-dealers likely will increase their fees, another new cost that will be borne by issuers.

2. Loss of Liquidity

102. The 2020 Amendments to Rule 15c2-11 prohibit broker-dealers from freely quoting an issuer's securities unless key information about the issuer is publicly available. Private issuers that continue to rely on Rule 144A but do not subject themselves to the competitive harms associated with disclosing proprietary financial information will bear increased borrowing costs in the form of an illiquidity premium—because any purchaser of those securities will have a much more difficult time selling the security in the secondary market due to the absence of broker-dealer quotations.

103. According to a recent study commissioned by Plaintiff NAM and completed by EY, borrowers on average would face an illiquidity premium of 72 basis points due to the application of Rule 15c2-11 to Rule 144A securities. Both investment-grade issuances (27 basis points) and high-yield issuances (100 basis points) would be impacted. These illiquidity premiums attributable to the application of Rule 15c2-11 would produce an 8-13% increase in Rule 144A issuers' borrowing costs—significantly reducing the funding potential of Rule 144A issuances and undermining the Commission's rationale for creating Rule 144A.

104. Moreover, the new disclosure requirements imposed by the expansion of Rule 15c2-11 may cause the Rule 144A market to shrink as some private companies decide to raise capital through other avenues rather than incur the burdens associated with the requirements of Rule 15c2-11. Similarly, some broker-dealers may decide to exit the Rule 144A market because

of the increased compliance costs and uncertainties about their obligations under the new interpretation. Investors faced with a shrinking Rule 144A market may become concerned that they will be unable to find buyers for the private company Rule 144A fixed-income securities that they purchase, or that finding buyers will become more difficult. As a result, transaction costs will increase and the market will become less efficient. Market-wide, that will put upward pressure on interest rates, given the direct link between liquidity and corporate funding costs. The ultimate result is that the cost of obtaining funding through the Rule 144A market will increase. That was the conclusion reached by a NERA Economic Consulting study, which found that the application of Rule 15c2-11 could increase a private issuer's cost of borrowing and would likely devalue their existing debt, which, in turn, would further impede issuers' ability to raise funds. *See Market Impact Diagram: Major SEC Regulatory Actions*, NERA Economic Consulting 11 (2022), http://bit.ly/3gdAQz2.

105. Many institutional investors also may decide to leave the Rule 144A market due to the decrease in liquidity and because they would have difficulty reporting the value of their 144A holdings to their clients if broker-dealers are no longer able to issue quotations for those holdings. This would then have the snowball effect of further reducing liquidity and negatively affecting the investors still willing to participate in the Rule 144A market. It is therefore unsurprising that institutional investors in the Rule 144A market have themselves told the Commission that they do not need or want Rule 15c2-11 to apply to Rule 144A securities and that this expansion is inconsistent with the Commission's longstanding goal of promoting investor protection. *See* Letter from Matt Thornton, Associate Gen. Couns. for the Investment Company Institute, to Gary Gensler, Chair, U.S. SEC at 2 (Oct. 25, 2022), https://bit.ly/3Em8smB.

3. Cost of Switching to Inferior Funding Alternatives

106. The significant burdens imposed on issuers by the novel expansion of Rule 15c2-11 likely will lead many companies, including some of Plaintiffs' members, to abandon the Rule 144A market altogether. The principal alternative to Rule 144A issuances would be private placements exempt under Section 4(a)(2) of the Securities Act of 1933. But private placements lack many of the benefits of the Rule 144A market—and are more expensive as a result. In a private placement:

a. Bonds are typically placed by investment banks acting on a best-efforts basis, which gives issuers significantly less certainty that they will be able to raise the amount of funding sought.

b. Offerings tend to be marketed to a small number of investors, which are generally limited to buy-and-hold investors, such as pension funds and insurance companies; as a result, issuers typically pay higher interest rates on bonds with shorter maturities. Furthermore, this market is not nearly as deep as the Rule 144A market and cannot absorb the level of issuances typical of the Rule 144A market.

c. Bonds settle outside of The Depository Trust Company central clearing system, and settle in physical, certificated form. This increases transaction costs and the time to execute a secondary trade, which in turn decreases liquidity.

d. There is no readily available resale market for these privately placed securities—because the section 4(a)(2) exemption is available only to the issuer of the securities and is not available for the resale of securities purchased by

investors in a private placement.

e. Buyers conduct their own diligence, which usually results in a much longer, less well-coordinated process that is more costly and time-consuming for the issuer to manage than in the Rule 144A market, where investment banks act as principals (initial purchasers "underwriting" the issuance) and undertake due diligence on the issuer of the bonds.

107. Whichever choice private companies make—publicly disclose proprietary financial information, forgo disclosure and face increased borrowing costs and reduced liquidity, or abandon the Rule 144A market—much-needed funding will become costlier and more burdensome to obtain.

108. This higher cost of funding will make it more difficult for companies to grow, innovate, and create new jobs. These harms will especially affect Plaintiffs' members, who operate in the manufacturing sector, given manufacturers' consistent need to invest in equipment and facilities, undertake capital-intensive projects, and finance mergers and acquisitions. Indeed, 55% of nonfinancial private issuances in the Rule 144A market are in manufacturing and related industries.

CLAIMS FOR RELIEF

COUNT 1
Administrative Procedure Act
(Failure to Provide Opportunity to Comment – No-Action Letters)
5 U.S.C. § 553

109. Plaintiffs repeat and incorporate by reference all of the allegations set forth above.

110. The APA requires a reviewing court to set aside agency action that is "arbitrary

capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The court must also set aside an agency action that is taken "without observance of procedure required by law." *Id.* § 706(2)(D).

111. The APA defines "agency action" to "include[] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent . . . thereof." 5 U.S.C. § 551(13). A "rule" is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." *Id.* § 551(4). "A legislative rule '*modifies* or adds to a legal norm based on the agency's *own authority*.'" *Ass'n of Flight Attendants-CWA*, 785 F.3d at 716-17 (quoting *Syncor Int'l Corp. v Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997)). "Agency actions that 'impose legally binding obligations or prohibitions on regulated parties' . . . are legislative rules." *Id.* (quoting *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251-52 (D.C. Cir. 2014)). Such rules must "be promulgated pursuant to notice and comment" under the APA. *Id.* Further, "an agency may not escape . . . notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation." *Maple Drive Farms*, 781 F.3d at 857 (quoting *Appalachian Power Co.*, 208 F.3d at 1024).

112. To comply with the law's notice-and-comment obligation, the Commission must issue a notice of proposed rulemaking so that "interested persons" have "an opportunity to participate in the rulemaking through submission of written data, views, or arguments." 5 U.S.C. § 553(c).

113. The Commission staff's no-action letters expanded Rule 15c2-11's scope to include fixed-income securities, including Rule 144A fixed-income securities, without following the APA's mandatory requirements. Even though numerous interested parties voiced serious concerns

over the letters' unprecedented change, the Commission has not initiated the rulemaking proceedings required to effectuate such a change.

114. The November 30, 2022 no-action letter makes clear that companies must begin complying with Rule 15c2-11 as applied to Rule 144A fixed-income securities by January 2025. As the Commission's staff itself recognized by delaying enforcement for two years, Plaintiffs' members must now begin expending significant resources to comply with the new expansion of the Rule. Plaintiffs' members must (1) develop new (or enhance existing) technology systems, which could represent a significant change to Plaintiffs' longstanding business practices and compliance programs for Rule 144A securities; and (2) dedicate sufficient staff, technology, and other resources to support compliance with Rule 15c2-11's information requirements. These efforts will take significant time to complete, so the expansion of the Rule has triggered an "immediate and significant change in the [P]laintiffs' conduct of their affairs with serious penalties attached to noncompliance." *Sch. Dist. of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 263-64 (6th Cir. 2009).

115. Interested parties such as Plaintiffs and their members did not have any opportunity, much less a full and fair opportunity, to comment on the expansion of Rule 15c2-11's scope.

116. For these reasons, the no-action letters' expansion of Rule 15c2-11 was arbitrary, capricious, and without observation of procedure required by law. Plaintiffs are therefore entitled to relief pursuant to 5 U.S.C. §§ 702 and 706, and the Court should declare that Rule 15c2-11 does not apply to Rule 144A fixed-income securities, hold the no-action letters unlawful, and vacate them.

COUNT 2
Administrative Procedure Act
(Arbitrary, Capricious, and Not in Accordance with Law –
Failure to Justify Rule Change – No-Action Letters)
5 U.S.C. § 706

117. Plaintiffs repeat and incorporate by reference all of the allegations set forth above.

118. The APA requires a reviewing court to set aside any agency action that is "arbitrary capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

119. An agency is permitted to change its position, but when doing so the agency "must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars*, 579 U.S. at 221 (quoting *Fox Television Stations*, 556 U.S. at 515).

120. For fifty years, the Commission never applied Rule 15c2-11 to fixed-income markets. In adopting Rule 144A, the Commission concluded that it did not believe that public disclosures were needed to protect QIBs, providing instead that they would be entitled to obtain access to the financial information of Rule 144A issuers on a confidential basis. In the 30 years since adopting Rule 144A, the Commission never applied Rule 15c2-11 to Rule 144A securities, confirming that QIBs did not need to protections of Rule 15c2-11, because they are sophisticated institutional investors that already had access to the relevant information.

121. Market participants operated with the understanding that Rule 15c2-11 applied only to OTC equity securities. Issuers and broker-dealers in the fixed-income market did not take steps to comply with that Rule. And the Commission never brought enforcement actions against them despite this lack of compliance.

122. Similarly, FINRA—an entity operating under the Commission's supervision—has

promulgated rules confirming that Rule 15c2-11 applies only to OTC equity securities. The Commission's express approval of those rules makes clear that Rule 15c2-11 does not by its own terms apply to Rule 144A fixed-income securities.

123. Through the no-action letters, the Commission has taken the unprecedented position that Rule 15c2-11 applies to Rule 144A fixed-income securities—without any explanation for the change in position.

124. The Commission has never provided an explanation for this about-face. The Commission has not even acknowledged that it has reversed the position it had held for decades.

125. For these reasons, the no-action letters' expansion of Rule 15c2-11 to Rule 144A fixed-income securities is arbitrary and capricious and not in accordance with law. Plaintiffs are therefore entitled to relief pursuant to 5 U.S.C. §§ 702 and 706, and the Court should declare that Rule 15c2-11 does not apply to Rule 144A fixed-income securities, hold the no-action letters unlawful, and vacate them.

COUNT 3
Administrative Procedure Act
(Arbitrary, Capricious, and Not in Accordance with Law –
Failure to Consider Rule 15c2-11's Impact on Fixed-Income Markets – No-Action Letters)
5 U.S.C. § 706

126. Plaintiffs repeat and incorporate by reference all of the allegations set forth above.

127. The APA requires a reviewing court to set aside any agency action that is "arbitrary capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agency action is arbitrary and capricious if the agency has "'entirely failed to consider [an] important aspect of the problem.'" *Regents of the Univ. of Cal.*, 140 S. Ct. at 1913 (quoting *State Farm*, 463 U.S. at 43).

128. Section 3(f) of the Exchange Act requires that the Commission study a rule's impact on "efficiency, competition, and capital formation." 25 U.S.C. § 78c(f).

129. The Commission failed entirely to study the impact of applying Rule 15c2-11's requirements on fixed-income markets in general and the Rule 144A market in particular.

130. The Commission has never studied the Rule's effect on fixed-income markets. In promulgating and amending Rule 15c2-11, the Commission has relied solely on data from the OTC equity market.

131. Moreover, enforcing Rule 15c2-11 against fixed-income markets in general and the Rule 144A fixed-income market in particular will have very substantial adverse effects on efficiency, competition, and capital formation. But the Commission has never studied what the effects would be. The Commission's failure to study Rule 15c2-11's effect on fixed-income markets in general and the Rule 144A market in particular renders the Commission's expansion of Rule 15c2-11 to Rule 144A markets through the no-action letters arbitrary, capricious, and not in accordance with law. Plaintiffs are therefore entitled to relief pursuant to 5 U.S.C. §§ 702 and 706, and the Court should declare that Rule 15c2-11 does not apply to Rule 144A fixed-income securities, hold the no-action letters unlawful, and vacate them.

COUNT 4
Administrative Procedure Act
(Arbitrary, Capricious, and Not in Accordance with Law –
Failure to Engage in Reasoned Decisionmaking – No-Action Letters)
5 U.S.C. § 706

132. Plaintiffs repeat and incorporate by reference all of the allegations set forth above.

133. The APA requires a reviewing court to set aside any agency action that is "arbitrary capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

134. When promulgating a rule, the agency must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (citation omitted).

135. In adopting Rule 15c2-11, the Commission's purpose was to protect retail investors from fraudulent practices on the over-the-counter market in equity securities. The Commission never identified such a risk in the Rule 144A market—nor could it. The investors who participate in the Rule 144A market are highly sophisticated institutional investors. In addition, Rule 144A provides institutional investors with the ability to obtain financial information from issuers on a confidential basis, so sophisticated institutional investors are already protected under Rule 144A's provisions. The no-action letters' application of Rule 15c2-11 to Rule 144A markets is thus wholly untethered from the purposes underlying both Rule 15c2-11 and Rule 144A. Plaintiffs are therefore entitled to relief pursuant to 5 U.S.C. §§ 702 and 706, and the Court should declare that Rule 15c2-11 does not apply to Rule 144A fixed-income securities, hold the no-action letters unlawful, and vacate them.

COUNT 5
Administrative Procedure Act
(Arbitrary, Capricious, and Not in Accordance with Law –
Failure to Justify Change in Agency Position – 2020 Amendments)
5 U.S.C. § 706

136. Plaintiffs repeat and incorporate by reference all of the allegations set forth above and allege this count in the alternative should the Court determine that Rule 15c2-11 has always applied to fixed-income securities.

137. The APA requires a reviewing court to set aside any agency action that is "arbitrary capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

138. An agency is permitted to change its position, but the agency "must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars*, 579 U.S. at 221 (quoting *Fox Television Stations*, 556 U.S. at 515).

139. In adopting Rule 144A, the Commission concluded that it did not believe that public disclosures were needed to protect QIBs, providing instead that they would be entitled to obtain access to the financial information of Rule 144A issuers on a confidential basis. In the 30 years since adopting Rule 144A, the Commission never applied Rule 15c2-11 to Rule 144A fixed-income securities, confirming that QIBs did not need to protections of Rule 15c2-11, because they are sophisticated institutional investors that already had access to the relevant information.

140. To the extent the Court concludes that Rule 15c2-11 has always applied to fixed-income securities, the Commission, in adopting the 2020 Amendments, has taken the unprecedented position that Rule 15c2-11's public-disclosure requirement should apply to Rule 144A securities—without any explanation for reversing the determination it made in adopting Rule 144A: that public disclosure was not warranted.

141. The Commission has never provided an explanation for this about-face. The Commission has not even acknowledged that it has reversed the position it had held for decades.

142. For these reasons, the 2020 Amendments are arbitrary and capricious and not in accordance with law. Plaintiffs are therefore entitled to relief pursuant to 5 U.S.C. §§ 702 and 706, and the Court should hold the application of the 2020 Amendments' public-disclosure requirement to Rule 144A fixed-income securities unlawful and set aside the 2020 Amendments to the extent they apply that requirement to Rule 144A fixed-income securities.

COUNT 6
Administrative Procedure Act
(Arbitrary, Capricious, and Not in Accordance with Law –
Failure to Consider Rule 15c2-11's Impact on Fixed-Income Markets – 2020 Amendments)
5 U.S.C. § 706

143. Plaintiffs repeat and incorporate by reference all of the allegations set forth above and allege this count in the alternative, should the Court determine that Rule 15c2-11 has always applied to fixed-income securities.

144. The APA requires a reviewing court to set aside any agency action that is "arbitrary capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency action is arbitrary and capricious when the agency has "'entirely failed to consider [an] important aspect of the problem.'" *Regents of the Univ. of Cal.*, 140 S. Ct. at 1913 (quoting *State Farm*, 463 U.S. at 43).

145. Section 3(f) of the Exchange Act requires that the Commission study a rule's impact on "efficiency, competition, and capital formation." 25 U.S.C. § 78c(f).

146. The Commission failed entirely to study the impact of applying Rule 15c2-11's public-disclosure requirement to fixed-income markets in general and the Rule 144A fixed-income market in particular.

147. Indeed, in amending the Rule in 2020 to adopt the public-disclosure requirement, the Commission relied solely on data from the OTC equity market and deemed it representative of the entire market.

148. Moreover, enforcing Rule 15c2-11's public-disclosure requirement against fixed-income markets in general and the Rule 144A market in particular will have very substantial

adverse effects on efficiency, competition, and capital formation. But the Commission has never studied what the effects would be.

149. For these reasons, the Commission's failure to assess and justify the effect of applying Rule 15c2-11's public-disclosure requirement to fixed-income markets in general and the Rule 144A market in particular renders the 2020 Amendments arbitrary, capricious, and not in accordance with law. Plaintiffs are therefore entitled to relief pursuant to 5 U.S.C. §§ 702 and 706, and the Court should hold the application of the 2020 Amendments' public-disclosure requirement to Rule 144A fixed-income securities unlawful, and set aside the 2020 Amendments to the extent they apply that requirement to Rule 144A fixed-income securities.

COUNT 7
Administrative Procedure Act
(Arbitrary, Capricious, and Not in Accordance with Law –
Failure to Engage in Reasoned Decisionmaking – 2020 Amendments)
5 U.S.C. § 706

150. Plaintiffs repeat and incorporate by reference all of the allegations set forth above and allege this count in the alternative, should the Court determine that Rule 15c2-11 has always applied to fixed-income securities.

151. The APA requires a reviewing court to set aside any agency action that is "arbitrary capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

152. When promulgating a rule, the agency must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (citation omitted).

153. In amending Rule 15c2-11 in 2020, the Commission relied solely on data from the OTC equity market and deemed it representative of the entire market. Further, in adopting Rule

15c2-11, the Commission's purpose was to protect retail investors from fraudulent practices on the over-the-counter market in equity securities. The Commission never identified such a risk in the Rule 144A market—nor could it. The investors who participate in the Rule 144A market are highly sophisticated institutional investors. In addition, Rule 144A provides institutional investors with the ability to obtain financial information from issuers, so these sophisticated institutional investors are already protected under Rule 144A's provisions.

154. In adopting the 2020 Amendments, the Commission failed to articulate a rational connection between the facts found and the choice made when it chose to impose new disclosure requirements with respect to Rule 144A fixed-income securities (that is, to the extent the Court concludes that Rule 15c2-11 has always applied to fixed-income securities). Plaintiffs are therefore entitled to relief pursuant to 5 U.S.C. §§ 702 and 706, and the Court should hold the 2020 Amendments' application of Rule 15c2-11's public-disclosure requirements to Rule 144A fixed-income securities unlawful and set it aside.

COUNT 8
Administrative Procedure Act
(Arbitrary, Capricious, and Not in Accordance with Law –
Failure to Justify Change in Agency Position – 2020 Amendments)
5 U.S.C. § 706

155. Plaintiffs repeat and incorporate by reference all of the allegations set forth above, and allege this count in the alternative, should the Court determine that it is the 2020 Amendments that apply Rule 15c2-11 to Rule 144A fixed-income securities.

156. The APA requires a reviewing court to set aside any agency action that is "arbitrary capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

157. An agency is permitted to change its position, but the agency "must at least 'display

awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars*, 579 U.S. at 221 (quoting *Fox Television Stations*, 556 U.S. at 515).

158. For fifty years, the Commission never applied Rule 15c2-11 to fixed-income markets. In adopting Rule 144A, the Commission concluded that it did not believe that public disclosures were needed to protect the interests of QIBs, which could request access to the financial information of Rule 144A issuers. In the 30 years after adopting Rule 144A, the Commission never applied Rule 15c2-11 to Rule 144A securities, confirming that QIBs did not need to protections of Rule 15c2-11, because they were sophisticated institutional investors that already had access to the information they needed to protect themselves from fraud.

159. Then, in 2020, the Commission amended Rule 15c2-11. Without analysis or justification, it now takes the position that Rule 15c2-11's public-disclosure requirements apply to Rule 144A fixed-income securities. The Commission also has taken the unprecedented position that QIBs—the only purchasers of Rule 144A securities—need Rule 15c2-11 public disclosures to be protected from fraud.

160. The Commission has never provided an explanation for this about-face. The Commission has not even acknowledged that it has reversed the position it had held for decades.

161. For these reasons, the 2020 Amendments' expansion of Rule 15c2-11 to Rule 144A fixed-income securities is arbitrary and capricious and not in accordance with law. Plaintiffs are therefore entitled to relief pursuant to 5 U.S.C. §§ 702 and 706, and the Court should hold the 2020 Amendments' application of Rule 15c2-11 to Rule 144A fixed-income securities unlawful and set it aside.

COUNT 9
Administrative Procedure Act
(Arbitrary, Capricious, and Not in Accordance with Law –
Failure to Consider Effect of Rule 15c2-11's Expansion to Fixed-Income Markets – 2020 Amendments)
5 U.S.C. § 706

162. Plaintiffs repeat and incorporate by reference all of the allegations set forth above, and allege this count in the alternative, should the Court determine that the 2020 Amendments apply Rule 15c2-11's new disclosure requirements to Rule 144A fixed-income securities.

163. The APA requires a reviewing court to set aside any agency action that is "arbitrary capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency action is arbitrary and capricious when the agency has "'entirely failed to consider [an] important aspect of the problem.'" *Regents of the Univ. of Cal.*, 140 S. Ct. at 1913 (quoting *State Farm*, 463 U.S. at 43).

164. Section 3(f) of the Exchange Act requires that the Commission study a rule's impact on "efficiency, competition, and capital formation." 25 U.S.C. § 78c(f).

165. The Commission failed entirely to study the impact of applying Rule 15c2-11's requirements on fixed-income markets in general and the Rule 144A market in particular.

166. The Commission has never studied the Rule's effect on fixed-income markets. Indeed, in amending the Rule in 2020, the Commission relied solely on data from the OTC equity market and deemed it representative of the entire market.

167. Moreover, enforcing Rule 15c2-11 against fixed-income markets in general and Rule 144A fixed-income securities in particular will have very substantial adverse effects on efficiency, competition, and capital formation. But the Commission has never studied what the

effects would be.

168. For these reasons, the Commission's failure to study Rule 15c2-11's effect on fixed-income markets in general and the Rule 144A market in particular renders its expansion of Rule 15c2-11 to Rule 144A markets arbitrary, capricious, and not in accordance with law. Plaintiffs are therefore entitled to relief pursuant to 5 U.S.C. §§ 702 and 706, and the Court should hold the 2020 Amendments' application of Rule 15c2-11 to Rule 144A fixed-income securities unlawful and set it aside.

COUNT 10
Administrative Procedure Act
(Arbitrary, Capricious, and Not in Accordance with Law –
Failure to Engage in Reasoned Decisionmaking – 2020 Amendments)
5 U.S.C. § 706

169. Plaintiffs repeat and incorporate by reference all of the allegations set forth above and allege this count in the alternative, should the Court determine that the 2020 Amendments apply Rule 15c2-11's new disclosure requirements to Rule 144A fixed-income securities.

170. The APA requires a reviewing court to set aside any agency action that is "arbitrary capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

171. In promulgating a rule, the agency must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (citation omitted).

172. In amending Rule 15c2-11 in 2020, the Commission relied solely on data from the OTC equity market and deemed it representative of the entire market. Further, in adopting Rule 15c2-11, the Commission's purpose was to protect retail investors from fraudulent practices on the over-the-counter market in equity securities. The Commission never identified such a risk in

the Rule 144A market—nor could it. The investors who participate in the Rule 144A market are highly sophisticated institutional investors. In addition, Rule 144A provides institutional investors with the ability to obtain financial information from issuers on a confidential basis, so sophisticated institutional investors are already protected under Rule 144A's provisions.

173. The 2020 Amendments' application of Rule 15c2-11 to Rule 144A markets is thus wholly untethered from the purposes underlying both Rule 15c2-11 and Rule 144A. The Commission failed to articulate a rational connection between the facts found and the choice made when it chose to impose new disclosure requirements on Rule 144A fixed-income securities. Plaintiffs are therefore entitled to relief pursuant to 5 U.S.C. §§ 702 and 706, and the Court should hold the 2020 Amendments' application of Rule 15c2-11 to Rule 144A fixed-income securities unlawful and set it aside.

COUNT 11
Administrative Procedure Act
(Unlawfully withheld or unreasonably delayed response to petition for rulemaking)
5 U.S.C. § 706(1)

174. Plaintiffs repeat and incorporate by reference all of the allegations set forth above.

175. The APA requires a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

176. Since shortly after issuance of the September 2021 no-action letter, interested parties discussed the 2020 Amendments and no-action letters with Commissioners and Commission staff and asked the Commission to act to make clear that Rule 15c2-11 does not apply to Rule 144A securities—in order to avoid severe economic harms. Those discussions continued through November 2022. But the Commission did nothing. Instead, every no-action letter issued

by Commission staff repeated the assertion that Rule 15c2-11 applies to Rule 144A securities.

177. Plaintiffs therefore formally petitioned the Commission on November 22, 2022 to initiate a rulemaking proceeding to promulgate a rule making clear that Rule 15c2-11 does not apply to Rule 144A fixed-income securities.

178. The Commission has not responded to Plaintiffs' petition for rulemaking, including the assertions by Plaintiffs in that petition that the Commission lacked a reasoned justification for expanding Rule 15c2-11 to the Rule 144A markets—because Rule 144A investors are already protected by separate disclosure requirements—and that the Commission's expansion of Rule 15c2-11 would cause severe economic harms. The Commission's staff delayed enforcement until January 2025, but the steps that Plaintiffs' members and others must undertake to comply with the new requirements will be time consuming and costly and must start long before the January 2025 deadline.

179. The Commission has now had two years to respond to the concerns from Plaintiffs and many others, including members of Congress, that this unprecedented expansion of Rule 15c2-11 will cause grave economic harm and yet is untethered from any reasoned justification.

180. A rulemaking proceeding takes many months to complete. Given the January 2025 enforcement date specified in the most recent no-action letter, entities in the Rule 144A market must begin incurring significant compliance costs soon.

181. The Commission's response to the rulemaking petition is therefore unreasonably delayed.

182. Although unreasonable, the failure to respond to Plaintiffs' petition is not unusual. The Commission virtually without exception takes no action with respect to petitions for

rulemaking. The Court should compel the Commission to respond to Plaintiffs' petition for rulemaking within ninety days.

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court enter judgment in their favor and against Defendants as follows:

a. A declaratory judgment that Rule 15c2-11 does not apply to Rule 144A fixed-income securities;

b. A declaratory judgment that the no-action letters' expansion of Rule 15c2-11 to apply to Rule 144A fixed-income securities is arbitrary, capricious, or otherwise contrary to law under 5 U.S.C. § 706(2)(A);

c. An order vacating and setting aside the no-action letters' interpretation in its entirety under 5 U.S.C. § 706(2);

d. An order enjoining the Commission from enforcing the interpretation that Rule 15c2-11 applies to Rule 144A fixed-income securities;

e. A declaratory judgment that the 2020 Amendments, as applied to Rule 144A fixed-income securities, are arbitrary, capricious, or otherwise contrary to law under 5 U.S.C. § 706(2)(A);

f. An order enjoining the Commission from enforcing the 2020 Amendments with respect to Rule 144A fixed-income securities;

g. An order compelling the Commission to respond to Plaintiffs' petition for rulemaking within thirty days;

h. An order awarding Plaintiffs their reasonable costs, including attorney's fees, incurred in bringing this action; and/or

i. Any other relief as the Court deems just and appropriate.

Dated: September 12, 2023

Respectfully submitted,

/s/ Cory J. Skolnick

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