UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Mr. Andrew John Pincus
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1999 K Street, N.W.
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Re: Case No. 23-3750*, In re: NAM, et al*
Originating Case No. 2020-20980

Dear Counsel,

The petition for writ of mandamus has been docketed as case number **23-3750** with the caption listed above.

Counsel for petitioners must file an Appearance of Counsel form and, if not admitted, apply for admission to the 6th Circuit Bar by **September 26, 2023**. The forms are available on the court's website.

Sincerely yours,

s/Monica M. Page
Case Manager
Direct Dial No. 513-564-7021

No. ______

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE NATIONAL ASSOCIATION OF MANUFACTURERS AND KENTUCKY ASSOCIATION OF MANUFACTURERS,

Petitioners.

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION OR, IN THE ALTERNATIVE, PETITION FOR REVIEW

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INTRODUCTION

The National Association of Manufacturers (NAM) and the Kentucky Association of Manufacturers (KAM) bring this mandamus action seeking critical, time-sensitive relief: an order requiring the Securities and Exchange Commission (SEC or Commission) to act on their pending rulemaking petition seeking urgently-needed regulatory clarity for debt securities issued pursuant to 17 C.F.R. § 230.144A (Rule 144A).

In November 2022, NAM and KAM submitted a petition asking the SEC to institute a rulemaking proceeding to address the confusion produced by an SEC staff no-action letter. *See* Petition for Rulemaking and Application for Exemption With Respect to Rule 15c2-11 (Nov. 22, 2022), https://bit.ly/3DJCKQk, attached as exhibit 1, at A1 (Rulemaking Petition).[1] That no-action letter adopted an unprecedented interpretation of 17 C.F.R. § 240.15c2-11 (Rule 15c2-11) by applying Rule 15c2-11's public-disclosure requirements to Rule 144A debt securities issued by private companies—even though no such requirement is imposed by Rule 144A, and indeed the entire purpose of Rule 144A is to allow companies to access the debt markets *without* public disclosure of their financial and business-strategy information.

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[1] All exhibits referenced herein are included in the Addendum to this Petition.

The sole response to Petitioners' rulemaking petition was issuance of another no-action letter reiterating the SEC's expansive interpretation of Rule 15c2-11 but delaying enforcement action until January 2025. That letter makes clear that the Commission has no plans to institute a rulemaking proceeding. But the Commission's refusal to formally announce that decision prevents judicial review of the denial of rulemaking—which leaves undisturbed the staff's unprecedented and unjustifiable interpretation of Rule 15c2-11 and enables the Commission to impose a new substantive obligation through the threat of enforcement, instead of seeking to impose that obligation through the rulemaking process. Petitioners ask the Court to order the SEC to issue its decision on the rulemaking petition so that Petitioners may seek review of the Commission's rulemaking-through-no-action-letter approach.

Rule 144A was adopted by the SEC over thirty years ago for the express purpose of permitting privately-held companies to access the debt markets without publicly disclosing their financial information—and private companies rely on Rule 144A to raise funds critical for their operations and growth. Rule 144A limits resales of fixed-income securities[2] to sophisticated institutional investors, defined as those

[2] Fixed-income securities include 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 are debt securities, such as bonds, notes, or debentures.

managing at least $100 million in assets. It entitles these sophisticated institutional investors to obtain company financial information from the issuers of these debt securities on a confidential basis, rather than requiring private companies to disclose that information publicly.

Rule 15c2-11 was first promulgated in 1971 to protect small, retail investors trading in the over-the-counter (OTC) market for equity securities, such as stocks,[3] from fraud in that market, by requiring the issuers of those equity securities to publicly disclose certain information. In 2020, the Commission amended Rule 15c2-11 to condition secondary-market trading[4] of these OTC equity securities on public disclosure of an issuer's financial information.

In 2021, one year after the 2020 Amendments to Rule 15c2-11 were finalized, the Commission staff issued a no-action letter declaring, for the first time, that Rule 15c2-11, with its new public-disclosure requirement, applies to fixed-income securities—including those offered pursuant to Rule 144A. Prior to that no-action letter, the Commission had only applied Rule 15c2-11 to equity securities and had never taken enforcement action that applied Rule 15c2-11 to fixed-income securities like Rule 144A securities.

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[3] Equity securities are those securities representing an ownership interest in a corporation.

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

The determination embodied in the no-action letter effectively nullifies Rule 144A, which expressly rejected public disclosure of issuer financial information. And it does so even though (1) 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 can obtain an issuer's financial information when they ask for it; and (2) the Commission's own actions with respect to implementation of the 2020 Amendments show that Rule 15c2-11 is limited to equity securities.

The no-action letter gave Rule 144A market participants a limited period of time before the SEC would begin enforcing Rule 15c2-11 against them.

In light of the looming deadline, Petitioners filed a formal petition in November 2022 requesting that the Commission initiate a rulemaking proceeding to expressly exempt Rule 144A fixed-income securities from Rule 15c2-11. Petitioners 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 and any ensuing judicial review.

The SEC's sole response to these submissions was the issuance of another no-action letter delaying until January 2025 any enforcement action with respect to Rule 15c2-11's application to fixed-income securities. The Commission has not taken any other action with respect to the rulemaking petition and has evinced no willingness to reconsider the novel expansion of Rule 15c2-11 embodied in the no-action letters.

The SEC's failure to respond to Petitioners' rulemaking petition, in the nearly ten months it has been pending, is in these circumstances "agency action" that has been "unreasonably delayed" and therefore necessitates judicial correction under the Administrative Procedure Act (APA). 5 U.S.C. § 706(1).

The Third Circuit, in a closely-analogous case, recently compelled the Commission to explain why it ignored a rulemaking petition—and the Commission in response has taken steps to respond to that rulemaking petition. *See* Order, *In re Coinbase, Inc.*, No. 23-1779 (3d Cir. June 6, 2023); Letter from SEC to Clerk, *In re Coinbase, Inc.*, No. 23-1779 (3d Cir. June 13, 2023).

Requiring the Commission to formally respond to the rulemaking petition is critical to ensure judicial review of the agency's new interpretation of Rule 15c2-11. Concurrent with the filing of this Petition for Mandamus, Petitioners have filed a petition for review in this Court, seeking review of the 2020 Amendments to Rule 15c2-11 to the extent they apply to Rule 144A debt securities; and a complaint in the U.S. District Court for the Eastern District of Kentucky, seeking review of the 2020 Amendments and the no-action letters. But the SEC is likely to oppose these attempts to seek judicial review.

Mandamus is tailor-made for this scenario, because it will create a clear path to judicial review of a Commission action. "[T]he primary purpose of the writ in circumstances like these is to ensure that an agency does not thwart [courts'] jurisdiction by withholding a reviewable decision." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004).

The Court should not permit the SEC to ignore its legal duty to respond to the rulemaking petition, and it should not permit the SEC to avoid answering to the courts for its expansive and unprecedented interpretation of Rule 15c2-11. The Court therefore should issue a writ of mandamus compelling the Commission to respond to Petitioners' rulemaking petition. Alternatively, the Court should construe this submission as a petition for review of the SEC's effective denial of the rulemaking petition.

ISSUE PRESENTED

Whether a writ of mandamus should issue under the All Writs Act, 28 U.S.C. § 1651, directing the SEC to act on Petitioners' rulemaking petition within 30 days.

JURISDICTION AND VENUE

"The All Writs Statute vests in this court the power to issue a writ of mandamus," *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 658 (6th Cir. 1996) (citation omitted)—and it "empowers the court . . . to protect its future jurisdiction," *In re Howard*, 570 F.3d 752, 757 (6th Cir. 2009).

The SEC's decisions regarding rulemaking petitions are reviewable directly in the courts of appeals. 15 U.S.C. §§ 77i, 78y. "The 'statutory commitment of review of [agency] action to the Court of Appeals, read in conjunction with the All Writs Act, affords this court jurisdiction over claims of unreasonable [agency] delay.'" *In re Howard*, 570 F.3d at 757 (quoting *Telecommc'ns Rsch. & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984)). That is "[b]ecause the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails to resolve disputes," and this Court therefore "may resolve claims of unreasonable delay in order to protect its future jurisdiction." *Id.* at 756 (internal quotation marks omitted).

Venue is proper in this Court because Petitioner KAM resides in Kentucky and thus "reside[s]" in the Sixth Circuit. *See* 15 U.S.C. §§ 77i(a), 78y(a)(1); *Suttle v. Reich Bros. Constr. Co.*, 333 U.S. 163, 166 (1948).[5]

[5] Petitioners have direct organizational standing to bring this petition because they have devoted considerable 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 educating members about the regulatory action and its consequences; advocating before legislators, legislative staff, the Commission, and Commission staff; preparing and distributing advocacy materials; and coalition-building—and of course preparing and filing the rulemaking petition that is the subject of this action. Petitioners 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. If the change to Rule 15c2-11's reach is not overturned, Petitioners 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

STATEMENT

A. Rule 144A

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.

Securities issued pursuant to Rule 144A may be purchased only by highly sophisticated institutional investors that are certified as "qualified institutional buyers" or 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 include insurance companies such as MetLife, and investment banks such as Goldman Sachs.

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change to be reversed; Petitioners also 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 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).

Petitioners also 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 Petitioners' members. Each Petitioner 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 Petitioners 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.

In adopting Rule 144A, the Commission 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. Thus, companies issuing Rule 144A securities need not disclose to the public their sensitive financial and other business information. The trade-off for this reduced disclosure burden is that Rule 144A securities may only be purchased by a limited number of sophisticated institutional investors.

B. History and Purpose of Rule 15c2-11

The Commission first adopted Rule 15c2-11 in 1971 to protect retail investors from 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).

The Commission amended Rule 15c2-11 in 1991 to impose additional obligations 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).

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. Thus, the Commission's entire focus was "penny stocks"—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.”).

Although the Commission promulgated Rule 144A around the same time that it amended Rule 15c2-11 in 1991, Rule 144A did not subject broker-dealers to Rule 15c2-11’s 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 made available to QIBs upon request. *Compare* 56 Fed. Reg. at 19,148, *with* Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities Under Rules 144 and 145, 55 Fed. Reg. 17,934, 17,939 (Apr. 30, 1990).

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* Publication or Submission of Quotations Without Specified Information, 85 Fed. Reg. 68,124 (Oct. 27, 2020).

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).

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.

First, 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.

Second, 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 are able to access pertinent financial and operational information and cannot 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 debt securities.

And third, the reference to enforcement actions based on allegations of fraud relates entirely to equity securities. There is no history of any enforcement actions with respect to trading in Rule 144A debt securities.

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. The Commission did not assess, or even identify, the differences between the equity and fixed-income markets. As Commissioner Hester Peirce recognized, the "economic analysis" underlying the 2020 Amendments addresses only "the effects and incentives the rule creates 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, attached as exhibit 2, at A31 (Peirce Statement).

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, attached as exhibit 3, at

A34; *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, attached as exhibit 4, at A38 ("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 . . . .").

As then-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, attached as exhibit 5, at A42. 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." Peirce Statement, *supra* Exh. 2, at A31.

After promulgating the 2020 Amendments, the Commission approved a rule adopted by the Financial Industry Regulatory Authority (FINRA)[6] to ensure

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[6] FINRA is a membership-based organization that creates and enforces rules for broker-dealers under the Commission's oversight and approval.

compliance with the provisions of Rule 15c2-11 added by the 2020 Amendments. The FINRA rule expressly requires compliance only with respect to equity securities. Thus, 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).

When FINRA sought the Commission's approval for the amendments to FINRA Rule 6432 made "in light of the SEC's [2020] amendments to [Rule 15c2-11]," FINRA stated that Rule 15c2-11 applies to "non-exchange-listed securit[ies]," which are 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).

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). The FINRA submission to the Commission was clear, through that express exclusion, that

FINRA exempted Rule 144A securities from its rule implementing the Commission's 2020 Amendments to Rule 15c2-11.

The Commission approved FINRA's changes to its Rule 6432—with the exclusion of Rule 144A securities—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).

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

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, including the 2020 Amendments' public-disclosure requirement. A September 2021 no-action letter announced that Rule 15c2-11 applies to fixed-income securities, but stated that the Commission staff would not recommend any enforcement action with respect to this new interpretation 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, attached as exhibit 6, at A45.

The SEC thus used the no-action letter to impose a new broadly-applicable substantive rule—announcing, for the first time ever, that affected parties had to completely revamp their fixed-income securities systems and policies to account for Rule 15c2-11's requirements or face enforcement action. And it did so notwithstanding the settled legal principle that substantive rules must be promulgated pursuant to the APA's notice-and-comment requirements.

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:

- The staff's interpretation was unprecedented; that the Commission had never applied the Rule to fixed-income securities;[7]

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[7] *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 (July 18, 2022), http://bit.ly/3XcM9Ij, attached as exhibit 7, at A49 (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 (Sept. 23, 2021), http://bit.ly/3EgakwR, attached as exhibit 8, at A57 (SIFMA Sept. 23 Letter); Letter from Justin M. Underwood, Exec. Dir., Am. Bankers Ass'n, to Vanessa Countryman, Sec'y, U.S. SEC (Sept. 23, 2021), http://bit.ly/3Am35lW, attached as exhibit 9, at A64 (Am. Bankers Ass'n Letter); Letter from Kristi Leo, President, Structured Fin. Ass'n, to Gary Gensler, Chair, U.S. SEC (Dec. 9, 2021), http://bit.ly/3GmOhY4, attached as exhibit 10, at A72 (Structured Fin. Ass'n Letter);

- 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;[8]

- Application of the Rule to fixed-income securities was wholly unjustified in light of the differences between the equity and fixed-income markets;[9]

- Extension of the Rule to fixed-income markets was not necessary to protect investors;[10] and

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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 (Aug. 26, 2021), http://bit.ly/3V67tNN, attached as exhibit 11, at A78 (SIFMA Aug. 26 Letter).

8 *See* NAM Letter, *supra* Exh. 7, at A49 ("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* Exh. 9, at A66; Letter from the Bond Dealers of Am. to Vanessa Countryman, Sec'y, U.S. SEC (May 5, 2021), https://bit.ly/3O9ZeOA, attached as exhibit 12, at A100 (Bond Dealers of Am. Letter).

9 *See* NAM Letter, *supra* Exh. 7, at A49 ("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* Exh. 8, at A60; Am. Bankers Ass'n Letter, *supra* Exh. 9, at A65 (same); SIFMA Aug. 26 Letter, *supra* Exh. 11, at A80; Structured Fin. Ass'n Letter, *supra* Exh. 10, at A71-A72; Bond Dealers of Am. Letter, *supra* Exh. 12, at A100.

10 NAM Letter, *supra* Exh. 7, at A49 ("[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* Exh. 11, at A86; Bond Dealers of Am. Letter, *supra* Exh. 12, at A102.

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

A subsequent no-action letter, issued in December 2021, reaffirmed the position that Rule 15c2-11 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, attached as exhibit 13, at A105.

D. Petitioners and their November 2022 Petition for Rulemaking

The NAM is the largest manufacturing trade association in the United States, representing manufacturers of all sizes and in all 50 states. KAM is one of the oldest state manufacturing organizations in America, founded in 1911. NAM and KAM members include companies that issue Rule 144A fixed-income securities in order to fund activities that produce economic expansion, innovation, and job creation.

On November 22, 2022, NAM and KAM filed a petition urging the Commission to institute a rulemaking proceeding to make clear that Rule 15c2-11

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11 *See* NAM Letter, *supra* Exh. 7, at A50 ("[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* Exh. 8, at A60; Am. Bankers Ass'n Letter, *supra* Exh. 9, at A66; SIFMA Aug. 26 Letter, *supra* Exh. 11, at A87; Structured Fin. Ass'n Letter, *supra* Exh. 10, at A74.

does not apply to Rule 144A fixed-income securities or to exempt Rule 144A fixed-income securities from Rule 15c2-11 pursuant to the Commission's exemptive authority set forth in Rule 15c2-11(g). *See* Rulemaking Petition, *supra* Exh. 1. They filed a separate emergency petition seeking relief from the impending January 3, 2023 expiration of the enforcement moratorium specified in the no-action letter. *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), https://bit.ly/3qgKlCz.

On November 30, 2022, the Commission staff issued a third 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, attached as exhibit 14, at A112. That letter again reiterated that Rule 15c2-11 applies to fixed-income securities, but further extended the enforcement moratorium until January 4, 2025.

The Commission has not taken any action on Petitioners' rulemaking petition.

ARGUMENT

THE SEC HAS A MANDATORY DUTY TO ACT ON THE PETITION FOR RULEMAKING, BUT HAS FAILED TO DO SO.

The SEC is required to respond to petitions for rulemaking in a reasonable time. *See* 5 U.S.C. § 553(e); *id.* § 706(1); *see also* 17 C.F.R. § 201.192(a). Through its November 2022 no-action letter and subsequent silence, the SEC has demonstrated that it has no intention of conducting a rulemaking in response to the November 2022 rulemaking petition. But the Commission has never formally acted on that petition in the nearly ten months it has been pending.

That inaction may insulate from judicial review the SEC's decision to effectively amend Rule 15c2-11 by extending it to Rule 144A debt securities via the staff no-action letters. This Court should grant the petition for a writ of mandamus to require the SEC to respond to the rulemaking petition and allow Petitioners clear access to judicial review.

In a strikingly similar case, the Third Circuit recently ordered the SEC to explain why it ignored a rulemaking petition for ten months.

Coinbase, the petitioner in that matter, had—like Petitioners here—sought a writ of mandamus ordering the SEC to respond to its rulemaking petition because the SEC's silence limited Coinbase's ability to seek judicial review of the SEC's actions with respect to regulation of digital assets. *See* Pet. for Writ of Mandamus 17-18, *In re Coinbase, Inc.*, No. 23-1779 (3d Cir. Apr. 24, 2023). The Third Circuit gave the SEC one week to answer the following questions: "(1) whether the SEC has now decided to deny Coinbase's petition for rulemaking; (2) if not, how much additional time the SEC requires to decide whether to grant or deny that petition; and (3) why this Court should not retain jurisdiction and (a) order periodic reports . . .

and/or (b) establish a deadline by which the Court will rule on Coinbase's Petition." *See* Order, *In re Coinbase, Inc.*, No. 23-1779 (3d Cir. June 6, 2023).

The SEC responded to the Third Circuit's order by committing to answer the rulemaking petition within 120 days, and the court has maintained jurisdiction over the case to ensure that the SEC follows through on that commitment. *See* Order, *In re Coinbase, Inc.*, No. 23-1779 (3d Cir. June 20, 2023).

Petitioners here seek the same relief from this Court. The SEC has ignored Petitioners' rulemaking petition for ten months—despite having already decided, as the no-action letters show, that it will not engage in rulemaking and that it is content to create the impression that Rule 15c2-11's disclosure requirements apply to Rule 144A fixed-income securities. The Commission's inaction could well have the effect of preventing judicial review of this novel and unjustifiably expansive interpretation of Rule 15c2-11. This agency action is unreasonable, and the Court should issue the writ to stop the SEC's gamesmanship.

A. The SEC's Refusal To Act On The Petition Is An Unreasonable Evasion Of Judicial Review.

When an agency fails to "act within a reasonable time, the remedy [is] to seek issuance of a writ of mandamus to compel [agency] action." *Cellco P'ship v. FCC*, 357 F.3d 88, 101 (D.C. Cir. 2004); *see* 5 U.S.C. §§ 555(b) & 706(1). "Indeed, the primary purpose of the writ in circumstances like these is to ensure that an agency does not thwart [courts'] jurisdiction by withholding a reviewable decision." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d at 419.

Thwarting this Court's jurisdiction is exactly what the SEC is doing by refusing to act on the rulemaking petition. A formal denial of a rulemaking petition is textbook final agency action reviewable under the APA. *WWHT, Inc. v. FCC*, 656 F.2d 807, 809 (D.C. Cir. 1981). By withholding a decision, the Commission is depriving Petitioners of their right to "petition for the issuance, amendment, or repeal of a rule," and to obtain judicial review of the agency's decision on the petition. 5 U.S.C. § 553(e); *see also* 17 C.F.R. § 201.192(a).

This is not a new or isolated phenomenon. The SEC's usual practice is to never take action in response to rulemaking petitions—and the *Coinbase* litigation is another example. The SEC did not respond to Coinbase's rulemaking petition for ten months, and the Third Circuit therefore required the SEC to explain when it would issue its decision on the petition. *See* Order, *In re Coinbase, Inc.*, No. 23-1779 (3d Cir. June 6, 2023).

Through its November 2022 no-action letter here with respect to Rule 15c2-11, the SEC has made clear that it does not intend to institute a rulemaking proceeding. In that letter, for the third time in a 15-month stretch, the SEC staff stated its belief that Rule 15c2-11 applies to fixed-income securities, including Rule 144A securities.

By utilizing the no-action approach, and withholding a formal decision on Petitioners' rulemaking petition, the Commission is forcing affected parties to begin expending resources to comply with the new regulatory standard announced in its no-action letters—in order to avoid the expense and risk of future enforcement actions. *See* pages 28-32, *infra*. That is true even though the Commission's new regulatory standard conflicts with its own actions in approving the FINRA rule implementing the 2020 amendments to Rule 15c2-11 and with the text, history, and purpose of Rule 144A. *See* pages 8-19, *supra*. And even though regulation-by-no-action-letter is fundamentally inconsistent with the rulemaking process. *Maple Drive Farms Ltd. P'ship v. Vilsack*, 781 F.3d 837, 857 (6th Cir. 2015) ("[A]n agency may not escape . . . notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation.") (internal quotation marks omitted).

Petitioners have, concurrently with this Petition for Mandamus, filed a petition for review in this Court, seeking review of the 2020 Amendments to Rule 15c2-11. Petitioners assert in that filing that their petition for review of those Amendments is timely, despite the 60-day filing deadline, because application of the 2020 Amendments to fixed-income securities "was so obscure that" the Commission "did not provide sufficient notice to [Petitioners] that it inflicted the now-challenged burden." *Dominion Res., Inc. v. FERC*, 286 F.3d 586, 590 (D.C. Cir. 2002) (quotation marks omitted).

Petitioners also have concurrently filed a complaint in the U.S. District Court for the Eastern District of Kentucky, seeking review of the 2020 Amendments, the no-action letters, and the Commission's failure to act on the rulemaking petition. Petitioners have filed these multiple actions to ensure that they can obtain review of the Commission's expansion of Rule 15c2-11 in some forum—because they have been denied the most obvious and clear path to judicial review, a denial of their rulemaking petition.

But the SEC is likely to argue that judicial review is not available either in this Court or in the district court—and by withholding action on the rulemaking petition it is depriving Petitioners of what otherwise would be a clear route to judicial review. By signaling its substantive decision—denial—through a no-action letter and then failing to respond entirely to the rulemaking petition for ten months, the SEC has eliminated any rational explanation for its failure to respond other than a desire to insulate its determinations from judicial review. That foot-dragging is inherently "unreasonabl[e]." 5 U.S.C. § 706(1).

Just as the Third Circuit in *Coinbase* would not allow the SEC to avoid its obligations to respond to rulemaking petitions and thereby muddy litigants' path to judicial review of the agency's actions, this Court should require the SEC to comply with its legal duty to respond to the rulemaking petitions submitted to it and order the SEC to provide a formal response to Petitioners' request for a rulemaking, so that Petitioners may obtain judicial review of the SEC's decision.

B. Judicial Precedents Addressing Agency Delay Confirm That The SEC's Inaction Is Unreasonable And Therefore Impermissible.

Settled administrative law principles confirm that the SEC's failure to act on the rulemaking petition is unreasonable. In determining whether a delay is unreasonable, courts look to several factors, including (1) "the length of time that has elapsed since the agency came under a duty to act"; (2) the agency's "plea[s] of administrative error, administrative convenience, practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources;" (3) "the reasonableness of the delay . . . in the context of the statute which authorizes the agency's action"; and (4) "the consequences of the agency's delay." *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992) (quotation marks omitted); *Prometheus Radio Project v. FCC*, 824 F.3d 33, 39-40 (3d Cir. 2016). Courts also will look to whether there is "impropriety lurking behind agency lassitude." *Telecommc'ns Rsch. & Action Ctr.*, 750 F.2d at 80.

All five factors favor Petitioners.

1. Length of delay, agency resources, and reasonableness of delay.

The first three factors—the reasonableness of the length of the delay in light of the agency's logistical constraints and statutory mandate—collectively weigh in Petitioners' favor. "Although there is no *per se* rule as to how long is too long, 'inordinate agency delay would frustrate congressional intent by forcing a breakdown of regulatory processes.'" *In re Int'l Chem. Workers Union*, 958 F.2d at 1149 (quoting *Public Citizen Rsch. Grp. v. Auchter*, 702 F.2d 1150, 1158 n.30 (D.C. Cir. 1983)).

Here, the SEC plainly has already made its decision, so it needs only to issue the decision formally in order to deny the petition for rulemaking. That ministerial step does not require the SEC to "reorder [its] priorities." *In re Pub. Emps. For Env't Responsibility*, 957 F.3d 267, 275 (D.C. Cir. 2020). It is unreasonable for the SEC—an agency with over 4,500 employees—to take ten months (and counting) to complete that simple task. Moreover, the Commission has been on notice that Rule 144A market participants have been concerned over the potential enforcement of Rule 15c2-11 against fixed-income securities since the fall of 2021, when numerous market participants notified the Commission about their concerns and the Commission began engaging in discussions about the Rule's expansion with affected parties.

The November 2022 no-action letter reaffirming the novel view that Rule 15c2-11 applies to Rule 144A securities distinguishes this case from those in which courts concluded that longer agency delays did not warrant mandamus relief.

Courts have excused delays when, for example, the agency faces significant "scientific uncertainty and competing regulatory priorities" that may require the agency to devote significant resources to study a problem before making its eventual determination. *See, e.g.*, *Pub. Citizen Health Rsch. Grp. v. Chao*, 314 F.3d 143, 151 (3d Cir. 2002).

But Petitioners are aware of no case where a court has approved a three-quarters of a year delay on a petition for rulemaking when the agency issued a letter shortly after receiving a petition for rulemaking that directly addresses the petition's subject matter. And the SEC did so after receiving multiple requests, over the course of the prior year, to address the issue. The SEC's refusal to issue a reviewable decision—even though it plainly has made a decision to deny rulemaking and leave the issue to the no-action-letter process—renders its delay unreasonable.

2. Consequences of the delay.

The SEC's inaction also holds great "potential for harm." *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987). The SEC's refusal to formalize its decision to deny the rulemaking has created significant uncertainty in the Rule 144A market. That uncertainty has placed Petitioners' members and other regulated parties in an impossible position. Either they must expend significant resources in modifying their systems to prepare for the upcoming application of Rule 15c2-11 to Rule 144A securities (a process that will take many months), or they risk losing access to the Rule 144A market, because once the "no-action" period lifts in January 2025, broker-dealers will not issue quotations for Rule 144A securities unless the public-disclosure requirements are satisfied—because they would otherwise face enforcement actions.

Judicial review of a formal SEC denial of the petition for rulemaking would enable a court to make clear that the agency's abusive regulation-by-no-action-letter approach contravenes core tenets of administrative law and due process. Upon reviewing the SEC's express refusal to engage in rulemaking, a court could (and likely would) conclude that the APA obligates the agency to proceed by rulemaking because that is the only way the agency may impose new legally binding duties and obligations. *Maple Drive Farms*, 781 F.3d at 857; *see also Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 716-17 (D.C. Cir. 2015). By engaging in notice-and-comment rulemaking, the SEC could have provided fair notice to affected stakeholders and coherently considered whether it should have extended Rule 15c2-11 to fixed-income securities such as Rule 144A securities—but it did not do so.

The practical effect of allowing the SEC to regulate by no-action letter would be particularly devastating in these circumstances. The SEC has never received and been legally required to respond to formal comments on the impact of applying Rule 15c2-11 to the Rule 144A market. The adverse consequences for private companies, broker-dealers, institutional investors, and the economy as a whole will be enormous.

Private Companies. 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.

First, requiring them to publicly disclose proprietary financial and business information would impose significant burdens. Businesses have a strong, inherent interest in maintaining the confidentiality of their financial and operational information, strategic plans, and all other information relating to their operations and future plans. Further, 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. *See* Rulemaking Petition, *supra* Exh. 1, at A19-A21.

Second, private companies could respond by forgoing public financial disclosures, but that would make it difficult if not impossible for their securities to be traded on the secondary market and substantially increase their funding costs. *See* Rulemaking Petition, *supra* Exh. 1, at A21-A23.

Third, these companies could abandon the Rule 144A market and raise funds via inferior avenues that impose increased costs and limit their access to financing. *See* Rulemaking Petition, *supra* Exh. 1, at A22-A24.

Broker-dealers. 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. *See* Rulemaking Petition, *supra* Exh. 1, at A24-A25.

Institutional Investors. 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. *See* Rulemaking Petition, *supra* Exh. 1, at A25-A27.

Economic Harm. 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 inflict significant harm on the entire U.S. economy. *See* Rulemaking Petition, *supra* Exh. 1, at A27-A28. 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.

See EY, Macroeconomic Impacts of Applying Rule 15c2-11 to Rule 144A Debt Issued by Private US Companies (Sept. 2023) (EY Study), https://bit.ly/3RgpPgv, attached as exhibit 15, at A130. The EY study also found that the application of Rule

15c2-11 to the Rule 144A market will decrease U.S. gross domestic product by $100 billion over the next ten years. *Id*.

3. Agency impropriety.

The SEC's attempted evasion of judicial review demonstrates a lack of good faith, which is yet another reason for holding its delay unreasonable. "If the court determines that the agency delays in bad faith, it should conclude that the delay is unreasonable." *Cutler*, 818 F.2d at 898. As discussed, the SEC's ten-month delay in memorializing a decision it has already made has no possible justification other than to insulate from judicial review the agency's failure to engage in rulemaking. That points strongly to agency "impropriety," particularly when considered in the broader context of the agency's conduct in this area. *See Telecommc'ns Rsch. & Action Ctr.*, 750 F.2d at 80.

In demanding compliance through no-action letters, all while refusing to undertake rulemaking, the SEC's aim appears to be to force Rule 144A market participants to expend significant resources on a new public-disclosure scheme or face enforcement actions. And because the SEC has foresworn any enforcement actions until 2025 and refuses to formally deny the petition for rulemaking, Rule 144A market participants are left struggling to find an appropriate venue for judicial review—resulting in the concurrent filings in this Court and the district court. Mandamus is needed to ensure that the SEC can be properly held to account.

CONCLUSION

This Court should issue a writ of mandamus instructing the SEC to respond to the Petition for Rulemaking within 30 days.

Respectfully submitted,

<u>*/s/ Andrew J. Pincus*</u>

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Dated: September 12, 2023

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a) and Sixth Circuit Rule 26.1, the Kentucky Association of Manufacturers and the National Association of Manufacturers respectfully submit this Corporate disclosure Statement and state as follows:

1. The Kentucky Association of Manufacturers (KAM) states that it is a nonprofit trade association representing small and large manufacturers in Kentucky. The KAM aims to promote and grow manufacturing and Kentucky's overall economy. The KAM has no parent corporation, and no publicly held company has 10% or greater ownership in the KAM.

2. The National Association of Manufacturers (NAM) states that it is a nonprofit trade association representing small and large manufacturers in every industrial sector and in all 50 states. The NAM is the preeminent U.S. manufacturers' association as well as the nation's largest industrial trade association. The NAM has no parent corporation, and no publicly held company has 10% or greater ownership in the NAM.

/s/ *Andrew J. Pincus*
Andrew J. Pincus

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 21(d), undersigned counsel certifies that this Petition:

(i) complies with the type-volume limitation of Rule 21(d)(1) because it contains 7,770 words, including footnotes and excluding the parts of the Petition exempted by Federal Rule of Appellate Procedure 32(f).

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Word for Microsoft 365 and is set in Times New Roman font in a size equivalent to 14 points or larger.

Dated: September 12, 2023

/s/ *Andrew J. Pincus*
Andrew J. Pincus

CERTIFICATE OF SERVICE

I hereby certify that, on September 12, 2023, I sent copies of the forgoing Petition for a Writ of Mandamus to the following parties:

By first class mail

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E. Washington, D.C. 20549-6628

Merrick B. Garland
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Pursuant to 15 U.S.C. § 78y(b)(2) and 17 C.F.R. § 200.30-7, the Clerk of Court is respectfully requested to transmit this petition to the Secretary of the United States Securities and Exchange Commission and to the Attorney General of the United States.

/s/ *Andrew J. Pincus*
Andrew J. Pincus

ADDENDUM

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EXHIBIT 1

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November 22, 2022

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-6628

Re: Petition for Rulemaking and Application for Exemption With Respect to Rule 15c2-11

Dear Ms. Countryman:

The National Association of Manufacturers ("NAM") and the Kentucky Association of Manufacturers ("KAM") hereby respectfully (1) petition the Securities and Exchange Commission (the "Commission") pursuant to Rule 192 of the Commission's Rules of Practice, 17 C.F.R. § 201.192(a), for a rulemaking to amend Rule 15c2-11, 17 C.F.R. § 240.15c2-11, to expressly exempt from Rule 15c2-11 fixed-income securities that satisfy the requirements of Rule 144A, 17 C.F.R. § 230.144A ("Rule 144A securities"[1]); or, in the alternative, (2) request that the Commission expressly exempt Rule 144A securities from Rule 15c2-11 pursuant to the exemptive authority set forth in Rule 15c2-11(g).[2]

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[1] The terms "Rule 144A securities" and "Rule 144A market" in this submission refer only to Rule 144A fixed-income securities and the market for such securities, and do not include equity securities issued under Rule 144A or the market for such securities.

[2] For all of the reasons set forth in the petition for emergency interim relief and request for a stay also filed by NAM and KAM today—seeking an order staying the application of Rule 15c2-11 to Rule 144A securities pending judicial review or final action by the Commission to promulgate the rule or grant the exemption as requested herein—the Commission staff's conclusion that Rule 15c2-11 applies to Rule 144A securities is an erroneous interpretation of the Rule and, in addition, the application of Rule 15c2-11 to Rule 144A securities is arbitrary, capricious, and contrary to law. Action by the Commission expressly excluding Rule 144A

The Commission also could address the most serious adverse consequences of applying Rule 15c2-11 to Rule 144A securities by either (1) promulgating a rule or exercising its exemptive authority to exempt Rule 144A securities from the provisions of Rule 15c2-11 that impose requirements regarding public availability of issuers' information and broker-dealer verification of that information; or, alternatively, (2) amending Rule 15c2-11 or adopting an exemption specifying that, for Rule 144A securities, the issuer-information and broker-dealer verification requirements are satisfied as long as the issuer complies with the current information requirement under Rule 144A.

The 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 privately held manufacturers, including many NAM members, issue Rule 144A securities in order to fund these pro-growth activities, which support economic expansion, innovation, and job creation. In fact, from 2015 to 2021, companies in the economic sectors in which NAM members operate—manufacturing, information, transportation, and mining—comprised, on average, 55% of the nonfinancial U.S. private issuers of Rule 144A securities.[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. The NAM has previously submitted to the Commission a request that it take action to stop the staff's expansive interpretation of Rule 15c2-11 from taking effect.[4]

The KAM is one of the oldest state manufacturing organizations in America, founded in 1911. Through its advocacy efforts, KAM seeks to foster business growth and economic prosperity in Kentucky by promoting the best interests of Kentucky manufacturers. KAM's members include privately held manufacturers that issue Rule 144A securities to finance their growth.

Under the Commission's Rules of Practice, "[a]ny person desiring the issuance, amendment or repeal of a rule of general application may file a petition therefor with the Secretary." 17 C.F.R. § 201.192(a). This rule allows anyone to "petition for the amendment or

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securities from Rule 15c2-11 would correct that erroneous and impermissible interpretation of the Rule.

[3] *See* Ernst & Young, *Macroeconomic Impacts of Applying Rule 15c2-11 to Rule 155A Debt Issued by Private US Companies* at 6 (Nov. 2022) ("EY Study"), https://bit.ly/3EPMQjJ. This study was commissioned by the NAM.

[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 (July 18, 2022), http://bit.ly/3XcM9Ij (NAM Letter).

repeal of any Commission rule."[5] A petitioner must "include a statement setting forth the text or the substance of any proposed rule or amendment desired or specifying the rule the repeal of which is desired, and stating the nature of his or her interest and his or her reasons for seeking the issuance, amendment or repeal of the rule." 17 C.F.R. § 201.192(a). Upon recommendation from "the appropriate division or office," the Commission then takes "such action as [it] deems appropriate," and the Secretary must notify the petitioner of the action taken. *Id.*

Rule 15c2-11 provides that a party may submit a "written application" to the Commission for an order exempting "any class or classes of . . . securities" from "any provision or provisions" of the Rule. 17 C.F.R. § 240.15c2-11(g). The Commission may grant an exemption that is "necessary or appropriate in the public interest" and "consistent with the protection of investors." *Id.*

Promulgating a rule stating that Rule 15c2-11 does not apply to Rule 144A securities or, in the alternative, granting exemptive relief for such securities, is in the public interest and consistent with the Commission's tripartite mission to facilitate capital formation, maintain efficient markets, and protect investors. Leaving the Commission staff's determination in place, by contrast, will significantly harm companies' ability to raise necessary funds, disrupt the Rule 144A market, and injure investors.

To begin with, longstanding practice, and specific Commission action, demonstrate that Rule 15c2-11 does not apply to fixed-income securities. In the more than fifty years since Rule 15c2-11 was first promulgated, the Commission has never applied the Rule to fixed-income securities, and industry practice throughout that period has been to comply with the Rule only with respect to equity securities. Moreover, the Commission approved as consistent with the securities laws and Commission regulations a rule promulgated by the Financial Industry Regulatory Authority ("FINRA") to implement the Commission's 2020 amendments to Rule 15c2-11—which expressly excluded Rule 144A securities from the scope of the FINRA rule. The only reasonable interpretation of that action is that, in the Commission's view, those securities are not subject to Rule 15c2-11.

Moreover, the Commission has consistently justified Rule 15c2-11 as a measure necessary to protect retail investors. But retail investors cannot participate in the Rule 144A market, which is limited to large "qualified institutional buyers" ("QIBs").[6] Applying Rule 15c2-11 in that very different context is wholly unjustified. That is especially true because the Commission, in

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[5] *N.Y. Republican State Comm. v. SEC*, 799 F.3d 1126, 1136 (D.C. Cir. 2015).

[6] Rule 144A(a)(1) defines the term "qualified institutional buyer" to include insurance companies, investment companies registered under the Investment Company Act of 1940, investment advisers registered under the Investment Advisers Act of 1940, and certain other entities that own and invest on a discretionary basis at least $100 million in securities of issuers that are not affiliated with the entity. 17 C.F.R. § 230.144A(a)(1).

promulgating Rule 144A, specifically determined that making issuer information available by request (as opposed to the mandatory public disclosure required by the staff's interpretation of Rule 15c2-11) was sufficient to protect the sophisticated investors in that market.

The Commission's justifications for Rule 15c2-11 have focused entirely on the characteristics of the equity securities market, and the Commission has never even assessed the Rule's impact on the fixed-income market in general, or the Rule 144A market in particular—let alone determined whether the public interest supports application of the Rule to that very different market. The Commission also did not assess how the 2020 amendments to the Rule would affect the Rule 144A market: the adopting release fails to mention the amendments' impact on the Rule 144A market even a single time. But, as we explain, the amendments' public-disclosure requirement would impose significant burdens on the Rule 144A market if the staff's erroneous and unlawful application of Rule 15c2-11 is permitted to stand.

If the Commission had conducted the appropriate inquiry, it could only have concluded that there is no legitimate policy justification for applying Rule 15c2-11 to Rule 144A securities. Rule 15c2-11's sole rationale, the protection of retail investors, does not extend to a market in which the only investors are sophisticated QIBs. And extending Rule 15c2-11 to that very different environment will inflict significant harm on issuers—by advantaging issuers' competitors and substantially increasing issuers' borrowing costs; and on investors—by reducing the value of the Rule 144A securities they hold and decreasing the liquidity and transparency of the Rule 144A market.

Those increased costs and other burdens will inflict significant harm on the entire U.S. economy. An Ernst & Young ("EY") study—based on information obtained in interviews with fixed-income market professionals from seven large financial institutions and EY's macroeconomic model of the U.S. economy—found that application of Rule 15c2-11 to the Rule 144A market will mean

- 30,000 fewer jobs will be created in each of the next five years,
- 50,000 fewer jobs will be created in each of the five years after that, and
- 100,000 fewer jobs will be created each year thereafter.[7]

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.[8]

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7 *See* EY Study, *supra* note 3, at 3.

8 *Id*.

These substantial adverse effects weigh heavily against the extension of Rule 15c2-11 to the Rule 144A market.

The Commission therefore should grant the relief requested and make clear—either by rule or exemption—that Rule 15c2-11 does not apply to Rule 144A securities.

<u>Background</u>

The Commission first adopted Rule 15c2-11 in 1971 to combat fraud in the over-the-counter ("OTC") market—the market for securities not listed on a national securities exchange.[9] 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.[10]

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.[11]

In 2020 the Commission again amended the Rule. The 2020 amendments required broker-dealers to maintain up-to-date issuer information and for the first time mandated that the issuer information be made "publicly available."[12]

For fifty years—from the initial promulgation of the Rule until 2021—the Commission did not take action to apply the Rule to fixed-income securities.

In 2021, however, the Commission's staff indicated its view that fixed-income securities were subject to the Rule. The staff subsequently issued a no-action letter announcing its view that

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9 *See* Initiation or Resumption of Quotations by a Broker or Dealer Who Lacks Certain Information, 36 Fed. Reg. 18,641 (Sept. 18, 1971).

10 *Id.* at 18,642.

11 *See* Initiation or Resumption of Quotations Without Specified Information, 56 Fed. Reg. 19,148 (Apr. 25, 1991).

12 *See* Publication or Submission of Quotations Without Specified Information, 85 Fed. Reg. 68,124 (Oct. 27, 2020). For these purposes, Rule 15c2-11(e)(5) defines the term "publicly available" to mean available on EDGAR, the SEC's public database for corporate information; on the website of a state or federal agency, a qualified interdealer quotation system, a registered national securities association, an issuer, or a registered broker-dealer; or through an electronic information delivery system that is generally available to the public in the primary trading market of a foreign private issuer as defined in Rule 3b-4 under the Securities Exchange Act of 1934;

Rule 15c2-11 applies to fixed-income securities, but stating that it would not recommend enforcement action before January 3, 2022.[13]

Both before and after issuance of the no-action letter, numerous parties advised the Commission that:

- the staff's interpretation was unprecedented; that the Commission had never applied the Rule to fixed-income securities;[14]

- 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;[15]

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provided, however, that publicly available shall mean where access is not restricted by user name, password, fees, or other restraints.

13 *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.

14 *See* 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).

15 *See* Am. Bankers Ass'n Letter, *supra* note 14, 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.").

- application of the Rule to fixed-income securities was wholly unjustified in light of the differences between the equity and fixed-income markets;[16] and

- extension of the Rule to fixed-income markets was not necessary to protect investors,[17] and would in fact harm investors, the capital markets, and the U.S. economy.[18]

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16 *See* SIFMA Sept. 23 Letter, *supra* note 14, 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* note 14, 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* note 14, 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* note 14, 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* note 15, 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.").

17 SIFMA Aug. 26 Letter, *supra* note 14, at 11 ("Fixed Income Investors Are Fully Protected By Existing Regulations"); Bond Dealers of Am. Letter, *supra* note 15, at 4 ("[N]o investors have been harmed by not having applied the Rule to fixed income. The fixed income markets are extraordinarily safe.").

18 SIFMA Sept. 23 Letter, *supra* note 14, at 7 ("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* note 14, 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* note 14, 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* note 14, at 6 ("Application of Rule15c2-11 on [asset-backed securities, which are part of the fixed-income market] will immediately result in market illiquidity.").

The Commission's staff then issued another no-action letter reaffirming its view that the Rule applies to fixed-income securities, but delaying enforcement until January 3, 2023.[19]

The Commission Has Never Applied Rule 15c2-11 To Fixed-Income Securities.

Until the staff issued its novel interpretation of Rule 15c2-11, there had never been a Commission action applying Rule 15c2-11 to fixed-income securities. In fact, longstanding practice, as well as specific Commission action, demonstrate that the Rule does *not* apply to fixed-income securities.

To begin with, we are not aware of any enforcement action by the Commission applying Rule 15c2-11 to fixed-income securities. Indeed, since the staff announced its expansive interpretation of the Rule, no one has been able to identify a single such enforcement action. Commissioner Peirce stated that "there appears to have been limited, if any, application of the rule to fixed income markets prior to the Commission's 2020 adopting release."[20]

Second, the Commission—through its approval of a FINRA rule implementing the 2020 amendments to Rule 15c2-11—has made clear its view that the Rule does not apply to fixed-income securities.

In 2021, FINRA promulgated—and sought Commission approval of—its own rule to ensure compliance with the provisions of Rule 15c2-11 that were 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."[21] The FINRA rule does not mention fixed-income securities, and no other FINRA rule applies Rule 15c2-11 to the fixed-income market.

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19 *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 (Dec. 2021 No-Action Letter).

20 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). *See also* 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.").

21 FINRA, Rule 6432 (2021).

Indeed, when FINRA sought the Commission's approval for the amendments to 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."[22] 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.*, those securities to which Rule 15c2-11 does *not* apply—and § 230.144(a)(3) specifically includes "[s]ecurities acquired in a transaction . . . meeting the requirements of [17 C.F.R.] § 230.144A" as a restricted security.[23]

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

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."[24] That Commission action demonstrates the Commission's view that the Rule does not apply to Rule 144A securities—and completely undermines the staff's contrary interpretation, embodied in the no-action letter issued just eight days later.[25]

Third, and not surprisingly in light of this history, 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.

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22 Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change Relating to Members' Filing Requirements Under FINRA Rule 6432 (Compliance With the Information Requirements of SEA Rule 15c2-11), 86 Fed. Reg. 31,774, 31,774, 31,775 & n.13 (June 15, 2021).

23 17 C.F.R. § 230.144(a)(3).

24 Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Approval of a Proposed Rule Change Relating to Members' Filing Requirements Under FINRA Rule 6432 (Compliance With the Information Requirements of SEA Rule 15c2-11), 86 Fed. Reg. 51,700, 51,703 (Sept. 16, 2021).

25 Further supporting this point is the fact that even prior to 2020, FINRA's rules excluded Rule 144A securities from the FINRA rule imposing the requirements of Rule 15c2-11. *See, e.g.*, Luis A. Aguilar, Comm'r, SEC, *Making Capital Formation Work for Smaller Companies and Investors* (Oct. 30, 2015), https://bit.ly/3i1yS5u ("FINRA implements Exchange Act Rule 15c2-11 through its Rule 6432 . . . . For these purposes, FINRA defines 'non-exchange-listed security' as any equity security, other than a restricted equity security, that is not traded on any national securities exchange.").

Finally, Commissioners have confirmed that the Commission has never considered applying Rule 15c2-11's requirements to fixed-income securities. Commissioner Peirce stated that "[n]othing in the" 2020 amendments "suggests that the Commission considered the application of these rules to the fixed-income markets."[26] 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."[27] And then-Commissioner Roisman joined her in issuing a statement urging that the Commission adopt "plans to prevent Rule 15c2-11 from being misapplied to fixed-income securities."[28]

The Commission Has Justified Rule 15c2-11 Based Solely On The Characteristics Of Equity Markets—And Never Assessed The Rule's Effect On The Rule 144A Market.

The Commission's explanations of, and justifications for, Rule 15c2-11 have always been limited to equity securities; it has never considered, or even referred to, the Rule's possible effects on the fixed-income securities market in general or on the Rule 144A market in particular. Rule 15c2-11 is, in the words of Commissioners Peirce and Roisman, "designed for equity securities."[29]

When the Commission amended Rule 15c2-11 in 1991, for example, it 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."[30]

The Commission's entire focus was "penny stocks"—in other words, equity securities.

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

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26 Peirce Statement, *supra* note 20.

27 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).

28 Hester M. Peirce and Elad L. Roisman, Comm'rs, SEC, *Falling Further Back - Statement on Chair Gensler's Regulatory Agenda* (Dec. 13, 2021), http://bit.ly/3tEmCdQ.

29 Peirce & Roisman statement, *supra* note 28.

30 56 Fed. Reg. at 19,148.

> "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."[31]

Not only did the Commission refer expressly to "OTC *stocks*," but in addition each of its observations justifying the rule amendments relates only to equity securities and is wholly inapplicable to Rule 144A securities:

- The repeated references to "retail investors" are correct only with respect to OTC equities, because the equity market is open to retail investors, which constitute a large portion of all participants in that market.[32] The Rule 144A market, by contrast, is limited to institutional investors, and retail investors may not participate.[33]

- 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 it is a requirement of Rule 144A that investors have access to issuers' financial and operational information upon request.[34] Rule 144A investors accordingly are not at all likely to be misled by misinformation. The entire basis for the Commission's addition of a public-disclosure requirement to Rule 15c2-11 therefore is wholly inapplicable to Rule 144A securities.

- 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.

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31 85 Fed. Reg. at 68,125 (footnotes omitted).

32 *See* 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 ("Securities that trade on the OTC market are primarily owned by retail investors.").

33 *See infra* pp. 14-16.

34 *See infra* pp. 15-16.

In sum, the sole focus of the 2020 amendments, as Commissioner Roisman put it in a public statement, was "moderniz[ing] the OTC equity market."[35] In Commissioner Peirce's words, "[t]he policy analysis" in the 2020 amendments "focuses entirely on the need for additional disclosure in the OTC equity markets."[36]

Moreover, in justifying the 2020 amendments, the Commission relied only on data relating to equity securities.[37] This data, the Commission stated, was "reasonably representative of all OTC quoting and trading activity in the U.S."[38]

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

- 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.[39] Meanwhile, the fixed-income market's OTC daily trading volume for corporate and agency bonds, as well as securitized products, 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, as is clearly the case, the Commission never intended Rule 15c2-11 or the 2020 amendments thereto to apply to the fixed-income markets.[40]

- There are no national securities exchanges for restricted fixed-income securities. Equity securities, on the other hand, are traded on exchanges and also over-the-counter; equities issued by large companies and those that are heavily traded are listed on exchanges, while "the average OTC [equity] security issuer is smaller, and

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35 Elad L. Roisman, Comm'r, SEC, *Statement on Adoption of Amendments to Rule 15c2-11* (Sept. 16, 2020), http://bit.ly/3tGVISg.

36 Peirce Statement, *supra* note 20.

37 *See* 85 Fed. Reg. at 68,184-89.

38 *Id.* at 68,185 n.640.

39 *See* FINRA, *Over-The-Counter-Equities: Market Statistics*, http://bit.ly/3gjFfQW (describing OTC equities market); Joseph Corcoran & Christopher Killian, *The Collision of Rule 15c2-11 and Rule 144A*, SIFMA (Sept. 19, 2022), http://bit.ly/3EG43MF ("Average daily trading volume in 144A securities (across issuer types) in 2020 was over $9 billion and in 2021 was over $10 billion.").

40 *See* FINRA, *Market Data*, tbl. 3.6, http://bit.ly/3ECKN1p (describing OTC trading volume in corporate and agency bonds and securitized products in the fixed-income market).

> its securities trade less, on average."[41] The lack of national exchanges for fixed-income securities means that applying Rule 15c2-11 to fixed-income securities would encompass *all* fixed-income securities, including those issued by very large companies and those with a high trading volume. That is dramatically different from Rule 15c2-11's impact on the small segment of equity securities to which it applies—those issued by small companies and those with small trading volumes.

Applying Rule 15c2-11 to large, liquid, fixed-income issuers—especially Rule 144A issuers—involves very different policy considerations because of the critical differences between the two markets in terms of the type of investor (QIB vs. retail); the availability of information to investors (information available to QIBs on demand vs. not otherwise available to retail investors); the lack of any history of fraud in the fixed-income and Rule 144A markets, as compared to the significant anti-fraud enforcement actions in the OTC equity market; the much larger size of the fixed-income and Rule 144A markets as compared to the OTC equity market; and the type of issuer (very large businesses in the fixed-income and Rule 144A market vs. only smaller enterprises in the OTC equity market).

By relying only on information relating to equity-securities trading in adopting the 2020 amendments, the Commission did not assess the consequences of applying the new public-disclosure requirements to the significantly different fixed-income securities market or to the even more markedly distinct Rule 144A market. Nor could it have done so, because—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."[42] It is only the staff's 2021 no-action letters that expressly target fixed-income securities. But at no point in the past fifty years, including in the no-action letters, has the Commission or its staff justified applying Rule 15c2-11 to Rule 144A and other fixed-income securities or assessed the impact that the Rule would have on those markets.

There Is No Legitimate Policy Justification For Applying Rule 15c2-11 To Rule 144A Securities.

The Commission has never enforced Rule 15c2-11 in the fixed-income market, and it has never considered Rule 15c2-11's effect on the fixed-income market in general or the Rule 144A securities market in particular.

If the Commission had undertaken that analysis, it could reach only one conclusion: all of the relevant policy considerations demonstrate that there is no basis whatsoever for applying Rule 15c2-11 to Rule 144A securities. There is no investor-protection justification for subjecting Rule 144A securities to these additional requirements—because only sophisticated investors can trade these securities, and the issuers' financial and operational information already must be made

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41 85 Fed. Reg. at 68,185.

42 Peirce Statement, *supra* note 20.

available to these investors upon their request. Indeed, the Commission made that determination when it adopted Rule 144A. And imposing Rule 15c2-11's requirements on Rule 144A securities will harm issuers and burden capital formation; injure broker-dealers and investors; and reduce the growth of the American economy—preventing the creation of thousands of new jobs.

Rule 15c2-11's Key Rationale—Protection Of Retail Investors—Does Not Apply To Rule 144A Securities.

The Commission originally adopted Rule 15c2-11 to protect retail investors who participate in the OTC market from the fraudulent practices that it had identified in that market. These concerns motivated the 2020 amendments to Rule 15c2-11 as well. The Commission concluded in 2020 that compelling issuers of OTC equity securities to maintain up-to-date and publicly available information would limit malicious actors' ability to circulate false information designed to mislead the average retail investor.[43] It emphasized that a "lack of current and public information . . . disadvantages retail investors," and stated that the amended Rule 15c2-11 was "part of the Commission's overall efforts to protect retail investors from fraud and manipulation."[44]

But retail investors cannot participate in the Rule 144A market; only QIBs are eligible to purchase Rule 144A securities.[45] To qualify as a QIB, the entity must manage at least $100 million in securities.[46] These are highly sophisticated investors—insurance companies such as MetLife, and investment banks such as Goldman Sachs.[47]

Indeed, when it promulgated Rule 144A, the Commission explained that Rule 144A permitted only "resales to institutions that are sophisticated securities investors."[48] Rule 144A was specifically designed to "identify a class of investors that can be conclusively assumed to be sophisticated and in little need of the protection afforded by the Securities Act's registration provisions."[49] When the Commission amended certain terms used in Rule 144A in 2020, it again

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43 *See* Publication or Submission of Quotations Without Specified Information, 85 Fed. Reg. at 68,125; *see also supra* pp. 4-5.

44 Publication or Submission of Quotations Without Specified Information, 85 Fed. Reg. at 68,125.

45 *See* 17 C.F.R. § 230.144A(a)(1), (d)(1).

46 *Id.* § 230.144A(a)(1).

47 *See* Nat'l Comm'n on the Causes of the Fin. & Econ. Crisis in the U.S., *The Financial Crisis Inquiry Report* 170 (2011), http://bit.ly/3UPiPGh.

48 Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities Under Rules 144 and 145, 55 Fed. Reg. 17,933, 17,936 (Apr. 30, 1990).

49 Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities Under Rules 144 and 145, 53 Fed. Reg. 44,016, 44,028 (Nov. 1, 1988); *see*

made clear that QIBs are investors with "sufficient knowledge and expertise to participate in investment opportunities that do not have . . . rigorous disclosure and procedural requirements, and related investor protections."[50]

For that reason, the key justification for Rule 15c2-11—that the information disclosure and other requirements are needed to protect unsophisticated retail investors—is wholly inapplicable to the Rule 144A market.

In Adopting Rule 144A, The Commission Designed An Exemption Specifically For Issuances To Sophisticated Institutional Investors—And Expressly Declined To Impose The Requirements Of Rule 15c2-11.

The Commission adopted Rule 144A over 30 years ago to facilitate accessing the capital markets outside of the public offering process, which involves registration with the Commission and public disclosure of significant amounts of information—and therefore carries substantial initial and ongoing costs.[51] Rule 144A embodies an explicit tradeoff: issuers can access only a limited pool of investors, but because of those investors' sophistication, the issuers can avoid the costs and scrutiny associated with public-disclosure obligations. To put it directly, Rule 144A issuances and resales without publicly available issuer data represent Rule 144A working *exactly as intended*.

In promulgating Rule 144A, the Commission specifically considered what information-sharing requirements should apply in the Rule 144A market,[52] and ultimately implemented an "available upon request" disclosure system under which holders and prospective purchasers of Rule 144A securities are entitled to obtain certain information from issuers.[53] Issuers typically provide this information through a password-protected web portal, providing a password to QIBs seeking to review the information.

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)."[54] By

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also Letter from NAM, SIFMA, & U.S. Chamber of Commerce to U.S. Senators & Representatives at 2 (Sept. 14, 2022), http://bit.ly/3AogdqJ.

50 Accredited Investor Definition, 85 Fed. Reg. 64234, 64235 (Oct. 9, 2020).

51 *See* 55 Fed. Reg. at 17,933.

52 *See id.* at 17,948.

53 *Id.* at 17,939.

54 *Id.*; *see also id.* ("The holder must be able to obtain, upon request, . . . [a] very brief statement of the nature of the issuer's business and of its products and services offered, comparable to that information required by subparagraphs (viii) and (ix) of Exchange Act Rule 15c2-11(a)(5) . . . .").

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."[55]

The staff's decision to apply Rule 15c2-11's newly-adopted public-disclosure requirement to Rule 144A securities effectively overturns the contrary determination made by the Commission when it promulgated Rule 144A—a determination that has been in effect for 32 years. 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."[56] An "agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'"[57] But this complete reversal of position has not even been acknowledged by the Commission (or the staff), much less justified by a reasoned explanation. And, more importantly, only the Commission itself—through the notice-and-comment process mandated by the Administrative Procedure Act—can reverse a Commission determination.

Applying Rule 15c2-11 To Rule 144A Securities Will Harm Capital Formation And Injure Broker-Dealers and Investors.

More than $900 billion in Rule 144A securities were issued in 2021,[58] and there are $5 trillion of these securities outstanding.[59] Rule 144A trading volume averaged $10 billion per day

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55 *Id.* At the time Rule 144A was promulgated, Rule 15c2-11 did not impose a public-disclosure requirement. But Rule 15c2-11 did impose information review requirements on broker-dealers, which Rule 144A did not adopt.

56 *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).

57 *Id.* (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

58 EY Study, *supra* note 3, at 5 (the $900 billion number excludes "[a]ll issues with maturities of one year or less, as well as CDs"); *see also* Corcoran & Killian, *The Collision of Rule 15c2-11 and Rule 144A*, *supra* note 3959 ("Total 144A issuances (*across issuer types*) in 2020 were approximately $1.15 trillion and in 2021 were approximately $1.36 trillion." (emphasis added)).

59 Corcoran & Killian, *The Collision of Rule 15c2-11 and Rule 144A*, *supra* note 39; Letter from Kenneth E. Bentsen, Jr., SIFMA President and CEO, to Gary Gensler, Chair, U.S. SEC at 2 (June 10, 2022), http://bit.ly/3AuW1U6 (SIFMA June 10 Letter) ("The value of outstanding Rule 144A debt securities exceeds $5 trillion, and the Rule 144A debt market constitutes a material portion of the overall corporate bond, asset-backed security, tender option bond, commercial paper, and other debt markets. This $5 trillion amount includes the at least $150 billion in 144A debt securities issued by private companies in 2021.").

in 2021.[60] 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.[61] Rule 144A securities are a significant component of the U.S. financial system.

Despite that significance, the Commission has never studied the costs and benefits of applying Rule 15c2-11 to the Rule 144A market.

As already explained, expansion of the Rule cannot be justified based on the Rule's basic purpose—protection of retail investors—because retail investors cannot participate in the Rule 144A market. And sophisticated QIBs, who do participate in that market, are aware that all relevant information must be made available upon request.

Meanwhile, expanding the Rule will produce significant harm—to companies, broker-dealers, investors, and the U.S. economy. That harm, without any corresponding benefit, permits only one rational conclusion: Rule 15c2-11 should not be applied to Rule 144A securities.

Harm to Issuers and Burdens on Funding and Access to Capital

Applying Rule 15c2-11 to Rule 144A securities will have a significant adverse effect on companies' borrowing costs.

The Rule 144A market is large and vibrant. Issuances totaled approximately $900 billion in 2021, representing nearly 50% of U.S. corporate bond market issuances.[62] Rule 144A offerings have become a significant, if not the primary, method of private companies issuing asset-backed securities, high-yield bonds, and investment grade debt.[63] Over the last two years, Rule 144A securities issued by private companies—*i.e.*, the issuers that are the most impacted by the

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60 *See* Corcoran & Killian, *The Collision of Rule 15c2-11 and Rule 144A*, *supra* note 39.

61 EY Study, *supra* note 3, at 5-6 (describing $137 billion in private 144A bond issuances in 2020 and $178 billion in private 144A bond issuances in 2021, as well as $900 billion in total Rule 144A issuances in 2021 and $2.0 trillion U.S. corporate bond issuances in 2021).

62 *Id.* at 5.

63 *See* SIFMA Sept. 23 Letter, *supra* note 14, at 5; 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 (ICI Letter); SIFMA June 10 Letter, *supra* note 59, at 2 ("[T]the Rule 144A debt market constitutes a material portion of the overall corporate bond, asset-backed security, tender option bond, commercial paper, and other debt markets.").

misapplication of Rule 15c2-11—have totaled $315 billion.[64] At least 30 of the largest private companies in America are 144A issuers.[65]

Applying Rule 15c2-11 to Rule 144A securities will force privately held companies 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) publicly disclose proprietary financial and operational information and face both competitive harm from that 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.

Harm From Public Disclosure of Competitively Sensitive Information and Other Costs of Public Disclosure

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 (again, 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.

Maintaining competitive advantage by keeping financial and operational information confidential is a key 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."[66] Competitors often take advantage of public disclosures to gain insight into their peers' finances, operations, and profitability.[67] Rule 144A limits issuers' investor base to just sophisticated financial institutions—

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[64] EY Study, *supra* note 3, at 6.

[65] Letter from Representatives to Gensler, *supra* note 20.

[66] William K. Sjostrom Jr., *Carving a New Path to Equity Capital and Share Liquidity*, 50 B.C. L. Rev. 639, 645 (2009), http://bit.ly/3Eiu5E1; *see also* David A. Westenberg, *Initial Public Offerings: A Practical Guide to Going Public*, § 1:2.2 (2d ed. 2012) (noting that upon going public, "[p]reviously confidential information . . . becomes readily available to competitors and employees").

[67] *See* Cyrus Aghamolla & Richard T. Thakor, *Do Mandatory Disclosure Requirements for Private Firms Increase the Propensity of Going Public*, 60 J. Acct. Res. 755 (2021), http://bit.ly/3EF6aA8; Michael Minnis & Nemit Shroff, *Why Regulate Private Firm Disclosure and Auditing?*, 47 Acct. & Bus. Res. 473 (2017), http://bit.ly/3V6CNfG; Darren Bernard, *Is the*

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.

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,"[68] and takes up "valuable management time."[69] For the median public U.S. company, the annual cost of complying with mandatory disclosures is about $293,000.[70] 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

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Risk of Product Market Predation a Cost of Disclosure?, 62 J. Acct. & Econ. 305 (2016), http://bit.ly/3UKIkZz; Christian Leuz & Peter D. Wysocki, *The Economics of Disclosure and Financial Reporting Regulation: Evidence and Suggestions for Future Research*, 54 J. Acct. Res. 525, 552 (2016), http://bit.ly/3V4xRYt; Elisabeth Dedman & Clive Lennox, *Perceived Competition, Profitability and the Withholding of Information About Sales and the Cost of Sales*, 48 J. Acct. & Econ. 210 (2009), http://bit.ly/3tEk9jm

[68] Carlos Berdejo, *Going Public After the JOBS Act*, 76 Ohio St. L.J. 1, 17 (2015), http://bit.ly/3TLmXpD. *See also* Michael Ewens, *Regulatory Costs of Being Public: Evidence From Bunching Estimation*, Nat'l Bureau of Econ. Rsch., Working Paper No. 21943 (2021), http://bit.ly/3EENKPT; John C. Coates & Suraj Srinivasan, *SOX After Ten Years: A Multidisciplinary Review*, 28 Acct. Horizons 627, 631 (2014), https://bit.ly/3Onka4L ("SOX-mandated disclosures did induce significant direct costs."); *id.* at 641-42.

[69] Joseph L. Johnson III & Andrew J. Weidhaas, *The Going-Private Transaction*, N.Y.L.J. (Nov. 13, 2001), http://bit.ly/3Oj6M1M; *see also* Coates & Srinivasan, *SOX After Ten Years*, *supra* note 68, at 631, 641-42; (noting the costs of continuing disclosure); Leuz & Wysocki, *The Economics of Disclosure and Financial Reporting Regulation* (same); Sjostrom, *Carving a New Path*, at 645 (emphasizing the "legal and accounting fees and management opportunity costs year after year").

[70] Ewens et al., *Regulatory Costs of Being Public: Evidence from Bunching Estimation*, *supra* note 68, at 23.

company's business, its vendors and its customers."[71] Requiring public reporting from private Rule 144A issuers will impose these costs despite a complete lack of investor benefit.[72]

Applying Rule 15c2-11 to fixed-income securities will also impose significant new compliance obligations (and their associated costs) on broker-dealers. 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. 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.

Loss of Liquidity

The 2020 amendments to Rule 15c2-11 prohibit broker-dealers from freely quoting an issuers' 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.

The recent EY study found that, on average, borrowers would face an illiquidity premium of 72 basis points due to the application of Rule 15c2-11 to Rule 144A securities.[73] Both investment-grade issuances (27 basis points) and high-yield issuances (100 basis points) would be impacted.[74] These illiquidity premiums attributable to the application of Rule 15c2-11 would produce an 8-13% increase in Rule 144A issuers' borrowing costs[75]—significantly reducing the funding potential of Rule 144A issuances and undermining the Commission's rationale for creating Rule 144A.

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[71] Johnson & Weidhaas, *The Going-Private Transaction*; *see also* Petro Lisowsky & Michael Minnis, *The Silent Majority: Private U.S. Firms and Financial Reporting Choices*, 58 J. Acct. Res. 547 (2020), http://bit.ly/3EfGysc (finding that a majority of private companies choose not to disclose financial information).

[72] Although the costs to an issuer of the public disclosure specified in Rule 15c2-11 may not be identical to the costs associated with registration, the latter costs provide a highly relevant benchmark for the likely costs of Rule 15c2-11 public disclosure.

[73] EY Study, *supra* note 3, at 4.

[74] *Id.*

[75] *Id.*

Moreover, the new disclosure requirements imposed by the staff's interpretation 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, 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 costs of capital."[76] 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 will likely devalue their existing debt," which, in turn, will further impede issuers' ability to raise funds.[77]

Costs of Switching to Inferior Funding Alternatives

The significant burdens imposed on issuers by the staff's novel interpretation of Rule 15c2-11 likely will lead many companies 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.[78] But private placements lack many of the benefits of the Rule 144A market—and are more expensive as a result. In a private placement:

- 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.[79]

- 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,

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76 Tarun Chordia, Richard Roll & Avanidhar Subrahmanyam, *Market Liquidity and Trading Activity*, 56 J. Fin. 501, 501 (2002), http://bit.ly/3UXo7Q9.

77 Market Impact Diagram: Major SEC Regulatory Actions, NERA Economic Consulting 11 (2022), http://bit.ly/3gdAQz2; SIFMA June 10 Letter, *supra* note 59, at 2.

78 15 U.S.C. § 77d(a)(2).

79 *See* McLaughlinPC.Com, *Unregistered Securities Offerings* 7, http://bit.ly/3U7KYYh ("Rule 144A is important because it permits a financial intermediary to buy unregistered securities from an issuer on a firm commitment basis and resell them to an unlimited number of QIBs in transactions that comply with Rule 144A.").

this market is not nearly as deep as the Rule 144A market and cannot absorb the level issuances typical of the Rule 144A market.

- Bonds settle outside of the Depository Trust Company central clearing system, and settle in physical, certificated form.[80] This increases transaction costs and the time to execute a secondary trade, which in turn decreases liquidity.

- There is no readily available resale market for these privately placed securities—because "[t]he 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."[81]

- 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.

The private placement market thus provides issuers with slower execution and worse terms—which means increased funding costs.

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.

This higher cost of funding will make it more difficult for companies to grow, innovate, and create new jobs. These harms will especially affect the manufacturing sector, "given manufacturers' consistent need to invest in equipment and facilities, undertake capital-intensive projects, and finance mergers and acquisitions."[82] Indeed, 55% of nonfinancial private issuances in the Rule 144A market are in manufacturing and related industries.[83] These harms are particularly striking given that in adopting Rule 144A, the Commission recognized the Rule as "the first step toward achieving a more liquid and efficient resale market for unregistered securities."[84] The

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80 *See* Depository Trust Company, *About Underwriting* 17, http://bit.ly/3glGxLn ("Non-DTC-eligible securities, including certificated and money market instruments, private placements, and limited partnerships.").

81 *See* Anna T. Pinedo & James R. Tanenbaum, *Exempt & Hybrid Securities Offerings* § 2.2.1 (4th ed. 2022).

82 NAM Letter, *supra* note 4.

83 EY Study, *supra* note 3, at 6.

84 *See* 55 Fed. Reg. at 17,934; *id.* at 17,943 (highlighting the "increased liquidity of restricted securities" that Rule 144A would provide).

staff's novel and misguided application of Rule 15c2-11 would thus largely eliminate a critical benefit of Rule 144A.

Harm to Broker-Dealers

Rule 15c2-11 imposes very substantial new obligations on broker-dealers—obligations that will significantly increase broker-dealers' costs, as well as the risks associated with quoting and trading activities in Rule 144A securities. Broker-dealers have to incur those costs in order to continue to participate in the Rule 144A market on January 3, 2023 and thereafter.

Historically, broker-dealers have provided quotes of Rule 144A securities to investors without being obligated by regulation to require, or assess the accuracy or public availability of, issuers' financial information. The staff's determination that Rule 15c2-11 applies to Rule 144A securities means that broker-dealers must—before publishing a quotation for a security—collect, record, and review for timeliness, accuracy, reliability, and public availability specified information, including financial information, related to the issuer.[85] That will be a significant undertaking for broker-dealers in the Rule 144A market due to the manual nature of the collection and review process—there is no existing infrastructure for complying with Rule 15c2-11's information requirements as applied to Rule 144A securities.

In order to comply with Rule 15c2-11's requirements for providing quotes in the Rule 144A market, broker-dealers will have to take the following costly and burdensome steps:

- Implement written compliance policies and supervisory procedures to address how to approach quoting and trading Rule 144A securities, and otherwise serving customers (*e.g.*, providing indicative pricing information for use by customers to "mark to market" their positions) where Rule 15c2-11's information requirements are not already satisfied by the issuer (*i.e.*, when the issuer is a private company);

- Develop new (or enhance existing) technology systems and procedures to comply with the Rule 15c2-11 requirements, which could represent a significant change to the firms' longstanding business practices and compliance programs for Rule 144A securities; and

- Dedicate sufficient staff, technology, and other resources to support compliance with Rule 15c2-11's information requirements.

These processes will be costly to implement.[86]

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85 *See generally* Rule 15c2-11(a)(1)(i).

86 *See* SIFMA Sept. 23 Letter, *supra* note 14, at 5 ("If the [R]ule were to apply [to Rule 144A markets], the burden on dealers to obtain the required information, determine whether the body of

Moreover, because Rule 15c2-11 has never before been applied to Rule 144A securities, 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. Broker-dealers also will have no control over whether and when Rule 144A issuers actually publish financial information as required under Rule 15c2-11, which, in turn, could mean that broker-dealers are not able to publish quotations in Rule 144A securities on a going-forward basis, at least until the issuers make such information publicly available.[87] The result is that the broker-dealers will lose revenue as they are not able to publish quotations for, and trade in, Rule 144A securities that they would have quoted and traded absent the staff's novel interpretation of Rule 15c2-11.

Further, because Rule 15c2-11 has never been applied to the Rule 144A market, broker-dealers face an unknown level of regulatory and enforcement risk. In light of this increased regulatory uncertainty, broker-dealers may limit themselves to bilateral communications with customers (*e.g.*, telephone calls), which is inefficient, higher cost, and less transparent as compared to the use of electronic communication systems—again compounding the loss of transparency in the market. The costs of compliance and regulatory uncertainty also may cause broker-dealers to limit or cease providing quotations and/or trading in Rule 144A securities altogether. To the extent that broker-dealers reduce or eliminate their quoting and/or trading activities with respect to Rule 144A securities, broker-dealers will forgo revenue that they otherwise would have generated from that activity.

In sum, broker-dealers will face significant costs if Rule 15c2-11 is expanded to the Rule 144A market, which will cause them either to pass on those costs to other market participants, reduce their quotation and trading activity with respect to Rule 144A securities, or leave the Rule 144A market entirely.

Harm to Investors

The institutional investors who participate in the Rule 144A market also will suffer serious adverse consequences from application of Rule 15c2-11 to that market.

Most institutional investors purchase securities for their investment portfolio with the expectation that the securities will be tradeable—and that certainly is true for Rule 144A investors,

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information on each individual CUSIP is reliable, and whether it meets the 'current and publicly available' standard under the Rule will be enormous and costly, and impossible in cases such as Rule 144A securities.").

[87] *Id.* ("Dealers unable to comply with the Rule as written may retreat from providing indications of interest that could be considered 'quotations' under the Rule. These restrictions to quotation and trading practices could be broad-based across different types of [fixed-income] instruments or could be concentrated in certain markets such as those for Rule 144A securities.").

as the substantial trading volume (more than $10 billion per day in 2021[88]) demonstrates. Indeed, as explained above, one of the reasons why the Commission adopted Rule 144A was to enhance the liquidity of privately placed securities.

The staff's expansive interpretation of Rule 15c2-11 is likely to lead to significantly reduced liquidity for already-issued Rule 144A securities—and therefore trigger an immediate decrease in value for investors that hold those securities. That is because the process for selling those securities will become more costly and less transparent. Many private issuers will choose not to make their financial and other information public, which in turn will eliminate public broker-dealer quotations for their securities. Investors seeking to resell a Rule 144A security will thus have to solicit bids privately from broker-dealers. This process is time-consuming and expensive—and the one-off conversations with broker-dealers are much less likely to result in efficient price discovery. Additionally, even if a purchaser can be found via this time-consuming process, that purchaser is likely to charge an illiquidity premium to the current holder in anticipation of their own time-consuming and expensive process needed to re-sell the security in the future. That reduction in transparency and liquidity will produce an immediate decrease in the value of already-issued Rule 144A securities held by investors.[89]

Moreover, the lack of published quotations will decrease transparency for those seeking to invest in the Rule 144A market. It is axiomatic that transparency of quotations for securities benefits investors. If broker-dealers publish quotations publicly, everyone in the market will have equal access to the quotations, and investors would have the ability to choose the most favorable quotation. But if broker-dealers can only provide quotations on a private or limited basis, transparency and liquidity decrease, which increases costs. That will harm investors and could cause institutional investors to stop investing in Rule 144A securities.[90] Indeed, the Chairman has

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88 *See* Corcoran & Killian, *The Collision of Rule 15c2-11 and Rule 144A*, *supra* note 39.

89 Market Impact Diagram, *supra* note 77, at 11; ICI Letter, *supra* note 63, at 1-2 ("If broker-dealers determine that they cannot comply with the [R]ule's requirements [for Rule 144A markets], then their reduced trading activity would impair the liquidity of these securities, funds' ability to value them accurately, and advisers' ability to seek best execution for their clients."); *id*. at 8 ("If dealers reduce their quoting and/or trading activity for Rule 144A debt securities, then it will become more difficult for an investment adviser to assess its execution quality. Even worse, to the extent that funds are compelled to sell these securities, they may have to do so *at significantly impaired prices*, which would adversely impact fund investors and could have broader market implications." (emphasis added)); SIFMA June 10 Letter, *supra* note 59, at 2 ("Mutual funds, pension funds, and other investors currently holding these securities will ultimately bear the costs of this change in market structure through lower liquidity, less price transparency and increased trading costs for 144A debt securities, which *we anticipate will cause the value of currently outstanding 144A debt securities to materially decline*." (emphasis added)).

90 *See* ICI Letter, *supra* note 63, at 7 ("[[F]ewer available indications of interest or quotes will impair price discovery and transparency for existing securities . . . . A reduction in dealer activity—

emphasized the importance of post-trade transparency and sought to increase transparency by reducing the time period in which market participants must report transactions to FINRA's TRACE system,[91] but—by applying Rule 15c2-11 to the Rule 144A market and thereby encouraging issuers who want to maintain the confidentiality of their financial information to solicit bids privately—transparency will be reduced significantly because private debt transactions are not subject to any reporting requirement.

Institutional investors also will have to shoulder additional costs to comply with their obligations to their clients. Institutional investors are required to prepare reports for their clients, including, typically, a statement of net asset values. But without published quotations, investors will have difficulty calculating the value of their holdings and reporting this information to their clients. Institutional investors would have to individually solicit quotations for each and every security in their portfolio, which would be costly and time-intensive. In addition, outside auditors must review certain reports before institutional investors can provide them to their clients. Without public quotations, outside auditors will be unable to easily verify the information provided and may have to solicit private quotations separately, which would be extremely difficult and very costly.[92]

For these reasons, it is likely that some, and possibly many, institutional investors will decide to leave the Rule 144A market. 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 144A securities and that the staff's expansive interpretation is "inconsistent with the Commission's longstanding goal of promoting investor protection."[93]

Harm to the U.S. Economy

The costs and other burdens imposed by the staff's novel and unlawful interpretation of Rule 15c2-11 will have significant adverse consequences for the U.S. economy—including

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quoting activity, trading activity, or both—would reduce the overall quantity and quality of information that funds and pricing services incorporate, which would make valuation of these securities more difficult and likely less precise.").

91 *See* Chair Gary Gensler, *"The Name's Bond:" Remarks at City Week* (Apr. 26, 2022), http://bit.ly/3Ol6Pd9.

92 ICI Letter, *supra* note 63, at 7 ("[A]pplying Rule 15c2-11's requirements will have considerable negative implications for funds' significant holdings of Rule 144A debt securities . . . with respect to valuation, liquidity risk management, and seeking best execution."); *id*. ("[F]ewer available indications of interest or quotes will impair price discovery and transparency for existing securities, which could create challenges with respect to fund valuation.").

93 *See id.* at 2.

significant impacts on job creation by U.S. companies and on U.S. GDP, as documented in the recent study conducted by EY.

It is a basic economic reality that, as the EY report explains, "[i]ncreased borrowing costs raise the cost of investment, which discourages investment and results in less capital formation than would otherwise occur."[94] Further, "[w]ith less capital available per worker, labor productivity falls. This reduces workers' real wages and, ultimately, the overall productive capacity of the U.S. economy."[95]

The harm from the expansion of Rule 15c2-11 will be substantial. EY estimates that the increase in borrowing costs attributable to the new interpretation will eliminate 30,000 jobs each year in the first five years after the policy takes effect in January 2023. The job losses will increase to 50,000 jobs each year in the following five years, and then 100,000 jobs each year thereafter.[96] Additionally, U.S. GDP will decline by $10 billion annually, for a total of $100 billion over the first ten years after implementation.[97]

There simply is no reason to inflict this harm on the U.S. economy and on American workers. Rule 15c2-11 is premised on the need for robust protections for retail investors—but those investors are not permitted to purchase Rule 144A securities. And, for the sophisticated financial institutions that *can* purchase Rule 144A securities, the Commission has specifically determined that the "on demand" disclosure framework allowed under Rule 144A is appropriate and sufficient. In the face of significant economic harm—and with no plausible investor benefit in sight—the Commission should reverse course before the staff's erroneous interpretation takes effect in January 2023.

Conclusion

The staff's attempt to apply Rule 15c2-11 to fixed-income securities ignores fifty years of Commission and industry practice. It undercuts the very justification for Rule 144A—indeed, imposing the 2020 amendments on Rule 144A issuers squarely conflicts with the Commission's determination that public disclosure of issuer financial information is not necessary in the Rule 144A context. The staff's no-action letter was also directly contradicted just eight days prior by the Commission's approval of FINRA's implementation of the 2020 amendments, which applied the amendments' requirements only to equity securities and expressly excluded Rule 144A securities.

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94 EY Study, *supra* note 3, at 3.

95 *Id.*

96 *Id.*

97 *Id.*

What is more, the Commission has never analyzed, or in any way considered, the costs and benefits of applying Rule 15c2-11 to the fixed-income market in general, or to the Rule 144A market in particular. Such an analysis would reveal no benefits—given that retail investors cannot purchase Rule 144A securities and that the QIBs who can purchase these securities are entitled to access issuers' financial and operational information—against substantial costs in the form of reduced liquidity, increased cost of capital, and significant job losses. There simply is no possible policy justification for the staff's novel, misguided, and unlawful decision.

For all of these reasons, the Commission should promulgate a rule amending Rule 15c2-11 to expressly exempt Rule 144A securities from that Rule; or, in the alternative, the Commission should expressly exempt Rule 144A securities from Rule 15c2-11 pursuant to its Rule 15c2-11(g) exemptive authority. The Commission also could address the most serious adverse consequences of applying Rule 15c2-11 to Rule 144A securities by either (1) promulgating a rule or exercising its exemptive authority to exempt Rule 144A securities from the provisions of Rule 15c2-11 that impose requirements regarding public availability of issuers' information and broker-dealer verification of that information; or, alternatively, (2) amending Rule 15c2-11 or adopting an exemption specifying that, for Rule 144A securities, the issuer-information and broker-dealer verification requirements are satisfied as long as the issuer complies with the current information requirement under Rule 144A.

Respectfully submitted,

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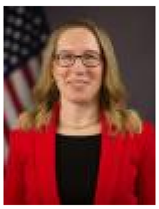
EXHIBIT 2

Statement

Statement on Staff No-Action Letter Regarding Amended Rule 15c2-11 in Relation to Fixed Income Securities



Commissioner Hester M. Peirce

Sept. 24, 2021

The Commission's amendments to Exchange Act Rule 15c2-11 that were finalized last fall will take effect next week. In recent months, market participants have raised concerns about the potentially significant negative effects of these amendments on trading in the fixed-income markets. I agree with the staff of the Division of Trading and Markets that relief is necessary to forestall these effects. However, the time-limited relief—three months—being granted in the no-action letter released today is wholly inadequate to that need. Instead, we should issue longer Commission-level no-action relief and reopen the rulemaking as part of a broader fixed-income modernization initiative.

Rule 15c2-11 is designed to address fraudulent behavior that is generally associated with trading in stocks in the over-the-counter (OTC) market. The combination of high retail investor participation and sparse information about certain issuers is fertile ground for fraud in this market. The Commission's 2020 amendments were intended to enhance Rule 15c2-11's ability to combat fraud by ensuring that issuers of securities being quoted in the OTC market make current financial information publicly available.[1]

Although the text of the rule always has encompassed more than just equity securities, there appears to have been limited, if any, application of the rule to fixed income markets prior to the Commission's 2020 adopting release. Nothing in the adopting release suggests that the Commission considered the application of these rules to the fixed-income markets. The policy analysis focuses entirely on the need for additional disclosure in the OTC equity markets to deter fraud in those markets, and the justification rests on the need to protect retail shareholders. The economic analysis focuses on the effects and incentives the rule creates in the OTC equity markets. A question in the proposing release about whether non-equity securities should be excepted from Rule 15c2-11, buried among more than a hundred other questions, failed to elicit any responses.[2] The equity-focused nature of the discussion during the rulemaking process and the limited application of the pre-amendment rule in the fixed-income context meant little attention was focused on the possible broad application of the amended rule to fixed-income securities. Consequently, nobody seems to have contemplated that this rule would affect the fixed-income markets in a way different from the pre-amendment version of the rule, much less that its requirements potentially would render unviable certain recent technological innovations in trading—innovations that have benefited investors and improved market quality. In other words, we are now grappling for the first time with whether the application of the amended rule to fixed-income securities could undermine transparency, rather than enhance it as it is expected to do for equities.

I acknowledge that I thought of the rule's application only in the OTC equity context. I ought to have solicited comment on the rule's broader application. However, my failure to do so, the failure of the Commission to highlight this issue for active consideration by the public, and the failure of the relevant market participants to identify the issue during the rulemaking process, is not a reason for us now to move forward robotically and apply the rule to fixed income markets without proper deliberation. If we were willing to analyze the need for and consequences of the rule in the fixed-income markets, three months—during which Commission attention will be focused on a host of other rulemakings—would not suffice to undertake such an analysis.

The fixed-income markets have changed dramatically over the past several decades. Many of these changes have been good for investors. Additional steps to modernize these markets could benefit investors further. The Commission should devote more resources to identifying areas where that market structure can be improved and regulatory changes can foster greater transparency, electronification, liquidity, and investor protection. A task of this importance, however, deserves careful consideration and engagement with investors, issuers, broker-dealers, and trading platforms, and the general public, through notice-and-comment rulemaking, not rushed implementation of an ill-tailored rule under the threat of a fast-approaching regulatory deadline.

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[1] *See* Publication or Submission of Quotations without Specified Information, Exchange Act Rel. No. 89891, 85 Fed. Reg. 68124, 68125 (Oct. 27, 2020). In the OTC equities context, the rule also could have unintended harmful consequences on certain shareholders. The establishment of an expert market, had it been allowed, could have mitigated these adverse consequences. *See* Notice of Proposed Conditional Exemptive Order Granting a Conditional Exemption from the Information Review Requirement of Amended Rule 15c2-11(a)(1)(i) and the Recordkeeping Requirement of Amended Rule 15c2-11(d)(1)(i)(A) under the Securities Exchange Act of 1934 for Certain Publications or Submissions of Broker-Dealer Quotations on an Expert Market (Dec. 22, 2020), *available at* https://www.sec.gov/rules/exorders/2020/34-90769.pdf. *But see* Staff Statement on the Proposed Expert Market, Division of Trading and Markets, Securities and Exchange Commission (Aug. 2, 2021), *available at* https://www.sec.gov/news/public-statement/proposed-expert-market (explaining that a proposed exemptive order for an expert market "is not on the Chair's agenda in the short term").

[2] *See* Publication or Submission of Quotations without Specified Information, Exchange Act Rel. No. 87115, 84 Fed. Reg. 58206, 68125 (Oct. 30, 2019), at Q87 ("Are there publications or submissions of quotations for other securities (e.g., debt securities, non-participatory preferred stock, or investment grade asset-backed securities) that have characteristics similar to those of the securities set forth above that should also be excepted from the Rule's provisions?").

EXHIBIT 3

Press Release

SEC Adopts Amendments to Enhance Retail Investor Protections and Modernize the Rule Governing Quotations for Over-the-Counter Securities

FOR IMMEDIATE RELEASE
2020-212

Washington D.C., Sept. 16, 2020 — The Securities and Exchange Commission today adopted amendments to Exchange Act Rule 15c2-11, an important component of the over-the-counter (OTC) market regulatory structure. The amendments are designed to modernize the rule, which was last substantively amended nearly thirty years ago, including to recognize advances in communications technologies. The amended rule enhances disclosure and investor protection in the OTC market by ensuring that broker-dealers, in their role as professional gatekeepers to this market, do not publish quotations for an issuer's security when current issuer information is not publicly available, subject to certain exceptions.

"These retail investor-focused improvements to Rule 15c2-11 are long overdue," said SEC Chairman Jay Clayton. "The technological advancements that have taken place since the rule was last amended enable us to require that information in the OTC market be more timely, enabling investors to make better informed investment decisions, and reducing fraud in these markets where retail presence is significant and, unfortunately, pump-and-dump and other frauds are too common."

"The amended rule represents another important step in our tireless and proactive efforts to protect retail investors from being victimized by microcap fraud," said Stephanie Avakian, Director of the Division of Enforcement.

Brett Redfearn, Director of the Division of Trading and Markets, said that "the amendments strike the right balance between promoting critically important investor protections while at the same time providing new exceptions that should make it easier for certain securities to develop a quoted market."

Securities that trade on the OTC market are primarily owned by retail investors. 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.

Prior to today's amendments, certain of the rule's previous exceptions permitted broker-dealers to maintain a quoted market for an issuer's security in perpetuity, in the absence of current and publicly available information about the issuer, and even when the issuer no longer exists. Recognizing the ease with which information sharing takes place today, the amendments generally prohibit broker-dealers from publishing quotations for an issuer's security when issuer information is not current and publicly available, subject to certain exceptions. Investors who have access to current and publicly available issuer information are better equipped to make informed decisions about how to allocate their capital and to counteract misinformation that can proliferate through promotions and other channels.

The amendments also are designed to enhance the efficiency of the OTC market and facilitate capital formation for issuers for which information is current and publicly available. Specifically, the amendments add new exceptions for certain OTC securities that may be less susceptible to fraud or manipulation, such as actively traded securities of well-capitalized issuers, and expand the scope of market participants that may comply with the rule's required review of issuer information.

* * *

FACT SHEET

Publication or Submission of Quotations Without Specified Information

Amendments

Rule 15c2-11 (the "Rule") governs the publication or submission of quotations by broker-dealers in a quotation medium other than a national securities exchange. Before a broker-dealer may initiate or resume quotations for a security in a quotation medium, the broker-dealer must review key, basic information about the issuer of the security. The Rule allows any qualified interdealer quotation system ("qualified IDQS") to conduct the required information review as well.

The amendments are designed to modernize the Rule to (1) provide greater transparency to investors and other market participants by requiring that information about the issuer and its security be current and publicly available before a broker-dealer can begin quoting that security; (2) limit broker-dealers' reliance on certain of the Rule's exceptions when issuer information is not current and publicly available; and (3) provide exceptions to reduce unnecessary burdens on broker-dealers to quote certain OTC securities that may be less susceptible to fraud and manipulation.

The amendments facilitate transparency of OTC issuer information by:

- Requiring to be current and publicly available certain specified documents and information regarding OTC issuers that a broker-dealer or qualified IDQS must obtain and review for the broker-dealer to commence a quoted market in an OTC issuer's security ("information review requirement");
- Updating the "piggyback" exception, which allows broker-dealers to rely on the quotations of another broker-dealer that initially complied with the information review requirement, to require, among other things, that issuer information, depending on the issuer's regulatory status, be current and publicly available, timely filed, or filed within 180 calendar days from a specified period; and
- Requiring that issuer information be current and publicly available for a broker-dealer to rely on the unsolicited quotation exception to publish quotations on behalf of company insiders and affiliates of the issuer.

The amendments provide greater investor protections when broker-dealers rely on the piggyback exception by:

- Requiring at least a one-way priced quotation;
- Prohibiting reliance on the exception during the first 60 calendar days following the termination of a Commission trading suspension under Section 12(k) of the Exchange Act; and
- Providing a time-limited window of 18 months during which broker-dealers may quote the securities of "shell companies."

The amendments reduce unnecessary burdens on broker-dealers by:

- Allowing broker-dealers to initiate a quoted market for a security if a qualified IDQS complies with the information review requirement and makes a publicly available determination of such compliance; and

- Providing new exceptions, without undermining the Rule's important investor protections, for broker-dealers to:
    - Quote actively traded securities of well-capitalized issuers;
    - Quote securities issued in an underwritten offering if the broker-dealer is named as an underwriter in the registration statement or offering statement for the underwritten offering, and the broker-dealer that is the named underwriter quotes the security; and
    - Rely on certain third-party publicly available determinations that the requirements of certain exceptions are met.

The amendments also streamline and remove outdated provisions from the Rule. The Commission is also issuing guidance that provides basic principles and examples of red flags to facilitate compliance with the information review requirement.

What's Next?

The Rule will become effective 60 days following publication of the amendments in the Federal Register. The Rule will have a general compliance date that is nine months after the effective date as well as a compliance date that is two years after the effective date regarding provisions to require an issuer's financial information for the last two fiscal years to be current and publicly available.

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Related Materials

- Final Rule

EXHIBIT 4

Statement

Statement on Commission Action to Enhance Investor Protections in the OTC Market

Chairman Jay Clayton

Sept. 16, 2020

Technology has driven many efficiencies in our markets. Technology can also enhance investor protection. Today, we recognize that, as a result of technological change, information can and should be made available to over-the-counter ("OTC") market investors in a more timely manner.

Ensuring that investors have access to material information so they can make informed investment decisions is a cornerstone of our federal securities laws. Information about companies in the OTC market is less available than it is for issuers that are listed on a national securities exchange. Yet, OTC securities, which include securities referred to as "penny stocks," are primarily owned by retail investors. One of the key SEC investor protection rules applicable in this market is Rule 15c2-11, which requires broker-dealers, as gatekeepers, to obtain and review certain information about OTC issuers before publishing quotations for their securities. 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, thereby providing greater transparency and helping prevent fraudulent and manipulative activity in the OTC market.

These amendments are long overdue—the Rule was adopted in 1971, 49 years ago, and was last substantively amended in 1991, 29 years ago. In those days, it was much more expensive for companies to disseminate information to the public—then, internet access was limited and the mails were the primary means of disseminating disclosures—and it was much more difficult for investors, particularly individual investors, to access the information that was available. Although the ease with which companies can share information, and investors can access such information, has vastly improved beyond what most would have expected, the Rule has not changed.

Today, while some issuers of quoted OTC securities publicly disclose current information, there is no or limited information available about many others. Prior to today's amendments, the Rule's outdated exceptions, including the so-called "piggyback" exception, allowed broker-dealers to maintain a quoted market for the securities of companies that had no current and publicly available information and, in some cases, that no longer existed. Unfortunately, experience shows the quoted markets for securities of such companies potentially can be used for fraudulent or manipulative purposes.

Under the amendments, the basic issuer information that broker-dealers must obtain and review to initiate a quoted market for the issuer's security must be current and publicly available. After a broker initiates a quote, issuer information also must be current and publicly available for broker-dealers to (1) maintain a quoted market in reliance on the piggyback exception and (2) rely on the unsolicited quotation exception to publish quotations on behalf of company insiders. In short, the amendments are designed to shed more light on the OTC market and reduce the potential to misuse the securities of small issuers for fraud.

The scope of this issue is noteworthy. There are thousands of issuers of quoted OTC securities that currently are dark, meaning that they do not disclose current information publicly. The Commission expends substantial resources in addressing fraud related to the securities of OTC issuers, particularly issuers that do not make public disclosures on a regular basis. These cases have involved substantial harm to investors—particularly retail investors. Under the amendments, broker-dealers cannot maintain a quoted market for these issuers' securities in perpetuity, and retail investors may be less susceptible to "pump-and-dump" and other manipulative schemes because quotations for such issuers' securities would not be easily accessible to them.

This type of fraudulent activity is not limited to actors inside the United States. The Commission has brought various actions involving these markets where the trading has originated outside the United States. I have asked staff to examine this area and, if appropriate, produce guidance to market participants and recommendations to the Commission, as appropriate.

With respect to market efficiency and capital formation, two other pillars of our mission, I believe the amendments will improve efficiencies in the OTC market as a result of the greater transparency and—thanks to the work of the staff—their thoughtful approach to various market-specific issues. For example, the amendments provide an exception to broker-dealers to quote actively traded and highly liquid securities of well-capitalized issuers, which are less likely to be the subject of the type of information limitations and risk of fraud or manipulation that the Rule is designed to prevent. Without undermining the Rule's important investor protections, this exception maintains investor access to larger and more liquid securities, including those of certain foreign issuers. The amendments also provide several other exceptions and provisions that are designed to reduce burdens and facilitate capital formation, including for small businesses.

Finally, I would like to note that the amendments adopted today are the result of cooperative, cross-divisional efforts between the Commission's enforcement and rulemaking teams, where the activity observed by the Division of Enforcement informed the Commission's policy.[1] The Commission's Division of Enforcement and Division of Trading and Markets have long been focused on combating microcap fraud, and the amendments will make it easier to deter and prevent some of the misconduct and fraud that Commission staff sees every day.[2] I also want to thank former Commissioners Luis Aguilar and Daniel Gallagher for their focus on these issues during their time at the Commission. I know their remarks as Commissioners on the importance of transparency in the OTC market resonated with me, other Commissioners and the staff.

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[1] I would like to acknowledge a few individuals, noting that countless members of the staff contributed to this effort:

From the Division of Trading and Markets: Brett Redfearn, Elizabeth Baird, Mark Wolfe, Josephine Tao, Elizabeth Sandoe, John Guidroz, Laura Gold, Joan Collopy, James Curley, Theresa Hajost, Samuel Litz, Patrice Pitts, Emily Russell, John Fahey, Nancy Sanow, Tyler Raimo, Randall Roy, Ajay Sutaria, Andrea Orr, and Roni Bergoffen.

From the Division of Economic and Risk Analysis: S.P. Kothari, Chyhe Becker, Narahari Phatak, Olga Itenberg, Lauren Moore, Andrew Glickman, and K. Jeremy Ko.

From the Division of Enforcement: Stephanie Avakian, Charlotte Buford, Glenn Gentry, Kerry Knowles, Melissa Hodgman, Marc Berger, Michael Paley, Jason Berkowitz, Sarah Concannon, Rachel Nonaka, Michael Brennan, Jessica Regan, Margaret Cain, Philip Koski, Keith Prive, Hane Lee Kim, Caitlyn Campbell, Mark Johnson and David Frye.

From the Office of the General Counsel: Bob Stebbins, Meridith Mitchell, Robert Teply, Janice Mitnick, and Maureen Johansen.

From the Division of Corporation Finance: Bill Hinman, Elizabeth Murphy, David Fredrickson, Jonathan Ingram, Tamara Brightwell, Adam Turk, Jennifer Zepralka, Heather Maples, Carolyn Sherman, Timothy Henseler, and Michael Coco.

From the Division of Investment Management: Dalia Blass, Sara ten Siethoff, Brian Johnson, Sara Cortes, Trace Rakestraw, Thoreau Bartmann, Brad Gude, and Joel Cavanaugh.

From the Office of Compliance Inspections and Examinations: Peter Driscoll, Daniel Kahl, Jennifer McCarthy, Carrie O'Brien, Christine Sibille, and Joseph Murphy.

From the Office of the Chief Accountant: Sagar Teotia, Peggy Kim, Jeffery Kessman, Ryan Wolfe, Natasha Guinan, Jeffery Joseph, and Jonathan Wiggins.

[2] Such risks are heightened when the identities of the underlying customer and beneficial owner are unknown to the broker-dealer, and the Divisions continue to work together to reduce fraud and misconduct in this space.

EXHIBIT 5

Statement

Statement on Adoption of Amendments to Rule 15c2-11

Commissioner Elad L. Roisman

Sept. 16, 2020

Today, the Commission adopted amendments to modernize Rule 15c2-11 under the Exchange Act, which addresses brokers' initiation and resumption of quotations in the over-the-counter ("OTC") market. I am pleased to support these amendments.

Close to thirty years have passed since the Commission last updated Rule 15c2-11. In the intervening years, modern technology has transformed the OTC market, much as it has transformed all of our equity and fixed income markets. The OTC equity market has transitioned from being paper-based, where brokers provided quotes over the phone, to a real-time electronic market. Twenty-first century markets require twenty-first century rules. The amendments we adopted today will improve the transparency and efficiency of the OTC market and continue to prioritize the protection of retail investors.

I commend Chairman Clayton for his leadership and commitment to modernizing these rules. Thank you to Director Brett Redfearn and the staff in the Division of Trading and Markets who diligently worked on this rulemaking. Thank you as well to the staffs in the Division of Economic and Risk Analysis, the Division of Corporation Finance, the Division of Enforcement, the Division of Investment Management, the Office of Compliance Inspections and Examination, the Office of the Chief Accountant, and the Office of the General Counsel for your invaluable contributions to the recommendation we adopted today.

The Commission received a large number of comment letters in response to its proposal. These comments make clear that there are a lot of ideas for how we can modernize the OTC equity market. I want to again thank the staff for your thoughtful engagement with these many comments and commenters. As a result of the feedback and dialogue, the final rule includes constructive changes.

For example, in response to a question in the proposing release, commenters suggested including a time-limited grace period during which a broker-dealer could continue to publish or submit quotations for a security that loses quote eligibility. The amendments include a fifteen-day grace period following public notice to the market. This grace period will foster market efficiency by providing notice to investors and issuers that a security has lost quote eligibility and facilitating an orderly market for an investor who may, for example, choose to exit a position.

In addition, while the amendments reflect the expanded role that inter-dealer quotation systems ("IDQSs") play in the OTC markets, many commenters suggested that we also allow IDQSs to publish quotes in securities that lose quote eligibility to a limited universe of professional investors, a so called "expert market." The adopting release explains that, while the amendments do not provide for such a market, we have the authority to issue exemptive relief to form one. Such an expert market would have the benefits of enhanced liquidity, efficiency and price discovery, but would take into account investor protection concerns by restricting it to professional investors. To the extent market participants are interested, I encourage them to timely submit their requests for relief during the transition period for these amendments, and to thoughtfully consider the guidance provided in the release in formulating requests.

Thank you again to the SEC staff for their hard work in developing these thoughtful amendments and thank you to all the commenters who took the time to engage with us on this important initiative.

EXHIBIT 6

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
TRADING AND MARKETS

September 24, 2021

Ms. Racquel Russell
Senior Vice President and
Director of Capital Markets Policy
Office of General Counsel
Financial Industry Regulatory Authority, Inc.
1735 K Street, NW
Washington, DC 20006

Re: Amended Rule 15c2-11 in relation to Fixed Income Securities

Dear Ms. Russell:

In response to requests from industry representatives that have indicated through telephonic meetings with Commission staff that they may be unable to complete, by the compliance date of September 28, 2021, the operational and systems changes necessary to comply with the amendments to Rule 15c2-11 (the "Amended Rule") under the Securities Exchange Act of 1934 ("Exchange Act") for fixed income securities,[1] the staff will not recommend enforcement action to the Securities and Exchange Commission ("Commission") under the Amended Rule until January 3, 2022 for quotations published by broker-dealers for fixed income securities to allow for an orderly and good faith transition into compliance with the Amended Rule.

Rule 15c2-11(the "Rule") governs the publication or submission of quotations for securities[2] in a quotation medium other than a national securities exchange. On

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1 17 CFR 240.15c2-11.

2 Since its original adoption in 1971, the Rule has applied to all securities including fixed income securities except for "exempt securities," such as government securities including treasuries, and the Rule has specifically excepted municipal securities since 1976. *See, e.g.,* Regulation of Municipal Securities Professionals and Transactions in Municipal Securities, Exchange Act Release No. 12468 (May 20, 1976); 41 FR 22820, 22821 (June 7, 1976) (Final Rule); *see also* Regulation of Municipal Securities Professionals and Transactions in Municipal Securities, Exchange Act Release No. 11876 (Nov. 26, 1975); 40 FR 60084 (Dec. 31, 1975) (Proposing Release).

September 16, 2020, the Commission adopted the Amended Rule,[3] which is designed to modernize the Rule, promote investor protection, and improve transparency by, among other things, requiring key, basic information about issuers to be current and publicly available in order for broker-dealers to maintain a market in their securities. The Adopting Release provided that the compliance date for the amendments is September 28, 2021.[4]

This Staff position[5] concerns enforcement action only and does not represent a legal conclusion with respect to the applicability of statutory or regulatory provisions of the federal securities laws.[6] Furthermore, this no-action position does not apply to the anti-fraud and anti-manipulation provisions of the Exchange Act, particularly Sections 9(a) and 10(b), and Rule 10b-5 thereunder. Responsibility for compliance with these and any other applicable provisions of the federal securities laws must rest with the registered broker-dealer.

Sincerely,

Josephine J. Tao
Assistant Director

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3 Publication or Submission of Quotations Without Specified Information, Exchange Act Release No. 89891 (Sept. 16, 2020), 85 FR 68124 (Oct. 27, 2020) ("Adopting Release").

4 *Id.*

5 This letter represents the views of the staff of the Division of Trading and Markets. It is not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved its content. This letter, like all staff statements, has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person.

6 This letter does not address any FINRA rules applicable to the OTC market.

EXHIBIT 7

NATIONAL ASSOCIATION OF Manufacturers

Chris Netram

Managing Vice President,
Tax and Domestic Economic Policy

July 18, 2022

The Honorable Gary Gensler
Chairman
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Dr. Haoxiang Zhu
Director, Division of Trading and Markets
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: *Amended Rule 15c2-11 in Relation to Fixed Income Securities*

Dear Chairman Gensler and Director Zhu,

On behalf of the National Association of Manufacturers ("NAM"), I write to express the NAM's concerns about the potential application of Rule 15c2-11 to the fixed income markets, and particularly to Rule 144A securities. These changes will have a direct and deleterious impact on issuers in the manufacturing industry—imposing public reporting obligations on privately held companies, harming capital formation, decreasing liquidity, and ultimately limiting the efficacy of Rule 144A without any clear benefit to investors. The NAM respectfully encourages the Securities and Exchange Commission ("SEC" or "Commission") and the Division of Trading and Markets ("Division") to abandon this novel interpretation and instead to provide regulatory certainty to American manufacturers who rely on Rule 144A issuances for capital formation.

I. The Commission's 2020 amendments to Rule 15c2-11 were not designed for, are not appropriate for, and should not be applied to fixed income securities, including those issued under Rule 144A.

The 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 and research and development ("R&D"). Many privately held manufacturers issue Rule 144A securities to finance these pro-growth activities, which set the stage for economic expansion, innovation, and job creation. The capital formation enabled by Rule 144A often has further downstream effects, as many Rule 144A issuances are designed to finance acquisitions and other corporate expansions, which can lead to significant business efficiencies and enhance product availability and consumer choice.

The NAM supports the SEC's efforts to increase transparency and protect retail investors from fraud and abuse in the context of over the counter ("OTC") equity securities, including the Commission's 2020 amendments to Rule 15c2-11.[1] As the 2020 amendments note, OTC equity securities are "primarily owned by retail investors"—yet a lack of "current and public information" about companies issuing these securities could "contribute to incidents of fraud and manipulation" to the detriment of these Main Street investors.[2] Thus, a critical component of the 2020 amendments is a new

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[1] *Publication or Submission of Quotations Without Specified Information*, 85 Fed. Reg. 68124 (27 October 2020). Release Nos. 33-10842, 34-89891; *available at* https://www.govinfo.gov/content/pkg/FR-2020-10-27/pdf/2020-20980.pdf.

[2] *Id.* at 68125.

requirement that broker-dealers facilitating the sale of OTC securities ensure that information about an issuer is "current and *publicly available*" to retail investors.[3]

The primary justification for the 2020 amendments was the protection of retail investors. After the rule was finalized, however, market participants raised concerns with the SEC that an overbroad interpretation of the new amendments could impose its requirements, including the mandate to verify that issuer financial information is publicly available, on broker-dealers facilitating fixed income offerings like Rule 144A issuances—even when retail investors are prohibited from purchasing the underlying securities. Rather than clarify that the 2020 amendments' retail-focused reforms would only apply to broker-dealers facilitating trades in OTC equity securities, however, the Division took the opposite approach. In September 2021, a Division no-action letter applied the provisions of the 2020 amendments to fixed income securities and provided only temporary no-action relief (through January 3, 2022) to broker-dealers in fixed income securities.[4] A subsequent no-action letter, issued in December 2021, extended the no-action relief for Rule 144A securities until January 4, 2023, as part of a structured implementation framework for the new interpretation of Rule 15c2-11 and the application of the 2020 amendments to the fixed income markets.[5]

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. In order to provide quotations for Rule 144A securities, broker-dealers will now be required to verify that information about the issuer of those securities is publicly available. 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. This is despite the fact that the general public cannot purchase Rule 144A securities.

Under Rule 144A, issuances can only be made to qualified institutional buyers ("QIBs")—institutions with over $100 million in assets under management.[6] Retail investors, and in fact all individual investors, are explicitly prohibited from purchasing Rule 144A securities.[7] As such, the 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.

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. Neither market participants nor the Commission appear to have considered how the 2020 amendments might apply to fixed income securities. And the adopting release does not include any justification for

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[3] 17 CFR 240.15c2-11(a)(1)(i)(B) (emphasis added).

[4] Letter from Josephine Tao, Assistant Director, Office of Trading Practices, Division of Trading and Markets, SEC to Racquel Russell, Senior Vice President and Director of Capital Markets Policy, Office of the General Counsel, FINRA (24 September 2021). *Available at* https://www.sec.gov/files/rule-15c2-11-fixed-income-securities-092421.pdf.

[5] Letter from Josephine Tao, Assistant Director, Office of Trading Practices, Division of Trading and Markets, SEC to Racquel Russell, Senior Vice President and Director of Capital Markets Policy, Office of the General Counsel, FINRA (16 December 2021). *Available at* https://www.sec.gov/files/fixed-income-rule-15c2-11-nal-finra-121621.pdf.

[6] 17 CFR 240.144A(a)(1).

[7] 17 CFR 240.144A(d)(1).

expanding the amendments' application to fixed income securities nor any analysis of the potential costs and benefits of such a dramatic change. As Commissioner Peirce has noted, "[n]othing in the adopting release suggests that the Commission considered the application of these rules to the fixed income markets."[8] The Division's interpretation thus runs counter to the intent of the Commission and could result in significant unintended consequences.

II. Applying the 2020 amendments to the fixed income markets, and particularly to Rule 144A securities, would harm capital formation for manufacturers.

For manufacturers, applying the 2020 amendments to Rule 144A securities could have a serious and damaging impact. Under the Division's novel interpretation, the 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.

First, the new requirements would impose significant reporting obligations on privately held businesses. A mandate that broker-dealers must ensure that issuer financial information is publicly available is effectively a mandate for issuers to disclose that information in order to utilize Rule 144A. For private companies issuing Rule 144A securities, this would require reports to the public for the first time—a significant and intrusive imposition for businesses that are not publicly traded. Critically, the required disclosures would not benefit retail investors considering an investment decision, as retail investors are prohibited from purchasing Rule 144A securities. Nevertheless, private companies would be required to expose sensitive information to the public, ranging from retail investors who are legally prohibited from purchasing their securities to anyone with an internet connection. Put simply, there is no need or justification for these individuals to have access to confidential issuer data, and providing such disclosures will increase costs and administrative burden for private issuers. Manufacturers are dedicated to ensuring that the QIBs eligible to purchase securities under Rule 144A have access to relevant information about their business upon request, but a public disclosure mandate would be invasive and inappropriate for these issuers.

Imposing the 2020 amendments on the fixed income markets would also make it more difficult for broker-dealers to trade in issuers' Rule 144A securities, resulting in increased transaction costs and decreased liquidity for manufacturers. The increased regulatory risks that broker-dealers would face under the 2020 amendments would translate into increased fees and reduced proceeds for issuers. Given that the new requirements would apply upon resale, they are also likely to result in significantly reduced liquidity for Rule 144A securities. These changes would increase the cost of capital, to the detriment of innovation and job creation at manufacturers across the country.

Ultimately, applying the 2020 amendments to the fixed income markets would reduce the capital formation potential of Rule 144A—without any consideration by the Commission of the costs and benefits of such an approach. The combination of invasive reporting requirements, increased expenses, and decreased liquidity would increase issuer costs and reduce capital availability. These changes could even prevent manufacturers from issuing Rule 144A securities entirely, stifling growth by forcing them to seek other, less efficient sources of capital. Undermining Rule 144A in this fashion will have an outsized effect in the manufacturing industry given manufacturers' consistent need to invest in equipment and facilities, undertake capital-intensive projects, and finance mergers and acquisitions. Yet there has been no analysis of these potential impacts—because the

[8] Statement on Staff No-Action Letter Regarding Amended Rule 15c2-11 in Relation to Fixed Income Securities. Commissioner Hester M. Peirce (24 September 2021). *Available at* https://www.sec.gov/news/public-statement/peirce-nal-rule-15c2-11-2021-09-24.

Commission did not intend for the 2020 amendments to apply to the fixed income markets. The NAM is deeply concerned that the Division is persisting in its efforts to apply these new requirements to a universe of issuers that would be directly harmed by them, without any investor benefit, and absent a Commission mandate to do so.

III. The Commission should reverse the Division's novel interpretation of Rule 15c2-11 and commit to notice-and-comment rulemaking on any revisions to the regulations governing Rule 144A and other fixed income securities.

Given the significant damage to the capital formation potential of the fixed income markets that would be imposed by applying the 2020 amendments to Rule 144A and other fixed income securities (and the lack of any legitimate investor benefit), the NAM respectfully encourages the Commission and the Division to reconsider and rescind the 2021 staff interpretation. If the Commission believes that changes are needed to the rules governing the fixed income markets, it should undertake notice-and-comment rulemaking to consider any such changes and provide fixed income securities with Commission-level no-action relief from the 2020 amendments while any such process is ongoing.

Public reporting requirements are not appropriate for fixed income securities that retail investors are prohibited from purchasing, including those issued under Rule 144A. The Commission should clarify that the 2020 amendments—and in particular the requirement that broker-dealers ensure that issuer financial information is publicly available—were not intended to and do not apply to the fixed income markets. This clarification would obviate the need for the Division's September 2021 and December 2021 no-action letters and ultimately would supersede the Division's January 4, 2023, compliance date associated with Rule 144A securities.

If the Commission decides that more transparency is necessary in the fixed income markets, it should propose a rule to that effect rather than relying on the Division's interpretation. The official rulemaking process prescribed by the Administrative Procedure Act ("APA") would ensure that market participants have the opportunity to provide comment on any reforms the Commission is considering. The APA notice-and-comment process also would require the Commission to conduct the requisite cost-benefit analysis on the application of any new reporting requirements to the fixed income markets—analysis which, as discussed, is notably absent from the adopting release for the 2020 amendments.

If the Commission decides to move forward with fixed income rulemaking, it should provide Commission-level no-action relief from the 2020 requirements for participants in the fixed income (and particularly Rule 144A) markets for the duration of the rulemaking process. Temporary no-action relief is warranted given that the 2020 amendments were clearly not intended to apply to fixed income securities like those issued under Rule 144A; further, no-action relief in the fixed income space would in no way limit the Commission's ability to apply the amendments to the OTC equity markets for which they were designed. Given the potential for unintended consequences, temporary relief from these mandates while the Commission considers and adopts tailored, appropriate reforms would protect manufacturers and preserve their ability to utilize Rule 144A for much-needed capital formation.

* * * *

Capital formation is critical to the success of the manufacturing industry. For many privately held manufacturers, Rule 144A plays an important role in their ability to finance growth, innovation, and job creation. The NAM respectfully encourages the SEC to enhance regulatory certainty and support capital formation at these businesses by preserving their ability to utilize Rule 144A.

Sincerely,

Chris Netram
Managing Vice President, Tax and Domestic Economic Policy

EXHIBIT 8

sifma | asset management group

Invested in America

INVESTMENT COMPANY INSTITUTE®

IAA INVESTMENT ADVISER ASSOCIATION

Managed Funds Association

CENTER FOR CAPITAL MARKETS COMPETITIVENESS

September 23, 2021

The Honorable Gary Gensler
Chair, U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Rule 15c2-11

Dear Chair Gensler,

The Asset Management Group of the Securities Industry and Financial Markets Association ("SIFMA AMG"), the Investment Company Institute ("ICI"), the Investment Adviser Association ("IAA"), the Managed Funds Association ("MFA"), and the U.S. Chamber's Center for Capital Markets Competitiveness ("CCMC"), together, "The Associations")[1] write to express our deep concern about the potential application of Rule 15c2-11 (the "Rule") to the fixed income ("FI") markets without appropriate notice and opportunity to comment, which would adversely affect the liquidity and transparency of these markets and unnecessarily harm investors in these markets. The Associations' members include some of the largest and most active participants in the FI markets, including registered and private funds that invest in FI on behalf of retail and institutional investors and advisers that manage separately managed accounts ("SMAs") on behalf of retail and institutional clients. We urge the Securities and Exchange Commission ("Commission") not to apply the current Rule to these markets, which would threaten the continued expansion of liquidity and transparency in the FI markets and may increase transaction costs.

[1] Please see the last page for information about the Associations.

Introduction

As the Commission is aware, the Rule, which was implemented in 1971, amended in 1991, and amended again in 2020, is and always has been targeted at protecting retail investors from OTC equity market fraud.[2] The Rule prohibits dealers from publishing quotes on securities unless certain information review requirements are met, or certain exceptions are applicable. More specifically, these information review requirements are intended to prevent pump-and-dump and similar schemes that defraud retail investors.

While we support the goals of enhanced transparency in the FI markets, we believe the SEC should not apply the Rule to the FI markets without first adapting the Rule's requirements to the FI markets. Any revisions should be made through the rulemaking process, which would allow the SEC to conduct a cost-benefit analysis, provide an opportunity for public comment, and provide a more complete public policy analysis for the scope of and rationale for application of the Rule to the FI markets. Otherwise, any efforts to apply the existing regulatory framework to FI would risk market participants restricting their quoting activities and reducing liquidity and transparency, which would harm our members' ability to transact efficiently and manage risk for their clients. Further, the application of the Rule to FI markets would risk reversing decades of improvement in FI market transparency by reducing electronic trading volumes and the willingness of dealers to provide pricing information to investors.

If the SEC were to apply the current Rule to the FI markets, we believe that investors--including retail shareholders who invest in FI through registered funds--would be harmed. A rule otherwise intended to protect investors would do the opposite.

We discuss our views in more detail below.

The Rule's Focus is the Retail OTC Equity Markets, Which Operate Very Differently than the FI Markets

We emphasize that the Rule has long been applied to protect retail investors from OTC equity market fraud. The previous Director of the Division of Enforcement noted in connection with the 2020 amendments to the Rule that "[t]*he amended rule represents another important step in our tireless and proactive efforts to protect retail investors from being victimized by microcap fraud,"* and the same press release noted that a goal was "*reducing fraud in these markets where retail presence is significant and, unfortunately, pump-and-dump and other frauds are too common."*[3] (emphasis added)

The retail OTC equity market focus of the Rule is further evidenced by the construction of many important aspects of the Rule itself and the nature of the cost-benefit analysis performed when the rule has been amended, including most recently in 2020.[4] For example, the amendment to the Rule bases its analysis solely on

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[2] *See Publication or Submission of Quotations Without Specified* Information, SEC Rel. 34-87115 (Sept. 25, 2019) (2019 Proposal), *available at* https://www.sec.gov/rules/proposed/2019/34-87115.pdf; SEC Press Release, SEC Proposes Amendments to Enhance Retail Investor Protections (Sept. 26, 2019), *available at* https://www.sec.gov/news/press-release/2019-189; *Publication or Submission of Quotations Without Specified Information*, SEC Rel. 34-89891 (Sept. 16, 2020) (2020 Amendment), *available at* https://www.sec.gov/rules/final/2020/33-10842.pdf.

[3] *See* SEC Press Release, SEC Adopts Amendments to Enhance Retail Investor Protections and Modernize the Rule Governing Quotations for Over-the-Counter Securities (Sept. 16, 2020), *available at* https://www.sec.gov/news/press-release/2020-212.

[4] For example, the Rule's most important exemption is for exchange-traded securities; the exemptions such as that for ADTV assume the presence of a centralized tape; and the language of the Rule refers to tickers, but not CUSIPs.

OTC equity markets data.[5] Furthermore, FINRA's rules related to Rule 15c2-11 apply only to OTC equity securities,[6] and the Commission recently approved amendments related to FINRA Form 211 that are consistent with the OTC equity market scope of FINRA's rules.[7] We also understand that the Rule has never been applied to, or enforced in, the FI markets throughout its entire 50-year history.[8]

Importantly, we also note that the broad-based exemptions available under the Rule are tailored to the OTC equity market. The most important exemption for equity securities—listing on an exchange—is not available for FI securities. Other exemptions crafted to work for the equity markets similarly are not compatible with the FI markets (*e.g.*, the ADTV exemption, or exemptions premised on a lack of gaps in quoting on a security, given that securities in the FI markets tend to trade far less frequently than equity securities).

The Commission stated in the 2020 Amendment that "*[s]ecurities that trade on the OTC market are primarily owned by retail investors.*"[9] (emphasis added) This may be true in the OTC equity markets, but is not accurate for the FI markets. Indeed, this statement is footnoted by the Commission to a paper on OTC equity markets.[10] Direct trading participants in the FI markets are overwhelmingly institutional investors that do not wholly depend on dealers as their source for information related to their investments.[11] Some FI markets are exclusively available to institutional or sophisticated investors, such as the Rule 144A securities markets that are limited to QIBs. Currently, FI trading primarily takes place on ATSs, other electronic communications platforms (including through chat functions), and by voice methods, but extremely rarely on exchanges. In the FI markets, nearly every "market" made by a dealer is indicative. In other words, there is no guarantee that any specific size can be bought or sold at a specific price until the dealer decides to commit to trade that security. Further, the FI markets are vastly larger than equity markets—for example, FI CUSIPs number over 2.5 million,[12] whereas equity CUSIPs number in the tens of thousands (and the most actively traded equity securities are exempt from the

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[5] *See* 2020 Amendment at n.640 for reliance on equity market data: "*The Commission uses three sources of data on OTC securities. OTC Markets Group's 'End-of-Day Pricing Service' and 'OTC Security Data File' provide closing trade and quote data for the U.S. OTC equity market and include identifying information for securities and issuers, as well as securities' piggyback eligibility. The Commission also uses information from the weekly OTC Markets Group's 'OTC Company Data File.' Company Data Files include information about issuer reporting, shell, and bankruptcy status, as well as the SEC Central Index Key (CIK) identifier and whether an issuer's financial statements are audited.*" (emphasis added)

[6] FINRA Rule 6432 states that "[f]or purposes of [FINRA Rule 6432], the term 'non-exchange-listed security' means any equity security, other than a Restricted Equity Security, that is not traded on any national securities exchange." FINRA Rule 6432, *available at* https://www.finra.org/rules-guidance/rulebooks/finra-rules/6432.

[7] *See Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Approval of a Proposed Rule Change Relating to Members' Filing Requirements Under FINRA Rule 6432 (Compliance With the Information Requirements of SEA Rule 15c2-11)*, Sec. Rel. No. 34-29-32 (Sept. 10, 2021), *available at* https://www.sec.gov/rules/sro/finra/2021/34-92932.pdf.

[8] We acknowledge that an exemption was added in 1975 for municipal securities, but reiterate our understanding that the Rule has never been applied to or enforced in the FI markets.

[9] See 2020 Amendment at 5.

[10] *See* 2020 Amendment at n.3, which cites to Andrew Ang et al., *Asset Pricing in the Dark: The Cross-Section of OTC Stocks*, 26 Rev. Fin. Studs. 2985–3028 (2013). This paper begins by stating that *"[o]ver-the-counter (OTC) stocks are far less liquid, disclose less information, and exhibit lower institutional holdings than listed stocks. We exploit these different market conditions to test theories of cross-sectional return premiums."* The paper does not appear to discuss "bonds" or "fixed income."

[11] Retail investors also do participate in the FI markets, but mostly through investment vehicles such as mutual funds and SMAs that are professionally managed by asset managers and other institutional investors.

[12] SIFMA analysis of Bloomberg data.

rule by virtue of their listing on an exchange).[13] Accordingly, the compliance burden would be exponentially greater when applied to FI securities as compared to OTC equity securities.

Imposing the Rule on the FI Markets Would Harm Investors

We are deeply concerned about the disruptive impact and harm to the FI markets should the Commission attempt to apply the Rule, as written, to the FI markets. Specifically, we are deeply concerned about the risk of a potentially significant negative impact on our clients, investor protection, FI market liquidity, and further development and enhancement of electronic trading, which has greatly improved transparency and efficiency over the last decade or more. We are also concerned that it does not appear that the Commission, in its analysis of the costs and benefits of the most recent amendments to the Rule, has explicitly identified and addressed these or other potential costs to FI market participants and how the benefits of applying the Rule would outweigh these consequences. The Rule is not necessary for the FI markets, was not designed for the FI markets, and consequently the SEC should not apply the current Rule to them. Below we address some of our more specific concerns.

1. ***There Has Been No Analysis of the Application of the Rule to FI Markets***

   The Rule has been in place for 50 years. Since the Rule was first implemented and as it was subsequently amended, there has never been any analysis of the consequences of its potential application to the FI markets, including how the Rule would comport with FI market structure, impacts to market efficiency and end investors, cost of implementation, and views of market participants.

   Furthermore, many basic definitional questions have not been considered, such as what it means to "publish" a quotation and what a "quotation medium" is in the context of FI market structure. Accordingly, it is not clear to which activities the Rule might apply. There are also many uncertainties about the nature and extent of the review required to be performed by a dealer to determine whether information about an issuer is "current and publicly available" under the Rule. Unlike the OTC equity market, there is no qualified interdealer quotation system in the FI market able to make publicly available determinations. There are no such interpretations, guidance, and quotation system because, in part, neither the SEC nor dealers have applied the Rule to the FI markets. Dealers may struggle to understand how they should apply the Rule as it is currently written to the FI markets, and thus are likely come to different conclusions regarding its implementation, thereby fragmenting the trading markets and introducing risk for no discernable benefit.

2. ***Application of the Rule to FI Would Not Reduce Fraud or Improve Disclosure***

   There is no record of the types of specified fraud that the Rule is designed to mitigate (*e.g.*, pump-and-dump schemes) in the FI markets, nor are we aware of enforcement by the Commission in this regard. If, for some reason, the Commission remains concerned about these types of risks in the FI markets, then addressing this issue warrants its own thoughtful analysis separate and apart from this Rule, and with the requisite opportunity for public notice and comment.

[13] One company could be the issuer of a single equity CUSIP but hundreds of FI CUSIPs. Furthermore, a single FI transaction, such as a securitization, may involve the issuance of dozens of distinct securities.

Regarding issuer disclosure, institutional investors currently find that they have adequate information to transact in FI securities, even for non-public securities such as Rule 144A securities.[14] If the rule were to apply, the burden on dealers to obtain the required information, determine whether the body of information on each individual CUSIP is reliable, and whether it meets the "current and publicly available" standard under the Rule will be enormous and costly, and impossible in cases such as Rule 144A securities.[15] This could cause dealers to either cease providing quotes in certain FI securities at all or on a timely basis, reducing liquidity, or cause them to pass along such heightened costs to our clients. Further, pricing transparency is already quite high in the FI markets during normal market conditions, and application of the Rule will only serve to reduce that transparency if dealers retreat from providing quotes to asset managers and other investors.

3. *FI Market Liquidity May be Reduced*

If dealers are required to apply this Rule, as written, to the FI markets, then given this lack of experience and guidance, we expect dealers to take different views on where and how the Rule applies, leading to inconsistencies in trading activity, and ultimately, harm to overall market liquidity. Dealers unable to comply with the Rule as written may retreat from providing indications of interest that could be considered "quotations" under the Rule. These restrictions to quotation and trading practices could be broad-based across different types of FI instruments or could be concentrated in certain markets such as those for Rule 144A securities. These changes could happen in the near term or in the future depending on the interpretations taken by dealers or future guidance from the Commission, which would make the market less efficient. Additionally, we understand that dealers attempting to comply with this Rule will likely incur significant additional cost and may choose to incorporate such costs into the pricing of securities they trade with buyside firms and ultimately their individual investor clients.

4. *Pricing Discovery and Transparency Could be Impaired*

If dealers choose to curtail their quoting activity due to the Rule, then pricing discovery and transparency could become significantly impaired as it is not practical to expect that FI securities could migrate to an exchange to permit use of the Rule's "exchange" exemption. This could be an issue of particular importance for bonds that are not registered and do not have "publicly available" information, such as Rule 144A bonds. These bonds make up a significant proportion of the high-yield ("HY") corporate bond market.[16] In this market, dealers send indicative pricing almost exclusively in communications that are not live to trade. However, it is not clear if dealers would be able to continue this practice in the HY market or any other FI market. If dealers cannot provide these indications, then a critical source of pricing information would be lost, which would severely reduce pricing discovery and efficiency and could lead to less accurate pricing. Reductions in transparency and liquidity lead to higher transaction costs that are ultimately borne by end investors.

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[14] Typical concerns about disclosure in the FI markets do not relate to the total unavailability of issuer information (which is what the Rule addresses), but rather the nature of the disclosure received (which the Rule does not address, but other existing securities laws do address). Despite Rule 144A securities being considered "private placements," the provision of information to investors is required by the securities laws.

[15] Consequently, issuers may choose to shift their funding from securities to loans if liquidity or pricing deteriorates in their securities offerings, which would also harm investors by reducing the supply of securities in the market. However, this letter is focused on more direct impacts to investors.

[16] For example, Rule 144A bonds comprise two-thirds of the market value of the ML / ICE High Yield Index.

5. *Investor Risk Management May Be Impaired*

Given the massive number of FI CUSIPs, the relatively infrequent trading of many of them, and the lack of applicable exemptions, we are concerned that investors' risk management (including liquidity risk management) may be challenged if dealers reduce their quoting and/or trading activity. Especially in stressed markets, the dealers' ability to quickly accommodate client orders may be significantly reduced as dealers would have to locate and review documentation, as well as keep records of these actions to comply with the Rule. As we point out above, there is currently no infrastructure for compliance with the Rule, and in some cases, such as non-public Rule 144A bonds, compliance is not possible regardless of any infrastructure buildout.

6. *The Growth of Electronic Trading and Algorithmic Pricing Could be Reversed*

Electronic trading, which promotes greater transparency and price discovery among a broader range of market participants, has become an increasingly large proportion of trading volume in the FI markets.[17] This electronic trading activity may be reduced or even cease in some products if dealers are not permitted to put a bid or offer on a trading platform because of an inability to comply with the Rule. We believe this would reverse years of growth and enhanced transparency, and indeed, run counter to the Commission's efforts to improve FI market structure as shown though the extensive years-long efforts of the Fixed Income Market Structure Advisory Committee,[18] and in recent statements that you have given.[19]

Further, the application of the Rule could negatively impact a dealer's ability to generate algorithmic pricing, which the bond market is becoming more reliant upon for price formation. Algorithmic pricing relies on electronically generated prices as an input; therefore, depending on the interpretation of the Rule, dealers simply may not be able to make algorithmic pricing publicly available in instances where the requisite information is not publicly available, or the dealer is otherwise unable to verify the required information. Many bonds are priced algorithmically and traded based on trading activity in similar and comparable bonds. It is important to note that these algorithms are dependent on pricing data availability and transparency. Advances in technology have brought more clarity to these types of relationships and have led to improvements to pricing transparency. A step backward here would materially jeopardize the advancements made in the past several years to FI market price transparency generally.

7. *Investors' Best Execution and Valuation Determinations Will Become More Difficult*

If dealers reduce or eliminate their quotation activity in the FI markets, then it could become more challenging for certain market participants to fulfill some of their legal and contractual obligations and fiduciary duties, such as seeking and determining best execution. Investors use information from trading platforms, dealer runs, and other activity in their best execution determinations. However, it is

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[17] We estimate that approximately 40% of investment-grade corporate bonds are traded electronically, approximately 25% of HY are traded electronically, and 60% of Treasuries trade electronically. A significant proportion of agency MBS also trades electronically.

[18] *See, e.g.,* SEC, Spotlight on Fixed Income Market Structure Advisory Committee (FIMSAC), https://www.sec.gov/spotlight/fixed-income-advisory-committee.

[19] *See, e.g.,* SEC Chair Gary Gensler, Testimony Before the United States Senate Committee on Banking, Housing, and Urban Affairs (Sept. 14, 2021), *available at* https://www.sec.gov/news/testimony/gensler-2021-09-14.

not clear at this time whether and to what extent dealers will continue this activity, and the level of activity may vary by market and by dealer.

Valuation is another key function for institutional investors, including registered funds. Among other things, accurate valuation helps ensure fair and equitable treatment of investors (*e.g.*, open-end fund investors buy and sell fund shares daily), as well as accurate performance measurement, and fee calculations. Pricing services and institutional investors alike rely on dealer quotes to inform their valuation estimates and determinations. It is unclear how the Rule would impact dealer information provision at this time, but any reduction would harm FI investors. A reduction in this dealer activity—quoting activity, trading activity, or both—would reduce the overall quantity and quality of information that such entities incorporate, which would make valuation of FI securities more difficult and likely less precise. It would also be at odds with the Commission's long-standing emphasis on valuation, articulated most recently in the 2020 adoption of Rule 2a-5 under the Investment Company Act.

Accordingly, investment advisers that manage registered funds that calculate net asset value (NAV) daily will need to consider if and how reductions in dealer activity would impact their valuation practices, policies, and procedures. For instance, registered open-end funds must calculate their NAVs daily, and doing so requires them to determine in good faith the fair values of their FI portfolio investments. These valuation practices currently contemplate—and are enriched by—multiple pricing inputs, including dealer quotes.

Open-end registered funds are also subject to liquidity requirements, such that a diminution in dealer quoting or overall trading activity could impact not only compliance with these liquidity requirements, but also portfolio construction if certain FI investments become less liquid. Specifically, reductions of quoting and/or trading activity may cause some instruments to become illiquid or be deemed illiquid that were not previously difficult to trade.

Conclusion

As we have discussed above, the Rule was not designed to apply to the FI markets and, as it is currently written, should not be applied to the FI markets. It would not mitigate fraud or achieve other policy objectives, the costs and benefits of its application to the FI markets have not been analyzed, and it has not been enforced in the FI markets in the 50 years since it was implemented. More importantly, the risks of application are not abstract. 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. This harm would come from a Rule that is paradoxically intended to protect investors. The impacts of the imposition of the Rule, as written, go well beyond just the dealers subject to it.

However, if the Commission does decide that the Rule should be applied to the FI markets, then prior to any application or enforcement of the Rule, it is critical that the Commission conduct an analysis of whether there is a need for the Rule to apply to the FI markets, and if so, the attendant costs and benefits; provide an opportunity for public input through the notice and comment process; and revise the Rule in a manner that is consistent with the structure of the FI markets, with workable provisions and exceptions.

The Associations would welcome the opportunity to discuss the views expressed in this letter in more detail and engage with the Commission on important issues related to FI market structure. Please do not hesitate to contact any of the following staff at the Associations: Lindsey Keljo at SIFMA AMG (lkeljo@sifma.org), Susan

Olson at ICI (solson@ici.org), Monique Botkin at IAA (monique.botkin@investmentadviser.org), Jennifer Han at MFA (jhan@managedfunds.org), or Kristen Malinconico at CCMC (kmalinconico@uschamber.com).

Sincerely,

Lindsey Weber Keljo, Esq.
Asset Management Group – Managing Director and Associate General Counsel
Securities Industry and Financial Markets Association

Susan M. Olson
General Counsel
Investment Company Institute

Gail C. Bernstein
General Counsel
Investment Adviser Association

Jennifer W. Han
Chief Counsel & Head of Regulatory Affairs
Managed Funds Association

Tom Quaadman
Executive Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce

CC:

Honorable Caroline A. Crenshaw, Commissioner, Securities and Exchange Commission
Honorable Allison Herren Lee, Commissioner, Securities and Exchange Commission
Honorable Hester M. Peirce, Commissioner, Securities and Exchange Commission
Honorable Elad L. Roisman, Commissioner, Securities and Exchange Commission
Ms. Sarah ten Siethoff, Acting Director, Division of Investment Management, Securities and Exchange Commission
Mr. David Saltiel, Acting Director, Division of Trading and Markets, Securities and Exchange Commission

Information about the Associations

SIFMA AMG brings the asset management community together to provide views on U.S. and global policy and to create industry best practices. SIFMA AMG's members represent U.S. and global asset management firms whose combined assets under management exceed $45 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds. For more information, visit http://www.sifma.org/amg.

The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US$31.8 trillion in the United States, serving more than 100 million US shareholders, and US$10.2 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in Washington, DC, London, Brussels, and Hong Kong.

The IAA is the leading organization dedicated to advancing the interests of investment advisers. For more than 80 years, the IAA has been advocating for advisers before Congress and U.S. and global regulators, promoting best practices and providing education and resources to empower advisers to effectively serve their clients, the capital markets, and the U.S. economy. The IAA's member firms manage more than $25 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. For more information, please visit www.investmentadviser.org.

MFA represents the global alternative investment industry and its investors by advocating for regulatory, tax, and other public policies that foster efficient, transparent, and fair capital markets. MFA's more than 140 member firms collectively manage nearly $1.6 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. MFA has a global presence and is active in Washington, London, Brussels, and Asia.

The U.S. Chamber's Center for Capital Markets Competitiveness's (CCMC) mission is to advance America's global leadership in capital formation by supporting diverse capital markets that are the most fair, transparent, efficient, and innovative in the world. CCMC advocates on behalf of American businesses to ensure that legislation and regulation strengthen our capital markets allowing businesses—from the local flower shop to a multinational manufacturer—to mitigate risks, manage liquidity, access credit, and raise capital.

EXHIBIT 9

American Bankers Association
ABA Securities Association
ABASA, an ABA subsidiary

Justin M. Underwood
Executive Director
junderwood@aba.com
202-663-5037

SUBMITTED ELECTRONICALLY

September 23, 2021

Ms. Vanessa Countryman
Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Request for Exemptive Relief for Fixed-Income Securities Pursuant to Rule 15c2-11(g)

Dear Ms. Countryman:

The ABA Securities Association[1] (ABASA) hereby requests exemptive relief as it applies to fixed-income securities according to the U.S. Securities and Exchange Commission's ("Commission" or "SEC") Rule 15c2-11 ("the Rule"), including recent amendments[2] to enhance publicly available information for securities quoted in the over-the-counter ("OTC") securities markets. The Rule, as currently written, is inclusive of both equity and fixed-income securities, only expressly exempting municipal securities. While the Rule has never been applied to fixed-income securities since its inception in 1971, the Commission's statements in the amendments to the Rule have made market participants aware that the Rule technically applies to most fixed-income securities and that compliance with the Rule could undermine the dissemination of quotes for bonds. This outcome, which does not appear to have been anticipated when the amendments were written, would have detrimental consequences to the fixed-income markets. As such, we request that the Commission provide express exemptive relief for those fixed-income products or bonds that fall or may fall within the scope of the amended Rule.

Background

Focused primarily OTC equity market fraud, Rule 15c2-11 governs information requirements related to the publication of quotes by broker-dealers, including submission of quotes into qualified interdealer quotation systems. In 2020, the Rule was amended to add publicly available requirements for certain issuer information and modify and reduce reliance upon the "piggyback exception". The Commission has stated that the amendments are designed to modernize the

[1] The ABA Securities Association (ABASA) is a separately chartered trade association and nonprofit subsidiary of the American Bankers Association whose mission is to represent the interests of banks underwriting and dealing in securities, proprietary mutual funds, and derivatives before Congress and the federal government.
[2] The amendments were effective as of December 20, 2020, with a compliance date of September 26, 2021

Rule, promote investor protection, and curb incidents of fraud and manipulation.[3] It is evident that at the time the amendments were adopted, the SEC staff was concentrated on the integrity and availability of OTC equity market quotations:

> "These ***retail investor-focused*** improvements to Rule 15c2-11 are long overdue. The technological advancements that have taken place since the rule was last amended enable us to require that information in the OTC market be more timely, enabling investors to make better informed investment decisions, and reducing fraud in these markets where ***retail presence is significant*** and, unfortunately, ***pump-and-dump and other frauds are too common***."[4]

Prior to the Commission's amendments, the Rule required broker-dealers initiating quotations to obtain and review issuer information, with the aim of making the information for issuers available publicly to all market participants. Indeed, over the past several years, fixed-income markets (*i.e.*, Agency Securities, ABS/MBS, Corporate Bonds, and Treasury Bonds) have continued to evolve and become more efficient as electronic trading has provided greater liquidity and transparency. 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, and to our knowledge never have been, implicated in the concerns expressed by the SEC in promulgating the amendments or the original rule. In particular, there have been no reported instances of fraudulent or deceptive practices involving fixed-income securities in the OTC securities markets. In addition, it is clear from the Commission's economic analysis of the impact of the Rule, as amended, and the data used by the Commission for that analysis, that the Commission only contemplated the applicability of the Rule to OTC equity securities, not fixed income markets in which the overwhelming majority of securities are not exchanged-listed.[5] Analysis of these markets would have required significantly more (and different) data, notably and deliberately absent from the adopting release for the amendments.[6]

Request for Exemptive Relief

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[3] 17 CFR Parts 230 and 240

[4] Securities and Exchange Commission Press Release, "SEC Adopts Amendments to Enhance Retail Investor Protections and Modernize the Rule Governing Quotations for Over-the-Counter Securities," www.sec.gov/news/press-release/2020-212. Commissioner Roisman's comments clearly and explicitly refer to the OTC equity market, seemingly using the terms OTC market and OTC equity market interchangeably, and are also clearly and explicitly focused on the "pump and dump" protections afforded to retail investors. https://www.sec.gov/news/public-statement/roisman-statement-adoption-amendments-rule-15c2-11 The focus on retail investor protection is also clear in Commissioner Peirce's comments.

[5] See Section VI.B. of the adopting release. https://www.sec.gov/rules/final/2020/33-10842.pdf

[6] See footnote 640 of the adopting release. "The Commission believes that OTC Markets Group data are reasonably representative of all OTC quoting and trading activity in the U.S." The OTC market data used by the Commission consists entirely of OTC equity market data.

The prospective application of the Rule to fixed-income securities markets thus has created unnecessary industry concern and confusion. Until recently, industry participants were given no reason to believe that the Rule would be applied to fixed-income products.[7] While the amended Rule, like the current rule, specifically excludes municipal bonds, it does not explicitly exclude any other type of bond or fixed-income product, whether convertible or non-convertible, exempted or non-exempted. 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. Ultimately, this could lead to broker-dealers being discouraged from providing quotes for OTC fixed income securities that currently benefit from active secondary markets. Such a result also could negatively impact corporate issuers who are reliant on robust secondary trading markets to procure capital and credit. Given these adverse results, exemptive relief would serve the public interest and is the only appropriate response.

Anticipating that there may be instances where exemptive relief would be necessary or appropriate, the Rule includes a paragraph G of the Rule[8] and Section 36 of the Securities Exchange Act of 1934 (15 U.S.C. Chapter 2B), stating:

> "… the Commission may grant, conditionally, or unconditionally, an exemption from the Rule to the extent such exemption 'is necessary or appropriate in the public interest, and is consistent with the protection of investors.'"

Conclusion

In light of the interpretive uncertainties surrounding the application of the Rule, and that exemptive relief for all fixed-income products would be appropriate and in the public interest, we urge the Commission to provide exemptive relief across all fixed-income securities.[9] While SEC staff is considering our exemption request, we request further that the Commission refrain from applying and enforcing the provisions of the amended Rule with respect to fixed-income securities.

* * *

[7] We are not aware of any enforcement of the Rule by the Commission in the context of fixed income securities. In addition, it is worth noting that FINRA's Rule 6432, which is intended to standardize and help ensure compliance with Rule 15c2-11, explicitly applies only to equity securities.
[8] 17 CFR Parts 230 and 240.
[9] Fixed-income securities that include corporate bonds, U.S. treasuries and agency securities, foreign sovereign debt, asset-backed securities, and others that would inadvertently be deemed "in scope" based on a literal reading of the Rule.

Thank you for the consideration of our views. If you have any questions, please do not hesitate to contact the undersigned at 202-663-5273 (junderwood@aba.com).

Sincerely,

Justin M. Underwood
Executive Director

CC: The Honorable Gary Gensler, Chair, SEC
The Honorable Hester M. Peirce, Commissioner, SEC
The Honorable Elad L. Roisman, Commissioner, SEC
The Honorable Allison Herren Lee, Commissioner, SEC
The Honorable Caroline A. Crenshaw, Commissioner, SEC

EXHIBIT 10

STRUCTURED FINANCE ASSOCIATION

December 9, 2021

The Honorable Gary Gensler
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: Application of Rule 15c2-11 to Asset-Backed Securities

Dear Chair Gensler:

The Structured Finance Association ("SFA")[1] is providing this letter in regard to the potential application of Rule 15c2-11 under the Securities Exchange Act (the "SEA") to asset-backed securities ("ABS").[2] As further described in this letter, our members have deep concern that unintended consequences of Rule 15c2-11, if applied to ABS, will have a material and likely immediate adverse impact on market liquidity, resulting in direct harm to the specific market participants the rule is intended to protect – investors.

This concern is significantly heightened by the fact the informational requirements of Rule 15c2-11 are not material to ABS, and in many instances it would not be possible for publications of broker-dealer quotations on ABS to comply with these information requirements. Accordingly, if the Securities and Exchange Commission (the "SEC") were to take the historically unprecedented view that Rule 15c2-11 applies to ABS, the practical effect would be to prohibit the "publication" of quotes on many ABS on any "quotation medium" (as such terms may be interpreted by the SEC as to Rule 15c2-11) – and the essential transparency that these quotes provide.

Impeding quoting in this market will directly reduce liquidity and trading. Impairing the liquidity of ABS will likely immediately impair ABS market value and may leave the market with a limited ability to provide sufficient liquidity to help stabilize the market in times of stress.

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[1] SFA is a member-based trade industry advocacy group focused on improving and strengthening the broader structured finance and securitization market. Members of SFA represent all sectors of the securitization market including issuers, investors, financial intermediaries, law firms, accounting firms, technology firms, rating agencies, servicers and trustees. Further information can be found at www.structuredfinance.org.

[2] For purposes of this letter, the term ABS is defined in Section 3(a)(79) of the SEA as a "fixed-income or other security collateralized by any type of self-liquidating financial asset (including a loan, a lease, a mortgage, or a secured or unsecured receivable) that allows the holder of the security to receive payments that depend primarily on cash flow from the asset . . ."

STRUCTURED FINANCE ASSOCIATION

Further, the lack of liquidity and reduced market value could lead to reconsiderations of the use of ABS by regulated institutions to meet regulatory standards and responsible risk management practices. This would have a significant negative impact on the direct participants in this market, including asset managers who invest funds for their retail and institutional clients, entities with regulated capital that hold ABS such as insurance companies, broker-dealers, and banks. Moreover, the seismic impact of an effective prohibition on the use of quotation mediums would extend beyond institutional ABS investors to the financial institutions and their customers that use the ABS market to finance consumer and business loans. For instance, home buyers in the mortgage market represent the largest indirect beneficiaries of the financing provided by ABS. Other consumer financial debt supported by ABS includes credit cards, auto loans, and student loans. A reduction in the value of the financial assets that fund these consumer credit products would necessarily raise the cost to the customer of obtaining financing.

* * *

On August 26, 2021, the Securities Industry and Financial Markets Association ("SIFMA") and the Bond Dealers of America addressed a letter to Ms. Vanessa Countryman, the Secretary of the SEC, titled "Request for Exemptive Order Pursuant to Rule 15c2-11(g)" and on September 23, 2021, the Asset Management Group of the SIFMA, the Investment Company Institute, the Investment Adviser Association, the Managed Funds Association, and the U.S. Chamber's Center for Capital Markets Competitiveness addressed a letter to the Honorable Gary Gensler, titled, "Rule 15c2-11" (together, the "Exemptive Requests"). So as to avoid repetition of established background, SFA refers to the Exemptive Requests and expresses its support for the requests made in those letters.

There are, however, a few points made in the Exemptive Requests that we wish to reiterate and **to amplify as they apply to the ABS market.** Specifically, in the next section of this letter we explain why Rule 15c2-11 information is not materially relevant to ABS and therefore such information is not available. In the final section of the letter, we detail the negative impact on liquidity that will inevitably result from imposing informational requirements that cannot be fulfilled as to most ABS.

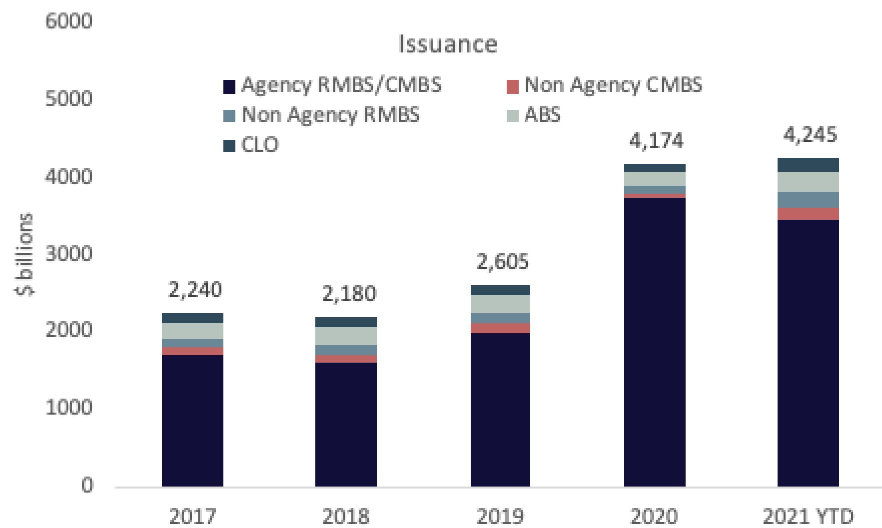
I. Issuer Information has Limited Relevancy for Asset-backed Securities Investment Analysis

The ABS market, with nearly $14 trillion dollars[3] of securities outstanding, provides sizeable fixed income investment opportunities to institutional investors and funds trillions of dollars of capital to consumers and businesses in communities across the country. The following chart

[3] As of 2Q 2021, ABS totaled approximately $13.2 trillion in remaining balance outstanding, including approximately $10.9 trillion of issuance from government-sponsored enterprises. We note that in the SEC's letter dated September 24, 2021, the SEC stated that Rule 15c2-11 does not apply to "exempt securities" and therefore are excluded from Rule 15c2-11.

STRUCTURED FINANCE ASSOCIATION

details the yearly issuance of ABS broken out by asset type.



Source: SFA Market Compilation

Unlike the equity markets which include substantial retail investment, the fixed income markets are largely institutional. The predominance of institutional investment within ABS securities is more pronounced than in debt securities generally, with the SEC stating: **"The predominant purchasers of asset-backed securities today are institutional investors, including financial institutions, pension funds, insurance companies and money managers. Generally, ABS are not marketed to retail investors."[4]**

In an ABS offering, financial assets of a particular type (e.g., mortgages, credit card receivables, student loans) are typically pooled together, transferred from the asset seller[5] to a special purpose entity (an "SPE"), the only activity of which is to hold the relevant financial assets and to allocate the associated cashflows thereon to the investors in the SPE. Commonly, the SPE is created specifically for a transaction and serves as the "issuer" of the ABS bonds. Because the assets are transferred to the SPE in a "true sale," ABS performance is driven by the performance of the asset pool.

In many cases, the SPE is a trust and an independent entity will serve as the trustee, but such trustee will not have any financial obligations to the purchasers of the ABS issued by the SPE.

[4] Asset-Backed Securities, 69 Fed. Reg. 26650, 26654 (May 13, 2004). The paragraph goes on to note one type of ABS that is marketed to retail investors, but states that such type is listed on a national securities exchange (in which case Rule 15c2-11 would not apply).

[5] In a typical ABS transaction, the asset seller may have originated the assets itself or aggregated the assets in the secondary market.

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Other entities, such as a calculation agent or an administrator, may provide services to the SPE while retaining no financial obligation to the investors.

The regulatory history of Rule 15c2-11 indicates that the information required was primarily relevant to equity securities; e.g., the questions related to the number of shares outstanding and to securities of corporate issuers. For example, even such basic information as the requirement to have information as to the business of the issuer or as to a list of all the company's insiders, which are significant for corporate issuers, is not meaningful information as to issuers of ABS.

The important financial information requirements of Rule 15c2-11; e.g., balance sheet and retained earnings, are not material to ABS investors. In fact, **the SEC has stated in this regard, "… financial information about the issuing entity generally does not provide useful information to investors."[6]**

Such distinctions underscore the fact that Rule 15c2-11 was adopted for the purpose of protecting retail investors in equity securities. There is no history of the Rule ever being applied to products other than equity securities, nor is there any history of the SEC considering the costs and benefits of the application of the Rule beyond equity securities.

In the case of ABS, at the time that Rule 15c2-11 was adopted in 1971, **ABS did not exist and therefore no consideration could have been given to the application of the Rule to the product.[7]**

Most Importantly, SFA investor members believe the key financial information that is required under Rule 15c2-11, the "balance sheet," the statement of "profit and loss," and the calculation of "retained earnings," of the issuer is not germane to ABS and therefore such information is not produced. Investor members believe they currently have access to collateral and deal information, including the limited issuer disclosure that they deem relevant, prior to transacting in the ABS market, and do not believe the information requirements of Rule 15c2-11 provide additional material transparency. In particular, trustee reports and remittance reports provide material information, on a monthly or quarterly basis timed with the distribution of transaction cashflows, relevant to the decision to participate in an ABS issuance; these reports present the performance of the pool of assets collateralizing the security – and the only source of repayment on the security.

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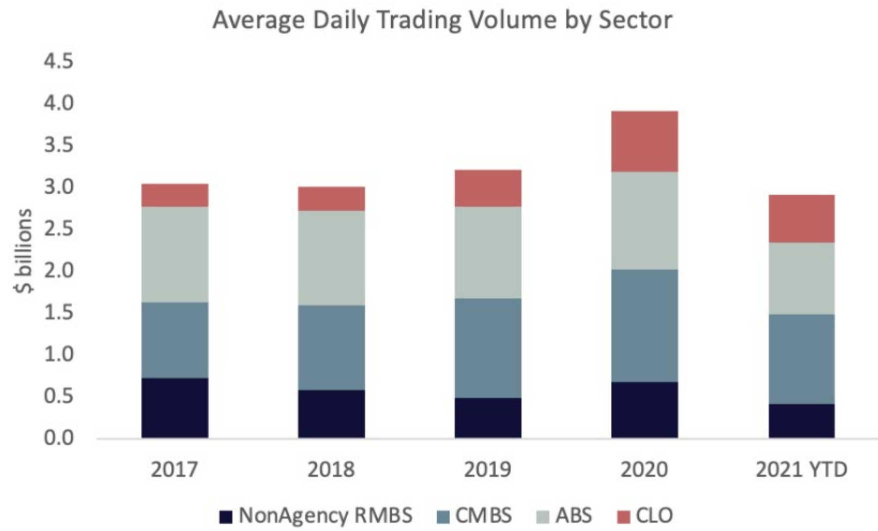
[6] *Id.* For further consideration of the non-relevance of financial statement disclosures on ABS, see Letter from Robert J. Kueppers, Chair, Center for Public Company Audit Firms, to Jonathan G. Katz, Secretary, SEC (July 29, 2004). We note that information that is relevant to ABS investors, such as trustee or remittance reports, is readily available to investors as to those securities.

[7] The Government National Mortgage Association (Ginnie Mae) issued its first mortgage-backed participation certificates in 1971. This is generally considered the first modern ABS product, but the market did not grow to any significant size for another decade.

STRUCTURED FINANCE ASSOCIATION

III. Implications of Prohibiting the Publishing of Quotes on ABS

ABS are priced relative to industry benchmarks and in comparison to other ABS with similar ratings, assets and maturities. This means that the more quotations that are available, the more transparent the market, the easier it is for investors to price securities accurately. In the following chart we show the historical average daily trading volume for the securitization market by sector.[8]



Source: FINRA Trace

Silencing or limiting quotations on ABS will diminish liquidity. The effect of diminishing liquidity in any security is that investors demand a higher return to hold the security, as the security cannot be readily turned into cash, and the market value of the security necessarily declines. In times of economic stress, liquidity is crucial to protect the safety and soundness of our nation's financial system. A decline in the market value of ABS will have a negative impact on ABS investors who are largely comprised of asset managers who invest retirement and pension funds for American households and highly regulated financial intermediaries, such as banks and insurance companies. These highly regulated financial intermediaries are subject to robust capital and liquidity regulatory standards and robust risk management practices, which utilize ABS to meet certain financial stability and solvency goals. Any reduced market value and limited liquidity may force regulators and companies to re-evaluate the use of ABS holdings generally, further reducing investor appetite for the market. We urge the SEC to consider the impact on the markets broadly of taking any action that would diminish the value of ABS holdings.

Further, any reduction in the market value of ABS will also spill over to the consumer and

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[8] As of H2 2021, the average daily trading volume for the private securitization market in 2021 year to date is $2.9 billion. Of that amount, $1.0 billion is in CMBS, $0.8 billion in ABS, $0.57 billion in CLOs, and $0.42 billion in non-agency RMBS.

business loans financed via the ABS market; i.e., these assets will decline in value, which then means that borrowers on the assets must pay a higher interest rate to obtain funding going forwards. Consumers and businesses are the principal borrowers on most of these assets. This means that impairing the ABS market has the result that retail consumers will pay more on loans such as mortgages, credit cards, and student loans.

* * *

Unlike some trade associations, before SFA takes any advocacy position, our governance requires us to achieve consensus by agreement rather than majority vote, ensuring the perspectives represented in our diverse membership, including our investor, market intermediaries, and issuer members, are reflected. This diversity is the strength of our organization as it builds healthy tension in arriving at member-consensus positions on policy.

Under such governance structure, our full membership, including our investor members who include asset managers who invest funds for their retail and institutional clients, entities with regulated capital that hold ABS such as insurance companies, broker-dealers, and banks, are in strong agreement in expressing substantial concern that applying Rule 15c2-11 to ABS would significantly impair trading and reduce liquidity in the ABS market.

The Structured Finance Association respectfully requests that the SEC provide that Rule 15c2-11 does not apply to the publication of quotations on asset-backed securities. Application of Rule15c2-11 on ABS will immediately result in market illiquidity. Given that the requirements of the Rule cannot be met as to most ABS, applying the Rule to ABS would effectively prohibit the use of any quotation medium to publish quotations on most ABS. The costs and negative impact of any such prohibition, and the damage done to market liquidity and to asset values, outweighs any benefit, as there would be significant direct effects on asset managers and their retail and institutional clients, banks, insurance companies and other investors that hold ABS and perhaps even more negative, even if indirect, consequences as to consumers whose loans to purchase homes, autos and other credit card goods makes up a significant share of the assets underlying ABS.

Sincerely,

Kristi Leo
President, Structured Finance Association

EXHIBIT 11

sifma
Invested in America

BDA Bond Dealers of America

August 26, 2021

Ms. Vanessa Countryman
Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Request for Exemptive Order Pursuant to Rule 15c2-11(g)

The Securities Industry and Financial Markets Association ("SIFMA") and the Bond Dealers of America ("BDA") and their members appreciate this opportunity to engage with the U.S. Securities and Exchange Commission ("Commission") and its staff on this important development in the over-the-counter ("OTC") securities markets.[1]

I. Introduction

On September 16, 2020, the Commission adopted a final rule amending Rule 15c2-11 under the Securities Exchange Act of 1934 ("Exchange Act"),[2] which addresses disclosures in the OTC markets and imposes requirements upon broker-dealers who publish quotations in such markets.[3] Rule 15c2-11, as amended, will require a broker-dealer or a qualified interdealer quotation system to collect, record, and review for timeliness, accuracy, reliability, and public availability certain information related to securities before publishing a quotation, or submitting a quotation for publication, in any quotation medium for an OTC security, unless an exception

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[1] **SIFMA** is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). **Bond Dealers of America** is the only DC-based organization exclusively representing the interests of securities dealers and banks focused on the US fixed income markets.
[2] 17 C.F.R. § 240.15c2-11.
[3] Publication or Submission of Quotations Without Specified Information, 85 Fed. Reg. 68124 (Oct. 27, 2020) ("Adopting Release").

applies. The rule, on its face, does not distinguish between types of securities, other than municipal securities, which Rule 15c2-11 expressly excepts.[4] The amendments became effective on December 20, 2020, with a compliance date of September 26, 2021.[5]

For the reasons discussed below, we seek an order pursuant to Rule 15c2-11(g) to exempt the publication of quotations for all fixed income securities from Rule 15c2-11.[6] If, however, the Commission is unwilling to issue an order exempting all fixed income securities from Rule 15c2-11, we request that the Commission issue an order exempting the following from Rule 15c2-11: (1) the publication of quotations for government securities as defined in Section 3(a)(42) of the Exchange Act; (2) the publication of quotations for fixed income securities which are addressed by the disclosure regime of the federal securities laws; (3) the publication of quotations to institutional investors and broker-dealers; and (4) the publication of quotations for securities issued by banks, including brokered certificates of deposit ("CDs") that are securities. We have had several conversations with the staff of the Commission's Division of Trading and Markets related to this exemption request, which have been helpful to us in considering how to structure this request.

Included within the category of fixed income securities addressed by the disclosure regime of the federal securities laws are: (1) fixed income securities of an issuer that is a reporting company under the federal securities laws;[7] (2) fixed income securities registered for sale under Section 5 of the Securities Act of 1933 ("Securities Act"); (3) fixed income securities of an issuer offered and sold pursuant to Rule 144A under the Securities Act; (4) fixed income securities of an issuer offered and sold pursuant to Regulation D under the Securities Act; (5) fixed income securities of an issuer that has issued any other security that is listed on a national securities exchange; and (6) securities sold offshore pursuant to Regulation S. Mortgage- and asset-backed securities (collectively, "ABS") have their own disclosure requirements and may be offered and sold either as registered offerings or under various exemptions from registration.

Further, to the extent the Commission does not issue an order exempting all fixed income securities from Rule 15c2-11, we respectfully request, as soon as practicable, an extension of

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[4] 17 C.F.R. § 240.15c2-11(f)(4). In addition, exempted securities, as defined in Section 3(a)(12) of the Exchange Act, appear to be excluded from Rule 15c2-11 because exempted securities are excluded from Section 15(c)(2)(A) of the Exchange Act. While government securities are exempted securities, as defined in Section 3(a)(12)(A)(i) of the Exchange Act, government securities are included in Section 15(c)(2)(C) of the Exchange Act. *See* Section II.C. below.

[5] Adopting Release at 68172. The compliance date is nine months after the effective date of the amended rule, except for the compliance date for paragraph (b)(5)(i)(M) of the amended rule, which is two years after the effective date of the amended rule. Paragraph (b)(5)(i)(M) requires a broker-dealer or a qualified interdealer quotation system, before publishing a quotation in a quotation medium, if relying on the "catch-all" provision, to collect and place in its records, review for timeliness and public availability, accuracy, and reliability, "similar financial information for such part of the two preceding fiscal years as the issuer or its predecessors have been in existence."

[6] 17 C.F.R. § 240.15c2-11(g) ("Exemptive authority. Upon written application or upon its own motion, the Commission may, conditionally or unconditionally, exempt by order any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this section, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.").

[7] Included within this request are fixed income securities issued in reliance on Rule 12g3-2(b).

time to comply with the rule for any fixed income security not covered by an exemptive order, as the infrastructure necessary to comply with the amendments in the fixed income markets does not exist and will require time to implement. In particular, considering the vast number of fixed income securities, the very limited application of many of the rule's current exceptions to fixed income securities, and the lack of any automated way to comply with the recent amendments, the application of the rule to any fixed income securities will be highly disruptive. We, therefore, request an extension of time to permit dealers to establish an automated infrastructure for compliance with the requirements of the amended rule. For the reasons discussed below, the requested exemptions are necessary and appropriate in the public interest and are consistent with the protection of investors.

The fixed income market, unlike the equity market, is almost exclusively an OTC market, so the rule, as written, purports to apply to the publication of quotations in a quotation medium for virtually all fixed income securities, other than municipal securities.[8] "Quotation" and "quotation medium" are each defined broadly in the rule.[9] These broadly defined terms potentially capture a significant amount of quotation activity in the fixed income markets. The act of publishing or submitting quotations for publication is the trigger for the application of the rule, but the word "publish" is not a defined term. We are concerned that the rule, as written, could apply broadly to quotation activity for fixed income securities, and that the application of the rule to quotations for fixed income securities will deter that quotation activity in a way that will have a significant, deleterious effect on the fixed income markets. We believe that such an application of the rule is overbroad and unnecessary and will increase costs, decrease liquidity, and reverse the gains in transparency that the fixed income markets have achieved in recent years as the market has become more electronic.

As we describe below, we anticipate that applying Rule 15c2-11 to the fixed income markets will be detrimental to investors. The rule's history demonstrates that fixed income securities should be broadly exempted from the rule. Fixed income investors have access to current information about issuers. The fixed income markets are different from the equity markets due to the variety of types of securities, the large number of fixed income securities, the lack of exchange trading, and the infrequency of trading of particular fixed income securities, among other things. Moreover, the current regulatory regime is sufficient to protect fixed income investors, and it is not necessary to add Rule 15c2-11 on top of that existing regime. There is no demonstrated problem in the fixed income markets that this rule would solve to justify the significant costs that would result from its application to the fixed income markets.

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[8] Exempted securities other than government securities, commercial paper, bankers' acceptances and commercial bills also appear to be outside the scope of Rule 15c2-11, as they are excluded by Section 15(c)(2)(A) of the Exchange Act. Government securities, although exempted securities, as defined in Section 3(a)(12) of the Exchange Act, are covered by Section 15(c)(2)(C) of the Exchange Act. *See* Section III.A. below.

[9] Quotation includes price bids or offers for a security, indications of interest for a security, and indication of wishes to advertise a general interest in a particular security; quotation medium includes an interdealer quotation system (itself a defined term), or any publication or electronic communication network or other device used by broker-dealers to make known to others there interest in transaction in a security, including offers to buy or sell at a stated price or otherwise, or invitations of offers to buy and sell. 17 C.F.R. § 15c2-11(e)(7)-(8).

Accordingly, an exemption for fixed income securities from the application of Rule 15c2-11 is necessary and appropriate in the public interest and is consistent with the protection of investors.

II. Background

A. The Application of Rule 15c2-11 to the Publication of Quotations for Fixed Income Securities Will Be Detrimental to Investors and Is Not in the Public Interest

The application of Rule 15c2-11 to the publication of quotations for fixed income securities will increase the costs and hence deter quotations for those securities. In some cases, publication of quotations may not be possible. The cost of publishing such quotations will be high because of the vast number of fixed income securities, the fact that these securities trade almost exclusively OTC, the significant costs associated with complying with the rule's requirements before publishing a quotation, and the lack of any meaningful exceptions from the rule relevant to fixed income securities (*e.g.*, the average daily trading volume ("ADTV") and piggyback exceptions will be extremely limited because most fixed income securities are infrequently traded and accurate volume data is not available, and the exchange listing exception will be largely unavailable because very few fixed income securities are listed and traded on an exchange). Accordingly, the rule will apply to the publication of quotations for virtually all non-municipal fixed income securities without discrimination, regardless of the nature of the issuer, the amount of available information, or the liquidity of the security.[10]

Recently, the fixed income markets have been evolving to be more electronic. This electronification has led to greater transparency, improved price discovery, and increased efficiency in these markets – a positive development for fixed income markets. The application of Rule 15c2-11 to the publication of quotations in the fixed income markets will create serious headwinds for electronic trading of fixed income securities, and quotations will move to methods where the requirements of Rule 15c2-11 do not apply, *e.g.*, the telephone.[11] A retreat to less transparent and less liquid fixed income markets will increase investors' costs, as dealers will be reluctant to provide liquidity due to the difficulty of reoffering bonds, or will provide liquidity at worse prices due to the increased risk and costs. In addition, retail customers may lose access to quotations for fixed income securities they seek to sell, especially on self-directed platforms.

Further, it is clear that the rule is tailored to the OTC equity markets, where the fraud and manipulation at which the rule is targeted have historically occurred; there is no history of this type of fraud or manipulation in the fixed income markets.

B. The Relevant History of the Rule Demonstrates It Was Aimed to Protect Retail Investors in the OTC Equity Markets

[10] *See supra*, n. 8.

[11] It is estimated that from 2010 to 2021 (year to date), the volume of investment grade corporate bonds traded electronically has increased from 7% to 39%, and the volume of high yield bond traded electronically from 1% to 25%. From 2017 to 2021 (year to date), the volume of U.S. Treasuries traded electronically has increased from 34% to 60%.

Rule 15c2-11 was initially adopted in 1971 and was last substantively amended in 1991, prior to the December 2020 amendments.[12] As the Commission stated in connection with the current amendments, "the amendments are narrowly tailored to further the Commission's ongoing effort to protect retail investors from fraud and manipulation in the OTC market, maintain the integrity of the OTC market, promote a more efficient and effective OTC market, and facilitate capital formation for issuers that make their information current and publicly available."[13] Further, the recent amendments are based on the premise that "[s]ecurities that trade in the OTC market are primarily owned by retail investors."[14] In fact, the Adopting Release for the amendment mentions "retail investors" 45 times. These concerns, 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. In fact, we have not identified any domestic securities enforcement action against a broker-dealer that involved fraud and manipulation in fixed income markets that would be related to the information requirements of Rule 15c2-11. While the recent Rule 15c2-11 amendments have been narrowly tailored to the OTC equity markets, they (and the rule itself) are not tailored to the fixed income markets.

Further, in 1999, the Commission proposed to expressly exclude certain fixed income securities from Rule 15c2-11. While that proposed rule was not adopted, the Commission made certain observations still relevant today. At the time, the Commission stated that "[w]e agree that applying the Rule to…. certain fixed income debt securities is not directly related to microcap fraud concerns."[15] "The fraud and manipulation that we have observed in the microcap securities have not been evident in the fixed income market."[16] Excluded by the Reproposing Release were "exempted securities, non-convertible debt securities, non-participatory preferred stock, and investment grade rated asset backed securities."[17] The rationale for excluding fixed income securities from the rule in 1999 is even more valid today.

The Commission, however, did not address the proposed 1999 exclusions in the most recent rulemaking. With respect to fixed income securities, the sole mention in the proposing release for the recent amendments was question 87 (of 128 questions), which asked if the "publications or submissions of quotations for other securities (*e.g.*, debt securities, non-participatory preferred stock, or investment grade asset-backed securities)…. should also be excepted from the Rule's provisions."[18] We understand that the Commission did not receive any comments in response to this question. This is the only place the word "debt" appears in the proposal, and the issue is not analyzed. Because this rule has never been applied to fixed income, bond market professionals were not aware of the request for comment on the application of the rule to markets, other than equity markets. Further, the Commission included the question

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[12] Adopting Release at 68125.
[13] *Id.* at 68128
[14] *Id.* at 68125.
[15] Reproposing Release at 11128.
[16] *Id.* at 11130.
[17] *Id.* at 11144. The Commission withdrew the proposal on November 1, 2013.
[18] Publication or Submission of Quotations Without Specified Information, 84 Fed. Reg. 58206, 58230 (Oct. 30, 2019).

in a discussion of the underwritten offering exception, which would not necessarily be noticed by the fixed income professionals or dealers that do not engage in underwriting. Further, in the Adopting Release, the Commission did not address the applicability of the rule to fixed income securities, did not conduct any cost-benefit analysis of the question, and relied on data solely relating to OTC equity markets. [19] The Commission, to our knowledge, has not evaluated the costs or benefits that might result from applying Rule 15c2-11 to the fixed income markets. We anticipate that applying the rule to fixed income securities would result in a significant decrease in the publication of quotations for a wide range of such securities. Applying Rule 15c2-11 to the fixed income market without sufficient analysis is neither in the public interest nor consistent with the protection of investors.

C. Fixed Income Investors Have Access to Current Information About Fixed Income Securities

Fixed income investors have access to current information about fixed income securities. Many fixed income issuers conduct offerings that are registered pursuant to Section 5 of the Securities Act and are reporting companies that file current and periodic reports pursuant to the Exchange Act.[20] These reports are publicly available. In addition, certain fixed income issuers also issue equity securities that are listed and traded on national securities exchanges, about which there is substantial public information available by virtue of such listing. Foreign private issuers relying on Rule 12g3-2(b) are also subject to public information availability requirements.[21] These issuers are required to publish information in English on their websites or through a publicly available information delivery system, including information made public pursuant to the laws of the country in which they operate, information they have filed with and has been made public by an exchange, and information which they are required to distribute to their security holders.[22]

Further, non-reporting issuers may sell fixed income securities that are subject to Rule 144A.[23] If the issuer of fixed income securities subject to Rule 144A is not a reporting company under the Exchange Act, security holders and prospective purchasers have the right to obtain certain information from the issuer or the seller prior to the sale.[24] Rule 144A is available for sales only to qualified institutional buyers, which are generally institutions with more than $100 million in assets or assets under management, dealers with at least $10 million in securities, or

[19] *See, e.g.*, Adopting Release at 68185, n. 640 (Describing how the Commission based its economic analysis of information from OTC Markets Group related to the U.S. OTC equity market and stating that the "Commission believes that OTC Markets Group data are reasonably representative of all OTC quoting and trading activity in the U.S." When reading the Adopting Release, it is clear that the Commission considered the "OTC quoting and trading activity" represented by such data to be the relevant subset of overall market activity to which Rule 15c2-11 applies. Notably, this data does not address fixed income securities.).
[20] Foreign governments that offer debt securities under Schedule B are not subject to ongoing reporting requirements.
[21] 17 C.F.R. § 240.12g3-2(b).
[22] 17 C.F.R. § 240.12g3-2(b)(1)(iii).
[23] 17 C.F.R. § 144A.
[24] Foreign governments, eligible to use Schedule B, and issuers exempt from reporting pursuant to Rule 12g3-2(b) are not subject to this ongoing information provision of Rule 144A, but issuers relying on Rule 12g3-2(b) are subject to other requirements to make information publicly available. *See supra*, n. 22 and accompanying text.

dealers acting on a riskless principal basis.[25] Fixed income securities sold under Rule 144A are not sold to the retail investors the rule is aimed at protecting. While this information may not be publicly available if the issuer is not a reporting company, the information is available to any investor qualified to purchase the fixed income securities. *See* Attachment A for the typical language in a Rule 144A reporting covenant.

Securities that are sold to qualified institutional buyers in the United States may also be offered and sold to offshore investors pursuant to Regulation S. The Commission has not required registration under Section 5 of the Securities Act of securities offered and sold offshore pursuant to Regulation S. When the Commission initially adopted Regulation S, it stated:

> The Regulation adopted today is based on a territorial approach to Section 5 of the Securities Act. The registration of securities is intended to protect the U.S. capital markets and investors purchasing in the U.S. market, whether U.S. or foreign nationals. Principles of comity and the reasonable expectations of participants in the global markets justify reliance on laws applicable in jurisdictions outside the United States to define requirements for transactions effected offshore. The territorial approach recognizes the primacy of the laws in which a market is located. As investors choose their markets, they choose the laws and regulations applicable in such markets.[26]

These policy considerations would apply, with equal force, to publication of quotations for fixed income securities offered for sale under Regulation S.

Further, fixed income securities offered and sold pursuant to Regulation D are subject to information requirements. Regulation D specifies general conditions to be met in order to rely upon its safe harbor from Section 5 of the Securities Act, including when information must be furnished.[27] Securities sold pursuant to Regulation D would generally be considered restricted securities.[28] Resales of restricted securities is permitted only with registration or pursuant to an exemption from registration, for example, pursuant to Rule 144 or the so-called 4(a)(1 ½) exemption. Private resales of restricted securities would be subject to the standards set forth in *SEC v. Ralston Purina Co*., 346 U.S. 119 (1953), which include that offerees and purchasers have access to the type of information necessary to make an informed investment decision.

ABS should be exempt from Rule 15c2-11 because: (a) the informational needs of ABS investors are met through both the existing disclosure framework described above and the additional informational reporting specific to ABS, (b) the informational requirements of the rule are not particularly relevant for ABS investors, and (c) ABS is not subject to the type of market manipulation concerns expressed by the Commission. ABS transactions can be offered on a public or private basis, or simultaneously with tranches in each category (where the privately offered bonds can be offered under Rule 144A, Regulation D and/or Regulation S). ABS-

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[25] 17 C.F.R. § 144A(d)(4)(i).
[26] Offshore Offers and Sales, Release No. 33-6863 (Apr. 24. 1990).
[27] 17 C.F.R. § 502(b).
[28] *See* 17 C.F.R. § 502(d); 17 C.F.R. § 144(a)(3)(ii) ("the term restricted securities means…[s]ecurities acquired from the issuer that are subject to the resale limitations of § 502(d) under Regulation D….").

specific information is provided to investors through both regulatory filings (such as Form 10-D or pursuant to Rule 15Ga-1) and through a third party, typically a trustee, with a duty to the ABS investors that is contractually required to provide periodic information, usually on a monthly basis, about the asset pool to investors. ABS performance is dependent upon the performance of the asset pool, rather than the performance of a corporate issuer. Consequently, information about the asset pool is material to investors; however, because the issuer of ABS is typically a pass-through trust or limited special purpose entity, the focus on issuer information under the rule is not suitable for ABS. Because ABS is typically priced relative to industry benchmarks and in comparison to other ABS with similar ratings, assets, and maturities, it would be extremely difficult to manipulate the price of an ABS without also manipulating the prices of all other similar ABS, and in the case of ABS with multiple tranches, the prices of the other tranches in the transaction. Moreover, the ABS market is primarily comprised of institutional investors, who have the means to independently assess a specific issuance as well as the relative market for similar ABS.[29]

These existing disclosure regimes are heavily relied upon by issuers and fixed income investors, and there is no indication that the additional requirements of the rule are necessary in this context. Given these various disclosure regimes and related policy considerations, it is consistent with the protection of investors to exempt fixed income securities from Rule 15c2-11.

D. The Fixed Income Markets Are Different From the Equity Markets; We Anticipate Significant Costs From the Application of Rule 15c2-11 With No Benefit

1. The Large Variety of Fixed Income Products Complicates Application of the Rule

The fixed income markets are quite varied, with many different types of instruments and many different types of issuers. The fixed income markets include government securities, a broad category that includes securities issued by the U.S. Treasury, by agencies whose obligations are guaranteed by the full faith and credit of the United States and by government sponsored enterprises ("GSEs") (including mortgage-backed securities issued or guaranteed by GSEs). The fixed income market also includes ABS that are privately issued, typically by trusts or some other form of special purpose vehicle, securities issued by foreign sovereigns, and securities issued by corporations. Fixed income issuers include companies that are subject to the mandatory reporting regimes of the federal securities laws, including Sections 13 or 15(d) of the Exchange Act, and issuers that are not so subject; and fixed income securities include securities offered and sold privately in transactions exempt from Section 5 of the Securities Act and securities that are offered and sold publicly pursuant to registration statements filed with the Commission pursuant to Section 5 of the Securities Act. The permutations are numerous and

[29] The Commission acknowledged the primarily institutional market for ABS in the initial adopting release for Regulation AB. Asset-Backed Securities, 70 Fed. Reg. 1505, 1511 (Jan. 7, 2005) ("The predominant purchasers of asset-backed securities today are institutional investors, including financial institutions, pension funds, insurance companies, mutual funds and money managers.").

wide-ranging; the effects of applying Rule 15c2-11 to each of these types of securities vary and have not been analyzed by the Commission.

2. There Are Many Fixed Income Securities and Few Meaningful Exceptions

Another key difference between the fixed income markets and the equity markets is the sheer number of instruments. An issuer may sell multiple fixed income instruments with different coupons, different maturities, and different call features. A single ABS offering may be comprised of many tranches with different characteristics and be based on different cashflows. Fixed income securities may trade frequently for a short period of time after issuance, but trade only infrequently, "by appointment" after that. The large number of fixed income securities significantly complicates compliance because the requirements of the rule will trigger much more frequently than in the equity markets (*i.e.*, each time a broker-dealer publishes a quotation for a unique fixed income security).[30] The systems and procedures that broker-dealers would have to build to comply with the information review requirements of Rule 15c2-11 with respect to this large number of securities is likely to increase transaction costs and deter the publication of quotations.

Another significant difference between equity markets and fixed income markets is that a vast majority of equity securities that are most likely to trade are listed and traded on a national securities exchange, whereas very few fixed income securities are listed or traded on exchanges. The OTC equity market is a relatively small segment of the overall equity market. The fixed income market, by contrast, is almost exclusively an OTC market. This distinction is critical because Rule 15c2-11 contains a broad exception for the publication of quotations for securities that are listed and traded on a national securities exchange, excepting thousands of equities (both stocks and options) from the scope of the rule.[31] This exception, however, is generally not relevant for fixed income securities, as very few such securities are listed and traded on exchanges. Absence of an available exception for fixed income securities leads to absurd results. For example, as written, the rule would apply to the publication of quotations for highly liquid U.S. government securities, such as the on-the-run 10-year U.S. Treasury note, but not to quotations for volatile equity securities, such as "meme" stocks; the rule would apply to the publication of quotations for bonds issued by Ford Motor Company, but not to the publication of quotations for stock issued by Ford Motor Company. We are very concerned that applying Rule 15c2-11 to fixed income securities would deter dealers from publishing quotations promptly (if at all) for fixed income securities, including those issued by large, investment-grade issuers. We do not believe that the Commission intended these results.

In addition, due to the large number of fixed income securities, many trade infrequently, making other exceptions scarcer for bonds than for stocks. For example, the rule contains a "piggyback" exception that is conditioned on, among other things, no more than four consecutive

[30] A search on Bloomberg indicates approximately 2.5 million fixed income securities are currently outstanding.
[31] 17 C.F.R. § 240.15c2-11(f)(1) ("Except as provided in paragraph (d)(2) of this section, the provisions of this section shall not apply to: (1) The publication or submission of a quotation for a security that is admitted to trading on a national securities exchange and that is traded on such an exchange on the same day as, or on the business day next preceding, the day the quotation is published or submitted.").

days without quotations.[32] Because the vast majority of bonds trade infrequently, this consecutive day condition is relatively less likely be to be met.[33] Further, the application of the piggyback exception is very difficult to monitor and efficiently apply, as it would effectively require a broker-dealer to monitor for every potential source of a publication of a quotation – there could be multiple potential sources and not all broker-dealers may have prompt access to them, if at all.

Similarly, Rule 15c2-11 contains an exception for actively traded securities if the ADTV is at least $100,000 during the 60 calendar days preceding the publication of the quotation and the issuer meets certain asset and shareholder equity requirements.[34] Again, because many fixed income securities trade infrequently, this exception may be of little value, even if it could be monitored and complied with, which is not clear to us. Moreover, the Trade Reporting and Compliance Engine ("TRACE") does not disseminate full volume information for trades in real time, and for certain asset classes does not disseminate any information in real time.[35] Accordingly, for some asset classes, rough estimates of trading volumes may be able to be generated, but for others, there is no information available.

In addition, many fixed income platforms that are alternative trading systems ("ATSs") display participant quotations anonymously, using the market participant identifier of the ATSs, and, therefore, are not interdealer quotation systems, as the definition of interdealer quotation system requires that the system disseminates quotations of "identified brokers or dealers."[36] Thus, in the context of these fixed income ATSs, the exception that permits a broker-dealer to rely on a public availability determination by a qualified interdealer quotation system appears to be unavailable. Other fixed income platforms may not be ATSs, or may not be registered as dealers, also making them ineligible to be qualified interdealer quotation systems and making the exception unavailable.[37] The absence of an exception would require each dealer participant separately to comply with the requirements of the rule.[38]

Each time a broker-dealer publishes a quotation for a unique fixed income security, it will need to determine whether an exception may exist. For example, the broker-dealer will need to figure out whether another dealer has been publishing quotations in a manner that could make available the piggyback exception by reviewing quotation activity across multiple platforms or if

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[32] 17 C.F.R. § 240.15c2-11(f)(3).
[33] For example, four consecutive days of quoting makes no sense in the context of the vast number of corporate bonds that do not trade each day. Only 17% of the over 43,000 unique U.S. dollar-denominated investment-grade bonds were traded on any given day in 2020.
[34] 17 C.F.R. § 240.15c2-11(f)(5).
[35] TRACE is the fixed income trade reporting system administered by the Financial Industry Regulatory Authority ("FINRA").
[36] 17 C.F.R. § 240.15c2-11(e)(3), (6).
[37] "[T]he fixed income electronic trading platforms that are regulated as ATSs were those that had live matching trading protocols that brought together the orders of multiple buyers and sellers…. Importantly, request-for-quote (RFQ) platforms, which execute the large majority of electronically-traded corporate bond volumes, generally are excluded from Regulation ATS based on the characteristics of the RFQ trading protocol." Recommendation Regarding Defining 'Electronic Trading' for Regulatory Purposes (Oct. 5, 2020).
[38] The Commission stated that one qualified interdealer quotation system would be subject to the rule. Adopting Release at 68174, n. 565 and accompanying text.

the security was traded frequently enough in the last 60 days such that the ADTV exception is available. If neither these nor any other exception is available, before publishing a quotation, the broker-dealer would need to collect materials, record the materials in its books and records, verify that the materials are current and publicly available, and determine that it has a reasonable basis for believing that the information in such materials is accurate in all material respects and that the source of the materials is reliable. In some instances, the information, while available to investors and prospective investors, may not be publicly available, preventing quotations completely.[39] Further, even if an exception is available on one day, it may not be available the next, so a broker-dealer may need to determine the availability of exceptions repeatedly each day with respect to each fixed income security quoted.

The application of the rule to fixed income securities is expected to increase the cost of quoting by broker-dealers, decreasing transparency and liquidity. Decreased transparency and liquidity will result in wider bid-offer spreads, wider spreads to benchmarks, increased costs of issuing debt, increased costs of price discovery, and less efficient markets. The ongoing electronification of the fixed income markets will be adversely impacted. These outcomes are not in the public interest, do not protect investors, and would instead be detrimental to the public interest and investors. Accordingly, an exemption from Rule 15c2-11 for fixed income securities is warranted.[40]

E. Fixed Income Investors Are Fully Protected by Existing Regulations

Fixed income investors are also protected by best execution requirements[41] and FINRA markup rules.[42] Retail fixed income investors to whom recommendations are made are further protected by Regulation Best Interest, which requires a broker-dealer, when making a recommendation, only to recommend financial products to their customers that are in their customers' best interests and to clearly identify any potential conflicts of interest and financial incentives the broker-dealer may have.[43] Such investors are also afforded the protections of FINRA Rule 2232, which requires disclosure of markups to retail customers on confirmations. These are a carefully tailored, interrelated set of requirements that are effective in ensuring that fixed income investors have the information necessary to make informed investment decisions and are otherwise protected from potential harm. We have seen no evidence in the fixed income markets of the type of issues that exist in the OTC equity markets that led to the Commission's decision to amend Rule 15c2-11. The existing regulatory scheme related to fixed income

[39] Information may be available to investors or prospective investors privately, but not publicly, for example, if the fixed income security is issued by a non-reporting company and offered pursuant to Rule 144A or the security is offered to investors that may receive information subject to a non-disclosure agreement due to the sensitivity of the information relevant to an investment decision.

[40] Rule 15c2-11 also contains an unsolicited customer order exception. The utility of this exception is unclear in the fixed income markets, which tend to involve more principal (or riskless principal) trading than trading on an agency basis. In its cost-benefit analysis of this exception, the Commission referenced costs related to Regulation SHO and FINRA Rule 6432. Regulation SHO and FINRA Rule 6432 both apply only to equity securities, not to fixed income securities, so they are not appropriate reference points for the costs related to compliance with this exception. *See* Adopting Release at 68179, n. 602 and 603 and accompanying text.

[41] See FINRA Rule 5310; FINRA Regulatory Notice 15-46 (Nov. 2015).

[42] See FINRA Rule 2121.02.

[43] Regulation Best Interest, 17 C.F.R. § 240.15l-1.

securities offer the requisite protection to investors without the added measures in Rule 15c2-11, given the nature of the fixed income markets and the limited risks of fraud and manipulation as compared to the OTC equity markets.

Further, the disclosure regime for fixed income securities is a highly calibrated series of requirements and exceptions under the Securities Act and the Exchange Act. That regime reflects a series of policy decisions made by Congress and the Commission over many years about the types of disclosures required for different types of securities, including fixed income securities. The application of Rule 15c2-11 on top of this existing disclosure regime, where the costs may be high and the benefits may be low, such costs and benefits have not been analyzed by the Commission, and the harms at which Rule 15c2-11 is addressed do not appear to exist, is unwarranted.

Fixed income markets drive real-world economic activity and credit availability. For example, the vast majority of U.S. mortgage lending is funded by fixed income securities, as are significant portions of auto lending, credit cards and other consumer products. Fixed income markets are an important source of capital for thousands of companies across the United States and the globe. To the extent that liquidity and activity in fixed income markets is harmed, 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. Given the harms that the rule would cause to the fixed income markets, its application to those markets is unwarranted.

F. <u>No Problem Exists in the Fixed Income Markets that Necessitates Application of the Rule</u>

There is no demonstrated reason to apply Rule 15c2-11 to fixed income securities. As noted above, the fixed income markets, unlike the OTC equity markets, are primarily institutional markets.[44] The Commission has put forth no evidence of fraud or manipulation in the fixed income market that would be addressed by the application of the rule to that market, and we have identified no such activities. If the Commission wants to apply Rule 15c2-11 to the fixed income markets, it will need to tailor its approach to identify those areas of the fixed income markets where fraud or manipulation are risks and target the rule accordingly. No such tailoring has been undertaken, and the rule, as written, would apply to quotations to all types of investors across the entire fixed income market, other than to quotations for municipal securities, without discrimination.[45] The Adopting Release does not provide any guidance on the application of the rule to the fixed income markets. Accordingly, the application of Rule 15c2-11 to the fixed income markets has definite costs, but no demonstrable benefits.[46] The rule may

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[44] Hendrik Bessembinder, Chester Spatt, and Kumar Venkataraman, *A Survey of the Microstructure of Fixed-Income Markets*, 55 J. OF FIN. AND QUANTITATIVE ANALYSIS 1, pg. 6-7 (Feb. 2020), *available at* https://www.sec.gov/spotlight/fixed-income-advisory-committee/survey-of-microstructure-of-fixed-income-market.pdf (Indicating that households make up only a small percentage of ownership for the fixed income securities surveyed outside of municipal securities).

[45] *See supra*, n. 8.

[46] The Commission staff has expressed concerns with the sale of foreign-listed exchange-traded notes to retail investors in the United States. A tailored approach could exclude these types of securities from any exemptive order.

be properly tailored to the retail-focused OTC equity markets, but it misses the mark when applied to fixed income securities.

G. Examples of Situations in Which the Application of the Rule to the Publication of Quotations for Fixed Income Securities Will Have a Negative Effect on Investors

The following examples demonstrate how the rule may harm fixed income markets.

A customer may approach a dealer to sell a bond that has not traded in quite some time. If the dealer buys the bond, providing the customer liquidity, the dealer may not be able to re-offer the bond without complying with the requirements of the rule, dissuading the dealer from providing a bid, or the dealer may lower the bid to incorporate the additional risks and costs. If dealers are dissuaded from bidding, the overall quality of information in markets will decrease, and investors will experience frustration in trying to sell fixed income securities efficiently. We would then expect investors to require higher yields to offset these risks, damaging issuers. As this hypothetical example illustrates, this outcome is negative for market participants, is not in the public interest, and is inconsistent with the protection of investors.

By way of another example, many quotations (or requests for quotations) for fixed income securities may be made available on platforms, such as ATSs. A platform may support broker-dealer quotations for tens of thousands of unique fixed income securities. Participants may seek to publish quotations for any bond at any time. It is not possible for a platform to collect the information and conduct the analysis on each bond each time, which we anticipate would reduce the number of quotations available on the platforms for a broad range of fixed income securities, further reducing transparency and increasing the cost of price discovery. Further, no reference data service currently provides a "Rule 15c2-11 compliant flag" to market participants; although, it is not apparent that the rule would permit such reliance in any event.[47] Market participants are concerned that applying Rule 15c2-11 to electronic platforms will reduce quotation activity on those platforms, decrease transparency, increase costs and interfere with the increasing electronification of the fixed income markets.

Further, applying the rule may have a negative impact on retail investors' ability to access quotations, including, for example, in situations where a retail investor seeks to sell a fixed income security.

III. Exemptive Relief Sought

Based on the above, we respectfully request that, pursuant to Rule 15c2-11(g), the Commission issue an exemptive order excluding quotations published for fixed income securities from the scope of Rule 15c2-11. We request that any security that is a debt security and any non-convertible preferred stock, collectively referred to herein as "fixed income securities" be included within the scope of the exemption. Currently, it is already clear that the application of Rule 15c2-11 to large portions, if not all, of the fixed income market would be unnecessary,

[47] *See* Adopting Release at 68132 ("the Commission does not believe that it would be appropriate to further expand the scope of entities that may comply with the Rule's information review requirement….").

inefficient, and ineffective due to the nature of the securities, the method of offering the securities, the market for the securities, the disclosure regime applicable to the securities, or the nature of the transaction involving the securities. In addition, investors in the fixed income markets are protected by the existing disclosure regimes and other rules related to those markets. Accordingly, the requested exemptions are necessary and appropriate in the public interest, and consistent with the protection of investors.

While we strongly believe that an exemptive order for all fixed income securities is necessary, appropriate, and in the public interest, if the Commission is unwilling to exempt all fixed income securities, we respectfully request that the Commission issue an order: (1) exempting from Rule 15c2-11 the publication of quotations in the following circumstances, and (2) providing dealers with additional time to comply with the amended rule.

A. Exemption for Government Securities

Rule 15c2-11's history demonstrates that government securities should be exempted from the rule. In 1976, the Commission exempted municipal securities from Rule 15c2-11.[48] At that time, the Commission stated:

> Prior to the Securities Acts Amendments of 1975 ("1975 Amendments"), municipal securities were 'exempted securities' under the Act, and section 15(c)(2) of the Act, which by its terms does not apply to 'exempted securities,' and rules promulgated thereunder were inapplicable to brokers and dealers effecting transactions in municipal securities. As a result of changes in the Act effected by the 1975 Amendments… [Rule 15c2-11] would have become applicable to transactions in municipal securities by brokers and dealers. To preserve the status quo pending careful examination of [the rule], the Commission announced the adoption of temporary Rule 23a-1(T) in release No. 11876.[49] (footnotes omitted).

The Commission then adopted a complete exemption from Rule 15c2-11 for the publication of quotations in municipal securities. The Commission stated:

> Generally, the type of information required by the rule is that which would be disclosed in a registration statement filed under the Securities Act of 1933 or in the periodic reports filed under the Securities Exchange Act. Since municipal securities and their issuers are currently exempt from federal registration and reporting requirements, the Senate Committee pointed out . . . that 'Rule 15c2-11 type of information is… generally not available for municipal securities and their issuers.' The Committee then stated that applying Rule 15c2-11 to municipal securities would 'preclude brokers and dealers from submitting quotations on most issues of municipal securities,' a development which 'would have very serious adverse consequences.' The Committee concluded by stating that '[i]t

[48] Exchange Act Rel. No. 34-12468, 41 Fed. Reg. 22820 (June 7, 1976).
[49] *Id.* at 22821.

> expects, therefore, that immediately upon enactment of S. 249, the Commission will exempt municipal securities from Rule 15c2-11.' Accordingly, the Commission has amended Rule 15c2-11 to exempt quotations for municipal securities for the time being.[50] (footnotes omitted).

The exemption for municipal securities has remained in Rule 15c2-11 through the present. The rationale that supported the exemption for municipal securities supports an exemption for government securities.

Rule 15c2-11 was initially implemented in 1971 pursuant to Sections 15(c)(2), 17(a) and 23(a) of the Exchange Act.[51] Section 15(c)(2)(A) prohibits broker-dealers from fraudulently inducing purchases or sales of securities. By its terms, Section 15(c)(2)(A) does not apply to an exempted security or to commercial paper, bankers' acceptances, or commercial bills. The definition of "exempted security" currently includes government securities and municipal securities.[52] Those two classes of securities would not have been covered by Section 15(c)(2) or Rule 15c2-11, except for amendments in 1975 to add what is now Section 15(c)(2)(B) to the Exchange Act and amendments in 1993 to add Section 15(c)(2)(C) to the Exchange Act, which applied Section 15(c)(2) to municipal securities and government securities, respectively.[53] We have identified no discussion of the application of Rule 15c2-11 to government securities as a result of the Government Securities Act Amendments of 1993.

As noted above, the Commission exempted municipal securities from Rule 15c2-11 in 1975. The Commission should take the same step now with respect to government securities for the same reason it took that step in 1975 with respect to municipal securities. The arguments for exempting municipal securities from Rule 15c2-11 apply equally to government securities: government securities are exempt from the registration requirements of the Securities Act and prohibiting broker-dealers from publishing quotations in government securities would be highly disruptive and have very serious adverse consequences. Moreover, because Section 15(c)(2) of the Exchange Act has not been amended to include any other exempted securities or to include commercial paper, bankers' acceptances, or commercial bills, these fixed income products are

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[50] *Id.* at 22822.
[51] Initiation or Resumption of Quotations by a Broker or Dealer Who Lacks Certain Information, 36 Fed. Reg. 18641 (Sept. 18, 1971). The Adopting Release provides as statutory authority Sections 3, 10(b), 15(c), 15(h), 17(a), 23(a), and 36 of the Exchange Act. Adopting Release at 68203.
[52] 15 U.S.C. § 78c(a)(12)(A)(i)-(ii) ("The term 'exempted security'…includes (i) government securities, as defined in paragraph (42) of this subsection: (ii) municipal securities, as defined in paragraph 29 of this subsection.").
[53] Government Securities Act Amendments of 1993; Securities Acts Amendments of 1975. Section 15(c)(2)(E) of the Exchange Act also requires the Commission to consult with the Secretary of the Treasury and each appropriate regulatory agency prior to adopting any rule or regulation under Section 15(c)(2)(C). Section 3(a)(12)(B)(i) of the Exchange Act states that government securities are not exempted securities for purpose of Section 17A of the Exchange Act and Section 3(a)(12)(B)(ii) states that municipal securities are not exempted securities for purposes of both 15(c) and 17A of the Exchange; presumably, then government securities remain exempted securities for purposes of Section 15(c) of the Exchange Act. Accordingly, the application of Rule 15c2-11 to government securities would be accomplished through Section 15(c)(2)(C) of the Exchange Act, which would have required the Commission to consult with the Secretary of the Treasury and each appropriate regulatory agency. We have not seen evidence of any such consultation with respect to the application of Rule 15c2-11 to government securities and so it is not clear that Rule 15c2-11 currently applies to government securities.

not subject to Rule 15c2-11.[54] For purposes of Rule 15c2-11, government securities should be treated like municipal securities and other exempted securities and should not be subject to Rule 15c2-11. Accordingly, we request an exemptive order from Rule 15c2-11 for government securities.

B. Exemption for Securities Addressed by the Federal Securities Law Disclosure Regime

As discussed in Section II.C. above, many fixed income securities are addressed by the existing disclosure regime of the federal securities laws. We request that the publication of quotations for any security issued or traded under any such disclosure regime be exempted from Rule 15c2-11. This exemption would exclude from Rule 15c2-11 quotations in the following types of securities: (1) fixed income securities of an issuer that is a reporting company under the federal securities laws;[55] (2) fixed income securities registered for sale under Section 5 of the Securities Act; (3) fixed income securities of an issuer offered and sold pursuant to Rule 144A under the Securities Act; (4) fixed income securities of an issuer offered and sold pursuant to Regulation D under the Securities Act; (5) fixed income securities of an issuer that has issued any other security that is listed on a national securities exchange; and (6) securities sold offshore pursuant to Regulation S. ABS have their own disclosure requirements and may be offered and sold under various rules. These disclosure regimes have proven effective for fixed income securities, and there is no demonstrated reason to add the requirements of Rule 15c2-11 to the existing disclosure regime for these securities

C. Exemption for Quotations Published to Institutional Investors and Broker-Dealers

Given Rule 15c2-11's clear focus on protecting retail investors, as evidenced by the rulemaking record discussed in Section II.B. above and in SEC statements, quotations published to institutional investors should be exempted from Rule 15c2-11, regardless of the underlying fixed income security.[56] For purposes of this exemption, we would define institutional investor to be consistent with FINRA Rule 4512(c).[57] We would define broker-dealer by reference to the definitions in Sections 3(a)(4) and 3(a)(5) of the Exchange Act. This exemption for the publication of quotations to institutional investors is necessary to maintain the status quo with respect to unregistered, non-exempted securities for which quotations are published in the institutional or interdealer markets. Institutional investors and broker-dealers can adequately

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[54] In 1998 and 1999, the Commission proposed to exempt exempted securities from Rule 15c2-11, but those proposals were never adopted and would appear to have been unnecessary for exempted securities, except government securities, which were brought within the ambit of Section 15(c)(2) in 1993. *See* Publication or Submission of Quotations Without Specified Information, 63 Fed. Reg. 9661 (Feb. 25, 1998); *see also* Publication or Submission of Quotations Without Specified Information, 64 Fed. Reg. 11124 (Mar. 8, 1999) ("Reproposing Release").

[55] Included within this request are fixed income securities issued in reliance on Rule 12g3-2(b).

[56] See https://www.sec.gov/news/press-release/2020-212.

[57] FINRA Rule 4512(c) defines an "institutional account" as "(1) a bank, savings and loan association, insurance company or registered investment company; (2) an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state securities commission (or any agency or office performing like functions); or (3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million."

assess the merits of these types of securities. The Commission has previously understood that these types of investors do not require the same protections as retail investors under the federal securities laws.[58] An important example of such securities is foreign sovereign debt, initially offered and sold offshore pursuant to Regulation S, that, after the completion of any distribution compliance period, may be offered and sold to investors in the United States pursuant to the exemptions provided by Section 4(a)(3) or 4(a)(4) of the Securities Act from Section 5 of the Securities Act. Moreover, an exemption to publish quotations to institutional investors and broker-dealers would permit a platform to build a compliance program around the status of the participant, rather than based on the status of hundreds of thousands of securities for which dealers may publish quotations.

D. Exemptions for Securities Issued by Banks Including Brokered CDs That Are Securities

Securities issued by banks are subject to an exemption in Section 3(a)(2) of the Securities Act from the registration requirements of Section 5 of the Securities Act. Banks that are subject to regulation by a member of the Federal Financial Institutions Examination Council ("FFIEC")[59] are required to make regular, detailed disclosures about their financial condition, among other things. Every national bank, state member bank, and insured nonmember bank is required by its primary federal regulator to file a Reports of Condition and Income ("Call Report") as of the close of business on the last day of each calendar quarter.[60] Call Reports and Uniform Bank Performance Reports ("UBPRs")[61] for most FDIC-insured institutions are made available to the public on the FFIEC Central Data Repository's Public Data Distribution website.[62] Call Reports provide current information about bank issuers that has been tailored by banking regulators for the institutions they regulate. The Commission has stated that

[58] *See* Resale of Restricted Securities; Changes To Method of Determining Holding Period of Restricted Securities Under Rules 144 and 145, 53 Fed. Reg. 44016-01, 1988 WL 271921 (Nov. 1, 1988) (when proposing the adoption of Rule 144A and the definition of "qualified institutional buyer," the Commission noted that it selected investors that "have extensive experience in the private resale market for restricted securities" and who are "conclusively assumed to be sophisticated and in little need of the protection afforded by the Securities Act's registration provisions."); *see also* Accredited Investor Definition, 85 Fed. Reg. 64234, 64235 (Oct. 9, 2020) (*quoting* Regulation D Revisions; Exemption for Certain Employee Benefit Plans, 52 Fed. Reg. 3015 (Jan. 30, 1987)) ("Historically, the Commission has stated that the accredited investor definition is 'intended to encompass those persons whose financial sophistication and ability to sustain the risk of loss of investment or fend for themselves render the protections of the Securities Act's registration process unnecessary.'").

[59] The FFIEC is an interagency body comprising the Federal Reserve Board of Governors, the Federal Deposit Insurance Corporation ("FDIC"), the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Consumer Financial Protection Bureau.

[60] *See, e.g.*, 12 U.S.C. § 324 (state member banks); 12 U.S.C. §1817 (state nonmember banks); 12 U.S.C. §161 (national banks); 12 U.S.C. §1464 (savings associations); *see also* FFIEC Forms 031, 041 and 051.

[61] The UBPR is a multi-page financial analysis of a commercial bank or savings bank that files the Consolidated Reports of Condition and Income (Call Report). The UBPR is organized by subject, *e.g.*, earnings, balance sheet, asset quality, liquidity, and capital. Each report contains data for five separate periods of time (quarters) that tie to the quarterly Call Report filed by banks. The UBPR compares the performance of a given bank both against itself over time and against the performance of a group of peer banks. Peer group average and percentile ranking data provide benchmarks to measure bank performance. FFIEC, *Frequently Asked Questions*, https://cdr.ffiec.gov/public/HelpFileContainers/FAQ.aspx#top.

[62] FFIEC Central Data Repository's Public Data Distribution, https://cdr.ffiec.gov/public/ManageFacsimiles.aspx.

"information that is posted on the website of a federal banking regulator, such as https://cdr.ffiec.gov/ and https://www.ffiec.gov/, generally includes the following financial information for companies that is specified in paragraph (b)(5)(i)(L) of the amended rule: The issuer's balance sheet, income statements, and retained earnings statement."[63]

Banks also issue CDs. While generally CDs are not securities, and would not be subject to Rule 15c2-11, there are limited circumstances under which brokered CDs may be securities.[64] CDs are insured by the FDIC up to certain amounts. CDs that are securities are also exempted from the requirements of Section 5 of the Securities Act under Section 3(a)(2) of the Securities Act. Regulations require that institutions need to be well-capitalized to accept deposits without restriction. A bank deemed adequately capitalized may only accept deposits if it has received a waiver by the FDIC, and undercapitalized banks may not accept deposits. This standard for insured depository institutions to accept deposits is aimed at reducing the number of liquidity failures of said institutions.

The application of Rule 15c2-11 to bank-issued fixed income securities and CDs is unnecessary, as banks are regulated, information is available, and in the case of CDs, deposit insurance is available up to a certain amount. Applying Rule 15c2-11 to this market would inhibit quotations and would be highly disruptive. Accordingly, we request an exemption for the publication of quotations for fixed income securities and CDs issued by banks.

E. Extension of Time to Comply for Fixed Income Securities Not Included Within an Exemption

Further, to the extent the Commission does not issue an order exempting all fixed income securities from Rule 15c2-11, we request an extension of time as soon as reasonably practicable to comply with the rule for any fixed income security not covered by an exemptive order, as the infrastructure necessary to comply with the amendments in the fixed income markets does not exist and will require time to implement. Given the vast number of fixed income securities, the very limited utility of the exchange-listed exception, the piggyback exception, and the ADTV exception, the rule will apply to a vast number of fixed income securities. Further, there is no automated way for dealers to comply; all compliance would be manual. We believe that applying the rule to fixed income securities will be highly disruptive and will reduce quotation activity, increasing costs unnecessarily. We, therefore, request an extension of time to permit dealers to establish an automated infrastructure for compliance with the requirements of the rule.

SIFMA and BDA are willing and open to continued discussions with the Commission about the application of Rule 15c2-11 to the fixed income market. Should you have any questions, please contact the undersigned.

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[63] Adopting Release at 68143, n. 249.
[64] *See, e.g.*, NASD Notice Members 02-69 (Oct. 2002) (circumstances that may make a brokered CD a security).

Regards,

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cc: The Honorable Gary Gensler, Chair, SEC
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The Honorable Elad L. Roisman, Commissioner, SEC
The Honorable Allison Herren Lee, Commissioner, SEC
The Honorable Caroline A. Crenshaw, Commissioner, SEC

Robert Cook, President and CEO, FINRA
Stephanie Dumont, Executive Vice President, Market Regulation and Transparency Services, FINRA

Attachment A

Sample Rule 144A Reporting Covenant

Reports and Other Information

The Indenture provides that so long as any Notes are outstanding, the Company will furnish to the Holders (with a copy to the Trustee):

> (1) (a) all annual and quarterly financial statements substantially in forms that would be required to be contained in a filing with the SEC on Forms 10-K and 10-Q of the Company, if the Company were required to file such forms, plus a "Management's Discussion and Analysis of Financial Condition and Results of Operations," (b) with respect to the annual and quarterly information, a presentation of EBITDA and Adjusted EBITDA of the Company substantially consistent with the presentation thereof in the Existing Notes Offering Memorandum and derived from such financial information, and (c) with respect to the annual financial statements only, a report on the annual financial statements by the Company's independent registered public accounting firm; and
>
> (2) promptly after the occurrence of an event required to be therein reported, such other information containing substantially the same information that would be required to be contained in filings with the SEC on Form 8-K under Items 1.01, 1.02, 1.03, 2.01, 2.05, 2.06, 4.01, 4.02, 5.01 and 5.02(b) and (c) (other than with respect to information otherwise required or contemplated by Item 402 of Regulation S-K promulgated by the SEC) as in effect on the Effective Date if the Company were required to file such reports; provided, however, that no such current report will be required to include as an exhibit, or to include a summary of the terms of, any employment or compensatory arrangement agreement, plan or understanding between the Company (or any of its Subsidiaries) and any director, manager or executive officer of the Company (or any of its Subsidiaries);

provided, *however*, that (i) in no event shall such reports be required to comply with Rule 3-10 of Regulation S-X promulgated by the SEC or contain separate financial statements for the Company, the Guarantors or other Subsidiaries the shares of which are pledged to secure the Notes or any Guarantee that would be required under (a) Rule 3-09 of Regulation S-X, (b) Rule 3-10 of Regulation S-X or (c) Rule 3-16 of Regulation S-X, respectively, promulgated by the SEC, (ii) in no event shall such reports be required to comply with Regulation G under the Exchange Act or Item 10(e) of Regulation S-K promulgated by the SEC with respect to any non-GAAP financial measures contained therein, (iii) no such reports referenced under clause (2) above shall be required to be furnished if the Company determines in its good faith judgment that such event is not material to the Holders or the business, assets, operations or financial position of the Company and the Restricted Subsidiaries, taken as a whole, (iv) in no event shall such reports be required to include any information that is not otherwise similar to information included in the Existing Notes Offering Memorandum, other than with respect to reports provided under clause (2) above and (v) in no event shall reports referenced in clause (2) above be required to include as an exhibit copies of any agreements, financial statements or other items that would be required to be filed as exhibits to a current report on Form 8-K except for (x) agreements evidencing material Indebtedness and (y) historical and *pro forma* financial statements to the extent reasonable available and, in any case with respect to *pro forma* financial statements, to include only *pro forma* revenues, Consolidated EBITDA and Capital Expenditures in lieu thereof.

All such annual reports shall be furnished within 120 days after the end of the fiscal year to which they relate, and all such quarterly reports shall be furnished within 60 days after the end of the fiscal quarter to which they relate.

At any time that any of the Company's Subsidiaries are Unrestricted Subsidiaries and if any such Unrestricted Subsidiary or group of Unrestricted Subsidiaries, if taken together as one Subsidiary, would constitute a Significant Subsidiary of the Company, then the quarterly and annual financial information required by the preceding paragraph will include a reasonably detailed presentation, either on the face of the financial statements or in the footnotes thereto, in the "Management's Discussion and Analysis of Financial Condition and Results of Operations" or other comparable section, of the financial condition and results of operations of the Company and Restricted Subsidiaries separate from the financial condition and results of operations of such Unrestricted Subsidiaries of the Company.

The Company will make available such information and such reports (as well as the details regarding the conference call described below) to any Holder and, upon request, to any beneficial owner of the Notes, securities analysts providing analysis of investment in the Notes and market makers, in each case by posting such information on its website, on Intralinks or any comparable password-protected online data system which will require a confidentiality acknowledgment, and will make such information readily available to any Holder, beneficial owners of Notes, any prospective investor in the Notes, any securities analyst (to the extent providing analysis of investment in the Notes) or any market maker in the Notes who agrees to treat such information as confidential or accesses such information on Intralinks or any comparable password-protected online data system which will require a confidentiality acknowledgment; *provided* that the Company shall post such information thereon and make readily available any password or other login information to any such Holder, beneficial owner of Notes, prospective investor, securities analyst or market maker; *provided, further, however,* the Company may deny access to any competitively-sensitive information otherwise to be provided pursuant to this paragraph to any such Holder, prospective investor, security analyst or market maker that is a competitor of the Company and its Subsidiaries to the extent that the Company determines in good faith that the provision of such information to such Person would be competitively harmful to the Company and its Subsidiaries; and *provided, still further,* that such Holders, prospective investors, security analysts or market makers shall agree to (i) treat all such reports (and the information contained therein) and information as confidential, (ii) not use such reports and the information contained therein for any purpose other than their investment or potential investment in the Notes (but shall be authorized to trade the Company's securities) and (iii) not publicly disclose any such reports (and the information contained therein). The Company will hold a quarterly conference call for all Holders and securities analysts (to the extent providing analysis of investment in the Notes) to discuss such financial information (including a customary Q&A session) no later than ten (10) Business Days after distribution of such financial information.

In addition, to the extent not satisfied by the foregoing, the Company shall furnish to prospective investors, upon their request, any information required to be delivered pursuant to Rule

144A(d)(4) under the Securities Act so long as the Notes are not freely transferable under the Securities Act.

The Indenture permits the Company to satisfy its obligations in this "Reports and Other Information" covenant with respect to financial information relating to the Company by furnishing financial information relating to any Parent Entity of the Company instead of the information, which may be unaudited, that explains in reasonable detail the differences between the information Company; provided that to the extent financial information related to such Parent Entity is provided, such information is accompanied by consolidating information, which may be unaudited, that explains in reasonable detail the differences between the information of such Parent Entity, on the one hand, and the information relating to the Company and its Subsidiaries on a stand-alone basis, on the other hand.

The Company will be deemed to have furnished the reports referred to clauses (1) and (2) of the first paragraph of this covenant if the Company or any Parent Entity of the Company has filed reports containing such information with the SEC.

To the extent any information is not provided within the time periods specified in this section "—Reports and Other Information" and such information is subsequently provided, the Company will be deemed to have satisfied its obligations with respect thereto at such time and any Default or Event of Default with respect thereto shall be deemed to have been cured.

Notwithstanding the foregoing, if at any time the Company or any Parent Entity of the Company has made a good faith determination to file a registration statement with the SEC with respect to an initial public offering of such entity's Capital Stock, the Company will not be required to disclose any information or take any actions that, in the good faith view of the Company, would violate applicable securities laws or the SEC's "gun jumping" rules.

Delivery of such reports, information and documents to the Trustee shall be for informational purposes only and the Trustee's receipt of such shall not constitute actual or constructive notice of any information contained therein or determinable from information contained therein, including the Company's compliance with any of its covenants under the Indenture or the Notes (as to which the Trustee shall have no duty to monitor and shall be entitled to rely exclusively on Officer's Certificates). The Trustee shall not be obligated to monitor or confirm, on a continuing basis or otherwise, our compliance with the covenants or with respect to any reports or other documents filed with the SEC or participate in any conference calls.

EXHIBIT 12

BDA Bond Dealers of America

1909 K Street NW, Ste 510
Washington, DC 20006
202.204.7900
www.bdamerica.org

May 5, 2021

Ms. Vanessa Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Ms. Countryman,

Today the Bond Dealers of America ("BDA") requests that the SEC issue exemptive relief from SEC Rule 15c2-11 (17 CFR § 240.15c2-11), "Publication or submission of quotations without specified information" (the "Rule"), as it applies to fixed income securities. We request this relief on behalf of our broker-dealer member firms.[1] This exemptive relief is authorized under Section 36 of the Securities Exchange Act of 1934 (15 U.S.C. Chapter 2B) and paragraph G of the Rule. BDA is the only DC-based group exclusively representing the interests of securities dealers and banks focused on the US fixed income markets.

Background

The Rule governs the action of securities dealers publishing quotations for over-the-counter securities on quotation mediums. The Rule requires dealers, before submitting a quote to a quotation medium, to review certain issuer financial filings, ensure the filings are current and publicly available, and have a reasonable basis to believe the issuer information is materially accurate and that public sources of the information are reliable. Alternatively, dealers can rely on a qualified interdealer quotation medium that has publicly stated that they are conducting the reviews required under the Rule as long as the quotation is within three business days of the medium's public determination. The Rule also imposes requirements on operators of quotation mediums.

Information required to be reviewed before submitting a quotation includes the prospectus or offering circular, the issuer's current annual financial statement and any periodic statements issued thereafter, and a list of specific facts about the issuer and security, including such data as a description of products or services offered by the issuer and name and title of all company insiders, among many others (paragraph (b)(5) of the Rule). The Rule requires dealers to maintain certain information about quotations they submit (paragraph (c) of the Rule) and includes a record keeping requirement. Quotations for municipal securities are exempt from the Rule.

Changes to the Rule adopted by the Commission in October 2020 (86 *Federal Register* 2311) require not only that dealers maintain and review the relevant information but that they also ensure it is publicly available. The SEC's publication of these changes highlighted the Rule for many fixed income dealers. Before last October, there was a widespread view that Rule 15c2-11 did not apply to quotations in fixed income securities. This view was perhaps fostered by supporting FINRA Rule 6432, "Compliance with the Information Requirements of SEA Rule 15c2-11," which applies only to "any equity security, other than a

[1] A complete list of BDA member firms is at www.bdamerica.org/firms/.

Restricted Equity Security, that is not traded on any national securities exchange," not to fixed income securities (paragraph (e) of Rule 6432).

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. So much of the SEC's language around the Rule points to penny stocks. Here are examples from the October 2020 adopting release strongly suggesting that the Commission did not have fixed income in mind when the rule was written. The adopting release states:

- "The Commission remains concerned about the potential that a continuously quoted market facilitated by the piggyback exception could be used to entice investors…" Except perhaps for on-the-run Treasury securities, fixed income securities are not continuously quoted.
- "Securities that are quoted on the OTC market differ from those listed on national securities exchanges. In particular, the average OTC security issuer is smaller, and its securities trade less, on average." Bonds do not trade on exchanges; all bonds in the US are OTC. OTC bond issuers include the United States government and some of the largest companies in the world. And trading volume in fixed income securities is orders of magnitude larger than OTC equities.
- "The OTC market may be attractive to those seeking to engage in fraudulent practices, such as pump-and-dump schemes, due to a lack of publicly available current information about certain issuers of quoted OTC securities." We are aware of no enforcement actions related to pump-and-dump schemes involving fixed income products.
- "Securities that trade on the OTC market are primarily owned by retail investors." The markets for corporate and government debt securities are overwhelmingly institutional.[2]
- In the press release accompanying the adopting release, Commission staff was quoted saying "The amended rule represents another important step in our tireless and proactive efforts to protect retail investors from being victimized by microcap fraud."[3] "Microcap fraud" obviously does not apply to the fixed income markets, which include the US Treasury, federal agencies, and nearly every blue chip company in America.

None of these and similar statements, all justifications for why the Rule is necessary, apply to fixed income. In addition, the Economic Analysis published in the adopting release makes no mention of the effect of the rule on fixed income quotations, related trading activity, the benefits of the Rule to fixed income investors, or compliance costs in the context of fixed income quotations. Apparently the Commission's economists did not consider the application of the Rule to fixed income products despite fixed income accounting for more than $1 trillion per day in trading[4] compared to around $2 billion per day in OTC equity trading.[5]

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[2] Board of Governors of the Federal Reserve, "Financial Accounts of the United States," March 11, 2021, www.federalreserve.gov/releases/z1/20210311/html/default.htm. See tables L.210 and L.213.
[3] Securities and Exchange Commission, "SEC Adopts Amendments to Enhance Retail Investor Protections and Modernize the Rule Governing Quotations for Over-the-Counter Securities," press release, www.sec.gov/news/press-release/2020-212.
[4] SIFMA, "SIFMA Research Quarterly—1Q21," www.sifma.org/wp-content/uploads/2021/01/US-Research-Quarterly-Fixed-Income-Issuance-Trading-2021-04-13-SIFMA.pdf.
[5] OTC Markets Group, "Current Market," www.otcmarkets.com/market-activity/current-market/ALL/active/dollarVolume.

Some segments of the OTC fixed income market are more affected by the Rule than others. Private label mortgage-backed securities (MBS)—MBS not guaranteed by a government agency and issued by a private company—and asset-backed securities would be particularly affected. Private label MBS are issued through trusts, so each issuance transaction is from a different issuer. Each trust is unique. And trusts update disclosure information frequently, perhaps as often as monthly, as the composition of the underlying mortgage pool changes. Moreover, the private label market is almost exclusively institutional. Requiring traders to review pool updates every time they quote a bond is overly burdensome and provides no market or customer benefit.

An existing exception to the Rule may cover certain quotations for fixed income securities. Paragraph (f)(5) of the Rule specifies an exemption for quotations related to certain securities:

- A security with a worldwide average daily trading volume value of at least $100,000 reported during the 60 calendar days immediately before the publication of the quotation of such security; and
- The issuer of such security has at least $50 million in total assets and $10 million in shareholders' equity as reflected in the issuer's publicly available audited balance sheet issued within six months after the end of its most recent fiscal year.

This exemption likely covers a significant portion of, but not all, quotations provided for fixed income trades. The trading volume requirement may be particularly limiting. Even large corporate issuers have individual CUSIPs outstanding that trade infrequently. And some fixed income products may have never traded at all after the first sale to the investor.

It is unlikely that the "piggyback" exemption in the Rule (paragraph (a)(1)(ii) of the Rule), which excuses dealers from their information review requirements if the quotation medium operator specifies that they have conducted that review, would provide much help for fixed income products. The most widely used fixed income trading platforms generally do not support this function since platform users never recognized that the Rule applies to fixed income.

<u>Exemptive relief request</u>

Given that the Rule does not "fit" the fixed income markets, that the reasons for the Rule do not apply to fixed income, and that the SEC's own economic analysis of the 2020 amendments to the Rule ignored effects on the fixed income markets, we request that the Commission provide exemptive relief by specifying that the Commission will not enforce the Rule with respect to fixed income products. Such relief is necessary or appropriate in the public interest and is consistent with the protection of investors.

Exemptive relief is appropriate in the public interest because it would reflect industry practice that has prevailed for decades. Given that many fixed income firms did not recognize until recently that the Rule applies to fixed income trading, we can assuredly assume that many trillions of dollars of bonds have traded in the last four decades without the application of the Rule and without noted problems or material violations. We are aware of no SEC or FINRA enforcement actions related to firms not applying the Rule to quotations for fixed income products. 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. By not mandating the application of the Rule to fixed income since its inception, regulators have effectively blessed current industry practice. Formalizing that approach with exemptive relief would not even change anything in terms of the way dealers quote fixed income trades. Also, many fixed income quotations already are exempted from the Rule based on the paragraph (f) large issuer exemption. If the Commission does not provide exemptive relief, we will be left with the perverse outcome that for issuers with both exchange-traded equities and OTC bonds outstanding, traders would be required to review issuer information when quoting bonds but not when quoting shares.

Exemptive relief is consistent with the protection of investors because no investors have been harmed by not having applied the Rule to fixed income. The fixed income markets are extraordinarily safe. Of the $47 trillion of non-municipal fixed income securities outstanding at the end of 2020, more than 70 percent is issued or guaranteed by the US government.[6] Of the $10.6 trillion of corporate bonds outstanding, more than 80 percent are rated investment grade with little risk of default.[7] The bond market simply is not the high risk, low transparency world of microcap stocks. Moreover, applying the Rule to fixed income would increase compliance costs for dealers, which ultimately would be reflected in higher transaction costs for investors. Finally, adding additional requirements before a firm can provide a quote or execute a trade for a customer could discourage firms from quoting certain securities altogether.

We urge you to provide relief across all fixed income sectors, retail as well as institutional, including government and agency debt and securitized products, corporate bonds, mortgage- and asset-backed securities, money market securities, and all others. It is especially important that the relief applies to retail trading as well as institutional. In terms of dollar trading volume, institutional trades dominate the market. In terms of number of quotations and trades, however, the retail segment is much bigger. On average per day in the first quarter of 2021, for example, there were a total of 6,356 trades of $1 million or larger of investment grade corporate bonds. There were 31,388 trades of $100,000 or less.[8] Assuming the number of quotations roughly reflects of the number of trades, there are approximately five times more retail-size quotations than institutional. The time required for a trader to review issuer information is the same whether quoting 10 bonds or 10 million, and so the compliance burden for retail trades is the same, but multiplied so many more times.

Thank you for your consideration. Please contact me at 202 204 7900 or mdecker@bdamerica.org if you have any questions.

Sincerely,

[6] SIFMA, "Fixed Income Outstanding," www.sifma.org/resources/research/fixed-income-chart/.
[7] *Ibid.*
[8] FINRA, "2021 TRACE Fact Book," www.finra.org/filing-reporting/trace/trace-fact-book.

EXHIBIT 13

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
TRADING AND MARKETS

December 16, 2021

Ms. Racquel Russell
Senior Vice President and
Director of Capital Markets Policy
Office of General Counsel
Financial Industry Regulatory Authority, Inc.
1735 K Street, NW
Washington, DC 20006

Re: Amended Rule 15c2-11 in Relation to Fixed Income Securities

Dear Ms. Russell:

On September 24, 2021, the staff of the Division of Trading and Markets issued a no-action letter stating that the staff would not recommend enforcement action to the Securities and Exchange Commission ("Commission") under the amendments to Rule 15c2-11[1] (the "Amended Rule") under the Securities Exchange Act of 1934 ("Exchange Act") until January 3, 2022, for quotations of fixed income securities published by brokers or dealers in quotation mediums, in order to allow for an orderly and good faith transition into compliance with the Amended Rule.[2]

In response to requests from industry representatives that have indicated, through telephonic meetings with Commission staff, they need additional time beyond January 3, 2022 to complete the operational and systems changes necessary to comply with the Amended Rule for fixed income securities, the staff will not recommend enforcement action to the Commission under the Amended Rule for brokers or dealers that publish or

[1] 17 CFR 240.15c2-11 (the "Rule"). All terms from Rule 15c2-11 that are used in this letter have the same meanings as in the Rule. For example, "current" and "publically available" are defined terms in paragraphs (e)(2) and (e)(5) of Rule 15c2-11.

[2] *See* Letter from Josephine 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) (Temporary Staff No-action Letter Regarding Rule 15c2-11 and Fixed Income Securities) at: https://www.sec.gov/files/rule-15c2-11-fixed-income--securities-092421.pdf.

submit quotations, including continuous quotations,[3] in a quotation medium, for fixed income securities if the broker or dealer has determined that:

- *Phase 1* – the fixed income security or its issuer meets one of the criteria in Appendix A, or that there is current and publicly available financial information (consistent with Rule 15c2-11(b)) about the issuer. Phase 1 will be in place for a one-year period (from January 3, 2022 until, and including, January 3, 2023).

- *Phase 2* – the fixed income security or its issuer meets one of the criteria in Appendix B, or there is current and publicly available financial information (consistent with Rule 15c2-11(b)) about the issuer. Fixed income securities sold pursuant to Rule 144A that do not otherwise meet the criteria in Appendix B would no longer qualify for Phase 2 unless the broker or dealer determines that there is current and publicly available information (consistent with Rule 15c2-11(b)) about the issuer. Phase 2 will be in place for a one-year period (from January 4, 2023 until, and including, January 4, 2024).

- *Phase 3* – the fixed income security qualifies for Phase 2 and: (1) the fixed income security is foreign sovereign debt or a debt security guaranteed by a foreign government; or (2) there is a website link, on the quotation medium on which the security is being quoted, directly to the current and publicly available information about the issuer (consistent with Rule 15c2-11(b)), provided that the broker or dealer has determined at least on an annual basis that the website link and its underlying information is current ("Phase 3"). Phase 3 commences at the expiration of Phase 2 (on or after January 5, 2024).

Rule 15c2-11 governs the publication or submission of quotations for securities[4] in a quotation medium other than on a national securities exchange. Since 1971, Rule 15c2-11 has applied to the publication or submission of quotations for any security (a

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[3] We understand that fixed income securities are often quoted on quotation mediums rather than on interdealer quotation systems. Rule 15c2-11 applies to any broker or dealer that publishes or submits quotations in a quotation medium. "Quotation medium" is defined in Rule 15c2-11(e)(8) as "any device that is used by brokers or dealers to make known to others their interest in any security." Brokers or dealers that publish or submit quotations in a quotation medium that is an "interdealer quotation system" ("IDQS"), defined as a system of general circulation that regularly disseminates quotations of "identified brokers or dealers," may become eligible for the piggybacking exception of Rule 15c2-11(f)(3) (*see* subparagraphs (e)(3) and (e)(8)). The piggyback exception allows brokers or dealers to publish or submit continuous quotations without complying with the information review requirements before publishing or submitting each quotation. The piggyback exception is not available for quotations in a quotation medium that is not an IDQS (i.e., does not identify brokers or dealers) and, thus, continuous quotations are generally not permitted in such quotation mediums. The staff would not recommend enforcement action if brokers or dealers quoted certain fixed income securities without complying with the information review requirements for each such quotation (upon determining eligibility for each Phase in accordance with this letter).

[4] As explained in the Temporary Staff No-action Letter Regarding Rule 15c2-11 and Fixed Income Securities (September 24, 2021), the recent amendments to Rule 15c2-11 did not alter the types of securities covered by the Rule.

defined term that has and continues to include fixed income securities[5]), except "exempted securities"[6] and the Rule has excepted municipal securities since 1976.[7] The Commission also has stated that Rule 15c2-11 applies to fixed income securities.[8]

Following adoption of the amendments on September 16, 2020, certain market participants began requesting additional time to comply with the Rule. The amendments to Rule 15c2-11 are designed to modernize the Rule and to enhance investor protection by requiring that current and publicly available issuer information be accessible to investors. Accordingly, the phase-in approach outlined above should allow for brokers or dealers that publish or submit quotations for fixed income securities in a quotation medium to achieve the goals of Rule 15c2-11.

This Staff position[9] concerns enforcement action only and does not represent a legal conclusion with respect to the applicability of statutory or regulatory provisions of the federal securities laws.[10] Furthermore, this no-action position does not apply to the anti-fraud and anti-manipulation provisions of the Exchange Act, including without

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[5] *See, e.g., Publication or Submission of Quotations Without Specified Information*, Exchange Act Release No. 68124 (Feb. 17, 1998); 63 FR 9661, 9669 (Feb. 25, 1998) (stating that Rule 15c2-11 covers debt securities but recognizing that brokers or dealers may not have focused on this aspect of the Rule).

[6] *See* Section 3(a)(12)(A) of the Exchange Act (definition of "exempted securities"). For example, "any security issued by or any interest or participation in any pooled income fund, collective trust fund, collective investment fund, or similar fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940" is an exempted security under Section 3(a)(12)(A)(v) of the Exchange Act and, as such, Rule 15c2-11 would not be applicable.

[7] *See* Rule 15c2-11(f)(4). *See also Regulation of Municipal Securities Professionals Transactions in Municipal Securities*, Exchange Act Rel. No. 12468 (May 20, 1976); 41 FR 22820, 22821 (June 7, 1976) (Final Rule).

[8] *See, e.g., Publication or Submission of Quotations Without Specified Information*, Exchange Act Release No. 41110 (March 2, 1999), 64 FR 11124 (March 8, 1999) (re-proposing amendments to Rule 15c2-11 amendments proposed in 1998). The Commission, in stating that it agreed that applying Rule 15c2-11 to the securities of larger issuers, more liquid securities, and certain fixed-income debt securities was not directly related to microcap fraud concerns, proposed to exclude debt securities, non-participatory preferred stock, and investment grade asset-backed securities.

In connection with the earlier 1998 proposed amendments to Rule 15c2-11, the Commission stated, "the proposed amendments apply to all securities covered by Rule 15c2-11, not just microcap securities. . . [t]he Commission believes that the scope of the amendments is appropriate to preserve the general integrity of quotations in the over-the-counter market and to foster greater information transparency in a marketplace where issuers often are relatively unknown and their securities are traded infrequently." *See Publication or Submission of Quotations Without Specified Information,* Exchange Act Release No. 39670 (Feb. 17, 1998), 63 FR 9661, 9669 (Feb. 25, 1998).

[9] This letter represents the views of the staff of the Division of Trading and Markets. It is not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved its content. This letter, like all staff statements, has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person.

[10] This letter does not address any FINRA rules applicable to the OTC market.

limitation Sections 9(a) and 10(b), and Rule l0b-5 thereunder. Broker-dealers must continue to comply with these and other applicable provisions of the federal securities laws.

Sincerely,

Josephine J. Tao
Assistant Director

APPENDIX A

For Phase 1, the broker or dealer publishing or submitting the quotation for the fixed income security reasonably has determined:

- The issuer of the fixed income security also has a class of securities that is listed on a national securities exchange;

- The issuer is subject to the requirement to file reports pursuant to Section 13 or Section 15(d) of the Exchange Act and has filed all required periodic reports under section 13 or 15(d) of the Exchange Act, as applicable, during the preceding 12 months (or for such shorter period that the issuer was required to file such reports);

- The issuer of the fixed income security has a class of equity securities that is exempt from registration pursuant to Rule 12g3-2(b) under the Exchange Act;

- The fixed income security is foreign sovereign debt or a debt security guaranteed by a foreign government;

- The fixed income security is issued by an issuer where a qualified interdealer quotation system makes a publicly-available determination (in accordance with the requirements in Rule 15c2-11(a)(3)) that there is current and publicly available information about the issuer for any class of security of the issuer that is eligible for an exception in paragraphs (f)(2)(iii)(B), (f)(3)(ii)(A), or (f)(7) of Rule 15c2-11;

- There is current and publicly available information (consistent with Rule 15c2-11(b))[11] about the issuer of the subject security;

- The issuer of the fixed income security is a bank as defined in section 3(a)(6) of the Exchange Act, a bank holding company, or a credit union regulated by the National Credit Union Association ("NCUA") that reports information to the Federal Financial Institutions Examination Council or files call reports with the NCUA; or

- The subject security is a corporate fixed income security or asset-backed security offered pursuant to Rule 144A under the Securities Act, and the broker or dealer reasonably believes that the issuer of the subject security will provide the information specified in Rule 144A(d)(4), prior to a Rule 144A transaction, upon request.

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[11] For purposes of this no-action letter, staff would consider the Information Requirement discussed in Section II.D. of the Rule 144A Adopting Release, Release No. 33–6862 (Apr. 30, 1990), 55 FR 17933, 17939, to be consistent with Rule 15c2-11(b).

APPENDIX B

For Phases 2 and 3, the broker or dealer publishing or submitting the quotation for the fixed income security reasonably has determined:

- The issuer of the fixed income security has a class of securities that is listed on a national securities exchange;
- The issuer is subject to the requirement to file reports pursuant to Section 13 or Section 15(d) of the Exchange Act and has filed all required periodic reports under section 13 or 15(d) of the Exchange Act, as applicable, during the preceding 12 months (or for such shorter period that the issuer was required to file such reports);
- The issuer of the fixed income security has a class of equity securities that is exempt from registration pursuant to Rule 12g3-2(b) under the Exchange Act;
- The fixed income security is foreign sovereign debt or a debt security guaranteed by a foreign government;
- The fixed income security is issued by an issuer where a qualified interdealer quotation system makes a publicly-available determination (in accordance with the requirements in Rule 15c2-11(a)(3)) that there is current and publicly available information about the issuer for any class of security of the issuer that is eligible for an exception in paragraphs (f)(2)(iii)(B), (f)(3)(ii)(A), or (f)(7) of Rule 15c2-11;
- There is current and publicly available information (consistent with Rule 15c2-11(b))[12] about the issuer of the fixed income security; or
- The issuer of the fixed income security is a bank as defined in section 3(a)(6) of the Exchange Act, a bank holding company, or a credit union regulated by the NCUA that reports information to the Federal Financial Institutions Examination Council or files call reports with the NCUA.

[12] For purposes of this no-action letter, staff would consider the Information Requirement discussed in Section II.D. of the Rule 144A Adopting Release, Release No. 33–6862 (Apr. 30, 1990), 55 FR 17933, 17939, to be consistent with Rule 15c2-11(b).

EXHIBIT 14

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
TRADING AND MARKETS

November 30, 2022

Ms. Racquel Russell
Senior Vice President and
Director of Capital Markets Policy
Office of General Counsel
Financial Industry Regulatory Authority, Inc.
1735 K Street, NW
Washington, DC 20006

Re: Amended Rule 15c2-11 in Relation to Fixed Income Securities

Dear Ms. Russell:

On December 16, 2021, the staff of the Division of Trading and Markets ("Division") issued a no-action letter stating that the staff would not recommend enforcement action to the Securities and Exchange Commission ("Commission") under the amendments to Rule 15c2-11 ("Amended Rule")[1] under the Securities Exchange Act of 1934 ("Exchange Act") for brokers or dealers that publish or submit quotations, including continuous quotations, in a quotation medium, for fixed income securities under certain scenarios, in order to allow for an orderly and good faith transition into compliance with the Amended Rule.[2]

In response to indications from industry representatives that they need additional time to complete the operational and systems changes necessary to comply with the Amended Rule for fixed income securities, the Division will not recommend enforcement action to the Commission under the Amended Rule for brokers or dealers that publish or submit quotations, including continuous quotations,[3] in a quotation medium, for fixed

[1] 17 CFR 240.15c2-11. All terms from Rule 15c2-11 that are used in this letter have the same meanings as in the rule. For example, "current" and "publicly available" are defined terms in paragraphs (e)(2) and (e)(5) of Rule 15c2-11.

[2] *See* Letter from Josephine 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 (Dec. 16, 2021) ("December 2021 Letter"), available at: https://www.sec.gov/files/fixed-income-rule-15c2-11-nal-finra-121621.pdf.

[3] We understand that fixed income securities are often quoted on quotation mediums rather than on interdealer quotation systems. Rule 15c2-11 applies to any broker or dealer that publishes or submits quotations in a quotation medium. "Quotation medium" is defined in Rule 15c2-11(e)(8) as "any device that is used by brokers or dealers to make known to others their interest in any security." Brokers or

income securities if the broker or dealer has determined that the fixed income security or its issuer meets one of the criteria in Appendix A, or that there is current and publicly available financial information (consistent with Rule 15c2-11(b)) about the issuer. This position of the Division is temporary and shall expire on January 4, 2025.[4]

In addition to the position expressed above, the Division will not recommend enforcement action to the Commission under the Amended Rule for brokers or dealers that publish or submit quotations, including continuous quotations, in a quotation medium, for any fixed income security if the broker or dealer reasonably has determined that the fixed income security is foreign sovereign debt or a debt security guaranteed by a foreign government.

Furthermore, the December 2021 Letter discussed above is hereby withdrawn.

Rule 15c2-11 governs the publication or submission of quotations for securities[5] in a quotation medium other than on a national securities exchange. Since 1971, Rule 15c2-11 has applied to the publication or submission of quotations for any security (a defined term that has and continues to include fixed income securities[6]), except

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dealers that publish or submit quotations in a quotation medium that is an "interdealer quotation system" ("IDQS"), defined as a system of general circulation that regularly disseminates quotations of "identified brokers or dealers," may become eligible for the piggybacking exception of Rule 15c2-11(f)(3) (*see* subparagraphs (e)(3) and (e)(8)). The piggyback exception allows brokers or dealers to publish or submit continuous quotations without complying with the information review requirements before publishing or submitting each quotation. The piggyback exception is not available for quotations in a quotation medium that is not an IDQS (i.e., does not identify brokers or dealers) and, thus, continuous quotations are generally not permitted in such quotation mediums. The Division would not recommend enforcement action if brokers or dealers quoted certain fixed income securities without complying with the information review requirements for each such quotation (upon determining eligibility in accordance with this letter).

[4] This letter represents the views of the staff of the Division. It is not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved its content. This letter, like all staff statements, has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person.

[5] The recent amendments to Rule 15c2-11 did not alter the types of securities covered by the rule. *See* December 2021 Letter at 2 n.4.

[6] *See, e.g., Publication or Submission of Quotations Without Specified Information*, Exchange Act Release No. 68124 (Feb. 17, 1998); 63 FR 9661, 9669 (Feb. 25, 1998) (stating that Rule 15c2-11 covers debt securities but recognizing that brokers or dealers may not have focused on this aspect of the rule).

"exempted securities"[7] and the rule has excepted municipal securities since 1976.[8] The Commission also has stated that Rule 15c2-11 applies to fixed income securities.[9]

Following adoption of the amendments on September 16, 2020, certain market participants began requesting additional time to comply with the Amended Rule. The amendments to Rule 15c2-11 are designed to modernize the rule and to enhance investor protection by requiring that current and publicly available issuer information be accessible to investors. Accordingly, the approach outlined above should allow for brokers or dealers that publish or submit quotations for fixed income securities in a quotation medium to achieve the goals of Rule 15c2-11.

The position of the Division concerns enforcement action only and does not represent a legal conclusion with respect to the applicability of statutory or regulatory provisions of the federal securities laws.[10] Furthermore, this no-action position does not apply to the anti-fraud and anti-manipulation provisions of the Exchange Act, including without limitation Sections 9(a) and 10(b), and Rule 10b-5 thereunder. Broker-dealers must continue to comply with these and other applicable provisions of the federal securities laws.

Sincerely,

Josephine J. Tao

Josephine J. Tao
Assistant Director

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[7] *See* Section 3(a)(12)(A) of the Exchange Act (definition of "exempted securities"). For example, "any security issued by or any interest or participation in any pooled income fund, collective trust fund, collective investment fund, or similar fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940" is an exempted security under Section 3(a)(12)(A)(v) of the Exchange Act and, as such, Rule 15c2-11 would not be applicable.

[8] *See* Rule 15c2-11(f)(4). *See also Regulation of Municipal Securities Professionals Transactions in Municipal Securities*, Exchange Act Release No. 12468 (May 20, 1976); 41 FR 22820, 22821 (June 7, 1976) (Final Rule).

[9] *See, e.g., Publication or Submission of Quotations Without Specified Information*, Exchange Act Release No. 41110 (March 2, 1999), 64 FR 11124 (March 8, 1999) (re-proposing amendments to Rule 15c2-11 amendments proposed in 1998). The Commission, in stating that it agreed that applying Rule 15c2-11 to the securities of larger issuers, more liquid securities, and certain fixed-income debt securities was not directly related to microcap fraud concerns, proposed to exclude debt securities, non-participatory preferred stock, and investment grade asset-backed securities.

In connection with the earlier 1998 proposed amendments to Rule 15c2-11, the Commission stated, "the proposed amendments apply to all securities covered by Rule 15c2-11, not just microcap securities. . . [t]he Commission believes that the scope of the amendments is appropriate to preserve the general integrity of quotations in the over-the-counter market and to foster greater information transparency in a marketplace where issuers often are relatively unknown and their securities are traded infrequently." *See Publication or Submission of Quotations Without Specified Information*, Exchange Act Release No. 39670 (Feb. 17, 1998), 63 FR 9661, 9669 (Feb. 25, 1998).

[10] This letter does not address any FINRA rules applicable to the OTC market.

APPENDIX A

The broker or dealer publishing or submitting the quotation for the fixed income security reasonably has determined:

- The issuer of the fixed income security also has a class of securities that is listed on a national securities exchange;

- The issuer is subject to the requirement to file reports pursuant to Section 13 or Section 15(d) of the Exchange Act and has filed all required periodic reports under Section 13 or 15(d) of the Exchange Act, as applicable, during the preceding 12 months (or for such shorter period that the issuer was required to file such reports);

- The issuer of the fixed income security has a class of equity securities that is exempt from registration pursuant to Rule 12g3-2(b) under the Exchange Act;

- The fixed income security is issued by an issuer where a qualified interdealer quotation system makes a publicly-available determination (in accordance with the requirements in Rule 15c2-11(a)(3)) that there is current and publicly available information about the issuer for any class of security of the issuer that is eligible for an exception in paragraphs (f)(2)(iii)(B), (f)(3)(ii)(A), or (f)(7) of Rule 15c2-11;

- There is current and publicly available information (consistent with Rule 15c2-11(b))[11] about the issuer of the subject security;

- The issuer of the fixed income security is a bank as defined in Section 3(a)(6) of the Exchange Act, a bank holding company, or a credit union regulated by the National Credit Union Association ("NCUA") that reports information to the Federal Financial Institutions Examination Council or files call reports with the NCUA; or

- The subject security is a corporate fixed income security or asset-backed security offered pursuant to Rule 144A under the Securities Act, and the broker or dealer reasonably believes that the issuer of the subject security will provide the information specified in Rule 144A(d)(4), prior to a Rule 144A transaction, upon request.

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[11] For purposes of this no-action letter, the Division would consider the Information Requirement discussed in Section II.D. of the Rule 144A Adopting Release, Release No. 33–6862 (Apr. 30, 1990), 55 FR 17933, 17939, to be consistent with Rule 15c2-11(b). In addition, for purposes of this no-action letter, the Division would not recommend enforcement action to the Commission with respect to any broker or dealer relying on information that satisfies the requirement in Rule 144A(d)(4) and acts consistently with relevant written Division of Corporation Finance No Action statements. *See, e.g.*, Division of Corporation Finance no-action letters to British Aerospace Public Limited Co. and British Aerospace Holdings, Inc. (May 9, 1990); Schering-Plough Corp. (Nov. 21, 1991); and Fédération des caisses Desjardins du Québec (Apr. 29, 2021).

EXHIBIT 15

Macroeconomic impacts of applying Rule 15c2-11 to Rule 144A debt issued by private US companies

Prepared for the National Association of Manufacturers (NAM)

September 2023

Building a better working world

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Executive summary

This report estimates the macroeconomic impacts of requiring that the financial information of private US companies issuing Rule 144A debt be current and publicly available in order for broker-dealers to be able to freely quote their bonds. These quotations enable qualified institutional buyers (QIBs), which unlike the general public are permitted to participate in the Rule 144A market, to buy and sell corporate bonds. If broker-dealers are not able to freely quote an issuer's bonds, this would increase issuers' borrowing costs via an illiquidity premium. This increase in borrowing costs would lead to job losses and a reduction in US gross domestic product (GDP).

Background

Rule 15c2-11 and Rule 144A

US Securities and Exchange Commission (SEC) Rule 15c2-11 of the Securities Exchange Act of 1934, as amended (Rule 15c2-11), requires broker-dealers to review key issuer information and ensure that such information is current and publicly available prior to publishing quotations for that issuer's securities to the market through quotation mediums. Implemented in 1971, Rule 15c2-11 was designed to deter fraud in the largely retail, over-the-counter (OTC) equity markets.

SEC Rule 144A of the Securities Act of 1933, as amended (Rule 144A), was established in 1990 to provide a safe harbor from registration for resales of securities to QIBs. QIBs are sophisticated financial institutions that manage at least $100 million of securities from unaffiliated issuers. Rule 144A was designed to improve the liquidity and efficiency of the private placement market by offering more flexibility to sophisticated institutional investors to trade restricted securities. Notably, under Rule 144A, issuers are obligated to make their financial and operational information available to QIBs, if such information is requested.

In September 2020, the SEC amended Rule 15c2-11 to require broker-dealers to verify that issuers' financial information is publicly available before quoting their securities. In September 2021, the SEC's Division of Trading and Markets issued a no-action letter applying Rule 15c2-11 to both equity and fixed income securities, including those offered pursuant to Rule 144A, contrary to the Rule's historical application to only equity securities. In December 2021, the Division issued a second no-action letter indicating that SEC staff would not immediately recommend enforcement action for non-compliance. Specifically, as part of a three-phase implementation timeline, private issuers of Rule 144A bonds would be expected to make their financial information publicly available beginning in January 2023 in order for broker-dealers to be able to freely quote their bonds. In November 2022, however, the Division issued a third no-action letter stating that the staff will not recommend enforcement until January 2025.

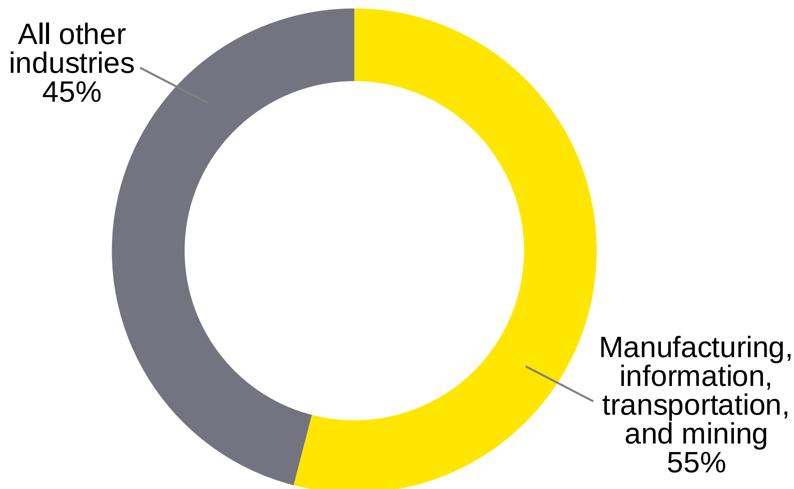
Implication

The application of amended Rule 15c2-11 would prevent broker-dealers from being able to freely quote the securities of Rule 144A bond issuers that do not make their financial information available to the general public (which cannot invest in Rule 144A securities). As a result, the bonds issued by companies that do not make their financial information publicly available would become less liquid. The reduced liquidity would diminish the market value of such Rule 144A bond issuances and result in increased borrowing costs for these issuers. Additionally, current holders of affected Rule 144A bonds would see the value of their investments decline.

The Rule 144A bond market is an important source of financing for many private US companies. Private US companies issued approximately $178 billion in Rule 144A bonds in 2021, comprising a significant portion of the overall US corporate bond market. The total amount of corporate Rule 144A bonds outstanding exceeds $4 trillion.

Figure ES-1 displays the industry composition of nonfinancial private US companies issuing Rule 144A bonds. Manufacturing and related industries comprised 55% of nonfinancial private US companies issuing Rule 144A bonds, on average, over the 2015-2021 period.

Figure ES-1. Industry composition of nonfinancial private US companies issuing Rule 144A bonds, share by industry, 2015-2021 average



Note: Figure displays share of amount of issuances. Industry definitions follow the North American Industry Classification System (NAICS). Figures are rounded.
Source: Refinitiv; EY analysis.

The application of amended Rule 15c2-11 would significantly impact private US companies. Companies can face significant costs if they choose to make their financials publicly available. These costs include the erosion of a company's competitive advantage from the disclosure of proprietary information, as well as the time and resources spent preparing and disseminating the information.[i] The application of amended Rule 15c2-11 would increase borrowing costs and decrease liquidity for Rule 144A debt issued by companies that do not make financial and operational information available to the public and their competitors.

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[i] The body of the report includes a discussion of disclosure costs faced by private US companies. This analysis assumes that private US companies would not publicly disclose their financial information. There is, however, significant uncertainty as a similar market dynamic has not been previously encountered. For a description of the required financial information see 17 CFR § 240.15c2-11.

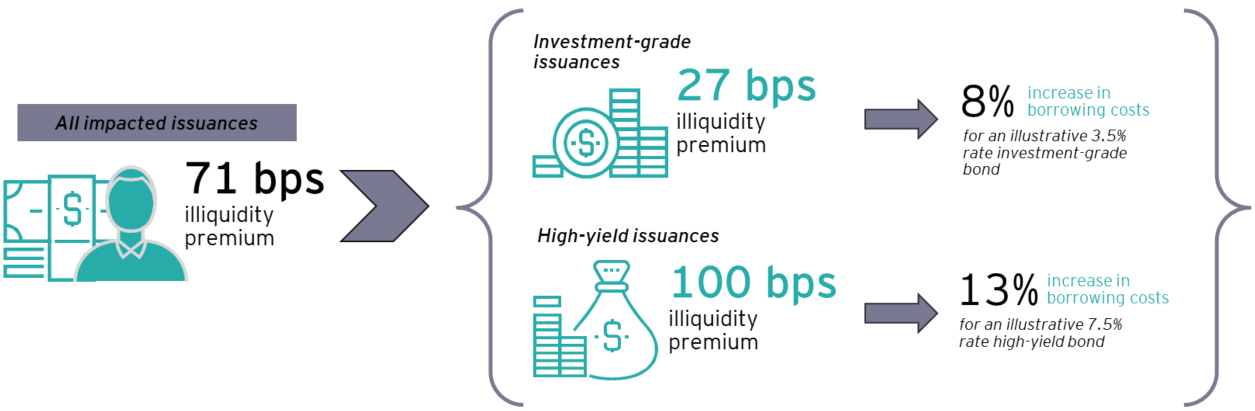
Impact on borrowing costs

To estimate the potential change in borrowing costs for Rule 144A bond issuers that do not make their financial information publicly available, EY surveyed US fixed income market professionals from seven large financial institutions on their expectations for the illiquidity premium such issuers would face.[ii] The median responses from the respondents, which provided results separately for investment-grade and high-yield bonds, were:

- Investment-grade issuances: 27 basis points
- High-yield issuances: 100 basis points
- Weighted-average Rule 144A issuance: 71 basis points

These premiums represent an 8% increase in borrowing costs for an illustrative 3.5% rate investment-grade bond, and a 13% increase in borrowing costs for an illustrative 7.5% rate high-yield bond.

Figure ES-2. Impact on borrowing costs



Source: EY analysis.

Macroeconomic impacts

Increased borrowing costs raise the cost of investment, which discourages investment and results in less capital formation than would otherwise occur. With less capital available per worker, labor productivity falls. This reduces workers' real wages and, ultimately, the overall productive capacity of the US economy. The impact grows over time as it takes time for changes in investment flows to impact the capital stock.

The macroeconomic impact of applying Rule 15c2-11 to Rule 144A debt issued by private US companies is estimated using the EY Macroeconomic Model, a macroeconomic model similar to

[ii] Specifically, the survey question asked, "If dealers cannot continue to publish quotations on quotation mediums consistent with current practice, what is the resulting illiquidity premium expected for 1) investment-grade and 2) high-yield 144A-for-life bonds in primary issuances where the issuers of such bonds do not make information publicly available?" Survey responses reflect an estimate of what respondents think will happen in the relevant markets. The actual impact, however, may be significantly different as a similar market dynamic has not been previously encountered.

models used by the Congressional Budget Office, Joint Committee on Taxation, and US Department of the Treasury. The estimated macroeconomic impacts are as follows:

- **Job losses.** A large portion of the burden of applying Rule 15c2-11 to Rule 144A bond markets would fall on workers through decreased labor productivity, wages, and employment. Applying Rule 15c2-11 to private Rule 144A issuances is estimated to decrease job equivalents relative to the baseline level, resulting in approximately:[iii]
  - 30,000 fewer jobs per year in each of the first five years;
  - 50,000 fewer jobs per year in each of the second five years; and
  - 100,000 fewer jobs each year thereafter.
- **Gross domestic product.** The application of Rule 15c2-11 to Rule 144A bond markets is estimated to decrease US GDP relative to the baseline level by:
  - $10 billion annually or
  - $100 billion over 10 years.

Figure ES-3. Macroeconomic impact

Note: Estimates show change relative to the baseline level. Jobs are jobs equivalents and summarize the impact of both the reduction in hours worked and reduced wages. Impacts are scaled to the size of the 2023 US economy. Figure are rounded.
Source: EY analysis.

[iii] Job equivalents summarize the impact of both the reduction in hours worked and reduced wages.

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Macroeconomic impacts of applying Rule 15c2-11 to Rule 144A debt issued by private US companies

I. Introduction

This report estimates the macroeconomic impacts of requiring that the financial information of private US companies issuing Rule 144A debt be current and publicly available in order for broker-dealers to be able to freely quote their bonds. These quotations enable qualified institutional buyers (QIBs), which unlike the general public are permitted to participate the Rule 144A market, to buy and sell corporate bonds. If broker-dealers are not able to freely quote an issuer's bonds, this would increase issuers' borrowing costs via an illiquidity premium. This increase in borrowing costs would lead to job losses and a reduction in US gross domestic product (GDP).

Background

Rules 15c2-11 and 144A

US Securities and Exchange Commission (SEC) Rule 15c2-11 of the Securities Exchange Act of 1934, as amended (Rule 15c2-11), requires broker-dealers to review key issuer information and ensure that such information is current and publicly available prior to publishing quotations for that issuer's securities to the market through quotation mediums. Implemented in 1971, Rule 15c2-11 was designed to deter fraud in the largely retail, over-the-counter (OTC) equity markets.

SEC Rule 144A of the Securities Act of 1933, as amended (Rule 144A), was established in 1990 to provide a safe harbor from registration for resales of securities to QIBs. QIBs are sophisticated financial institutions that manage at least $100 million of securities from unaffiliated issuers. Rule 144A was designed to improve the liquidity and efficiency of the private placement market by offering more flexibility to sophisticated institutional investors to trade restricted securities. Notably, under Rule 144A, issuers are obligated to make their financial and operational information available to QIBs, if such information is requested.

In September 2020, the SEC amended Rule 15c2-11 to require broker-dealers to verify that issuers' financial information is publicly available before quoting their securities. In September 2021, the SEC's Division of Trading and Markets issued a no-action letter applying Rule 15c2-11 to both equity and fixed income securities, including those offered pursuant to Rule 144A, contrary to the Rule's historical application to only equity securities. In December 2021, the Division issued a second no-action letter indicating that SEC staff would not immediately recommend enforcement action for non-compliance. Specifically, as part of a three-phase implementation timeline, private issuers of Rule 144A bonds would be expected to make their financial information publicly available beginning in January 2023 in order for broker-dealers to be able to freely quote their bonds. In November 2022, however, the Division issued a third no-action letter stating that the staff will not recommend enforcement until January 2025.

Implication

The application of amended Rule 15c2-11 would prevent broker-dealers from being able to freely quote the securities of Rule 144A bond issuers that do not make their financial information available to the general public (which cannot invest in Rule 144A securities). As a result, the bonds issued by companies that do not make their financial information publicly available would become less liquid. The reduced liquidity would diminish the market value of such Rule 144A bond issuances and result in increased borrowing costs for these issuers. Additionally, current holders of affected Rule 144A bonds would see the value of their investments decline.

The application of amended Rule 15c2-11 would significantly impact private US companies. Companies can face significant costs if they choose to make their financials publicly available. These costs include the erosion of a company's competitive advantage from the disclosure of proprietary information, as well as the time and resources spent preparing and disseminating the information.[1] The application of amended Rule 15c2-11 would increase borrowing costs and decrease liquidity for Rule 144A debt issued by companies that do not make financial and operational information available to the public and their competitors.

<u>Disclosure costs faced by private US companies</u>

Private US companies are generally not required to publicly disclose financial and operational information and, under current law, they rarely choose to. In a literature review and survey of over 2,000 companies conducted by the University of Chicago and Massachusetts Institute of Technology, Minnis and Shroff (2017) find that companies required to disclose financial statements "overwhelmingly indicate they would not voluntarily file financial statements publicly if the mandate were removed" and the authors conclude that, on net, individual companies find that the costs of public disclosure outweigh the benefits.[2]

The academic literature finds that one significant reason for private businesses to avoid public financial disclosures is that disclosing proprietary information can reduce a company's competitive advantage. Competitors often take advantage of insights regarding a company's financial limitations (Bernard, 2016; Minnis and Shroff, 2017).[3] For example, with public disclosure there is risk of more profitable, dominant entities engaging in behavior such as reducing prices with the intention of pushing companies to exit the market (Bernard, 2016).[4] Additionally, competitors may leverage information regarding a company's innovative practices and product profitability, potentially adopting peer innovations and disincentivizing smaller companies in particular from innovating (Breuer et al. 2019; Leuz and Wysocki, 2015; Krieger, 2017; Aghamolla and Thakor, 2019).[5]

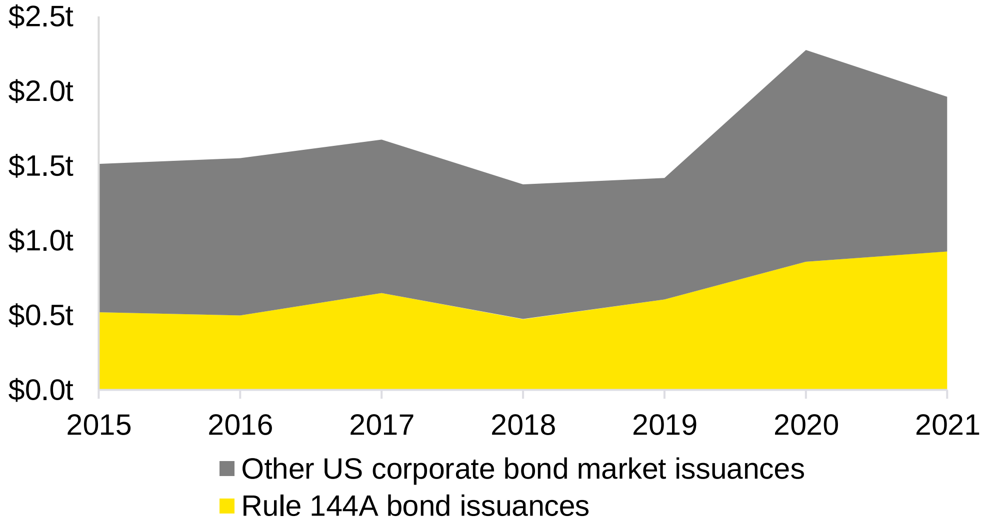
The academic literature also finds that the process of compiling and distributing financial and operational information can require significant time and resources (Coates and Srinivasan, 2014; Leuz and Wysocki, 2015).[6] In addition, certain costs of disclosure can be particularly burdensome for smaller companies (Coates and Srinivasan, 2014; Leuz and Wysocki, 2015).[7]

Given the significant competitive and compliance costs associated with public disclosure of proprietary financial and operational information, this analysis assumes private US companies would not publicly disclose their financial information. There is, however, significant uncertainty as a similar market dynamic has not been previously encountered.

II. Market composition

Rule 144A issuances comprise a significant share of the overall US corporate bond market. As displayed in Figure 1, Rule 144A bond issuances increased from over $500 billion in 2015 to over $900 billion in 2021. In 2021, Rule 144A bond issuances represented nearly 50% of the US corporate bond market.

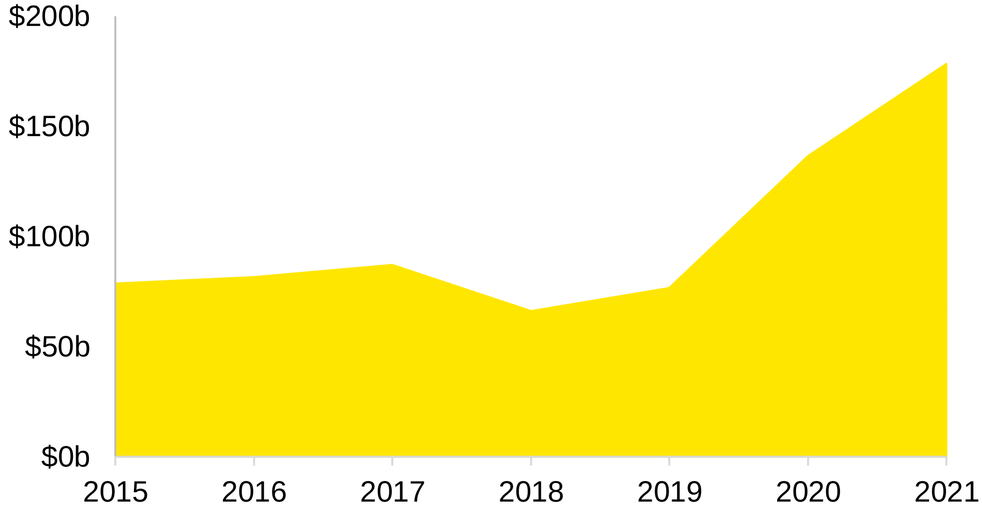
Figure 1. US corporate bond market issuances, 2015-2021



Note: This figure provides an overview of the US corporate bond market. This is comprised of both domestic and foreign companies issuing within the US market. The figure displays the total amount sold within the US market. All issues with maturities of one year or less, as well as CDs, have been excluded.
Source: Refinitiv; EY analysis.

The Rule 144A bond market is an important source of financing for many private US companies. As displayed in Figure 2, private US companies issued approximately $178 billion in Rule 144A bonds in 2021, comprising a significant portion of the overall US corporate bond market.[8] The total amount of corporate Rule 144A bonds outstanding exceeds $4 trillion.[9]

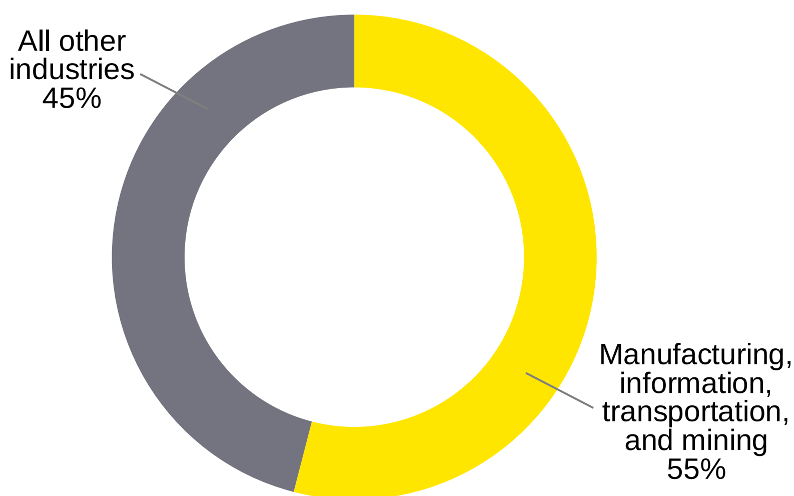
Figure 2. Rule 144A bond issuances by private US companies within the US corporate bond market, 2015-2021



Note: This figure provides an overview of the Rule 144A bonds issued by private US companies. The figure displays the total amount sold within the US corporate bond market. All issues with maturities of one year or less, as well as CDs, have been excluded.
Source: Refinitiv; EY analysis.

Figure 3 displays the industry composition of nonfinancial private US companies issuing Rule 144A bonds. Manufacturing and related industries comprised 55% of nonfinancial private US companies issuing Rule 144A bonds, on average, over the 2015-2021 period.

Figure 3. Industry composition of nonfinancial private US companies issuing Rule 144A bonds, share by industry, 2015-2021 average



Note: Figure displays share of amount of issuances. Industry definitions follow the North American Industry Classification System (NAICS). Figures are rounded.
Source: Refinitiv; EY analysis.

III. Case study: SteelCo

SteelCo is a privately held, family-owned steel manufacturing company located in the midwestern United States. Initially founded in the 1950s, the company focuses on manufacturing specialty steel. It employs approximately 150 workers and its major clients include car manufacturers and aircraft manufacturers.

Brittany, the family member currently serving as CEO of SteelCo, notices a new market trend of high demand for specialty steel from construction companies, which had historically not been SteelCo's customer base. As one of the few companies noticing this trend, Brittany decides that SteelCo should expand the business by building a new manufacturing facility to produce specialty steel for construction industry customers.

The new manufacturing facility will cost $10 million. SteelCo does not currently have the cash on hand to fully fund the new facility and decides to fund half of it via a bond issuance. To raise capital, SteelCo plans to issue a high-yield Rule 144A bond at the market interest rate of 7.5%. After working through the project economics, Brittany finds that SteelCo's $5 million investment combined with $5 million of debt financing would yield approximately $350,000 of net income in present value. That is, the project would have a 7.0% rate of return.[10]

As Brittany is planning the project and the associated bond issuance, the application of amended Rule 15c2-11 to Rule 144A debt takes effect. Applying amended Rule 15c2-11 to SteelCo, a private US company, would require the company to make its financial and operational information publicly available in order for broker-dealers to be able to freely quote its Rule 144A bonds. As required by Rule 144A, SteelCo already makes this information available to the QIBs that purchase its bonds, but not to the broader public that is prohibited from buying Rule 144A securities.

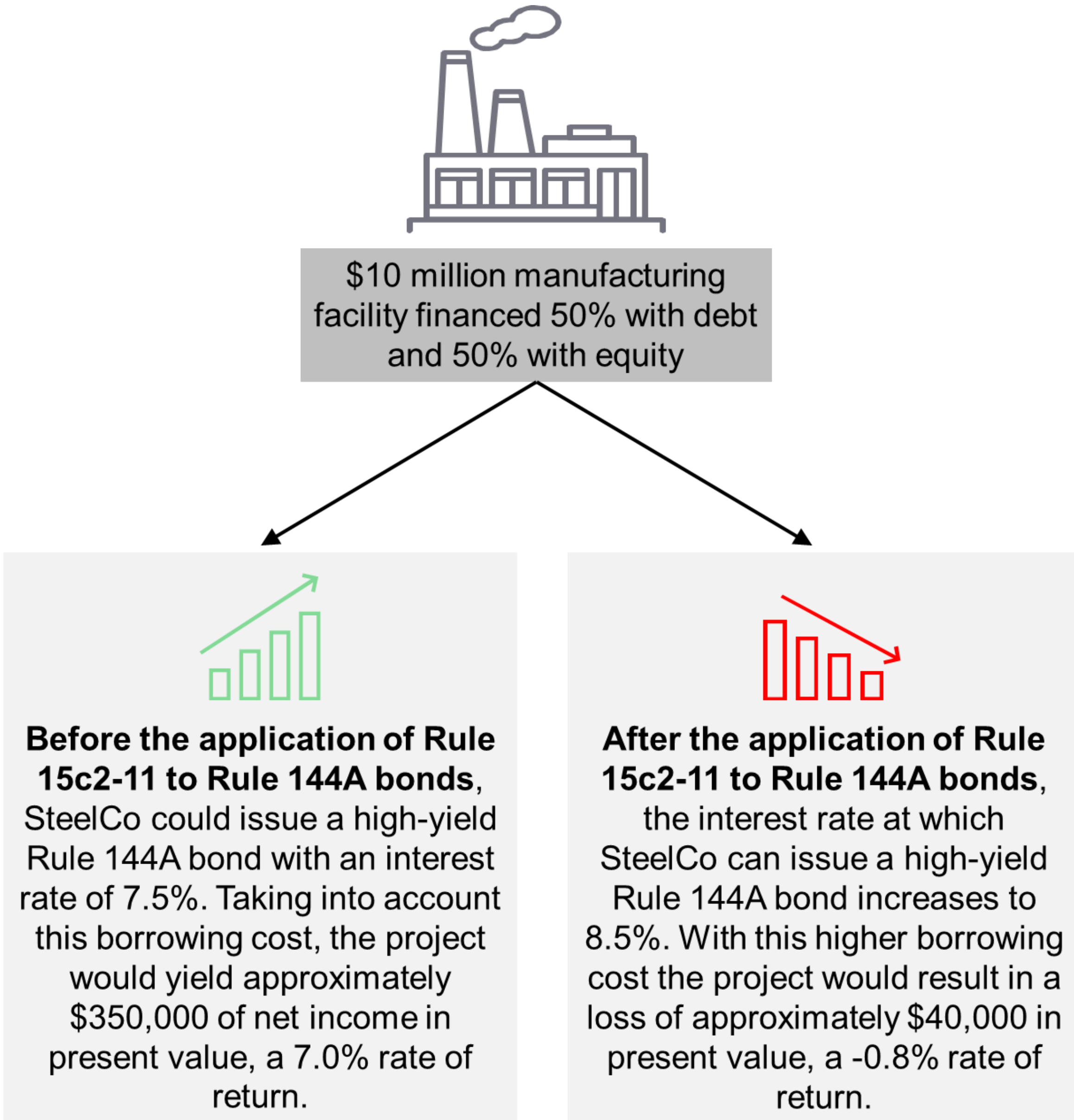
Brittany decides to continue to protect the company's proprietary information from public disclosure so as not to erode SteelCo's competitive advantage in the market. This decision results in broker-dealers not being able to freely quote SteelCo's bonds on the secondary market. This reduction in liquidity reduces the value of any SteelCo bonds currently on the market and raises the borrowing cost for the $5 million issuance needed to fund SteelCo's new specialty steel manufacturing facility. In short, SteelCo faces a direct increase in borrowing costs as a result of the application of amended Rule 15c2-11 in the form of an illiquidity premium.

Following the application of amended Rule 15c2-11 taking effect, Brittany finds that the interest rate on the high-yield Rule 144A bond SteelCo plans to issue increases by 100 basis points, from 7.5% to 8.5%. This represents an increase in SteelCo's borrowing costs of more than 13%, directly attributable to the new illiquidity premium. Upon recalculating the project economics, Brittany finds that after the increased interest payments the project would lose approximately $40,000 in present value. That is, the rate of return would decline from 7.0% to -0.8%.

In short, the project economics no longer support a decision to move forward with the investment. Brittany has little choice but to abandon this plan to expand SteelCo. Applying Rule 15c2-11 to the fixed income markets (and specifically to Rule 144A issuances) thus makes an otherwise profitable investment unprofitable.

Not moving forward with the expansion of SteelCo would have broader economic impacts, including a reduction in the profitability of SteelCo, fewer new job opportunities for the workers SteelCo would have hired to build and operate the new facility, and a reduction in materials available to construction companies in need of the specialty steel SteelCo would have manufactured, among others. These impacts at SteelCo and similarly situated businesses translate to macroeconomic impacts such as the job losses and GDP reductions that are the subject of this report.

Figure 4. Case study: SteelCo



IV. Macroeconomic impacts

This report estimates the macroeconomic impacts of requiring that the financial information of private US companies issuing Rule 144A debt be current and available to the general public in order for broker-dealers to be able to freely quote their bonds to QIBs. These quotations enable market participants to buy and sell corporate bonds. If broker-dealers are not able to freely quote an issuer's bonds, this would increase borrowing costs via an illiquidity premium. This increase in borrowing costs would lead to job losses and a reduction in US GDP.

Increased borrowing costs raise the cost of investment, which discourages investment and results in less capital formation than would otherwise occur. With less capital available per worker, labor productivity falls. This reduces workers' real wages and, ultimately, the overall productive capacity of the US economy. The impact grows over time as it takes time for changes in investment flows to impact the capital stock.

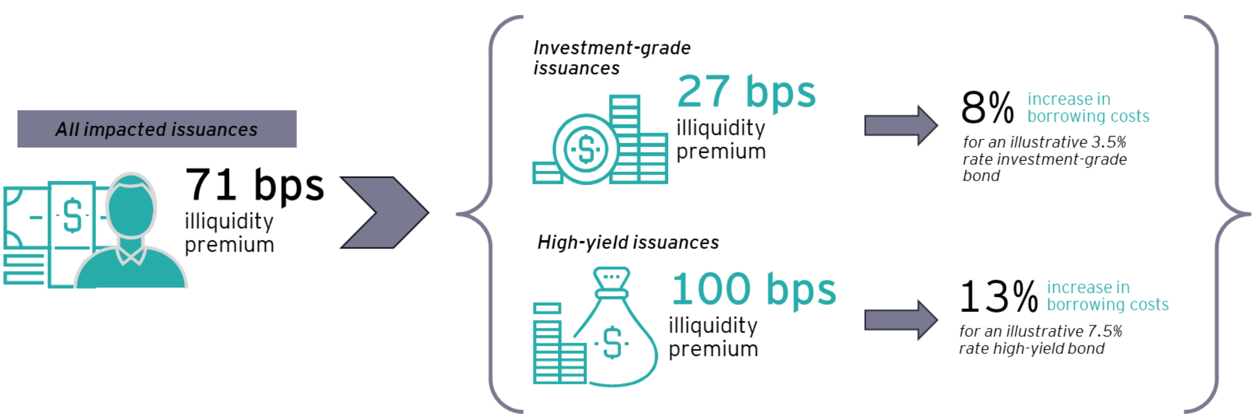
The macroeconomic impacts of applying Rule 15c2-11 to Rule 144A debt issued by private US companies is estimated using the EY Macroeconomic Model, a macroeconomic model similar to models used by the Congressional Budget Office, Joint Committee on Taxation, and US Department of the Treasury. The modeling approach is described in more detail in the appendix. Estimates are presented relative to the size of the US economy in 2023.

Impact on borrowing costs

To estimate the potential change in borrowing costs for Rule 144A bond issuers that do not make their financial information publicly available, EY surveyed US fixed income market professionals from seven large financial institutions on their expectations for the illiquidity premium such issuers would face.[11] The median responses from the respondents, which provided results separately for investment-grade and high-yield bonds, were:

- Investment-grade issuances: 27 basis points
- High-yield issuances: 100 basis points
- Weighted-average 144A issuance: 71 basis points[12]

Figure 5. Impact on borrowing costs



Source: EY analysis.

Survey responses reflect an estimate of what respondents think will happen in the relevant markets. The actual impact, however, may be significantly different as a similar market dynamic has not been previously encountered. Additional detail on the range of results for the impact on borrowing costs can be found in the sensitivity analysis section of this report.

<u>Macroeconomic impacts</u>

The estimated macroeconomic impacts are as follows:

- **Job losses.** A large portion of the burden of applying Rule 15c2-11 to Rule 144A bond markets would fall on workers through decreased labor productivity, wages, and employment. Applying Rule 15c2-11 to private Rule 144A issuances is estimated to decrease job equivalents relative to the baseline level, resulting in approximately:[13]
  - 30,000 fewer jobs per year in each of the first five years;
  - 50,000 fewer jobs per year in each of the second five years; and
  - 100,000 fewer jobs each year thereafter.
- **Gross domestic product.** The application of Rule 15c2-11 to Rule 144A bond markets is estimated to decrease US GDP relative to the baseline level by:
  - $10 billion annually or
  - $100 billion over 10 years.

Figure 6. Macroeconomic impact

Note: Estimates show change relative to the baseline level. Jobs are jobs equivalents and summarize the impact of both the reduction in hours worked and reduced wages. Impacts are scaled to the size of the 2023 US economy. Figure are rounded.
Source: EY analysis.

A discussion of the macroeconomic impacts is included in the appendix.

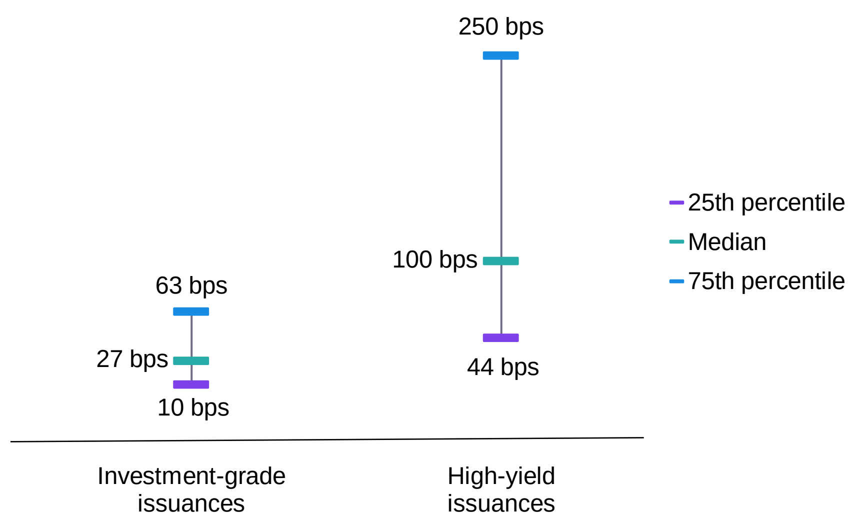
V. Sensitivity analysis

To estimate the potential change in borrowing costs for Rule 144A bond issuers that do not make their financial information publicly available, EY surveyed US fixed income market professionals from seven large financial institutions on their expectations for the illiquidity premium such issuers would face. Survey responses reflect an estimate of what respondents think will happen in the relevant markets. The actual impact, however, may be significantly different as a similar market dynamic has not been previously encountered.

Figure 7 displays information on the range of results from respondents, who provided results separately for investment-grade and high-yield bonds. The median response was that investment-grade issuances would face an illiquidity premium of 27 basis points and that high-yield issuances would face an illiquidity premium of 100 basis points. These median responses were used to produce the macroeconomic impacts in this report.

As seen in the figure, however, survey results suggest the impact on borrowing costs could be significantly larger or somewhat smaller.[14] Specifically, for investment-grade issuances the 25th percentile was 10 basis points and the 75th percentile was 63 basis points. This contrasts to the median response of 27 basis points. Moreover, for high-yield issuances the 25th percentile was 44 basis points and the 75th percentile was 250 basis points. This contrasts to the median response of 100 basis points. Using significant larger or somewhat smaller impacts on borrowing costs would make the estimated macroeconomic impacts significantly larger or somewhat smaller than those estimated in this report.[15]

Figure 7. Potential change in borrowing costs for Rule 144A bond issuers that do not make their financial information publicly available
Illiquidity premium in basis points



Note: The 25th percentile means 25% of responses are equal to or lower than this value, the median means 50% of responses are equal to or lower than this value, and the 75th percentile means 75% of responses are equal to or lower than this value.
Source: EY analysis.

VI. Caveats and limitations

Any modeling effort is only an approximate depiction of the economic forces it seeks to represent, and the economic model developed for this analysis is no exception. Although various limitations and caveats might be listed, noteworthy limitations include:

- **Estimated macroeconomic impacts limited by calibration.** This model is calibrated to represent the US economy and then forecast forward. However, because any particular year may reflect unique events and also may not represent the economy in the future, no particular baseline year is completely generalizable.
- **Estimates are limited by available public information.** The analysis relies on publicly available data (primarily from Refinitiv and the US Bureau of Economic Analysis). The analysis did not attempt to verify or validate this information using sources other than those described in this report.
- **Full employment model.** The EY Macroeconomic Model, like many general equilibrium models, focuses on the longer-term incentive effects of policy changes. It also assumes that all resources throughout the economy are fully employed; that is, there is no slackness in the economy (i.e., a full employment assumption with no involuntary unemployment). Any decrease in labor supply is a voluntary response to a change in income or the return to labor that makes households choose to substitute between consumption and leisure. To provide a high-level measure of the potential employment impacts, a job-equivalents measure has been estimated. Job-equivalent impacts are defined as the change in total labor income divided by the baseline average labor income per job.
- **Impact on borrowing costs is uncertain.** To estimate the potential change in borrowing costs for 144A bond issuers that do not make their financial information publicly available, this analysis surveyed US fixed income market professionals from seven large financial institutions on their expectations for the illiquidity premium such issuers would face. Survey responses reflect an estimate of what respondents think will happen in the relevant markets. The actual impact, however, may be significantly different as a similar market dynamic has not been previously encountered.
- **This analysis assumes that private US companies would not publicly disclose their financial information.** Private US companies would face costs from publicly disclosing financial and operational information. Accordingly, this analysis assumes that private US companies would not publicly disclose their financial information. There is, however, significant uncertainty as a similar market dynamic has not been previously encountered.
- **Short-run macroeconomic conditions are uncertain.** Short-run macroeconomic conditions (e.g., the rate of US economic growth and the level of interest rates) are highly uncertain and could impact the results of this analysis. To abstract from short-run macroeconomic conditions and focus on the macroeconomic impacts of applying Rule 15c2-11 to Rule 144A debt issued by private US companies, this analysis estimates the macroeconomic impacts relative to the US economy under "normal" market conditions. That is, it does not reflect any potential impacts of the short-term macroeconomic uncertainty.

Appendix. EY Macroeconomic Model

The EY Macroeconomic Model used for this analysis is similar to those used by the Congressional Budget Office, Joint Committee on Taxation, and US Treasury Department.[16] In this model, changes in policy affect the incentives to work, save and invest, and to allocate capital and labor among competing uses. Representative individuals and firms incorporate the after-tax return from work, savings, and investment, into their decisions on how much to produce, save, and work.

The general equilibrium methodology accounts for changes in equilibrium prices in factor (i.e., capital and labor) and goods markets and simultaneously accounts for the behavioral responses of individuals and businesses to changes in taxation (or other policies). Behavioral changes are estimated in an overlapping generations (OLG) framework, whereby representative individuals with perfect foresight incorporate changes in current and future prices when deciding how much to consume and save in each period of their lives.

High-level description of model's structure

Production

Firm production is modeled with the constant elasticity of substitution (CES) functional form, in which firms choose the optimal level of capital and labor subject to the gross-of-tax cost of capital and gross-of-tax wage. The model includes industry-specific detail through use of differing costs of capital, factor intensities, and production function scale parameters. Such a specification accounts for differential use of capital and labor between industries as well as distortions in factor prices introduced by the tax system. The cost of capital measure models the extent to which the tax code discriminates by asset type, organizational form, and source of finance.

The industry detail included in this model corresponds approximately with three-digit North American Industry Classification System (NAICS) codes and is calibrated to a stylized version of the US economy. Each of 36 industries has a corporate and pass-through sector except for owner-occupied housing and government production. Because industry outputs are typically a combination of value added (i.e., the capital and labor of an industry) and the finished production of other industries (i.e., intermediate inputs), each industry's output is modeled as a fixed proportion of an industry's value added and intermediate inputs to capture inter-industry linkages. These industry outputs are then bundled together into consumption goods that consumers purchase.

Consumption

Consumer behavior is modeled through use of an OLG framework that includes 55 generational cohorts (representing adults aged 21 to 75). Thus, in any one year, the model includes a representative individual optimizing lifetime consumption and savings decisions for each cohort aged 21 through 75 (i.e., 55 representative individuals) with perfect foresight. The model also distinguishes between two types of representative individuals: those that have access to capital markets (savers) and those that do not (non-savers or rule-of-thumb agents).

Non-savers and savers face different optimization problems over different time horizons. Each period non-savers must choose the amount of labor they supply and the amount of goods they consume. Savers face the same tradeoffs in a given period, but they must also balance consumption today with the choice of investing in capital or bonds. The model assumes 50% of US households are permanently non-savers and 50% are permanently savers across all age cohorts.

The utility of representative individuals is modeled as a CES function, allocating a composite commodity consisting of consumption goods and leisure over their lifetimes. Representative individuals optimize their lifetime utility through their decisions of how much to consume, save, and work in each period subject to their preferences, access to capital markets, and the after-tax returns from work and savings in each period. Representative individuals respond to the after-tax return to labor, as well as their overall income levels, in determining how much to work and thereby earn income that is used to purchase consumption goods or to consume leisure by not working. In this model the endowment of human capital changes with age — growing early in life and declining later in life — following the estimate of Altig et al. (2001).[17]

Government

The model includes a simple characterization of both federal and state and local governments. Government spending is assumed to be used for either: (1) transfer payments to representative individuals, or (2) the provision of public goods. Transfer payments are assumed to be either Social Security payments or other transfer payments. Social Security payments are calculated in the model based on the 35 years in which a representative individual earns the most labor income. Other transfer payments are distributed on a per capita basis. Public goods are assumed to be provided by the government in fixed quantities through the purchase of industry outputs as specified in a Leontief function.

Government spending in the model can be financed by collecting taxes or borrowing. Borrowing, however, cannot continue indefinitely in this model. Eventually, the debt-to-GDP ratio must stabilize so that the government's fiscal policy is sustainable. The model allows government transfers, government provision of public goods, or government tax policy to be used to achieve a selected debt-to-GDP ratio after a selected number of years. This selected debt-to-GDP ratio could be, for example, the initial debt-to-GDP ratio or the debt-to-GDP ratio a selected number of years after policy enactment.

Modeling the United States as a large open economy

The model is an open economy model that includes both capital and trade flows between the United States and the rest of the world. International capital flows are modeled through the constant portfolio elasticity approach of Gravelle and Smetters (2006).[18] This approach assumes that international capital flows are responsive to the difference in after-tax rates of return in the United States and the rest of the world through a constant portfolio elasticity expression. Trade is modeled through use of the Armington assumption, wherein products made in the United States versus the rest of the world are imperfect substitutes.

Table A-1. Key model parameters

Intertemporal substitution elasticity	0.4
Intratemporal substitution elasticity	0.6
Leisure share of time endowment	0.4
International capital flow elasticity	3.0
Capital-labor substitution elasticity	0.8
Adjustment costs	2.0

Source: Key model parameters are generally from Joint Committee on Taxation, *Macroeconomic Analysis of the Conference Agreement for H.R. 1, The 'Tax Cuts and Jobs Act,'* December 22, 2017 (JCX-69-17) and Jane Gravelle and Kent Smetters, "Does the Open Economy Assumption Really Mean that Labor Bears the Burden of a Capital Income Tax?" *Advances in Economic Analysis and Policy,* 6(1) (2006): Article 3.

Discussion of macroeconomic impacts

A large portion of the burden of applying Rule 15c2-11 to Rule 144A bond markets is estimated to fall on workers through decreased labor productivity, wages, and employment. Hours worked are estimated to decline, on average, 0.02% in each of the first five years, 0.02% in each of the second five years, and 0.01% each year after the first 10 years (i.e., in the long run) relative to the level that otherwise would have occurred. Moreover, the wage rate is estimated to decline, on average, less than 0.005% in each year over the first five years, 0.02% in each year over the second five years, and 0.05% each year after the first 10 years relative to the level in the baseline.

These two labor market impacts – a decline in hours worked plus a decline in the wage rate – are summarized in the estimate of the decrease in job equivalents. This measure represents the equivalent change in jobs, holding the average wage rate constant. When scaled to the size of the 2023 US economy, job equivalents are estimated to decline by 30,000 jobs (0.02%) in each of the first five years, 50,000 jobs in each of the second five years (0.03%), and 100,000 jobs each year after 10 years (0.06%) relative to the level in the baseline.

Requiring that the financial information of private US companies issuing Rule 144A debt be current and publicly available in order for broker-dealers to be able to freely quote their bonds is estimated to decrease the level of GDP relative to the baseline by, on average, 0.02% in each of the first five years, 0.03% in each of the second five years, and 0.04% each year after the first 10 years. After 10 years denotes the long run, which is when the US economy would fully adjust to the change. When scaled to the US economy in 2023, this amounts to a $10 billion annual decline in the level of GDP in each of the first 10 years relative to what it otherwise would have been in the baseline. These GDP losses represent an approximately $100 billion decline over 10 years.

The impact grows over time as it takes time for changes in investment flows to impact the capital stock. Specifically, relative to the baseline level, the capital stock is, on average, 0.02% lower in each of the first five years, 0.04% lower in each of the second five years, and 0.09% lower each year after the first 10 years. This growing impact reflects both that there are adjustment costs to altering the size and composition of the capital stock and that it takes time for the annual flow of investment to impact the overall capital stock.

Endnotes

[1] This analysis assumes that private US companies would not publicly disclose their financial information. There is, however, significant uncertainty as a similar market dynamic has not been previously encountered.
[2] See Minnis, Michael and Shroff, Nemit, "Why Regulate Private Firm Disclosure and Auditing?", March 2017. Accounting and Business Research, Vol 47, No. 5, 2017.
[3] D. Bernard, "Is the risk of product market predation a cost of disclosure?", November – December 2016. J. Account. Econ., 62, pp. 305-325; See Minnis, Michael and Shroff, Nemit, "Why Regulate Private Firm Disclosure and Auditing?", March 2017. Accounting and Business Research, Vol 47, No. 5, 2017.
[4] D. Bernard, "Is the risk of product market predation a cost of disclosure?", November – December 2016. J. Account. Econ., 62, pp. 305-325.
[5] Breuer et al., "Reporting regulation and corporate innovation", March 2022. National Bureau of Economic Research, Working Paper 26291; Leuz, Christian and Wysocki, Peter D., "The Economics of Disclosure and Financial Reporting Regulation: Evidence and Suggestions for Future Research", December 2015. European Corporate Governance Institute (ECGI) - Law Working Paper No. 306/2016, Chicago Booth Research Paper No.16-03; Joshua L. Krieger, "Trials and Terminations: Learning from Competitors' R&D failures", June 2020. Harvard Business School, Working Paper 18-043; Aghamolla, Cyrus and Thakor, Richard T., "Do Mandatory Disclosure Requirements for Private Firms Increase the Propensity of Going Public?", April 2019. Journal of Accounting Research, Vol. 60, No. 3, 2022.

In Aghamolla and Thakor (2019), researchers from the University of Minnesota studied the impact of the Food and Drug Administration Amendment Act in 2007 that requires all US biopharma companies, public or private, to disclose information about clinical trials. The research found that the required disclosure worked to the detriment of the disclosing firm and imposed substantial proprietary costs on private firms that didn't need to disclose such information previously, as competitors start to adopt the innovations or use the disclosed information to advance their own projects.
[6] See Coates and Srinivasan, "SOX after ten years: a multidisciplinary review", May 2014. Harvard Law and Economics Discussion Paper No.758; Leuz, Christian and Wysocki, Peter D., "The Economics of Disclosure and Financial Reporting Regulation: Evidence and Suggestions for Future Research", December 2015. European Corporate Governance Institute (ECGI) - Law Working Paper No. 306/2016, Chicago Booth Research Paper No.16-03.
[7] Coates and Srinivasan, "SOX after ten years: a multidisciplinary review", May 2014. Harvard Law and Economics Discussion Paper No.758; Leuz, Christian and Wysocki, Peter D., "The Economics of Disclosure and Financial Reporting Regulation: Evidence and Suggestions for Future Research", December 2015. European Corporate Governance Institute (ECGI) - Law Working Paper No. 306/2016, Chicago Booth Research Paper No.16-03
[8] Sourced from Refinitiv, these data display the total amount of Rule 144A bonds issued by private US companies within the US corporate bond market. This was calculated as follows: all bond issuances within the US marketplace from 2015-2021 were considered, excluding all issues with maturities of one year or less, as well as CDs. These data reflecting the US corporate bond market were then limited to the Rule 144A market. The data displaying the Rule 144A market within the broader US corporate bond market was split into that of public issuers and private issuers, by total amount sold within the US market.

In order to categorize the entities as either public or private, the ultimate parent public status was referenced as a guideline. This is because this analysis was concerned with whether each entity's financials were likely to be released publicly. That is, a private entity with a public ultimate parent would be categorized as public. Notably, Refinitiv's public status designation reflects the entity's status at the time of the issue date. Additionally, Refinitiv's public status designation includes further classifications in addition to public and private (subsidiary, government, mutual, and joint venture); these apply to both the entity itself as well as the ultimate parents (with the exception of the joint venture designation, which only applies to the entities themselves). For entities that were categorized as such and also had ultimate parents that were simply public or private, the ultimate parent public status was used. Any entities with an ultimate parent public status of subsidiary (a data vendor error), government, or mutual were manually reclassified. Entities with government ultimate parents were typically either state owned enterprises or government entities and were accordingly classified as public under the assumption that these entities would generally release financial reports. Entities with the ultimate parent public status designation of mutual were primarily private life insurance companies and were accordingly grouped within the private category. Because the initial data describing the US corporate bond market included both domestic and foreign companies issuing within the US marketplace, this resulting data limited to private companies was further limited to reflect only US-based companies.

[9] See SIFMA, "The Collision of Rule 15c2-11 and Rule 144A," 2022.

[10] This case study assumes that the manufacturing facility produces $57,000 in net income each year for 10 years. With a discount rate of 10% the present value of this stream of income is approximately $350,000. This is an illustrative example and impacts will differ based on any particular company's facts and circumstances.

[11] Specifically, the survey question asked, "If dealers cannot continue to publish quotations on quotation mediums consistent with current practice, what is the resulting illiquidity premium expected for 1) investment grade and 2) high-yield 144A-for-life bonds in primary issuances where the issuers of such bonds do not make information publicly available?"

[12] The weighted-average Rule 144A issuance result was calculated by this analysis using the composition of high-yield versus investment-grade issuances by private US companies.

[13] Job equivalents summarize the impact of both the reduction in hours worked and reduced wages.

[14] Additionally, some respondents expressed concerns about constrained market capacity after the application of Rule 15c2-11 to Rule 144A debt.

[15] These larger or smaller estimated macroeconomic impacts would broadly be proportional in order of magnitude. That is, the results would not be exactly proportional.

[16] See, for example, Shinichi Nishiyama, "Fiscal Policy Effects in a Heterogeneous-Agent Overlapping-Generations Economy With an Aging Population," Congressional Budget Office, Working Paper 2013-07, December 2013; Joint Committee on Taxation (JCT), *Macroeconomic Analysis of the 'Tax Reform Act of 2014,'* February 2014 (JCX-22-14); JCT, *Macroeconomic Analysis of Various Proposals to Provide $500 Billion in Tax Relief*, March 2005 (JCX-4-05); and, US Department of the Treasury, *The President's Advisory Panel on Federal Tax Reform, Simple, Fair, & Pro-Growth: Proposals to Fix America's Tax System*, November 2005.

[17] See David Altig, Alan Auerbach, Laurence Koltikoff, Kent Smetters, and Jan Walliser, "Simulating Fundamental Tax Reform in the United States," *American Economic Review,* 91(3) (2001): 574-595.

[18] See Jane Gravelle and Kent Smetters, "Does the Open Economy Assumption Really Mean That Labor Bears the Burden of a Capital Income Tax?" *Advances in Economic Analysis and Policy,* 6(1) (2006): 1-42.