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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 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

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 emergency interim relief from the application of Rule 15c2-11, 17 C.F.R. § 240.15c2-11, to fixed-income securities that satisfy the requirements of Rule 144A, 17 C.F.R. § 230.144A ("Rule 144A securities")[1] while the Commission considers the petition for rulemaking and application for exemption, filed by the NAM and the KAM today (the "Rulemaking Petition"), which seeks permanent relief specifying that Rule 15c2-11 does not apply to Rule 144A securities; or, in the alternative (2) request a stay of the application of Rule 15c2-11 to Rule 144A securities to allow the NAM and the KAM to seek preliminary and permanent injunctive relief in court, *see* 15 U.S.C. § 78y(c)(2). If the Commission grants a stay, the NAM and the KAM ask that any stay extend until the conclusion of judicial review or, in the alternative, for 90 days from January 3, 2023, the date on which the Commission staff has stated that Rule 15c2-11's requirements may begin to be enforced with respect to Rule 144A securities.

[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.

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If the Commission declines to grant temporary relief or a stay by December 5, 2022, the NAM and the KAM will conclude that their request has been denied and reserve the right to seek relief in a court with appropriate jurisdiction. This submission fulfills the NAM's and the KAM's obligation under the Federal Rules of Appellate Procedure and the Administrative Procedure Act, which require a petitioner to seek a stay from the appropriate agency before moving for a stay in court. *See* Fed. R. App. P. 18(a)(1).

Since the Commission staff first announced in September 2021 its novel interpretation that Rule 15c2-11 applies to fixed-income securities, including Rule 144A securities, numerous interested parties, including the NAM, have asked the Commission to take action to reject the staff's interpretation of Rule 15c2-11—through written submissions and ongoing discussions with Commission staff.[2] There have been some indications during that time that the Commission might act on these requests.[3] But no action has yet occurred. The NAM and the KAM therefore submit this formal application for relief in light of the approaching January 3, 2023 deadline and the irreparable harms that will occur if the staff's interpretation is permitted to take effect.

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.[4] 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.[5]

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2 *See* Rulemaking Petition at 6-7 & nn. 14-18; *infra* notes 17-19.

3 *See infra* note 20.

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

5 *See* Letter from Chris Netram, Managing Vice President, Tax and Domestic Economic Policy, NAM, to Gary Gensler, Chair, U.S. SEC, and Haoxiang Zhu, Director, Division of Trading and Markets, U.S. SEC (July 18, 2022), http://bit.ly/3XcM9Ij (NAM Letter).

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). 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 192(a) provides a way for parties to "ask[] the SEC to enjoin a rule."[6] Further, the Commission "may stay its order or rule . . . if it finds that justice so requires." 78 U.S.C. § 78y(c)(2).

Summary

The Commission should grant emergency relief from the application of Rule 15c2-11 to Rule 144A securities. Rule 15c2-11 was designed to protect retail investors purchasing over-the-counter *equity* securities. That purpose has been confirmed each time that the Commission has amended the Rule, in 1991 and in 2020. And that purpose has further been confirmed by fifty years of practice—broker-dealers and issuers in the fixed-income market have not been complying with Rule 15c2-11, and the Commission has never enforced Rule 15c2-11 against them. Despite this long history, the Commission staff in 2021 adopted a new, drastically expanded construction of Rule 15c2-11, stating that the Rule applies in full force—including the new public-disclosure obligations imposed by the 2020 amendments to Rule 15c2-11—to the entire fixed-income market. That interpretation is not just unprecedented—it is an erroneous construction of the Rule that is arbitrary, capricious, and contrary to law.

Immediate action by the Commission is needed because the staff's novel interpretation of Rule 15c2-11 will result in immediate and irreparable harm to issuers, broker-dealers, and investors in the Rule 144A market, as well as to the economy as a whole. As the D.C. Circuit has explained, "financial injury [can be] irreparable where no 'adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation.'"[7] Such unrecoverable financial injury is exactly what will happen to participants in the Rule 144A market in the absence of Commission action.

If the staff's interpretation is permitted to take effect on January 3, 2023, private companies that issue Rule 144A securities in order to obtain necessary funding will be forced into one of several alternative pathways for raising funds, each of which will subject them to irreparable

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[6] *Rabin v. NASDAQ OMX PHLX LLC*, 182 F. Supp. 3d 220, 235 (E.D. Pa. 2016), *aff'd*, 712 F. App'x 188 (3d Cir. 2017).

[7] *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

injury: (1) publicly disclose proprietary financial information and face competitive harm and, in addition, significantly increased costs; (2) remain in the Rule 144A market but forgo public financial disclosures, which would make it difficult if not impossible for companies' new issuances to be traded on the secondary market and therefore increase their cost of capital; or (3) abandon the Rule 144A market and raise funds via inferior avenues that impose increased costs.

Broker-dealers, who will be tasked with complying with the Rule, also will face irreparable injury, because they will incur significant costs to build the internal infrastructure needed to comply with the new requirements. Indeed, those costs will begin to be incurred shortly, if they are not being incurred already, as broker-dealers will have to start devoting time and money to implementing the new compliance procedures before the January 3, 2023 deadline. They also will face regulatory uncertainty, as Rule 15c2-11 has never before been applied to Rule 144A securities. To escape both the higher costs and increased uncertainty, some broker-dealers may simply reduce or stop publishing quotations entirely for Rule 144A securities, resulting in an unrecoverable loss of income. Whether they continue to participate in the Rule 144A market and incur unrecoverable costs, or exit that market and lose business, broker-dealers will suffer irreparable injury.

Investors in the Rule 144A market also will face irreparable harm if the staff's interpretation takes effect—even though the purpose of Rule 15c2-11 is to protect investors. As Rule 144A issuers and broker-dealers flee the Rule 144A market, the market will lose liquidity and the value of Rule 144A securities held by investors will decline—inflicting irreparable injury in the form of lost value. Moreover, institutional investors will face increased compliance costs of their own, as the lack of published quotations will make reporting the value of their holdings to their clients labor-intensive and difficult.

These combined consequences to issuers, broker-dealers, and investors will reduce the ability of companies to obtain the funding necessary for growth, which in turn will lead to serious harms to the U.S. economy as a whole, in the form of reduced job growth and lower GDP.

Staying the staff's decision to apply Rule 15c2-11 to Rule 144A securities will not harm investors, the Commission, or the public interest. The rationale underlying Rule 15c2-11—protecting retail investors—does not apply to the Rule 144A market, which is not open to retail investors: only sophisticated "qualified institutional buyers" ("QIBs") may purchase these securities.[8] Indeed, applying Rule 15c2-11 to Rule 144A securities harms QIBs by completely undermining the rationale that led to the Commission's adoption of Rule 144A—which was to create a more liquid market for sophisticated investors who would have access to issuers' disclosures on an "available upon request" basis. In addition, to the extent they are current holders

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[8] 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).

of already-issued Rule 144A securities, QIBs will be harmed by the reduction in liquidity—and the associated reduction in value—of those securities when the staff's interpretation takes effect. Further, because Rule 15c2-11 has never been applied to Rule 144A securities for the thirty years that such securities have existed, there is no credible basis for asserting that harm will result from delaying application of Rule 15c2-11 to Rule 144A securities.

In sum, the balance of hardships requires the Commission to act to prevent the application of Rule 15c2-11 to Rule 144A securities. The Commission should grant the requested temporary relief.

Background

Rule 15c2-11

The Commission first adopted Rule 15c2-11 in 1971 to combat fraud in the over-the-counter ("OTC") equities 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.

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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] 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

In September 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 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 unprecedented interpretation would contradict fifty years of consistent, longstanding industry practice of complying with the Rule's requirements solely with respect to equity securities, and not with respect to fixed-income securities.[14] Parties also advised the Commission that the staff's expansion of the Rule was wholly unjustified, particularly with respect to the Rule 144A market, which is limited to sophisticated institutional investors, and that the expansion would inflict significant harm on investors, the capital markets, and the U.S. economy.[15]

Nevertheless, the Commission's staff responded with another no-action letter reaffirming its view that the Rule applies to fixed-income securities, but delaying enforcement until January 3, 2023.[16]

Since the issuance of the no-action letters, the Commission has received numerous

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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; 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 (Sept. 2021 No-Action Letter).

[14] *See* Rulemaking Petition at 6 & nn. 14-15 .

[15] *See id.* at 7 & nn. 16-18.

[16] *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 (Dec. 16, 2021), http://bit.ly/3EDmGR7 (Dec. 2021 No-Action Letter).

submissions from the private sector[17] and from Members of Congress[18] urging it not to apply Rule 15c2-11 to fixed-income securities, and particularly not to apply Rule 15c2-11 to Rule 144A securities. In addition, the Commission staff has held telephone calls, videoconferences, and meetings with private sector representatives to discuss the issue.[19] Members of the Commission, and Commission staff, have indicated that the possibility of providing some sort of relief is under consideration,[20] but no action has occurred.

Rule 144A

The Commission adopted Rule 144A over 30 years ago to facilitate accessing 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.[21] Rule 144A embodies an explicit tradeoff: these securities may be purchased only by sophisticated investors—QIBs—but are exempt from public-disclosure requirements. The Commission specifically considered what information-sharing requirements

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17 *See* Letter from Christopher A. Iacovella, CEO, American Securities Association, to Gary Gensler, Chair, U.S. SEC (Oct. 22, 2021), http://bit.ly/3V9a1uW; Letter from Kristi Leo, President, Structured Fin. Ass'n, to Gary Gensler, Chair, U.S. SEC (Dec. 9, 2021), http://bit.ly/3GmOhY4 ; Letter from the Credit Roundtable to Gary Gensler, Chair, U.S. SEC (June 21, 2022), http://bit.ly/3gd3BvV; NAM Letter, *supra* note 5; Letter from Kenneth E. Bentsen, Jr., President and CEO, Securities Industry and Financial Markets Association ("SIFMA"), to Gary Gensler, Chair, U.S. SEC (July 21, 2022), http://bit.ly/3AnsThu (SIFMA July 21 Letter).

18 *See* Letter from Congressman Josh Gottheimer et al., to Gary Gensler, Chair, U.S. SEC (July 26, 2022), http://bit.ly/3ApisdA; *see also* Letter from Senators Bill Hagerty and Thom Tillis to Gene Dodaro, Comptroller General, U.S. G.A.O. (Oct. 12, 2022), http://bit.ly/3tCyn4w.

19 *See* Sept. 2021 No-Action Letter, *supra* note 13, at 1 ("In response to requests from industry representatives . . . through telephonic meetings with Commission staff . . . ."); Dec. 2021 No-Action Letter, *supra* note 16, at 1 ("In response to requests from industry representatives . . . through telephonic meetings with Commission staff . . . ."); SIFMA July 21 Letter, *supra* note 17, at 1 ("SIFMA appreciates the Webex meeting we had with your staff on June 28, 2022 and the smaller, follow-up Webex meeting on June 30, 2022 with your staff to discuss our concerns . . . ."); *see also* Bond Dealers of America, *BDA Requests Exemption from SEC Rule 15c2-11*, BDA (May 5, 2021), http://bit.ly/3EBYD47 ("SEC staff have informally confirmed with BDA that the Rule applies equally to equities and fixed income.").

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

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

should apply in the Rule 144A market,[22] and ultimately implemented an "available upon request" disclosure system under which holders and prospective purchasers of Rule 144A securities are entitled to obtain certain financial and operational information from issuers.[23] Issuers typically make this information available 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)."[24] By expressly referring to Rule 15c2-11 but requiring only that financial information be "available upon request," the Commission distinguished Rule 144A securities from the securities subject to Rule 15c2-11, making clear that the Rule 144A market was not directly subject to Rule 15c2-11's requirements. And, of course, a key purpose of Rule 144A was to exempt issuers from the public-disclosure requirements that otherwise would apply. Indeed, the Commission specifically explained that it "d[id] not believe that the limited information requirement [ultimately adopted] should impose a significant burden on those issuers subject to the requirement."[25]

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.

There Is, At Minimum, A Substantial Likelihood That The Staff's Application of Rule 15c2-11 to Rule 144A Securities Is An Erroneous Construction Of The Rule; Is Arbitrary, Capricious, And Contrary To Law; And Is Contrary To The Public Interest

The staff's contention that Rule 15c2-11 applies to Rule 144A securities is for multiple reasons incorrect and, in addition, the application of Rule 15c2-11 to such securities would be arbitrary, capricious, and contrary to law—and therefore invalid. *See* 5 U.S.C. § 706(2).

First, when the Rule was promulgated in 1971, it did not apply to fixed-income securities. The Rule's justification—protecting retail investors—applies only with respect to investors in OTC equity securities. Moreover, the Commission has never taken enforcement action for a failure

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[22] *See id.* at 17,948.

[23] *Id.* at 17,939.

[24] *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) . . . .").

[25] *Id.* at 17,939. 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.

to comply with Rule 15c2-11 with respect to fixed-income securities even though broker-dealers in the fixed-income market have not complied with Rule 15c2-11's requirements for fifty years.[26]

Second, regardless of the scope of the 1971 rule, the Commission's 1991 amendments to Rule 15c2-11 codified the Commission's view that, at minimum, the Rule did not apply to Rule 144A securities. The Commission amended Rule 15c2-11 in 1991 to impose additional requirements on broker-dealers, requiring them to review certain information submitted by issuers and to have a reasonable basis for believing that the information was obtained from reliable sources and accurate in all material respects.[27] Just a year earlier, the Commission had adopted Rule 144A to provide an alternative, less costly and less burdensome means for companies to raise funding.[28] In promulgating Rule 144A, the Commission expressly chose not to impose on Rule 144A securities either the public-disclosure requirements that otherwise would have applied to such securities or the then-existing requirements imposed by Rule 15c2-11.[29]

The 1991 amendments to Rule 15c2-11 imposed additional requirements on broker-dealers, requiring them to review the required information submitted by issuers and to have a reasonable basis for believing that the information was obtained from reliable sources and accurate in all material respects. Rule 144A did not subject broker-dealers to such review or reliability requirements in order to publish quotations with respect to Rule144A securities. Rule 144A required only that specified financial and operational information be available upon request.[30]

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[26] *See* Rulemaking Petition at 6 & nn. 14-15.

The September 2021 No-Action Letter cited the Commission's 1976 addition to Rule 15c2-11 of an exemption for municipal securities. *See also* Rule 15c2-11(f)(4). But that exemption, adopted by the Commission as part of a large number of rule changes relating to municipal securities, was added to the Rule pursuant to a specific direction from Congress, and was not the product of a reasoned determination by the Commission that the Rule otherwise applied broadly to fixed-income securities. *See* Regulation of Municipal Securities Professionals and Transactions in Municipal Securities, 41 Fed. Reg. 22,820, 22,821 (June 7, 1976); Regulation of Municipal Securities Professionals and Transactions in Municipal Securities, 40 Fed. Reg. 60,084, 60,088 (Dec. 31, 1975). In any event, the 1976 action has no relevance whatsoever to the application of Rule 15c2-11 to the Rule 144A market, for the reasons discussed in the text below.

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

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

[29] *See* Rulemaking Petition at 15-16.

[30] *Compare* Initiation or Resumption of Quotations Without Specified Information, 56 Fed. Reg. 19,148 (Apr. 25, 1991), *with* Resale of Restricted Securities; Changes to Method of

Nothing in the 1991 amendments addresses, let alone provides a reason for overturning, the Rule 144A standards adopted a year earlier. If the Commission were displacing the Rule 144A standards, it would have been obligated by the Administrative Procedure Act to expressly recognize that fact and to explain its change of position.[31] The only logical—and only legally-permissible—conclusion is that the Commission did not displace the Rule 144A standards. As such, the Commission's promulgation of the 1991 amendments codified the pre-existing interpretation that Rule 144A securities are not subject to Rule 15c2-11. And again, the lack of any enforcement action despite industry's universal noncompliance with the Rule with respect to Rule 144A securities provides additional, strong support for this conclusion.

Third, the conclusion that the Commission codified its interpretation that Rule 15c2-11 does not apply to Rule 144A securities applies even more strongly with respect to the 2020 amendments, for multiple reasons: (1) the 2020 amendments adopted requirements mandating public disclosure that squarely conflict with Rule 144A, which does not require public disclosure[32]; (2) the Commission approved a Financial Industry Regulatory Authority ("FINRA") rule implementing the amended Rule 15c2-11 that expressly applied only to equity securities[33]; and (3) the Commission has exhibited a continued lack of enforcement since Rule 144A's adoption (until the staff's issuance of its novel interpretation in September 2021) in the face of uniform industry non-compliance with the Rule in connection with those securities.[34]

Fourth, the application to Rule 144A securities of the 2020 amendments' requirement that issuers publicly disclose their financial information is arbitrary, capricious, and contrary to law because an "agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'"[35] The Commission did not acknowledge or explain the reversal of its determination, reached when promulgating Rule 144A, that public disclosure of issuer financial information was not warranted for Rule 144A securities.[36]

Fifth, to the extent the Commission agrees with the staff interpretation that the disclosure requirements imposed by the 2020 amendments apply to Rule 144A securities—and for the

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Determining Holding Period of Restricted Securities Under Rules 144 and 145, 55 Fed. Reg. 17,933, 17,934, 17,939 (Apr. 30, 1990).

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

[32] *See* Rulemaking Petition at 15-16.

[33] *See id.* at 8-9.

[34] *See id.* at 6 & nn. 14-15.

[35] *Encino Motorcars*, 579 U.S. at 221 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

[36] *See id.* (While "[a]gencies are free to change their existing policies," they may only do so "as long as they provide a reasoned explanation for the change.").

reasons already discussed, neither Rule 15c2-11 nor the 2020 amendments thereto can or should apply to Rule 144A securities—those amendments are arbitrary, capricious, and contrary to law for the additional reason that the Commission "'entirely failed to consider [an] important aspect of the problem.'"[37] At no point did the Commission evaluate the consequences of applying the public-disclosure requirement to Rule 144A securities, even though it will inflict significant adverse harm on Rule 144A issuers, broker-dealers, investors, and the entire economy.

Sixth, because, for the reasons just explained, the Commission has never applied Rule 15c2-11 to Rule 144A securities, the extension of Rule 15c2-11 to those securities could rest only on the Commission staff's determination embodied in the September 2021 and December 2021 no-action letters. But only a lawfully-promulgated rule can support the imposition of a new legal duty.[38] Because the staff guidance was not promulgated in accordance with the Administrative Procedure Act, it is invalid.[39]

Seventh, for the reasons stated in the Rulemaking Petition—which is incorporated by reference into this submission—the staff's interpretation is wholly inconsistent with the public interest and with the Commission's tripartite mission to facilitate capital formation, maintain efficient markets, and protect investors.

<u>Investors, Issuers, Broker-Dealers, and the U.S. Economy Will All Suffer Irreparable Harm If the Staff's Application of Rule 15c2-11 to Rule 144A Securities Is Permitted To Take Effect</u>

Applying Rule 15c2-11 to the Rule 144A market will impose immediate, irreparable harm on issuers, broker-dealers, and investors. Issuers will immediately be compelled to expend unrecoverable time and money to comply with the public-disclosure requirements, or else experience a decrease in liquidity and an increase in borrowing costs—or be forced into less efficient and more costly methods of raising funding. Broker-dealers will be obligated to expend funds to comply with expensive and time-consuming compliance obligations. And investors will suffer the immediate loss in value of the Rule 144A securities that they hold.

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[37] *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (agency decision must be set aside when agency fails to "'consider [an] important aspect of the problem'").

[38] "Agency actions that 'impose legally binding obligations or prohibitions on regulated parties'" must "be promulgated pursuant to notice and comment" under the APA. *Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 716-17 (D.C. Cir. 2015).

[39] *See United States v. Picciotto*, 875 F.2d 345, 346 (D.C. Cir. 1989) ("A rule which is subject to the APA's procedural requirements, but was adopted without them, is invalid.").

Infliction of these unrecoverable costs plainly constitutes irreparable injury. Courts have recognized that "financial injury [is] irreparable where no 'adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation.'"[40]

These irreparable injuries require the issuance of interim relief pending Commission action or of a stay pending judicial review of the staff's interpretation.

Applying Rule 15c2-11 to Rule 144A Securities Will Cause Immediate and Irreparable Harm to The Companies Issuing Rule 144A Securities

For over 30 years, numerous private companies have raised funds pursuant to Rule 144A—which the Commission specifically adopted in order to create an efficient market for those companies to raise capital.

The efficiencies of the Rule 144A market have made it highly successful. Issuances totaled approximately $900 billion in 2021.[41] Rule 144A offerings have become a significant, if not the primary method, used by private companies issuing asset-backed securities, high-yield bonds, and investment grade debt.[42] Rule 144A securities issued by private companies 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.[43] Rule 144A securities are thus a significant component of the U.S. financial system and a key tool to fund corporate growth.

Applying Rule 15c2-11 to Rule 144A securities will force privately held companies to adopt one of several alternative pathways for raising funds, each of which will subject those

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[40] *Mexichem Specialty Resins*, 787 F.3d at 555 (quoting *Wis. Gas Co.*, 758 F.2d at 674).

[41] EY Study, *supra* note 4, at 5 (the $900 billion number excludes "[a]ll issues with maturities of one year or less, as well as CDs"); *see also* Chris Killian & Joseph Corcoran, *The Collision of Rule 15c2-11 and Rule 144A*, SIFMA (Sept. 19, 2022), http://bit.ly/3EG43MF ("Total 144A issuances (*across issuer types*) in 2020 were approximately $1.15 trillion and in 2021 were approximately $1.36 trillion." (emphasis added)).

[42] *See* Letter from Lindsey Weber Keljo, Managing Dir. and Assoc. Gen. Couns., SIFMA, et al., to Gary Gensler, Chair, U.S. SEC at 5 (Sept. 23, 2021), http://bit.ly/3EgakwR (SIFMA Sept. 23 Letter); Letter from Matt Thornton, Assoc. 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); Letter from Kenneth E. Bentsen, Jr., SIFMA President and CEO, to Gary Gensler, Chair, U.S. SEC at 2 (June 10, 22), http://bit.ly/3AuW1U6 (SIFMA June 10 letter) ("[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.").

[43] EY Study, *supra* note 4, 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).

companies to multiple adverse consequences compared to the current robust, liquid, and well-functioning market for Rule 144A issuances: (1) publicly disclose proprietary financial information and face competitive harm and, in addition, significantly increased costs; (2) remain in the Rule 144A market but forgo public financial disclosures, which would make it difficult if not impossible for the company's new issuances to be traded on the secondary market and therefore increase their cost of capital; (3) abandon the Rule 144A market and raise funds via inferior methods that impose increased costs. Each of these options will impose irreparable harm on the issuers that have relied on Rule 144A to raise funds—by significantly increasing their funding costs. These are losses that issuers will not be able to recover in the event that the staff's interpretation of Rule 15c2-11 is later overturned by the Commission or its application to Rule 144A securities is invalidated in court.

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

If private companies choose to continue to issue Rule 144A securities under the 15c2-11 disclosure requirements, they will incur significant costs that cannot be recovered.

First, they will be required to publicly disclose confidential information so that broker-dealers may continue to provide public quotations for their securities. But maintaining competitive advantage through confidentiality is a key reason why many companies choose to remain private in the first place. 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."[44] Competitors often take advantage of public disclosures to gain insight into their peers' finances, operations, and profitability.[45] Further, public disclosures are a bell that cannot be unrung—once competitors have gleaned information from a public disclosure, a later

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[44] 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").

[45] *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 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.

court ruling or agency determination that the disclosure was unnecessary cannot undo the harm that has been done.

Second, private Rule 144A issuers forced to make public financial disclosures will face new, significant compliance costs. Ongoing public disclosure is expensive. It makes up "a substantial portion of the costs of becoming and remaining a public issuer,"[46] and takes up "valuable management time."[47] For the median public U.S. company, the annual cost of complying with mandatory disclosures is about $293,000.[48] For large businesses, those costs are much higher. For companies that have not had to make such disclosures before, the costs of initially compiling their public disclosures may be even greater, as they likely do not have the experience or internal infrastructure to compile the needed information in an efficient and timely manner. It is unsurprising that a private company would choose to avoid these costs of the "public spotlight" and instead devote its "full attention to the company's business, its vendors and its customers."[49] And again, once the costs of compliance are incurred, they cannot and will not be recouped, even if the disclosure requirement is later overturned.[50]

Third, companies choosing to remain in the Rule 144A market likely will face higher costs because broker-dealers will have additional and onerous compliance obligations (explained below), and some of those costs will be passed on to issuers.[51]

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[46] Carlos Berdejo, *Going Public After the JOBS Act*, 76 Ohio St. L.J. 1, 17 (2015). *See also* Michael Ewens, Kairong Xiao & Ting Xu, *Regulatory Costs of Being Public: Evidence From Bunching Estimation* (Nat'l Bureau of Econ. Rsch., Working Paper No. 21943 (2021); 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.

[47] Joseph L. Johnson III & Andrew J. Weidhaas, *The Going-Private Transaction*, N.Y.L.J. (Nov. 13, 2001); *see also* Coates & Srinivasan, *SOX After Ten Years* (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").

[48] Ewens et al., *supra* note 46, at 23.

[49] 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) (finding that a majority of private companies choose not to disclose financial information).

[50] 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.

[51] *See infra* at 18-20; Rulemaking Petition at 23-24.

Fourth, some companies will choose to leave the Rule 144A market as a result of the public-disclosure requirement, opting instead for other means of raising capital, such as private placements. A smaller Rule 144A market will lead to a lack of liquidity in that market because investors in Rule 144A securities are likely to 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."[52] 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 issuer's ability to raise funds.[53]

In sum, private companies that continue to issue Rule 144A securities and comply with the staff's public-disclosure requirement will suffer significant increased costs that could not be recovered if the staff's interpretation is overturned. That plainly qualifies as irreparable injury.

Irreparable Harm from Higher Borrowing Costs for Issuers that Forgo Public Disclosure

Some private companies may decide to remain in the Rule 144A market without subjecting themselves to the competitive harm and increased compliance costs associated with public financial disclosures. Such issuers will bear increased borrowing costs in the form of an illiquidity premium charged by investors—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 public broker-dealer quotations, which, under the staff's interpretation of Rule 15c2-11, cannot be issued in the absence of public disclosure of issuer information.

A recent study by Ernst & Young—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, on average, borrowers would face an illiquidity premium of 72 basis points due to the application of Rule 15c2-11 to Rule 144A securities.[54] Both investment-grade issuances (27 basis points) and high-yield issuances (100 basis points) would be impacted.[55] The illiquidity premiums attributable to the application of Rule 15c2-11 would produce an 8-13% increase in Rule 144A issuers' borrowing costs.[56] That increased cost is a harm

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

[53] Market Impact Diagram: Major SEC Regulatory Actions, NERA Economic Consulting at 11 (2022), http://bit.ly/3gdAQz2; SIFMA June 10 Letter, *supra* note 42, at 2.

[54] EY Study, *supra* note 4, at 4.

[55] *Id.*

[56] *Id.*

that will remain irreparable, and unrecoverable, even if a court or the Commission later determines that Rule 15c2-11 does not apply to Rule 144A securities.

Irreparable Harm From Costs of Switching to Inferior Funding Alternatives

If companies choose to exit the Rule 144A market—a choice that many private companies have informed the Commission they intend to make should Rule 15c2-11 be imposed on the Rule 144A market—those companies' funding costs will increase, subjecting them to irreparable injury.

The principal alternative option would be private placements exempt under Section 4(a)(2) of the Securities Act.[57] 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.[58]

- 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, the private-placement market is not nearly as deep or efficient as the Rule 144A market. Thus, some issuers will find that they will not be able to place the same amount of securities, terms will be less favorable, borrowing costs will be higher and execution times will be slower.

- Bonds settle outside of the Depository Trust Company central clearing system, and settle in physical, certificated form.[59] That increases transaction costs and the time to execute a secondary trade, which in turn decreases liquidity.

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57 15 U.S.C. § 77d(a)(2).

58 *See* McLaughlinPC.com, *Unregistered Securities Offerings* at 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.").

59 *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.").

- 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."[60]

- 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, raising capital will immediately become costlier and more difficult if the staff's interpretation of Rule 15c2-11 is permitted to take effect with respect to Rule 144A securities. Those increased costs plainly qualify as irreparable injury.

Applying Rule 15c2-11 to Rule 144A Securities Will Inflict Immediate and Irreparable Harm on 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. Again, there is no way for broker-dealers to recoup those costs if the Commission or a court later determines that the Rule should not be applied to those securities. These increased costs therefore qualify as irreparable harm.

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.[61] That will be a significant undertaking for broker-dealers in the Rule 144A market due to the manual nature of the collection

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

[61] *See generally* Rule 15c2-11(a)(1)(i).

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.[62]

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 brokers-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.[63] 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.

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[62] *See* SIFMA Sept. 23 Letter, *supra* note 42, 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 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.").

[63] *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 FI instruments or could be concentrated in certain markets such as those for Rule 144A securities.").

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.

Applying Rule 15c2-11 to Rule 144A Securities Will Cause Immediate and Irreparable Harm to Investors that Currently Hold Those Securities and to Investors that Trade Those Securities

The Commission has justified Rule 15c2-11 as an investor-protection measure. But investors in Rule 144A securities will be harmed, not protected, by application of the Rule—and that harm will be both immediate and irreparable.

First, investors that hold Rule 144A securities will see an immediate decrease in the value of 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 would thus have to solicit bids privately from broker-dealers. This process is time-consuming and expensive—and the one-off conversations with broker-dealers make it extremely difficult if not impossible to generate competition in setting sale prices. Additionally, even if a purchaser can be found through 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. These reductions in transparency and liquidity will produce an immediate decrease in the value of Rule 144A holdings.[64]

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[64] Market Impact Diagram, *supra* note 53, at 11; ICI Letter, *supra* note 42, 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

Second, 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.[65] Indeed, the Chairman has 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,[66] 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.

Third, a reduction in published quotations also will immediately increase institutional investors' costs of required reporting 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 will have to individually solicit quotations for each and every security in their portfolio, which would be costly and time-intensive.[67] In addition,

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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 42, 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)).

[65] *See* ICI Letter, *supra* note 42, at 8 ("[F]ewer available indications of interest or quotes will impair price discovery and transparency for existing securities . . . . A reduction in dealer activity—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.").

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

[67] *See* ICI Letter, *supra* note 42, 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.").

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. The time and cost of this process would ultimately be borne by the investor.

Because of these costs and risks, it is possible that some, if not many, institutional investors will shy away from the Rule 144A market. An overall reduction in Rule 144A investors would further reduce liquidity and negatively affect investors still willing to invest in Rule 144A securities.

It is therefore unsurprising that institutional investors in the Rule 144A market have themselves told the Commission that they do not need or want Rule 15c2-11 to apply to Rule 144A securities and that the staff's expansive interpretation is "inconsistent with the Commission's longstanding goal of promoting investor protection."[68] That confirms the irreparable harm investors will suffer if the staff's interpretation is not suspended.

A Stay Will Not Harm Other Parties, and the Public Interest Favors a Stay

No third parties will be harmed if the staff's novel and broad interpretation does not go into effect, because the investor-protection rationale underlying Rule 15c2-11's disclosure requirements is wholly inapplicable to the Rule 144A market. The Commission adopted those requirements to protect retail investors,[69] but retail investors cannot participate in the Rule 144A market, which is limited to sophisticated, institutional investors—QIBs. Moreover, QIBs already are entitled to obtain financial and operational information from issuers of Rule 144A securities simply by asking for it. Public availability of that information and review of the information by broker-dealers provides no additional benefit whatsoever.

Nor would the Commission be harmed. The Commission has not brought an enforcement action for noncompliance with Rule 15c2-11 in the fixed-income market in the entire fifty years that Rule 15c2-11 has existed. Further, the Commission already determined, when it adopted Rule 144A, that public disclosure of issuer financial and operational information is not necessary or required in the Rule 144A context—and that the current system, which requires that the relevant information be provided to QIBs upon request, properly protects investors and the public interest.

A stay is also in the public interest because applying Rule 15c2-11 to the Rule 144A market will have significant negative consequences for the U.S. economy.

The recent EY study documented significant adverse impacts on job creation by U.S. companies and on U.S. GDP. 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

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68 *See id.* at 2.

69 *See supra* pp. 5-6.

results in less capital formation."[70] 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."[71]

EY estimates that the increase in borrowing costs attributable to the staff's new interpretation will reduce job growth by 30,000 jobs in each of the first five years after the interpretation takes effect. Those losses will increase to 50,000 jobs each year in the following five years, and then 100,000 jobs each year thereafter.[72] Additionally, U.S. GDP will decline by $10 billion annually, for a total of $100 billion over the first ten years after implementation.[73]

There simply is no reason to inflict this harm on the U.S. economy and on American workers. The public interest weighs heavily in favor of interim relief.

Conclusion

The Commission should grant interim relief staying the application of Rule 15c2-11 to Rule 144A securities.

The staff's decision that Rule 15c2-11 applies to Rule 144A securities is incorrect, arbitrary and capricious, contrary to law, and contrary to the public interest. Not only does the decision ignore fifty years of Commission and industry practice, but it squarely conflicts with the Commission's determination, in promulgating Rule 144A, that public disclosure of issuer financial and operational information is not required with respect to Rule 144A securities, which may be purchased only by sophisticated investors that are entitled to obtain issuers' financial and operational information upon request.

Applying Rule 15c2-11 to the Rule 144A market will inflict significant, immediate, and irreparable harm on private companies, by exposing proprietary information and thereby inflicting competitive harm, decreasing liquidity, and increasing the cost of capital; on broker-dealers, by imposing the substantial costs of putting in place new procedures and staff to comply with the Rule; and on investors, by immediately reducing the value of the Rule 144A securities that they hold and disrupting the market on a going-forward basis. It also will harm the U.S. economy as a whole by preventing the creation of 30,000 new jobs in the next year alone, and thousands of new jobs in subsequent years.

Further, staying the application of the Rule will not harm any third party—the Rule is not needed to protect the highly sophisticated investors in the Rule 144A market—and the

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70 EY Study, *supra* note 4, at 3.

71 *Id.*

72 *Id.*

73 *Id.*

Commission has never even considered, let alone determined, that Rule 15c2-11 provides any benefit to investors in that market, which differs markedly from the equity market that has been the sole focus of the Commission's analysis and the sole basis for its adoption of the Rule.

The Commission therefore should provide interim relief to exempt Rule 144A securities from Rule 15c2-11 pending the Commission's consideration of the Rulemaking Petition or, in the alternative, grant a stay of the application of Rule 15c2-11 to Rule 144A securities pending judicial review so that the NAM and the KAM may seek preliminary and permanent injunctive relief in court.

Respectfully submitted,

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