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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]

[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.

Background

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]

<u>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</u>.

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.

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

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.

<u>Harm to Investors</u>

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]

<u>Harm to the U.S. Economy</u>

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.

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