NATIONAL ASSOCIATION OF Manufacturers

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

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

Dear Chairman Gensler and Director Zhu,

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

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

The NAM is the largest manufacturing trade association in the United States, representing manufacturers of all sizes and in all 50 states. Manufacturing is a capital-intensive industry, requiring significant investments for equipment purchases and research and development ("R&D"). Many privately held manufacturers issue Rule 144A securities to finance these pro-growth activities, which set the stage for economic expansion, innovation, and job creation. The capital formation enabled by Rule 144A often has further downstream effects, as many Rule 144A issuances are designed to finance acquisitions and other corporate expansions, which can lead to significant business efficiencies and enhance product availability and consumer choice.

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

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

[2] *Id.* at 68125.

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

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

The result of the Division's actions is that Rule 15c2-11 will soon be enforced for fixed income securities, including Rule 144A securities, for the first time in its 50-year history. In order to provide quotations for Rule 144A securities, broker-dealers will now be required to verify that information about the issuer of those securities is publicly available. This change will effectively impose a new compliance mandate on the issuers themselves, who will be forced to expose private, competitively sensitive information to the public for the first time. This is despite the fact that the general public cannot purchase Rule 144A securities.

Under Rule 144A, issuances can only be made to qualified institutional buyers ("QIBs")—institutions with over $100 million in assets under management.[6] Retail investors, and in fact all individual investors, are explicitly prohibited from purchasing Rule 144A securities.[7] As such, the retail investor protections found in the 2020 amendments are completely extraneous to Rule 144A issuances. Not only are these requirements irrelevant to retail investors, but they also do not provide any new information for the QIBs who are actually allowed to purchase Rule 144A securities given that these sophisticated institutions are already able to access issuer information upon request.

The 2020 amendments clearly were not designed to apply to the fixed income markets generally or to Rule 144A securities specifically. The amendments were justified on retail investor protection grounds, and fixed income securities did not merit a single mention in the adopting release. Neither market participants nor the Commission appear to have considered how the 2020 amendments might apply to fixed income securities. And the adopting release does not include any justification for

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

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

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

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

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

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

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

For manufacturers, applying the 2020 amendments to Rule 144A securities could have a serious and damaging impact. Under the Division's novel interpretation, the amendments would force private companies to make sensitive information public, increase the cost of capital, and decrease the utility of Rule 144A issuances to finance manufacturing growth and innovation.

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Chris Netram
Managing Vice President, Tax and Domestic Economic Policy