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Fixed Income Securities and SEC Rule 15c2-11: History, Context, Uncertainties—and a Pathway Forward

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Fixed Income Securities and SEC Rule 15c2-11: History, Context, Uncertainties—and a Pathway Forward

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This Article discusses a topical legal issue in the areas of securities, corporate, and administrative law: an ongoing controversy regarding the SEC’s broker-dealer quoting rule, Rule 15c2-11 under the Securities Exchange Act of 1934. For the past fifty years, the rule has been understood to apply only to equity securities (primarily, penny stocks). But more recently, the SEC staff has stated that the rule also actually applies to fixed income securities, such as corporate bonds and asset-backed securities. This SEC staff interpretation has set off a wave of uncertainty across the financial services industry about the application of a rule to fixed income securities that many believe was actually designed for equity securities. After tracing the regulatory history of the rule, its purpose and these recent developments, the article ultimately recommends a pathway forward for the SEC to address this regulatory conundrum—a pathway that would stem the market uncertainty and also advance the SEC’s investor protection mission.

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Introduction

Informal conversations in 2021 between the financial services industry and staff members of the Securities and Exchange Commission (SEC) revealed important news: in the SEC staff’s eyes, SEC Rule 15c2-11—a fifty-year-old rule governing broker-dealers’ over-the-counter (OTC) securities quoting activities—applies to *fixed income* securities, a broad category of securities that includes corporate bonds and asset-backed securities, among other things.

This was consequential because many had long understood, rightly or wrongly, that the rule’s focus and application is limited to OTC *equity* securities (i.e., stocks). These conversations have set off a wave of uncertainty and concern across the financial services industry, and advocacy about the application of a rule to fixed income that many believe was intended and designed for equities.

In 2021 and 2022, the SEC endeavored to address the uncertainty through the issuance of three staff “no-action letters” that provided targeted, time-limited relief from Rule 15c2-11 for many (but not all) types of fixed income securities. But long-term uncertainties remain, given the relief’s impermanence and incongruities between the substantive requirements of Rule 15c2-11 and a separate SEC safe harbor, Rule 144A, that underpins a multi-trillion-dollar fixed income securities market.

This Article explores this regulatory quandary. It traces Rule 15c2-11’s history and recent developments, which indicate that there has been bona fide confusion regarding which securities are subject to the rule, including confusion within the SEC. The Article ultimately proposes a two-part pathway forward that would stem market uncertainty and, importantly, advance the SEC’s tripartite mission of protecting investors; maintaining fair, orderly, and efficient markets; and facilitating capital formation.¹ Specifically, investors, issuers and the marketplace would be well-

1. See Gary Gensler, Chair, SEC, Testimony Before the United States Senate Committee on Banking, Housing, and Urban Affairs 13 (Sept. 15, 2022) [hereinafter Gensler September 2022 Testimony], <https://www.banking.senate.gov/imo/media/doc/Gensler%20Testimony%209-15-22.pdf> [https://perma.cc/J7NJ-FPCR] (stating that “we are motivated by our three-part mission, as

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served if the SEC were to: (1) preserve the status quo by extending indefinitely the time-limited no-action relief that the staff issued in November 2022; and concurrently (2) release a request for public comment to facilitate a formal SEC evaluation of what, if any, additional safeguards governing fixed income quoting activities may be necessary to protect investors.

I. Key Background and Context

A. History and Mechanics of Rule 15c2-11

The SEC established Rule 15c2-11 in 1971.² In basic terms, the rule requires a broker-dealer that is seeking to publish its interest in buying or selling an OTC security (for purposes of this rule, generally, a security that is not listed on an SEC-registered exchange)³ through a quotation medium to conduct diligence on the security's issuer and, following 2020 amendments, ensure that specified information about the issuer is current and publicly available.⁴

The historical purpose of Rule 15c2-11 is to leverage the “gatekeeper role” of broker-dealers to help reduce fraud and manipulative practices in the market for OTC securities. It requires a broker-dealer to conduct diligence on an OTC issuer to ensure that the issuer is a legitimate entity (and not a shell company or fraud) before publishing quotations on, and thus potentially providing further legitimacy to, that issuer's securities.⁵

In more technical terms, Rule 15c2-11 applies when a broker-dealer “publish[es]” or “submit[s] . . . for publication” “any quotation” on covered OTC securities in “any quotation medium,” subject to certain exceptions.⁶ The rule does not define “publish” or “submit for publication,” but it

directed by Congress: to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation”).

2. Initiation or Resumption of Quotations by a Broker or Dealer Who Lacks Certain Information, 36 Fed. Reg. 18641 (Sept. 18, 1971) (codified at 17 C.F.R. § 240.15c2-11).

3. More specifically, the rule includes an exception for the publication or submission of a quotation for a security “that is admitted to trading on a national securities exchange and that is traded on such an exchange on the same day as, or on the business day next preceding, the day the quotation is published or submitted.” Publication or submission of quotations without specified information, 17 C.F.R. § 240.15c2-11(f)(1) (2022).

4. For further information concerning the 2020 amendments, including the new requirement that specified information about the issuer must be current and publicly available, see *infra* Part I.B.

5. See generally 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), <https://www.sec.gov/news/press-release/2020-212> [<https://perma.cc/9ASX-2TSQ>] (noting that “[b]ecause broker-dealers play an integral role in facilitating access to OTC securities and serve an important gatekeeper function, Rule 15c2-11 requires broker-dealers to review key, basic issuer information before initiating or resuming quotations for the issuer's security in the OTC market”).

6. Publication or submission of quotations without specified information, 17 C.F.R. § 240.15c2-11(a) (2022).

defines “quotation” extremely broadly to include any indication of general interest in buying or selling a particular security, even without pricing information.⁷ The rule defines “quotation medium” to include any (1) “interdealer quotation system”—that is, any system of general circulation to broker-dealers (an alternative trading system or otherwise) that regularly disseminates quotations of identified broker-dealers; or (2) “publication or electronic communications network or other device that is used by brokers or dealers to make known to others their interest in transactions in any security, including offers to buy or sell at a stated price or otherwise, or invitations of offers to buy or sell.”⁸

Under the rule, a broker-dealer cannot engage in this covered quoting activity unless it: (1) gathers and maintains in its records certain specified information about the security’s issuer; (2) ensures that the issuer information is current and publicly available; (3) reviews the relevant information and forms a reasonable belief that the information is accurate and the sources of information are reliable; and (4) meets certain records requirements.⁹

The specific issuer information that must be publicly available and reviewed depends on the nature of that issuer’s disclosure obligations under the federal securities laws.¹⁰ For example, for an issuer that has filed a registration statement under the Securities Act of 1933 (the Securities Act), the required issuer information is the issuer’s prospectus, provided that it became effective less than ninety calendar days prior to the quoting activity.¹¹ For “catch all issuers” (i.e., issuers that are not subject to similar statute- or rule-based disclosure and reporting requirements, among others) the rule identifies sixteen pieces of information that collectively comprise the issuer information.¹² This includes, for example: (1) the address of the issuer’s principal place of business; (2) a description of the issuer’s business; (3) a description of products or services offered by the issuer; and (4) the name and title of all company insiders.¹³

B. 2020 Amendments to Rule 15c2-11

The SEC amended Rule 15c2-11 in 2020.¹⁴ Significantly, the amendments included a new requirement that a broker-dealer must confirm, before engaging in covered quoting activity, that the issuer information is

7. *Id.* § 240.15c2-11(e).

8. *Id.* § 240.15c2-11(e)(3), (8).

9. *Id.* § 240.15c2-11(a), (c-d).

10. *Id.* § 240.15c2-11(b).

11. *Id.* § 240.15c2-11(b)(1).

12. *Id.* § 240.15c2-11(b)(5).

13. *Id.* § 240.15c2-11(b)(5)(i)(B), (H-I), (K).

14. Publication or Submission of Quotations Without Specified Information, 85 Fed. Reg. 68124 (Oct. 27, 2020).

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current and publicly available.¹⁵ The rule defines “publicly available” to mean available on a website or other electronic information delivery system where access is not restricted by user name, password, fees, or other restraints.¹⁶ The 2020 amendments also added new exceptions and modified certain existing exceptions to the rule.¹⁷ As amended, the rule currently contains exceptions for: (1) exchange-listed securities; (2) customers’ unsolicited indications of interest; (3) circumstances where a broker-dealer “piggybacks” on another published quotation; (4) municipal securities; (5) actively-traded securities of certain large issuers; and (6) securities recently underwritten by the broker-dealer doing the quoting activity.¹⁸

C. Rule 15c2-11 Applied to Fixed Income Securities

In 2021, staff in the SEC’s Division of Trading and Markets expressed the view that the rule has always applied to equities and other types of OTC securities, including fixed income securities.¹⁹ Fixed income securities (also commonly known as debt securities) are quite different from equity securities (stocks). An investor that owns a share of common stock owns *equity* in the issuer. By contrast, an investor that owns a fixed income security does not own equity in the issuer, but instead holds an “IOU” from the issuer. A fixed income security is a debt owed by the issuer to the investor that is designed to be paid back with interest.²⁰ Fixed income securities include a broad range of products, including corporate bonds, government bonds, public finance bonds, and asset-backed securities, among other things.

Many market participants and their representatives expressed great surprise and dismay at the SEC staff’s view that Rule 15c2-11 applies to fixed income securities. For example, the Structured Finance Association—which represents sectors of the securitization market, including certain issuers, investors, and financial intermediaries, among others—has stated that “[s]ince [Rule 15c2-11’s] introduction, the SEC has only applied the rule to equity securities, with no record of application to fixed income

15. Publication or submission of quotations without specified information, 17 C.F.R. § 240.15c2-11(a)(1)(B) (2022).

16. *Id.* § 240.15c2-11(e)(5).

17. *Id.* § 240.15c2-11(f).

18. *Id.*

19. See Chris Killian & Joseph Corcoran, *The Detriment of Rule 15c2-11’s Application to Fixed Income Markets*, SIFMA: PENNSYLVANIA + WALL (Sept. 12, 2022), <https://www.sifma.org/resources/news/the-detriment-of-rule-15c2-11s-application-to-fixed-income-markets-the-consequences-of-unilateral-rulemaking-without-public-comment> [https://perma.cc/2XZ7-ST67] (stating that “it came as quite a surprise when SEC staff in September 2021 stated that the Rule does, and has always applied to fixed income markets”).

20. For additional background information on fixed income securities and markets, see COALITION GREENWICH, UNDERSTANDING FIXED-INCOME MARKETS IN 2023 (2023), <https://www.sifma.org/wp-content/uploads/2023/05/Understanding-Fixed-Income-Markets-2023-23-2007.pdf> [https://perma.cc/54JX-ZYRY].

or structured products.”²¹ Similarly, five other industry associations—representing various investors, asset management firms and companies—stated in a September 2021 letter to the SEC that they “understand that the Rule has never been applied to, or enforced in, the [fixed income] markets throughout its entire fifty-year history.”²²

The SEC staff has raised several compelling points in support of its position that the rule applies to fixed income securities.²³ Most significantly:

1. The Rule Text

The plain language of Rule 15c2-11 states that the rule applies in respect of a broker-dealer’s quoting activities relating to “securities” (not, for example, “equity securities”).²⁴ The Securities Exchange Act of 1934 defines “security” to include stocks and bonds, among other things.²⁵

2. 2019 Request for Comment

In the 2019 proposal that the Commission published prior to its 2020 final rulemaking, the Commission included a request for comment concerning whether debt securities or other types of securities should be excepted from the rule.²⁶ This request for comment implies that debt securities and other types of securities are currently subject to Rule 15c2-11.

3. Statements in Prior SEC Releases

In 1998 and 1999 rulemaking proposals, the Commission explicitly stated that Rule 15c2-11 applies to debt securities, subject to exceptions for

21. *SFA Advocates on SEC Rule 15c2-11*, STRUCTURED FIN. ASS’N, <https://structured-finance.org/resource-details/sfa-advocates-on-sec-rule-15c2-11> [<https://perma.cc/2CEB-BKCU>] (last visited Mar. 1, 2023).

22. Letter from Lindsey Weber Keljo, Managing Dir. & Assoc. Gen. Couns., Sec. Indus. & Fin. Mkts. Ass’n, et al., to Gary Gensler, Chair, SEC 3 (Sept. 23, 2021), <https://www.sifma.org/wp-content/uploads/2021/09/Investor-15c2-11-letter-final-2021-09-23.pdf> [<https://perma.cc/D4NV-D7RS>].

23. See, e.g., Letter from Josephine J. Tao, Assistant Dir., Div. Trading & Mkts., SEC, to Racquel Russell, Senior Vice President and Dir. Cap. Mkts. Pol’y, Off. Gen. Couns., Fin. Indus. Reg. Auth. 3 (Dec. 16, 2021) [hereinafter December 2021 No-Action Letter], <https://www.sec.gov/files/fixed-income-rule-15c2-11-nal-finra-121621.pdf> [<https://perma.cc/4QC7-GS5H>].

24. The December 2021 No-Action Letter also states: “Since 1971, Rule 15c2-11 has applied to the publication or submission of quotations for any security (a defined term that has and continues to include fixed income securities), except ‘exempted securities’ and the Rule has excepted municipal securities since 1976.” *Id.* at 2-3 (footnotes omitted).

25. Securities Exchange Act of 1934 § 3(a)(10), 15 U.S.C. § 78c(a)(10) (2018).

26. Publication or Submission of Quotations Without Specified Information, 84 Fed. Reg. 58206, 58230 (Oct. 30, 2019).

exempted securities and municipal securities.²⁷ In the 1998 proposal, the Commission stated, in part, “Rule 15c2-11 covers debt securities, although the Commission recognizes that broker-dealers publishing quotations for debt securities may not have focused on this aspect of the Rule.”²⁸ In that proposal, the Commission also solicited comment on whether the rule should continue to apply to debt securities, and whether the Commission should add an exception in the rule for non-convertible debt securities or non-convertible investment grade debt securities.²⁹ In the 1999 proposal, the Commission proposed to exclude debt securities from Rule 15c2-11.³⁰ The Commission never adopted this proposal.

D. Counterarguments

But on the other hand, the longstanding and widely held impression that the rule’s focus is limited to equities is not without basis:

1. The Rule Text

Although Rule 15c2-11 uses the general term “securities,” certain other aspects of the rule text suggest that the Commission may not have crafted the rule with fixed income (or other types of non-equity) securities in mind. For instance, as noted above, for “catch all issuers” the rule identifies sixteen pieces of information that collectively constitute the relevant issuer information. Several of these required pieces of information appear to contemplate only securities of traditional operating companies: (1) the address of the issuer’s principal place of business; (2) a description of the issuer’s business; (3) a description of products or services offered by the issuer; and (4) the name and title of all company insiders.³¹ The rule does not acknowledge or otherwise accommodate that these categories of information are not relevant to common types of fixed income issuers and securities, including certain public finance entities, sovereigns, and structured products, among others.³² The rule text and SEC guidance do not address how to apply the rule to issuers that, for example, (a) have no

27. Publication or Submission of Quotations Without Specified Information, 63 Fed. Reg. 9661, 9669 (Feb. 25, 1998); Publication or Submission of Quotations Without Specified Information, 64 Fed. Reg. 11124, 11128 (Mar. 8, 1999).

28. Publication or Submission of Quotations Without Specified Information, 63 Fed. Reg. 9661, 9669 (Feb. 25, 1998).

29. *Id.*

30. Publication or Submission of Quotations Without Specified Information, 64 Fed. Reg. 11124, 11144 (Mar. 8, 1999).

31. Publication or submission of quotations without specified information, 17 C.F.R. § 240.15c2-11(b)(5)(B), (H-I), (K) (2022) (emphasis added).

32. *Id.* § 240.15c2-11.

“business” or “principal place of business;” (b) do not sell or provide “products” or “services;” or (c) have no “company insiders.”³³

2. 2020 SEC Release

It appears that some SEC personnel may not have been aware at the time of the 2020 rulemaking that the rule might apply to fixed income securities. The 2020 rulemaking release—which was prepared and reviewed by the SEC’s Division of Trading and Markets, Division of Economic and Risk Analysis, and Office of General Counsel, before it was unanimously³⁴ approved by the SEC’s five Commissioners—discusses the rule and the amendments and their application and effects only in the context of equities. For example, the release lacks any discussion of the rule’s application to, and implications for, OTC fixed income securities.³⁵ If the rule was intended to apply to fixed income securities, then this omission is particularly striking given the significant size and breadth of the fixed income markets. According to a 2020 paper co-authored by the SEC’s former chief economist, the fixed income markets account for 56% of U.S. capital markets.³⁶ Additionally, if the SEC contemplated that Rule 15c2-11 applies to fixed income securities, then the SEC would likely have discussed the interplay between the new Rule 15c2-11 requirement that issuer information be publicly available, and a different standard for the availability of issuer information under Rule 144A under the Securities Act, particularly given the size and importance of the market for fixed income securities offered pursuant to Rule 144A, as discussed below.³⁷

The SEC’s 2020 release uses an equities-only Financial Industry Regulatory Authority (FINRA) rule as the basis for its assessment of the anticipated burdens associated with the amendments to Rule 15c2-11. The SEC’s release states that given the “alignment” between FINRA Rule 6432 and Rule 15c2-11, the Commission believes that the number of forms filed under FINRA Rule 6432 provide a “reasonable baseline from which to estimate the burdens” associated with Rule 15c2-11.³⁸

For context, FINRA Rule 6432 requires FINRA member broker-dealers to file Form 211 with FINRA before initiating or resuming a

33. See, e.g., *id.*; Publication or Submission of Quotations Without Specified Information, 85 Fed. Reg. 68124 (Oct. 27, 2020).

34. See *Final Commission Votes for Agency Proceedings: Calendar Year 2020*, U.S. SEC. EXCH. COMM’N, <https://www.sec.gov/about/commission-votes/annual/commission-votes-ap-2020.xml> [<https://perma.cc/D7VG-KH63>] (noting that all five SEC Commissioners voted to approve the 2020 Rule 15c2-11 rulemaking).

35. Publication or Submission of Quotations Without Specified Information, 85 Fed. Reg. 68124 (Oct. 27, 2020).

36. Hendrik Bessembinder, Chester Spatt & Kumar Venkataraman, *A Survey of the Microstructure of Fixed-Income Markets*, 55 J. FIN. & QUALITATIVE ANALYSIS 1, 5 (2020).

37. For further information concerning Rule 144A, see *infra* Part II.

38. Publication or Submission of Quotations Without Specified Information, 85 Fed. Reg. 68124, 68175 (Oct. 27, 2020).

quotation in a “non-exchange-listed security”—a term that FINRA explicitly defines to include only equity securities—in a quotation medium.³⁹ In a 2021 Regulatory Notice, FINRA explained that it “uses Form 211 in connection with its oversight of member compliance with SEC Rule 15c2-11.”⁴⁰

Thus, given that FINRA Rule 6432 and Form 211 explicitly apply *only to equities*, the characterization in the SEC’s 2020 release of an “alignment” between FINRA Rule 6432 and Rule 15c2-11 is curious. The notion that the number of forms filed under an equities-only rule, FINRA Rule 6432, would provide a “reasonable baseline” from which to estimate burdens associated with Rule 15c2-11 would appear to suggest that the SEC personnel who drafted that portion of the 2020 release understood and believed that Rule 15c2-11 is similarly limited only to equities.

In the discussion of the policy goals animating the rulemaking, the SEC’s 2020 release states that “[s]ecurities that trade in the OTC market are primarily owned by retail investors.”⁴¹ This also appears to have been written with only equities in mind. The footnote in the release attached to this sentence includes a single source, an academic paper on OTC *stocks*.⁴² Furthermore, the substantive point being made—that OTC securities are primarily owned by retail investors—seems suspect unless it is intended to mean only “OTC equities.” As explained below, there is a multi-trillion-dollar swath of OTC fixed income securities offered pursuant to Rule 144A that, by definition, are owned only by institutions that meet the “qualified institutional buyer” definition, *and thus—by law—cannot be owned by retail investors*.⁴³

3. Statements of SEC Commissioners

On this broad point of whether the Commission and other SEC officials understood that Rule 15c2-11 potentially applies to fixed income securities, SEC Commissioner Hester Peirce issued a statement on September 24, 2021 that provided, in part,

39. FINRA RULE 6432(f) (FIN. INDUS. REG. AUTH. 2008) (last amended Sept. 28, 2021).

40. *Regulatory Notice 21-33*, FIN. INDUS. REG. AUTH. (Sept. 17, 2021), <https://www.finra.org/sites/default/files/2021-09/Regulatory-Notice-21-33.pdf> [<https://perma.cc/CT8Q-X2FF>].

41. Publication or Submission of Quotations Without Specified Information, 85 Fed. Reg. 68124, 68125 (Oct. 27, 2020).

42. *Id.* at 68125 n.3 (citing Andrew Ang et al., *Asset Pricing in the Dark: The Cross-Section of OTC Stocks*, 26 REV. FIN. STUD. 2985 (2013)).

43. The Rule 144A exemption from Securities Act registration for resales of restricted securities is only available for resales to those highly sophisticated institutions that meet the “qualified institutional buyer” definition, which can only be satisfied by entities that own and invest at least \$100M (or \$10M for dealers) of securities of unaffiliated issuers. Individuals cannot satisfy this definition. For further information on Rule 144A—including concerning the qualified institutional buyer limitation and context on the size of the 144A fixed income markets—see *infra* Part II.

Nothing in the [SEC's 2020 rulemaking] release suggests that the Commission considered the application of [Rule 15c2-11] to the fixed-income markets. The policy analysis [in the rulemaking release] focuses entirely on the need for additional disclosure in the OTC equity markets to deter fraud in those markets, and the justification rests on the need to protect retail shareholders. The economic analysis focuses on the effects and incentives the rule creates in the OTC equity markets. . . . Consequently, nobody seems to have contemplated that this rule would affect the fixed-income markets in a way different from the pre-amendment version of the rule⁴⁴

Commissioner Peirce and then-Commissioner Elad Roisman subsequently issued a joint statement on December 13, 2021 raising concerns that the SEC's Fall 2021 Public Rulemaking Agenda did not include plans to "prevent Rule 15c2-11 from being misapplied to fixed-income securities."⁴⁵ The two Commissioners also opined that a full Commission rulemaking on the topic would "make a lot more sense than trying to shoehorn these securities into a rule designed for equity securities."⁴⁶

E. SEC Staff No-Action Relief for Fixed Income Securities

In response to industry concerns about the application of Rule 15c2-11 to fixed income securities, on September 24, 2021, the SEC Division of Trading and Markets issued a letter that—in addition to reaffirming the staff's position that Rule 15c2-11 applies to fixed income securities—provided broker-dealers with "no-action relief" until January 3, 2022 to comply with Rule 15c2-11 for fixed income securities.⁴⁷ Then, on December 16, 2021, the Division issued a second no-action letter,⁴⁸ establishing the following three-phase compliance regime for fixed income securities under the rule.

"Phase 1" of compliance with the rule for fixed income would apply from January 3, 2022 to January 3, 2023. During this phase, compliance with the rule would not be required for corporate or asset-backed fixed income securities offered pursuant to Rule 144A, nor would compliance with Rule 15c2-11 be required for seven other categories of fixed income

44. 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), <https://www.sec.gov/news/public-statement/peirce-nal-rule-15c2-11-2021-09-24> [<https://perma.cc/6CZX-RBCZ>].

45. Hester M. Peirce & Elad L. Roisman, Comm'rs, SEC, Falling Further Back – Statement on Chair Gensler's Regulatory Agenda (Dec. 13, 2021), <https://www.sec.gov/news/statement/peirce-roisman-falling-further-back-121321> [<https://perma.cc/Q7ZD-E9G2>].

46. *Id.*

47. Letter from Josephine J. Tao, Assistant Dir., Div. Trading & Mkts., SEC, to Racquel Russell, Senior Vice President and Dir. Cap. Mkts. Pol'y, Off. Gen. Couns., Fin. Indus. Reg. Auth. (Sept. 24, 2021) [hereinafter September 2021 No-Action Letter] <https://www.sec.gov/files/rule-15c2-11-fixed-income-securities-092421.pdf> [<https://perma.cc/D7G5-AUCV>].

48. December 2021 No-Action Letter, *supra* note 23.

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securities, such as securities of issuers that also have a class of securities listed on an SEC-registered exchange.⁴⁹

“Phase 2” compliance for fixed income would apply from January 4, 2023 until January 4, 2024 and apply to the same categories of fixed income securities as Phase 1, except compliance with the rule would be required for 144A fixed income securities unless (a) the broker-dealer determines that there is current and publicly available information about the issuer, consistent with Rule 15c2-11; or (b) the issuer or security otherwise satisfies one of the other categories of relief in the no-action letter.⁵⁰

“Phase 3” compliance for fixed income would commence on January 5, 2024 (with no end date) and apply to the same categories of fixed income securities covered in Phase 2 where either (a) the security is foreign sovereign debt or guaranteed by a foreign government or (b) there is a website link on the medium on which the security is quoted that links directly to the current and publicly available information about the issuer.⁵¹

In 2022 (i.e., during “Phase 1” of the December 2021 No-Action Relief), industry participants and representatives and certain members of Congress expressed additional concerns to the SEC about the application of Rule 15c2-11 to fixed income securities. This included concerns about the potential negative effects on fixed income securities resold pursuant to Rule 144A when Phase 1 of the December 2021 No-Action relief expired. For instance, the Securities Industry and Financial Markets Association submitted a letter to SEC Chair Gary Gensler on July 21, 2022 that stated, among other things, “the value and liquidity of 144A securities (including securities that are already outstanding) are likely to be adversely affected, potentially significantly, without further action by the Commission.”⁵² On July 26, 2022, a bipartisan group of twenty members of the U.S. House of Representatives submitted a letter to SEC Chair Gensler raising procedural and substantive concerns, including that the application of Rule 15c2-11 to 144A fixed income securities “will make it more difficult and expensive for privately held companies to raise capital through 144A offerings, negatively impacting their investors, employees, customers, and prospects for spurring growth in the U.S. economy.”⁵³ Part II below explains the function and importance of Rule 144A.

49. *Id.* at 2, app. A.

50. *Id.* at 2, app. B.

51. *Id.* at 2.

52. Letter from Kenneth E. Bentsen, Jr., President and CEO, Sec. Indus. & Fin. Mkts. Ass’n, to Gary Gensler, Chair, SEC 1 (July 21, 2022) [hereinafter SIFMA July 21, 2022 Letter], <https://www.sifma.org/wp-content/uploads/2022/07/Disclosure-Requirements-and-Reporting-Covenants-of-Debt-Securities-Issued-Pursuant-to-Securities-Act-Rule-144A-1.pdf> [https://perma.cc/QE2V-ZQ7H].

53. Letter from Rep. Josh Gottheimer et al. to Gary Gensler, Chair, SEC 1 (July 26, 2022) (on file with author).

Then, on November 30, 2022, the SEC Division of Trading and Markets issued a third no-action letter.⁵⁴ The letter eliminated the “three-phase” compliance regime established by the December 2021 No-Action Letter and replaced it with, in essence, the same basic substantive relief provided in Phase 2 of the December 2021 No-Action Letter (i.e., relief for fixed income securities offered pursuant to Rule 144A, as well as certain other categories of fixed income securities) but extended the relief’s duration by two years, from January 4, 2023 to January 4, 2025.⁵⁵ This temporary relief provided by the November 30, 2022 No-Action Letter is currently in effect.

II. Uncertainties Concerning Potential Effects on 144A Fixed Income Securities

While the SEC staff’s no-action letters, including the November 2022 No-Action Letter, provided some degree of short-term certainty to the market, significant uncertainties remain. Specifically, it is not clear how issuers and investors will react when the no-action relief expires on January 5, 2025, and fixed income securities resold pursuant to Rule 144A become subject to the substantive requirements of Rule 15c2-11.

This is significant because, as explained below, the market for Rule 144A fixed income securities has developed around a regulatory construct that is different from the new Rule 15c2-11 paradigm. Resales of securities under Rule 144A are not conditioned on the issuer making its information publicly available, as is required under the 2020 amendments to Rule 15c2-11.⁵⁶ Instead, under Rule 144A, holders of 144A securities and any prospective purchasers of such securities must be given *the right* to obtain issuer information *upon request*.⁵⁷ This key difference in the two rules’ issuer information constructs has created concern in the marketplace that the SEC staff’s clarification that Rule 15c2-11 applies to fixed income securities effectively modifies the Rule 144A paradigm upon which thousands of issuers and investors rely.

A. Rule 144A: A Key Tool for Raising Debt Capital

The SEC established Rule 144A in 1990 to provide a safe harbor exemption from Securities Act registration for resales of restricted securities to highly sophisticated institutions that are “qualified institutional buyers”

54. Letter from Josephine J. Tao, Assistant Dir., Div. Trading & Mkts., SEC, to Racquel Russell, Senior Vice President and Dir. Cap. Mkts. Pol’y, Off. Gen. Couns., Fin. Indus. Reg. Auth. (Nov. 30, 2022) [hereinafter November 2022 No-Action Letter], <https://www.sec.gov/files/fixed-income-rule-15c2-11-nal-finra-113022.pdf> [<https://perma.cc/3PZP-GY67>].

55. The letter also provides no-action relief—with no end date—for foreign sovereign debt and debt securities guaranteed by a foreign government. *Id.* at 2.

56. Private resales of securities to institutions, 17 C.F.R. § 230.144A (2022).

57. *Id.* § 230.144A(d)(4).

(QIBs).⁵⁸ To be eligible as a QIB, an entity generally must be one of several enumerated categories of institutions and own and invest at least \$100M (or \$10M for dealers) of securities of unaffiliated issuers.⁵⁹ Individuals cannot be QIBs, no matter their level of wealth or financial expertise.⁶⁰

In practice, issuers use—and investors benefit from—the Rule 144A exemption in the following general manner. Typically, an issuer seeking to raise capital in this manner first sells restricted securities directly to a broker-dealer through a private placement that is exempt from registration under different regulatory provisions that apply to an issuer’s original offering (as opposed to resales under Rule 144A).⁶¹ The broker-dealer then uses the Rule 144A exemption to offer and resell those securities to QIBs.⁶² While practices may vary in different transactions, when a broker-dealer engages in a Rule 144A offering, the QIB is typically provided with an offering memorandum that is subject to the antifraud provisions of the federal securities laws and contains the same general type of information contemplated by Rule 15c2-11, including a detailed description of the issuer, its financial statements, and the securities to be offered.⁶³ The broker-dealer participating in the offering receives legal opinions, negative assurance letters from both the issuer’s and its own counsel, and a comfort letter from the issuer’s auditing firm as assurance as to the accuracy of the information in the offering memorandum.⁶⁴

Securities acquired in a Rule 144A transaction are “restricted securities” and may only be resold by the QIB buyer pursuant to an exemption from registration under the Securities Act.⁶⁵ That exemption is typically either Rule 144A for sales inside the United States or Regulation S for sales outside the United States.⁶⁶

Rule 144A facilitates U.S. and foreign companies’, financial institutions’, and other issuers’ ability to raise trillions of dollars annually, particularly through issuance of fixed income securities. At the same time, the

58. Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities Under Rules 144 and 145, 55 Fed. Reg. 17933 (Apr. 30, 1990).

59. Private resales of securities to institutions, 17 C.F.R. § 230.144A(a)(1) (2022).

60. *Id.*

61. See generally Chris Killian & Joseph Corcoran, *The Collision of Rule 15c2-11 and Rule 144A*, SIFMA: PENNSYLVANIA + WALL (Sept. 19, 2022), <https://www.sifma.org/resources/news/the-collision-of-rule-15c2-11-and-rule-144a/> [https://perma.cc/N3C8-3KQW] (providing information concerning the mechanics and practical use of Rule 144A by issuers); SIFMA July 21, 2022 Letter, *supra* note 52.

62. See Killian & Corcoran, *supra* note 61.

63. *Id.*

64. See *id.*

65. Private resales of securities to institutions, 17 C.F.R. § 230.144A Preliminary Note 6 (2022) (“Securities acquired in a transaction made pursuant to the provisions of this rule are deemed to be *restricted securities* within the meaning of Rule 144(a)(3)”).

66. Because Rule 144A does not apply to securities that are fungible with securities listed on SEC-registered exchanges, the rule is generally not used for common equity securities of listed issuers. See *Id.* § 230.144A(d)(3).

rule provides an efficient and effective investment option for sophisticated institutions seeking fixed income exposure. The Rule 144A fixed income markets are very large. The value of outstanding Rule 144A fixed income securities exceeds \$5 trillion, at least \$150 billion of which was issued by private companies in 2021.⁶⁷

B. SEC's 144A Design Choice: Issuer Information Available to Eligible Purchasers "Upon Request"

When the issuer is not a reporting company (or in certain other categories), the availability of the Rule 144A exemption is conditioned on the holder of the 144A securities and any prospective purchaser having the right to obtain from the issuer, upon request, specified information about the issuer.⁶⁸ This includes a brief description of the issuer's operations and certain financial information.⁶⁹ Issuers commonly make this information available to eligible investors upon request through a password-protected website.⁷⁰

The Commission closely considered this design choice—the availability of 144A issuer information—in its deliberations leading up to its 1990 adoption of Rule 144A, including through a 1988 rule proposal⁷¹ and 1989 reproposal.⁷² During this process, the Commission requested public comment on, among other things, whether an issuer information condition should be entirely eliminated “on the theory that [QIBs] are sophisticated investors that are able to adequately assess their need for information and to determine when to proceed with an investment” and whether an issuer information condition would “unnecessarily impair the efficiency of resale transactions” under the rule.⁷³

After considering the public's comments, the Commission ultimately determined in 1990 that requiring issuer information to be made available upon request to holders and eligible purchasers appropriately balanced investor protection and capital formation policy goals.⁷⁴ The Commission

67. Letter from Kenneth E. Bentsen, Jr., President and CEO, Sec. Indus. & Fin. Mkts. Ass'n, to Gary Gensler, Chair, SEC 2 (June 10, 2022), <https://www.sifma.org/wp-content/uploads/2022/06/SIFMA-provided-comments-to-the-SEC-regarding-application-of-Rule-15c2-11.pdf> [https://perma.cc/8VF5-Q2WW].

68. Private resales of securities to institutions § 230.144A(d)(4).

69. *See id.*

70. *See* Killian & Corcoran, *supra* note 61.

71. Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities Under Rules 144 and 145, 53 Fed. Reg. 44016 (Nov. 1, 1988).

72. Resale of Restricted Securities International Series—104; Changes to Method of Determining Holding Period of Restricted Securities Under Rules 144 and 145, 54 Fed. Reg. 30076 (July 18, 1989).

73. *Id.* at 30082.

74. Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities Under Rules 144 and 145, 55 Fed. Reg. 17933 (Apr. 30, 1990).

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noted that in its view the limited information requirement should not impose a significant burden on issuers subject to the requirement.⁷⁵

C. Intersection of Rules 15c2-11 and 144A: Practical Considerations and Policy Implications

Subjecting Rule 144A fixed income securities to the substantive requirements of Rule 15c2-11, particularly the requirement that issuer information must be publicly available, effectively raises the standard that issuers must satisfy to use the Rule 144A exemption, at least for issuers that want broker-dealers to be able to publish quotations on their securities in quotation mediums. This is because, as explained above, Rule 15c2-11 requires issuer information to be “publicly available” (freely available to anybody without any restraints).⁷⁶ Rule 144A, by contrast, is conditioned on *the holder* of the 144A securities and any *prospective purchaser* having the right to obtain the issuer information *upon request*.⁷⁷

It remains to be seen how issuers will react to this altered regulatory landscape. As a preliminary matter, while this regulatory controversy has received significant attention since 2021, it is not entirely clear how many issuers are aware of these regulatory developments and have fully considered their implications, particularly given the absence of a public rulemaking or traditional regulatory process led by the SEC’s Division of Corporation Finance (the SEC division typically responsible for formulating and leading policy developments affecting companies and capital formation). It is currently unknown how many 144A issuers will find it desirable or practicable to make their information publicly available for purposes of Rule 15c2-11. Given the ongoing uncertainty in this area, and a likely lack of desire by at least some privately-held issuers to make their information publicly available—including to institutions and individuals that are not QIBs and thus not even eligible to purchase such securities—some privately-held issuers may reevaluate how they meet their financing needs, including potentially shifting to the loan market, the direct lending market, or offshore capital markets.⁷⁸

These regulatory developments and the associated uncertainties also affect investors. Institutional investors that currently hold Rule 144A debt securities (and the institutional investors’ underlying investors) may face an unfortunate and unfair reality. Absent a regulatory change, starting

75. *Id.* at 17939.

76. Publication or submission of quotations without specified information, 17 C.F.R. § 240.15c2-11(e)(5).

77. Private resales of securities to institutions, 17 C.F.R. § 230.144A(d)(4).

78. Letter from Jay H. Knight, Chair, Fed. Reg. Sec. Comm., Bus. L. Section, Am. Bar Ass’n, to Gary Gensler, Chair, SEC 3 (Nov. 28, 2022) [hereinafter ABA Letter], <https://www.bassberrysecuritieslawexchange.com/wp-content/uploads/sites/869/2022/11/ABA-Rule-15c2-11-Letter.pdf> [<https://perma.cc/KZ8J-SMFK>].

January 6, 2025, unless the issuers of the 144A securities have made their information publicly available (or an exception applies), broker-dealers will no longer be able to engage in quoting activity that is covered by the rule.⁷⁹ Only time will tell what effects this may have on liquidity, the value of affected securities, and price efficiency.⁸⁰ For these same reasons, institutional investors' appetite to purchase Rule 144A debt securities may also be reduced in the future, which may drive up the cost of capital for issuers. Institutional investors' ability to sell affected securities in the most efficient and effective manner may be compromised as a result of how these regulatory paradigms interact.

Some investors in 144A fixed income securities have expressed the view that the information currently available to them concerning Rule 144A securities is sufficient. For example, the Credit Roundtable, which describes itself as "a group of large institutional fixed income managers including investment advisors, insurance companies, pension funds, and mutual fund firms, responsible for investing more than \$4 trillion of assets," submitted a letter to Chair Gensler stating that its members "do not have any issues obtaining access to financial reporting to make informed investment decisions regarding issuers accessing fixed income financing pursuant to Rule 144A and are unaware of significant examples of investors having been harmed by a lack of information access."⁸¹

III. A Pathway Forward in the Best Interests of Investors and Issuers

As described above, the regulatory history shows that there has been legitimate confusion and uncertainty concerning the scope and application of Rule 15c2-11. Rather than ignoring the uncertainty and, as two SEC Commissioners⁸² put it, potentially "trying to shoehorn [fixed income securities] into a rule designed for equity securities," the SEC could take the following two steps, which would stem the uncertainty and ultimately advance the agency's mission: (1) extend the November 2022 no-action relief indefinitely, so as to preserve the status quo; and concurrently (2) release a request for public comment to facilitate a formal evaluation and development of a public report or release discussing what, if any, additional safeguards or restrictions governing fixed income quoting activities may be necessary—and if so, how they should be structured and tailored for different types of securities. Based on the results of that evaluation, the no-

79. See December 2021 No-Action Letter, *supra* note 23 at 2.

80. The ABA Letter states that many issuers "may choose not to, or may not be able to, make the information required under the Rule 'publicly available.' This could result in diminished secondary market liquidity for institutional investors (and their underlying investors), a devaluation of the affected companies' outstanding securities and an illiquidity premium on future issuances." ABA Letter, *supra* note 78, at 3.

81. Letter from the Credit Roundtable to Gary Gensler, Chair, SEC 1 (June 21, 2022) (on file with author).

82. Peirce & Roisman, *supra* note 45.

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action relief could then be amended or terminated, as appropriate, in conjunction with any other appropriate regulatory action.

An indefinite extension of the no-action relief pending a request for public comment and formal evaluation of the topic would stem the negative effects on investors and issuers described above—namely, the uncertainties facing investors and issuers and the potentially negative effects on liquidity, the value of affected securities, and price efficiency.

At the same time, an extension of the no-action relief would not appear to jeopardize any immediate investor protection considerations. As evidenced by the SEC staff's willingness to issue no-action relief on three occasions, the agency appears to acknowledge that there is not an acute or urgent investor protection or other need to apply Rule 15c2-11 to fixed income without delay. Therefore, and because heretofore there has not been an analysis of the application of the new “publicly available” issuer information requirement under Rule 15c2-11 to fixed income (including 144A) securities, it would be appropriate to pause and analyze the topic, including through public input.

The benefits of the solicitation of public input are well-established: it enables the public—including investors, issuers, broker-dealers, and other market participants and academics—to provide perspectives, insights, and data to the SEC's Commissioners and staff. In turn, this helps facilitate an effective evaluation by the agency of the relevant regulatory issues, policy considerations, and potential responses.⁸³ This general approach of methodically analyzing whether there is a regulatory gap and then formulating an appropriate policy response, with public inputs throughout, is foundational to agency regulation.⁸⁴

As SEC Commissioner Peirce described in a different context, Public commenters help the Commission to look at rules in light of their unique experiences. They bring a broad range of perspectives, technical expertise, and deep, personal experience to their comments. In so doing, they help us to see things we otherwise would not. Sometimes they identify better ways to tackle a problem or point out flaws with rules that we might not have found on our own.⁸⁵

In addition to providing critical information and perspectives to the SEC, the solicitation of public comment—paired with a formal evaluation and public report or release on the topic—would enhance public and

83. *See generally* Mary Jo White, Chair, SEC, 14th Annual A.A. Sommer, Jr. Corporate Securities and Financial Law Lecture at Fordham Law School: The Importance of Independence, (Oct. 3, 2013), <https://www.sec.gov/news/speech/spch100113mjw> [<https://perma.cc/39SR-X4EM>] (discussing the SEC's notice-and-comment rulemaking process and observing that “seeking out and considering public comment by all interested and affected parties makes for much better decisions and much better rules”).

84. *See id.*

85. Hester M. Peirce, Comm'r, SEC, Rat Farms and Rule Comments – Statement on Comment Period Lengths (Dec. 10, 2021), <https://www.sec.gov/news/statement/peirce-rat-farms-and-rule-comments-121021> [<https://perma.cc/Q9JU-LSY5>].

market confidence in the ultimate regulatory decision. By providing the public with an opportunity “to be heard,” and then publishing a report or release discussing its evaluation of the topic, the SEC would demonstrate that it has undertaken a deliberate and careful consideration of the relevant policy interests and engaged in a reasoned decision-making process. This transparent and process-focused approach would contribute to a greater sense of fairness, as well as enhance confidence and trust in the regulatory system—all to the benefit of investors, issuers, the securities markets generally, and the SEC.

Conclusion

Indeed, by reducing market uncertainty and facilitating a rigorous and public evaluation of whether there are any regulatory gaps relating to fixed income securities quoting activities that need to be addressed, this proposed two-part approach would help the SEC advance its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.⁸⁶

86. See Gensler September 2022 Testimony, *supra* note 1 at 13.