



Invested in America

June 10, 2022

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

Dear Chair Gensler,

SIFMA¹ appreciated the opportunity to meet with staff from the Divisions of Corporation Finance and Trading and Markets on May 24, 2022 to discuss our concerns relating to the December 16, 2021 Trading and Markets staff No-Action letter. That letter established a detailed, three-phase regime for compliance with Exchange Act Rule 15c2-11 as applied to certain fixed income securities, including debt securities resold pursuant to Rule 144A of the Securities Act. We write to reiterate our concerns, which are echoed by issuers and buy-side market participants, regarding application of Rule 15c2-11 to Rule 144A securities issued by private companies and asset-backed issuers, including the condition in the No-Action letter that provides that, following expiration of “Phase 1” of relief in January 2023, 144A issuer financial information must be current and publicly available in order for broker-dealers to be able to publish quotations on such securities on quotation mediums under Rule 15c2-11. The SEC staff has not, despite our requests, shared any policy rationale to support this public disclosure condition. Unless the SEC removes this condition from the No-Action letter or indefinitely extends the relief provided by the No-Action letter, in January 2023, there are likely to be material disruptions to this very important asset class that will harm investors and issuers, with no appreciable benefits accruing to either group.

The currently applicable No-Action relief for Rule 144A debt securities pursuant to “Phase 1” of the staff’s No-Action letter, under which issuer financial information is made available upon request, provides a reasonable approach to address this issue and should be extended indefinitely. Such an approach would be consistent with the requirement of Rule 144A that has been in existence since the Rule was adopted that this financial information be made available upon request to qualified institutional buyers (QIBs), who are the only type of investors permitted to buy 144A securities. It also would avoid the market dislocation that will ensue if Phase 1 of the No-Action relief were to expire. If the SEC believes fundamental changes to Rule 144A are needed to ensure that the public has access to 144A issuer financial information, proposed changes to Rule 144A should be put forth transparently and directly in a formal rulemaking, with an opportunity for investors and other market participants,

¹ SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry’s one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

including Rule 144A issuers, to comment. By doing this, the SEC would be able to ascertain and consider the important views of investors, issuers, other market participants, and would be able to address uncertainties and questions regarding the specific application of any changes to Rule 144A. Rule 15c2-11 should not be used as an indirect way to change Rule 144A's information requirements or inhibit issuers' reliance on Rule 144A's 30-year history of allowing them to raise funds privately.

Harmful Real-World Impacts to Investors and Issuers

The expiration of Phase 1 of the No-Action letter, and the subsequent requirement that the financial information of 144A debt issuers be current and publicly available if they wish their securities to be freely quoted by broker-dealers, will have real and significant harmful impacts to Rule 144A investors and issuers. The Rule 144A debt markets are very large and important sources of financing for many companies and other structured issuers, and are an important component of many investment and capital raising strategies. 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. If the current No-Action relief expires, dealers will be unable to publish quotations on a quotation medium for large segments of this market and liquidity for investors will decrease. Ironically, at a time when the SEC is pushing for greater use of electronic trading and increased market and price transparency, application of Rule 15c2-11 to the 144A fixed income markets may push dealers to revert to more arcane and less transparent means of quoting securities.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. These investors also will be faced with the real prospect of trading in the market on a bi-lateral basis, much as occurred many years ago, with the associated information disadvantages and impaired ability to manage risk that they will face when seeking to enter or exit large 144A debt positions.³ Importantly, these investors will have no control over whether an issuer publishes its financial information, and therefore no control over whether a 144A security they hold will be eligible for quotation under Rule 15c2-11. In other words, they will not be able to avoid harm if private 144A debt issuers choose not to disclose their financial information publicly.

Similarly, diminished secondary market liquidity in Rule 144A bonds will cause issuers issuing in the 144A market to pay higher interest rates for new issuances and could devalue their existing debt. Investors will demand higher yield from issuers due to the uncertainty of secondary market liquidity. This could increase capital costs at American businesses at a time when they and their customers are facing economic headwinds.

² See Speech by Chair Gary Gensler, "The Name's Bond: Remarks at City Week" ("I've asked staff to consider how quotes and pre-trade price information might be more broadly accessible") (April 26, 2022), available here (<https://www.sec.gov/news/speech/gensler-names-bond-042622>).

³ We note that groups representing fixed income investors have previously expressed opposition to the imposition of Rule 15c2-11 to fixed income markets, and detailed their concerns (including these concerns) in a letter to the SEC, which is available here: (<https://www.ici.org/system/files/2021-09/33787a.pdf>).

Lack of Identified Public Harm or Benefit

In connection with this momentous shift in the regulation of fixed income markets, the SEC has not identified a public harm it is addressing or a public benefit it is providing by requiring that financial information be current and publicly available in order for broker-dealers to be able to publish quotations on 144A securities on quotation mediums under Rule 15c2-11. The only eligible participants in the Rule 144A market, QIBs, already are provided access by Rule 144A to financial information of the issuers of these securities. The Staff noted in the No-Action letter and in our May 24th meeting that the specified financial information required in Rule 144A will satisfy Rule 15c2-11 information requirements beginning in 2023 if the information is made public. In other words, disclosure to eligible investors *will not change*. Investors in Rule 144A bonds will continue to have access to the same information that they have access to today pursuant to Rule 144A and under the financial reporting covenants contained in bond indentures. Moreover, as buy-side investors have noted,⁴ and as the staff has heard in meetings, these investors believe that they receive the information they need to make investment decisions with respect to 144A securities. **Conditioning broker-dealers’ ability to freely quote 144A securities on the disclosure of this specified information to the general public, who cannot purchase Rule 144A bonds in the first place, serves no policy objective and provides no additional benefit to the investors who can purchase these securities.**

Rule 15c2-11 Regulatory History

During our May 24th meeting with SEC staff, there was a suggestion by staff that the industry was attempting to “re-litigate” the Commission’s 2020 amendments to Rule 15c2-11. This characterization continues to distract from the important issues before us. There was wide-spread surprise in 2021 when the SEC staff stated in communications with industry participants that Rule 15c2-11 applies to securities other than equities, including fixed income securities.⁵ Market participants (including dealers, buy-side investors, and debt issuers) did not appreciate the potential application of Rule 15c2-11 to fixed income securities when reviewing the proposed amendments in 2019, hence the lack of comments on Rule 15c2-11’s potential application to fixed income securities.⁶

Nonetheless, this history should not prevent the SEC, issuers, investors and other market participants from collectively addressing the reality of the current situation and developing a construct that makes

⁴ *Id.* at pp.4-5.

⁵ See, e.g., Commissioner Hester M. Peirce, “Statement on Staff No-Action Letter Regarding Amended Rule 15c2-11 in Relation to Fixed Income Securities” (Sept. 24, 2021), available at (<https://www.sec.gov/news/public-statement/peirce-nal-rule-15c2-11-2021-09-24>).

⁶ The Commission stated in connection with the 2020 amendments, “the amendments are narrowly tailored to further the Commission’s ongoing effort to protect retail investors from fraud and manipulation in the OTC market, maintain the integrity of the OTC market, promote a more efficient and effective OTC market, and facilitate capital formation for issuers that make their information current and publicly available.” See Publication or Submission of Quotations Without Specified Information, 85 FR 68124 (Oct. 27, 2020) at 68128. Further, these recent amendments are based on the premise that “[s]ecurities that trade in the OTC market are primarily owned by retail investors.” *Id.* at 68125. In fact, the release adopting the amendment mentions “retail investors” 45 times. Moreover, in its economic analysis, the Commission estimated that 9,998 OTC securities were quoted daily on average in 2019, a figure that is wildly inaccurate if quotes on fixed income securities were meant to be included. *Id.* at 68186.

sense for the corporate debt and asset-backed securities markets. We urge the SEC to work with us to move forward in the most constructive manner, without harming a well-functioning market.

Conclusion

Given impending harm to Rule 144A debt issuers and investors and the lack of a concurrent policy benefit or rationale, the Staff should extend Phase 1 of the December 16, 2021 No-Action Letter for 144A debt securities indefinitely. If the SEC desires to change or reconsider its Rule 144A paradigm—including the requirements regarding the availability of issuer financial information—it should do so transparently and directly through a formal Commission rulemaking.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ken Bentsen". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Kenneth E. Bentsen, Jr.
President and CEO

cc: The Honorable Hester M. Peirce, Commissioner
The Honorable Allison Herren Lee, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
Mr. Haoxiang Zhu, Director, Division of Trading and Markets
Ms. Renee Jones, Director, Division of Corporation Finance