

September 14, 2022

The Honorable Sherrod Brown
Chairman
Committee on Banking, Housing, and Urban Affairs
U.S. Senate
Washington, DC 20510

The Honorable Maxine Waters
Chairwoman
Committee on Financial Services
U.S. House of Representatives
Washington, DC 20515

The Honorable Pat Toomey
Ranking Member
Committee on Banking, Housing, and Urban Affairs
U.S. Senate
Washington, DC 20510

The Honorable Patrick McHenry
Ranking Member
Committee on Financial Services
U.S. House of Representatives
Washington, DC 20515

Re: Unprecedented SEC Staff Interpretation to Force Private Companies Public and Raise Costs on Job Creators

Dear Chairman Brown, Chairwoman Waters, Ranking Member Toomey, and Ranking Member McHenry:

The undersigned associations write to express our strong concerns with a surprising new rule interpretation, recently issued by staff at the Securities and Exchange Commission (“SEC”), that conflicts with existing regulation, will force private companies to make public disclosures, and will directly harm businesses’ ability to raise capital for job-creating projects. This change constitutes a reversal of 50 years of SEC policy and will have far-reaching implications, yet it was adopted without input from the public or any analysis of its potential impacts.

If Congress does not step in to reverse this erroneous and damaging staff interpretation before it takes effect in January 2023, private companies will be forced to publicly disclose competitively sensitive information and will face new barriers to capital formation—significantly limiting their growth potential and imposing direct consequences on their ability to create jobs here in the U.S. What is more, the new interpretation will provide no additional protection for investors, given that retail investors cannot participate in the private placements implicated by the change—and the institutional investors who can participate will face increased costs and decreased value as a result of the staff’s actions.

In 2020, the SEC adopted amendments to Rule 15c2-11, which governs the quotation of securities in the over-the-counter (“OTC”) market, to provide new protections for retail investors in OTC equity securities. In September 2021, however, the SEC’s Division of Trading and Markets issued a no-action letter expressing the view that Rule 15c2-11, including the 2020 amendments thereto, applies to *other* types of OTC securities—including bonds and other fixed income securities.¹ Given the complete lack of analysis of fixed income securities in the 2020

¹ 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 (Sept. 24, 2021). Available at <https://www.sec.gov/files/rule-15c2-11-fixed-incomesecurities-092421.pdf>.

adopting release, this new interpretation was a shock to companies, investors, and broker-dealers alike—and even to some SEC Commissioners.² To our knowledge, in the 50 years of the existence of Rule 15c2-11, the SEC has never attempted to enforce compliance with the rule for fixed income securities.

Many private companies issue fixed income securities in the form of corporate bonds offered under Rule 144A, which companies have used for private placements since 1990. Applying the 2020 amendments to fixed income securities will require these *private* issuers to make detailed financial data *publicly available* before broker-dealers can freely quote their securities. This new requirement will take effect on January 4, 2023.³

Rule 144A was created by the SEC more than 30 years ago specifically to provide companies with a means to raise capital outside of public, registered offerings. Retail investors—which Rule 15c2-11’s disclosure requirements were designed to protect—are prohibited from participating in these private placements. Only qualified institutional buyers (“QIBs”), such as mutual funds and pension plans, can purchase Rule 144A securities, and these sophisticated institutions already have a mechanism to access issuer financial information. Rule 144A requires that securityholders and prospective purchasers be given the right to obtain, upon request, specified operational and financial information about the issuer. When it promulgated Rule 144A, the SEC determined after considering public comments that this “available upon request” approach appropriately balanced investor protection and capital formation.⁴ Yet the SEC staff has now effectively overturned this balance without public notice-and-comment or any analysis of the potential impacts of such a dramatic policy change.

If the SEC persists in enforcing this novel interpretation, private companies will be forced to go beyond what is required by Rule 144A and instead make public their confidential and competitive information for their debt to be freely quoted on the secondary market. This requirement will impose significant costs on these businesses by exposing sensitive information to competitors and undermining their right as non-public companies to avoid public scrutiny of their financial data. Private companies that choose to protect this confidential information, on the other hand, will experience substantially decreased liquidity given that broker-dealers will not be able to freely quote their securities. This will directly increase the costs of raising capital through Rule 144A and reduce the capital available to private companies, ultimately impacting their ability to create jobs, grow their business, and invest for the future.

² *Statement on Staff No-Action Letter Regarding Amended Rule 15c2-11 in Relation to Fixed Income Securities*. Commissioner Hester M. Peirce (Sept. 24, 2021). Available at <https://www.sec.gov/news/public-statement/peirce-national-rule-15c2-11-2021-09-24>. (“Nothing in the adopting release suggests that the Commission considered the application of these rules to the fixed-income 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 rule...”)

³ 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 (Dec. 16, 2021). Available at <https://www.sec.gov/files/fixed-income-rule-15c2-11-nalfinra-121621.pdf>.

⁴ *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). Release Nos. 33-6862, 34-27928, IC-17452; available at https://archives.federalregister.gov/issue_slice/1990/4/30/17932-17949.pdf#page=2.

Importantly, the SEC intends for the effects of this new staff interpretation to be retroactive, which will impair investments in private company bonds made by institutional investors, even if those investments were made years ago. Investors in Rule 144A bonds face the challenge of trying to determine which issuers will comply with this new staff interpretation, which will not, and whether they need to sell their investments—which will further depress prices. This new staff interpretation has no benefit for investors, which is why they have opposed this significant policy change from the SEC.

Congress enacted the Administrative Procedure Act to require agencies to follow appropriate deliberative processes when developing significant regulatory requirements. Critically, agencies are required to provide opportunities for the public to review and submit feedback on proposed changes before they are adopted. They are also required to conduct a fulsome analysis of the potential impacts of their rule proposals. The SEC bypassed these important safeguards in applying the 2020 amendments to Rule 15c2-11 to Rule 144A securities, and the SEC has given no indication that it plans to reverse the staff’s interpretation before it becomes effective early next year.

Given the impending harms discussed above, we respectfully encourage Congress to step in before the new interpretation takes effect in January 2023. It is critical that Congress act by year’s end to protect American businesses and safeguard capital formation by preventing the SEC from imposing public disclosure obligations on privately held Rule 144A issuers.

Sincerely,

National Association of Manufacturers

Securities Industry and Financial Markets Association

U.S. Chamber of Commerce

cc: Members of the Senate Committee on Banking, Housing, and Urban Affairs
Members of the House Committee on Financial Services