AMERICAN BAR ASSOCIATION
Business Law Section

321 N. Clark Street
Chicago, IL 60654-7598
T: 312-988-5588 | F: 312-988-5578
businesslaw@americanbar.org
ababusinesslaw.org

Via Electronic Submission

November 28, 2022

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

Re: Application of Rule 15c2-11 to Fixed Income Securities

Dear Chair Gensler:

This letter is submitted on behalf of the Federal Regulation of Securities Committee (the "**Committee**") of the Business Law Section of the American Bar Association relating to the application of Rule 15c2-11 (the "**Rule**") under the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"), to fixed income securities and the related no-action letter from the Division of Trading and Markets dated December 16, 2021 (the "**No-Action Letter**"). The purpose of this letter is to request that the Securities and Exchange Commission (the "**Commission**") extend the relief currently provided under "Phase 1" as set forth in the No-Action Letter until the Commission has had sufficient time to evaluate an economic analysis by the Division of Economic and Risk Analysis ("**DERA**") and the costs and benefits of applying the Rule to fixed income securities in order to determine the appropriate exemptive relief, if any, for fixed income securities, or whether additional rule-making is advisable.

The Committee includes a wide range of practitioners whose areas of interest and expertise include securities laws and the regulation of the U.S. capital markets. Members of the Committee advise public and private companies who issue fixed income securities, investors who purchase fixed income securities, and broker-dealers who act as underwriters and initial purchasers in offerings of fixed income securities or financial intermediaries who facilitate transactions among investors. In particular, we are familiar with the full range of fixed income securities, including corporate debt securities and asset-backed debt securities, issued in reliance on Rule 144A ("**Rule 144A**") under the Securities Act of 1933, as amended (the "**Securities Act**"), Regulation S under the Securities Act, Regulation D under the Securities Act and Section 4(a)(2) of the Securities Act. The Committee does not represent any client, and the views expressed by the Committee are those of the

Committee and not necessarily the views of any of its individual members or their respective firms or institutions.

The Committee notes the concerns regarding the application of the Rule to fixed income securities expressed by other commentators representing industry participants in the U.S. and global capital markets.[1] We take this opportunity to express our views on this topic as it has an impact on capital-raising through the issuance of fixed income securities to qualified institutional buyers, as defined in Rule 144A ("**QIBs**"), accredited investors and non-U.S. persons and the subsequent trading of such securities.

Harm to Capital-Raising and Liquidity for Investors

The Committee is concerned that the application of the Rule to fixed income securities will likely have a detrimental effect on the ability of U.S. and foreign companies to obtain funding in the U.S. capital markets through fixed income securities issuances, as well as adverse impacts on institutional investors – and their underlying investors – who invest in these securities. Debt securities issued in reliance on exemptions under the Securities Act and resold pursuant to Rule 144A or in other private transactions are important to the overall U.S. economy, providing companies an important source of financing, representing billions of dollars every year. The Rule 144A and private placement debt markets are well-established, efficient and reliable and a large amount of debt securities is outstanding in these markets.

Issuers, particularly private companies, frequently rely on the information provided to potential eligible investors not being "publicly available" (as defined under the Rule) given legitimate confidentiality and competition concerns. Institutional investors in privately issued fixed income securities agree with this private reporting arrangement because they have sufficient knowledge, expertise and negotiating leverage to ensure they receive (and continue to receive) the information they require to make their investment decisions, but in a manner that balances the issuers' concerns for confidentiality with investors' information requirements and a liquid institutional trading market.

Standard indentures for Rule 144A debt securities include reporting covenants that require issuers to provide ongoing financial and other

[1] These commentators include the Asset Management Group of the Securities Industry and Financial Markets Association ("**SIFMA**"), the Structured Finance Association ("**SFA**"), the Investment Company Institute ("**ICI**"), the Loan Syndications and Trading Association ("**LSTA**"), the Bond Dealers' Association ("**BDA**"), the Managed Funds Association ("**MFA**"), the U.S. Chamber of Commerce's Center for Capital Markets Competitiveness ("**CCMC**") and copies of the letters submitted by these organizations and related commentary can be found on their public websites.

information to debt holders, potential eligible investors and market-makers. These reporting covenants not only cover the information required to be provided upon request by Rule 144A(d)(4), but typically also provide for the provision of certain financial and business information similar to that provided by a public company under the Exchange Act, such as a management's discussion and analysis (as would be required under Form 10-K and Form 10-Q) and certain current event reporting (as would be required under Form 8-K). We note that the letter submitted by SIFMA to Chair Gensler, dated July 21, 2022, provides several examples of reporting covenants, and we agree that those examples are standard in the Rule 144A debt market. Such provisions have been negotiated over time by issuers and the sophisticated investors in Rule 144A debt securities, and standard practice is that this information is made available to all debt holders, potential eligible investors and market-makers on a password-protected or otherwise private website.

We further note that, to the extent other parties have a need for information regarding issuers, Rule 144A already ensures the availability of such information as it requires the ongoing provision of financial and other information that is different from the requirements of the Rule and, most importantly, does not require that such information be "publicly available"; rather, the information need only be obtainable from the issuer or seller upon request. To require both different substantive information and a different way of providing this information undermines the construct and design of Rule 144A relating to the private resale of securities to QIBs.

Issuers and institutional investors significantly rely on broker-dealers to freely quote privately-placed debt securities in order to gain access to this important market and to provide liquidity for their securities in the secondary markets. If the current relief provided by the No-Action Letter expires in early January 2023, many issuers who issued debt securities assuming they would be able to follow historical market practice 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. Furthermore, without actively traded outstanding securities to inform the pricing of new issuances, issuers will face significant uncertainty with respect to their funding costs, likely causing them to look to raise capital from other sources, such as the loan market, the direct lending market or offshore capital markets.

No Additional Protection to Investors

Applying the Rule to fixed income securities that cannot be purchased by retail investors will not provide any additional protection to investors that

would justify the significant adverse consequences. As discussed above, QIBs and accredited investors in the private fixed income securities market already have access to the information, including financial information, they deem necessary to make informed investment and trading decisions. Under existing standard documentation and market practice, such investors already benefit from negotiated covenants that require issuers to make information available to all existing holders and any potential eligible purchaser upon request. This method of providing information is understood and accepted by investors in these securities. Moreover, because QIBs, accredited investors or non-U.S. investors are the only investors eligible to purchase fixed income securities in the private and Rule 144A markets, requiring issuers to disclose information to the general public, including investors who are prohibited from purchasing these debt securities, creates confusion without attendant investor protection benefits.

Furthermore, if the relief under "Phase 1" of the No-Action Letter is not extended and issuers of fixed income securities decide not to make their financial information "publicly available" (as defined under the Rule), broker-dealers may no longer publish quotations, which provide efficient price discovery for eligible investors, and current holders of these securities will be significantly harmed by this decreased transparency. Sound economic analysis would advise about increased trading costs, decreased liquidity, impairment to the ability of mutual funds to mark their holdings to market due to the absence of available quotations from broker-dealers and devaluation of the securities. In addition, insurance companies, which are some of the largest investors in the fixed income securities market, would be similarly impaired in their ability to value their investment portfolios, which could increase the cost of insurance to consumers. Ultimately, the increased costs will be passed on to investors, including retail investors who invest in fixed income securities via mutual funds and exchange-traded funds, and likely would outweigh any possible indirect benefit they might receive from having access to financial information regarding the issuers of the securities.

Private and Rule 144A Markets Operate Fairly and Efficiently

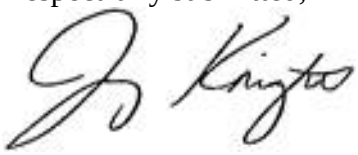
With the assistance of broker-dealers, the private and Rule 144A markets operate fairly and efficiently today. Broker-dealers play an important role in making a market for fixed income securities, providing liquidity and efficiently connecting QIBs, accredited investors and non-U.S. investors who wish to make trades. Further, their quoting activities provide for price discovery and price transparency, leading to a fair, orderly and efficient market. We are not aware of any specific instance of broker-dealer misconduct or any enforcement action against broker-dealers for conduct relating to market-making activities for Rule 144A and other privately issued fixed income

securities, which is what the application of the Rule to fixed income securities is intended to address.

Accordingly, unless the Commission determines to provide more comprehensive relief to the fixed income market, our Committee recommends that the Commission extend the "Phase 1" relief provided under the No-Action Letter to allow the Commission sufficient time to (i) evaluate an economic analysis by DERA and the costs and benefits of applying the Rule to fixed income securities, (ii) consider the issues raised in this letter and the many others submitted by interested parties and (iii) determine the appropriate exemptive relief, if any, for such fixed income securities or whether a potential rule-making process to address the application of the Rule to fixed income securities is advisable. This is a matter of some urgency because "Phase 1" is currently scheduled to expire on January 3, 2023.

We appreciate your consideration of these issues and would be pleased to discuss with the Commission any aspect of this letter.

Respectfully submitted,



Jay H. Knight
Chair of the Federal Regulation of Securities Committee

cc: Commissioner Hester Peirce
Commissioner Caroline Crenshaw
Commissioner Mark Uyeda
Commission Jaime Lizarraga
Haoxiang Zhu, Director, Division of Trading & Markets
Renee Jones, Director, Division of Corporation Finance
Rod Miller, Milbank LLP, Drafting Committee Co-Chair
Matthew Kaplan, Debevoise & Plimpton LLP, Drafting Committee Co-Chair

34552247.1