

United States Senate

WASHINGTON, DC 20510

October 12, 2022

The Honorable Gene Dodaro
Comptroller General
U.S. Government Accountability Office
441 G Street NW
Washington, D.C. 20548

Dear Comptroller Dodaro:

We write to seek your determination regarding whether the Securities and Exchange Commission's (SEC) no-action letter on December 16, 2021 establishing new requirements for broker-dealer compliance with Rule 15c2-11 constitutes a rule for purposes of the Congressional Review Act (CRA).

SEC staff issued a no-action letter on December 16, 2021 that sets forth the new terms for broker-dealers to comply with Rule 15c2-11 under the Securities Exchange Act of 1934 with regard to fixed-income securities.¹ This no-action letter, coupled with another issued by SEC staff on September 24, 2021,² indicated that the SEC would for the first time apply Rule 15c2-11 to broker-dealer quotations for fixed income securities published in quotation mediums. The impacts of the policy change effected by these staff no-action letters will materially change the compliance obligations of broker-dealers with regard to providing quotations for fixed-income securities and the overall structure and nature of trading in the fixed-income securities market, including the significant market for fixed-income securities issued under Rule 144A of the Securities Act of 1933. So, in substance, the December 16 letter is a rule because it amends existing SEC rules. Therefore, we write to seek your determination of whether the letter is a rule for purposes of the CRA.³

In pertinent part, the CRA defines a rule as: "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4). Excluded from this definition, however, are: (1) rules of particular applicability; (2) rules "relating to agency management or personnel"; and (3) rules of "agency organization, procedure, or practice that do[] not substantially affect the rights or obligations of non-agency parties." 5 U.S.C. § 804(3).

"The definition of a rule under the CRA is very broad." Government Accountability Office B-323772, at 3 (Sept. 4, 2012), available at <https://www.gao.gov/assets/b-323772.pdf>. "The CRA

¹ See (<https://www.sec.gov/files/fixed-income-rule-15c2-11-nal-finra-121621.pdf>).

² See (<https://www.sec.gov/files/rule-15c2-11-fixed-income-securities-092421.pdf>).

³ For rules that are not submitted to Congress, Members of Congress may obtain a formal opinion from your office regarding whether the agency action at issue constitutes a rule. See CRS Report R43992, The Congressional Review Act (CRA): Frequently Asked Questions, at 12 (Jan. 14, 2020), available at <https://fas.org/sgp/crs/misc/R43992.pdf>.

United States Senate

WASHINGTON, DC 20510

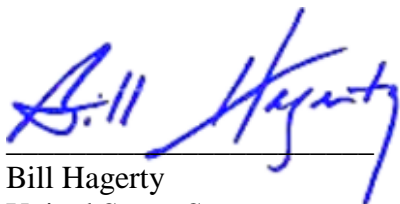
borrowes the definition of a rule from 5 U.S.C. § 551, [the Administrative Procedure Act (“APA”),] as opposed to the more narrow definition of legislative rules requiring notice and comment contained in 5 U.S.C. § 553.” *Id.* Based upon this broad definition, the Government Accountability Office (GAO) has rightly pointed out that “agency pronouncements may be rules within the definition of 5 U.S.C 551, and the CRA, even if they are not subject to notice and comment rulemaking requirements under section 553.” *Id.* Similarly, the GAO has noted that nonbinding general statements of policy can be rules under the CRA as well. Government Accountability Office B-329129 (Dec. 5, 2017), available at <https://www.gao.gov/assets/b-329129.pdf>.

The changes to the application of Rule 15c2-11 and its related impact on Rule 144A are prospective in nature, generally applicable to broker-dealers that fall within their ambit, and designed to implement, interpret, or prescribe law or policy. These changes enact wholly new policy, as well, because when the rule was last amended in 2020, there was no discussion or analysis of the costs or the benefits of applying the amendments to the fixed income markets by the SEC.⁴ Therefore, this December 16 letter meets the definition of a rule under 5 U.S.C. § 551(4).

Moreover, the exceptions under 5 U.S.C. § 804(3) plainly do not apply. The letter prescribes new policies that apply generally to any broker-dealer providing quotations for fixed-income securities and thus is not a rule of particular applicability. The letter does not concern agency management or personnel. And finally, the letter is not a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties—indeed, its entire impact is to change the compliance obligations of broker-dealers with regard to providing quotations for fixed-income securities in the markets, rather than establishing any sort of rule of practice or procedure governing disputes, controversies or other matters pending before the SEC.

For these reasons, it is our view that the SEC’s December 16, 2021 no-action letter changing the application of Rule 15c2-11, with its related impact on Rule 144A, is a rule under the CRA. Because this no-action letter is currently causing significant consequences for broker-dealers, investors, and issuers in the Rule 144A market, we respectfully request that you provide your opinion by December 31, 2022, regardless of whether the opinion’s issuance would occur during a congressional recess.

Sincerely,



Bill Hagerty
United States Senator



Thom Tillis
United States Senator

⁴ See <https://www.sec.gov/rules/final/2020/33-10842.pdf>.