



NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

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December 27, 2019

By email to: rule-comments@sec.gov

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

RE: File Number S7-14-19: NASAA Comment Letter Regarding Proposed Amendments to SEC Rule 15c2-11, Publication or Submission of Quotes Without Specified Information

Dear Ms. Countryman:

On behalf of the North American Securities Administrators Association, Inc. (“NASAA”),¹ I am writing in response to U.S. Securities and Exchange Commission (the “SEC” or “Commission”) Release No. 34-87115, Publication or Submission of Quotations Without Specified Information, to amend Rule 15c2-11 under the Securities Exchange Act of 1934 (the “Rule Proposal”).² The Rule Proposal would make significant revisions to Rule 15c2-11, including as to the so-called “piggyback” exception therein. NASAA supports the Rule Proposal and encourages its adoption. We offer comments in this letter to address specific issues raised by the Rule Proposal’s proposed revisions to the piggyback exception.

Background

Rule 15c2-11 is rooted in antifraud concerns and serves an important purpose: fostering price discovery for securities traded in the generally opaque over-the-counter market. The Commission adopted it in 1971 as a prophylactic measure to combat “pump-and-dump” schemes

¹ Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA’s membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

² The Rule Proposal is available at <https://www.sec.gov/rules/proposed/2019/34-87115.pdf>.

and other forms of market manipulation involving over-the-counter shell companies.³ The rule does this by prohibiting broker-dealers from publishing price quotes for over-the-counter securities unless the broker-dealer has verified certain minimum information about the issuer. This important investor protection measure has been eroded by an exception built into Rule 15c2-11, the so-called “piggyback” exception. Under the piggyback exception, a broker-dealer is excused from complying with Rule 15c2-11’s obligations to collect and review issuer information if the security is already subject to regular and frequent market quotations in the marketplace (*i.e.*, if within the preceding 30 calendar days price quotations for the security have appeared on each of the last 12 trading days and there have been no more than four trading days in succession without a quote).

The Need for Amendments to the Piggyback Exception

The piggyback exception is an example of the proverbial “exception swallowing the rule.” Initially crafted as a way to avoid unnecessary duplication of efforts by broker-dealers, the piggyback exception has come to be the principal means by which broker-dealers comply with Rule 15c2-11 – that is, broker-dealers comply with Rule 15c2-11’s obligations by avoiding them. The Commission has previously considered repealing the piggyback exception, including through amendments proposed to Rule 15c2-11 but never adopted.⁴ Former SEC Commissioner Luis Aguilar noted concerns with the piggyback exception in 2015 when he remarked: “because the exception allows broker-dealers simply to rely on their own prior quotations, broker-dealers have no obligation to confirm that the information they initially relied on when they first published a quotation is still valid, no matter how old the initial quotation is.”⁵ Chairman Clayton has also rightly made fixing Rule 15c2-11 a priority.⁶

We believe the proposed amendments to the piggyback exception are an appropriate solution to this longstanding regulatory problem. We agree that repealing the piggyback exception entirely would be harmful for existing shareholders of over-the-counter securities, as this would cause many broker-dealers to stop making markets or quoting prices in many over-the-counter securities, draining or even eliminating liquidity in these markets. Many retail investors thus would be adversely affected if the piggyback exception were simply eliminated. Instead of repeal, the Rule Proposal rightly seeks to fix the problems with the current piggyback exception by permitting its use only when information about an issuer is “current” and “publicly available.”⁷ Under the

³ See Adoption of Rule 15c2-11 under the Securities Exchange Act of 1934, SEC Release No. 34-9310 (Sep. 13, 1971).

⁴ See Publication or Submission of Quotations Without Specified Information, SEC Release No. 34-41110 (Feb. 25, 1999).

⁵ See Luis A. Aguilar, *The Need for Greater Secondary Market Liquidity for Small Businesses* (Mar. 4, 2015), <https://www.sec.gov/news/statement/need-for-greater-secondary-market-liquidity-for-small-businesses.html>.

⁶ See Jay Clayton and Brett Redfearn, *Equity Market Structure 2019: Looking Back and Moving Forward* (Mar. 8, 2019), <https://www.sec.gov/news/speech/clayton-redfearn-equity-market-structure-2019>.

⁷ See Rule Proposal, *supra* note 2, at 29-31.

Rule Proposal, information will be deemed publicly available if it is accessible on the Internet (such as through EDGAR or on the issuer's or broker-dealer's websites) and will be deemed current if it meets certain defined timeliness standards.⁸ We support these amendments to the piggyback exception and believe they will effect important, positive change in the over-the-counter securities market. We offer the following comments in response to specific questions raised in the Rule Proposal.

Responses to Specific Questions in the Rule Proposal

Q2. Should proposed paragraph (b) information meet the definition of “publicly available” if, for example, access to such information requires payment of a fee or registration and provision of customer data to be allowed access to such information? Are there any other potential barriers to accessibility that the Commission should address? If so, what are they and how should the Commission address them in this rulemaking?

Information should not be considered “publicly available” for purposes of Rule 15c2-11 if it is restricted behind any sort of paywall or password-protected site. Rule 15c2-11 does not now (nor would it as revised by the Rule Proposal) require issuers to disclose trade secrets, proprietary business operations, or other highly sensitive business information. Rather, the rule requires disclosure of only basic information about an issuer's operations and finances. There is no reason to limit the accessibility of such information. Furthermore, the costs of posting this information to the public domain over the Internet will be minimal, whether posted by issuers themselves or by registered market participants. To allow Rule 15c2-11 information to be hidden behind paywalls or other subscription-only services would defeat the basic purpose of the Rule Proposal.

Q5. Are there any data privacy concerns the Commission should address with regard to issuers' proposed paragraph (b) information being made publicly available by someone other than the issuer? Please give examples of any concerns and how the Commission might address them in this rulemaking.

We do not see any data privacy concerns associated with making Rule 15c2-11 information publicly available on the Internet. This is true whether the information is provided directly from issuers or through broker-dealers or other third parties. As indicated above, the rule does not require issuers to disclose sensitive business information.⁹ It should be the responsibility of issuers to ensure they do not disclose trade secrets or other sensitive information beyond what is required.

⁸ See *id.* at 30.

⁹ We acknowledge that some issuers may not want to disclose their financial information and would instead prefer to keep the marketplace in the dark about their current financial conditions, but this self-interested goal of some issuers should not guide SEC rulemaking.

Q23. Certain issuers choose not to have reporting obligations for business purposes. The proposal, however, would require proposed paragraph (b)(5) information from a catch-all issuer, excluding paragraphs (b)(5)(i)(N) through (P), to be current and made publicly available within six months before the date of publication or submission of the broker-dealers' quotation in order for broker-dealers to rely on the piggyback exception to publish or submit quotations for the security of a catch-all issuer. Is six months the appropriate time frame [. . .]? What are the potential costs and benefits to small issuers of this requirement? [. . .]

Rule 15c2-11 as revised under the Rule Proposal would in effect require that all over-the-counter issuers disclose their Rule 15c2-11 information at least semiannually in order to maintain an over-the-counter market for their securities. Some issuers may elect not to meet this requirement and will choose instead to cease disclosing information entirely and “go dark.” Many other commenters on the Rule Proposal have emphasized this concern in their comment letters to the Commission.¹⁰ This risk should not deter the Commission from acting. The longstanding problem of broker-dealers maintaining price quotes long after the underlying issuer information becomes stale is untenable. This practice should not be allowed to persist. The Commission should not hold needed marketplace reforms captive to the potential that some issuers may elect to go dark rather than comply with the requirements set forth in the Rule Proposal.

Q26. Should the piggyback exception not apply to publications or submissions of quotations for securities of issuers that have declared bankruptcy, filed for corporate dissolution, or otherwise taken steps to wind down their business? Why or why not?

Q27. Should the piggyback exception not apply to publications or submissions of quotations for securities of issuers that have undergone a re-organization, any major mergers and acquisitions, reverse mergers, or other significant restructuring that affects their business or management? Why or why not?

As indicated, the Rule Proposal will in effect require that over-the-counter issuers update the marketplace with their Rule 15c2-11 information no less frequently than every six months. This implicit semiannual reporting obligation of course opens a potential disclosure gap wherein material information within these periods goes unreported until the issuer's next Rule 15c2-11 update. NASAA encourages the Commission to amend the Rule Proposal to make issuers that undergo material business developments (including, but not limited to, declarations of bankruptcy, re-organizations and mergers) ineligible for the piggyback exemption unless this information has been disclosed. Issuers who undergo such material business events should be required to update their information to the marketplace as soon as the event becomes known to the issuer or lose eligibility for the piggyback exemption. This would allow issuers to operate consistent with the law and would ensure that material events are disclosed timely to investors and the marketplace.

Conclusion

¹⁰ See generally comment file, SEC File No. S7-01-17, <https://www.sec.gov/comments/s7-14-19/s71419.htm>.

Vanessa Countryman
December 27, 2019
Page 5 of 5

For the foregoing reasons, NASAA supports the Rule Proposal and encourages its adoption. The Rule Proposal will provide needed corrective measures to Rule 15c2-11 and will have a positive long-term impact on the structure and operations of the over-the-counter securities market.

Thank you for considering our views and we look forward to working with you in our shared mission to protect investors. Should you have questions, please contact either the undersigned or NASAA's Executive Director, Joseph Brady, at 202-737-0900

Sincerely,

A handwritten signature in black ink, appearing to read "C. Gerold". The signature is fluid and cursive, with a large, stylized "G" at the end.

Christopher Gerold
NASAA President
Chief, New Jersey Bureau of Securities