

## SCOPE OF AVAILABLE RELIEF FOR QUOTATIONS FOR RULE 144A FIXED INCOME SECURITIES AFTER FIRST PHASE OF TRANSITIONAL RELIEF EXPIRES

January 3<sup>rd</sup> of 2023 is the last day of the first phase of transitional relief from a U.S. rule that specifies the conditions under which a broker-dealer may legally publish or submit quotations for unlisted fixed income securities in a quotation medium. During this first phase, the staff of the Division of Trading and Markets of the U.S. Securities and Exchange Commission (the "**SEC**") are not recommending enforcement action pursuant to Rule 15c2-11 under the U.S. Securities Exchange Act of 1934, as amended (the "**Exchange Act**"), if a broker-dealer publishes or submits quotations in a quotation medium for fixed income securities sold pursuant to Rule 144A ("**Rule 144A fixed income securities**") under the Securities Act of 1933, as amended (the "**Securities Act**"). During the second and third phases, the no-action letter dated December 16, 2021 issued by the staff of the SEC's Division of Trading and Markets (the "**December 2021 Letter**", [available here](#)) imposes additional conditions on a broker-dealer publishing or submitting quotations for Rule 144A fixed income securities. This briefing discusses these additional conditions and related practical implications for issuers of Rule 144A fixed income securities.

### BACKGROUND

Rule 15c2-11 implements Section 15(c)(2) of the Exchange Act, which prohibits a broker-dealer from engaging in certain fraudulent, deceptive or manipulative acts or practices. Specifically, this rule sets forth the circumstances under which a broker-dealer would be permitted to publish or submit quotations in a quotation medium for a security that is not listed on a U.S. national securities exchange.

#### Key issues

- Rule 15c2-11 generally prohibits a broker-dealer from publishing quotations for an unlisted security when specified current information about the issuer is not publicly available.
- Since at least September 2021, the SEC staff has taken the view that Rule 15c2-11 applies to unlisted fixed income securities (including Rule 144A fixed income securities) as well as OTC equity securities.
- A December 2021 no-action letter provides phased relief to allow additional time for broker-dealers to implement changes necessary to address the expanded interpretation of Rule 15c2-11.
- After the end of Phase 1, broker dealers will only be permitted to publish quotes for Rule 144A fixed income securities if the Rule 144A(d)(4) information is publicly available or if the securities or issuer qualify for another category of relief under the December 2021 Letter.

Any of the following would generally constitute a "**quotation**" for purposes of Rule 15c2-11:

- any bid or offer at a specified price with respect to a security;
- any indication of interest by a broker-dealer in receiving bids or offers from others for a security; or
- any indication by a broker-dealer that wishes to advertise its general interest in buying or selling a particular security.

In 2020, Rule 15c2-11 was amended to enhance disclosure and investor protection in the over-the-counter ("**OTC**") market by generally prohibiting a broker-dealer from publishing quotations for an unlisted security when specified current information about the security's issuer (described below) is not publicly available.

Since its initial adoption in 1971, Rule 15c2-11 was implemented and enforced by the SEC to target fraud in the largely retail, OTC equity markets. During 2021, market participants raised concerns with the SEC staff about the potentially significant negative effects of amendments to Rule 15c2-11 on trading in the fixed-income markets. In connection with a temporary no-action letter dated September 24, 2021, the staff of the SEC's Division of Trading and Markets confirmed its view that Rule 15c2-11 also applied to fixed income securities, including debt securities sold only to qualified institutional buyers in reliance on Rule 144A under the Securities Act of 1933 ("**Rule 144A**"). The December 2021 Letter provides phased no-action relief to provide additional time for broker-dealers to implement operational and systems changes necessary to address the SEC staff's expanded interpretation of Rule 15c2-11. While Rule 144A already requires issuers of Rule 144A fixed income securities to make certain current information available to investors who are eligible to invest in their securities, this new interpretation of Rule 15c2-11 will only permit broker-dealers to publish or submit quotes for Rule 144A fixed income securities if they can confirm that the relevant current information is publicly available. Broker-dealers seeking to publish or submit quotes for Rule 144A fixed income securities may face difficulties, however, after Phase 1 relief expires because the terms of most currently outstanding Rule 144A fixed income securities do not include any contractual requirements to make the relevant current information publicly available.

Neither Rule 15c2-11 or the December 2021 Letter expressly address their application to non-U.S., non-SEC registered broker-dealers who publish quotations for Rule 144A fixed income securities offshore. Accordingly, it is theoretically possible that the SEC could expect a non-U.S. broker-dealer who transacts with U.S. institutional investors pursuant to Rule 15a-6 to comply with Rule 15c2-11 or the conditions of the December 2021 Letter.

## **CONDITIONS FOR PHASE 2 NO-ACTION RELIEF**

The second phase of transitional relief from Rule 15c2-11 provided by the December 2021 Letter will be available from January 4, 2023 through January 4, 2024. Unless a Rule 144A fixed income security or its issuer qualifies for at least one of the below described "Appendix B" categories, Phase 2 relief would only be available if the broker-dealer publishing or submitting the quotation has

determined current information about the issuer, consistent with Rule 15c2-11(b), is publicly available. The information requirement specified in Rule 144A(d)(4) is considered by the SEC staff to be "consistent with Rule 15c2-11(b)" for purposes of the December 2021 Letter. Rule 15c2-11 specifies that "**publicly available**" means available:

- on the issuer's website;
- on EDGAR (the SEC's public filings database, in which SEC-registered public companies file their reports) or on the website of a state or federal agency;
- on a website of a qualified interdealer quotation system, a registered national securities association, or a registered broker or dealer; or
- through an electronic information delivery system that is generally available to the public in the primary trading market of a foreign private issuer.

If access to relevant issuer information is restricted by a user name, password, fees, or other similar restraints, the information would not be considered to be publicly available.

## Appendix B Categories

During Phase 2, a broker-dealer would not need to make such a determination if the issuer or fixed income security (as applicable) qualifies for any of the following categories listed in Appendix B of the December 21 Letter:

- **Exchange Traded Issuer:** the issuer of the relevant fixed income security has a class of securities listed on a U.S. national securities exchange (i.e., NYSE or Nasdaq);
- **Public Reporting Issuer:** the issuer of the relevant fixed income security is subject to the ongoing public reporting requirements of the Exchange Act and has filed all required periodic reports during the preceding 12 months (or such shorter period that the issuers was required to file such reports);
- **Rule 12g3-2(b) Exempt Issuer:** the issuer of the fixed income security has a class of equity securities that is exempt from registration pursuant to Rule 12g3-2(b) under the Exchange Act;
  - To qualify for the Rule 12g3-2(b) exemption, an issuer must:
    - be a foreign private issuer that is not subject to the ongoing public reporting requirements of the Exchange Act;
    - have listed equity securities on one or more exchanges outside the United States that constitute the primary trading market for those securities; and
    - publish in the English language on its website (or other electronic information delivery system) all material information that it distributes to its security holders,

makes public under the laws of its home country or files with its principal securities exchange.

- The existence of an unlisted American Depositary Receipt (ADR) program (sponsored or unsponsored) would be an indicator that either the issuer or a depositary bank had made a determination that the issuer qualifies for the exemption provided by Rule 12g3-2(b).
- **Non-U.S. Sovereign Debt:** the relevant fixed income security is foreign sovereign debt or a debt security guaranteed by a foreign government;
- **Bank:** the issuer of the relevant fixed income security is a bank (as defined in Section 3(a)(6) of the Exchange Act), a bank holding company and certain other U.S. financial institutions; and
- **Publicly-available determination:** a qualified interdealer quotation system makes a publicly-available determination that there is current and publicly available information about the issuer for a class of the issuer's securities that is eligible for certain exceptions provided in Rule 15c2-11(f).

## **CONDITIONS FOR PHASE 3 NO-ACTION RELIEF**

Phase 3 relief provided by the December 2021 Letter would be available on and after January 5, 2024 (with no end date specified) if the relevant fixed income security qualifies for Phase 2 relief as described above and either:

- the fixed income security is foreign sovereign debt or a debt security guaranteed by a foreign government; or
- a website link directly to current and publicly available information about the issuer (consistent with Rule 15c2-11(b)) is available on the quotation medium on which the security is being quoted, provided that the broker-dealer has determined at least on an annual basis that the website link and its underlying information is current.

As noted above, the information requirement specified in Rule 144A(d)(4) is considered to be consistent with Rule 15c2-11(b).

## **POTENTIAL IMPACT OF THE END OF PHASE 1 ON SECONDARY MARKET FOR OUTSTANDING RULE 144A FIXED INCOME SECURITIES**

Unless the issuer of the relevant fixed income security makes publicly available all of the information contemplated by Rule 15c2-11 or is eligible for Phase 2 no-action relief under the December 2021 Letter, U.S. federal securities law will prohibit a broker-dealer from publishing or submitting quotations on a quotation medium for Rule 144A fixed income securities. While offers and bids for any such securities could continue to be bilaterally communicated via person-to-person conversations, trading volume will likely be significantly reduced, the price discovery process will become less efficient, which could negatively impact the valuation of these securities. To prevent serious disruptions in the trading of their currently outstanding Rule 144A fixed income securities, issuers unable to qualify for any of the above described "Appendix B" categories will want to consider

whether to voluntarily make their Rule 144(d)(4) information publicly available (for example, by posting the information on the issuer's website) before the end of Phase 1.

## **POTENTIAL IMPACT OF THE END OF PHASE 1 ON OFFERING DOCUMENTS, PURCHASE AGREEMENTS AND INDENTURES FOR RULE 144A FIXED INCOME SECURITIES**

Many participants in recent offerings of Rule 144A fixed income securities have been anticipating and evaluating the impact of the SEC's new interpretation of Rule 15c2-11 and the upcoming expiration of Phase 1 relief under the December 2021 Letter. For example, numerous recent offering documents for asset-backed securities sold pursuant to Rule 144A have included references to amended Rule 15c2-11 or the SEC's interpretation of that rule in liquidity-related risk factor disclosures. Privately held issuers who do not qualify for any of the "Appendix B" categories described above and are not interested in making their Rule 144(d)(4) information publicly available will want to consider including similar risk factor disclosures in their offering documents. Investors may request issuers to pay higher yields for new issuances of Rule 144A fixed income securities that will likely not qualify Phase 2 relief, which would increase the cost of financing.

To the extent an issuer qualifies for any of the "Appendix B" categories, transaction participants will want to consider whether to document eligibility for Phase 2 relief provided by the December 2021 Letter in the representations and warranties section of the purchase agreement. In addition, transaction participants might consider including in the reporting covenant of the related indenture a requirement to make Rule 144(d)(4) information publicly available on the issuer's website in certain circumstances – such as when the issuer no longer has a class of securities listed on a U.S. national securities exchange or no longer has a class of equity securities exempt from registration pursuant to Rule 12g3-2(b) under the Exchange Act.

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