

New Public Information Requirements for the Quotation of Fixed-Income Securities

November 10, 2022

As we have previously reported,¹ Rule 15c2-11 under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), requires a broker-dealer that wishes to publish a quotation for an issuer’s securities in a quotation medium other than a national securities exchange (*i.e.*, over-the-counter, or “OTC”) to first establish that certain information about the issuer is current and publicly available.² In 2021, the U.S. Securities and Exchange Commission (the “SEC”) for the first time interpreted Rule 15c2-11 to apply to fixed-income securities.

In response to industry-wide concerns regarding the disruptive effect of this new interpretation on trading in the OTC security market, the SEC published a no-action letter on December 16, 2021 (the “Rule 15c2-11 No-action Letter”) introducing a phased compliance regime for fixed-income securities. Under Phase 1 of this regime, regular practices required for securities to trade among qualified institutional buyers (“QIBs”) under Rule 144A (“Rule 144A”) under the Securities Act of 1933, as amended, were also deemed to satisfy Rule 15c2-11. In other words, it was sufficient for an issuer of Rule 144A securities to undertake to make certain financial information about the issuer available to QIBs on request. However, beginning with Phase 2 of the regime, which has a start date of January 4, 2023, a broker-dealer or Qualified IDQS may only publish or submit “quotations”³ for fixed-income securities traded pursuant to Rule 144A if the relevant issuer has actually made the financial information required by Rule 15c2-11 publicly available, including the following information:

- A balance sheet of the issuer dated as of a date less than 16 months prior to the publication or submission of the quotation;

¹ Refer to Debevoise & Plimpton Updates dated September 17, 2021 (accessible [here](#)) and September 27, 2021 (accessible [here](#)).

² Similar requirements apply to a qualified interdealer quotation system (“Qualified IDQS”) that wishes to disseminate broker-dealer quotations.

³ For purposes of Rule 15c2-11, the term “quotation” is defined broadly to include bids, offers, indications of interest in receiving bids or offers, and advertisements of general interest in buying or selling.

- Profit and loss and retained earnings statements of the issuer for the 12 months preceding the date of the most recent balance sheet; and
- Similar financial information of the issuer for the part of the two preceding fiscal years that the issuer or its predecessors have been in existence.

In addition, interim profit and loss and retained earnings statements of the issuer from the date of the issuer's balance sheet to a date less than six months prior to the publication or submission of the quotation may be required (if the issuer's balance sheet is dated as of a date not less than six months prior to the publication or submission of the quotation) to be made public for existing and newly issued Rule 144A Debt Securities, depending on whether the relevant issuer chooses to comply with the information requirements of Rule 144A(d)(4) rather than the information requirements of Rule 15c2-11(b).⁴

The information requirements of Rule 15c2-11 do not require making publicly available audited financial statements, auditor reports, notes to financial statements or statements of cash flow, nor is the information provided required to be prepared in accordance with U.S. generally accepted accounting principles.

In addition, among other disclosure requirements, the issuer must provide a very brief statement of the nature of the business of the issuer and the products and services it offers as of a date within 12 months prior to the publication or submission of a quotation.

While issuers themselves are not required to comply with the information requirements of Rule 15c2-11, failure to make publicly available the information required by Rule 15c2-11 would prevent a broker-dealer or Qualified IDQS from publishing or submitting for quotation such issuer's fixed-income securities on the OTC market, potentially limiting investors' ability to buy and sell existing and future fixed-income securities traded pursuant to Rule 144A ("Rule 144A Debt Securities"). Broker-dealers would not be prohibited from trading the existing or future Rule 144A Debt Securities of such issuer entirely (they could trade in such securities on a reverse-inquiry basis), but liquidity in any such security would likely be adversely affected.

For any security to be eligible to trade in the fixed-income securities market, the relevant issuer has always been required to make analogous information to that required by Rule 15c2-11 available upon request by an investor, pursuant to Rule 144A(d)(4).

⁴ The Rule 15c2-11 No-action Letter notes that the information requirements discussed in Section II.D. of the Rule 144A Adopting Release, Release No. 33-6862 (Apr. 30, 1990), 55 FR 17933, 17939, would be consistent with Rule 15c2-11(b).

Issuers of Rule 144A Debt Securities have also been customarily required to make such information available (at least on a private basis) in compliance with reporting covenants in high-yield indentures.

Under Phase 3 of the SEC's compliance regime for fixed-income securities, which has a start date of January 5, 2024, the quotation medium on which a security is being quoted will be required to include a website link directly to the current and publicly available information about the issuer.⁵

Public Dissemination of Information

Issuers will separately need to consider whether and how to make the required information publicly available for the purposes of Rule 15c2-11, which adopts a definition of "publicly available" that precludes the restriction of information based on usernames, passwords, fees or other restraints. The information must also be accessible to members of the public generally and only certain venues (e.g., EDGAR, the website of a state or federal agency, the website of a broker-dealer or the issuer's own website) qualify. Accordingly, certain third-party websites that typically post financial information on behalf of issuers for compliance with indenture-reporting covenants may not be used to satisfy the disclosure requirements of Rule 15c2-11 if they are not eligible publication media or if access to the information requires registration, confirmation that party seeking access is a verified eligible investor or satisfaction of other conditions such as an issuer's affirmative permission, provision of confidentiality waivers or the like.

Foreign Private Issuers

Certain foreign private issuers may satisfy the information requirements of Rule 15c2-11 by utilizing an exemption under Rule 12g3-2(b) of the Exchange Act, which requires each such issuer to submit its non-U.S. disclosure documents to the SEC on an ongoing basis and publish on its website or an electronic information delivery system generally available to the public, in English, certain information made public pursuant to the laws of the country of its incorporation, filed with the principal stock exchange in its primary trading market and distributed to its security holders.

⁵ The information accessible *via* the website link must be consistent with Rule 15c2-11(b) of the Exchange Act, and the broker-dealer must determine at least on an annual basis that the website link and its underlying information are current.

Permitted Exemptions from SEC Enforcement

In addition to the exemptions listed in Rule 15c2-11(b), the SEC indicated in the Rule 15c2-11 No-action Letter that beginning on January 4, 2023, publication of quotations will be permitted where one of the following alternative criteria is met:

- The issuer of the fixed-income security has a class of securities listed on a national securities exchange;
- The issuer of the fixed-income security is subject to the requirement to file reports pursuant to Section 13 or Section 15(d) of the Exchange Act and has filed all required periodic reports under section 13 or 15(d) of the Exchange Act, as applicable, during the preceding 12 months (or for such shorter period that the issuer was required to file such reports);
- 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;
- The fixed-income security quoted is foreign sovereign debt or a debt security guaranteed by a foreign government;
- The fixed-income security is issued by an issuer where a Qualified IDQS makes a publicly available determination (in accordance with the requirements in Rule 15c2-11(a)(3)) that there is current and publicly available information about the issuer for any class of security of the issuer that is eligible for an exception in paragraphs (f)(2)(iii)(B), (f)(3)(ii)(A) or (f)(7) of Rule 15c2-11;
- There is current and publicly available information (consistent with Rule 15c2-11(b)) about the issuer of the fixed-income security; or
- The issuer of the fixed-income security is a bank as defined in section 3(a)(6) of the Exchange Act, a bank holding company or a credit union regulated by the National Credit Union Administration that reports information to the Federal Financial Institutions Examination Council or files call reports with the National Credit Union Administration.

Practical Considerations for Issuers

Ahead of January 4, 2023, issuers should consider the following so that their Rule 144A Debt Securities may be quoted without disruption:

- Existing financial disclosure: Issuers may already be required to publish financial information with respect to their Rule 144A Debt Securities pursuant to existing indenture or other reporting covenants. These issuers should confirm that such information satisfies the information requirements of Rule 15c2-11, *e.g.*, whether the information is prepared for the issuer itself or another entity such as a parent entity or a guarantor. Issuers also need to consider the timing for publishing indenture financial reporting and Rule 15c2-11 information.
- Preparation for financial information to be made public: In order to satisfy the information requirements of Rule 15c2-11, issuers may be required to make publicly available financial information that was previously inaccessible to an issuer's competitors, suppliers, customers or employees.
- Public dissemination of information: Issuers should consider carefully the definition of "publicly available" in determining the forum by which the financial information required by Rule 15c2-11 should be disseminated, as discussed above.

In light of the fast-approaching compliance deadline for Rule 15c2-11, various participants in the fixed-income securities market have requested that the SEC extend the deadline for the beginning of Phase 2 or provide further exemptive relief from the rule's application to fixed-income securities. It is, however, unclear whether those requests will be granted or if the SEC will modify its interpretation of the operation of Rule 15c2-11, though we understand that the SEC may currently be considering what, if any, relief it is willing to grant. Accordingly, issuers should make plans for the informational requirements of the rule now, ahead of the compliance deadline of January 4, 2023.

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Please do not hesitate to contact us with any questions.

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