

New Public Disclosure Requirements for Foreign Private Issuers of OTC-Quoted Rule 144A Debt Securities

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Beginning January 4, 2023, foreign private issuers of Rule 144A fixed income securities will be required to make certain financial information publicly available in order to allow for publication of quotations of such securities in the over-the-counter markets pursuant to Rule 15c2-11 (“Rule 15c2-11”) of the United States Securities Exchange Act of 1934, as amended (the “U.S. Exchange Act”). While Rule 15c2-11 requires compliance by broker-dealers, issuers may need to augment their public disclosure practices in order to avoid a potential disruption in the trading and decrease in the liquidity of their Rule 144A bonds.

Background. Rule 15c2-11 requires that a broker-dealer that wishes to publish a quotation¹ in a medium other than a national securities exchange (i.e., over-the-counter, or “OTC”) must first establish that certain current financial information about the issuer is publicly available. As we have previously reported,² in a no-action letter dated September 24, 2021, the staff of the U.S. Securities and Exchange Commission (the “SEC”) confirmed its position that Rule 15c2-11 applies to fixed-income securities sold in reliance on Rule 144A of the United States Securities Act of 1933, as amended (“Rule 144A”). Previously, it was sufficient that an issuer of Rule 144A debt securities undertake to provide certain financial information to qualified institutional buyers (“QIBs”) upon request. The SEC, in a no-action letter dated December 16, 2021, provided for a phase-in of compliance with Rule 15c2-11, which requires, effective January 4, 2023, broker-dealers and qualified interdealer quotation systems (“Qualified QIDS”) to ascertain that the issuer information required under Rule 15c2-11 is publicly available before they publish quotations for the issuer’s Rule 144A debt securities. Starting January 5, 2024, the quotation medium on which a Rule 144A debt security is quoted will be required to include a website link to the issuer’s publicly available information.

Disclosure Requirements. The issuer information required by Rule 15c2-11 includes (i) a balance sheet as of a date no less than 16 months prior, (ii) a profit and loss and

¹ For purposes of Rule 15c2-11, a “quotation” is defined to include any bid, offer, indication of interest in receiving bids or offers, and advertisement of general interest in buying or selling.

² Refer to Debevoise & Plimpton Updates dated September 17, 2021 (accessible [here](#)), September 27, 2021 (accessible [here](#)) and November 10, 2022 (accessible [here](#)).

retained earnings statement for the 12 months preceding the date of the most recent balance sheet, and for the two preceding fiscal years and (iii) a brief statement of the nature of the issuer's business, including its products and services. The information requirements of Rule 15c2-11 do not require audited financial statements, auditor reports, notes to financial statements or that the information be prepared in accordance with U.S. generally accepted accounting principles. Importantly, the information provided must be of the issuer of the securities itself, and not of an affiliated entity (such as a parent guarantor) that might ordinarily produce financial statements of a consolidated group.

Rule 15c2-11 specifies that information is deemed "publicly available" if it is accessible without passwords, fees or other restrictions through the issuer's website, the SEC's website (EDGAR) or on the website of a state or federal agency, on a website of a Qualified QID, a registered national securities association or a registered broker or dealer, or through an electronic information system that is generally available to the public in the primary trading market of a "foreign private issuer."³

Application to Foreign Private Issuers. Foreign private issuers of Rule 144A debt securities will generally be subject to Rule 15c2-11, but may be deemed to satisfy the public disclosure requirements based on their status and reporting under the U.S. Exchange Act.

First, if a foreign private issuer is subject to the reporting requirements under the U.S. Exchange Act and has filed all required periodic reports in the prior 12 months (or the applicable shorter period that the issuer was required to file such reports), then a broker-dealer would not need to confirm separately that the current financial information of the issuer is publicly available under Rule 15c2-11.

Second, a foreign private issuer with a class of equity securities exempt from the reporting requirements of the U.S. Exchange Act pursuant to Rule 12g3-2(b) ("Rule 12g3-2(b)") of the U.S. Exchange Act and that has published, since the first day of the most recently completed fiscal year, the information required by Rule 12g3-2(b) would be considered to have satisfied the public disclosure requirements of Rule 15c2-11. Rule 12g3-2(b) requires an issuer to publish on its website, or on an electronic information delivery system generally available to the public in its primary trading market, in English, certain information made public pursuant to the laws of the issuer's country of incorporation or filed with the principal stock exchange in the issuer's primary trade

³ For U.S. securities law purposes, a "foreign private issuer" is an issuer that has 50% or less of its outstanding voting securities held directly or indirectly by U.S. residents; or if more than 50% of its outstanding voting securities are held directly or indirectly by U.S. residents, (i) less than a majority of its executive officers or directors are U.S. citizens or residents, (ii) less than 50% of the issuer's assets are located in the U.S. and (iii) the issuer's business is administered principally outside of the U.S.

market or distributed to its security holders.⁴ Issuers with Level I ADR programs (sponsored or unsponsored) are typically exempt from the reporting obligations of the U.S. Exchange Act under Rule 12g3-2(b).

Finally, foreign sovereign debt securities and debt guaranteed by a foreign government are exempt from Rule 15c2-11.

Considerations for Foreign Private Issuers. In advance of January 4, 2023, foreign private issuers of Rule 144A debt securities that are quoted on OTC markets are advised to consider the following to avoid disruptions in trading:

- **Current status under the U.S. Exchange Act:** For foreign private issuers subject to the reporting requirements of the U.S. Exchange Act, adherence to such reporting requirements negates the need to make public disclosure in satisfaction of Rule 15c2-11. Similarly, foreign private issuers that rely on Rule 12g3-2(b) for an exemption from the reporting requirements of the U.S. Exchange Act should ensure their compliance with its information dissemination requirements of Rule 12g3-2(b) in order to avoid the need to satisfy the Rule 15c2-11 informational requirements.
- **Public dissemination of information:** A foreign private issuer that is neither subject to the reporting obligations of the U.S. Exchange Act nor exempt from such reporting obligations pursuant to Rule 12g3-2(b) should consider carefully the definition of “publicly available” to determine whether the financial information that it has historically made available and disseminated satisfies Rule 15c2-11. If not, an issuer should make necessary administrative arrangements for the publication of information going forward, such as a publicly accessible website in order to ensure the continued quotation of its fixed income securities.
- **Publishing financial information not previously available:** Issuers of Rule 144A debt securities that are not subject to exchange or regulatory reporting requirements will commonly only make financial information available through a password-protected or otherwise restricted website accessible to QIBs and other selected categories of potential investors, in addition to providing information to QIBs upon request, pursuant to Rule 144A(d)(4). The application of Rule 15c2-11 could mean that financial information of a foreign private issuer that has not been publicly disclosed in the past will now become available to an issuer’s competitors, suppliers,

⁴ To qualify for the Rule 12g3-2(b) exemption, in addition to the publication requirement, an issuer must (a) be a “foreign private issuer” that is not subject to the reporting requirements of the U.S. Exchange Act and (b) have listed equity securities on one or more exchanges outside the United States that constitute the primary trading market for those securities.

customers or employees. As such, advanced consideration should be given to the potential investor relations and competitive impact of these requirements.

- **Potential preparation of additional financial information:** Reporting covenants in indentures governing Rule 144A debt securities commonly permit financial statements delivered to investors to be those of an affiliated entity, such as a parent guarantor. However, Rule 15c2-11, as interpreted by the SEC, requires that the information be in respect of the issuer itself. As a result, to the extent not otherwise produced, foreign private issuers may need to prepare the necessary financial information at the issuer level for the relevant time periods.
- **Future issuances of Rule 144A debt securities:** Going forward, issuers should be mindful of additional disclosure and legal obligations that underwriters, investors and other third parties in future offerings of Rule 144A debt securities may demand relating to compliance with Rule 15c2-11. Further, if a foreign private issuer that has currently outstanding Rule 144A debt securities wishes to enter into the market for an additional offering, then underwriters and investors may look to past compliance with Rule 15c2-11, and the trading activity of such securities, when evaluating the new issuance.

While various participants in the fixed-income securities market have requested that the SEC extend the deadline for compliance or provide further exemptive relief from the application of Rule 15c2-11 to fixed-income securities, to date, it is not clear if or when the SEC will take further action. In the absence of further exemptive relief, foreign private issuers of Rule 144A fixed income securities should take steps now to ensure compliance with the disclosure requirements of Rule 15c2-11 so that their Rule 144A fixed income securities may be quoted by broker-dealers after January 3, 2023.

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Please do not hesitate to contact us with any questions.

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