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## SEC Delays by Two Years Implementation of Rule 15c2-11 for Private Issuers of Rule 144A Debt Securities

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

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In response to concerns raised by market participants, the staff of the Division of Trading and Markets of the Securities and Exchange Commission (SEC) issued a no-action letter on November 30, 2022, that delays by two years implementation of amended Rule 15c2-11 under the Securities Exchange Act of 1934 for issuers of certain fixed income securities that trade in the over-the-counter (OTC) markets.

Pursuant to the no-action letter, private issuers of debt securities — most notably those issued under Rule 144A and Regulation S — now will have until January 4, 2025 (extended from January 4, 2023) to comply with Rule 15c2-11's public information requirements in order to allow broker-dealers to publish or submit quotations on such securities in the OTC markets.

The delayed implementation is a welcome development. However, absent permanent relief, issuers of fixed income securities and their advisers will need to revisit in two years the issues raised in this alert, including the potential costs and benefits of ultimately complying with amended Rule 15c2-11, both for existing and future debt issuances.

### Background

Rule 15c2-11 generally prohibits broker-dealers from publishing or submitting securities of private issuers in a quotation medium other than a national securities exchange (*i.e.*, OTC securities), unless the issuer has made current financial and other information publicly available as specified by the rule. In September 2020, the SEC amended Rule 15c2-11 with a view to modernizing it and enhancing investor protection. Compliance with the amended rule was set to commence in September 2021.

Prior to the effective date, in a surprise to many market participants, the staff made clear that they interpreted Rule 15c2-11 to apply to debt as well as equity securities, including debt securities issued in reliance on Rule 144A and Regulation S. Until then, it generally was not believed that Rule 15c2-11 applied to debt securities. This interpretation alarmed many broker-dealers as well as private issuers of Rule 144A or Regulation S debt securities because many of these issuers fail to meet the exceptions to Rule 15c2-11 (*e.g.*, if they file periodic reports with the SEC or are foreign private issuers that are listed abroad and exempt from registration under the Exchange Act under Rule 12g3-2(b).)

The staff interpretation would have presented these issuers with a choice between significantly expanding the information they make public in order to maintain price quotations by broker-dealers or, alternatively, risking reduced liquidity and opaque pricing on existing issuances and higher capital costs on future issuances. To illustrate, in order for

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broker-dealers to continue to facilitate trading in private issuers' Rule 144A securities, the issuers would be required to publish financial statements outside of traditional password-protected data-rooms currently available only to bondholders and prospective purchasers.

In response to these concerns, on December 16, 2021, the staff issued a no-action letter providing a phased-in approach to application of Rule 15c2-11 to certain debt securities. In Phase 1, which was set to expire on January 3, 2023, the staff stated that it would not recommend enforcement against a broker-dealer that provided a quotation for a debt security where that security or its issuer met one of a limited number of conditions. Most notably for non-reporting issuers, securities that met the requirements to trade among qualified institutional buyers under Rule 144A were also deemed to satisfy Rule 15c2-11 (*i.e.*, it was sufficient for an issuer of Rule 144A securities to undertake to make certain financial information about the issuer available to current and prospective investors on request).

However, with the January 3, 2023 expiration date fast approaching, market participants continued to reach out to the SEC seeking further relief. As a result, the November 30, 2022, no-action letter was issued, withdrawing the one of December 16, 2021.

## Temporary Relief Until January 4, 2025

In the November 30, 2022 no-action letter, the staff indicated that it would not recommend enforcement action for quotations for debt securities published or submitted by broker-dealers that are compliant with the Phase 1 procedures described above. Most notably, a broker-dealer can publish or submit quotations in an OTC security if the broker-dealer has reasonably determined that the subject security is a corporate fixed income security or asset-backed security being offered under Rule 144A, and that the broker-dealer reasonably believes that the issuer will provide the information specified in Rule 144A(d)(4), upon request, prior to a Rule 144A resale transaction.<sup>1</sup> Given that the typical indenture reporting covenant for a private issuer requires the availability of information that would satisfy (or exceed) Rule 144A(d)(4), we expect this temporary procedure will be satisfied by private issuers.

<sup>1</sup> See Appendix A to the November 30, 2022, no-action letter, included at the end of this article, for a list of the criteria.

Further, the staff confirmed that it:

- a. views the information requirement described in Section II.D of the Rule 144A Adopting Release<sup>2</sup> to be consistent with Rule 15c2-11(b),
- b. will not recommend enforcement action with respect to any broker or dealer that relies on information satisfying the Rule 144A(d)(4) information requirements and acts consistently with prior SEC no-action letters relating to Rule 144A (*e.g.*, where securities are fully and unconditionally guaranteed, information concerning a guarantor that is subject to the reporting requirements of the Exchange Act, or exempt from reporting pursuant to Rule 12g3-2(b) thereunder, may be relied upon in satisfaction of Rule 15c2-11), and
- c. will not recommend enforcement action for brokers-dealers that publish quotations for any debt security if the broker-dealer reasonably has determined that the security is foreign sovereign debt or a debt security guaranteed by a foreign government.

The relief is temporary and is set to expire on January 4, 2025.

## Next Steps

Market participants now have two years to digest the limits and implications of the staff relief and to consider how to update any practices in the event that relief is not further extended or made permanent.

Market participants may see increased attention paid to Rule 144A reporting covenants in purchase agreements and indentures and risk factor disclosure about potential reduced liquidity arising from any disruption in secondary market quotations.

Further, issuers impacted by amended Rule 15c2-11 will need to consider whether they are willing to make financial statements and other information publicly available and, if not, what the likely impacts on their existing and future Rule 144A bonds will be, how they will manage relations with any investors that are adversely affected, and what alternatives may be available.

<sup>2</sup> See Rule 144A Adopting Release, Release No. 33-6862 (April 30, 1990).

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## Appendix A to November 30, 2022, SEC No-Action Letter

The broker or dealer publishing or submitting the quotation for the fixed income security reasonably has determined:

- The issuer of the fixed income security also has a class of securities that is listed on a national securities exchange;
- The issuer 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 is issued by an issuer where a qualified interdealer quotation system 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))<sup>11</sup> about the issuer of the subject security;
- 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 Association (“NCUA”) that reports information to the Federal Financial Institutions Examination Council or files call reports with the NCUA; or
- The subject security is a corporate fixed income security or asset-backed security offered pursuant to Rule 144A under the Securities Act, and the broker or dealer reasonably believes that the issuer of the subject security will provide the information specified in Rule 144A(d)(4), prior to a Rule 144A transaction, upon request.

# Capital Markets Alert

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