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# Memorandum

## SEC Extends Temporary Relief From Amended Rule 15c2-11 to January 4, 2025 for Private Issuers of Fixed Income Securities

November 30, 2022

In 2020, the Securities and Exchange Commission amended Rule 15c2-11 under the Securities Exchange Act of 1934 to prohibit broker-dealers from providing price quotations in over-the-counter securities unless specified information about the issuer of the securities is current and publicly available. Notably, in 2021, the SEC clarified that amended Rule 15c2-11 applies to debt securities issued in private offerings pursuant to Rule 144A and Regulation S under the Securities Act of 1933, in addition to equity securities. Pursuant to this clarification, issuers of these privately-placed debt securities, many of which are not public reporting companies under the Securities Exchange Act, will face a choice between significantly expanding the scope of information they make public to enable broker-dealers to continue to provide price quotations, or, alternatively, risking reduced liquidity (and a corresponding negative impact on price) in the markets for such securities.

The original compliance date for amended Rule 15c2-11 was September 28, 2021, which, pursuant to a series of no-action letters issued by the staff of the SEC's Division of Trading and Markets, was extended to January 4, 2023 for issuers of fixed income securities. Following requests from market participants for additional relief, on November 30, 2022, the SEC issued a no-action letter temporarily extending the compliance date for issuers of fixed income securities to January 4, 2025.

In this memorandum, we briefly describe the scope of information typically provided by private issuers of fixed income securities under current practice and how amended Rule 15c2-11 will result in changes to that approach if permanent relief is not provided.

### Overview of Current Requirements for Private Issuers of Fixed Income Securities

#### ONGOING REPORTING COVENANTS

Under customary indenture reporting covenants, issuers are required to provide annual and quarterly financial statements, along with, in some cases, a discussion of financial results and disclosure of material events. In order to protect the confidentiality of the information, most private issuers make such information available to noteholders in password-protected sites, without otherwise posting it on the issuer's website or another publicly available platform.

### REQUIREMENT TO PROVIDE CERTAIN INFORMATION UPON REQUEST UNDER RULE 144A(D)(4)

In addition to the indenture reporting covenant, an issuer of Rule 144A debt securities currently must only provide certain information to prospective resale purchasers upon request[1]:

- a very brief statement of the nature of the issuer's business and its products and services; and
- the issuer's most recent balance sheet and profit and loss and retained earnings statements, and similar financial statements for such part of the two preceding fiscal years as the issuer or its predecessors have been in existence, which statements should be audited to the extent reasonably available.

We note that such requests are exceedingly rare.

## Overview of New Requirements for Private Issuers of Fixed Income Securities

### INFORMATION REQUIRED UNDER AMENDED RULE 15C2-11

Unless the SEC or the staff provide further revisions, beginning on January 4, 2025, private issuers will be subject to heightened information requirements in order for a broker-dealer to publish market quotations of those issuers' debt securities. While an issuer will not be directly subject to the disclosure obligations under amended Rule 15c2-11, failure of an issuer to make information available that is compliant with the rule would result in more limited market quotations for its Rule 144A debt securities and likely will negatively impact execution on new issuances.

To enable broker-dealers to comply with amended Rule 15c2-11, a non-reporting issuer of Rule 144A debt securities will have to periodically make certain information "publicly available" during the life of the notes, including:

- the issuer's current and historical corporate information (including the issuer's name, description of the security, address, material facilities, etc.);
- the number of shares or total amount of the securities outstanding as of the end of the most recent fiscal year;
- a description of the issuer's business, including the issuer's products and services and identification of insiders, as of a date within 12 months prior to the publication or submission of the quotation; and

[1] This information must be "reasonably current," which for most issuers requires: (i) the description of the issuer's business, products and services is as of a date within 12 months prior to the date of resale; (ii) the issuer's most recent balance sheet is as of a date less than 16 months before the date of resale; and (iii) the issuer's profit and loss and retained earnings statements are for the 12 months preceding the date of the balance sheet provided, *provided* that if such balance sheet is not as of a date less than six months before the date of resale, additional statements of profit and loss and retained earnings for the period from the date of such balance sheet to a date less than six months before the date of resale must be included. In the case of foreign private issuers, the information must merely meet the timing requirements of the issuer's home country or principal trading markets.

- the issuer's most recent balance sheet as of a date less than 16 months prior to the publication or submission of the quotation, profit and loss and retained earnings statements for the 12 months preceding the date of the most recent balance sheet, and similar financial information for such part of the two preceding fiscal years as the issuer or its predecessors have been in existence.[2]

Broker-dealers will be required to keep this information on record for at least three years, unless it becomes publicly available on EDGAR.

## IMPACT OF HEIGHTENED INFORMATION REQUIREMENTS

We expect the heightened disclosure requirements under amended Rule 15c2-11 may be viewed by private issuers as a deterrent to issuing Rule 144A debt securities. While the financial statement requirements are similar to the current requirements under Rule 144A(d)(4), other requirements, including a periodic refresh of the issuer's business and insider and additional corporate-related disclosures (beyond the "very brief" description required under Rule 144A), would necessitate more effort from private issuers than is currently required by both the market and the securities laws. In addition, all of this information would affirmatively become publicly available. We also expect there will be some uncertainty while practice develops or guidance is provided regarding the extent of information required to satisfy the amended rule.

Additionally, it is anticipated that efforts will be made to shift the Rule 144A debt market to include indenture reporting covenants for new issuances that obligate issuers to provide all the information required by amended Rule 15c2-11, with corresponding changes made to commitment letters for bridge financings.

## PUBLIC AVAILABILITY OF REQUIRED INFORMATION UNDER AMENDED RULE 15C2-11

Information is deemed "publicly available" under amended Rule 15c2-11 if it is "available on EDGAR; on the website of a state or federal agency, a qualified interdealer quotation system, a registered national securities association, a registered broker or dealer or an issuer; or through an electronic information delivery system that is generally available to the public in the primary trading market of a foreign private issuer," and excludes platforms, such as password-protected sites used by private issuers, that are restricted "by user name, password, fees, or other restraints."

[2] Amended Rule 15c2-11 specifically requires that the issuer provide: (i) the name of issuer and any predecessors during the past five years; (ii) the address(es) of the issuer's principal executive office and principal place of business; (iii) the state of incorporation or registration during the past five years; (iv) the title, class and ticker symbol (if any) of the security; (v) the par or stated value of the security; (vi) the number of shares or total amount of the securities outstanding as of the end of the most recent fiscal year; (vii) the name and address of transfer agent; (viii) a description of business as of a date within 12 months prior to the publication or submission of the quotation; (ix) a description of products or services offered as of a date within 12 months prior to the publication or submission of the quotation; (x) a description and extent of facilities as of a date within 12 months prior to the publication or submission of the quotation; (xi) the name and title of all company insiders as of a date within 12 months prior to the publication or submission of the quotation; (xii) the issuer's most recent balance sheet (as of a date less than 16 months prior to publication or submission of the quotation) and profit and loss and retained earnings statements (for 12 months preceding date of most recent balance sheet); and (xiii) similar financial information for the preceding two fiscal years. In addition, broker-dealers must maintain certain additional information, though it need not be publicly available.

## IMPACT OF PUBLIC AVAILABILITY REQUIREMENT

Both new and existing private issuers may be deterred by the requirement to publicly provide competitively sensitive information or hesitant generally to publicly disclose information to support the trading of unregistered securities.

If issuers do not publicly provide the information required by amended Rule 15c2-11, however, it may not be possible for broker-dealers to continue to provide quotes in support of an existing secondary market or to develop a secondary market for new issuances. Absent permanent relief from the SEC regarding the application of amended Rule 15c2-11 to Rule 144A debt securities, beginning in 2025, issuers will need to balance the potential negative impact of public disclosure against the benefit of being able to access the Rule 144A debt market and/or continuing to have robust secondary markets for existing fixed income securities.

## TAKEAWAYS

The SEC recently extended the effective date of amended Rule 15c2-11 to January 4, 2025 for private issuers of fixed income securities. While this provides a welcome reprieve from the immediate issues addressed in this client alert, the SEC has yet to address market participants' concerns regarding the market implications of amended Rule 15c2-11 for private issuers of debt securities. Existing and new issuers of privately-placed debt securities will therefore still need to consider the ramifications of complying with amended Rule 15c2-11 in advance of the new compliance date or otherwise face the prospect of reduced liquidity in their debt securities in the future.

Absent permanent relief, amended Rule 15c2-11 could serve as a deterrent to private issuers offering new debt securities under Rule 144A. In lieu of publicly providing the information broker-dealers will need to publish market quotations, private issuers may turn to other forms of debt that do not depend on broker-dealers' compliance with amended Rule 15c2-11.

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