

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98819; File No. 4-795)

October 30, 2023

Order Granting Broker-Dealers Exemptive Relief, Pursuant to Section 36(a) and Rule 15c2-11(g) under the Securities Exchange Act of 1934, from Rule 15c2-11 for Fixed-Income Securities Sold in Compliance with the Safe Harbor of Rule 144A under the Securities Act of 1933

I. Introduction

The Securities and Exchange Commission (“Commission”) adopted 17 CFR 240.15c2-11 (“Rule 15c2-11”) under the Securities Exchange Act of 1934 (“Exchange Act”) in 1971.¹ In September 2020, the Commission adopted amendments to Rule 15c2-11 to, among other things, provide greater transparency to investors and other market participants by requiring brokers or dealers to have in their records specified information about the issuer and its security that is current and publicly available before a broker-dealer can begin quoting that security.² Rule 15c2-11 governs the publication of quotations for securities³ in a quotation medium other than a national securities exchange, i.e., over-the-counter (“OTC”) securities, other than exempted securities⁴ and municipal securities.⁵ Rule 15c2-11 sets forth certain information review and

¹ *Initiation or Resumption of Quotations by a Broker or Dealer Who Lacks Certain Information*, Release No. 34-9310 (Sept. 13, 1971), 36 FR 18641 (Sept. 18, 1971).

² *See Publication or Submission of Quotations Without Specified Information*, Release No. 34-89891 (Sept. 16, 2020), 85 FR 68124, 68125 (Oct. 27, 2020) (“2020 Rule 15c2-11 Release”).

³ The term “security” is defined under section 3(a)(10) of the Exchange Act and specifically includes, among others, notes, bonds, debentures, and certificates of deposit, which are commonly known as fixed-income securities. 15 U.S.C. 78c(a)(10), (79). For purposes of this order, the term “fixed-income security” shall mean any note, bond, debenture, certificate of deposit for a security, certificate of deposit, or asset-backed security. *See id.*

⁴ *See* 15 U.S.C. 78o(c)(2)(A). The term “exempted security” includes, among others, certain government securities, such as securities which are direct obligations of, or obligations guaranteed as to principal or interest by, the United States. *See* 15 U.S.C. 78c(a)(12), (42).

⁵ 17 CFR 240.15c2-11(f)(4). The term “municipal security” includes, among others, securities which are direct obligations of, or obligations guaranteed as to principal or interest by, a State or any political subdivision thereof, or any agency or instrumentality of a State or any political subdivision thereof, or any municipal corporate instrumentality of one or more States. *See* 15 U.S.C. 78c(a)(29).

recordkeeping requirements for brokers and dealers to initiate or resume quotations for securities in the OTC market. Under 17 CFR 240.15c2-11(a)(1)(i), a broker or dealer, before it may publish any quotation for a security or, directly or indirectly, submit any such quotation for publication, in a quotation medium other than a national securities exchange, must obtain, have in its records, and review key, basic information regarding the subject security and its issuer, as specified in 17 CFR 240.15c2-11(b) (“paragraph (b) information”), that is “current” and “publicly available.”⁶ In addition, based upon a review of the applicable paragraph (b) information, together with any other supplemental documents and information specified in 17 CFR 240.15c2-11(c), the broker or dealer must have a reasonable basis under the circumstances for believing that the paragraph (b) information is accurate in all material respects and is from a reliable source.⁷ Further, the reviewing broker or dealer must also preserve documents and information that are required to be obtained under the applicable paragraphs (a), (b), and (c) of Rule 15c2-11.⁸

Following the Commission’s 2020 adoption of amendments to Rule 15c2-11, certain market participants stated that Rule 15c2-11’s information review and recordkeeping requirements should not apply with regard to quotations for fixed-income securities that are sold in compliance with the safe harbor in 17 CFR 230.144A (“Rule 144A”)⁹ under the Securities Act

⁶ See 17 CFR 240.15c2-11(a)(1)(i)(A), (B). The terms “current” and “publicly available” are defined in paragraphs (e)(2) and (e)(5) of Rule 15c2-11, respectively, and have the same meaning in this order.

⁷ See 17 CFR 240.15c2-11(a)(1)(i)(C). See also 2020 Rule 15c2-11 Release, 85 FR at 68125. These rule amendments, among other things, expanded the scope of Rule 15c2-11’s requirements for obtaining and reviewing specified information. Broker-dealers may publish initial quotations in reliance on the publicly available determination of a “qualified interdealer quotation system” that it complied with the information review requirement set forth in Rule 15c2-11(a)(2)(i) through (iii). See 17 CFR 15c2-11(a)(1)(ii).

⁸ See 17 CFR 240.15c2-11(d)(1)(i)(A). See also 2020 Rule 15c2-11 Release, 85 FR at 68131, 68162.

⁹ 17 CFR 230.144A. See also No. 33-6862 (Apr. 23, 1990), 55 FR 17933, 17939 n.55 (Apr. 30, 1990) (“Rule 144A Adopting Release”) (noting the applicability of Rule 15c2-11 to Rule 144A offerings).

of 1933¹⁰ (“Rule 144A fixed-income securities”). In particular, on November 22, 2022, the National Association of Manufacturers and the Kentucky Association of Manufacturers submitted a petition to the Commission pursuant to 17 CFR 201.192(a) of the Commission’s Rules of Practice¹¹ for a rulemaking to amend Rule 15c2-11, to expressly exempt from Rule 15c2-11 Rule 144A fixed-income securities (“Petition”). The Petition also requested, in the alternative, that the Commission expressly exempt Rule 144A fixed-income securities from Rule 15c2-11 pursuant to the exemptive authority set forth in 17 CFR 240.15c2-11(g).¹²

For the reasons discussed below, this Order exempts Rule 144A fixed-income securities from Rule 15c2-11, thus effectively granting the alternative relief sought in the Petition.

II. Discussion of Exemptive Relief

Section 36 of the Exchange Act authorizes the Commission to, conditionally or unconditionally, exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of the Exchange Act, or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.¹³ Paragraph (g) of Rule 15c2-11 under the Exchange Act similarly provides that the Commission may, conditionally or unconditionally, exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of Rule 15c2-11 to the extent that

¹⁰ 15 U.S.C. 77a.

¹¹ 17 CFR 201.192(a).

¹² *See, e.g.*, Letter from Andrew Pincus to Vanessa Countryman, Petition for Rulewriting and Application for Exemption from Rule 15c2-11 (Nov. 22, 2022), <https://www.sec.gov/files/rules/petitions/2022/petamend-rule-15c211-4795.pdf>.

¹³ 15 U.S.C. 78mm.

such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.¹⁴

This exemptive relief is limited to Rule 144A fixed-income securities.¹⁵ Because the exemption applies only to fixed-income securities issued in accordance with the requirements of Rule 144A, it is limited to resales of securities to an investor base that “can be conclusively assumed to be sophisticated,”¹⁶ is able to obtain certain basic financial information concerning the issuers’ business, and has extensive experience in the private resale market for restricted securities.¹⁷ Under the requirements of Rule 144A, securities can be sold only to “qualified institutional investors” (or purchasers that the seller or a person acting on its behalf reasonably believes are qualified institutional investors), which, with the exception of registered dealers, must in the aggregate own and invest on a discretionary basis at least \$100 million in securities of issuers that are not affiliated with such a qualified institutional buyer.¹⁸ Furthermore, in the case of issuers that do not file periodic reports under the Exchange Act or furnish home country information to the Commission pursuant to 17 CFR 240.12g3-2(b), Rule 144A requires that any prospective purchaser of Rule 144A fixed-income securities has the right to obtain from the issuer reasonably current financial information (“Rule 144A information”):¹⁹

¹⁴ 17 CFR 240.15c2-11(g).

¹⁵ The Petition was limited to Rule 144A fixed-income securities and expressly excluded equity securities sold in compliance with the safe harbor in Rule 144A. *See* Petition at n.1. Moreover, the amendments to Rule 15c2-11 have applied to Rule 144A equity securities since the compliance date of those amendments which was September 2021. Accordingly, this exemption does not address equity securities sold in compliance with the safe harbor in Rule 144A.

¹⁶ *Accredited Investor Definition*, Release No. 33-10824 (Aug. 26, 2020), 85 FR 64234, 64236 (Oct. 9, 2020) (“Accredited Investor Release”) (citing *Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities Under Rules 144 and 145*, Release No. 33-6806 (Oct. 25, 1988), 53 FR 44016 (Nov. 1, 1988)) (“1988 Rule 144A Proposing Release”).

¹⁷ 1988 Rule 144A Proposing Release, 53 FR at 44028.

¹⁸ 17 CFR 230.144A(a)(1) (definition of “qualified institutional buyer”).

¹⁹ 17 CFR 230.144A(d)(4).

[A] very brief statement of the nature of the business of the issuer and the products and services it offers; 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 has been in operation (the financial information should be audited to the extent possible).²⁰

The availability of the Rule 144A information can be used by prospective qualified institutional buyers to make better informed investment decisions and assess potential risks in investing in the security. While the Rule 144A information that is required to be provided to qualified institutional buyers upon request is not the current publicly available information defined in paragraph (b) of Rule 15c2-11, the Rule 144A information serves the same purpose of investor protection.

The Commission finds it is appropriate in the public interest, and consistent with the protection of investors, to exempt brokers and dealers from the requirements of Rule 15c2-11, with respect to Rule 144A fixed-income securities.

III. Conclusion

Accordingly, IT IS HEREBY ORDERED, pursuant to section 36(a) of the Exchange Act²¹ and Rule 15c2-11(g) under the Exchange Act,²² that a broker or dealer is exempt from the requirements of Rule 15c2-11 with respect to a fixed-income security to be sold in compliance with the safe harbor in Rule 144A²³ under the Securities Act of 1933.²⁴

²⁰ *Id.* With respect to asset-backed securities, the Commission has interpreted the information requirement to mandate provision of "basic, material information concerning the structure of the securities and distributions thereon, the nature, performance and servicing of the assets supporting the securities, and any credit enhancement mechanism associated with the securities." *See* Rule 144A Adopting Release, 55 FR at 17939.

²¹ 15 U.S.C. 78mm(a).

²² 17 CFR 240.15c2-11(g).

²³ 17 CFR 230.144A.

²⁴ 15 U.S.C. 77a *et seq.*

This exemptive relief is subject to modification or revocation at any time by the Commission but will be in effect unless and until the Commission determines that modification or revocation is necessary or appropriate in furtherance of the purposes of the Exchange Act, or the relief is otherwise superseded by future Commission action such as a rulemaking addressing the Rule 144A safe harbor or issues pertaining to the fixed income markets more generally.

Persons relying on this exemption are directed to the anti-fraud and anti-manipulation provisions of the Exchange Act, particularly sections 9(a) and 10(b), and 17 CFR 240.10b-5 thereunder.²⁵ Responsibility for compliance with these and any other applicable provisions of the Federal securities laws must rest with the persons relying on this exemption. This order should not be considered a view with respect to any other question that the proposed transactions or quotations may raise, including, but not limited to the adequacy of the disclosure concerning, and the applicability of other Federal or State laws to, the proposed transactions or quotations.

By the Commission.

Sherry R. Haywood,

Assistant Secretary.

²⁵ 15 U.S.C. 78i(a), 78j(b); 17 CFR 240.10b-5.