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## SEC Grants Broker-Dealers Permanent Exemptive Relief From Rule 15c2-11 for Fixed-Income Securities Sold Under Rule 144A Safe Harbor

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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On October 30, 2023, the Securities and Exchange Commission (SEC) issued an order granting broker-dealers exemptive relief from Rule 15c2-11 of the Securities Exchange Act of 1934 for fixed-income securities sold in compliance with the Rule 144A safe harbor. The order resolves concerns raised by market participants that issuers of fixed-income securities would have needed to comply with Rule 15c2-11's expanded public information requirements in order for broker-dealers to publish, submit or maintain quotations on such securities in the over-the-counter (OTC) markets.

### 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 of the Division of Trading and Markets of the SEC 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 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.

# Capital Markets Alert

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### Temporary Relief

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, on November 30, 2022, the staff issued an additional no-action letter, withdrawing the one of December 16, 2021, and delaying by two years implementation of amended Rule 15c2-11 for issuers of certain fixed-income securities that trade in the OTC markets.<sup>1</sup>

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 were compliant with the Phase 1 procedures described above. Most notably, a broker-dealer could publish or submit quotations in an OTC security if the broker-dealer had reasonably determined that the subject security was a corporate fixed-income security or asset-backed security being offered under Rule 144A, and that the broker-dealer reasonably believed that the issuer would provide the information specified in Rule 144A(d)(4), upon request, prior to a Rule 144A resale transaction. 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), most private issuers were able to satisfy the requirements of this temporary procedure. In the November 30, 2022, no-action letter, the staff confirmed that it:

- a. viewed the information requirement described in Section II.D of the Rule 144A Adopting Release to be consistent with Rule 15c2-11(b),
- b. would 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. would 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 Exemptive Relief Order

The exemptive relief order appears to have been set in motion by a November 2022 petition submitted by two trade associations and bolstered by other market participants' assertions that Rule 15c2-11's information review and recordkeeping requirements should not apply to issuers of fixed-income securities.

To support the finding that the exemptive relief is consistent with the protection of investors, the SEC noted that the exemption applies only to fixed-income securities issued in accordance with Rule 144A and is thus limited to resales of securities to a sophisticated and experienced investor base, for which Rule 144A information is sufficient to facilitate an informed investment decision.

The exemptive relief order provides welcome certainty for issuers of fixed-income securities in reliance on Rule 144A by relieving those issuers from the burden of publicly disclosing detailed information under the SEC's recently amended Rule 15c2-11 in a more permanent way.<sup>2</sup> Absent this relief, we believe many issuers of fixed-income securities ultimately would have concluded that the costs and burdens of complying with amended Rule 15c2-11 for existing and future debt issuances would have outweighed the benefits of maintaining quotations in the OTC markets, which in turn would have resulted in reduced liquidity of these securities while diminishing over time the ability of certain issuers to raise capital through private placements.

<sup>2</sup> The order provides, "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."

<sup>1</sup> The temporary relief was set to expire on January 4, 2025.

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