

Happy Holidays: SEC Provides Temporary Rule 15c2-11 Reprieve

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December 2022

Dechert
LLP



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Overview

In 2021, the staff (the “Staff”) of the Securities and Exchange Commission (the “SEC”) surprised the industry when it issued an interpretation¹ stating that fixed income securities (including asset-backed securities) fall within the scope of Rule 15c2-11 under the Exchange Act² (the “Rule”),³ which was previously thought to be applicable only to equity securities. The effect of the interpretation was that broker-dealers were prohibited from quoting securities sold pursuant to Rule 144A under the Securities Act,⁴ as well as other securities, in any quotation medium without determining that the issuer has made certain information about those securities publicly available. In response to industry comments, the SEC adopted a “phase-in” approach for fixed income securities (including asset-backed securities) sold pursuant to Rule 144A, giving market participants until January 4, 2023 to comply.⁵ Earlier this week, in response to advocacy from various trade groups, law firms and industry participants, the SEC extended the compliance deadline to January 4, 2025,⁶ and issuers, institutional investors and broker-dealers alike breathed a sigh of relief.

In light of the recent SEC guidance, this OnPoint recaps what the Rule is, how we got here, and what may lie ahead.

Rule 15c2-11

The Rule has been in effect since 1971, and was designed to curb practices such as “the hasty submission of quotations in the daily sheets of the National Quotation Service, Inc., in the absence of any information about the security or the issuer and before any opportunity is afforded to public investors to acquire such information in order to make an informed investment judgment.”⁷ Rule 15c2-11 responded to that concern by prohibiting broker-dealers from

¹ Letter from Josephine Tao, Assistant Director, Office of Trading Practices, Division of Trading and Markets to Racquel Russell, Senior Vice President and Director of Capital Markets Policy, Office of the General Counsel, FINRA, *Amended Rule 15c2-11 in relation to Fixed Income Securities* (Sept. 24, 2021), available at <https://www.sec.gov/files/rule-15c2-11-fixed-income-securities-092421.pdf> (the “First No-Action Letter”).

² The Securities Exchange Act of 1934, as amended.

³ 17 C.F.R. § 240.15c2-11.

⁴ The Securities Act of 1933, as amended.

⁵ Letter from Josephine Tao, Assistant Director, Office of Trading Practices, Division of Trading and Markets to Racquel Russell, Senior Vice President and Director of Capital Markets Policy, Office of the General Counsel, FINRA, *Amended Rule 15c2-11 in Relation to Fixed Income Securities* (Dec. 16, 2021), available at <https://www.sec.gov/files/fixed-income-rule-15c2-11-nal-finra-121621.pdf> (the “Second No-Action Letter”).

⁶ Letter from Josephine Tao, Assistant Director, Office of Trading Practices, Division of Trading and Markets to Racquel Russell, Senior Vice President and Director of Capital Markets Policy, Office of the General Counsel, FINRA, *Amended Rule 15c2-11 in Relation to Fixed Income Securities* (Nov. 30, 2022), available at <https://www.sec.gov/files/fixed-income-rule-15c2-11-nal-finra-113022.pdf> (the “Third No-Action Letter”).

⁷ *Fraudulent, Manipulative, Deceptive and Fictitious Quotations*, SEC Release No. 34-8909, 35 Fed. Reg. No. 10597 (June 30, 1970) (proposing the Rule); see also *Initiation or Resumption of Quotations by a Broker or Dealer Who Lacks Certain Information*, SEC Release No. 34-9310, 36 Fed. Reg. 18641 (Sept. 18, 1971) (adopting the Rule).

publishing or submitting quotations for certain securities on a quotation medium without taking steps to ensure that specified information about the securities is current and publicly available.

Initially, compliance with the Rule was relatively simple in the case of securities issued by issuers required to file periodic reports under the Exchange Act. In the decades that followed, the SEC was largely focused on penny stocks and similar securities offered and sold in the over-the-counter (“OTC”) market to retail investors.⁸ Given the stated purpose of the Rule, fixed income market participants paid little attention.

2020 Amendments and 2021 No-Action Letter Guidance

In 2020, the SEC adopted a number of modernizing revisions to the Rule, intended primarily to “better address risks to retail investors and promote market efficiency.”⁹ As with prior iterations of the Rule, the discussion of the Rule in the release proposing its adoption was centered around OTC securities typically purchased by retail investors.¹⁰ However, in September 2021, just before the revisions became effective, the Staff published a no-action letter (the “First No-Action Letter”)¹¹ asserting that, not only does the Rule *now* apply to fixed income securities, but it *always* did—meaning fixed income securities cannot be quoted by broker-dealers on a quotation medium unless the broker-dealer first determines that there is current and publicly available financial information about the issuer, consistent with the requirements of the Rule.

After significant industry protest, the Staff issued a new no-action letter in December 2021 (the “Second No-Action Letter”)¹² adopting a “phase-in” approach to compliance—delaying the end of the initial “Phase 1” compliance period until January 4, 2023. For Phase 1, the Staff stated that it would not recommend enforcement action against broker-dealers publishing or submitting quotations for corporate fixed income securities or asset-backed securities offered and sold pursuant to Rule 144A, as long as the broker-dealer reasonably believes that the issuer will provide information required under Rule 144A upon request prior to a Rule 144A transaction, or current and publicly available financial information is available about the issuer.¹³ Phase 2, which would have ended on January 4, 2024, would not permit a separate exemption for corporate fixed income securities or asset-backed securities offered and sold pursuant to Rule 144A.¹⁴ Lastly, for fixed income securities, Phase 3 would require not only that the issuer make available current and publicly available information about the issuer, but also would require “a website link, on the quotation medium on which the security is being quoted, directly to the current and publicly available information

⁸ See, e.g., SIFMA, *The Detriment of Rule 15c2-11’s Application to Fixed Income Markets: The Consequences of Unilateral Rulemaking Without Public Comment* (Sept. 12, 2022), available at <https://www.sifma.org/resources/news/the-detriment-of-rule-15c2-11s-application-to-fixed-income-markets-the-consequences-of-unilateral-rulemaking-without-public-comment/>.

⁹ See *Publication or Submission of Quotations Without Specified Information*, SEC Release No. 34-87115, 84 Fed. Reg. 58206, 58208 (Oct. 30, 2019) (proposing amendments to the Rule) (the “2019 Amendment Proposal”); *Publication or Submission of Quotations Without Specified Information*, SEC Release Nos. 33-10842, 34-89891, 85 Fed. Reg. 68124 (Oct. 27, 2020) (adopting amendments to the Rule) (the “2020 Amendment Release”).

¹⁰ See, e.g., 2019 Amendment Proposal, *supra*, note 9 at 58206 (“The Rule governs the publication of quotations for securities in a quotation medium other than a national securities exchange, *i.e.*, over-the-counter (“OTC”) securities.”)

¹¹ First No-Action Letter, *supra*, note 1.

¹² Second No-Action Letter, *supra*, note 5.

¹³ Second No-Action Letter, *supra*, note 5 at 2.

¹⁴ *Id.* at 2.

about the issuer [...] provided that the broker or dealer has determined at least on an annual basis that the website link and its underlying information is current.”¹⁵

Rule 144A Information

In the Second No-Action Letter, the SEC indicated that the information that must be made publicly available under the Rule is the information that is already required to be furnished upon request pursuant to Rule 144A.¹⁶ One of the conditions to satisfy the Rule 144A exemption from registration is that investors and prospective investors have the right to obtain certain reasonably current information upon request. For most Rule 144A securities, this information consists of “a very brief statement of the nature of the business of the issuer and the products and services it offers,” together with the issuer’s most recent balance sheet, profit and loss and retained earnings statements, and similar financial statements.¹⁷ For issuers of mortgage-backed securities and other asset-backed securities, the SEC advised that it would interpret this information requirement to require the 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.”¹⁸

Rule 144A already requires this information to be provided to investors and prospective investors upon request, but under this new interpretation, issuers not already providing this information publicly would be faced with a choice: either make this information public (including to investors that are not “qualified institutional buyers” and therefore are unable to invest in Rule 144A securities), or face the possibility of a liquidity crunch in the secondary market due to a lack of broker-dealer quotations. It is important to note that, although compliance with the Rule is the broker-dealer’s responsibility, if the broker-dealer determines that the necessary information is not sufficiently current or is not publicly available, then it will be the issuer and the investor that pay the price; if broker-dealers cannot publish quotations, then in many cases, the security will become significantly less liquid, and therefore less valuable.

Industry Response and 2022 No-Action Letter

These developments came as a surprise to fixed income issuers and broker-dealers, who were concerned about the impact of newly applying the Rule to fixed income securities, and to investors, who had not been requesting broadening the scope of the Rule.¹⁹ The new interpretation also caught the attention of SEC Commissioner Hester M. Peirce. The same day the Second No-Action Letter was published, Commissioner Peirce issued a statement disagreeing with the Staff’s interpretation and calling for a more fulsome rulemaking process to give industry

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 4, n.2. Though the Second No-Action Letter was rescinded by the Third No-Action Letter, the Staff retained the text of this footnote in the Third No-Action Letter, and further added: “In addition, for purposes of this no-action letter, the [Staff] would not recommend enforcement action to the Commission with respect to any broker or dealer relying on information that satisfies the requirement in Rule 144A(d)(4) and acts consistently with relevant written Division of Corporation Finance No Action statements. See, e.g., Division of Corporation Finance no-action letters to British Aerospace Public Limited Co. and British Aerospace Holdings, Inc. (May 9, 1990); Schering-Plough Corp. (Nov. 21, 1991); and Fédération des caisses Desjardins du Québec (Apr. 29, 2021).” Third No-Action Letter at 4, n.11.

¹⁷ 17 C.F.R. § 230.144A(d)(4)(i).

¹⁸ *Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities Under Rules 144 and 145*, SEC Release Nos. 33-6862, 34-27928, 55 Fed. Reg. 17933, 17939 (Apr. 30, 1990) (adopting Rule 144A).

¹⁹ See the 2020 Amendment Release, *supra*, note 9 at 68172-74, for the SEC’s responses to industry feedback on the 2019 Amendment Proposal.

participants notice of the change and the opportunity to submit comments on the proposal.²⁰ In her statement, Commissioner Peirce noted that “there appears to have been limited, if any, application of the rule to fixed income markets prior to the Commission’s 2020 adopting release,” stating that “I thought of the rule’s application only in the OTC equity context,” and acknowledging a “failure of the Commission to highlight this issue for active consideration by the public.”²¹

A number of trade groups and other industry participants (and their representatives, including Dechert) lobbied and advocated for various forms of relief, including the American Bar Association (“ABA”),²² Structured Finance Association (“SFA”),²³ Securities Industry and Financial Markets Association (“SIFMA”)²⁴ and Commercial Real Estate Finance Council (“CREFC”).²⁵ In response, and ahead of the looming compliance deadline, the Staff issued an additional no-action letter earlier this week (the “Third No-Action Letter”)²⁶ which withdrew the Second No-Action Letter and extended the fixed income compliance deadline to January 4, 2025.

Other than the new compliance deadline, the framework of the Third No-Action Letter remains substantially unchanged from that of the Second No-Action Letter. Until January 4, 2025, broker-dealers may quote corporate fixed income securities and asset-backed securities offered and sold pursuant to Rule 144A (among other securities) if the broker-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.”²⁷ However, on and after January 4, 2025, unless the SEC or Congress extends further relief, broker-dealers may not publish quotations²⁸ for corporate fixed income

²⁰ Commissioner Hester M. Peirce, U.S. Securities and Exchange Commission, *Statement on Staff No-Action Letter Regarding Amended Rule 15c2-11 in Relation to Fixed Income Securities* (Sept. 24, 2021), available at <https://www.sec.gov/news/public-statement/peirce-nal-rule-15c2-11-2021-09-24>.

²¹ *Id.* In the 2019 Amendment Proposal, the SEC requested comment on the following question: “Are there publications or submissions of quotations for other securities (e.g., debt securities, non-participatory preferred stock, or investment grade asset-backed securities) that have characteristics similar to those of the securities set forth above that should also be excepted from the Rule’s provisions?” See 2019 Amendment Proposal, *supra*, note 9 at 58230, Q87.

²² ABA, Letter to SEC (Nov. 28, 2022), available at <https://www.bassberrysecuritieslawexchange.com/wp-content/uploads/sites/869/2022/11/ABA-Rule-15c2-11-Letter.pdf>.

²³ SFA, Letter to SEC (Dec. 9, 2021), available at https://structuredfinance.org/wp-content/uploads/2021/12/SFA_15c2-11_vf_website.pdf.

²⁴ SIFMA, Letter to SEC (June 10, 2022), available at <https://www.sifma.org/wp-content/uploads/2022/06/SIFMA-provided-comments-to-the-SEC-regarding-application-of-Rule-15c2-11.pdf>; see also SIFMA and Bond Dealers of America Request for Exemptive Order Pursuant to Rule 15c2-11(g) (Aug. 26, 2021), available at <https://www.sifma.org/wp-content/uploads/2021/09/SIFMA-BDA-Exemptive-Request-FI-2021-08-26.pdf>.

²⁵ CREFC, Letter to SEC (Nov. 30, 2022), available at <https://cmbs.informz.net/cmbs/data/images/CREFC%2015c2-11%20Letter.pdf>.

²⁶ Third No-Action Letter, *supra*, note 6.

²⁷ *Id.* at 4.

²⁸ The Rule defines a “quotation” as “any bid or offer at a specified price with respect to a security, or any indication of interest by a broker or dealer in receiving bids or offers from others for a security, or any indication by a broker or dealer that wishes to advertise its general interest in buying or selling a particular security.” 17 C.F.R. § 240.15c2-11(e)(7).

securities or asset-backed securities offered and sold pursuant to Rule 144A on a quotation medium²⁹ (such as Bloomberg) unless the broker-dealer is satisfied that the issuer makes publicly available³⁰ the information required by the Rule.³¹

To Err Is Human, But to Reprive Is Divine

The Third No-Action Letter is certainly welcome news for fixed income markets, but the Rule still looms large. The Staff only granted the extension in order to permit “additional time to complete the operational and systems changes necessary to comply,” and did not indicate any intent to heed calls to request public comment on the impact of the Rule on the fixed income market or any particular segments thereof. There is no telling what shape further relief will take, or whether it will be forthcoming at all, and we expect that various market participants, and their respective trade groups and other advocates, will continue to encourage regulators and legislators to review the application of the Rule to fixed income securities. At least for now, however, fixed income issuers, investors and broker-dealers have cause to celebrate.

If you would like to discuss the Rule, or would like any additional information on the Rule, please contact one of the Dechert attorneys listed below or any Dechert attorney with whom you regularly work.

²⁹ The Rule defines a “quotation medium” as “any ‘interdealer quotation system’” (*i.e.*, “any system of general circulation to brokers or dealers that regularly disseminates quotations of identified brokers or dealers”) or “any publication or electronic communications network or other device that is used by brokers or dealers to make known to others their interest in transactions in any security, including offers to buy or sell at a stated price or otherwise, or invitations of offers to buy or sell.” 17 C.F.R. § 240.15c2-11(e)(3); (e)(8).

³⁰ Under the Rule, “publicly available” means “available on EDGAR; on the website of a state or federal agency, a qualified interdealer quotation system, a registered national securities association, an issuer, or a registered broker or dealer; or through an electronic information delivery system that is generally available to the public in the primary trading market of a foreign private issuer [...]; Provided, however, that publicly available shall mean where access is not restricted by user name, password, fees, or other restraints.” 17 C.F.R. § 240.15c2-11(e)(5) (emphasis added).

³¹ As the Staff notes in the Third No-Action Letter and elsewhere, other exemptions may apply. For example, 17 C.F.R. § 240.15c2-11(f)(3), otherwise known as the “piggybacking exception,” permits broker-dealers to publish continuous quotations in an interdealer quotation system (but not any other form of quotation medium), subject to certain restrictions. See Third No-Action Letter, *supra*, note 6 at 1, n.3.

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*The authors would like to thank *Sarahan Moser* for her assistance with this OnPoint

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