

CLIENT ALERT

RULE 15c2-11 FIXED INCOME POTENTIAL DISRUPTION AVERTED

On December 16, 2021, the Staff of the Division of Trading and Markets (Staff) of the Securities and Exchange Commission (SEC) issued a conditional extension of the no-action position that it published on September 24, 2021.¹ The no-action position was issued in response to securities industry requests for additional time to comply with the requirements of Rule 15c2-11 (Rule) under the Securities Exchange Act of 1934 (Exchange Act), as amended (Amended Rule), with regard to quotations for fixed income securities published by broker-dealers in quotation mediums. While the December 16th letter covers a wide swath of fixed income securities, it does not extend to securities for which their issuer information is not current and available in certain forms.

HIGHLIGHTS OF THE NAL INCLUDE:

- Reaffirmation that the Rule applies to all securities, including fixed income securities.
- The Rule applies to quotations published by broker-dealers in any “quotation medium.”
- The centrality in the Amended Rule of “current” and “publicly available” issuer information.
- All fixed income securities of qualifying issuers are eligible for the no-action position.
- It covers quotations in connection with certain Rule 144A transactions.
- It covers “continuous” quotations even where the “piggybacking” exception is unavailable.
- Successive yearly phases to the no-action position, with differing conditions.

A. THE RULE COVERS FIXED INCOME SECURITIES

The NAL contains multiple references to SEC statements that fixed income securities are and always have been encompassed by the Rule.² However, broker-dealers and the SEC itself have rarely addressed that aspect of the rule. It was only after the adoption of the amendments in 2020 that the securities industry focused on its application to fixed income securities and requested additional time to comply with the Amended Rule.

¹ No-action Letter re: “Amended Rule 15c2-11 in Relation to Fixed Income Securities” (December 16, 2021), <https://www.sec.gov/files/fixed-income-rule-15c2-11-nal-finra-121621.pdf> (NAL). See No-action Letter re: “Amended Rule 15c2-11 in relation to Fixed Income Securities” (September 24, 2021), <https://www.sec.gov/files/rule-15c2-11-fixed-income-securities-092421.pdf>. Amendments to the Rule were adopted in 2020 with a Compliance Date of September 28, 2021. See Release 34-10842 (September 16, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-10-27/pdf/2020-20980.pdf>. See also “Rule 15c2-11 Amendments: Potential Market Disruptor?,” https://www.mmlawus.com/newsitem/pdf/Rule_15c2-11_amendments_memo_09282020_2662387465613786115.pdf.

² The NAL notes that the Rule does not apply to exempted securities or municipal securities. NAL footnotes 6 & 7.

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B. THE RULE APPLIES TO QUOTATIONS PUBLISHED IN A “QUOTATION MEDIUM”

Footnote 3 of the NAL observes that “fixed income securities are often quoted on quotation mediums rather than on interdealer quotation systems,” and that “the Rule applies to any broker-dealer that publishes or submits quotations in a quotation medium.”³ “Quotation” encompasses any indication by a broker-dealer that wishes to advertise its specific or general interest in buying or selling a particular security. “Quotation medium” is broadly defined as “any device that is used by brokers or dealers to make known to others their interest in any security.” The footnote explains that the distinguishing characteristic of an interdealer quotation system (IDQS) is that it is a quotation medium that regularly disseminates quotations of *identified* brokers or dealers.⁴

C. THE CENTRALITY OF “CURRENT” AND “PUBLICLY AVAILABLE” ISSUER INFORMATION⁵

Definitions of “current” and “publicly available” information are central to the ability of a broker-dealer to publish a quotation in any quotation medium and the availability of the “piggyback” exception. “Current” means that the issuer information is filed, published, or is as of a date within the timeframes specified in paragraphs (b)(2)-(5) of the Amended Rule. “Publicly available” means that the required information is available on one or more specified venues that is available to the public and access to the venue is not restricted by username, password, fees, or other restraints. Prior to the amendments, the concept of “reasonably current” in the Rule was more expansive, and there was no express public availability requirement. Perhaps most significantly, in the Amended Rule, the information also must be current and publicly available for the piggyback exception to be available.⁶

D. THE NAL EXPANSIVELY COVERS FIXED INCOME SECURITIES OF QUALIFYING ISSUERS, INCLUDING IN CONNECTION WITH RULE 144A TRANSACTIONS

The securities that are eligible for the no-action position relate to issuers that have obligations to provide current information that is available publicly.⁷ Specifically, the NAL applies to:

- a. An issuer that:
 - Has a class of securities listed on a national securities exchange;
 - Is subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act and has filed all required reports within the preceding 12 months;
 - Has a class of equity securities that is exempt from registration pursuant to Exchange Act Rule 12g3-2(b) (i.e., foreign private issuers);
 - Has current and publicly available information consistent with Rule 15c2-11(b);⁸ or

³ The terms “interdealer quotation system,” “quotation,” and “quotation medium” are defined in Amended Rule 15c2-11(e)(3), (7), and (8), respectively.

⁴ The significance of an interdealer quotation system primarily is related to the operation of the “piggyback” exception in Amended Rule 15c2-11(f)(3). As NAL footnote 3 explains: “The piggyback exception is not available for quotations in a quotation medium that is not an IDQS (i.e., does not identify brokers or dealers).” See Section E below.

⁵ These terms are defined in Amended Rule 15c2-11(e)(2) and (5), respectively.

⁶ See Amended Rule 15c2-11(f)(3)(i)(C).

⁷ See Appendix A and Appendix B of the NAL. The broker-dealer publishing or submitting the quotation has the responsibility for determining that the fixed income security qualifies for the no-action position.

⁸ Footnotes 11 and 12 of the NAL state that the Staff “would consider the Information Requirement discussed in Section II.D. of the Rule 144A Adopting Release, Release 33-6862 (Apr. 30, 1990), 55 FR 17933, 17939, to be consistent with Rule 15c2-11(b).” That release makes reference to portions of the pre-Amended Rule. Specifically, the information (which must be reasonably current in relation to the date of resale under Rule 144A) is: a very brief statement of the nature of the issuer’s business and of its products and services offered, comparable to that information required by subparagraphs (viii) and (ix) of Rule 15c2-11(a)(5); and its most recent balance sheet and

- Is a bank, bank holding company, or credit union that files reports with Federal regulators; or
- b. A fixed income security that is:
 - Foreign sovereign debt or a debt security guaranteed by a foreign government;
 - Issued by an issuer where a “qualified inter-dealer quotation system” (QIDQS) has made a publicly-available determination that there is current and publicly available information about that issuer for any class of security of the issuer that is eligible for an exception in Rule 15c2-11(f)(ii)(B), (f)(3)(ii)(A); or (f)(7);⁹ or
 - A corporate fixed income or asset-backed security offered pursuant to Rule 144A under the Securities Act of 1933, although the relief differs in the Phases, as described below.

The scope of the NAL is significant in at least two ways:

- It expansively applies to quotations for an issuer’s fixed income securities where the issuer has a qualifying class of certain securities or is a reporting company. For example, because Ford Motor Company has a class of equity securities listed on the New York Stock Exchange, a broker-dealer can publish quotations for Ford’s fixed income securities in a quotation medium without gathering and reviewing the issuer information otherwise required by paragraph (b) of the Amended Rule.¹⁰
- It applies to Rule 144A transactions, which likely reflects the significance of the Rule 144A market for corporate debt and the nature of the participants in that market. Phase 1 of the NAL applies to quotations related to Rule 144A transactions in fixed income and asset-backed securities if 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 transaction. Therefore, the issuer information need not be “current” or “publicly available” as those terms are defined in the Amended Rule.¹¹ Phases 2 and 3 differ, however, from Phase 1: after January 4, 2023, the required information must be current and publicly available consistent with Rule 15c2-11(b).¹²

E. THE NAL ALLOWS “CONTINUOUS” QUOTATIONS IN QUOTATION MEDIUMS FOR FIXED INCOME SECURITIES

As noted above, footnote 3 of the NAL explains that “[t]he piggyback exception is not available for quotations in a quotation medium that is not an IDQS (i.e., does not identify brokers or dealers).” Having recognized that quotations for fixed income securities invariably are published in quotation mediums (i.e., not in IDQSs), the NAL effectively provides for a quasi-piggyback exception by permitting such quotations to be published in quotation mediums on a continuous basis where the conditions of the NAL are satisfied. In other words, where the conditions are satisfied, a broker-dealer would not have to comply

profit and loss and retained earnings statements, and similar financial statements for such part of the two preceding fiscal years as it has been in operation. The financial information required is the same as that required by subparagraphs (xii) and (xiii) of Rule 15c2-11(a)(5). The financial statements should be audited to the extent audited financial statements are reasonably available. “Reasonably current” is defined in n.54 of the release. Release 33-6862 (April 30, 1990), 55 FR 17933, 17939, https://archives.federalregister.gov/issue_slice/1990/4/30/17932-17949.pdf#page=2. The required information is essentially similar to Amended Rule paragraph (b)(5)(i)(H), (I), (L), and (M), and differs somewhat from Rule 144A(d)(4).

⁹ QIDQS is defined in Amended Rule 15c2-11(e)(6). The NAL refers in this context to Amended Rule 15c2-11(a)(3), but does not address the situation where a QIDQS has made a publicly available determination about an issuer’s security pursuant to Amended Rule 15c2-11(a)(2).

¹⁰ Ford’s fixed income securities also could qualify for the no-action position by virtue of Ford’s status as an Exchange Act reporting issuer.

¹¹ Rule 144A(d)(4) requires that the specified information be “reasonably current” as defined in Rule 144A(d)(4)(ii).

¹² As noted in n.8 above, the information required is that described in the Rule 144A Adopting Release rather than Rule 15c2-11(b).

with the Rule's information requirements every time it publishes a quotation for a qualifying fixed income security in a quotation medium.¹³

F. PHASED IMPLEMENTATION

The no-action position applies in three phases:

- Phase 1: January 3, 2022 to January 3, 2023
- Phase 2: January 4, 2023 to January 4, 2024
- Phase 3: on or after January 5, 2024

Phase 1 applies where (a) the fixed income security or its issuer meets one of the criteria in Appendix A (described above in Section D), or (b) there is current and publicly available financial information consistent with Rule 15c2-11(b) about the issuer.¹⁴ As noted above, Phase 1 also applies to quotations related to certain Rule 144A transactions.

Phase 2 applies where (1) the fixed income security or its issuer meets one of the criteria in Appendix B, or (2) there is current and publicly available financial information consistent with Rule 15c2-11(b) about the issuer.¹⁵ Phase 2 and Appendix B differ from Phase 1 with regard to Rule 144A transactions. In this phase, the broker-dealer must determine that there is current and publicly available information consistent with Rule 15c2-11(b) about the issuer.¹⁶

Phase 3 applies where the fixed income security qualifies for Phase 2 and:

- The security is foreign sovereign debt or a debt security guaranteed by a foreign government;¹⁷ or
- (a) There is a website link, on the quotation medium on which the security is being quoted, directly to the current and publicly available information about the issuer consistent with Rule 15c2-11(b), and (b) the broker-dealer determines at least on an annual basis that the website link and its underlying information is current.¹⁸

OBSERVATIONS:

Without some form of additional relief for broker-dealer quotation activity, there was a potential that the market for fixed income securities would have been disrupted on January 3, 2022 when the original no-action position expired. The NAL provides welcome, if complicated, relief. However, while the NAL

¹³ As such, quotations allowed by the no-action position need not be “continuous” in the same sense that quotations qualifying for the piggyback exception must satisfy a continuity requirement. See Amended Rule 15c2-11(f)(3)(i)(A).

¹⁴ NAL at (unnumbered) p.2. The reference is to *financial* information about the issuer, whereas Rule 15c2-11(b) impliedly or expressly requires a broker-dealer to gather and review more than financial information.

¹⁵ NAL at (unnumbered) p.2. This has an ambiguity similar to that noted above regarding Phase 1.

¹⁶ As with the requirements for Phase 1, the scope of the required information for Phase 2 references the Rule 144A Adopting Release. See NAL footnote 12 and n.8 above.


¹⁷ Those securities are already covered by Appendix B (and Appendix A).

¹⁸ NAL (unnumbered) p.2. The website link must be on the quotation medium where the security is quoted, but the NAL does not say that the website must be available without restrictions as in the case of other “publicly available” venues. However, the reference solely to an annual determination that the underlying information is “current” could imply that the website need not satisfy all of the “publicly available” criteria. Nevertheless, the website link must be to “current” and “publicly available” information consistent with Rule 15c2-11(b). One might ask here why it is necessary for the quotation medium to have a website link to issuer information that is already current and publicly available?

covers a wide swath of fixed income securities, it does not extend to securities for which issuer information is not current and available in certain forms. For securities not within the scope of the NAL, broker-dealers will either have to comply with the information gathering and review requirements of Amended Rule 15c2-11 (essentially paragraph (b)(5)) or qualify for an exception, which as a practical matter would mean paragraph (f)(2) for quotations representing unsolicited customer interest. Therefore, as has been the case with equity securities following implementation of the Amended Rule, some of the excluded fixed income securities may “go dark” after January 3, 2022.

The SEC explicitly incorporated the concept of a QIDQS into Amended Rule 15c2-11 and provided that the QIDQS can “stand in the shoes” of a broker-dealer in making a determination that an issuer’s information is current and publicly available. Broker-dealers can comply with the Amended Rule by relying on the QIDQS’s publicly available determination to that effect. The NAL seems more limited in that regard: it expressly refers to a QIDQS’s determination only regarding an issuer’s information in connection with the exceptions in Amended Rule 15c2-11(f).¹⁹

It will be important for broker-dealers taking advantage of the NAL to document their satisfaction of its conditions. Although the NAL makes no reference to the supplemental information requirement in Amended Rule 15c2-11(c), it is something that broker-dealers may wish to consider. That paragraph requires a broker-dealer to take certain information into account, in addition to paragraph (b) information, before publishing or submitting a quotation in a quotation medium. Such information includes an SEC trading suspension regarding any securities of the issuer or other adverse information about the issuer that comes to the knowledge or possession of the broker-dealer.²⁰

				
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¹⁹ The NAL makes no reference to a role for FINRA in this connection, although the Amended Rule contemplates a role for FINRA in the operation of paragraph (f).

²⁰ This publication is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice.