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Expiration of Rule 15c2-11 Relief May Require Rule 144A Issuers to Publicly Disseminate Financial Statements

Beginning on January 4, 2023, private companies that use the Rule 144A debt market for funding will need to publicly release financial statements or else risk reduced liquidity for their 144A bonds, which may in turn impact borrowing costs and adversely affect investors.

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In September 2020, the SEC amended Rule 15c2-11, which governs when dealers can publish quotations for securities, to, among other things, generally prohibit broker-dealers from publishing quotations for an issuer's securities in a quotation medium when current information about the issuer is not publicly available. In 2021, the SEC staff made clear that they interpreted Rule 15c2-11 to apply to fixed income securities as well as equity securities and granted time-limited relief from the public information requirement for fixed income securities offered pursuant to Rule 144A. That relief expires on January 4, 2023.

While Rule 144A only requires issuers to make financial information available upon request to holders or prospective purchasers of their securities, beginning on January 4th dealers will no longer be able to publish quotations for debt securities in quotation mediums unless financial statements for and certain other information about the issuer are publicly available (for example, on the issuer's website). Accordingly, issuers may be required to agree to publish financial statements outside of password-protected datarooms currently available only to bondholders and prospective purchasers so that dealers can continue to facilitate a liquid 144A market.

The requirement that issuers make financial statements publicly available in order to allow broker-dealers to publish quotations for 144A bonds has been controversial – with numerous trade groups representing issuers, broker-dealers and investors asking the SEC to reconsider that requirement and separately asking Congress to step in. However, absent some action being taken, the public disclosure requirement will come into effect on January 4, 2023. While it remains to be seen how the industry will respond if the relief expires as anticipated, we expect an increased focus on Rule 144A reporting covenants in the market.

The change affects issuers that do not file annual reports with the SEC and are not either foreign private issuers that are listed abroad and exempt from registration under the Exchange Act under Rule 12g3-2(b) or insurance companies relying on section 12(g)(2)(G) of the Exchange Act. Affected issuers should consider if they are willing to make financial statements publicly available and, if not, what the likely impacts on trading in their Rule 144A bonds will be, how they will manage relations with any investors that are adversely affected, and what alternatives may be available.

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