

# New SEC rule for issuers of private securities and broker-dealers

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## At a glance

An SEC rule effective in 2023 may significantly impact companies that issue securities under Securities Act Rule 144A as well as purchasers of these securities. This is a result of a new requirement for broker-dealers to ensure that information relating to issuers is current and publicly available before providing quotations for the issuers' securities in the over-the-counter (OTC) market. The new requirement applies to fixed income securities, including those issued pursuant to Securities Act Rule 144A.

In September 2020, the SEC amended [Exchange Act Rule 15c2-11](#) ("the Amended Rule") to — among other things — require broker-dealers to ensure that certain documents and information relating to issuers are current and publicly available before initiating or resuming quotations for the issuers' securities in the OTC market. As discussed below, the Amended Rule will impact fixed income securities, including those issued pursuant to Securities Act Rule 144A.

## Impact on broker-dealers

The Amended Rule applies to broker-dealers that provide quotations for securities traded in the OTC markets. The Amended Rule prohibits the publication or submission of certain quotations unless specific requirements are met. In order for a broker-dealer to publish a quotation for any security, the Amended Rule requires that:

1. the broker-dealer has certain documents and information (including specified issuer financial information) in its records,
2. the required documents and information are current and publicly available, and
3. based on a review of the documents and information, the broker-dealer has a reasonable basis under the circumstances for believing that:
  - a. the documents and information are accurate in all material respects and
  - b. the sources of the documents and information are reliable.<sup>1</sup>

<sup>1</sup> See 17 CFR §240.15c2-11(b).

The documentation and information that a broker-dealer is required to review generally has not changed as a result of the Amended Rule; rather, it is the fact that such documentation and information must be current and publicly available (as opposed to available upon request) that will likely represent a change for certain entities that issue (or have issued) Rule 144A securities.

Broker-dealers will likely need to evaluate their processes and consider implementing policies, procedures, and practices to make the determinations required under the Amended Rule, such as reviewing the accuracy and timeliness of the financial information of the Rule 144A issuer or security, and determining that the information is available in a publicly-accessible location.

## Impact on Rule 144A issuers

Rule 144A securities are a form of privately-placed securities that qualify for a safe harbor from certain SEC registration and reporting requirements. Rule 144A allows qualified securities to be resold to qualified institutional buyers without SEC registration.

Rule 144A only requires that certain limited issuer information be available upon request. Under Rule 144A(d)(4)(i), this information includes a brief business description, balance sheet and profit and loss statement for the most recent and preceding two fiscal years which only need be audited “to the extent reasonably available.” By requiring broker-dealers to ensure private issuers have made information publicly available in order for their Rule 144A securities to be quoted, the application of the Amended Rule could, effectively, impose additional public disclosure requirements on private issuers.

The Amended Rule may have the following consequences:

- Private companies may be hesitant to make this information publicly available, for competitive or other reasons. If a private company is unable or unwilling to make the necessary documents and information publicly available, it will face the potential that broker-dealer quotations will not be published on its securities, which could impact their liquidity and valuation.
- If private companies choose to make the documents and information publicly available, the issuer may need to invest additional resources to produce such information and keep it current. Rule 144A issuers may need to produce this information on a more frequent basis than previously required.
- Depending on the facts and circumstances surrounding a particular issuer and security, an issuer’s prior conclusion regarding whether it meets the FASB’s definition of a public business entity (PBE)<sup>2</sup> may change as a result of the Amended Rule and result in additional requirements. Judgment should be applied by Rule 144A issuers when determining whether they meet the definition of a PBE. In making this assessment, issuers should evaluate their financial statement reporting requirements and whether the securities include contractual restrictions. For example, if

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<sup>2</sup> The FASB Master Glossary defines the term *public business entity* as, among other things, a business entity that has securities that are not subject to contractual restrictions on transfer and that is by law, contract, or regulation required to prepare US GAAP financial statements (including footnotes) and make them publicly available on a periodic basis.

an entity issues a Rule 144A security that does not require management preapproval for resales to a qualified institutional buyer and the issuer is subject to a requirement to periodically prepare full US GAAP financial statements and make them publicly available, then the entity is likely a PBE. Refer to the [“QA Section 7100 Definition of a Public Business Entity”](#) for further guidance.

## Other impacts

Investors in Rule 144A securities (e.g., mutual funds, investment advisers, private funds, insurance companies, banks) could face challenges in obtaining quotations on some Rule 144A securities held in their investment portfolios or inventories. The Amended Rule could potentially lead to fewer broker-dealer quotations of Rule 144A securities of issuers if broker-dealers are not able to comply with the Amended Rule. A lack of quotations could also lead to additional required processes and procedures related to determining fair value measures, a potential decrease in liquidity for certain Rule 144A securities, and impact on valuations if broker-dealers cannot quote or execute trades.

## Compliance date

In order to publish or submit the quotations for fixed income securities, broker-dealers will be expected to comply with the Amended Rule based upon the phase-in schedule outlined in a [December 2021 No-Action Letter](#), which for Rule 144A fixed income securities is generally January 4, 2023.

### To have a deeper discussion, contact:

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