

LEGAL ALERT

Securities Law and Practice Updates

February 2021

SEC Adopts Amendments to Exchange Act Rule 15c2-11

On September 16, 2020, the Securities and Exchange Commission (the "SEC" or the "Commission") adopted amendments to Rule 15c2-11 (the "Rule") under the Securities Exchange Act of 1934 (the "Exchange Act"), which governs the publication of quotations for securities in a quotation medium other than a national securities exchange, i.e., over-the-counter ("OTC") securities. Among other matters, the amendments require information about issuers to be current and publicly available for broker-dealers to quote their securities in the OTC market; narrow reliance on certain exceptions from the Rule's requirements, including the piggyback exception; add new exceptions for the quotations of securities that may be less susceptible to fraud and manipulation; and remove obsolete provisions. The SEC's Adopting Release is available at the following location: <https://www.sec.gov/rules/final/2020/33-10842.pdf>

The amendments became effective on December 28, 2020. Broker-dealers and other market participants will be required to comply with the amended Rule commencing on September 28, 2021.

Under the amended Rule, certain required issuer information must be "current" and "publicly available," as those terms are defined in the amended Rule, for a broker-dealer to initiate (or resume) a quoted market in the issuer's security. Further, with respect to the "piggyback" exception, which allows a broker-dealer to rely on the quotations of the broker-dealer that initially complied with the information review requirement to maintain continuous quotations for the security in an interdealer quotation system the amendments require that applicable

We are able to provide counsel and guidance in SEC and New Mining Disclosure matters. For additional information, please contact the attorneys named below or the attorney with whom you have a primary relationship.

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issuer information also must be current and publicly available, timely filed, or filed within 180 calendar days from the end of the issuer's most recent fiscal year or any quarterly reporting period that is covered by a report.

The amended Rule continues to require a broker-dealer to obtain and review basic information about an issuer of an OTC security before initiating or resuming a quoted market in the issuer's security. The amended Rule also continues to require the broker-dealer to have a reasonable basis for believing that the information about the issuer, when considered along with any supplemental information, is accurate and from a reliable source.

Under the amended Rule, qualified interdealer quotation systems (each, a "qualified IDQS"), such as OTC Link ATS, are permitted to comply with the information review requirement, and broker-dealers may rely upon a qualified IDQS's publicly available determination that it has complied with the information review requirement to publish or submit a quotation to initiate or resume a quoted market in an issuer's security.

The amended Rule specifies the documents and information that must be reviewed with respect to issuers, including a new provision to recognize companies that issue securities in reliance on Regulation Crowdfunding ("crowdfunding issuers"), and expands the list of documents and information that must be reviewed for certain other types of issuers.

In addition, the amended Rule requires that a broker-dealer or qualified IDQS identify whether the quotation is published on behalf of the issuer or a company insider and also expands the list of market participants that must review supplemental information to comply with the information review requirement to include qualified IDQs.

The amended Rule continues to provide an exception that permits broker-dealers to publish a quotation for unsolicited customer orders without complying with the information review requirement. However, the amendments to the Rule prohibit broker-dealers from relying on this exception for an affiliate of the issuer or a company insider, unless information about the issuer is current and publicly available. This exception, as amended, permits a broker-dealer to rely on a representation from the customer's broker that such customer is not an affiliate of the issuer or a company insider.

The amended Rule also adds three new exceptions:

- First, the amended Rule adds an exception for highly liquid securities of well-capitalized issuers if the security meets a multi-prong test involving the security's worldwide average daily trading volume value and its issuer's total assets and shareholders' equity.
- Second, the amended Rule adds an underwritten offerings exception for quotations for a security by a broker-dealer that is named as an underwriter in the registration statement or offering statement for such security.
- Finally, the amended Rule adds an exception to permit broker-dealers to rely on publicly available determinations by a qualified IDQS or a registered national securities

association that the requirements of certain other exceptions are met. The qualified IDQS or registered national securities association must establish, maintain, and enforce reasonably designed written policies and procedures with respect to making the determinations.

In addition, the amended Rule modifies the “piggyback” exception, which allows a broker-dealer to rely on the quotations of another broker-dealer that initially complied with the information review requirement. The amended Rule permits broker-dealers to rely on the piggyback exception based on at least a one-way priced quotation, so long as there are no more than four business days in succession without a quotation, and prohibits reliance on the exception if the issuer of the security is a shell company after a certain prescribed period or was the subject of a trading suspension order issued by the Commission until 60 calendar days after the expiration of such order.

The exception also now requires issuer information to be, depending on the regulatory status of the issuer, one of the following: (1) current and publicly available, as defined by the amended Rule; (2) timely filed (i.e., filed by the prescribed due date for a report or statement as required by an Exchange Act or Securities Act reporting obligation); or (3) filed within 180 calendar days from a specified period. The exception also now includes a grace period that permits broker-dealers to continue quoting the securities for a limited period of up to 15 calendar days once a qualified IDQS or register national securities association makes a publicly available determination that issuer information is no longer current and publicly available, timely filed, or filed within 180 calendar days from the applicable specified time frame. The piggyback exception no longer requires that there be quotations on each of at least 12 days within the previous 30 calendar days to establish piggyback eligibility.

The amended Rule also adds definitions for the terms “company insider,” “current,” “publicly available,” “qualified interdealer quotation system,” and “shell company.” Finally, the Commission is providing guidance regarding source reliability and the information review requirement, with modifications to incorporate and update the red flags guidance provided in 1999.

The amended Rule provides that the particular information that a broker-dealer must obtain and review is determined by an issuer’s regulatory status: whether the issuer (1) filed a registration statement under the Securities of Act of 1933 (a “prospectus issuer”), (2) filed an offering statement under Regulation A (a “Reg. A issuer”), (3) is subject to the periodic reporting requirements of the Exchange Act, Regulation A or Regulation Crowdfunding, or is the issuer of a security covered by Section 12(g)(2)(G) of the Exchange Act (a “reporting issuer”), or (4) is a foreign private issuer that is exempt from registration under Exchange Act Section 12(g) pursuant to Rule 12g3-2(b) (an “exempt foreign private issuer”). Such issuers are subject to statute- or rule-based disclosure and reporting requirements under the federal securities laws. An issuer that does not fall within any of these categories and is generally not subject to similar statute- or rule-based disclosure and reporting requirements under the federal securities laws is referred to as a “catch-all issuer.”

The amended Rule includes a partial prohibition against broker-dealers relying on the piggyback exception for shell companies. Specifically, a broker-dealer may rely on the piggyback exception to quote the security of an issuer that the broker-dealer has a reasonable basis under the circumstances for believing is a shell company for the 18 months following the initial priced quotation for an issuer's security that is published or submitted in an IDQS.

With respect to the determination of shell company status, the Adopting Release indicates that, consistent with Commission guidance regarding the definition of "shell company" for purposes of Rule 144(i)(1)(i), the Commission believes that it is appropriate in the context of the amended Rule to reiterate that startup companies, or companies that have a limited operating history, such as early-stage biotechnology companies with no or limited assets and revenues and substantial expenses, are not intended to be captured by the definition of "shell company" because the Commission believes that such companies do not meet the condition of having "no or nominal operations." A startup company that has limited operating history would not meet the condition of having "no or nominal operations" in paragraph (e)(9)(i) of the amended Rule's definition of shell company.