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A Guide to Regulation AB II

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Introduction

On August 27, 2014, the Securities and Exchange Commission (the "SEC" or the "Commission") voted 5-0 to adopt the long-awaited comprehensive amendments to Regulation AB and the other rules affecting the offering process for asset-backed securities, commonly known as "Regulation AB II" (the "Adopting Release").[1]

The SEC, in adopting this broad expansion and revision of federal regulation of offerings of asset-backed securities ("ABS"), reiterated that "the financial crisis highlighted that investors and other participants in the securitization market did not have the necessary tools to be able to fully understand the risk underlying those securities and did not value those securities properly or accurately."

"This lack of understanding and the extent to which it pervaded the market and impacted the U.S. and worldwide economy," the Commission said, "prompted us to revisit several aspects of our regulation of asset-backed securities."

The new rules will, among other things:

- Modernize the public offering process by requiring that investors in ABS backed by residential mortgages, commercial mortgages, automobile loans, automobile leases and debt securities, and in resecuritizations, be provided with standardized asset-level data disclosures in XML format at the time of the offering and periodically thereafter;
- Increase the amount of disclosure provided in public offerings and, in shelf offerings, the amount of time that investors have to examine the disclosure – including a requirement that, in a shelf offering, an integrated preliminary prospectus must be filed with the SEC at least three business days before any securities are sold; and
- Eliminate the investment-grade rating requirement for shelf eligibility and impose new shelf eligibility requirements, including:
    - A certification filed at the time of each takedown by the chief executive officer of the depositor, addressing the prospectus disclosure and the structure of the securitization;
    - Transaction document provisions requiring the appointment of an asset representations manager to review assets when certain trigger events occur, and mandating dispute resolution for failure to comply with requests to repurchase assets;

[1] Asset-Backed Securities Disclosure and Registration, SEC Release Nos. 33-9638, 34-7298, available at http://www.sec.gov/rules/final/2014/33-9638.pdf.

- Transaction document provisions requiring the inclusion in distribution reports on Form 10-D of requests by investors to communicate with other investors; and
- An annual evaluation of compliance with these requirements.[2]

Just as importantly, the Commission did not at this time adopt several controversial aspects of its proposals, which remain outstanding. Among other things, these provisions would:

- Give investors in any private offering of "structured finance products" made in reliance on Rule 144A under the Securities Act of 1933, as amended (the "Securities Act"), the right to obtain all of the same initial and ongoing information as if the offering were SEC-registered;
- Require general asset-level data disclosures in securitizations of all asset classes, impose specific asset-class requirements for equipment loans and leases, student loans and floorplan financings, and require grouped-account disclosure for credit and charge card ABS;
- Require that investors be provided with a computer program of the cash flow waterfall; and
- Require substantially final transaction documents to be filed by the date the preliminary prospectus is required to be filed.

The new rules will become effective 60 days after they are published in the Federal Register. All of the rules must be complied with by one year from the effective date, except for the new asset-level disclosure requirements, which must be complied with no later than two years from the effective date.

History of the Commission's Proposals

The SEC originally proposed Regulation AB II in April 2010 (the "Proposing Release").[3]

Subsequent to the original proposal but before the end of the comment period, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act of

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[2] Compliance with the shelf eligibility requirements will become more difficult and will need to be assessed more frequently, and failure to comply will result in more severe consequences, as described below.

[3] Asset-Backed Securities; Proposed Rule, SEC Release Nos. 33-9117, 34-61858, 75 Fed. Reg. 23328 (May 3, 2010), available at https://www.sec.gov/rules/proposed/2010/33-9117fr.pdf. Our guide to the Proposing Release is available at http://www.bingham.com/Alerts/Files/2010/04/A-Guide-to-the-SECs-Proposed-Revisions-to-the-Rules-and-Forms-for-Offerings-of-Asset-Backed-Securities.

2010 (the "Dodd-Frank Act").[4] Because several of the requirements originally proposed for Regulation AB II were also addressed by the Dodd-Frank Act, and in response to comments received on the Proposing Release, the SEC re-proposed certain aspects of Regulation AB II in July 2011 (the "Re-Proposing Release").[5]

In February 2014, the SEC re-opened the comment period for Regulation AB II[6] to permit comment on a proposed approach to the dissemination of potentially sensitive asset-level data as discussed in a memorandum from the SEC staff (the "Staff Privacy Memorandum").[7]

Disclosure in Registered Public Offerings of ABS

The changes to the SEC's disclosure requirements for public offerings of ABS primarily focus on requiring ABS issuers to provide detailed, ongoing, asset-level data regarding both the characteristics of the pool assets and related obligors and collateral, and the performance of the pool assets.

Asset-Level Disclosure

The new rules will greatly expand the amount of information regarding the securitized asset pool that is made available to investors, both at the time of the initial offering and on an ongoing basis, for ABS that are backed by residential mortgages, commercial mortgages, automobile loans, automobile leases and debt securities, and for resecuritizations. Issuers will be required to provide information responsive to the applicable standardized asset-level data points listed on a new Schedule AL.[8] Many of these data points are intended to provide information about the borrower's ability to pay, as well as information regarding the characteristics of the receivables and any related collateral.

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[4] The Dodd-Frank Act is available at http://banking.senate.gov/public/_files/Rept111517DoddFrankWallStreetReformandConsumerProtectionAct.pdf. Our summary of the Dodd-Frank Act is available at http://www.bingham.com/Media.aspx?MediaID=10963.

[5] Re-proposal of Shelf Eligibility Conditions for Asset-Backed Securities and Other Additional Requests for Comment, SEC Release Nos. 33–9244, 34–64968, 76 Fed. Reg. 46948, Aug. 5, 2011), available at https://www.sec.gov/rules/proposed/2011/33-9244fr.pdf. Our client alert on the Re-Proposing Release is available at http://www.bingham.com/Alerts/2011/08/SEC-Re-Proposes-Shelf-Eligibility-Conditions-and-Filing-Requirements-for-Transaction-Documents-in-Offerings-of-Asset-Backed.

[6] Re-Opening of Comment Period for Asset-Backed Securities Release, SEC Release Nos. 33-9552, 34-71611, available at https://www.sec.gov/rules/proposed/2014/33-9552.pdf.

[7] Available at http://www.sec.gov/comments/s7-08-10/s70810-258.pdf. Our client alert on the Staff Privacy Memorandum and the re-opening of the comment period is available at http://www.bingham.com/Alerts/2014/02/SEC-Re-opens-comment-period-on-regulation-AB-II-for-comments-on-restricted-website.

[8] *See* Items 1111(h) and 1125 of Regulation AB and Items 7(a) of Forms SF-1 and SF-3.

The SEC did not at this time adopt its proposals that would require general asset-level data disclosures in securitizations of all asset classes, impose specific asset-class requirements for equipment loans and leases, student loans and floorplan financings, or require grouped-account disclosure for credit and charge card ABS. However, it "continues to consider whether asset-level disclosure would be useful to investors across other asset classes."

The SEC consolidated all asset-level data disclosure requirements, whether required to be disclosed in the offering document or in periodic reports under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), into a single Schedule AL set forth in Regulation AB Item 1125, with the filing requirements contained in Item 1111(h).[9]

Asset-level data will be required to be filed on EDGAR in a standardized asset data file as an exhibit to new Form ABS-EE, which will be incorporated by reference into Form SF-1 or SF-3.[10] The data will be filed in a standardized tagged data format using XML Extensible Mark- up Language, or XML,[11] which will permit investors to download the asset data directly into spreadsheets or databases for analysis. Generally, unless otherwise specified by Schedule AL, the data points will require the specified data to be provided as of the end of the most recent reporting period.

Some commenters expressed concern about the potential for securities law liability for errors or inaccuracies in asset-level data. The Commission noted that, as with any disclosure, liability will depend on a traditional materiality analysis, and that issuers may provide whatever narrative analysis and disclosures as are necessary to make the asset-level disclosures not misleading in light of the circumstances in which they were made, either in the prospectus itself[12] or in a separate exhibit to Form ABS-EE.

Privacy Concerns

In order to protect the privacy of individual obligors, the SEC originally had proposed that some asset-level data would be provided in the form of codes, categories or ranges. For example, geographic location was not proposed to be disclosed by zip code, but instead would be shown by Metropolitan or Micropolitan Statistical Areas, and credit score, debt and income were proposed to be shown in ranges.

Many comments on the proposed asset-level data rules focused on privacy issues. Among other things, commenters were concerned that while the asset-level data disclosures would not include direct identifiers, responses might be combined with other publicly-available information to permit the "re-identification" of consumers, in

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[9] As proposed, Schedule L would have set forth the data points required to be disclosed in the offering document, while Schedule L-D would have enumerated somewhat different data points to be provided in Exchange Act reports.

[10] Or, with respect to periodic reporting as described below, into Form 10-D.

[11] *See* Rule 11 of Regulation S-T.

[12] Or Form 10-D, for ongoing disclosure purposes.

potential violation of Federal consumer privacy rules. The SEC requested additional comment on these issues in 2011 in the Re-Proposing Release. In early 2014, the SEC staff issued the Staff Privacy Memorandum and re-opened the comment period on this topic, suggesting that privacy concerns could be addressed by requiring the disclosure of asset-level data on an issuer-sponsored, password-protected website, rather than filing the information publicly on EDGAR. Commenters generally were opposed to this approach.

As adopted, the rules will require the public disclosure of the required asset-level data on EDGAR, but the Commission consulted the Consumer Financial Protection Bureau (the "CFPB") and revised the required data points to reduce the disclosure of individually sensitive data and the resulting re-identification risk. The Commission also obtained a letter from the CFPB stating that the Fair Credit Reporting Act will not apply to asset-level disclosures that the Commission has determined are "necessary for investors to perform due diligence" in accordance with Section 7(c) of the Securities Act, which was added by the Dodd-Frank Act.[13]

General Data Points

As proposed, there were a number of general data points that would have been required for each offering for which asset-level disclosures were required. The SEC redistributed these general data points into the requirements for specific asset classes.

As adopted, the general data requirements for each asset include a unique identifying number, an indication as to whether the asset met the criteria for the first level of credit or underwriting criteria used to originate the asset, and a group of data points relating to repurchase activity concerning the asset.

Residential Mortgage-Backed Securities

The data points for residential mortgage-backed securities transactions were based primarily on information that Fannie Mae and Freddie Mac require in connection with purchases of mortgage loans, and the disclosure and reporting package developed by Project RESTART. Some of the most significant categories of data points for this asset class are:

- Information about the borrower's payment status and payment history, including the most recent 12-month pay history, the number of payments past due and the paid through date;

[13] Section 7(c) mandates that the Commission adopt rules requiring ABS issuers to disclose, for each tranche or class of a security, information regarding the assets backing that security, including asset-level data that is necessary for investors to independently perform due diligence. The SEC believes that its Regulation AB II asset-level data provisions satisfy the requirements of Section 7(c).

- Information about junior liens and senior liens, to the extent the information was obtained by or available to the originator;
- Information about the property, including location by 2-digit zip code[14] and information about property valuations obtained by any transaction party or its affiliates;
- Information about borrower's credit quality, including credit score, length of employment and frond-end and back-end debt-to-income ratios calculated at origination and at the time of any modification;[15]
- Information about servicer advances, including the advance method, and amounts advanced and reimbursed for principal, interest, taxes/insurance and corporate purposes; and
- Information about modified loans, including the most recent loan modification event type and the effective date of the most recent modification.[16]

Automobile Loan and Lease ABS

The data points required for automobile loan and lease ABS were derived from the pool-level disclosures commonly contained in prospectuses for such deals. The SEC did not agree with industry commenters who argued that asset-level data should not be required for automobile ABS, or that grouped account data or more robust pool-level reporting should suffice. However, it did significantly reduce the scope of required data points from those that were proposed.

Some of the important data points for automobile loan and lease ABS include: the obligor's payment-to-income ratio; verification of the obligor's income and employment; the presence or absence of a co-obligor; information about the terms of the loan or lease (including the term and, for loans, the original interest rate); information regarding scheduled payments and collections; servicer advance amounts; information regarding modifications and extensions; and (for leases) information regarding residual values and acquisition costs.[17]

Commercial Mortgage-Backed Securities

The data points required for commercial mortgage-backed securities ("CMBS") are based in large part on the data included in the CREFC Investor Reporting Package (the

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[14] The original proposal would have required disclosure by Metropolitan or Micropolitan Statistical Areas. As discussed above, the SEC made this change in an effort to minimize re-identification risk.

[15] The Commission did not adopt a variety of proposed data points regarding obligor income and debt. While these were originally proposed to be addressed by ranges, or categories of coded response, to minimize privacy concerns, the Commission was convinced that the re-identification risk of this approach was still too great.

[16] *See* Schedule AL (Regulation AB Item 1125), Item 1.

[17] *See* Schedule AL (Regulation AB Item 1125), Items 3 and 4.

"CREFC IRP") and data that is commonly provided in Annex A to CMBS prospectuses. In the final rules, the SEC made an effort to adjust codes, titles and data points to make them largely comparable to those in the CREFC IRP.

Some of the more significant data points for CMBS include: information about the loan and its terms; information regarding the mortgaged property and its revenues, operating expenses, net operating income and net cash flow; the identities of the three largest tenants and their lease expiration dates; and the most recent available appraisals or valuations.[18]

Repacks and Resecuritizations

Debt security ABS (*i.e.*, repacks) will require asset-level data points regarding the title of the underlying security, origination date, minimum denomination, payment currency, whether the security is callable, payment frequency, interest rate and other basic debt security characteristics.[19]

Resecuritizations will require the same data points as repacks. In addition, if the underlying security is of a type where asset-level disclosure requirements have been adopted, all of the required asset-level data points will be required for the underlying securities. However, the SEC has adopted an exemption from the requirement to provide asset-level data on the underlying ABS if they were issued before the compliance date for the new asset-level disclosure requirements (*i.e.*, two years from the rules' effective date). If the underlying ABS were issued by a third party, the resecuritization issuer may simply reference the underlying issuer's asset-level data filings. The SEC permitted a simple reference rather than a full incorporation by reference in an effort to address commenters' concerns surrounding potential securities law liability for information generated by an unrelated third party.[20]

Expanded Pool Disclosure

The SEC adopted its proposal to require a description of the provisions in the transaction documents governing modification of the terms of pool assets.[21]

The SEC did not adopt its proposal to require disclosure of whether the transaction has the benefit of a representation and warranty as to the lack of fraud. The proposed

[18] *See* Schedule AL (Regulation AB Item 1125), Item 2.

[19] *See* Schedule AL (Regulation AB Item 1125), Item 5.

[20] *See* Schedule AL (Regulation AB Item 1125), Item 6.

[21] *See* Regulation AB Item 1111(e)(2).

disclosure requirements regarding pool assets that deviate from the disclosed underwriting criteria have already been adopted.[22]

The SEC did not further comment on its statement in the Proposing Release that existing Item 1111 of Regulation AB should be interpreted as requiring statistical information in the prospectus regarding "risk layering" – the bundling of multiple non-traditional features into a single loan product; presumably, that interpretation remains in effect.

Static Pool Information

Because of perceived inconsistencies among ABS issuers in disclosure of static pool information, the SEC adopted several changes to its requirements for disclosure of static pool information, including:

- A narrative description of the static pool information presented, the methodology used in the calculations, a description of terms or abbreviations used and a description of how the static pool assets differ from the assets included in the securitized pool;[23]
- If applicable, an explanation of why an issuer has not provided static pool information or has provided alternative disclosure;[24]
- For amortizing pools, presentation of delinquencies and losses in accordance with Item 1100(b) of Regulation AB, with respect to presenting such information in 30-31 day increments through no less than 120 days;[25] and
- Also for amortizing pools, a graphical presentation of delinquency, loss and prepayment data.[26]

Static pool information filed on Form 8-K will now be filed under new Item 6.06, and if incorporated by reference into the prospectus, filed as new Exhibit 106.[27] The SEC did not adopt its proposal to permit static pool information to be filed in .pdf format.

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[22] *See* Item 1111(a)(8) of Regulation AB, as adopted in Issuer Review of Assets in Offerings of Asset-Backed Securities, SEC Release Nos. 33-9176, 34-63742, 76 Fed. Reg. 4231 (Jan. 25, 2011), available at http://www.sec.gov/rules/final/2011/33-9176fr.pdf. Our client alert regarding this rulemaking is available at http://www.bingham.com/Alerts/2011/01/SEC-Adopts-Final-Rules-Mandating-Disclosure-of-Repurchase-Requests-for-Public-Securitizations-and-Requiring-Due-Diligence.

[23] *See* introduction to Item 1105 of Regulation AB.

[24] *See* Item 1105(c) of Regulation AB.

[25] *See* Item 1105(a)(3)(ii) of Regulation AB.

[26] *See* Item 1105(a)(3)(iv) of Regulation AB.

[27] *See* Item 6.06 of Form 8-K, Item 601(b)(106) of Regulation S-K.

Cash Flow Waterfall Computer Program

As originally proposed, Regulation AB II would have required most ABS issuers to file a "waterfall computer program" giving effect to the flow of funds from the assets to the investors. In the Re-Proposing Release, the Commission acknowledged that many commenters opposed this proposal due to the lack of its clarity, cost and liability concerns, and that it received many helpful suggestions as to how to revise this requirement. At that time, it stated that this requirement will be re-proposed separately, and it remains outstanding.

Repurchase or Substitution of Pool Assets

Information regarding the financial condition of the sponsor or any 20 percent originator that is required to repurchase or replace any asset for breach of a representation or warranty will be required if there is a material risk that the effect on its ability to comply with those provisions resulting from its financial condition could have a material impact on pool performance or performance of the ABS. [28]

The SEC had proposed to require disclosure of the amount, if material, of publicly securitized assets originated or sold by the sponsor or an identified originator that were the subject of a demand to repurchase or replace any of the assets for breach of representations and warranties concerning the pool assets in the last three years pursuant to the transaction agreements. Rules requiring the disclosure of repurchase demand activity were considered and adopted in connection with the adoption of Rule 15Ga-1, in the rulemaking required by Section 943 of the Dodd-Frank Act. [29]

Servicers

Annual reports filed by ABS issuers are required to contain, among other things, a platform-level assessment of compliance with the Regulation AB servicing criteria by each servicer and each other party participating in the servicing function ("PPSF"), together with an accountant's attestation of each such assessment. Material instances of noncompliance with the servicing criteria that are identified in the assessment must be disclosed in the body of the annual report on Form 10-K. However, because the assessment is performed on a servicer's or PPSF's entire servicing platform for similar assets (or some permitted segment of the platform), it may not be clear whether reported instances of noncompliance with the servicing criteria are relevant to a particular issuer or its ABS. The SEC has amended Item 1122 of Regulation AB to

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[28] *See* Items 1104(f) and 1110(c) of Regulation AB.

[29] *See* Disclosure for Asset-Backed Securities Required by Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, SEC Rel. Nos. 33-9175 and 34-63741, 76 Fed. Reg. 4489 (Jan. 6, 2011), available at http://www.sec.gov/rules/final/2011/33-9175fr.pdf. Our client alert regarding this rulemaking is available at http://www.bingham.com/Alerts/2011/01/SEC-Adopts-Final-Rules-Mandating-Disclosure-of-Repurchase-Requests-for-Public-Securitizations-and-Requiring-Due-Diligence.

require that the annual report disclose whether identified instances of noncompliance involved the servicing of the related pool assets. Also required is disclosure regarding anfy steps taken to remedy a material instance of noncompliance.

The SEC also amended Item 1122 to codify a prior SEC staff telephone interpretation regarding the scope of the annual assessment of compliance. The servicing platform addressed by an assessment should generally include all ABS transactions, taken as a whole, involving the same asset type as those that are the subject of the annual report. The servicing platform may be limited in ways that reflect actual servicing practices, but may not be "artificially designed." An instruction to amended Item 1122 now provides that any limitation on the scope of the servicing platform must be disclosed in the assessment.

The Adopting Release reiterates the Commission's view that Item 1108(b)(2) of Regulation AB requires disclosure in the prospectus of any material instances of noncompliance noted in the annual assessment or attestation reports required under Item 1122 of Regulation AB or in the annual servicer compliance statement required under Item 1123, together with any steps taken to remedy the noncompliance and the current status of any such remedial steps.

Originators

Currently, an originator that originated less than 10 percent of an asset pool need not be identified in the prospectus. The SEC now will require that if the cumulative amount of assets originated by parties other than the sponsor and its affiliates is 10 percent or more of the pool, then those originators originating less than 10 percent of the pool assets also must be identified.[30]

Economic Interest in the Transaction

The nature and amount of the risk retained by the sponsor, the servicer, or the originator, or any affiliate of any of them, will be required to be disclosed in the prospectus, and the prospectus must separately state the amount and nature of any interest or asset retained in compliance with law by these parties and by any other party (*i.e.,* when adopted, the Dodd-Frank credit risk retention requirements). [31] Additionally, any hedge (whether security specific or portfolio) must be disclosed if it is materially related to the credit risk of the securities and was entered into by the sponsor, servicer or originator (or, if known, an affiliate) to offset the risk position held.[32] According to the SEC, because the exact amount retained may not be known

[30] *See* Item 1110(a) of Regulation AB.

[31] Our guide to the re-proposed credit risk retention rules is available at https://www.bingham.com/Alerts/2013/09/~/media/Files/Docs/2013/A-guide-to-the-Re-proposed-Credit-Risk-Retention-Rules.ashx.

[32] *See* Items 1104(g), 1108(e) and 1110(b)(3) of Regulation AB.

until closing, the preliminary prospectus will be required to disclose the amount and nature of the interest these parties intend to retain.

The Offering Process for Registered ABS Offerings

The SEC has created a separate registration scheme for ABS, and has substantially increased the requirements for eligibility for shelf registration and the frequency with which compliance will be assessed.

New Forms SF-1 and SF-3

Currently, most offerings of ABS are registered for the shelf on Form S-3, and individual offerings of ABS are registered on Form S-1. Offerings of securities that do not meet the Regulation AB definition of "asset-backed security" are ineligible for shelf registration and may only be registered on Form S-1. Forms S-3 and S-1 are also used for registration of offerings of corporate securities.

The SEC has adopted new forms tailored specifically for ABS offerings – Form SF-3, for shelf registration of ABS, and Form SF-1, for individual registrations by ABS issuers not eligible to use Form SF-3.[33] Issuers that use Form SF-3 will be subject to strict eligibility requirements, and the SEC has made a variety of changes to the shelf offering process for ABS.

Eligibility for Shelf Registration

Eligibility of ABS for registration on Form SF-3 will be conditioned on, among other things, satisfaction of various new criteria.

Currently, offerings of ABS may be eligible for shelf registration if, among other criteria, the securities will be rated investment grade by at least one nationally recognized statistical rating organization ("NRSRO").[34] Consistent with the Dodd-Frank Act's requirement to remove NRSRO credit ratings from the SEC's rules in an effort to reduce the risk of undue reliance on ratings, this requirement will be eliminated and replaced with the new eligibility criteria described below.

[33] Offerings of securities not satisfying the Regulation AB definition of "asset-backed security" may still be registered on Form S-1.

[34] *See* General Instruction I.B.2 of Form S-3.

Existing shelf eligibility criteria other than the rating requirement will continue to apply.[35] Compliance with the existing requirement that all periodic reports required to have been filed under the Exchange Act during the 12 months (and any portion of a month) immediately prior to the filing of the registration statement have been timely filed[36] will need to be periodically verified, in addition to the following:[37]

- A certification must be filed at the time of each takedown by the chief executive officer of the depositor, addressing the prospectus disclosure and the structure of the securitization;
- Transaction document provisions must require the appointment of an asset representations manager to review assets when certain trigger events occur, and mandating dispute resolution for failure to comply with requests to repurchase assets;
- Transaction document provisions must require the inclusion in distribution reports on Form 10-D of requests by investors to communicate with other investors; and
- There must be an annual evaluation of compliance with these requirements.[38]

Failure to satisfy these ongoing eligibility requirements by the depositor, or by any issuing entity established by the depositor or any of its affiliates, could render the depositor unable to use an effective shelf registration statement – unlike under current rules, which assess shelf eligibility only at the time that a registration statement is filed.

CEO Certification

The new rules will require a certification by the depositor's CEO to be filed at the time of each takedown, containing the components discussed below.[39] The SEC did not

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[35] These requirements include:

- The securities proposed to be registered must satisfy the definition of "asset-backed security" in Regulation AB;
- Less than 20 percent (by principal balance) of the asset pool may be delinquent in payment on the closing date; and
- For ABS evidencing interests in or secured by leases other than motor vehicle leases, less than 20 percent (by dollar volume) of the securitized pool balance may be attributable to the residual value of the leased property.

[36] This requirement applies to each issuing entity formed by the depositor or any affiliate of the depositor in a securitization of the same asset class contemplated by the registrant. Certain types of current reports on Form 8-K that are specified in current Form S-3 and new Form SF-3 need not have been filed timely in order for an ABS issuer to maintain shelf eligibility.

[37] *See* General Instruction I.A of Form SF-3. The rules also include certain disclosure requirements relating to the shelf eligibility criteria.

[38] *See* General Instruction I.B of Form SF-3.

[39] *See* Item 601(b)(36) of Regulation S-K.

adopt its alternative proposal, which would have permitted the certification to instead be signed by the executive officer in charge of securitization of the depositor.

- The CEO has reviewed the prospectus and is familiar with, in all material respects, the characteristics of the pool assets, the structure of the securitization, and all material transaction documents described in the prospectus.
- Based on the CEO's knowledge, the prospectus does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading.
- Based on the CEO's knowledge, the prospectus and registration statement fairly present in all material respects the characteristics of the securitized assets and the risks of ownership of the offered ABS, including risks relating to the assets that would affect the cash flows available to service payments or distributions in accordance with their terms.
- Based on the CEO's knowledge, taking into account all material aspects of the characteristics of the securitized assets, the structure of the securitization, and the risks described in the prospectus, there is a reasonable basis to conclude that the securitization is structured(but not guaranteed) to produce expected cash flows at times and in amounts to service scheduled payments of interest and the ultimate repayment of principal (or other scheduled or required distributions) in accordance with their terms as described in the prospectus.
- All of these certifications are subject to any and all defenses available to the CEO under federal securities laws, including defenses available to an executive officer that signed the related registration statement.

Materiality qualifiers were added in several places in response to comments that the certifying officer should not be expected to be familiar with every single aspect of the transaction, and because materiality is the appropriate standard under general disclosure principles. The SEC confirmed that the CEO may rely on the work of other parties in providing this certification, so long as he or she provides appropriate oversight to be able to make the certification.

Many commenters objected to the use of the term "fairly present" in the third portion of the certification because it is a term of art in financial statement disclosure. The SEC declined to modify this phrase, on the basis that it does not have the same meaning here. Rather, it "will require the CEO to consider whether the disclosure is tailored to the risks of the particular offering and presented in a clear, non-misleading fashion." At the request of commenters, the reference to risks in that portion was broadened to include all relevant risks, rather than being limited to those in the "risk factors" section of the prospectus.

In the fourth portion of the certification, the SEC removed a limitation that would have permitted the CEO only to consider internal credit enhancement in making this

certification. The word "structured" replaces "designed" because that term is better understood in the context of structured finance. In addition, commenters expressed concern that the proposed certification that the transaction was structured to produce cash flows that are "sufficient" to service "expected payments" was unclear in many structures, including those with pass-through certificates (where fixed principal payments are not required) and more subordinated offered tranches (where greater credit risk is inherent in the structure). The SEC responded by revising this portion of the certification to refer to "expected" cash flows to service scheduled interest payments and the ultimate repayment of principal, "or other scheduled or required distributions on the securities, however denominated," in accordance with the terms described in the prospectus.

The last portion of the certification is a clarification added in response to commenters worried about the potential for increased personal liability. The Commission acknowledged that there may be greater risk but, believes that the additional risk is justified by the incentive to provide better oversight.

Asset Review

The new rules will require that the transaction documents contain a mandate for the appointment of an "asset representations manager"[40] which would review the pool assets when certain trigger events occur. The asset representations manager must be unaffiliated with the sponsor, depositor, the servicer, the trustee or any third-party due diligence services provider, and will have access to copies of the underlying loan documents for the asset pool. At a minimum, there will have be a two-pronged trigger for having the asset representations manager review the pool assets for compliance with representations and warranties: first, a threshold of delinquent assets (as specified in the transaction documents) has been reached or exceeded, and second, investors have voted to direct such a review (with the transaction documents requiring no more than five percent of the total interest in the pool to initiate a vote and no more than a simple majority vote thereafter).[41] This process, along with the dispute resolution and investor communications requirements discussed below, are intended to address investor complaints that they often were not empowered to make repurchase demands directly, and that trustees have not enforced repurchase rights consistently.

The Commission had proposed a trigger event where applicable credit enhancement requirements are not met. This trigger was not adopted, because some structures do not have pool-level credit enhancements, and in other structures credit enhancement is not at its target level on the closing date, but builds toward a target level over time as funds are applied from excess cash flow. Instead, the SEC adopted the two-pronged trigger based on delinquencies, which can be applied across different asset classes and deal structures. The SEC left the relevant threshold amount of delinquencies to be

[40] Rather than, as proposed, a "credit risk manager."

[41] *See* General Instruction I.B.1(b) of Form SF-3.

agreed upon by the transaction parties, but for these purposes delinquencies must be calculated in accordance with a specified method,[42] and there is requirement to disclose how the trigger was determined to be appropriate, including a comparison of the trigger against delinquencies disclosed for the sponsor's previous securitized pools of the same asset type.[43]

Once a review is triggered, the asset representations manager must, at a minimum, review all assets that are 60 days or more delinquent.[44]

The prospectus will be required to disclose the name of the asset representations manager, its form of organization, the extent of its experience and details about its compensation. Further disclosure will be required regarding the asset representations manager's duties, any limitations on its liability under the transaction documents, any indemnification provisions, any provisions regarding its removal or replacement, and how its expenses would be paid.[45] The new rules also will require disclosure, if material, about any relationships between the asset representations manager and any other transaction parties.[46]

The asset representations manager will be required to report to the trustee on its findings and conclusions in any review, and the trustee may use the report to determine whether to make a repurchase request. If a trigger event requiring asset review occurs during any distribution period, the Form 10-D for that period must disclose that event. If the asset representations manager provides a report to the trustee during a distribution period, the Form 10-D for that period must summarize that report. Additional Form 10-D disclosures will be required of the date and circumstances of any resignation, removal or replacement of the asset representations manager, together with all of the disclosures described above with respect to any new asset representations manager.

The Commission was persuaded that is was not appropriate to require the trustee to appoint the asset representations manager, so the selection of the asset representations manager will be left to the transaction parties. While not explicit in the rules, the prospectus disclosure requirements described above regarding the asset representations manager make it clear that that the asset representations manager must be appointed at the inception of the transaction.

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[42] A percentage of the aggregate dollar amount of delinquent pool assets to the aggregate dollar amount of all pool assets, as of the end of the reporting period, with thresholds for separate subpools to be calculated separately and votes for those subpools to be measured separately. Instruction to General Instruction 1.B.1(b) of Form SF-3.

[43] *See* Item 1113(a)(7)(i) of Regulation AB.

[44] General Instruction I.B.1(b)(D) of Form SF-3.

[45] *See* Item 1109(b) of Regulation AB.

[46] *See* Item 1119(a)(7) of Regulation AB.

Dispute Resolution

The new rules will require the transaction documents to include dispute resolution procedures for repurchase requests, whether or not they are submitted as a result of the new asset review requirements. If an asset is subject to a repurchase request made pursuant to the terms of the transaction documents but is not repurchased within 180 days after notice is received of the repurchase request, the party submitting the repurchase request may refer the matter to either mediation or arbitration. The party with the repurchase obligation must agree to the dispute resolution mechanism selected by the party requesting the repurchase. The transaction documents must specify that in an arbitration, the arbitrator will determine the party responsible for expenses, and in a mediation, the parties will agree on the allocation of expenses with assistance of the mediator.[47]

Investor Communications

According to the Commission, investors have had difficulty locating other investors to enforce rights contained in transaction documents, including those related to the repurchase of pool assets for breaches of representations and warranties. These difficulties have been exacerbated since most ABS are book-entry securities held in street name through the Depository Trust Company.

Therefore, the transaction documents will have to require the party responsible for making periodic filings on Form 10-D[48] to include any request from an investor to communicate with other investors relating to their rights under the ABS that is received during the reporting period. The disclosure must include the name of the requesting investor, the date the request was received and a description of the method by which other investors may make contact. Investors may not use these mechanisms for purposes other than communicating with regard to rights under the registered ABS.

Transaction parties may specify only limited procedures for verifying the identities of beneficial owners making use of these mechanisms. If the investor is a record holder, the investor will not have to provide verification of ownership. If the investor is not a record holder, the transaction documents may require a written statement from the record holder that the investor beneficially held the ABS at the time of the request and one other form of documentation (*e.g.*, a trade confirmation, account statement or letter from a broker-dealer). [49]

More Frequent Evaluation of Shelf Eligibility

Under current rules, shelf eligibility for ABS is determined at the time that the registration statement is filed.

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[47] *See* General Instruction I.B.1.(c) of Form SF-3.

[48] The depositor, or on behalf of the issuing entity by a duly authorized representative of the servicer. *See* General Instruction E.1 of Form 10-D.

[49] *See* General Instruction I.B.1.(d) of Form SF-3.

Under the new rules, an ABS shelf issuer will need to evaluate annually, as of the 90th day after the end of the depositor's fiscal year, whether all periodic reports required under the Exchange Act were timely filed by the depositor or (with respect to ABS backed by the same asset class) by any issuing entity established by the depositor or any of its affiliates.[50] If the issuer fails this compliance check, "the related registration statement could not be used for subsequent offerings for at least one year from the date the depositor of the affiliated issuing entity that had failed to file Exchange Act reports then became current in its Exchange Act reports...."

An ABS shelf issuer also will need to evaluate annually, as of the 90th day after the end of the depositor's fiscal year, whether the depositor or (with respect to ABS backed by the same asset class) any issuing entity established by the depositor or any of its affiliates satisfied the requirements for CEO certification, asset review, dispute resolution and investor communications, and timely filing of all CEO certifications and transaction documents containing the required asset review, dispute resolution and investor communications provisions. Any such failure will be deemed cured 90 days after the issuer files the required documents.[51] In response to comments that the cure period was too long, the Commission points out that an issuer may avoid being out of the market by curing its deficiency while it continues to use the shelf and before the required annual compliance check.

Preliminary Prospectuses in Shelf Offerings

Under current rules, neither delivery nor filing of a preliminary prospectus is required in shelf offerings of ABS. The new rules require that an integrated preliminary prospectus that contains all required disclosure other than pricing-related information[52] be filed with the SEC at least three business days before the first contract of sale is entered into with an investor.[53] This preliminary prospectus requirement will not be satisfied by filing a free writing prospectus (*i.e.*, a "virtual red"), although free writing prospectuses may continue to be used in shelf offerings of ABS.

If there is any material change in the information contained in the preliminary prospectus, then a prospectus supplement that clearly delineates the change must be filed at least 48 hours before the time of the first contract of sale.[54]

This represents a significant liberalization of the SEC's proposal, which would have required the preliminary prospectus to be filed five business days before the first

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[50] *See* General Instruction I.A.1 of Form SF-3 and Securities Act Rule 401(g)(4).

[51] *See* General Instruction I.A.2 of Form SF-3.

[52] A preliminary prospectus may omit information with respect to the offering price, underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds, or other matters dependent upon the offering price. Rule 430D(a)(1).

[53] Or, if used earlier, by the second business day after first use of the preliminary prospectus. *See* Rule 424(h)(1) under the Securities Act.

[54] Rule 424(h)(2) under the Securities Act.

contract of sale and, in the event of a material change, that a complete new preliminary prospectus be filed, which would have restarted the five business day waiting period.

The current exemption of most shelf offerings of ABS from the requirement that a preliminary prospectus be delivered at least 48 hours before a confirmation of sale is sent will be eliminated.[55]

Use of Integrated Prospectus in Shelf Offerings

In a shelf offering, disclosure currently is presented in the form of a base prospectus and a prospectus supplement. The base prospectus, which is filed with the SEC prior to effectiveness of the registration statement, describes generally the types of assets that may be securitized and the structures that may be used, and provides information about future offerings that is known at the time the registration statement is filed, including general tax and ERISA disclosure and risk factors relating to investment in the ABS. The prospectus supplement describes the specific terms of the securities that are offered.[56] Together, these two documents constitute the final prospectus that is filed with the SEC for each shelf offering.

According to the Commission, this practice "has resulted in unwieldy documents with excessive and inapplicable disclosure that is not useful to investors." Therefore, the new rules eliminate this method of providing disclosure in ABS shelf offerings, requiring instead that shelf registrants file a single form of prospectus before a registration statement becomes effective, and file a single preliminary prospectus and a single final prospectus for each shelf takedown that includes all required disclosure in one integrated document.[57]

Limitations on Content of Shelf Registration Statement

Shelf issuers will no longer be permitted to include multiple base prospectuses to register offerings of different asset classes in a single registration statement. Multiple depositors sharing a single registration statement also will no longer be permitted. Each separate asset class will require a separate registration statement filed by a single depositor.[58]

The SEC has codified its current requirement to file a post-effective amendment to add new structural features.[59]

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[55] *See* pre-amendment Rule 15c2-8(b) under the Exchange Act.

[56] Currently, when a shelf registration statement is filed it includes one or more forms of prospectus supplement that outline the format of transaction-specific disclosure that may be provided at the time of a shelf takedown.

[57] *See* Rule 430D under the Securities Act.

[58] Except for a master trust structure with multiple affiliated depositors who transfer credit card receivables into the issuing entity, which will be viewed as a single transaction.

[59] *See* Rule 430D(d)(2) under the Securities Act.

Pay As You Go

To alleviate the burden of managing multiple registration statements among ABS issuers, the SEC adopted its proposal to allow ABS shelf issuers to pay filing fees at the time of each offering, rather than paying in advance at the time the registration statement becomes effective as is currently required. The fee will be paid at the time that an initial preliminary prospectus is filed, at whatever fee rate is applicable at that time.[60]

Timely Filing of Final Transaction Documents

All material transaction documents required to be filed as exhibits to the registration statement must be filed, together with any attachments or schedules, no later than the date on which the final prospectus is required to be filed.[61] This filing generally will be accomplished by filing the agreements under cover of Form 8-K and incorporating them by reference into the prospectus. Such documents must be in final form, except that "prices, signatures and similar matters" may be omitted.

The SEC did not adopt its proposal, set forth in the Re-Proposing Release, to require the even earlier filing of transaction documents at the time the preliminary prospectus is required to be filed.

Periodic Reporting

Other changes to the Exchange Act periodic reporting requirements for ABS are summarized below.

As described above, ongoing reporting of asset-level performance data will be required at the time of filing of each distribution report on Form 10-D pursuant to a unified Schedule AL.[62] Asset-level data will be filed on EDGAR in a standardized asset data file as an exhibit to new Form ABS-EE, which will be incorporated by reference into each Form 10-D.[63]

Delinquency and loss disclosures required in Form 10-D under Item 1121(a)(9) of Regulation AB must be presented in accordance with Item 1100(b) of Regulation AB, with respect to presenting such information in 30-31 day increments through no less than 120 days.

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[60] *See* Rules 456(c)(1) and 457(s) under the Securities Act. Rule 457(p) will be available to apply unused registration fees previously paid and associated with unsold securities.

[61] *See* Item 1100(f) of Regulation AB.

[62] As proposed, Schedule L would have set forth the data points required to be disclosed in the offering document, while Schedule L-D would have enumerated somewhat different data points to be provided in Exchange Act reports.

[63] *See* General Instruction D.(3) to Form 10-D.

Form 10-D must include information about any material change in the sponsor's (or an affiliate's), interest in the securities resulting from any purchase, sale or other acquisition or disposition during the reporting period, including a separate statement of the amount and nature of any interest or asset retained in compliance with law by these parties and by any other party (*i.e.*, when adopted, the Dodd-Frank credit risk retention requirements).[64]

Private Offerings of Structured Finance Products

As proposed, Regulation AB II would have applied the stringent disclosure requirements for registered offerings of a broad category of "structured finance products" to the most active and liquid private market for ABS, the Rule 144A market, as well as to offerings made in reliance on Rule 506 of Regulation D under the Securities Act. The SEC did not adopt this controversial requirement at this time.

Other Aspects of the Proposal

Changes to Definition of Asset-Backed Security

Regulation AB II further limits the extent to which SEC-registered ABS may deviate from the "discrete pool" requirement in the definition of "asset-backed security" by reducing the maximum amount of prefunding from 50 percent of offering proceeds (or the aggregate principal balance of the total asset pool whose cash flows support the ABS, in the case of a master trust) to 25 percent.[65] The SEC adopted this limit, rather than only 10 percent as it had proposed, because of strong opposition from commenters, many of which suggested the 25 percent limit that was adopted. According to the Commission, this reduction will result in the asset pool being more developed at the time of the offering, which will provide investors with more information about the securities they are purchasing.

The SEC did not adopt its proposals to permit master trust structures to be used only to hold assets arising out of revolving accounts, or to impose stricter limits on the use of revolving structures for non-revolving assets (including reducing the maximum length of the revolving period from three years to one year).

Who Must Sign the Registration Statement

A registration statement for ABS must be signed by the depositor, the depositor's principal executive officer or officers, the principal financial officer, and the controller or principal accounting officer, as well as by at least a majority of the depositor's board of directors or persons performing similar functions. The Commission did not adopt its

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[64] *See* Item 1124 of Regulation AB. As proposed, this disclosure would have been a Form 8-K disclosure item.

[65] *See* Item 1101(c)(3)(ii) of Regulation AB.

proposal to require an ABS registration statement would be required to be signed by the depositor's senior officer in charge of securitization, rather than by its controller or principal accounting officer.

Transition Period

The new rules will become effective 60 days after they are published in the Federal Register. All of the rules must be complied with by one year from the effective date, except for the new asset-level disclosure requirements, which must be complied with no later than two years from the effective date.

This guide was authored by Charles A. Sweet. For assistance, please contact any of the following lawyers:

John Arnholz, Practice Group Leader, Structured Transactions
john.arnholz@bingham.com, +1.202.373.6538

Reed D. Auerbach, Partner, Structured Transactions
reed.auerbach@bingham.com, +1.212.705.7400

Harlyn Bohensky, Partner, Structured Transactions
harlyn.bohensky@bingham.com, +1.212.705.7462

Michael P. Braun, Partner, Structured Transactions
michael.braun@bingham.com, +1.212.705.7540

Robert J. Gross, Partner, Structured Transactions
robert.gross@bingham.com, +1.202.373.6106

Laurence B. Isaacson, Of Counsel, Structured Transactions
laurence.isaacson@bingham.com, +1.212.705.7297

Jeffrey R. Johnson, Partner, Structured Transactions
jeffrey.johnson@bingham.com, +1.202.373.6626

Matthew P. Joseph, Partner, Structured Transactions
matthew.joseph@bingham.com, +1.212.705.7333

Steve Levitan, Partner, Structured Transactions
steve.levitan@bingham.com, +1.212.705.7325

Edmond Seferi, Partner, Structured Transactions
edmond.seferi@bingham.com, +1.212.705.7329

Sarah Smith, Partner, Structured Transactions
sarah.smith@bingham.com, +44.20.7661.5370

Vincent Sum, Partner, Structured Transactions
vincent.sum@bingham.com, +852.3182.1756

Charles A. Sweet, Managing Director, Shared Legal Services
and Practice Development Leader, Structured Transactions
charles.sweet@bingham.com, +1.202.373.6777