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A legal update from Dechert LLP

SEC Issues Final Rules in Connection with Exchange Act Reporting for ABS Issuers

The Securities and Exchange Commission (the “SEC”) on August 17 promulgated final rules (the “Rules”) regarding an asset-backed securities (“ABS”) issuer’s duty to file reports under the Securities Exchange Act of 1934 (the “Exchange Act”). The Rules were published in the Federal Register on August 23 and become effective on September 22.¹

The Rules specify that the duty to file periodic reports under the Exchange Act will be suspended if all outstanding ABS are held by affiliates of the depositor or if no ABS are outstanding. The filing of the certification on Form 15 is also now a *condition* to the suspension of the reporting obligation.²

Certain ABS issuers file various Exchange Act reports including Forms 10-D, 10-K and 8-K. Before the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”),³ the obligation to file such Exchange Act reports was automatically suspended for any fiscal year after the year in which the issuer’s registration statement became effective or, for offerings of ABS shelf takedowns, the fiscal year after the takedown where the ABS are held by fewer than 300 persons. Prior to the Dodd-Frank Act, most ABS issuers could and did take advantage of the suspension. Section 942(a) of the Dodd-Frank

Act amended Section 15(d) of the Exchange Act by eliminating this automatic suspension and authorized the SEC to issue rules providing for the suspension or termination of an ABS issuer’s reporting obligations.

Some industry participants were concerned that Section 942(a) of the Dodd-Frank Act could result in a “springing” filing requirement for ABS issuers that had already suspended filings before the enactment of the Dodd-Frank Act. In response to this concern, the SEC issued a no-action letter on January 6, 2011⁴ stating that enforcement action will not be recommended if an ABS issuer “continues to determine its reporting requirements based on the standards set forth in Section 15(d) of the Exchange Act immediately prior to enactment” of the Dodd-Frank Act provided that each of three conditions is satisfied. Since the Rules do not state that the no-action letter is overturned or superseded, many in the industry have taken the view that issuers should be able to continue to rely on the no-action letter if all the conditions set forth in the no-action letter are satisfied. These conditions are:

- the ABS issuer’s reporting obligation in respect of outstanding ABS had been suspended by operation of Section 15(d) prior to the date of enactment of the Dodd-Frank Act;

¹ <http://www.federalregister.gov/articles/2011/08/23/2011-21500/suspension-of-the-duty-to-file-reports-for-classes-of-asset-backed-securities-under-section-15d-of>.

² The SEC’s rules had required that a Form 15 be filed upon suspension, but it was not a condition to the suspension of reporting obligations.

³ [http://www.financialreformwatch.com/uploads/file/Dodd-Frank-Final-Enrolled\(1\).pdf](http://www.financialreformwatch.com/uploads/file/Dodd-Frank-Final-Enrolled(1).pdf).

⁴ <http://www.sec.gov/divisions/corpfin/cf-noaction/2011/asf010611-15d.htm>.

- the ABS issuer continues to comply with its requirements under the related transaction agreements to make ongoing information regarding the ABS and the related pool assets available to security holders, directly or through the trustee, in the manner and to the extent required under the transaction agreements; and
- the ABS issuer retains the information for a period of not less than five years after the related ABS are no longer outstanding and, upon request, furnishes a copy of any or all such information to the SEC or its staff.

The Dodd-Frank Act gave the SEC the broad authority to draft a final rule such that the SEC could have provided for automatic suspension of the filing requirement in a variety of circumstances. For example, the Commercial Real Estate Finance Council and the Mortgage Bankers Association commented to the SEC that commercial mortgage-backed securities (“CMBS”) issuers should be permitted to suspend reporting under the old Section 15(d) standard because the Investor Reporting Package™ is generally given to CMBS investors pursuant to CMBS pooling and servicing agreements and contains the information that would be provided under Section 15(d).⁵ Alas, the SEC’s Rules provide only very limited circumstances when the duty to file may be suspended—if all outstanding ABS are held by affiliates of the depositor or if no ABS are outstanding. The Rules provide for the timing of the suspension of the duty to file to be tested at the beginning of the *semi-annual*

⁵ The Commercial Real Estate Finance Council and the Mortgage Bankers Association comment letters are available at <http://www.sec.gov/comments/s7-02-11/s70211-5.pdf> and <http://www.sec.gov/comments/s7-02-11/s70211-5.pdf>.

fiscal period rather than annually as proposed. The SEC states in the Rules that the increased frequency of the required assessment makes it “harder to evade the reporting requirements as well as reduce[s] costs imposed by requiring reporting for the remainder of the year when the ABS are held solely by affiliates of the depositor.”⁶

The Rules also clarify that securities held of record by a broker, dealer, bank or nominee for any of them for the accounts of customers are considered held by the separate accounts for which they are held. So if an investment bank is an ABS issuer and holds securities in its name for the benefit of other non-affiliated investors, it cannot suspend reporting. Conversely, if an unaffiliated bank or broker holds ABS for affiliates of the ABS issuer, the unaffiliated status of the broker or bank will not preclude suspension of reporting.

The Rules also provide that an issuer may not suspend reporting if securities are acquired and resold by affiliates as part of a plan or scheme to evade the reporting obligations of Section 15(d).

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⁶ Suspension of the Duty to File Reports for Classes of Asset-Backed Securities Under Section 15(D) of the Securities Exchange Act of 1934, 76 Fed. Reg. 52,549, 52,551 (Aug. 23, 2011) (to be codified at 17 C.F.R. pts. 240 and 249).

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