

SEC Clarifies Exchange Act Reporting for ABS Issuers

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On August 17, the [final rules](#) from the SEC came out (“Rules”) regarding an ABS issuer’s duty to file Exchange Act reports -- specifically, if and when an issuer can suspend reporting.

The Rules specify that, effective September 22, 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.

Before the enactment of the [Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010](#) (the “Dodd-Frank Act”), the obligation to file certain 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. 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 the automatic suspension of the duty of ABS issuers to file Exchange Act reports for transactions in which the ABS are held by fewer than 300 persons and authorized the SEC to issue rules providing for the suspension or termination of an ABS issuer’s reporting obligations.

The industry was left to guess as to whether the Dodd-Frank Act would result in a “springing” filing requirement for ABS issuers. In January, the SEC issued a [no-action letter](#) stating that an enforcement action would 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 subject to certain conditions. Since the Rules do not state that the no-action letter is overturned or superseded, ABS issuers who suspended their filing of Exchange Act reports prior to July 22, 2010 should be able to continue to rely on the no-action letter if all the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.

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, [CREFC](#) and the [MBA](#) commented to the SEC that CMBS issuers should be permitted to suspend reporting under the old Section 15(d) standard because of the

“Investor Reporting Package” which is given to all CMBS investors pursuant to CMBS pooling and servicing agreements and which contains the same information that would be provided under Section 15(d). 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* 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.”

The Rules 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).

Also, the filing of the certification on Form 15 is now a condition to the suspension of the reporting obligation.