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Regulation AB II – Final Rules

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REGULATION AB II – FINAL RULES

On August 27, 2014, the Securities and Exchange Commission (the **"SEC"**) unanimously voted to adopt a package of new and amended rules (the **"Final Rules"**) governing the registration, offering process, disclosure and reporting for SEC registered asset-backed securities (**"ABS"**). The release adopting the Final Rules (the **"Adopting Release"**) was dated and posted on September 4, 2014.[1] The Final Rules are part of the SEC's rule-making effort commonly referred to as **"Regulation AB II."**

The Final Rules will become effective 60 days after their publication in the Federal Register. Market participants will be required to comply with the new rules and forms (except for the asset-level disclosure requirements) no later than one year after effectiveness and with the new asset-level disclosure requirements no later than two years after effectiveness, as further described below.

BACKGROUND

In April 2010, the SEC originally proposed its Regulation AB II rules (the **"Original Proposal"**).[2] The SEC indicated that the proposed rules were prompted by the recent financial crisis, which "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 [ABS] and did not value [ABS] properly or accurately."

In July 2011, the SEC re-proposed certain of its Regulation AB II rules in light of the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the **"Dodd-Frank Act"**) and comments received on the Original Proposal (the **"July 2011 Re-Proposal"**).[3] Specifically, the SEC re-proposed rules relating to the eligibility criteria for shelf registrations of ABS and related filing deadlines for transaction agreements, and solicited additional comment on its proposal to require asset-level information about pool assets.

In February 2014, in response to privacy concerns over the proposed asset-level disclosure requirements, the SEC re-opened the comment period on a portion of its Regulation AB II rule proposals, specifically seeking comment on a proposed approach for the dissemination of potentially sensitive asset-level data to investors (the **"February 2014 Re-Opening"**).[4]

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[1] The Adopting Release is available at **http://www.sec.gov/rules/final/2014/33-9638.pdf**.

[2] The Original Proposal is available at **http://www.sec.gov/rules/proposed/2010/33-9117fr.pdf**, and Orrick's related Client Alert is available at **http://www.orrick.com/Events-and-Publications/Documents/2562.htm**.

[3] The July 2011 Re-Proposal is available at **http://www.sec.gov/rules/proposed/2011/33-9244fr.pdf**, and Orrick's related Client Alert is available at **http://www.orrick.com/Events-and-Publications/Documents/3935.pdf**.

[4] The February 2014 Re-Opening is available at **http://www.sec.gov/rules/proposed/2014/33-9552.pdf**, an SEC staff memorandum summarizing the proposed approach is available at **http://www.sec.gov/comments/s7-08-10/s70810-258.pdf**, and Orrick's related Client Alert is available at **http://www.orrick.com/Events-and-Publications/Documents/SEC-Seeks-Comment-on-Disclosure-of-Asset-Level-Under-Reg-AB-II.htm**.

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SCOPE OF THE FINAL RULES

The Final Rules cover registered ABS only and address the following areas, each of which is discussed in greater detail below:

- revisions to the registration requirements under the Securities Act of 1933, as amended (the **"Securities Act"**), including changes to the shelf offering process and prospectus delivery requirements;
- new disclosure requirements, including requirements to disclose asset-level information in connection with certain specified asset classes;
- new requirements relating to ongoing reporting under the Securities Exchange Act of 1934, as amended (the **"Exchange Act"**); and
- certain clarifying, technical and other changes to the current rules governing ABS.

OUTSTANDING PROPOSALS

The SEC did not adopt several provisions that had been proposed in connection with Regulation AB II. The SEC indicated that certain of these proposals remain outstanding, although it remains unclear (from both the Adopting Release and comments delivered during the SEC open meeting on August 27, 2014) if and when the SEC will address the remaining proposals. Notable proposals that remain outstanding include:

- a requirement to deliver the same disclosure for Rule 144A offerings as is required for registered offerings;
- asset-level disclosure requirements for ABS asset classes other than those specified in the Final Rules;
- grouped account disclosure requirements for credit and charge card ABS;
- a requirement to prepare and file a waterfall computer program that would model the contractual cash flow provisions relating to ABS; and
- a requirement that transaction documents relating to an ABS issuance be filed in substantially final form by the date the preliminary prospectus is required to be filed.

SECURITIES ACT REGISTRATION REQUIREMENTS

New Registration Statement Forms

The SEC has adopted new Forms SF-1 and SF-3 for the registration of ABS offerings. Eligible registrants seeking to register ABS offerings on a shelf registration basis will use Form SF-3, while all other ABS offerings will be registered on Form SF-1.

Prospectus Requirements and Procedures

Rule 424(h) Preliminary Prospectus In connection with any takedown of securities in a shelf offering of ABS, new Securities Act Rule 424(h) requires that a complete preliminary prospectus be filed no more than two business days after first use *but no later than three business days before the date of the first sale in the offering*.[5] Pursuant to new Securities Act Rule 430D, the Rule 424(h) preliminary prospectus must disclose required information previously omitted from the prospectus filed as part of an effective registration statement, other than information relating to offering price, the underwriting syndicate, underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds or other information dependent on pricing to the extent such information is unknown or not reasonably available to the issuer.

Any material change to the information included in the Rule 424(h) preliminary prospectus requires the filing of a prospectus supplement *at least 48 hours before the date and time of the first sale*, which prospectus supplement must clearly describe what material information has changed and how it has changed.

The final prospectus should continue to be filed pursuant to Rule 424(b), which was unchanged by the Final Rules.

Presentation of Disclosure in Prospectus The Final Rules require that issuers file a single form of prospectus at the time of effectiveness of a registration statement on Form SF-3 and file a single prospectus for each takedown. This new requirement eliminates the common practice in shelf ABS offerings of using a base prospectus and prospectus supplement. In addition, the Final Rules require a separate registration statement and form of prospectus for each asset class and for each country of origin of the assets, unless the pool assets for additional classes or countries of origin are, in the aggregate, less than 10% of the total pool (by dollar amount) for any particular takedown.[6]

48-Hour Preliminary Prospectus Delivery Requirement Under the Final Rules, brokers and dealers in shelf-eligible ABS transactions are no longer exempt from the requirement under Exchange Act Rule 15c2-8(b) to deliver a copy of the preliminary prospectus to an investor at least 48 hours before a confirmation of sale is sent to that investor. This change does not appear to create an independent timing issue given the three-business day filing requirement for Rule 424(h) preliminary prospectuses.

Shelf Registration Statement Eligibility

The Final Rules eliminate the previously existing requirement that ABS be rated investment grade as a condition for shelf registration. In place of investment grade ratings, the Final Rules introduce new transaction and registrant shelf eligibility requirements for ABS, as well as an annual compliance requirement.

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[5] The SEC had originally proposed a requirement that the preliminary prospectus be filed five business days before the first sale.

[6] See General Instruction IV to Form SF-3.

Transaction Eligibility Requirements The four new eligibility criteria applicable to each offering from an ABS shelf registration statement on Form SF-3 include:[7]

- CEO Certification In connection with each offering, the chief executive officer[8] of the depositor must sign a written certification about the disclosure contained in the prospectus and the structure of the securitization. The text of the required certification, which cannot be modified, is attached as Appendix A. The certification is required to be dated as of the date of the final prospectus and filed with the SEC. The primary purpose the SEC identified for the certification is to encourage senior officer involvement in the oversight of the ABS transaction.

  The SEC made a number of changes to the CEO certification requirement from its prior proposals, most notably in response to concerns expressed by commenters that the proposed certification constituted a guarantee of future performance[9] and that the proposed certification exposed the signatory to increased securities law liability without appropriate defenses.[10]

- Asset Review Provision The underlying transaction agreements must include provisions requiring the review of pool assets for compliance with the representations and warranties made with respect to those assets upon the occurrence of a two-pronged trigger event. The first prong is triggered if a specified threshold percentage of delinquent assets in a given pool or sub-pool (calculated based on aggregate dollar amount) is reached.[11] The second prong is triggered if, after the delinquency threshold has been reached, investors vote to direct a review of the assets.[12] The two-pronged trigger is a minimum requirement, and additional review triggers may be included.

  The underlying transaction documents must also provide for the appointment of an "asset representations reviewer" that is not affiliated with the sponsor, depositor, servicer or trustee, or any of their affiliates, and is not the same party or an affiliate of any party hired by

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[7] The new transaction eligibility requirements are included in General Instruction I.B. to Form SF-3.

[8] The July 2011 Re-Proposal contemplated the certification being delivered by the CEO *or the executive officer in charge of securitization for the depositor*, but the SEC ultimately decided that the CEO, as a signatory to the registration statement, should be the signatory to the certification.

[9] Paragraph 4 of the certification now contains language reflecting that the statement is based on the knowledge of the signatory at the time of the certification, that there is a "reasonable basis" to make the required conclusion about the structure, and that the certification is not a guarantee of that conclusion.

[10] The SEC added paragraph 5 to the certification to clarify that the certification is given subject to any and all defenses available to the certifier under the federal securities laws.

[11] While the SEC did not specify the delinquency threshold percentage, the Final Rules require disclosure in the prospectus describing how the delinquency trigger was determined to be appropriate, including by comparing the percentage to delinquencies disclosed for prior securitized pools of the sponsor for the same asset type. See Item 1113(a)(7)(i) of Regulation AB.

[12] The transaction agreements may (but are not required to) include minimum investor thresholds for both the initiation of a vote to direct a review of assets and the vote itself. However, the transaction agreements may not require more than (a) 5% of the total investors' interest in the pool or sub-pool in order to initiate a vote on whether to direct a review and (b) a simple majority of those interests casting a vote to direct a review. "Investors' interest" means the interests in the pool that are not held by affiliates of the sponsor or servicer.

the sponsor or underwriter to perform pre-closing due diligence on the pool assets.[13] Certain information on the asset representations reviewer is required to be disclosed in the prospectus (including its name, form of organization, experience, duties and responsibilities, compensation, limitations on liability, indemnification provisions and provisions regarding its removal, replacement or resignation and how related expenses will be paid) and disclosure of a change in the reviewer and the circumstances surrounding the change is required to be provided in ongoing reports.[14]

Once a review has been triggered, the reviewer must perform, at a minimum, reviews of all assets that are 60 or more days delinquent to determine compliance with the representations and warranties made with respect to those assets. A report of the reviewer's findings and conclusions is required to be delivered to the trustee, and disclosure on Form 10-D is required of any event triggering a review and of a summary of the reviewer's report (but not the report itself).[15]

- Dispute Resolution Provision The underlying transaction agreements must provide that if any asset repurchase request is not resolved within 180 days of the request, the party submitting the request will have the right to refer the matter, at its discretion, to either mediation or third-party arbitration, and the party obligated to repurchase or replace the asset must agree to such selection.[16]

- Investor Communication The underlying transaction agreements must require the disclosure on Form 10-D of any request from an investor to communicate with other investors in connection with the investors exercising their rights under the transaction agreements. The disclosure need only include the requesting investor's name, the date of the request, a statement that the request has been received and that the investor is interested in communicating with other investors with regard to the possible exercise of rights under the transaction agreements, and a description of the method other investors may use to contact the requesting investor.[17] The disclosure is not required to include the substance of the requested communication.

Registrant Eligibility Requirements A registrant must meet two registrant requirements to be eligible to use Form SF-3 for the shelf registration of ABS.[18]

- Timely Exchange Act Reporting The SEC retained the registrant requirement previously included in Form S-3 that the depositor, any issuing entity established by the depositor and any affiliate of the depositor must have timely filed all reports (subject to certain specified exceptions) required under the Exchange Act during the preceding 12 calendar months (plus

[13] In addition, such party shall not be the party to determine whether any non-compliance with representations or warranties constitutes a breach of any contractual provision.

[14] See Items 1109(b) and 1121(d)(2) of Regulation AB.

[15] See Item 1121(d)(1) of Regulation AB.

[16] If arbitration is selected, the arbitrator will determine responsibility for the dispute resolution expenses. If mediation is selected, the parties, with the assistance of the mediator, are to mutually agree on the allocation of the dispute resolution expenses.

[17] See Item 1121(e) of Regulation AB.

[18] The new registrant eligibility requirements are included in General Instruction I.A. to Form SF-3.

any portion of a month immediately preceding the filing of the Form SF-3) with respect to previous offerings of ABS of the same asset class.

- Transaction Eligibility Requirement The Final Rules include a second, new registrant requirement that the depositor, any issuing entity established by the depositor and any affiliate of the depositor must have timely filed the CEO certification described above and all underlying transaction documents containing the required asset review, dispute resolution and investor communication provisions described above, in each case during the preceding 12 calendar months (plus any portion of a month immediately preceding the filing of the Form SF-3) with respect to previous offerings of ABS of the same asset class. Unlike the Exchange Act reporting requirement, failure to comply with the transaction eligibility requirement can be cured by a subsequent filing, and the registrant will be deemed to have satisfied these requirements 90 days after the late filing is made. The registrant must also include disclosure in a prospectus that is part of the registration statement that it has complied with this new registrant requirement.

Annual Compliance Evaluation Under the Final Rules, a registrant with an effective shelf registration statement on Form SF-3 is required to evaluate whether, as of the date that is 90 days after the depositor's fiscal year, the two registrant eligibility requirements described above were satisfied, in each case evaluating the previous 12 months (plus any portion of a month), as provided in the registrant eligibility requirements.[19] If, based on such evaluation, it is determined that either eligibility requirement is not satisfied as of the evaluation date, the shelf registration statement will be unavailable. A registrant's ability to maintain or restore eligibility depends on which of the registrant requirements is determined to have been violated.

- Non-Compliance with the Timely Exchange Act Reporting Requirement The determination on the evaluation date that an Exchange Act report was not timely filed during the evaluation period would result in the depositor being unable to use its existing shelf registration statement until 12 months after the depositor (or the affiliated entity) became current in its Exchange Act reports.[20]

- Non-Compliance with the Transaction Eligibility Requirement The determination on the evaluation date that the CEO certification or an underlying transaction document containing the required asset review, dispute resolution or investor communication provisions was not timely filed during the evaluation period would result in the depositor being unable to use its existing shelf registration statement until 12 months after the date of the required (but missed) filing. However, during the period from the missed filing to the evaluation date, the existing shelf registration statement would remain available.[21] Further, if the missed filing

[19] See new Securities Act Rule 401(g)(4) and General Instruction I.A. to Form SF-3. Previously, an ABS issuer with a missed or untimely Exchange Act filing would be barred from filing a new registration statement on Form S-3 for a 12-month period following the missed filing, but such ABS issuer would not be barred from continuing to utilize its existing shelf registration statement that had been previously declared effective. The new required annual compliance evaluation may make an effective shelf registration statement unavailable for specified periods if non-compliance is identified.

[20] Similarly, neither the depositor nor any of its affiliates would be eligible to file a *new* shelf registration statement with respect to the same ABS asset class until 12 months (plus any portion of a month) after it (or the affiliated entity) became current in its Exchange Act reports.

[21] Even though the depositor would be able to continue to use its existing shelf registration statement during this period, neither the depositor nor any of its affiliates would be eligible to file a *new* shelf registration statement with

were to be cured 90 or more days before the date of the annual evaluation, thereby allowing the depositor to be deemed to have satisfied the requirement prior to the evaluation date, the depositor's ability to use the existing shelf registration statement would be uninterrupted.

Other Securities Act Registration Changes

Mortgage Related Securities Under the Final Rules, Rule 415 is amended to eliminate a provision that previously allowed "mortgage related securities"[22] to be registered for shelf offerings without regard to form eligibility requirements, thereby requiring mortgage related securities to meet all criteria for eligibility for shelf registration on Form SF-3.

Filing Requirements for Transaction Documents Incorporated into a Form SF-3 Under Item 1100(f) of Regulation AB, as amended by the Final Rules, transaction documents to be included as exhibits to Form SF-3 will be required to be filed, in substantially final form, and made part of the registration statement by the date the final prospectus is required to be filed. Item 1100(f) of Regulation AB allows issuers to file agreements or other documents as exhibits to a registration statement through incorporation by reference such as, in the case of shelf registration, by filing the documents as exhibits to Form 8-K. The SEC staff expressed concern about the timeliness of the filing of such documents.[23] In the Adopting Release, the staff explains that "[b]ecause all exhibits to Form SF-1 must be filed by the time of effectiveness, we believe that all transaction agreements for shelf offerings filed as exhibits should be filed and made part of the shelf registration statement by the time of the final prospectus."

Adding Structural Features or Credit Enhancements Under the Final Rules, an ABS issuer must file a post-effective amendment to its registration statement in order to add information regarding new structural features or credit enhancement not described in the prospectus filed with the effective registration statement, rather than describing such changes for the first time in a prospectus delivered in connection with a takedown.[24] This change codifies an existing SEC position.

Continuous Offerings Securities Act Rule 415, as amended by the Final Rules, limits the registration of continuous offerings for ABS offerings to "all or none" offerings (i.e., where the transaction is completed only if all securities are sold), as opposed to "best efforts" or "mini-max" offerings, where a variable amount of securities may be sold and the size of the offering and other transaction-specific information, including the final asset pool, may not be known by investors.[25]

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respect to the same ABS asset class until the earlier of 12 months (plus any portion of a month) after the missed filing and 90 days after the missed filing is cured.

[22] As defined in Section 3(a)(41) of the Exchange Act.

[23] The SEC staff points out in the Adopting Release that "some ABS issuers have delayed filing such material agreements with the SEC until several days or even weeks after the offering of securities off a shelf registration statement."

[24] See Securities Act Rule 430(D)(d)(2).

[25] In response to a comment, the SEC confirmed in the Adopting Release that an offering of ABS where all or a portion of one or more classes offered for sale to investors through one or more underwriters are initially retained by the depositor or sold to one or more of its affiliates would not be a "mini-max" offering if the prospectus includes the size of the offering and other transaction-specific information.

Pay-as-You-Go Registration Fees Under the Final Rules, ABS issuers are permitted to pay registration fees as securities are offered off a registration statement, as opposed to paying all registration fees upfront prior to the effectiveness of the Form SF-3. The triggering event for a fee payment will be the filing of an initial preliminary prospectus.[26]

Registration of Underlying Collateral Certificates or SUBIs Codifying an existing staff interpretation, the Final Rules amend Securities Act Rule 190 to require that, for ABS backed by collateral certificates or special units of beneficial interest (**"SUBIs"**), the offer and sale of those assets be registered concurrently with the registration of the ABS. In addition, Securities Act Rule 457, as amended by the Final Rules, reflects the SEC staff's position that no separate registration fee is required for the underlying collateral certificates or SUBIs.

Incorporating by Reference Subsequently Filed Exchange Act Reports Under the Final Rules, the SEC codified its staff interpretation regarding the incorporation by reference of subsequently filed periodic reports into shelf registration statements. Under Item 10(d) of new Form SF-3, the prospectus is required to contain a statement indicating either that all Exchange Act reports subsequently filed by the registrant prior to the termination of the offering shall be deemed to be incorporated by reference into the prospectus or that only current reports on Form 8-K shall be deemed to be incorporated by reference.

ASSET-LEVEL DISCLOSURE

Asset-Level Disclosure Requirements

Under the Final Rules, ABS backed by residential mortgages, commercial mortgages, auto loans, auto leases and debt securities, as well as resecuritizations, must comply with asset-level disclosure requirements, both in connection with the initial issuance of the ABS and on an ongoing basis in distribution reports on Form 10-D.[27] The SEC indicated that it is continuing to review specific requirements for equipment loans and leases, student loans, floorplan financings and credit and charge card receivables, although the timing of publication of any requirements relating to these additional asset types remains unclear.

The Final Rules include a specific list of asset-level disclosure requirements applicable to each of the specified ABS asset classes, with each individual requirement referred to as an **"asset-level data point."** A new Schedule AL included in new Item 1125 of Regulation AB identifies all the required asset-level data points.

All Asset Classes Asset-level data points that are applicable to each of the specified ABS asset classes include an asset number that is unique to each asset that would be used consistently in all reports, an underwriting indicator that specifies whether the asset "met the criteria for the first level of solicitation, credit-granting or underwriting criteria used to originate the pool asset,"[28] information about repurchases (such as whether a demand for repurchase has been received and whether the demand is in dispute or has been rejected or withdrawn, the date the asset was repurchased, the name of the repurchaser and reason for repurchase), and reporting period beginning and end dates.

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[26] See Securities Act Rule 457(s).

[27] See Item 1111(h) of Regulation AB and Form 10-D.

[28] See, for example, Item 1(c)(10) under Item 1125 of Regulation AB.

Residential Mortgages For residential mortgage loans, the 270 required asset-level data points include information with respect to each mortgage loan about the mortgaged property, the mortgage, the obligor's creditworthiness, original and current mortgage terms, mortgage insurance, loan performance information, modifications, losses and servicer advances. For first lien mortgages, information regarding subordinate liens is required to be included "if obtained or available."

Commercial Mortgages For commercial mortgages, the SEC noted that its requirements are largely comparable to the CREFC Investor Reporting Package. Specific requirements include asset-level data points regarding the terms of the related mortgage loans, information related to the underlying properties (including current valuations and any updated valuations obtained by any transaction party or its affiliates, property financial information, status of the property, and information regarding the three largest tenants (based on square feet)) and information relating to activity on the loan and the status of any demands to repurchase or replace the loan.

Auto Loans and Leases For auto loans or leases, the SEC pointed out that it substantially reduced the number of asset-level data points proposed to be required in the Original Proposal. The final rules provide for 72 data points for auto loan ABS and 66 data points for auto lease ABS. The required information includes information about an obligor's credit quality, the extent of verification of obligor income and employment, co-obligor information, the terms of the loan or lease, including term and initial grace period, interest rate and scheduled payments, payment activity, prepayments, servicer advances, modifications and extensions.

Debt Securities Issuers of ABS backed by debt securities[29] will be required to report, with respect to each underlying debt security, a standard industry identifier if available, its title, origination date, minimum denomination, currency, the trustee, whether the security is callable, frequency of payments and other basic characteristics. All information is required to be disclosed only if it is publicly available.

Resecuritizations Issuers of resecuritizations must provide the same disclosures that are required for debt security ABS. In addition, if the resecuritization consists of securities where the SEC has adopted asset-level disclosure requirements (i.e., ABS backed by residential mortgages, commercial mortgages or auto loans or leases) and the underlying ABS are subject to the asset-level disclosure requirements (i.e., the underlying securities are issued after the compliance date for applicable asset-level disclosure requirements), then a second tier of asset-level information is required with respect to the underlying assets in accordance with the requirements for the applicable asset class.

Asset-Level Filing Requirements

At the time of issuance of ABS, asset-level disclosures must be incorporated by reference in both the preliminary prospectus and the final prospectus. Such information must be filed in XML format on the SEC's EDGAR system and is referred to in amended Item 1111 of Regulation AB as an **"Asset Data File."**

The same asset-level disclosures are required to be updated and filed at the time of filing each Form 10-D (which under current requirements is within 15 days after each required distribution date) for each asset that is in the pool at any point in time during the reporting period.

[29] In the Original Proposal, the debt security asset class was categorized as "Corporate Debt."

In connection with each filing, issuers may also file an **"Asset Related Document"** that allows issuers to provide additional information, the definitions or formulas relating to any asset-level data and further explanatory disclosure regarding the information in the Asset Data File. An Asset Data File including the information required under Schedule AL, and any Asset Related Document, are required to be filed as exhibits to new Form ABS-EE. This filing is to be incorporated by reference in each prospectus and Form 10-D, as applicable.

Privacy Matters

Certain modifications from the lists of asset-level data points included in the Original Proposal applicable to mortgage loans and auto loans and leases were made to respond to privacy concerns. These changes were intended to reduce the likelihood of data points being used to identify obligors of the related receivables; for example, only the first two digits of a property zip code are required, and there are no fields for obligor income, monthly debt or sales price.

In addition, the SEC sought guidance from the Consumer Financial Protection Bureau (the **"CFPB"**) on the application of the Fair Credit Reporting Act (the **"FCRA"**). The CFPB provided guidance to the SEC to the effect that the FCRA will not apply to asset-level disclosures that exclude direct identifiers where the SEC determines that disclosure of such information is "necessary for investors to independently perform due diligence."

Foreign Asset-Backed Securities

The SEC opted not to provide an exemption for ABS backed by assets originated outside the United States, so ABS backed by foreign assets of the types identified above are also required to comply with the new asset-level disclosure requirements.

OTHER PROSPECTUS DISCLOSURE REQUIREMENTS

Transaction Parties

Identification of the Originator The SEC adopted an amendment to Item 1110(a) of Regulation AB to expand the existing requirements to identify originators in certain circumstances. Under the Final Rules, if the cumulative amount of assets originated by parties other than the sponsor or its affiliates comprises more than 10% of the total pool assets, then any originator(s) originating less than 10% of the total pool assets will also be required to be identified in the prospectus.[30]

Financial Information Regarding a Party Obligated to Repurchase Assets The SEC adopted amendments to Item 1104 and Item 1110 of Regulation AB to require disclosure of the financial condition of certain parties required to repurchase assets. Under the Final Rules, the standard focuses on whether there is a material risk that the financial condition of the sponsor or of an originator of 20% or more of the total pool assets could have an effect on such sponsor's or originator's ability to comply with any repurchase obligations in a manner that could have a material impact on pool performance or performance of the ABS. The SEC believes that this expanded disclosure will provide investors insight (at the time of their investment) into the capacity of the obligated parties to repurchase assets. The requirement does not require financial statements, but

[30] Under the prior rule, parties other than the sponsor or its affiliates originating less than 10% of the total pool assets were not required to be identified in the prospectus.

only information about such entities' financial condition (similar to the type of disclosure required under current rules regarding financial information of certain servicers).

Economic Interest in the Transaction The SEC adopted amendments to Items 1104, 1108 and 1110 to require disclosure regarding the interest retained in the transaction by sponsors, servicers or originators of 20% or more of the total pool assets, including the amount and nature of that interest, and disclosure of any hedge (security specific or portfolio) materially related to the credit risk of the securities that was entered into by those parties or, if known, by any affiliate of those parties to offset any risk position held. The preliminary prospectus is also required to include disclosure of the amount and nature of risk retention retained in order to comply with applicable law.[31] The final prospectus must disclose the actual amount and nature of the interest to be retained.

Prospectus Summary

The SEC revised an instruction to Item 1103(a) of Regulation AB to clarify its position on what should be provided in the prospectus summary. Specifically, the instruction identifies disclosure that may be included in the summary of the material characteristics of the particular ABS transaction, such as statistics regarding whether the loans in the asset pool were originated under various underwriting or origination programs, whether loans were underwritten as exceptions to the underwriting or origination programs, or whether the loans in the pool have been modified. The final instruction does not require specific disclosure but rather indicates the type of information that may be summarized. The final instruction also includes a requirement to cross-reference in the prospectus summary the location of corresponding disclosure in the body of the prospectus.

Modification of Underlying Assets

The SEC replaced Item 1108(c)(6) of Regulation AB with a more detailed and specific disclosure requirement in Item 1111 requiring a description of the provisions in the transaction agreements governing modification of the assets and disclosure regarding how modifications may affect cash flows from the assets to the securities. The SEC believes that more granular information about modifications will enable investors to better assess the possibility of a potential change in the cash flows.

Disclosure of Fraud Representations

The SEC did *not* revise Item 1111(e) of Regulation AB (as proposed) to require specific disclosure relating to whether or not the transaction documents contain a representation that "no fraud has taken place in connection with the origination of the assets on the part of the originator or any party involved in the origination of the assets."

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[31] This requirement is intended to address concerns that the final amount of retained interests may not be known at the time of sale and would include disclosure regarding the interest required to be retained to satisfy the credit risk retention rules proposed to implement the requirements of Section 15G of the Securities Act, as added by Section 941 of the Dodd-Frank Act (the "Risk Retention Rules"), when adopted. The re-proposal of the Risk Retention Rules is available at **http://www.sec.gov/rules/proposed/2013/34-70277.pdf**, and Orrick's related client alert is available at **http://www.orrick.com/Events-and-Publications/Documents/Orrick-Client-Alert-Credit-Risk-Retention-Re-Proposal-Sept-2013.pdf**.

Static Pool Disclosure

The SEC adopted revisions to Item 1105 of Regulation AB to increase the clarity, transparency and comparability of static pool information.

Disclosure Required The Final Rules include the following disclosure requirements for all issuers of registered ABS:

- narrative disclosure that provides appropriate introductory and explanatory information to introduce the static pool information (such as the number of loans that were exceptions to the standardized underwriting criteria);
- a description of the methodology used in determining or calculating the characteristics of the static pool (and a description of any terms or abbreviations);
- a description of how the assets in the static pool differ from the pool assets underlying the ABS being offered;
- the graphical presentation of the static pool information, if such presentation would aid in understanding; and
- in cases where an issuer does not include static pool information or includes disclosure that is intended to serve as an alternative to static pool information, disclosure of the rationale for doing so.

Amortizing Asset Pools The SEC added an instruction to Item 1105(a)(3)(ii) of Regulation AB to require for amortizing asset pools that the static pool information related to delinquencies and losses be presented in 30- or 31-day increments (in accordance with Item 1100(b)) through no less than 120 days. The revisions also require the graphical presentation of pool information relating to delinquencies, prepayments and losses.

Filing Static Pool Data The SEC amended Form 8-K and Item 601 of Regulation S-K to permit the incorporation of static pool information into a prospectus by reference to a Form 8-K filed by the date the prospectus is filed.[32] The SEC did *not* adopt their proposal to permit issuers to file their static pool information in portable document format (PDF) as an official filing.

Other Disclosure Requirements That Rely on Credit Ratings

The SEC revised Items 1112 (Significant Obligors of Pool Assets) and 1114 (Credit Enhancement and Other Support, Except for Certain Derivatives Instruments) of Regulation AB to eliminate the exceptions based on investment-grade ratings provided under such items.

PREFUNDING AND THE DEFINITION OF "ASSET-BACKED SECURITY"

The SEC amended the definition of "asset backed security" under Regulation AB to limit the amount of prefunding permitted in ABS transactions. A security must meet the definition of an

[32] Issuers may incorporate by reference the same static pool information into the prospectus of one or more offerings of the same asset class so long as the most recent periodic increment for the static pool data is of a date no later than 135 days before the first use of the prospectus.

"asset-backed security" under Regulation AB in order to use the disclosure requirements of Regulation AB and be eligible for shelf registration as an asset-backed security. The definition of "asset-backed security" in Regulation AB requires that the security be "primarily serviced by the cash flows of a discrete pool of receivables or other financial assets. . ." Nevertheless, Item 1101(c)(ii) allows an offering which includes a prefunding account (where a portion of the proceeds is to be used for future acquisition of additional assets) to be considered a discrete pool of assets, subject to restrictions. Under the final rules, the prefunding limits are reduced:

- for master trusts, from 50% to 25% of the aggregate principal balance of the total asset pool; and
- for other offerings, from 50% to 25% of the proceeds of the offering.

EXCHANGE ACT REPORTING

The Final Rules include a number of new requirements with respect to periodic reporting requirements for ABS under the Exchange Act and significantly change the distribution reports filed on Form 10-D and the annual reports filed on Form 10-K.

Distribution Reports on Form 10-D

Asset-Level Disclosure As discussed above, asset-level disclosure is required to be included in each distribution report on Form 10-D for transactions involving the ABS asset classes for which asset-level disclosure requirements have been adopted.

Delinquency Disclosure A newly adopted instruction to Item 1121(a)(9) of Regulation AB requires that pool level delinquency information included on Form 10-D be presented in 30- to 31-day increments in accordance with the existing Item 1100(b). However, instead of presenting the delinquency information through charge off (as is required under 1100(b)), the new instruction to Item 1121(a)(9) requires delinquency disclosure on Form 10-D to be presented through no less than 120 days.

Material Changes in Sponsor's Interest New Item 1124 of Regulation AB requires the disclosure on Form 10-D of any material changes in a sponsor's retained interest in the ABS transaction during the reporting period covered by Form 10-D, including any interest held by an affiliate, due to purchase, sale or any other acquisition or disposition of the securities (but not including pledges). The resulting amount and nature of any such interest retained in order to comply with applicable law must be separately stated.[33]

Other Changes to Form 10-D Amended Form 10-D requires the inclusion of the name and phone number of the contact person in connection with the filing on the cover page and a reference to the Central Index Key (**"CIK"**) number, file number and date of any previously reported information not included in the current report because it is substantially the same as the information previously reported. As discussed above, any request from an investor to communicate with other investors received during the reporting period covered by Form 10-D must also be disclosed.

[33] See footnote 31.

Annual Reports on Form 10-K

Servicer's Assessment of Compliance In addition to the existing requirement to disclose any material instances of non-compliance with servicing criteria identified on an Item 1122 report included as an exhibit to the annual report on Form 10-K, the Final Rules also require the disclosure of whether the identified instance of noncompliance involved the servicing of the assets underlying the ABS to which the Form 10-K relates. The Final Rules also require the disclosure in the body of the annual report of any steps taken to remedy a material instance of noncompliance previously identified by an asserting party for activities performed on a platform level with assets of the same type, regardless of whether the noncompliance involved the servicing of the assets underlying the ABS to which the Form 10-K relates.

Codifying an existing staff interpretation, a new servicing criterion has been added to Item 1122 requiring a servicer to assess the mathematical accuracy of any information aggregated by that servicer and the accuracy of any information (aggregated or not) conveyed by that servicer to another party.[34] Also codifying an existing staff interpretation, a new instruction to Item 1122 now requires a servicer's assessment of compliance to include a description of the scope of the servicing platform if such platform includes less than all of the ABS transactions it services that are backed by the same asset type as the assets underlying the applicable ABS.

Central Index Key Numbers

The Final Rules require the cover page of a registration statement on Form SF-1 or Form SF-3 to include the CIK numbers of the depositor and, if applicable, the sponsor, and the cover page of a Form 10-D, Form 10-K or Form 8-K to include the CIK numbers of the depositor, the issuing entity and, if applicable, the sponsor. These requirements are designed to improve the ease of locating the registration statement and the periodic reports related to a particular ABS offering.

EFFECTIVENESS AND COMPLIANCE

The Final Rules will be effective *60 days* after their publication in the Federal Register (which, as of the publication of this Client Alert, has not occurred).

General Compliance Registrants must comply with the Final Rules (other than the asset-level disclosure requirements) no later than the date that is *one year* after the effective date of the Final Rules. Any Form 10-D or Form 10-K filed after such date must comply with the Final Rules (other than the asset-level disclosure requirements).

Compliance with Asset-Level Disclosure Requirements Offerings of ABS backed by residential mortgages, commercial mortgages, auto loans and leases, and debt securities (including resecuritizations) must comply with the asset-level disclosure requirements no later than the date that is *two years* after the effective date of the Final Rules.

[34] If, for instance, information regarding the pool assets obtained by the assessing servicer, in the course of performing its servicing duties, is required by another party (who may also be a servicer) to perform its duties under the transaction, the assessing servicer must assess whether the aggregation of such information is mathematically accurate and whether the conveyed information accurately reflects the information. See new Item 1122(d)(1)(v) of Regulation AB.

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Please contact any of the below-listed authors of this Client Alert, any of the members of our Structured Finance Group or other Orrick attorneys with whom you work to discuss any questions you may have with regard to the foregoing.

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Text of the CEO Certification

From New Item 601(b)(36) of Regulation S-K:

1. I have reviewed the prospectus relating to [title of all securities, the offer and sale of which are registered] (the "securities") and am familiar with, in all material respects, the following: the characteristics of the securitized assets underlying the offering (the "securitized assets"), the structure of the securitization, and all material underlying transaction agreements as described in the prospectus;

2. Based on my 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;

3. Based on my knowledge, the prospectus and other information included in the registration statement of which it is a part fairly present, in all material respects, the characteristics of the securitized assets, the structure of the securitization and the risks of ownership of the securities, including the risks relating to the securitized assets that would affect the cash flows available to service payments or distributions on the securities in accordance with their terms; and

4. Based on my knowledge, taking into account all material aspects of the characteristics of the securitized assets, the structure of the securitization, and the related risks as described in the prospectus, there is a reasonable basis to conclude that the securitization is structured to produce, but is not guaranteed by this certification to produce, expected cash flows at times and in amounts to service scheduled payments of interest and the ultimate repayment of principal on the securities (or other scheduled or required distributions on the securities, however denominated) in accordance with their terms as described in the prospectus.

5. The foregoing certifications are given subject to any and all defenses available to me under the federal securities laws, including any and all defenses available to an executive officer that signed the registration statement of which the prospectus referred to in this certification is part.