

STRUCTURED FINANCE NOTES

JANUARY 12, 2005

SEC's Regulation AB – Major Changes for the Securitization Industry

INTRODUCTION

On December 15, 2004 the US Securities and Exchange Commission approved the final version of the long anticipated Regulation AB, which for the first time will provide a comprehensive set of federal securities rules and regulations for asset-backed securities. SEC Release No. 33-8518 contains the text of the final rules along with extensive commentary. The release can be accessed at www.sec.gov/rules/final/33-8518.pdf.

The final rules will govern an extensive set of securities law issues relating to ABS in the areas of registration, disclosure, communications, and reporting. Previously, there was no comprehensive set of rules and regulations on these topics, and instead the area was governed by a variety of no-action letters and SEC staff positions. A number of these positions were communicated through comment letters on specific registration statements, or otherwise through means that were not widely disseminated. As a result, the body of securities law applicable to ABS was characterized by significant uncertainty.

A principal goal of the SEC in adopting Regulation AB was to bring clarity and transparency to the regulations applicable to ABS, thus enhancing market efficiency. The SEC also sought to improve the quality of disclosure and reporting to investors, while avoiding the imposition of excessive regulatory burdens that might hamper the markets.

Prior to adopting the final rules, the SEC published proposed rules in May 2004 and received extensive comment letters on the proposal. The SEC also engaged in a constructive dialogue with industry and investor representatives. The final release makes clear that a substantial number of helpful changes were

made in the final rules based on comments received. In particular, the SEC frequently refers to comment letters from the American Securitization Forum, The Bond Market Association and the American Bar Association in its discussion.

Regulation AB consists of a series of provisions referred to as Items 1100 – 1123. In addition, the final rules include extensive revisions to other regulations and forms under both the Securities Act of 1933 and the Securities Exchange Act of 1934.

OVERALL IMPACT

In addition to providing much needed regulatory clarity, Regulation AB will have a major impact on both disclosure and reporting for ABS following the transition period.

- Issuers will have to provide substantial new static pool data at the time of each offering, although the SEC will allow the information to be provided through websites.
- Substantial additional prospectus disclosure will be required, especially as to servicers, originators, significant obligors of pool assets, enhancement providers and derivatives counterparties.
- Additional undertakings will be required in the registration statement.
- The form of periodic reports to investors will have to be revised to comply with the specific requirements of the new rules.
- Substantial changes in the content of reports under the Exchange Act, including numerous new triggering events that require filing of a Form 8-K report, will require new compliance policies and procedures for issuers.

- Ongoing financial statement reporting will be required for certain significant obligors, enhancement providers and derivatives counterparties.
- So long as Exchange Act reports are required, all significant servicers involved in an ABS transaction must prepare an annual assessment of compliance with new servicing criteria that are specified in Regulation AB and obtain an accountant's attestation report.
- The signer of the annual report on Form 10-K will be required to certify that all required assessments of compliance have been filed, except as disclosed.

TRANSITION RULES

The effective date of the final rules is March 8, 2005. However, in response to comment letters requesting a substantial transition period, the SEC has provided a set of delayed compliance dates as described below.

Any series of ABS with an initial bona fide offering date after December 31, 2005 must comply with the new rules and forms in all respects.

Transactions with an initial bona fide offering date on or before December 31, 2005 are fully grandfathered and are not required to comply with the new rules. In particular, for these transactions: 1) the static pool data and other new disclosure requirements do not apply to the offering, and 2) the new reporting rules, including the new assessment of compliance and attestation requirements, will never apply.

Keeping in mind that only ABS offerings after December 31, 2005 must comply with the disclosure and registration statement undertakings of the new rules, the transition period rules provide for how ABS shelves filed prior to that date must be amended to comply.

For an ABS shelf registration statement filed on or before August 31, 2005: 1) for any takedown with an initial bona fide offering date after December 31, 2005 but not after March 31, 2006, the base prospectus does not need to be revised, however the base prospectus and the prospectus supplement taken together must comply with the new rules, and Part II of the registration statement must be amended post-

effectively as necessary to add any required undertakings, and 2) for any takedown with an initial bona fide offering date after March 31, 2006, the registration statement must be amended post-effectively to make the base prospectus comply with the new rules, and to add any required undertakings to Part II (if not already added).

For an ABS shelf registration statement filed after August 31, 2005: for any takedown with an initial bona fide offering date after December 31, 2005, the registration statement must be amended either pre-effectively or post-effectively to make the base prospectus comply with the new rules, and to add any required undertakings to Part II.

It should be noted that any post-effective amendment to an ABS shelf registration statement for the purpose of making the base prospectus comply with the new rules may trigger a full review by the staff.

Accordingly, we would advise ABS issuers to take the following steps in anticipation of the new rules. Issuers may wish to make sure that they have filed ABS shelf registration statements that have become effective before August 31, 2005 with capacity to last through March 31, 2006. Such registration statements would not have to comply with Regulation AB at the time of effectiveness and therefore would be unlikely to draw comments from the SEC relating to compliance with Regulation AB. It would be helpful to include with such registration statements at the time of filing the Part II undertakings required under Regulation AB, in order to avoid having to add them post-effectively.

ABS shelf registration statements filed after August 31, 2005 can be expected to draw comments from the SEC relating to compliance with Regulation AB. As indicated above, these shelves will have to comply fully for takedowns after December 31, 2005. It can be inferred that the SEC wanted to allow a period of up to 4 months in which to engage in full reviews of ABS shelf registration statements to allow sufficient time to allow for effectiveness by that date.

IMMEDIATE IMPACT

Even though the full impact of the new rules will not be felt for some time, there are a number of ways in which the final release will have an immediate impact on the securitization industry. This is generally due to the fact that the final release clarifies the SEC's positions on current law in a number of areas, the ability to refer to the final rules now for guidance on certain issues, and the anticipated effect of the new rules in certain areas.

Examples of the immediate impact of the new rules include the following:

- Exchange Act compliance: as of January 1, 2006 eligibility for use of a Form S-3 for an ABS issuer will depend on the compliance by the depositor, and by all affiliated depositors securitizing the same asset type, with all Exchange Act reporting requirements for the preceding 12 months. Because this compliance testing period has already begun, ABS issuers should immediately take any necessary steps to make sure they are in compliance.
- Market making transactions: as discussed below, there is no longer any requirement in secondary transactions to update the prospectus, or to maintain Exchange Act reporting after it is allowed to be suspended as a means of updating the prospectus, merely because the depositor is affiliated with the dealer. This applies regardless of whether the dealer is affiliated with the servicer.
- Disclosure thresholds: the final rules can be looked to now for guidance as to whether to identify or provide additional disclosure for servicers, originators, significant obligors, enhancement providers and certain derivatives counterparties.
- Multiple loan groups: transactions involving a single trust with separate loan groups backing separate sets of ABS classes can now be done without any crossing of cash flows.
- Reperforming loans: loans with prior delinquencies that are "reperforming" under the sponsor's criteria can be included in a

pool without regard to the 20% limit on delinquent assets.

- Term sheets and computational materials: the final rules can be looked to now for guidance as to what can be included in ABS term sheets and computational materials. Under the final rules, the permitted content may be broader than what is used currently in some respects. Issuers should discontinue use of legends stating that the materials are superseded by the final prospectus.
- Initial/final pool changes: in the event that the final asset pool delivered at closing differs from the pool as described in the final prospectus, the final rules can be looked to now for guidance as to whether updated disclosure should be provided.
- Prefunding completion: the final rules can be looked to now for guidance as to what disclosure should be provided upon completion of a prefunding period.

In addition, ABS market participants should begin to consider changes in standard documentation. For example, purchasers of whole loan pools where the assets may be securitized in the future, at some point should consider requesting changes to the purchase documentation to require the seller to provide information needed to meet the new disclosure requirements. As another example, conduits that purchase assets servicing retained and then securitize and master service those assets, should consider when to make servicing agreement or guide changes needed to require the servicers to deliver the assessment of compliance reports and attestations under the new requirements.

SUMMARY OF KEY CHANGES

Following is a summary of key changes made by the final rules as compared to current law and practices. Please note that the following discussion is only a summary and omits many details. The discussion below also omits reference to many provisions of Regulation AB which codify existing SEC positions without significant change, and does not address further changes that may result under the Securities Offering Reform proposal.

I. Registration

A. Definition of asset-backed security

Regulation AB contains a new definition of “asset-backed security.” Asset-backed securities can only be registered on a Form S-3 shelf registration statement, or a Form S-1 non-shelf registration statement. Securities that are asset-backed securities must comply with all provisions of Regulation AB, regardless of which form is used for filing. The definition is similar to the one that currently appears in Form S-3, and retains the core requirement that the security “is primarily serviced by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite period of time.”

Asset-backed securities registered on Form S-3 must be rated investment grade (this requirement does not apply under Form S-1).

The definition also includes a requirement that the issuing entity be passive. The SEC indicates that this excludes a “series trust,” which is a structure where a single trust issues several transactions backed by separate asset pools. However, in discussing this requirement the SEC makes clear that the following structures are permitted:

- A typical master trust where all securities though issued at separate times are backed by a single pool, including those that also include an “issuance trust.” Assets can be added to a master trust, both to facilitate the issuance of new series as well as to maintain the balance of existing series pursuant to a revolving period.
- A transaction with one asset pool where cash flows from different subpools support separate groups of classes, regardless of whether there is any cross support.
- Titling trusts where a single titling trust is used to issue multiple beneficial interests (SUBIs) backing different ABS transactions; provided that this structure can only be used for asset classes such as auto leases that currently use the structure.

B. Synthetics and derivatives

Synthetic securities are excluded from the definition of asset-backed security and the Regulation AB regime. The SEC intends to exclude transactions where payments on the securities depend primarily or entirely on assets that are not included in the securitized pool. For example, if the pool included a derivative tied to the “value of an equity or commodity or other index” and payment on the securities was based “primarily” on that index, the security would not qualify. Credit default swaps and total return swaps cannot be used where they create an exposure to an asset not transferred to the pool.

The SEC draws a principles based distinction between synthetic transactions, and securitizations that use a derivative to “reduce or alter” risk from the assets in the securitized pool. Interest rate and currency swaps are permitted, as are credit default swaps that protect against losses on assets included in the pool.

C. Resecuritizations and repackagings

Resecuritizations of ABS, as well as repackagings of corporate debt securities, are within the definition of asset backed security. Specific provisions address whether there is a separate registration requirement for the underlying security. In addition, these transactions may be subject to significant obligor disclosure, discussed below, independently of any registration requirement.

D. Delinquent and non-performing assets

The definition of asset-backed security prohibits the inclusion of any non-performing assets, and provides that delinquent assets cannot be 50% or more of the pool. For asset-backed securities registered on Form S-3, delinquent assets cannot be 20% or more of the pool. These limits are tested at the cut-off date (with a special rule for master trusts). Non-performing and delinquent assets in the trust that are not purchased with the ABS proceeds and whose cash flows do not back the ABS (for example, that are held in a reserve fund as credit enhancement) do not count towards these limits.

Under the final rule, a delinquent asset is one that is more than “30 or 31 days or a single payment cycle, as applicable” past due, as determined

under: the transaction documents; the delinquency recognition policies of the sponsor, an affiliated originator or the servicer; or the delinquency recognition policies of an applicable regulator. These rules are intended to be flexible, and are intended to permit the inclusion of loans that are considered current due to “grace periods, re-aging, restructures, partial payments considered current or other such practices”, which are required to be disclosed. Thus, for example, reperforming loans can be treated as current even if not contractually modified. Also, either the MBA or the OTS method can be used, but must be disclosed.

Similarly, a non-performing asset is one that has been wholly or partially charged-off, as determined under: the transaction documents; the charge-off policies of the sponsor, an affiliated originator or the servicer; or the charge-off policies of an applicable regulator.

E. Leases

The definition of asset-backed security includes new provisions that permit financial assets that are leases, where part of the cash flows are derived from the residual value of the leased asset. However, the portion of the pool balance attributable to residual values is limited to 65% for motor vehicle leases (excluding leisure craft) and 50% for other types of leases. For asset-backed securities registered on Form S-3, the limitations are 65% for motor vehicle leases (excluding leisure craft) and 20% for other types of leases.

F. Prefunding and revolving periods

Under the final rules, prefunding amounts are limited to 50% of the offering proceeds (or, for master trusts, up to 50% of the total asset pool). The prefunding period is limited to one year from the date of issuance. These limits apply to all ABS, regardless of whether registered on Form S-3 or S-1.

A revolving period for an ABS refers to a period of time during which collections on the pool assets can be used by the issuing entity to acquire additional assets, as opposed to being used to make payments on the ABS, thus preventing the principal amount of the ABS from being reduced. Under the final rules, for ABS that are not backed by assets that are themselves revolving accounts,

the revolving period applicable to the ABS cannot be more than 3 years, and there is no percentage limit on the amount of assets that can be acquired in this manner. For ABS backed by assets that are themselves revolving accounts, the revolving period is not limited. All of these provisions apply regardless of whether the ABS are registered on Form S-3 or S-1.

G. Form S-3 eligibility

Under the final rule, in order to be eligible to file a Form S-3 shelf registration statement for ABS, the following requirement must be satisfied as to all securitizations previously issued by the depositor, and by any affiliate of the depositor involving the same asset class: to the extent that any such securitizations were subject to Exchange Act reporting requirements during the preceding 12 calendar months (as well as the current month up to the date of filing), all material required to be filed under the Exchange Act must have been filed in a timely manner (except that the timeliness requirement does not apply to certain Form 8-K reports). The requirement does not apply to the extent that reporting was properly suspended for any securitization.

While a significant change from current law, this requirement is not as onerous as the proposed version which could have extended to reporting requirements of non-affiliated sponsors, and also was not limited to the same asset class. For affiliated depositors that were acquired in a business combination during the twelve month period, there is also an exception for non-compliance by such entities prior to the business combination.

The SEC clarifies in the final release that this requirement is tested solely at the time of filing, so that post-filing non compliance would not result in ineligibility to use the shelf.

The final rule also clarifies that the “issuer” of an ABS is the depositor, acting solely in its capacity as depositor to the issuing entity for all purposes under the Securities Act.

H. Foreign ABS

Under the final rules, ABS issued by a foreign issuer or backed by assets outside the United States will be eligible for registration on the same

forms as domestic ABS, subject to specified additional disclosure requirements.

I. "48 hour rule"

The SEC has codified an exclusion from the requirement under Exchange Act Rule 15c2-8 to deliver a preliminary prospectus at least 48 hours prior to sending of the confirmation, for all ABS registered on Form S-3.

II. Market making

In the proposal, the SEC took the position that a current prospectus was required for market-making transactions; namely, secondary sales by dealers who are affiliated with the depositor. Moreover, the SEC indicated that all pool information in the original prospectus would have to be updated in the market-making prospectus.

A number of commenters, including The Bond Market Association, the American Securitization Forum and the American Bar Association, argued that the policy reasons for requiring a market-making prospectus did not reasonably apply to ABS. Comments also stated that there were adequate protections under federal securities laws to prevent misuse of information by dealers in these transactions.

In the release for the final Regulation AB, the SEC stated that "we are sufficiently persuaded by these comments such that we will no longer require registration and delivery of a prospectus for market-making transactions" for ABS. (See the release at footnote 192.)

In other words, there is no longer any requirement in secondary transactions to update the prospectus, or to maintain Exchange Act reporting after it is allowed to be suspended as a means of updating the prospectus, merely because the depositor is affiliated with the dealer. This position applies regardless of whether the dealer is affiliated with the servicer. We believe this position can be relied upon effective immediately.

This position does not apply to registered remarketing transactions, resecuritizations where information must be provided on the underlying ABS, or a delayed or continuous selling shareholder offering. However, these exclusions

would not apply to typical market-making transactions.

III. Static pool information

One of the most important areas of Regulation AB is the new requirement to disclose static pool information. Static pool information tracks the performance of a specific pool of loans or assets over time. In response to comments, the SEC made a number of helpful changes from the proposal that limit the scope of the information required to be provided. In addition, the SEC will permit static pool information to be disclosed on a website, at least through 2009.

Nevertheless this change is one of the most significant in terms of the compliance burden on issuers, as well as the interpretive issues and questions that will arise.

A. Starting point for disclosure

Item 1105 describes the disclosure to be provided under separate provisions for amortizing asset pools and for revolving asset master trusts. In each case the disclosure is required "unless the registrant determines that such information is not material" (see the discussion below). The SEC refers to these disclosure requirements as the "starting point" for determining what must be provided.

1. *Amortizing asset pools*

For sponsors with at least 3 years experience securitizing the relevant asset type, the starting point is static pool information regarding delinquencies, cumulative losses and prepayments for prior securitized pools of the sponsor.

Sponsors with less than 3 years experience are to consider instead providing information by vintage origination years for originations or purchases by the sponsor.

In either case, information should be provided relating to the preceding 5 years, or such shorter period that the sponsor has been securitizing, originating or purchasing that asset type. Also, summary information about the original characteristics of each prior securitized pool or vintage year must be provided, including characteristics such as interest rate, term, balance,

credit score, LTV and geographic distribution, as applicable and material.

2. *Revolving asset master trusts*

For revolving asset master trusts, the approach is very different because the trust assets are a non-static portfolio. Here the starting point is data regarding delinquencies, cumulative losses, prepayments, payment rate, yield and credit score of all assets in the master trust, in separate increments based on the origination date of the assets, in 12-month increments over the first 5 years of the account's life.

B. Materiality

Issuers are required to make a determination as to whether the static pool information is material. For some asset types it may be possible to conclude that static pool data would not be material, such as commercial mortgage loans on the ground that the assets are non-fungible, or repackaged corporate debt.

The SEC did not include a specific requirement to include static pool information on the assets being securitized, however this should be provided if material. This information might be material, for example, for securitizations of seasoned loans, or for resecuritizations of ABS.

C. Alternative disclosure

There is a specific provision that states that if the starting point information would not be material, but other static pool information would be material, then the alternative information should be provided. This alternative might be appropriate, for example, for sponsors that are conduit purchasers of assets from a variety of originators. Such a sponsor might consider, for example, whether it would be better to disclose static pool information on its own prior securitized pools (including the originator as one of the summary characteristics), or to provide static pool information of each originator with a material concentration.

D. Liability standard, unavailable information

The SEC recognizes that requiring historical data may initially pose special difficulties. Therefore special rules will apply to static pool information

regarding: 1) prior securitized pools of the sponsor that were established prior to January 1, 2006 and 2) the pool being offered, for periods before January 1, 2006.

For such static pool information, the information can be omitted if not known and not available to the registrant without unreasonable effort or expense. Moreover, such static pool information will not be deemed to be part of the prospectus or registration statement, and therefore will be subject only to Rule 10b-5 liability.

Note that these provisions do not apply to vintage pool information.

No safe harbor was provided for the selection of the static pool information disclosed, as had been requested.

E. Website disclosure

The SEC provided a temporary rule, under which required disclosure of static pool information can be made through a website, until December 31, 2009 under the following conditions. If these conditions are met, the static pool information is not required to be in the prospectus or filed on Form 8-K; however, except for the pre- January 1, 2006 information referred to above, the information will be deemed to be included in the prospectus and registration statement for liability purposes.

The base prospectus filed with the registration statement must disclose the intent to use a website, and the final prospectus must contain the internet address where the information is posted. The internet address should not be to the issuer's general website or to a general purpose reporting website, but should go directly to the information that is required to be provided for that offering (or to an index page for multiple offerings with further links to the information being provided for each specific offering). In other words, the issuer cannot simply refer to all of its posted static pool information, but must identify specifically the static pool information that it considers to be material for each specific offering.

The website must be unrestricted and free of charge. The SEC believes it is not appropriate to require user registration to access the site.

The information must remain available on the website, and the registrant must retain records of the information posted (and any revisions), for at least 5 years.

The registration statement must contain an undertaking that the information is deemed to be included in the relevant prospectus and registration statement.

The SEC hopes to modify EDGAR to facilitate electronic filing of static pool information by the beginning of 2010.

IV. Other disclosure changes

In other areas, Regulation AB significantly expands required disclosure in the prospectus by providing detailed guidelines for specific items. However, for all items issuers must assess materiality. Disclosure is not required if the item is not applicable.

A. Transaction parties

Regulation AB requires disclosure about specific transaction parties.

1. *Sponsor*

The sponsor is the person that organizes and initiates an ABS transaction by transferring the assets, directly or through the depositor, to the issuing entity. Normally this person will be an affiliate of the depositor. However in a rent-a-shelf transaction it may be a non-affiliate, and in some cases there may be multiple sponsors.

Disclosure required under Item 1104 includes a general description of the sponsor's securitization experience with all asset types, and a detailed description of its experience and procedures for originating or acquiring and securitizing the relevant asset type. Other relevant information must be disclosed, such as defaults or performance triggering events on prior securitizations, and actions taken outside the ordinary performance to prevent such events. Also, the sponsor's underwriting criteria should be described and the extent to which it relies on securitization for funding.

2. *Issuing entity, documents and structure*

Basic disclosure is required under Item 1107 about the issuing entity. Note that the governing documents for the issuing entity, as well as all governing documents and material agreements related to the ABS, must be filed as exhibits to the registration statement. For deals registered on Form S-3 filing can be made on a Form 8-K. There is no clear deadline for filing these documents, however they should be filed as soon as practicable after they are finalized.

If the pool assets are securities, then Regulation AB now requires disclosure of the market price of the assets and how it was determined. This applies to ABS resecuritizations, as well as corporate debt repackagings.

The prospectus is also required to describe legal structural elements of the transaction. For example, disclosure must be made as to whether any security interests in the pooled assets are granted or perfected, whether the issuing entity is bankruptcy remote and whether it would be consolidated in the event of the bankruptcy of another entity such as the sponsor, and whether the pooled assets are beyond the reach of others in a bankruptcy of the issuing entity. Any material risks related to these matters must be disclosed as risk factors. Legal opinions on these issues are not required to be filed.

3. *Servicers*

As proposed, the SEC adopted a broad definition of "servicer" that includes all entities that have any responsibility for 1) managing or collecting pooled assets, or 2) making allocations or distributions to investors. This includes servicers, master servicers, primary (or sub-) servicers, special servicers, and administrators, whether or not in direct contractual privity with the trust. A "naked" trustee would not be a servicer. Also, a trustee that acts as paying agent but does not calculate distributions or otherwise administer cash flows would not be a "servicer".

Disclosure is required under Item 1108 as follows:

10% threshold: every master servicer, affiliated servicer, unaffiliated servicer that services 10% or more of the assets, and every material

administrator or special servicer, must be identified.

20% threshold: additional information must be provided for every master servicer, affiliated servicer, unaffiliated servicer that services 20% or more of the assets, and every material administrator or special servicer. This includes a general description of the servicer's experience with servicing all asset types, and a detailed description of its experience and procedures for servicing the relevant asset type including any material changes in the past three years. Also required is the size, composition and growth of the servicer's portfolio. Other relevant information, such as defaults or performance triggering events relating to servicing on prior securitizations, and disclosed instances of material noncompliance with servicing criteria in other securitizations also must be disclosed.

Financial information of the servicer is not generally required, however disclosure is required to the extent there is a material risk that the financial condition could materially impact performance of the ABS. A specific proposed requirement to describe computer systems and backup systems was deleted.

There is a specific requirement to provide "statistical information regarding past advance activity" if material. However, note that there is no express requirement to provide servicer portfolio loss and delinquency information in the format typically found in prospectuses today. Also, there is no requirement to provide static pool information on pools serviced by the servicer.

For servicers that perform only limited functions, such as an administrator, the disclosure is required only as to the servicer's experience and procedures relevant to those functions.

Current forms of disclosure should be reviewed to make sure that all required disclosure is included about servicing processes and procedures, and about transferring servicing.

4. *Trustees*

The description of the required disclosure for trustees in Item 1109 appears similar to current practice. However, in the final release the SEC clarifies that the requirement to "describe the

trustee's duties and responsibilities" should address items such as the extent to whether the trustee independently checks cash flows, activity in transaction accounts, and compliance with transaction covenants.

5. *Originators*

Disclosure is required under Item 1110 regarding originators other than the sponsor or its affiliates as follows:

10% threshold: every originator that originated 10% or more of the assets, must be identified.

20% threshold: additional information must be provided for every originator that originated 20% or more of the assets. This information includes a description of the originator's experience with originating the relevant asset type. Also required is a description of the size and composition of the originator's portfolio and its underwriting criteria, if material.

B. Pool assets

Regulation AB includes detailed disclosure requirements for the pool assets in Item 1111. While the requirements are for the most part consistent with good disclosure practices today, current forms should be reviewed to make sure that all required disclosure is included.

If material, tabular data showing number, amount and percentage of pool for assets in ranges of a given variable (such as interest rate or balance) should also show other parameters for each range, such as weighted average LTV or credit score.

Credit scores are specifically required to be disclosed if material and if applicable. The SEC believes investors generally consider credit scores to be material.

If 10% or more of the pool is located in any one state or geographic region, information is required regarding any "economic or other factors" specific to the state or region that may materially impact the pool.

Delinquency and loss information for the pool being securitized (if applicable) is required. In addition, disclosure is required about how delinquencies or charge-offs are determined,

including how grace periods, re-aging, restructures, and partial payments considered current are treated for this purpose, and the amount of the pool that was re-aged.

Regulation AB takes a tiered approach for disclosure about commercial mortgage loans. Certain information is required for all such loans, such as location, net operating income, and occupancy rates. For loans representing 10% or more of the pool, more specific information is required. (See also “Significant obligors” below.)

C. Transaction structure

Item 1113 of Regulation AB includes detailed disclosure requirements for the transaction structure, and current forms of disclosure should be reviewed to make sure that all required disclosure is included.

A new requirement under this section is to include a separate table with an itemized list of all fees and expenses to be paid out of the cash flows. This would include, for example, premiums for financial guaranty insurance.

In addition, the identity of the holder of the economic residual interest must be disclosed, but only if the holder is affiliated with the sponsor, depositor or other transaction participant (including a servicer or credit enhancer), or if the holder has rights that may alter the transaction structure.

The identity of the holder of any cleanup call or other termination option or obligation must also be disclosed, as well as whether the party is affiliated with the sponsor, depositor or other transaction participant (including a servicer or credit enhancer).

D. Significant obligors

Under Item 1112, a “significant obligor” is an obligor, single property or lessee, or related group, as to pool assets representing 10% or more of the pool. For pool assets that are mortgages or leases on real property, if they are non-recourse to the obligor and the obligor is a special purpose entity, then financial disclosure is required only as to the property, not the obligor.

10% threshold: for significant obligors representing 10% or more but less than 20% of the pool assets, selected financial data is required.

20% threshold: for significant obligors representing 20% or more of the pool assets, audited financial statements are required. (See “Financial information” below.)

For ABS resecuritizations where there is a 10% or more concentration as to any underlying ABS, then instead of the foregoing, in the resecuritization prospectus certain specified information that would be required in a current prospectus for each such underlying ABS must be disclosed.

E. Credit enhancement

For all material external credit enhancements, including financial guaranty insurance, guarantees, liquidity facilities, and derivatives used to provide credit support, the related agreements must be filed under Item 1114.

10% threshold: for credit enhancers that are contingently liable for payments representing 10% or more but less than 20% of the cash flow supporting any offered class, selected financial data is required.

20% threshold: for credit enhancers that are contingently liable for payments representing 20% or more of the cash flow supporting any offered class, audited financial statements are required. (See “Financial information” below.)

A special alternative disclosure applies for FFELP student loans.

F. Derivatives

Disclosure is required under Item 1115 for all derivatives included in an ABS transaction, other than ones used for credit enhancement. For all derivatives, the related agreements must be filed.

Under Regulation AB, derivatives can only be included in an ABS transaction if 1) they are used to provide credit enhancement (as discussed above) or 2) they are used to alter the payment characteristics of the cash flows from the issuing entity, such as interest rate and currency swaps. This is intended to permit only derivatives that “reduce or alter” risk from the assets in the

securitized pool. Derivatives cannot be used where they create an exposure to an asset not transferred to the pool.

As requested in various comment letters, for purposes of disclosure thresholds, derivatives (other than for credit enhancement) will be measured based on a reasonable good-faith estimate of their “maximum probable exposure” calculated in the same way as would be for risk management purposes in a credit decision about the counterparty. That estimate is then compared to the total balance of the pool, or if the derivative related only to specific classes then to the balance of those classes.

10% threshold: for any derivative, if the resulting percentage is 10% or more but less than 20%, selected financial data is required.

20% threshold: for any derivative, if the percentage is 20% or more, audited financial statements are required.

G. Legal proceedings

Item 1117 requires disclosure of legal proceedings pending, or known to be contemplated by a governmental authority, against entities including the sponsor, trustee, and servicers and originators that are within the 20% threshold disclosure category, that is material to investors. The proposal to include credit enhancers in this group was deleted. Issuers will need to consider what ongoing diligence will be necessary to meet this requirement.

H. Affiliates and related transactions

Item 1119 requires disclosure of any affiliation between the sponsor, depositor or issuing entity and any: trustee, any servicer that is within the 20% threshold disclosure category, or any originator, significant obligor, credit enhancement provider or derivatives counterparty that is within the 10% threshold disclosure category. Also required is disclosure of transactions or relationships in the past 2 years with any such parties: 1) that are non-ordinary course or non-arm’s length, or 2) that are material and that relate to the ABS transaction or the pool assets. Note that disclosure of all material transactions or relationships between the sponsor, depositor or issuing entity and any

underwriter is required under other, existing regulations.

I. Financial information

As discussed above, financial information is required for significant obligors, credit enhancers and derivatives counterparties based on the specified disclosure thresholds. Note that in all cases where such information is required as to a foreign business, the requirement may be complied with by providing information as previously filed on Form 20-F (for foreign businesses that are private issuers).

For any of such financial information that is required to be filed by an ABS issuer, the information can be incorporated by reference from the relevant entity’s Exchange Act reports, subject to certain conditions.

In addition, for any of such financial information that is required to be filed by an ABS issuer relating to certain significant obligors, the issuer can simply refer to the information as contained in the relevant entity’s Exchange Act reports, subject to certain conditions. Note that unlike incorporation by reference, referring to the significant obligor’s financial information does not cause the ABS issuer to assume liability for the information referred to.

In either case, if the underlying significant obligor, credit enhancer or derivatives counterparty stops filing Exchange Act reports, the ABS issuer is still required to file the required financial information. In addition, this information must be periodically updated in the ABS issuers Exchange Act reports as long as they are required to be filed (see the discussion below). For an ABS resecuritization with a 10% or more concentration as to any underlying ABS, for so long as Exchange Act reports are required at the resecuritization level, the disclosure required under Form 10-K must continue to be provided as to the underlying ABS, even if reporting was suspended for the underlying ABS.

In corporate debt repackagings, the documents typically provide that the transaction will terminate if the underlying obligor ceases reporting. This approach is not necessarily practical for significant obligors in other types of ABS, or for credit enhancers or derivatives counterparties.

ABS issuers in transactions involving significant obligors, credit enhancers and derivatives counterparties where financial disclosure is required under the new rules will have to develop procedures for obtaining financial information from such entities that cease filing Exchange Act reports, or that are not reporting companies. ABS issuers may be effectively barred from engaging in business with such entities where financial disclosure would be required under the new rules, unless such entities are Exchange Act reporting companies or they agree by contract to provide the required financial information including audit reports and consents.

V. Communications

Regulation AB codifies the existing no-action letter provisions for computational materials, structural term sheets and collateral term sheets. All such materials that were previously allowed are included in a new definition of "ABS informational and computational material" ("ABS ICM"). As before, use of ABS ICM is not mandatory.

A. ABS ICM

The definition broadly permits factual information about the ABS including the structure and the various classes, factual information about the pool assets, and statistical information about class performance under various scenarios. The definition also makes clear that items can be included such as tax and ERISA treatment and other legal aspects of the ABS, a description of key parties, and a description of the offering procedures. Static pool data of the sponsor or the servicer can be also provided as ABS ICM.

ABS ICM are only permitted to be provided in connection with an offering of ABS registered on Form S-3, after its effective date. All materials within the definition of ABS ICM that are provided in connection with an offering, prior to delivery of the final prospectus, are themselves considered prospectuses subject to liability under Section 12(a)(2) and, if filed, Section 11 of the Securities Act. Any such materials provided with or after the final prospectus are not themselves considered to be prospectuses or required to be filed.

B. Filing Requirements

Any ABS ICM that are provided in connection with an offering, prior to delivery of the final prospectus, are required to be filed if: 1) they were provided at any time to an investor that indicated it would purchase, or 2) they were provided to any investor after the final terms were set. Filing is not required for ABS ICM that relate to abandoned structures, or that were provided to an investor prior to the time the final terms were set if the investor did not indicate it would purchase prior to that time. Also, filing is not required for any ABS ICM that do not contain "new or different" information from other such materials filed. Materials may be filed in an aggregated or consolidated form.

If filing is required, the deadline for all types of ABS ICM is the later of: 1) the due date for filing the final prospectus, or 2) 2 business days after first use.

C. Legending

The ABS ICM must contain a legend advising the investor to read other documents filed or to be filed (including the final prospectus) "because they contain important information". However, the SEC indicates in the final release, based on its views as articulated in its recent Securities Offering Reform proposal regarding the adequacy of information provided at the time of the contract of sale, that it would be "inappropriate" for ABS ICM to contain a legend stating that they will be superseded by the final prospectus. Also, legends on ABS ICM may not disclaim accuracy or completeness of the information provided, or state that they are not a prospectus or an offer.

D. Clarification of loan level data

The final release also makes clear that loan level data is permitted under the definition (and also under the existing no-action letters). We advise the removal of borrower name, address and social security number information from any materials that might be filed.

E. Clarification of third party analytic services

The final release also addresses the use of third party analytic services, such as Bloomberg and Intex. These services allow an issuer or underwriter to transfer or upload data about the structure and underlying assets of an ABS transaction being offered, so that investors can access the third party service to perform their own analytics. Alternatively, using software provided by the third party service, an issuer or underwriter can imbed data about the structure and underlying assets of an ABS transaction being offered into a file, which is then provided to the investor and can be used by the investor in accessing the third party service to perform its own analytics.

The SEC clarifies that in connection with the use of third party analytic services, only the “inputs, models and other information” about the structure and the collateral provided by the issuer or underwriter are ABS ICM for purposes of the rule. The SEC also notes that information required to be filed may be consolidated so long as no substantive content is omitted, and must be in an understandable form. Executable code is not required to be filed.

We believe that it is not necessary to file a data file that was provided by the issuer or underwriter to a third party analytic service, or that was provided to an investor for use in accessing such a service. Rather, we believe that the filing requirement is met if all substantive information about the pool assets and structure and terms of the ABS, that is imbedded in any such data file provided by the issuer or underwriter to such a service or to an investor, is filed. If all of that substantive information is included in other ABS ICM that are or will be timely filed, then there would be no additional filing requirement related to the data file.

The SEC notes that the result may be different if there is a particular relationship with the analytical service, such as an affiliation with the issuer or underwriter, or a compensation structure that raises questions.

F. EDGAR

The SEC is eliminating the electronic filing exemption that was previously granted for computational materials.

G. Research reports and tombstones

The previous no-action letter guidance for ABS research reports was codified substantially as proposed under new Rule 139A. The SEC did not provide any expansion of Rule 134 tombstones for ABS, as had been requested in comments. A minimal expansion of Rule 134 for ABS may be provided under the recent Securities Offering Reform proposal, but it is not the intent of the SEC to permit detailed term sheets for ABS under this provision.

VI. Reporting

Regulation AB contains substantial changes in Exchange Act reporting requirements for ABS issuers. The overall effect is to substantially increase required content of distribution statements to investors, increase Exchange Act reportable events, establish minimum servicing and administration criteria, and increase compliance monitoring by responsible parties. These changes reflect a key SEC concern that servicers must develop systems and processes that substantially improve their overall level of compliance with Exchange Act reporting requirements.

The final rule also clarifies that the “issuer” of an ABS is the depositor, acting solely in its capacity as depositor to the issuing entity, for all purposes under the Exchange Act. As a result, reporting requirements arise and may be suspended separately for each issuer (that is, for each separate ABS series).

Regulation AB will require separate Exchange Act reporting for each ABS series, instead of permitting combined reporting for all series of the same depositor.

The new requirements will apply to all publicly offered ABS with an initial bona fide offering date after December 31, 2005, at least for the fiscal year in which the offering is made. As under current law, Exchange Act reporting can be suspended for any ABS series in any subsequent

fiscal year if there are less than 300 holders of record of that series at the beginning of the year.

The final rules also clarify that, if an ABS offering occurs near the end of a fiscal year but the first distribution does not occur until the following fiscal year, a Form 10-K report would nevertheless be required for the fiscal year of the offering. This is a change from the SEC's prior position.

A. Responsibility for preparing and signing reports

As proposed, Form 8-K and new Form 10-D can only be signed: 1) by the depositor, or 2) on behalf of the issuing entity by a representative of a) the servicer or b) the master servicer or entity performing equivalent functions, if there are multiple servicers.

Form 10-K can only be signed: 1) on behalf of the depositor by the senior officer in charge of securitization of the depositor, or 2) on behalf of the issuing entity by the senior officer in charge of the securitization function of a) the servicer, or b) the master servicer or entity performing equivalent functions, if there are multiple servicers. The same person who signs the Form 10-K must also sign the required Sarbanes-Oxley certification.

The SEC did not expand the list of persons eligible to sign Exchange Act reports. Generally the SEC does not believe that trustees should be eligible to sign Exchange Act reports. However, given the expansive definition of "servicer", it would appear that in a transaction where there are multiple servicers none of whom have servicing oversight responsibility, and no master servicer, but a trustee or administrator that is responsible for making allocations and distributions, then the trustee or administrator could sign.

The final release clarifies at footnote 469 that the ability to sign these reports under a power of attorney is very restricted. A power of attorney for this purpose must be manually signed and filed, must have a board resolution attached, and can only relate to a specific filing (that is, it cannot confer general authority).

Operative documents should allocate responsibility among parties permitted to sign Exchange Act reports under the new rules.

B. Form 10-D for standard distribution statements

Regulation AB creates a new Form 10-D to be used for filing periodic distribution statements. It must be filed within 15 days after each distribution date.

Item 1121 lists specific items that must be disclosed either in the distribution statement or in the Form 10-D report. Item 1121 includes some new items, such as:

- Interest rates applicable to the pool assets, which the SEC suggests to be shown in a table with ranges.
- Updated pool composition information. This item contemplates only a statement of key parameters on a weighted average basis.
- Material modifications to pool assets.
- Material beaches of pool asset representations and warranties.
- Delinquency and loss information. Current formats showing, for example, all delinquencies of 90 or more days in one bucket would be permitted.
- Changes in criteria used to originate, acquire or select new pool assets.
- Information about any new ABS issued backed by the same pool.
- Information about any pool asset changes (other than due to normal collections or liquidations), including changes due to prefunding or revolving periods or other substitutions and repurchases.

In addition, Item 1121 requires a restatement of all information required in the prospectus regarding the pool assets (as well as originators and significant obligors, if different from the prior disclosure), at the following times: 1) for transactions involving a prefunding or revolving period, a) in the Form 10-D for the period in

which the prefunding or revolving period ends and b) in the last Form 10-D for each fiscal year while the prefunding or revolving period continues, and 2) for any new issuance of ABS by a master trust in any fiscal year, in the last Form 10-D for such fiscal year. However, such restatement is not required if the information did not materially change from the most recent prospectus or Exchange Act disclosure. It is not clear what the threshold for materiality is for this purpose, or whether the threshold is different than under Item 6.05 of Form 8-K (discussed below).

In addition, the legal proceeding disclosure under Item 1117 must be updated.

C. Updated financial disclosure

Form 10-D together with Form 10-K also require periodic updated disclosure of summary financial information or audited financial statements as required in the prospectus for significant obligors, credit enhancers and derivatives counterparties, based on the specified disclosure thresholds. Whenever the financial information is updated, it would be required in the next Form 10-D or Form 10-K report of the ABS issuer. As described above, the information can be provided by incorporation by reference, or for significant obligors by referring to, the entity's Exchange Act reports. However, if the entity ceased filing Exchange Act reports, or if the entity is not a reporting company, the ABS issuer would nevertheless have the ongoing disclosure obligation. See "Other disclosure changes – Financial information" above.

For purposes of the ongoing reporting requirements, the SEC clarified in the definition of "significant obligor" that the determination of whether an entity is a significant obligor (that is, above the 10% threshold) is made at the cut-off date. Thus a reporting obligation would not arise if the concentration was below 10% initially, but became above 10% due to changes in the pool composition. In addition, an entity that was a significant obligor would cease to be such (and the ongoing reporting obligation would terminate) if the concentration went below 10%. The SEC did not clarify whether the same guideline would apply to the 20% threshold.

However, the SEC did not articulate the same guidelines for credit enhancers and derivatives counterparties.

D. Form 8-K for special events

Filing of Form 8-K is required within 4 business days of a specified reportable event.

Regulation AB will modify or add to the list of reportable events to better reflect issues applicable to ABS issuers. Examples of reportable events for ABS issuers include: 1) entering into material definitive agreements not in the ordinary course of business, 2) triggering events that accelerate a financial obligation (such as early amortization events), 3) change in servicer or trustee, and 4) change in credit enhancement.

In addition, Item 6.05 requires a restatement of all information required in the prospectus regarding the pool assets (as well as originators and significant obligors, if different from the prior disclosure), if any material characteristic of the asset pool at the closing date differs by more than 5% from the description of the asset pool in the final prospectus.

Thus, the overall concept is: Form 10-D will be used for routine periodic filings; Form 8-K will be used to report unusual events on a quicker time frame.

Servicers responsible for Exchange Act filings must develop procedures to assure compliance with these requirements.

E. Form 10-K annual report

Regulation AB will modify the list of reportable items to better reflect issues applicable to ABS issuers, largely following existing practices. There are some new requirements, such as updated Item 1119 disclosure of non-ordinary course transactions among related entities.

A Sarbanes-Oxley certification is required. The final regulations also contain a new form of the certification.

Regulation AB requires that each entity that performs any of the servicing functions (except as noted below) must provide a platform level assessment of compliance with the Item 1122

servicing criteria, together with an accountant's attestation report. The signer of the Form 10-K report must certify in the Sarbanes-Oxley certification that all such assessments of compliance and attestation reports that are required to be filed have been filed (except as disclosed). The signer must determine if all parties performing servicing functions have submitted a report and that all applicable servicing criteria are addressed.

If any material instances of noncompliance are identified in such assessments of compliance and attestation reports, they must be disclosed in the Form 10-K.

Form 10-K also must include the annual servicer compliance statements required under Item 1123.

F. Servicer annual compliance statement

Item 1123 requires an annual compliance statement, indicating compliance with all obligations under the applicable servicing agreement, from each master servicer, each affiliated servicer, and each unaffiliated servicer that services 10% or more of the pool assets.

VII. Assessment of compliance and attestation

Item 1122 provides new SEC-mandated minimum servicing criteria applicable to all types of ABS. These criteria effectively replace the USAP minimum servicing criteria, which covered loan level servicing functions.

The new criteria address not just loan level servicing, but also ABS level cash flow calculations and distributions. The categories of servicing criteria (including representative topics) are:

- General servicing considerations: policies and procedures, monitoring third parties, insurance.

- Cash collection and administration: administering collections, maintaining cash accounts as required.
- Investor remittances and reporting: calculating and reporting distributions, making distributions.
- Pool asset administration: administering changes to asset pool, loss mitigation, credit enhancement.

A separate assessment of compliance is required from each entity that performed any activities related to the serving criteria, unless its activities related to 5% or less of the pool assets.

The assessment of compliance is to be on a "platform" level as opposed to a deal specific level. However, unlike the USAP criteria which addressed only loan level servicing, the new criteria require assessment of compliance with ABS level matters (such as cash flows and accounts), so the "platform" review must encompass some level of review of individual ABS series.

Disclosure is required in each assessment of compliance of all material instances of noncompliance during the reporting period, even if cured during the reporting period.

The assessment of compliance must state that an independent accountant's attestation report has been obtained, and such report must be filed as an exhibit to the Form 10-K report.

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ADDITIONAL INFORMATION

If you have any questions about the final regulations or are in need of further information, please contact Steve Kudenholdt at 212.912.7450 or skudenholdt@tpw.com.

PUBLISHED BY
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NY ADMIN 4035964

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