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SEC Adopts Dodd-Frank Implementing Regulations Covering Representations, Warranties and Repurchases and Pool Asset Reviews

Editor's Note: This Financial Markets Update includes our further views on, and analysis of, the final Dodd-Frank implementing regulations discussed below and supersedes our previously-distributed Update addressing these regulations dated January 24, 2011.

On January 20, 2011, at an open meeting of the Securities and Exchange Commission ("SEC"), the SEC adopted final regulations implementing Sections 943 and 945 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[1] The final regulations address:

- **Repurchase History:** Securitizers of asset-backed securities ("ABS") must disclose and regularly update their history of fulfilled and unfulfilled repurchase requests for breaches of representations and warranties in both registered and unregistered ABS offerings;
- **Representations and Warranties:** Nationally-recognized statistical rating organizations ("NRSROs") must include information regarding the representations, warranties and enforcement mechanisms available to investors in an ABS offering in any credit rating report relating to the ABS; and
- **Pool Asset Reviews:** Issuers registering the offer and sale of ABS must perform a review of the assets underlying the ABS and disclose the nature, findings and conclusions of that review.

The regulations regarding representations, warranties and repurchases were adopted unanimously by the SEC. The regulations regarding pool asset reviews were adopted by a split vote, with two Commissioners withholding their support and expressing significant reservations about key aspects of the final regulations.

As described in more detail below, most securitizers have a one-year transition period before they must comply with the new regulations, while municipal securitizers have an additional three years. The regulations regarding repurchase history disclosure have a three-year look-back period and apply to securitizers that sponsored or issued ABS during that three-year period. As a result, following the relevant transition period, a securitizer will be required to disclose and regularly update its repurchase history if it issued ABS at any time during the three-year look-back period. This represents a significant change from the proposed regulations, which would have required that a securitizer disclose and regularly update its repurchase history only if it issued ABS after the new regulations took effect.

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[1] *See* **Securities Act Rel. No. 9175** (Jan. 20, 2011) ("Section 943 Adopting Release"); **Securities Act Rel. No. 9176** (Jan. 20, 2011) ("Section 945 Adopting Release").

I. Repurchase History

New Rule 15Ga-1 under the Securities Exchange Act of 1934 ("Exchange Act") requires any securitizer of ABS to disclose fulfilled and unfulfilled repurchase requests across all of the securitizer's transactions during a designated reporting period, including ABS issued by different trusts, ABS supported by different asset classes and ABS issued in registered and unregistered transactions.

Definition of ABS under Exchange Act: Rule 15Ga-1 applies to all ABS that fall within the new statutory definition of an "asset-backed security," which is significantly broader than the Regulation AB definition, and includes ABS that are exempt from registration under the Securities Act of 1933 ("Securities Act"), such as ABS issued in private placements, ABS issued or guaranteed by government-sponsored enterprises (GSEs) and ABS issued by municipal entities.

Definition of "Securitizer" under Rule 15Ga-1; Dual Reporting Obligations: The term "securitizer" refers to the ABS issuer and the person who organizes and initiates the ABS transaction, and so includes both sponsors and depositors. Because both sponsors and depositors meet the definition of securitizer, both entities would have the obligation to make the disclosures required under Rule 15Ga-1. However, if a sponsor makes all of the required disclosures, which would include disclosures of the activity of affiliated depositors, the final rule provides that those depositors affiliated with the sponsor would not have to separately provide and file the same disclosures. This option is not available in the case of depositors that are not affiliated with the sponsor (e.g., in a "rent-a-shelf" transaction), and so, while duplicative, both the sponsor and the depositor would have to provide and file the same disclosures.

Disclosures Required by Rule 15Ga-1: Repurchase information is to be presented in a prescribed tabular format, sorted by asset class, issuing entity and originator,[2] and securitizers should include footnotes providing additional explanatory disclosure, as appropriate.[3] A securitizer is required to present the number, outstanding principal balance and percentage by principal balance of assets:

- originated by each originator in the pool at the time of securitization for each issuing entity;[4]
- that were the subject of a repurchase or replacement request, including investor demands upon a trustee;
- that were repurchased or replaced;

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[2] The SEC has never adopted a definition of the term "originator" for purposes of Regulation AB, despite commenters' requests that the SEC clarify and confirm whether the focus is on the entity that sold a loan or other financial asset to the sponsor or depositor, closed a loan in its name, provided funds for loan closings, or established the underwriting standards for originations. Item 1110 of Regulation AB, however, sets forth required disclosure regarding originators and is clearly focused on the potential impact origination may have on asset quality and performance. The market has, therefore, tended to conclude that the focus of the disclosure item should be on the entity that established the credit-granting or underwriting criteria applied in connection with the creation of a loan, or that applied those criteria in connection with the acquisition of an existing loan.

Unlike Regulation AB, Dodd-Frank does set forth a definition of the term "originator" as a person who (i) through the extension of credit or otherwise, creates a financial asset that collateralizes an asset-backed security; and (ii) sells an asset directly or indirectly to a securitizer. It appears, therefore, that the term as used in Dodd-Frank could look beyond the entity that established or applied the credit-granting or underwriting criteria, to include (if different) the entity that initially created the financial asset.

[3] In response to comments on the proposed regulations, the SEC has confirmed that the inclusion of this explanatory disclosure would not preclude an issuer from relying on the private offering exemption under the Securities Act or the Regulation S safe harbor for offshore transactions.

[4] This disclosure item presupposes that the ABS are supported by a "discrete" pool of assets (i.e., an asset pool that is fixed and identified at the time of the securitization). In some cases, ABS are supported by dynamic, revolving asset pools, which could render information regarding the number, outstanding principal balance and percentage by principal balance of assets originated by each originator in the pool *at the time of securitization* to be a relatively arbitrary point of reference.

- that are pending repurchase or replacement because they are within a cure period;
- where the demand is currently in dispute;
- where the demand was withdrawn; and
- where the demand was rejected.

By its terms, Rule 15Ga-1 applies only in cases where the underlying transaction agreements contain a covenant to repurchase or replace an underlying asset for breach of a representation or warranty. The SEC was not, however, persuaded by industry requests to limit the required disclosure to those demands made pursuant to the terms of the transaction agreements (i.e., properly-authorized demands). Instead, as noted above, investor demands upon a trustee are required to be included in the tabular information reported, regardless of whether the trustee, in turn, makes a repurchase demand on a securitizer.

Rule 15Ga-1 establishes a three-year look-back period for the initial disclosures, instead of the five-year period originally proposed, and permits securitizers to omit information that is unknown or not available without unreasonable effort or expense, provided that the securitizer includes a statement describing such effort or expense. In addition, in recognition that a securitizer may not initially be able to obtain complete information with respect to investor demands upon a trustee, a securitizer may include a footnote if the securitizer requests but is unable to obtain all such information with respect to such demands that occurred prior to July 22, 2010 (the effective date of Dodd-Frank).

Form ABS-15G: Securitizers must report the repurchase information required by Rule 15Ga-1 on new Form ABS-15G. The report must be signed by the senior officer in charge of securitization of the securitizer.

Initial Report on Form ABS-15G; Covered Securitizers:[5] An initial report on Form ABS-15G covering the three-year period ended December 31, 2011 must be filed by any securitizer that sponsored or issued ABS during that three-year period, and must be filed no later than February 14, 2012 (45 days after the end of that three-year period).[6] An instruction to paragraph (c)(1) of Rule 15Ga-1 indicates that, for demands made prior to January 1, 2009, the disclosure should include any related activity subsequent to January 1, 2009 associated with such demand.

If there is no demand, repurchase or replacement activity to report during this initial three-year period, then the securitizer may simply "check-the-box" on Form ABS-15G to confirm that it has no activity to report.

Quarterly Reports on Form ABS-15G; Covered Securitizers: Quarterly reports on Form ABS-15G covering each subsequent calendar quarter must be filed by any securitizer that sponsored or issued ABS during that calendar quarter, or had outstanding ABS held by non-affiliates during that calendar quarter, and must be filed no later than 45 calendar days after the end of that calendar quarter.[7]

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[5] The compliance date for municipal securitizers is delayed for an additional three years and is discussed separately below.

[6] This represents a significant change from the proposed regulations, where an initial report on Form ABS-15G would not have been required until a securitizer completed its first issuance after the effective date of the final regulations. The SEC was persuaded to change this trigger by commenters that expressed concern that such a trigger could deprive market participants of important information about demand, repurchase and replacement activity because the prospect of a new issuance by many securitizers could be delayed for a long period of time following the effective date of the final regulations.

[7] As discussed above, the initial filing requirement, with its three-year reporting period ended December 31, 2011, applies only to those securitizers that sponsored or issued ABS during that three-year period. The quarterly filing requirement, on the other hand, applies not only to those securitizers that sponsored or issued ABS during the related calendar quarter, but also to any securitizer that had outstanding ABS held by non-affiliates during that calendar quarter. The interaction of these requirements leads to the curious result that a securitizer that sponsored or issued ABS prior to January 1, 2009, but that remain outstanding in 2012, would not be required to make the initial three-year look-back filing, but would be required to make the quarterly filings. It is not clear whether or not the SEC intended this result. *See* Section 943 Adopting Release at

If there is no demand, repurchase or replacement activity in a given quarter, then the securitizer may simply "check-the-box" on Form ABS-15G to confirm that it has no activity to report and, thereafter, suspend its quarterly reporting until a change in demand, repurchase or replacement activity occurs.[8] Even in these cases, however, the securitizer must file a "check-the-box" Form ABS-15G annually to confirm that it had no activity to report during the previous calendar year.

Finally, at such time as a securitizer has no ABS outstanding held by non-affiliates, the duty to file quarterly updates will terminate immediately upon filing a notice on Form ABS-15G.

Municipal Securitizers: As noted above, most securitizers have a one-year transition period before they must comply with Rule 15Ga-1, while municipal securitizers have an additional three years.[9] The SEC acknowledged various factors that distinguish municipal ABS from more typical ABS, but believed that, in the absence of express authority to exempt particular classes of securitizers, Dodd-Frank required the SEC to adopt rules mandating that "any securitizer" of ABS provide the specified disclosures. The SEC recognized, however, that a delayed compliance date for municipal securitizers would allow those securitizers to observe how the rule operates for other securitizers and better prepare for implementation. The SEC also recognized that a delayed compliance date would allow the SEC to evaluate implementation by other securitizers and to complete their current review of the municipal securities market, and thereby enable the SEC to consider whether adjustments to the rule would be appropriate before the rule becomes applicable to municipal securitizers.

In the case of a municipal securitizer, therefore, an initial report on Form ABS-15G must be filed covering the three-year period ended December 31, 2014, and must be filed no later than February 14, 2015 (45 days after the end of that three-year period). While the final regulations are not entirely clear, it appears that only municipal securitizers that sponsored or issued ABS during that three-year period would be required to file an initial report on Form ABS-15G on or before February 14, 2015. We believe this result is consistent with the overall framework of the regulation and the purposes behind the delayed compliance date.

Under the final regulations, municipal securitizers may file reports on Form ABS-15G on the Municipal Securities Rulemaking Board's public database, EMMA, rather than on EDGAR.

Prospectus Disclosure Requirements: The final regulations amend Items 1104 and 1121 of Regulation AB to require that disclosure regarding demand, repurchase and replacement activity in prospectuses and periodic reports be in the same tabular format as provided in Rule 15Ga-1, but allows an ABS issuer to (i) limit repurchase history appearing in the prospectus to those repurchases involving the same asset class and (ii) limit repurchase disclosure in Form 10-D reports to the related pool assets. Repurchase disclosure appearing in prospectuses must cover the prior three years and the latest information presented must not be more than 135 days old.[10] The ABS issuer must also

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note 142, where the SEC indicates that a *new securitizer* would not be required to make the initial three-year look-back filing because it would not have any ABS outstanding as of December 31, 2011 and thus, would not have any historical repurchase activity to report. It is not clear whether the SEC also considered the case of a *seasoned securitizer* that sponsored or issued ABS prior to January 1, 2009, but that may have been outstanding during the three-year reporting period ended December 31, 2011 and thus, could have historical repurchase activity during the reporting period.

[8] If a securitizer had no activity during the initial three-year period, and indicated that by checking the box on the initial filing, then its obligation to file periodic filings would be suspended. *See* Section 943 Adopting Release at note 140. The securitizer must still file a "check-the-box" Form ABS-15G annually to confirm that it had no activity to report during the previous calendar year.

[9] A "municipal securitizer" is a securitizer that is any State or Territory of the United States, the District of Columbia, any political subdivision of any Sate, Territory or the District of Columbia, or any public instrumentality of one or more States, Territories or the District of Columbia.

[10] In effect, in cases where a prospectus is first used more than 135 days after the most recent calendar year is completed, this 135-day age-of-information standard requires the ABS issuer to include repurchase disclosure for the prior three complete calendar years, as well as for an interim "stub" period in the current calendar year that extends to a date that is within 135 days of the date the prospectus is first used.

include a reference to the most recent Form ABS-15G filed by the securitizer and disclose the securitizer's Central Index Key (CIK) number.

The new prospectus disclosures are required with the first *bona fide* offering of registered ABS on or after February 14, 2012. The new 10-D disclosures are required for any ABS issuer that is required to report on Form 10-D after December 31, 2011.[11] In response to commenters' concerns about the ability to produce historical data to meet the new prospectus disclosure requirements, the SEC is phasing in those requirements. A prospectus filed in the first year after the compliance date (between 2/14/12 and 2/13/13) will be permitted to include a one-year look-back period, and in the second year after the compliance date (between 2/14/13 and 2/13/14), a two-year look-back period. Prospectuses filed in the third year after the compliance date and thereafter (on and after 2/14/14) must include the full three-year look-back period.

II. Representations, Warranties and Enforcement Mechanisms

The SEC also adopted Rule 17g-7 under the Exchange Act requiring each NRSRO to include in any credit rating report for an ABS offering a description of (i) the representations, warranties and enforcement mechanisms available to investors and (ii) how those representations, warranties and enforcement mechanisms differ from those in issuances of similar securities.

The SEC declined to provide a definition of "similar securities" in the final rule, and also declined to endorse reliance exclusively on industry standards for the purpose of making the required comparisons, expressing concern that these actions could create unintentional gaps in disclosure. Instead, the SEC indicated that each NRSRO should draw upon its knowledge of industry standards, its experience with previously-rated transactions and its general knowledge of the market to determine what constitutes "similar securities" for purposes of the required comparisons. The SEC did, however, indicate that one way an NRSRO could carry out the comparison requirement would be by reviewing previous issuances both on an initial and an ongoing basis to establish appropriate "benchmarks" for various types of securities.

The SEC rejected requests to allow NRSROs to satisfy the requirements of Rule 17g-7 by incorporating the required disclosures by reference to the transaction's offering documents, noting Congress' intent that the disclosures appear within the ratings report itself. The SEC also rejected requests to limit the rule's application to representations and warranties regarding the pool assets, as well as the suggestion that the rule should not apply to foreign issuers that are not issuing securities into the U.S. market.

The final rule applies to "any report accompanying a credit rating," without limitation, and as such, the requirements of the rule apply to all reports issued in conjunction with both solicited and unsolicited ratings. NRSROs may disclose their status as hired or non-hired and the method by which they obtained the relevant information regarding the representations and warranties.

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[11] Prior to enactment of Dodd-Frank, Exchange Act Section 15(d) automatically suspended the duty to file ongoing reports after any fiscal year (other than the fiscal year within which the related registration statement became effective) if the securities of each relevant class were held of record by fewer than three hundred persons. As a result, the reporting obligations of most ABS issuers suspended after they filed one annual report on Form 10-K. Dodd-Frank Section 942(a) amended Section 15(d) to exclude ABS from the automatic suspension provisions and, in its place, authorized the SEC to suspend or terminate Section 15(d) reporting requirements for any class of ABS on such terms and conditions and for such periods as the SEC deems appropriate.

The SEC staff has issued a no-action letter permitting ABS issuers whose reporting obligations in respect of outstanding ABS had been suspended by operation of Section 15(d) immediately prior to the date of enactment of Dodd-Frank, and who satisfy certain other conditions, to continue to determine their reporting obligations based on the standards set forth in Section 15(d) immediately prior to enactment of Dodd-Frank. Conversely, ABS issuers whose reporting obligations in respect of outstanding ABS had *not* been suspended by operation of Section 15(d) immediately prior to the date of enactment of Dodd-Frank (which includes issuers that issued registered ABS at any time during the 2010 calendar year and beyond), or who do *not* satisfy the other conditions set forth in the no-action letter, are *not* grandfathered and are, therefore, obligated to file Exchange Act reports on an ongoing basis without the benefits of the Section 15(d) automatic suspension provisions. *See* SEC staff no-action letter to American Securitization Forum (Jan. 6, 2011).

Finally, the SEC clarified that a "credit rating" includes any expected or preliminary credit rating issued by an NRSRO, and that a "preliminary credit rating" includes any rating, any range of ratings, or any other indications of a rating used prior to the assignment of an initial credit rating for a new issuance.

NRSROs are required to provide the information required by Rule 17g-7 in all credit rating reports issued on or after September 26, 2011, which is the six-month anniversary of the rule's effective date.

III. Pool Asset Reviews

New Rule 193 under the Securities Act requires issuers registering the offer and sale of ABS to perform a review of the underlying pool assets, and amendments to Item 1111 of Regulation AB require these issuers to disclose the nature, findings and conclusions of that review in the prospectus forming a part of the related registration statement.[12] While the SEC recognizes that the nature of this review may vary depending on the circumstances, including the nature of the assets and the degree of the sponsor's continuing involvement in the transaction, the SEC does mandate a minimum standard for such reviews that will apply to all registered ABS offerings.

Minimum Standard for Review: Rule 193 requires that, at a minimum, the pool asset review be "designed and effected to provide reasonable assurance that the disclosure regarding the pool assets in the…prospectus…is accurate in all material respects."

The SEC notes that this principles-based standard is similar to the standard applicable to corporate issuers, which generally requires an issuer to maintain disclosure controls and procedures to provide reasonable assurance that the issuer is able to record, process, summarize and report the information required in the issuer's Exchange Act reports within appropriate time frames.

The SEC recognizes that there is a range of judgments that an issuer might make as to what will provide "reasonable assurance," and that the term does not imply a single methodology but instead encompasses the full range of reviews an issuer may perform to ensure that its prospectus disclosure regarding the pool assets is materially accurate.[13] The SEC agrees that, depending on the case, sampling may be sufficient to satisfy the "reasonable assurance" standard. Where a pool is comprised of a large group of loans, as is the case in RMBS offerings, the initial review of a representative sample may be appropriate, but further review may be warranted if the results of the initial review are inconclusive. In contrast, where a pool is comprised of a relatively small group of loans, as may be the case in CMBS offerings, a review of each pool asset may be more appropriate. The SEC also recognizes that, in the case of a dynamic, revolving asset pool, "a different type of review may be warranted than in ABS transactions involving term receivables."

Industry comment on proposed Rule 193 noted that Dodd-Frank neither mandated nor contemplated that the SEC establish a minimum standard for the pool asset review, and advocated that, if a minimum standard were adopted, it should be designed to verify asset quality, and that a review against the originator's underwriting guidelines would be the best indicator of inherent quality.[14] The

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[12] By their terms, Rule 193 and the amendments to Item 1111 of Regulation AB apply to registered ABS offerings only. As part of its pending Regulation AB II rule proposals, however, the SEC has proposed to condition the availability of the safe harbors for privately-issued structured finance products on an issuer's undertaking to provide to investors the same information as would be required in a registered offering. If the SEC adopts these rules in the form proposed, issuers in private placements of ABS could also be required to perform pool asset reviews and disclose the nature, findings and conclusions of those reviews.

[13] Exchange Act Section 13(b)(7) defines "reasonable assurance" as "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs."

[14] In adopting its minimum review standard, the SEC indicates that the review will necessarily include credit quality and underwriting of the assets since disclosure about these factors is required in the prospectus, but also will include disclosure about the composition and material characteristics of the asset pool, as required by Item 1111 of Regulation AB.

industry also questioned what is achieved by imposing a standard of review that relates to the accuracy of disclosure about the pool assets when the robust liability regime under the federal securities laws already holds issuers and other offering participants accountable for the accuracy of disclosure. Commenters also expressed concerns that such a standard could be interpreted as more than simply a "belt and suspenders" approach to ensure the accuracy of disclosure, and instead could be read to convert a process and disclosure obligation into a substantive, performance-based rule.

As noted above, the SEC adopted its pool asset review regulations by a 3-2 split vote, over the vocal opposition of Commissioners Casey and Paredes who echoed the comments and concerns expressed by the industry and withheld their support based largely on the inclusion of this minimum standard for reviews.

Third-Party Review; Expert Liability: Rule 193 permits issuers to engage third parties to perform the requisite review of the pool assets. If the findings and conclusions of any such review are attributed to the third party, then the third party must be named in the registration statement and must consent to being named as an expert in the registration statement, which consent would then expose the third party to liability as an expert under Section 11 of the Securities Act for material misstatements or omissions with respect to its findings and conclusions.[15] If, on the other hand, an issuer engages a third party to conduct its Rule 193 review but adopts the findings and conclusions of such review as its own, then the third party need not be named in the registration statement, thereby avoiding the issue of third-party consent and expert liability.[16] Inasmuch as the issuer already has Section 11 "strict" liability for the entire content of the registration statement, this latter alternative may prove attractive to many issuers. The issuer should, of course, take steps to diligence any information it adopts as its own. These steps could include, for example, obtaining appropriate representations, warranties, covenants and indemnities from the third party concerning the findings and conclusions of its review.

Commenters expressed significant concerns over the SEC's proposal to impose expert liability on third parties performing pool asset reviews. Drawing from the recent experience with NRSROs, who refused to consent to being named as experts when the NRSRO exemption from expert liability was rescinded by Dodd-Frank, industry participants are concerned that due diligence providers will similarly refuse to consent. This, in turn, could drive issuers to perform the required reviews themselves, which would be an unfortunate consequence of the new regulations considering the potential value to investors of independent third-party asset reviews. Commenters also questioned whether a third-party diligence provider should even be considered an "expert"; that is, a person "whose profession gives authority to a statement made by him."[17] Commenters noted that these entities are not licensed or regulated by any formal industry association, are not part of a recognized profession and are not providing a judgment about the risk or appropriateness of a loan. Stated another way, the value of the provider's diligence review is not that it is an expert, but rather that it is independent.

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[15] Securities Act Section 11 imposes liability on designated persons, including issuers, underwriters and experts, for false or misleading statements in a registration statement, including a prospectus forming a part of the registration statement.

[16] The SEC indicates that an issuer that engages a third party to conduct its Rule 193 review and then uses that review to market its securities (including by means of a free writing prospectus) would be inconsistent with disclosure that the issuer is adopting the finding and conclusions of that review as its own. The SEC also indicates that an issuer that merely discloses the fact that it obtained the assistance of a third party to perform the review (as required by the amendments to Item 1111 of Regulation AB, discussed below) would not be using the information to market the securities, so long as the issuer discloses only the information that is required by the rule and the issuer does not otherwise use this fact to market the securities. *See* Section 945 Adoption Release at note 69.

[17] *See* Securities Act of 1933, Section 11(a)(4).

While the SEC was unwilling to exempt third-party diligence providers from expert status, as discussed above, it has attempted to respond to the competing considerations by recognizing that, where an issuer adopts the findings and conclusions of a third-party review as its own, the issuer need not name the third party in the registration statement, thereby avoiding the issue of third-party consent and expert liability.

Notably, the SEC's final rule and related commentary makes no mention of agreed-upon-procedures (AUP) engagements, leaving the industry, for now at least, to determine whether such services are in the nature of a due diligence review of pool assets that would be subject to the new requirements.[18]

As a final but important note, an instruction to Rule 193 provides that, while an ABS issuer may rely on third parties to fulfill the issuer's obligation to perform a pool asset review, an issuer may not rely on a review performed by an unaffiliated originator.[19] Conversely, an issuer may rely on a review performed by an affiliated originator, as long as the review is undertaken for purposes of the securitization (as opposed to the review undertaken to originate the asset).[20]

Disclosure re Pool Asset Review: As noted above, amendments to Item 1111 of Regulation AB require the issuer to disclose the nature, findings and conclusions of the review performed, including whether the issuer engaged a third party to perform the review. Where the review is based on a sample of assets in the pool, the regulations do not establish a minimum sample size, but do require that the size of the sample and selection criteria be disclosed.

These amendments to Item 1111 also require the issuer to disclose (i) whether any pool assets reviewed, or any pool assets are otherwise known to, deviate from the disclosed underwriting criteria or other criteria or benchmarks used to evaluate the assets, (ii) the entity that determined to include those non-conforming assets in the pool and the factors upon which that determination was based, such as compensating factors or a determination that the exception was not material, and (iii) data on the amount of non-conforming assets in the pool or sample that met each such compensating factor and the amount that did not meet those factors.

Adoption of Additional Due Diligence Regulations Postponed: The SEC postponed consideration of regulations implementing Section 15E(s)(4)(A) of the Exchange Act, as added by Section 932 of Dodd-Frank. These regulations were proposed together with the pool asset review regulations outlined above, and would have required issuers and underwriters in both registered and unregistered ABS offerings to make publicly available the findings and conclusions of any third-party diligence review. The SEC will reconsider regulations implementing this section later in 2011, together with its proposals related to Section 15E as a whole. As noted above, the pool asset review regulations adopted on January 20, 2011 apply to registered ABS offerings only.[21]

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[18] Section 15E(s)(4)(A) of the Exchange Act, added by Section 932 of Dodd-Frank, will require issuers and underwriters in both registered and unregistered ABS offerings to make publicly available the findings and conclusions of any third party diligence review. The SEC expects to consider regulations implementing these requirements later in 2011, which may also shed more light on the types of reviews that are within the scope of Rule 193 and that are subject to the new disclosure requirements.

[19] The SEC believes that an unaffiliated originator may have different interests in the securitization, particularly if the securitization involves many originators where the assets of each originator represent only a small part of the securitized pool. This would seem to lead to the curious result that the issuer, or even an unaffiliated third party engaged by the issuer, may conduct the required review of assets created by an unaffiliated originator, but the unaffiliated originator may not conduct the required review itself.

[20] *See* Section 945 Adopting Release at note 50. *See also* footnote 2 *supra* (discussing and comparing the term "originator" as used in Regulation AB and as defined in Dodd-Frank).

[21] *But see* footnote 12 *supra* (discussing the possibility that, if the SEC adopts its Regulation AB II rule proposals in the form proposed, issuers in private placements of ABS could also be required to perform pool asset reviews and disclose the nature, findings and conclusions of those reviews).

Transition Period: In an effort to allow market participants sufficient time to develop procedures and systems required to comply with these new pool asset review regulations, only registered ABS offerings commencing with an initial bona fide offer after December 31, 2011 must comply with these new pool asset review regulations.

Please feel free to contact **Mike Mitchell**, **Mike Freedman** or **Christy Freer** if you have any questions or would like to discuss these regulations in greater detail.