

*This information or any portion thereof may not be copied or disseminated in any form or by any means or downloaded or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.*

## **The Business Lawyer**

The Newsletter of the ABA Section of Business Law  
Vol. 67, No. 3 – May 2012

### **Dodd-Frank Act - Securitization-Related Final Rules**

*by Robert Hahn*

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”)<sup>1</sup>, passed in July 2010, required, among other things, the Securities and Exchange Commission (the “Commission”) to adopt a number of rules regarding securitizations. Securitization is a financing technique that is used by issuers to obtain funding for certain assets, such as mortgages, auto loans, auto leases, equipment loans, equipment leases, credit card receivables and similar debt and debt-like assets, by issuing securities (referred to as “asset-backed securities” or “ABS”<sup>2</sup>) which make periodic payments to their holders from payments received on the related assets.<sup>3</sup> In 2011, the Commission issued a number of final rules under the

---

<sup>1</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>2</sup> The Dodd-Frank Act created a definition of “asset-backed securities” (“Exchange Act-ABS”) in Section 941, by adding Section 3(a)(77) to the Exchange Act which states as follows:

The term “asset-backed security” —

(A) Means a fixed-income or other security collateralized by any type of self-liquidating financial asset (including a loan, a lease, a mortgage, or a secured or unsecured receivable) that allows the holder of the security to receive payments that depend primarily on cash flow from the asset, including —

- (i) A collateralized mortgage obligation;
- (ii) A collateralized debt obligation;
- (iii) A collateralized bond obligation;
- (iv) A collateralized debt obligation of asset-backed securities;
- (v) A collateralized debt obligation of collateralized debt obligations; and
- (vi) A security that the Commission, by rule, determines to be an asset-backed security for purposes of this section; and

(B) Does not include a security issued by a finance subsidiary held by the parent company or a company controlled by the parent company, if none of the securities issued by the finance subsidiary are held by an entity that is not controlled by the parent company. 15 U.S.C. §78(c)(a)(77).

This definition is broader than the definition used by the Commission in Regulation AB, adopted in 2005, which adapted the disclosure, offering and reporting rules under the Securities Act and the Exchange Act for use with asset-backed securities.

<sup>3</sup> The securitization reforms are set forth in Subtitle D—Improvements to the Asset-Backed Securitization Process of Title IX—Investor Protections and Improvements to the Regulation of Securities of the Dodd-Frank Act.

Securities Act of 1933 (the “Securities Act”) and the Securities Exchange Act of 1934 (the “Exchange Act”) required by the Dodd-Frank Act as follows:

(a) Disclosure of Repurchase Requests Required by Section 943 of Dodd-Frank Act<sup>4</sup>

Rule 15Ga-1 under the Securities Act, requiring securitizers to disclose certain information in a specified format regarding fulfilled and unfulfilled repurchase requests, including the filing of reports containing such information for a three-year look back period on new Form ABS-15G;

Item 1104 of Regulation AB, requiring disclosures in prospectuses for asset-backed securities to include the certain information required to be disclosed by Rule 15Ga-1;

Item 1121 of Regulation AB, requiring the inclusion of specific asset-backed securities containing certain information in a specified format regarding fulfilled and unfulfilled repurchase requests in Form 10-D;

(b) NRSRO Reports on Representations, Warranties and Enforcement Mechanisms Available in Asset-Backed Securities Required by Section 943 of Dodd-Frank Act<sup>5</sup>

Rule 17g-7 under the Exchange Act, requiring nationally recognized statistical rating organizations (“NRSROs”) to include with any report accompanying a credit rating for an asset-backed security both (i) a description of the representations, warranties and enforcement mechanisms available to investors in that asset-backed security and (ii) a description of how those representations, warranties and enforcement mechanisms available to investors differ from those found in other, similar asset-backed securities;

(c) Required Issuer Review of Assets Underlying Asset-Backed Securities Required by Section 945 of Dodd-Frank Act<sup>6</sup>

Rule 193 under the Securities Act, requiring issuers of asset-backed securities to conduct a review of the assets underlying such asset-backed security and that such review be undertaken at a specified minimum standard of review;

---

<sup>4</sup> Disclosure For Asset-Backed Securities Required by Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 Fed. Reg. 4,489 (January 26, 2011) (to be codified at 17 C.F.R. pts. 229, 232, 240 and 249) [hereinafter the “Disclosure Required by Section 943 of the Dodd-Frank Act”].

<sup>5</sup> Disclosure Required by Section 943 of the Dodd-Frank Act, 76 Fed. Reg. at 4,503.

<sup>6</sup> Issuer Review of Assets in Offerings of Asset-Backed Securities, 76 Fed. Reg. 4,231, 4,232 (January 25, 2011) (to be codified at 17 C.F.R. parts 229 and 230), [hereinafter the “Issuer Review Final Release”].

Item 1111 of Regulation AB, requiring issuers of asset backed securities to disclose in the prospectus for an asset-backed security the nature of the review undertaken by the issuer of the assets underlying such asset-backed security and the findings and conclusions of such review; and

(d) Thresholds For Suspension of Duty to File Periodic Reports Under Section 15(d) of the Securities Exchange Act of 1934 Permitted by Section 943(a) of the Dodd-Frank Act<sup>7</sup>

Amendments to Rules 12h-3, 12h-6 and 15d-22 and Form 15, setting certain thresholds for the suspension or termination of the duty of issuers of asset-backed securities to file reports under Section 15(d) of the Exchange Act.

Each of these rules is summarized below.

### **Rules Regarding Disclosure of Repurchase Requests Required by Section 943 of Dodd-Frank Act**

Section 943 of the Dodd-Frank Act requires the Commission to adopt regulations requiring (a) NRSROs to include in any report accompanying a credit rating of any ABS a description of the representations, warranties and enforcement mechanisms available to investors and how they differ from the representations, warranties and enforcement mechanisms in issuances of similar securities and (b) securitizers to “disclose fulfilled and unfulfilled repurchase requests across all trusts aggregated by the securitizer, so that investors may identify asset originators with clear underwriting deficiencies.”<sup>8</sup> As required by Section 943 of the Dodd-Frank Act, the Commission adopted Rule 15Ga-1 and Rule 17g-7 and issued modifications to the disclosure and reporting requirements under Items 1104 and 1121 of Regulation AB.

#### Rule 15Ga-1:

Rule 15Ga-1 is applicable to both public and private securities offerings.<sup>9</sup> Rule 15Ga-1 applies only to those Exchange Act-ABS (A) whose underlying transaction agreements (“Underlying Agreements”) include a covenant to repurchase or replace individual pool assets for which it is discovered that a breach of a representation or warranty made in the Underlying Agreements with respect to such individual asset(s) occurred (“Repurchase Covenants”),

---

<sup>7</sup> Suspension of the Duty To File Reports For Classes of Asset-Back Securities Under Section 15(d) of the Securities Exchange Act of 1934, Securities Act Release No. 34-65148, 76 Fed. Reg. 52,549 (August 23, 2011) (to be codified at 17 C.F.R. pts. 240 & 249) [hereinafter the “Release Regarding Duty to Report Under Section 15(d)”].

<sup>8</sup> Dodd-Frank Act, § 943.

<sup>9</sup> Disclosure Required by Section 943 of the Dodd-Frank Act, 76 Fed. Reg. at 4,491.

(B) against which demands for repurchase or replacement have been made and (C) which are held by non-affiliates of the securitizer during the reporting period (each ABS meeting the foregoing criteria, an “Affected ABS”).<sup>10</sup>

Rule 15Ga-1 took effect on January 20, 2011, but initial filings thereunder are not required until February 14, 2012. Securitizers<sup>11</sup> (other than municipal entity securitizers)<sup>12</sup> who issued ABS at any time during the three (3) years ended on December 31, 2011 (the “Lookback Period”) pursuant to Underlying Agreements containing Repurchase Covenants, must file a completed Form ABS-15G with the Commission by February 14, 2012 (the “Initial Disclosure Form”), regardless of whether any repurchase requests were made with respect to such Exchange Act-ABS.<sup>13</sup> If demand was made against the Affected ABS of a securitizer prior to the start of the Lookback Period, and any activity relating to such demand was pursued during the Lookback Period, such securitizer’s Initial Disclosure Form must report all such activity.<sup>14</sup> Municipal securitizers who issued ABS the Underlying Agreements for which contained Repurchase Covenants at any time during the three (3) years ended on December 31, 2014 must file a completed Form ABS-15G with the Commission by February 14, 2015, again, regardless of whether any repurchase requests were made with respect to such ABS.<sup>15</sup>

After filing the Initial Disclosure Form, Rule 15Ga-1 requires any securitizer of Affected ABS issued during the Lookback Period to continue to file completed Forms ABS-15G relating to such Affected ABS within forty five (45) days of the end of each calendar quarter beginning with the calendar quarter ended March 31, 2012. Securitizers who sponsored or issued Affected ABS prior to the start of the Lookback Period, but for which no initial filing is required because no activity relating to any demand took place during the Lookback Period must file a completed Form ABS-15G within forty five (45) days of the end of the calendar quarter ended March 31, 2012.<sup>16</sup>

---

<sup>10</sup> 17 C.F.R. § 240.15Ga-1(a).

<sup>11</sup> “Securitizer” is defined in Section 15G(a)(3) of the Exchange Act to mean “(A) [a]n issuer of an asset-backed security; or (B) [a] person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuer.”

<sup>12</sup> Disclosure Required by Section 943 of the Dodd-Frank Act, 76 Fed. Reg. at 4,494.

<sup>13</sup> 17 C.F.R. § 240.15Ga-1(c)(1).

<sup>14</sup> Instruction to 17 C.F.R. § 240.15Ga-1(c)(1).

<sup>15</sup> Disclosure Required by Section 943 of the Dodd-Frank Act, 76 Fed. Reg. at 4,494.

<sup>16</sup> 17 C.F.R. § 240.15Ga-1(c)(2).

Because Rule 15Ga-1 requires the “securitizer” to make the filing of Form ABS-15G and the definition of “securitizer” includes “(A) an issuer of [Exchange Act-ABS] or (B) a person who organizes and initiates an [Exchange Act-ABS] transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuer”<sup>17</sup>, in cases where the sponsor and a depositor of an Exchange Act-ABS transaction are affiliated entities, Rule 15Ga-1 deems one such securitizer’s filed Form ABS-15G to act as the consolidated filing for all affiliated securitizers for that specific ABS transaction.<sup>18</sup>

The disclosure required by Rule 15Ga-1 must be in tabular format and contain information relating to each Affected ABS during the subject calendar quarter as follows:

- (i) asset class;
- (ii) name of issuing entity;
- (iii) indication of whether such Affected ABS was registered under the Securities Act and, if so, the CIK number of the issuing entity;
- (iv) originator of underlying assets;
- (v) underlying asset information as of the time of securitization;
- (vi) underlying asset information for those assets subject to a demand;
- (vii) underlying asset information for those assets which were repurchased or replaced;
- (viii) underlying asset information for those assets for which repurchase or replacement was pending the expiration of a cure period;
- (ix) underlying asset information for those assets subject to disputed demands for repurchase or replacement;
- (x) underlying asset information for those assets subject to withdrawn demands for repurchase or replacement;
- (xi) underlying asset information for those assets subject to rejected demands for repurchase or replacement; and

---

<sup>17</sup> Securities Exchange Act of 1934, § 15G(a)(3), Pub. L. No. 111-203, 124 Stat. 1891 (2010).

<sup>18</sup> 17 C.F.R. § 240.15Ga-1(b).

(xii) aggregations of certain underlying asset information compiled by asset class, issuing entity and all issuing entities.<sup>19</sup>

The securitizer may expound on any information required to be disclosed in the Form ABS-15G table to make the reported data more comprehensible, and the Commission encourages the use of explanatory footnotes and narrative disclosures to do so.<sup>20</sup>

Rule 15Ga-1 permits a securitizer to omit certain information indicated in the immediately preceding paragraph if such information is unknown and would not be available to the securitizer without the incurrence of unreasonable effort or expense.<sup>21</sup> If a securitizer does omit any required information because it is unknown and to produce it would involve an unreasonable effort or expense, such securitizer must both produce all of the information that it does know or possess and must include a statement in the Form ABS-15G disclosure demonstrating that any unknown information is not known and cannot be obtained without unreasonable effort or expense.<sup>22</sup>

A securitizer is permitted to suspend its obligation to file Form ABS-15G for a particular Exchange Act-ABS transaction if no demand for, or activity relating to a prior demand for, repurchase or replacement of pool assets (“Repurchase Activity”) has occurred in the subject calendar quarter and the last filed Form ABS-15G required by Rule 15Ga-1 indicated that there was no Repurchase Activity in the calendar quarter applicable thereto. This suspension continues automatically until the earlier to occur of (i) the next calendar quarter in which Repurchase Activity occurs and (ii) the forty-fifth (45th) day after the end of any calendar year, which date represents the deadline for filing a Form ABS-15G confirming that no demand activity occurred in the prior calendar year.<sup>23</sup>

---

<sup>19</sup> 17 C.F.R. § 240.15Ga-1(a)(1)(i) - (xii).

<sup>20</sup> Instruction 2 to 17 C.F.R. § 240.15Ga(a)(1).

<sup>21</sup> 17 C.F.R. § 240.15Ga-1(a)(2). Note that § 240.15Ga-1(a)(2) allows any securitizer who requested, but was unable to obtain information on Affected ABS demands occurring prior to July 22, 2010 to include in its Form ABS-15G a footnote stating as much. The footnote must also include a statement that the disclosures made on such Form ABS-15G do not contain information regarding investor demands occurring prior to July 22, 2010.

<sup>22</sup> *Id.*

<sup>23</sup> 17 C.F.R. § 240.15Ga-1(c)(2)(i)-(ii).

Related Amendments to Regulation AB:

In its rules implementing Section 943 of the Dodd-Frank Act, the Commission also modified certain disclosure and reporting requirements under Regulation AB.

Item 1104:

The Commission added subsection (e) to Item 1104 of Regulation AB requiring disclosure of Rule 15Ga-1 information for registered issuances of ABS. Specifically, Item 1104(e) requires each issuer<sup>24</sup> to disclose information relating to the assets securitized by the related sponsor<sup>25</sup> that were subject to repurchases or replacement pursuant to Repurchase Covenants included in the Underlying Agreements of any ABS transactions to which such sponsor was a party, which information may be limited to the prior one, two or three years, depending upon when the prospectus related to such issuer's ABS is filed with the SEC.<sup>26</sup> Issuers must include such information in prospectuses for those ABS issuances which (i) qualify as ABS under the Regulation AB definition of the term, (ii) are offered in the registered market and (iii) for which the Underlying Agreements contain Repurchase Covenants.<sup>27</sup> Rule 15Ga-1 disclosures made pursuant to Item 1104(e) must include (A) the sponsor's CIK number and a reference to the most recent Form ABS-15G filed by such sponsor<sup>28</sup> and (B) all pertinent information for all prospectuses for registered ABS filed pursuant to Rule 424 of the Securities Act (x) prior to February 14, 2013, from the immediately preceding year, (y) on or after February 14, 2013 but prior to February 14, 2014, from the immediately preceding two (2) year period and (z) on or after February 14, 2014, for the immediately preceding three (3) year period.<sup>29</sup> The Form ABS-15G data presented in affected prospectuses cannot be more than one hundred thirty five (135) days old.<sup>30</sup>

---

<sup>24</sup> The term "asset-backed issuer" is defined in Regulation AB to mean "an issuer whose reporting obligation results from either the registration of an offering of asset-backed securities under the Securities Act, or the registration of a class of asset-backed securities under Section 12 of the Exchange Act." 17 C.F.R. § 229.1101(b).

<sup>25</sup> The term "sponsor" is defined in Regulation AB to mean "the person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuing entity." 17 C.F.R. § 229.1101(l).

<sup>26</sup> 17 C.F.R. § 229.1104(e)(1).

<sup>27</sup> Disclosure Required by Section 943 of the Dodd-Frank Act, 76 Fed. Reg. at 4,502.

<sup>28</sup> 17 C.F.R. § 229.1104(e)(2).

<sup>29</sup> 17 C.F.R. § 229.1104(e)(1).

<sup>30</sup> 17 C.F.R. § 229.1104(e)(3).

Item 1121:

In addition to requiring the disclosure of Rule 15Ga-1 information in prospectuses for registered ABS under Item 1104(e) of Regulation AB, the Commission also adopted a corresponding requirement that Rule 15Ga-1 information be disclosed in the ongoing reporting regime for registered ABS. New subsection (c) of Item 1121 requires that securitizers disclose Rule 15Ga-1 information regarding the repurchase or replacement of assets pursuant to Repurchase Covenants which would be required to be disclosed under Rule 15Ga-1 on the Form 10-D report submitted for the asset pool.<sup>31</sup> Each such disclosure must also include the securitizer's CIK number and a reference to the most recent Form ABS-15G filed by such securitizer.<sup>32</sup>

**Rule Regarding NRSRO Reports On Representations, Warranties and Enforcement Mechanisms Available in Asset-Backed Securities**

Rule 17g-7:

To implement Section 943(a) of the Dodd-Frank Act, the Commission adopted Rule 17g-7, which requires NRSROs to disclose in any report accompanying a credit rating with respect to any ABS<sup>33</sup> (i) the representations, warranties and enforcement mechanisms available to investors that are included in the Underlying Agreements for such ABS and (ii) a description of how such representations, warranties and mechanisms differ from those found in the Underlying Agreements for issuances of similar securities.<sup>34</sup> Rule 17g-7 employs the same, broader definition of ABS used in Rule 15Ga-1 and discussed in greater detail above.<sup>35</sup>

In the official note to Rule 17g-7, the Commission makes clear that it intends for all reports relating to expected or preliminary credit ratings issued by an NRSRO prior to the issuance of its final, definitive credit rating for an ABS to be subject to Rule 17g-7.<sup>36</sup> It is the

---

<sup>31</sup> 17 C.F.R. § 229.1121(c)(1).

<sup>32</sup> 17 C.F.R. § 229.1121(c)(2).

<sup>33</sup> The Commission has declined to limit the effect of this Rule to ABS issued in the U.S. See *Disclosure Required by Section 943 of the Dodd-Frank Act*, 76 Fed. Reg. at 4,504.

<sup>34</sup> 17 CFR § 240.17g-7.

<sup>35</sup> *Id.*

<sup>36</sup> Note to 17 CFR § 240.17g-7.

Commission's stated intention that Rule 17g-7 should apply to both solicited and unsolicited credit ratings as well as to credit ratings delivered to foreign issuers of ABS.<sup>37</sup>

### **Rules Regarding Required Issuer Review of Assets Underlying Asset-Backed Securities**

Section 945 of the Dodd-Frank Act amends Section 7 of the Securities Act by adding a new subsection (d) which requires the Commission to issue rules requiring issuers of registered ABS to perform due diligence review of the underlying assets and to disclose the nature of such review.<sup>38</sup> To implement Section 945 of the Dodd-Frank Act, the Commission adopted Rule 193 under the Securities Act ("Rule 193"), requiring issuers<sup>39</sup> of ABS to review the underlying assets of all registered ABS offerings.<sup>40</sup> The Commission also adopted certain amendments to Item 1111 of Regulation AB, requiring disclosure of the nature of the issuer's review, including conclusions and findings of the review.<sup>41</sup> Rule 193 and the amendments to Item 1111 became effective on March 28, 2011, and all ABS issuers must comply with the requirements for any registered ABS offerings made after December 31, 2011.<sup>42</sup>

#### Rule 193:

Rule 193 requires issuers of registered ABS offerings<sup>43</sup> to perform a due diligence review of the underlying assets.<sup>44</sup> Rule 193 also sets forth a minimum standard for review stating that "[a]t a minimum, such review must be designed and effected to provide reasonable assurance that the disclosure regarding the pool assets in the form of prospectus filed pursuant to [17

---

<sup>37</sup> Disclosure Required by Section 943 of the Dodd-Frank Act, 76 Fed. Reg. at 4,504.

<sup>38</sup> 15 U.S.C. 77g(d).

<sup>39</sup> Issuer Review Final Release, 76 Fed. Reg. at 4,231-4,232 (noting that, for purposes of Rule 193, the "issuer" is the depositor or sponsor of the securitization).

<sup>40</sup> 17 C.F.R. § 230.193; Issuer Review of Assets in Offerings of Asset-Backed Securities, Release No. 33-9150 (October 13, 2010), 75 Fed. Reg. 64,182 [hereinafter the "Issuer Review Proposed Release"]; Issuer Review Final Release, 76 Fed. Reg. at 4,232.

<sup>41</sup> 17 C.F.R. § 229.1111; Issuer Review Proposed Release, 75 Fed. Reg. at 64,182; Issuer Review Final Release, 76 Fed. Reg. at 4,232.

<sup>42</sup> *Id.* at 4,238.

<sup>43</sup> 17 C.F.R. § 230.193. Rule 193 only applies to ABS offerings that are registered under the Securities Act and does not apply to unregistered ABS offerings.

<sup>44</sup> Issuer Review Final Release, 76 Fed. Reg. at 4,232.

C.F.R. 230.424] is accurate in all material respects.”<sup>45</sup> The Commission intended this standard to be flexible<sup>46</sup> and the type of review will vary depending on the type of assets and circumstances.<sup>47</sup> For example, where the pool consists of a large group of assets it may be appropriate to review a sample,<sup>48</sup> but where the pool consists of a small group of assets, then it may be appropriate to review all of the assets in the pool.

The issuer may conduct the due diligence review itself or it may engage a third party to review the assets. The issuer may rely on the third party’s findings if, (i) the review is of the type that meets the Rule’s minimum review standard, (ii) the issuer names the third party in its registration statement and (iii) the third party agrees to be named as an expert under Rule 436 of the Securities Act<sup>49</sup> and Section 7 of the Securities Act.<sup>50</sup> If the issuer attributes the third party’s findings to itself, then the third party does not need to be named as an expert.<sup>51</sup>

#### Amendments to Item 1111:

In addition to Rule 193, the Commission adopted certain amendments to Item 1111 of Regulation AB.<sup>52</sup> The purpose of these amendments is to expand the prospectus disclosures required by Item 1111 to give investors a better understanding of the type of review that was undertaken.<sup>53</sup>

The Commission added new Item 1111(a)(7), requiring disclosure in the issuer’s prospectus of the nature of the review performed pursuant to Rule 193 and disclosure of the

---

<sup>45</sup> *Id.* at 4,234 (setting forth the minimum review standard).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 4,235. Where only a sample of assets is reviewed, the issuer will need to disclose the size of the sample and criteria used to select the assets sampled.

<sup>49</sup> 17 C.F.R. § 230.436. An expert must consent to the use and publication of its findings in a registration statement.

<sup>50</sup> 15 U.S.C. 77g(a).

<sup>51</sup> Issuer Review Final Release, 76 Fed. Reg. at 4,236.

<sup>52</sup> 17 C.F.R. § 229.1111.

<sup>53</sup> Issuer Review Final Release, 76 Fed. Reg. at 4,238 (providing that the Commission believes these expanded disclosures will give investors the ability to evaluate the transaction).

findings and conclusions of the review.<sup>54</sup> When describing the “nature of the review”, the issuer is required to explain the scope of such review.<sup>55</sup> If a sample pool was reviewed, the description would include the size of the sample pool and the criteria used to select the sample.<sup>56</sup> The issuer would also disclose whether any third party conducted the review.<sup>57</sup> The issuer is also required to disclose the “findings and conclusions” of the review.<sup>58</sup> The “findings and conclusions” include such things as the criteria against which the assets were measured and why certain assets were excluded from the pool.<sup>59</sup>

The Commission also added new Item 1111(a)(8), requiring disclosure in the issuer’s prospectus of the composition of the pool of assets that deviate from the sample pool or underwriting standards (“Exception Assets”).<sup>60</sup> Item 1111(a)(8) requires the issuer to disclose in the issuer’s prospectus the identity of any third party reviewer of the Exception Assets, the criteria used to determine which assets were Exception Assets, the number of Exception Assets, the characteristics of the Exception Assets and how they deviate from the rest of the pool and the entity that determined that the Exception Assets should be included in the pool and why.<sup>61</sup> The Commission believes that these disclosures will provide more transparency and accountability.<sup>62</sup>

### **Rules Relating to Thresholds for Suspension of Duty to File Reports Under Section 15(d) of the Exchange Act**

Section 943(a) of the Dodd-Frank Act amended Section 15(d) of the Exchange Act by eliminating the applicability of the automatic suspension provision to an issuer of ABS. Prior to the enactment of the Dodd-Frank Act, Section 15(d) of the Exchange Act permitted the automatic suspension of any issuer’s obligation to file ongoing periodic reports with respect to

---

<sup>54</sup> 17 C.F.R. § 229.1111(a)(7).

<sup>55</sup> Issuer Review Final Release, 76 Fed. Reg. at 4,237-4,238.

<sup>56</sup> *Id.* at 4,238.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Issuer Review Final Release, 76 Fed. Reg. at 4,238.

<sup>61</sup> 17 C.F.R. § 229.1111(a)(8).

<sup>62</sup> Issuer Review Final Release, 76 Fed. Reg. at 4,238 (stating that the Commission believes these disclosures will be useful to investors in making informed decisions about their investments).

any fiscal year (other than the fiscal year during which the related registration statement became effective pursuant to the Securities Act) if, at the beginning of such fiscal year, the securities related to such registration statement were held of record by less than three hundred (300) persons.<sup>63</sup> Section 943(a) of the Dodd-Frank Act added a new subsection (2) to Section 15(d) of the Exchange Act, which permitted the Commission to promulgate rules or regulations that would “provide for the suspension or termination of the duty to file” with respect to any class of asset-backed securities in a manner that the Commission determined was “necessary or appropriate in the public interest or for the protection of investors.”<sup>64</sup>

Because it was not clear whether Section 943(a) of the Dodd-Frank Act would require that all existing ABS transactions that had suspended Exchange Act reporting prior to the enactment of the Dodd-Frank Act would have to resume such reporting, on January 6, 2011, the Commission released a “no-action” letter to the American Securitization Forum (the “No-Action Letter”) in which the Commission confirmed that it would not pursue an enforcement action against an issuer of asset-backed securities that continued to determine its reporting obligations for outstanding transactions according to the terms of Section 15(d) of the Exchange Act prior to its amendment by Section 943(a) of the Dodd-Frank Act.<sup>65</sup> The No-Action Letter is applicable to an issuer of asset-backed securities subject to the following conditions:

1. the issuer’s reporting obligation was suspended by operation of the automatic suspension provision set forth in Section 15(d) of the Exchange Act prior to the enactment of the Dodd-Frank Act;
2. the issuer continues to make information regarding the asset-backed securities and the related assets available to security holders (directly or indirectly through the related trustee) in accordance with the terms of the related transaction agreements; and
3. the issuer retains the information reported pursuant to item (2) above for a period of not less than five (5) years after the related asset-backed securities are no longer outstanding and provides such information to the Commission upon request.<sup>66</sup>

---

<sup>63</sup> Release Regarding Duty to Report Under Section 15(a), 76 Fed. Reg. at 52,549.

<sup>64</sup> Dodd-Frank Act, § 942(a).

<sup>65</sup> American Securitization Forum, SEC No-Action Letter, 2011 WL 50020, at \* 1 (January 6, 2011).

<sup>66</sup> *Id.*

The Commission released its final rule (the “Final Rule”) implementing Section 943(a) of the Dodd-Frank Act on August 18, 2011, which became effective on September 22, 2011.<sup>67</sup> The Final Rule sets forth certain requirements for the suspension of reporting obligations of an issuer of asset-backed securities under Section 15(d) of the Exchange Act and amends Exchange Act Rules 12h-3, 12h-6 and 15d-22 accordingly.

#### Rule 15d-22:

The Final Rule amended Exchange Act Rule 15d-22(a) to clarify, for asset-backed securities, when reports must be filed and when reporting suspension dates should be determined with respect to a takedown of a shelf-offering. As amended, Exchange Act Rule 15d-22(a) provides that the reporting requirements with respect to a class of asset-backed securities sold through a shelf-offering will begin upon the first “takedown of securities under the registration statement.”<sup>68</sup> The amended rule also states that the “starting and suspension dates for any reporting obligation” with respect to any such class of asset-backed securities should be “determined separately for each takedown of securities under the registration statement.”<sup>69</sup> The Commission notes that the changes to Exchange Act Rule 15d-22(a) were made to “retain the approach relating to separate takedowns” in effect prior to the enactment of the Dodd-Frank Act.<sup>70</sup>

The amendments to Rule 15d-22(b) implement the new reporting suspension criteria for issuers of asset-backed securities. An issuer’s obligation to file annual and other reports with respect to any class of asset-backed securities under Section 15(d) of the Exchange Act is suspended with respect to any semi-annual fiscal period if, at the beginning of such period (other than a period during the fiscal year in which the related registration statement became effective or, for shelf offerings, the related takedown occurred), “there are no asset-backed securities of such class that were sold in a registered transaction held by non-affiliates of the depositor” and a Form 15 certification has been filed.<sup>71</sup> In addition, the amended rule also permits the suspension of an issuer’s reporting obligations “[w]hen there are no [asset-backed securities] of such class that were sold in a registered transaction still outstanding” upon the filing of a Form 15 certification and “if the issuer has filed all required reports for the most recent three fiscal

---

<sup>67</sup> Release Regarding Duty to Report Under Section 15(d), 76 Fed. Reg. at 52,549.

<sup>68</sup> Release Regarding Duty to Report Under Section 15(d), 76 Fed. Reg. at 52,552.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 52,556.

years.”<sup>72</sup> If such Form 15 certification is withdrawn by the issuer or denied by the Commission, the issuer must file all reports which would have otherwise been required to be filed had such certification not been filed within sixty (60) days of such withdrawal or denial.<sup>73</sup>

In addition to the foregoing, the Commission included two (2) notes clarifying certain aspects of the amended rule.<sup>74</sup> The first note makes clear that, in determining whether or not an asset-backed security is being held by a non-affiliate of the depositor, it is sufficient if the beneficial holder of such security is the depositor or an affiliate of the depositor.<sup>75</sup> This note contemplates the situation where an asset-backed security is in an indirect holding system and that the securities are considered to be held by the separate beneficial owners. The second note is an anti-avoidance provision to prevent a depositor or an affiliate from acquiring “all registered [asset-backed securities] of a particular class that were not held by such entities prior to the Section 15(d) re-assessment determination date and then re-sell[ing] such securities to non-affiliates in secondary transactions during the course of the fiscal year.”<sup>76</sup>

#### Related Rules and Form:

Exchange Act Rule 12h-3(b)(1) was amended to exclude asset-backed securities from the classes of securities eligible for suspension.<sup>77</sup> This change was made in order to conform the provision to the amendments made to Section 15(d) of the Exchange Act.<sup>78</sup> In addition, a new note was added to Exchange Act Rule 12h-3 directing issuers of asset-backed securities to Exchange Act Rule 12d-22 for the requirements regarding the suspension of reporting.<sup>79</sup>

---

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Release Regarding Duty to Report Under Section 15(d), 76 Fed. Reg. at 52,556.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 52,555.

<sup>78</sup> *Id.* at 52,552.

<sup>79</sup> *Id.* at 52,555.

Exchange Act Rule 12h-6(i) was amended to include a note directing issuers of asset-backed securities to Exchange Act Rule 12d-22 for the requirements regarding the suspension of reporting.<sup>80</sup>

Form 15 was amended to include a new checkbox referring to Rule 15d-22(b).<sup>81</sup>

---

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 52,556.