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Legal Update
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SEC Re-Proposes Shelf Eligibility Conditions for Asset-Backed Securities

On July 26, 2011, the US Securities and Exchange Commission (the "SEC") issued a re-proposal (the "Revised Proposal")[1] of the Form SF-3 shelf registration statement eligibility rules originally contained in the SEC's massive Asset-Backed Securities rule proposed in April 2010 (the "Original Reg AB II Proposal").[2] The Revised Proposal is designed, in part, to align the Original Reg AB II Proposal with the various subsequent rulemaking initiatives under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). The Revised Proposal also reflects comments on the Original Reg AB II Proposal received by the SEC[3] and seeks additional comments on numerous aspects of the asset-level data disclosure rules and other provisions in the Original Reg AB II Proposal.

Deadline for Comments

Comments on the Revised Proposal are due 60 days following publication of the Revised Proposal in the *Federal Register*.

Compliance Date

The Revised Proposal does not specify a compliance date. Rather, the SEC states that it is considering the appropriate compliance date for the Original Reg AB II Proposal and the Revised Proposal, if adopted. The SEC has stated its belief that the compliance date should occur within a year after the adoption of final rules.[4]

Revision of Eligibility Conditions for Shelf Registration Statements on Form SF-3

The Original Reg AB II Proposal requires that issuers of asset-backed securities ("ABS") use new Form SF-3 shelf registration statements for shelf offerings of ABS.[5] In lieu of the current investment-grade rating requirement for ABS offered under Form S-3 shelf registration statements, the Original Reg AB II Proposal imposes the following eligibility requirements for the use of Form SF-3:

- A certification by the chief executive officer of the depositor as to the adequacy of the cash flows generated by the securitized pool assets;
- A covenant to periodically furnish an opinion of an independent third party regarding instances in which securitized assets were not repurchased following a demand for repurchase based on an alleged breach of representations or warranty;
- A specified minimum amount of risk retention; and
- An undertaking by the issuer to file reports under the Securities Exchange Act of 1934 (the "Exchange Act") for so long as ABS held by non-affiliates remain outstanding.

The Revised Proposal reformulates these shelf eligibility requirements to reflect intervening developments under the Dodd-Frank Act and to address certain comments on the Original Reg AB II Proposal received by the SEC. As described in further detail below, the Revised Proposal replaces the first two Form SF-3 shelf eligibility

requirements listed above with the following set of transaction-based eligibility requirements:

- A substantially revised certification by the chief executive officer of the depositor, or executive officer in charge of securitization of the depositor, regarding the securitized assets and the disclosure contained in the prospectus;
- A credit risk manager and dispute resolution requirement relating to demands to repurchase securitized assets following the breach of a representation or warranty; and
- A requirement that the securitization transaction documents contain provisions designed to facilitate communication among investors.

The Revised Proposal also contains a revised set of eligibility conditions based on past compliance with SEC filing requirements. Those revisions reflect comments received by the SEC on the version of the filing-based eligibility conditions contained in the Original Reg AB II Proposal.[6]

SHELF ELIGIBILITY REQUIREMENT #1: REVISED DEPOSITOR CERTIFICATION

The Revised Proposal contains substantial revisions to the certification required to be made by a senior officer of the depositor.[7] Those revisions are set forth in the chart below.

	ORIGINAL REG AB II PROPOSAL	REVISED PROPOSAL
CONTENT OF CERTIFICATION / STATEMENT AS TO CASH FLOWS:	To my knowledge, the securitized assets backing the issue have characteristics that provide a reasonable basis to believe that they will produce, taking into account internal credit enhancements, cash flows at times and in amounts necessary to service any payments of the securities as described in the prospectus.	Based on my knowledge, taking into account the characteristics of the securitized assets underlying the offering, the structure of the securitization, including internal credit enhancements, and any other material features of the transaction, in each instance, as described in the prospectus, the securitization is designed to produce, but is not guaranteed by this certification to produce,[8] cash flows at times and in amounts sufficient to service expected payments on the asset-backed securities offered and sold pursuant to the registration statement.
CONTENT OF CERTIFICATION / STATEMENT AS TO SUPPORTING REVIEW:	I have reviewed the prospectus and the necessary documents for this certification.	I have reviewed the prospectus relating to [title of all securities, the offer and sale of which are registered] and am familiar with the structure of the securitization, including without limitation the characteristics of the securitized assets underlying the offering, the terms of any internal credit enhancements and the material terms of all contracts and other arrangements entered in to the effect the securitization. [sic]

CONTENT OF CERTIFICATION/ OTHER REQUIRED STATEMENTS:	None	• Based on my knowledge, the prospectus does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading. • Based on my knowledge, the prospectus and other information included in the registration statement of which it is a part, fairly present in all material respects the characteristics of the securitized assets underlying the offering described therein and the risks of ownership of the asset-backed securities described therein,[9] including all credit enhancements and all risk factors[10] relating to the securitized assets underlying the offering that would affect the cash flows sufficient to service payments on the asset-backed securities as described in the prospectus.
REQUIRED SIGNATORY:	Chief executive officer of the Depositor	Chief executive officer of the Depositor or the executive officer in charge of securitization of the Depositor
TIMING OF FILING:	Time when final prospectus is required to be filed under Rule 424	Time when final prospectus is required to be filed under Rule 424

Note that the officers permitted to sign the depositor certification are also required to sign the Form SF-3 registration statement. Any person who signs a registration statement has liability under Section 11(a)(1) of the Securities Act for any untrue statement of a material fact in the registration statement or the omission to state a material fact in the registration statement necessary to make the statements therein not misleading. The required depositor certification extends to matters for which an officer who signs a registration statement would ordinarily not have liability under Section 11 of the Securities Act. As a result, many issuers are likely to have serious concerns about the incremental securities law liability that may be incurred by an officer who signs the depositor certification.

SHELF ELIGIBILITY REQUIREMENT #2: CREDIT RISK MANAGER AND DISPUTE RESOLUTION MECHANISM

As noted above, the Original Reg AB II Proposal contains a shelf eligibility requirement that the issuer periodically furnish an opinion of an independent third party regarding instances in which securitized assets were not repurchased following a demand for repurchase. In response to comments that the SEC received on the

Original Reg AB II Proposal,[11] the Revised Proposal eliminates this independent third-party opinion requirement and replaces it with a credit risk manager requirement and a repurchase request dispute resolution mechanism.[12]

Credit Risk Manager. The Revised Proposal requires that the transaction documents include a provision directing the trustee of the issuing entity to appoint a "credit risk manager" upon the occurrence of certain trigger events.[13] The Revised Proposal defines credit risk manager as a person appointed by the trustee to review the underlying assets for compliance with the representations and warranties on the underlying assets.[14] A credit risk manager may not be affiliated with any sponsor, depositor or servicer.[15]

Review of Securitized Assets by the Credit Risk Manager. Under the Revised Proposal, the credit risk manager must review the securitized assets for compliance with the representations and warranties on the securitized assets upon the occurrence of trigger events specified in the transaction agreements. The Revised Proposal requires that, at a minimum, the transaction agreements must specify a triggering event:

- When the credit enhancement requirements, such as required reserve account amounts or overcollateralization percentages, as specified in the underlying transaction agreements, are not met;[16] and
- At the direction of investors pursuant to the processes provided in the transaction agreement and disclosed in the prospectus.[17]

The Revised Proposal requires that the credit risk manager have authority to access copies of the underlying documents relating to the securitized assets. However, the Revised Proposal does not mandate that the credit risk manager follow specific procedures in its review of the securitized assets. Rather, the SEC believes that transaction parties should have the flexibility to tailor the review procedures to each ABS transaction, taking into account the specific features of the transaction and the underlying asset class. Similarly, under the Revised Proposal, transaction parties would have the flexibility to determine the appropriate processes for investor-directed review of the securitized assets.

Delivery of the Report of the Credit Risk Manager to the Trustee. Under the Revised Proposal, the credit risk manager must provide a report of its findings to the trustee.[18] The SEC states that the trustee could use the credit risk manager's report to determine whether a repurchase request would be appropriate under the terms of the transaction agreements. However, the Revised Proposal does not require the trustee to use the credit risk manager's report for that, or any other, purpose.

Prospectus Disclosure about the Credit Risk Manager. The Revised Proposal requires disclosure about the credit risk manager in the prospectus and in ongoing reports. The Revised Proposal requires disclosure of the following information about the credit risk manager in the prospectus:

- Name;
- Form of organization;
- Extent of its experience serving as a credit risk manager for ABS transactions involving similar pool assets;
- Duties and responsibilities regarding the ABS under the transaction documents and applicable law;
- Manner and amount of compensation for its services;
- Any limitations on the credit risk manager's liability under the transaction documents;
- Any contractual provisions or understandings regarding the credit risk manager's removal, replacement or resignation; and
- Any affiliations and relationships, to the extent material, between the credit risk manager and other transaction parties.[19]

Form 10-D Disclosure about the Credit Risk Manager. The Revised Proposal provides that if, during a distribution period, the credit risk manager has resigned, or has been removed, replaced or substituted, or if a new credit risk manager has been appointed, the related Form 10-D must disclose the date the event occurred, and the circumstances surrounding the change. That Form 10-D would also need to provide the disclosures concerning the new credit risk manager as listed above under "*Prospectus Disclosure about the Credit Risk Manager*."[20]

Form 10-D Disclosure about the Reports of the Credit Risk Manager. If the credit risk manager is required to review the assets during a distribution period, the Revised Proposal requires disclosure on the related Form 10-D of the event(s) that triggered the review by the credit risk manager during that distribution period. The Revised Proposal also requires that any report delivered by the credit risk manager to the trustee during a distribution period be filed as an exhibit to the related Form 10-D.[21]

Dispute Resolution Mechanism. Under the Revised Proposal, the transaction agreements must provide that if a repurchase request pursuant to the terms of the transaction agreements has been made with respect to a securitized asset, and that securitized asset is not repurchased by the end of the 180-day period beginning when notice is received, then the party that submitted such repurchase request shall have the right to refer the matter, at its discretion, to either mediation or third-party arbitration.[22] The Revised Proposal provides that the party obligated to repurchase must agree to the selected resolution method.[23]

SHELF ELIGIBILITY REQUIREMENT #3: INVESTOR COMMUNICATION PROVISION

Most ABS are issued as book-entry global securities and are registered in the name of The Depository Trust Company or similar securities depositories. The identity of the underlying beneficial owners of the ABS may not always be readily obtained from the trustee or note registrar in an ABS transaction.

In the Revised Proposal, the SEC noted that some investors have expressed concerns about their inability to identify other investors for the purpose of enforcing rights contained in transactions agreements. Of particular concern to the SEC has been the difficulty that some investors have had in communicating and coordinating with each other for the purpose of exercising their right to demand a repurchase of underlying assets for breach of representations and warranties.

In order the address those concerns, the Revised Proposal contains a new shelf eligibility requirement that the transaction agreements must require the party responsible for making periodic filings on Form 10-D to disclose on the Form 10-D any request from an investor to communicate with other investors received during that reporting period by the party responsible for making the Form 10-D filings.[24] The disclosure on Form 10-D must include the name of the investor making the request, the date the request was received and a description of the method by which other investors may contact the requesting investor.

The Revised Proposal contains two safeguards to prevent the use of this investor communication facilitation requirement in unintended ways. Under the Revised Proposal:

- Investors may not request to communicate with other investors for purposes other than exercising their rights under the terms of the ABS; and
- The transaction parties may specify procedures for verifying the identity of a beneficial owner in a particular ABS prior to including the proposed notice in a Form 10-D.[25]

SHELF ELIGIBILITY REQUIREMENT #4: REVISED ELIGIBILITY CONDITIONS BASED ON HISTORY OF SEC FILING COMPLIANCE

The Revised Proposal contains a modified set of eligibility conditions that require a history of SEC filing compliance in order to use Form SF-3 for shelf offerings of ABS.[26] Those eligibility conditions are summarized in the chart below.

CONDITIONS TO USE OF FORM SF-3	CONDITION APPLIES IF:	CONDITION MET IF:	CURE PERIOD AND ADDITIONAL CONDITION FOR TAKEDOWNS:
HISTORY OF COMPLIANCE WITH FORM SF-3 TRANSACTION FILING REQUIREMENTS	Depositor or one of its related issuing entities[27] is or was at any time during the 12-month lookback period[28] prior to the filing date of the Form SF-3 registration statement required to comply with the Form SF-3 transaction requirements with respect to a previous offering of ABS involving the same asset class.	Depositor and each such related issuing entity have filed on a timely basis: • All depositor certifications; • All transaction documents containing provisions for credit risk manager and repurchase request dispute resolution; and • All transaction documents containing provisions for facilitation of investor communication regarding the exercise of rights under the ABS.[29]	• *Cure Period*: If such depositor or related issuing entity fails to meet the filing compliance condition, such depositor or related issuing entity will be deemed to satisfy the condition 90 days after the date it makes the required filings. • *Condition for Takedowns*: With respect to any takedown offering under a Form SF-3 registration statement, the filing compliance condition must be met as of 90 days after the end of the depositor's fiscal year ended prior to such offering.[30]
HISTORY OF COMPLIANCE WITH EXCHANGE ACT REPORTING OBLIGATIONS	Depositor or one of its related issuing entities is or was at any time during the 12-month lookback period prior to the filing date of the Form SF-3 registration statement required to file Exchange Act reports[31] with respect to a previous offering of ABS involving the same asset class.[32]	Depositor and each such related issuing entity have filed on a timely basis[33] all Exchange Act reports required to be filed during the 12-month lookback period.	• *Cure Period:* No cure period is specified.[34] • *Condition for Takedowns*: With respect to any takedown offering under a Form SF-3 registration statement, the Exchange Act reporting compliance condition must be met as of 90 days after the end of the depositor's fiscal year ended prior to such offering.

These revised eligibility conditions based on past SEC filing compliance are complex and will require careful analysis and due diligence by transaction parties when determining whether the conditions have been met under particular circumstances. An illustration of the application of these revised conditions is presented in Appendix 1.

The Revised Proposal retains the requirement in the Original Reg AB II Proposal that the registration statement state that the registrant has complied with the conditions described above. The SEC believes that this disclosure will better enable investors and the SEC to assess compliance with the Form SF-3 shelf eligibility conditions.

ELIMINATION OF SHELF ELIGIBILITY REQUIREMENTS MADE REDUNDANT BY THE DODD-FRANK ACT

The Revised Proposal eliminates the risk retention requirement for Form SF-3 eligibility because risk retention is separately addressed with respect to all ABS in the proposed credit risk retention rules.[35] Similarly, the Revised Proposal eliminates the eligibility requirement that the issuer undertake to file Exchange Act reports for the life of the ABS transaction because Section 942(a) of the Dodd-Frank Act eliminated the automatic suspension of the duty to file Exchange Act reports and granted the SEC the authority to issue rules providing for the suspension or termination of the duty to file Exchange Act reports.[36]

Re-Proposal of Revised Filing Deadlines for Transaction Documents

The Revised Proposal requires that the transaction documents, in "substantially final form," be filed and made part of the registration statement by the date the preliminary prospectus is required to be filed under Rule 424(h).[37] As proposed, Rule 424(h) requires the preliminary prospectus to be filed with the SEC at least five business days before the date of the first sale in the offering or, if used earlier, the second business day after first use.[38]

According to the SEC, this requirement, if adopted, would allow investors additional time to analyze the actual underlying transaction documents containing the specific structure, assets and contractual rights regarding each transaction. If the exhibits filed with the preliminary prospectus remain unchanged at the time final prospectus is required to be filed under Rule 424(b), then an issuer would not be required to re-file the same exhibits.[39]

Request for Additional Comment on Asset-Level Data Disclosure

EQUIPMENT ABS

The Original Reg AB II Proposal requires asset-level disclosures for ABS backed by residential mortgages, commercial mortgages, automobile loans or leases, equipment loans or leases, student loans, floorplan financings, corporate debt and resecuritizations. For ABS backed by credit card receivables, the Original Reg AB II Proposal requires disclosure of grouped account data in lieu of asset-level data.

The Revised Proposal does not contain any changes to the asset-level data disclosure contemplated by the Original Reg AB II Proposal. However, with respect to equipment ABS and equipment floorplan ABS, the SEC is requesting additional comments as to how to modify the proposed rule to address concerns that asset-level data disclosure could create privacy issues and risk dissemination of competitively sensitive information. The SEC is also requesting comment as to whether grouped account or pool-level data, rather than asset-level data, is sufficient for equipment ABS.

UPDATED SCHEDULE L

The Original Reg AB II Proposal requires that issuers provide the asset-level data described in proposed Schedule L. This data must be presented as of a recent practicable date (the

"measurement date") and filed at the time the preliminary prospectus is filed. The Original Reg AB II Proposal requires that an updated Schedule L, containing data as of the cut-off date for the securitization, be filed with the final prospectus.

The Original Reg AB II Proposal requires issuers to update Schedule L to report changes to the pool under Item 6.05 of Form 8-K. According to the SEC, some comment letters expressed confusion as to the circumstances under which an updated Schedule L is required on Form 8-K. In the Revised Proposal, the SEC is requesting additional comment to determine whether it should make clear that the filing of a Schedule L under Item 6.05 of Form 8-K is required when assets are added to the pool after the issuance of the ABS, either through prefunding periods, revolving periods or substitution.

ASSET-LEVEL DISCLOSURE IN PRIVATE OFFERINGS OF STRUCTURED FINANCE PRODUCTS

The Original Reg AB II Proposal contains amendments to the SEC's safe harbors for exempt offerings and resales and new related rules regarding the information that must be made available to investors in private offerings of "structured finance products." In general, those amendments require that, in order for a seller of a structured finance product to sell a security in reliance on Securities Act Rule 144A, or in order for an issuer of a structured finance product to sell a security in reliance on Rule 506 of Regulation D:

- The underlying transaction documents must grant any purchaser, any security holder and any prospective purchaser of the securities designated by the holder the right to obtain, upon request of the purchaser or security holder, information that would be required if the offering were registered on Form S-1 or proposed Form SF-1; and
- The issuer would have to represent that it would provide such information to the purchaser, security holder, or prospective purchaser upon request of the purchaser or security holder.

The Revised Proposal does not alter the proposal described above as set forth in the Original Reg AB II Proposal. However, in response to comments received by the SEC on the Original Reg AB II Proposal, the SEC is requesting comments on whether it should require asset-level disclosures only where the structured finance product being sold in reliance on Rule 144A, or Rule 506 of Regulation D, is backed by assets of an asset class for which there are specific asset-level reporting requirements set forth in the Original Reg AB II Proposal.[40]

In addition, the SEC acknowledged the concerns of commentators about the hybrid of the corporate disclosure requirements under Form S-1 and the Regulation AB disclosure requirements under Form SF-1 that would apply for offerings of structured finance products that are not asset backed securities as defined in Regulation AB.[41] The SEC is seeking comments as to how it can address those concerns. If the SEC does not require asset-level disclosure for structured finance products or novel asset types or structures that fall outside of the Regulation AB definition of asset backed security, the SEC is also seeking comments as to what alternative disclosure should be provided to investors.

Future Re-Proposal of Cash Flow Waterfall Program Requirement

The Original Reg AB II Proposal contains a requirement that ABS issuers file a computer program that gives effect to the flow-of-funds, or "waterfall," provisions of the transaction documents. According to the SEC, this proposal was designed to make it easier for an investor to analyze the ABS offering at the time of its initial investment decision and to monitor ongoing performance of the ABS.

The SEC has received many comments on its cash flow waterfall program proposal. The SEC has indicated that it plans to re-propose the cash

flow waterfall program requirement separately from its project to enact final rules relating to ABS shelf eligibility, the offering process and asset-level data disclosure.

Endnotes

[1] The Revised Proposal is available at: http://www.sec.gov/rules/proposed/2011/33-9244.pdf.

[2] *See* SEC Release No. 33-9117, available at: http://www.sec.gov/rules/proposed/2010/33-9117fr.pdf. For a summary of the Original Reg AB II Proposal, *see* "Summary of the US SEC's ABS Rule Change Proposal" (Mayer Brown Securitization Update, April 21, 2010) (available at: http://www.mayerbrown.com/publications/article.asp?id=8892&nid=6).

[3] Comments on the Original Reg AB II Proposal received by the SEC are available at: http://www.sec.gov/comments/s7-08-10/s70810.shtml.

[4] The SEC is seeking comment on whether implementation of any of the proposals should be phased in.

[5] Form SF-3 may be used to register the sale of asset-backed securities, as that term is defined in Item 1101(c) of Regulation AB. Item 1101(c) of Regulation AB defines asset-backed security as "a security that 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 time period, plus any rights or other assets designed to assure the servicing or timely distributions of proceeds to the security holders; provided that in the case of financial assets that are leases, those assets may convert to cash partially by the cash proceeds from the disposition of the physical property underlying such leases." The definition of asset-backed security in Regulation AB contains a number of further limitations that can cause securities that otherwise meet the above description to fall outside the definition of asset-backed security under Regulation AB (e.g., limits on the amount of delinquent assets in the securitized pool and limits on the prefunding and revolving periods).

The definition of asset-backed security in Regulation AB is narrower than the definition of asset-backed security that was added to Section 3(a) of the Securities Act by the Dodd-Frank Act. The term asset-backed security is defined in Section 3(a)(77) of the Securities Act as "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, (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 [SEC] by rule determines to be an asset-backed security for purposes of this section."

[6] The Revised Proposal also seeks comment as to whether additional or alternative shelf eligibility conditions based on previous experience in the ABS market should be included in the final rules.

[7] *See* General Instruction I.B.1(a) of Form SF-3 and Item 601(b)(36) of Regulation S-K, each as set forth in the Revised Proposal.

[8] The "not guaranteed" qualifier was added by the SEC in response to comments on the version of the certification contained in the Original Reg AB II Proposal. Those comments expressed concern that the original proposed certification could be viewed as tantamount to a guarantee of the future performance of the assets underlying the ABS.

[9] Note that the "fairly presents in all material respects" standard in the Revised Proposal varies from, and could be construed as broader than, the standard for prospectus liability under Section 12(a)(2) of the Securities Act for any untrue statement of a material fact or omission to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading.

[10] Note that the "all risk factors" standard in the Revised Proposal is considerably broader than the standard contained in Regulation S-K. Item 503(c) of Regulation S-K requires that the "risk factors" section of the prospectus contain "a discussion of the *most significant factors* that make the offering speculative or risky" (emphasis supplied). In addition, Item 503(c) of Regulation S-K states that the risk factors section should "not present risks that could apply to any issuer or any offering."

[11] The SEC noted that several commentators from both the issuer and investor community were concerned that the independent third-party opinion proposal was unduly complex and costly, and that commentators generally suggested that a better way to address concerns about the ability of trustees and investors to enforce repurchase obligations related to breaches of representations and warranties would be to require a review of the underlying assets by an independent third party, or "credit risk manager."

[12] In January 2011, the SEC adopted Rule 15Ga-1 and related rules pursuant to Section 943 of the Dodd-Frank Act, requiring disclosure related to demands for repurchase following breaches of representations and warranties regarding the securitized assets. In the Revised Proposal, the SEC noted that while its new rules under Section 943

require disclosure of fulfilled and unfulfilled repurchase requests, those rules do not directly address the enforceability or effectiveness of ineligible asset repurchase provisions in the underlying transaction agreements. The SEC intends that the new credit risk manager and dispute resolution requirements will bolster the effectiveness of ineligible asset repurchase provisions in ABS transactions.

[13] *See* General Instruction I.B.1(b) of Form SF-3, as set forth in the Revised Proposal.

[14] *See* Item 1101(m) of Regulation AB, as set forth in the Revised Proposal.

[15] The SEC states that under its proposal, the credit risk manager could be a party that performs another role in the same ABS transaction, such as the trustee or custodian, so long as that party is not affiliated with the sponsor, depositor or servicer.

[16] In the SEC's view, it is appropriate for the credit risk manager to review defaulted assets when the credit enhancement for an ABS transaction falls below the required target level, because higher than expected losses on the securitized assets could mean that a portion of the securitized assets did not meet the representations and warranties provided in the transaction documents.

[17] The SEC believes that an investor-directed review trigger event will facilitate the ability of transaction parties to pursue transaction remedies and help to alleviate concerns related to representations, warranties and enforcement mechanisms in underlying transaction agreements.

[18] The Revised Proposal does not specify the format of the report. However, the SEC has requested comment as to whether it is necessary for the final rules to specify the format of the report.

[19] *See* Item 1109(b) and Item 1119(a)(7) of Regulation AB, each as set forth in the Revised Proposal.

[20] *See* Item 1121(f)(2) of Regulation AB, as set forth in the Revised Proposal.

[21] *See* Item 1121(f)(1) of Regulation AB, as set forth in the Revised Proposal.

[22] *See* General Instruction I.B.1(b)(E) of Form SF-3, as set forth in the Revised Proposal.

[23] The Revised Proposal does not specify whether mediation or arbitration must be agreed to by the obligated party in the dispute resolution provision. The SEC believes that the party that submitted the repurchase request should have the flexibility to select the appropriate mechanism to resolve repurchase disputes, although the SEC has requested comment on whether it should mandate either mediation or third-party arbitration.

[24] *See* General Instruction I.B.1(c) of Form SF-3 and Item 1121(g) of Regulation AB, each as set forth in the Revised Proposal.

[25] Although the Revised Proposal does not specify the verification procedure that must be used, the Revised Proposal does state that the verification procedure may require no more than the following: (1) if the investor is a record holder of the securities at the time of a request to communicate, then the investor would not have to provide verification of ownership because the person obligated to make the disclosure will have access to a list of record holders and (2) if the investor is not the record holder of the securities at the time of the request to communicate, the person obligated to make the disclosure must receive a written statement from the record holder verifying that, at the time the request is submitted, the investor beneficially held the securities.

[26] *See* General Instruction I.A to Form SF-3, as set forth in the Revised Proposal.

[27] As used in this memorandum, the term "related issuing entity" means, with respect to any depositor, any issuing entity previously established, directly or indirectly, by the depositor or an affiliate of the depositor.

[28] The 12-month lookback period refers to the 12 calendar months and any portion of a month immediately preceding the filing of SF-3 registration statement.

[29] Under the Revised Proposal, it is not clear if the filings subject to this condition are only those filings required to be made during the 12-month lookback period. However, an example provided by the SEC in its commentary on the Revised Proposal seems to contemplate that this condition relates only to filings required to be made during the 12-month lookback period.

[30] *See* Rule 401(g)(4) under the Securities Act, as set forth in the Revised Proposal.

[31] The required Exchange Act reports for most ABS issuers consist of annual reports on Form 10-K, distribution reports on Form 10-D and current reports on Form 8-K.

[32] Under the Revised Proposal, with respect to an affiliated depositor that became an affiliate as a result of a business combination transaction during the 12-month lookback period, the filing of any report prior to the business combination transaction relating to ABS of an issuing entity previously established, directly or indirectly, by such affiliated depositor is excluded from the condition, provided such business combination transaction was not part of a plan or scheme to evade the requirements of the Securities Act or Exchange Act.

[33] Reports that are required solely pursuant to Form 8-K Items 1.01 (entry into definitive material agreement), 1.02 (termination of material definitive agreement), 2.03 (creation of direct financial or off-balance sheet obligation), 2.04 (triggering events under direct financial or off-balance sheet obligation), 2.05 (costs associated with exist or disposal activities), 2.06 (material impairments), 4.02(a)

(non-reliance on previously issued financial statements), 6.01 (ABS informational or computational materials) or 6.03 (change in credit enhancement) do not have to be filed on a timely basis in order to satisfy the Form SF-3 eligibility condition. Form 8-K items that would have to be filed on a timely basis in order to satisfy the Form SF-3 eligibility condition are Form 8-K Items 1.03 (bankruptcy or receivership), 3.03 (material modifications to rights of security holders), 5.03 (amendments to articles of incorporation or bylaws; change in fiscal year), 5.06 (change in shell company status), 5.07 (submission of matters to a vote of security holders), 6.02 (change of servicer or trustee), 6.04 (failure to make a required distribution), 6.05 (Securities Act updating disclosure), 7.01 (Regulation FD disclosure), 8.01 (other events) and 9.01 (financial statements and exhibits).

[34] Thus, as noted in the Original Reg AB II Proposal, the Form SF-3 registration statement could not be used for subsequent offerings for at least one year from the date the depositor or related issuing entity that had failed to file Exchange Act reports became current in its Exchange Act reports. If the issuer used Exchange Rule 12b-25(b) during the 12-month lookback period with respect to a report or a portion of a report, that report or portion thereof has actually been filed within the time frame prescribed by Rule 12b-25(b). Rule 12b-25(b) provides that an Exchange Act report or portion thereof which is not timely filed because the registrant is unable to do so without unreasonable effort or expense will nevertheless be deemed to be timely filed if the conditions set out in Rule 12b-25(b) are met.

[35] For a detailed description of the proposed credit risk retention rules, *see* "Overview of the Proposed Credit Risk Retention Rules for Securitizations" (Mayer Brown White Paper, April 8, 2011) (available at: http://www.mayerbrown.com/publications/article.asp?id=10782&nid=6).

[36] In January 2011, the SEC issued proposed rules regarding the suspension of an ABS issuer's duty to file Exchange Act reports. See SEC Release No. 34-63652, available at: http://www.sec.gov/rules/proposed/2011/34-63652fr.pdf.

[37] *See* Item 1100(f) of Regulation AB, as set forth in the Revised Proposal.

[38] The SEC noted that it had received comments that the five business day timeframe under proposed Rule 424(h) should be reduced to two business days. The SEC stated that it has not reached a conclusion on that aspect of the proposal and that it remains outstanding.

[39] The SEC noted that under this proposal, any change to the agreement could only be minor. In the SEC's view, a material change in the information provided in the Rule 424(h) filing, other than offering price, would require a new Rule 424(h) filing. The SEC also noted that the filing requirement for an exhibit may be satisfied by filing the final form of the document to be used and that the final form must be complete, except that prices, signatures and similar matters may be omitted.

[40] The asset classes for which the Original Reg AB II Proposal prescribes asset-level disclosure requirements are: residential mortgage-backed securities, commercial mortgage-backed securities, automobiles loans and leases, equipment loans and leases, student loans, floorplan financings, corporate debt and resecuritizations.

[41] See footnote 5 for a description of the definition of asset-backed security under Regulation AB.

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Appendix 1

Illustrative Application of the Revised Form SF-3 Eligibility Conditions Based on History of SEC Filing Compliance

The example set forth in the chart below is based, in part, on an example that the SEC provided in its commentary that accompanies the Revised Proposal. As used in this chart:

- **Scenario A** refers to a scenario in which the depositor fails to make an SF-3 Transaction Filing required to be filed on June 20 of Year 1 but cures the defect on July 1 of Year 1. The term "SF-3 Transaction Filing" refers to (a) the filing of the required depositor certification and (b) the filing of the transaction documents containing provisions for (i) a credit risk manager and repurchase dispute resolution and (ii) facilitation of investor communication regarding the exercise of rights under the ABS.
- **Scenario B** refers to a scenario in which the depositor fails to file an Exchange Act report required to be filed on June 20 of Year 1 but cures the defect on July 1 of Year 1.

Note that the June 20 failure-to-file date and the July 1 cure date referred to in the scenarios above were chosen because those were the dates used by the SEC in its example referred to above.

DATE	ACTION	TAKEDOWN OFF EXISTING SHELF PERMITTED?	FILING OF NEW FORM SF-3 REGISTRATION STATEMENT PERMITTED?
YEAR 0			
ANY DATE	Form SF-3 registration statement filed and declared effective	Yes	Yes
DECEMBER 31	Depositor's fiscal year end	Yes	Yes
YEAR 1			
MARCH 30 (90 DAYS AFTER FISCAL YEAR END)	Rule 401(g)(4) takedown compliance check: Have all required filings been made during the 12-month lookback period? Answer: Yes	Yes	Yes

JUNE 20	*Scenario A*: Depositor fails to make a timely filing of SF-3 Transaction Filing	*Scenario A*: Yes Depositor would be able to conduct takedown offerings under its existing Form SF-3 registration statement until it is required to perform the takedown compliance check in Year 2, at which point takedown eligibility must be reassessed under Rule 401(g)(4).	*Scenario A*: No A new Form SF-3 Registration Statement cannot be filed until September 29 of Year 1 (i.e., the end of the 90-day cure period that begins when the late filing of the SF-3Transaction Filing is made on July 1).
	Scenario B: Depositor fails to make a timely filing of an Exchange Act report	*Scenario B*: Yes Depositor would be able to conduct takedown offerings under its existing Form SF-3 registration statement until it is required to perform the takedown compliance check in Year 2, at which point takedown eligibility must be reassessed under Rule 401(g)(4).	Scenario B: No A new Form SF-3 registration statement cannot be filed until June 20 of Year 2 (i.e., the date on which it becomes true that all required Exchange Act reports have been made during the 12-month lookback period).[42]
JULY 1	*Scenario A*: A late filing of the SF-3 Transaction Filing is made	*Scenario A*: Yes	*Scenario A*: No Depositor must wait until September 29 (i.e., the end of the 90-day cure period that began when the late filing of the SF-3 Transaction Filing was made on July 1).
	Scenario B: A late filing of the Exchange Act report is made	*Scenario B*: Yes	*Scenario B*: No Depositor must wait until June 20 of Year 2 to file a new Form SF-3 registration statement.

SEPTEMBER 29	*Scenario A*: End of 90 day cure period that began on July 1	*Scenario A*: Yes	*Scenario A*: Yes September 29 is the end of the 90-day cure period that began when the late filing of the SF-3 Transaction Filing was made on July 1.
	Scenario B: N/A	*Scenario B*: Yes	Scenario B: No Depositor must wait until June 20 of Year 2[43] to file a new Form SF-3 registration statement.
YEAR 2			
MARCH 30	Rule 401(g)(4) takedown compliance check: Have all required filings been made during the 12-month lookback period? *Scenario A*: Answer: Yes	*Scenario A*: Yes The filing failure on June 20 of Year 1 was deemed to have been cured on September 29 of Year 1.	*Scenario A*: Yes The filing failure on June 20 of Year 1 was deemed to have been cured on September 29 of Year 1.
	Scenario B: Answer: No	*Scenario B*: No There is no 90-day cure period for failure to file Exchange Act reports. Depositor would not be able to conduct takedown offerings under its existing shelf until June 20 of Year 2.	*Scenario B*: No There is no 90-day cure period for failure to file Exchange Act reports. Depositor must wait until June 20 of Year 2 to file a new Form SF-3 registration statement.
JUNE 20		Yes, under both Scenario A and Scenario B	Yes, under both Scenario A and Scenario B

[42] As noted above, the 90-day cure period does not apply to failures to file Exchange Act reports.

[43] Note that June 20 of Year 2 is the date shown in this example because it is the date used by the SEC in its example. Although June 20 of Year 1 is 12 calendar months prior to June 20 of Year 2, the standard for the 12-month lookback period under the Revised Proposal is 12 calendar months *and any portion of a month immediately preceding the filing of the SF-3 registration statement*. Therefore, July 1 of Year 2, rather than June 20 of Year 2, may be the correct date under the terms of the Revised Proposal. Presumably, the 12-month lookback period will be clarified in the final rules.

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