SEC Proposes Significant Revisions to Rules on the Offering Process, Disclosure and Reporting for Asset-Backed Securities

SUMMARY

On April 7, 2010, the Securities and Exchange Commission proposed significant revisions to Regulation AB and other rules relating to the disclosure, reporting and offering process for asset-backed securities. The proposed rules are intended to provide investors with more information, additional useful tools and more time to consider their investment in asset-backed securities. They would, among other things:

- require an ABS issuer using a shelf registration statement to file a preliminary prospectus containing transaction-specific information (essentially all relevant pool and other information, except for pricing-related information) at least five business days before the first sale of securities in the offering;
- replace the existing investment grade credit ratings requirement for shelf registration of asset-backed securities with four new requirements: (i) 5% risk retention by the sponsor in a “vertical slice”; (ii) third-party review of repurchase obligations; (iii) a certification by the depositor’s CEO that, to the best of his or her knowledge, the assets 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 payments on the securities as described in the prospectus; and (iv) an undertaking to provide ongoing reports;
- impose very detailed and specific minimum asset-by-asset disclosure requirements (with limited exceptions, including for credit and charge cards), including 28 “data points” that are applicable to all asset classes and additional data points applicable to nine specific asset classes (for example, 137 data points for securitizations of residential mortgages). These data points are to be provided as an “asset data file” in a computer-readable, standardized format accessible through EDGAR;
- require an ABS issuer to file under a Form 8-K a computer program, also accessible through EDGAR and incorporated by reference into the prospectus, that gives effect to the flow of funds, or “waterfall”, provisions of the transaction documents;
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- eliminate ability of an issuer that offered asset-backed securities that were registered under the Securities Act to cease filing ongoing reports under the Exchange Act when there are fewer than 300 holders of such asset-backed securities; and
- condition the availability of the Rule 144A and Regulation D safe harbor exemptions from registration under the Securities Act upon investors being given, upon request, the same information that would be required if the offering were registered.

We plan to submit a comment letter to the SEC on the proposals. Comments will be due 90 days after publication of the proposing release in the Federal Register.

I. SECURITIES ACT REGISTRATION

The Commission is proposing extensive changes to the Securities Act registration process for the offer and sale of asset-backed securities, including new eligibility criteria for shelf offerings that replace the eligibility criteria that were proposed in 2008. The changes are intended to improve investor protection by assuring that investors have access to, and adequate time to analyze, information relating to the offering and the underlying assets.

A. NEW SHELF REGISTRATION PROCEDURES

Proposed Rule 424(h) would require an asset-backed issuer using a shelf registration statement on proposed Form SF-3 to file a preliminary prospectus containing transaction-specific information at least five business days before the first sale of securities in the offering. The filing must contain substantially all the information for a specific ABS takedown previously omitted from the prospectus filed as part of an effective registration statement, except for the information with respect to the offering price, underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds or other matters dependent on the offering price. This approach is similar to that taken by Rule 430A for non-shelf offerings by corporate issuers. ABS issuers could continue to use a free writing prospectus or ABS informational and computational materials in accordance with existing rules, but these could not be used for purposes of meeting the requirements of proposed Rule 424(h). If a material change occurs in the information included in the Rule 424(h) filing (other than price), five additional days must elapse after complete updated information is filed as required by Rule 424(h) and before the first sale in the offering. A Rule 424(h) filing would be deemed part of the registration statement on the date of filing, or if the

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1 Release No. 33-8940. Those criteria would have required, among other things, minimum denominations of $250,000 and that initial sales be made only to qualified institutional buyers as defined in Rule 144A(a)(1).
2 If the preliminary prospectus is used earlier, it must be filed by the second business day after first use.
3 ABS informational and computational materials (as defined in Item 1101 of Regulation AB) may be used in accordance with Rules 167 and 426, and materials that constitute a free writing prospectus (as defined in Rule 405) may be used in accordance with Rules 164 and 433.
preliminary prospectus is used earlier than five business days in advance of the first sale of securities in the offering, on the date of first use. A final prospectus for ABS offerings would continue to be filed pursuant to Rule 424(b).

Proposed Rule 430D would provide the framework for delayed shelf offerings of asset-backed securities pursuant to Rule 415(a)(1)(vii), as proposed to be revised, and Rule 430B would no longer apply to ABS offerings. The new rule would allow the omission, from the prospectus filed as part of a shelf registration statement, of information that is unknown or not reasonably available to the issuer pursuant to Rule 409, provided that the issuer complies with proposed Rule 424(h). Information omitted from the form of prospectus filed as part of a registration statement may be included subsequently by filing a post-effective amendment, by filing a form of preliminary prospectus under Rule 424(h) or a final prospectus under Rule 424(b) or, if the applicable form permits, by including the information in the issuer’s Exchange Act reports that are incorporated or deemed incorporated by reference. Information that adds a new structural feature or credit enhancement to the offering, however, must be included by post-effective amendment. Like new registration statements, post-effective amendments are subject to review by the Commission staff. Registrants relying on Rule 430D would be required to include a new undertaking in the registration statement deeming subsequently filed prospectuses to be part of the registration statement, similar to current practice under Rule 430B.

Proposed Rules 424(h) and 430D, taken together, are likely to affect significantly the manner in which ABS offerings are executed. The new rules would allow for substantially more time than current practice permits for investors to examine and analyze data regarding an offering’s structure and underlying assets. The balance struck in the new rules between speed to market and time for analysis reflects the Commission’s judgment that each ABS offering, “from an investor point of view . . . is like an initial public offering with respect to the ABS issuer”.

**B. PROPOSED FORMS SF-1 AND SF-3**

The Commission is proposing new forms for the registration of all securities that meet the definition of an asset-backed security. Offerings that qualify for delayed shelf registration would be registered on Form SF-3 and all other offerings of asset-backed securities would be registered on Form SF-1, while Forms S-1 and S-3 would no longer be available to register asset-backed securities.

Forms SF-1 and SF-3 would be more tailored to the needs of asset-backed securities offerings. The eligibility criteria for the use of the more streamlined Form SF-3 would be tightened compared with current practice under Form S-3. In addition, all registered offerings of asset-backed securities, regardless of the

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applicable form, would be made using a single prospectus for each takedown, rather than a prospectus and prospectus supplement, as is currently customary practice. The Commission believes that this approach will facilitate investors’ access to material information and reduce the clutter associated with base prospectuses that include substantial amounts of information of no relevance to a particular offering.

C. SHELF ELIGIBILITY FOR DELAYED OFFERINGS

In a significant shift, the proposal would eliminate reliance on credit ratings as a condition to shelf eligibility. Instead, the Commission has proposed four new requirements: (1) risk retention, (2) third party review of repurchase obligations, (3) a certification by the depositor’s CEO, and (4) an undertaking to file ongoing reports.5 The Commission is also proposing that mortgage related securities6 be eligible for shelf registration only if they satisfy the eligibility requirements that would apply to asset-backed securities generally.

To help ensure that investors receive sufficient information relating to the pool assets underlying the asset-backed securities, the Commission is proposing to amend Rule 415 to limit registration of continuous offerings for ABS offerings to “all or none” offerings. This would prevent shelf procedures from being used for “best efforts” or “mini-max” offerings where the pool characteristics and composition can depend on the ultimate size of the offering.

The new shelf eligibility transaction criteria are described in more detail below.

Risk Retention. The Commission believes that securitizations by sponsors that have “skin in the game” would likely be higher quality than those without. The risk retention proposals appear to be broadly consistent with the mandate included in the current proposed financial reform legislation7 and with

5 Other current shelf transaction requirements would remain. The Commission is not proposing to amend the requirements that (1) delinquent assets not constitute 20% or more of the asset pool as measured by dollar volume and (2) for securitizations of leases other than motor vehicle leases, the portion of the securitized pool balance attributable to the residual value of the physical property underlying the leases does not constitute 20% or more of the securitized pool balance, as measured by dollar volume. See General Instruction I.B.5. to Form S-3.

6 The term “mortgage related security” is defined in Section 3(a)(41) of the Exchange Act and includes a requirement that the security be rated in one of the two highest rating categories by at least one nationally recognized statistical rating organization. Rule 415(a)(vii) now permits the registration of mortgage related securities for an offering to be made on a continuous or delayed basis regardless of whether they are eligible for registration on Form S-3.

7 The Restoring American Financial Stability Act of 2010, S. 3217 (the “Dodd Bill”), introduced in the full Senate on April 15, 2010, would amend the Exchange Act to mandate the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation and the Commission to jointly prescribe regulations (i) to require any issuer of an asset-backed security or person who organizes and initiates an asset-back securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuer (a “securitizer”) to retain an economic interest in a portion of the credit risk for any asset that the securitizer, through the issuance of an asset-backed security, transfers, sells or conveys to a third party and (ii) to prohibit the securitizer from directly or indirectly (footnote continued)
proposed FDIC rules applicable to insured depository institutions.\(^8\)

Under the proposed rules, the sponsor or an affiliate would be required to retain (1) a minimum of five percent of the nominal amount of each of the tranches sold or transferred to investors or (2) in the case of revolving asset master trusts, the originator’s interest of a minimum of five percent of the nominal amount of the securitized exposures, provided that the originator's interest and securities held by investors are collectively backed by the same pool of receivables, and payments of the originator's interest are not less than five percent of the payments of the securities held by investors collectively. These calculations in each of cases (1) and (2) are net of hedge positions “directly related” to the securities or exposures taken by the sponsor or affiliate.\(^9\) The retained interest would be measured at issuance (or at origination, in the case of revolving asset master trusts), would have to be maintained on an ongoing basis and would have to be disclosed in the prospectus that is filed as part of the registration statement. The Commission considered but declined to propose an alternative of retaining risk through randomly selected exposures, and also took the view that retention of the equity or residual interest could lead to skewed incentive structures.

The Commission noted several criticisms of risk retention, including the possibility that it exposes financial institutions who are sponsors to too much risk. Under the Commission’s proposal, a sponsor could still conduct a public offering without risk retention, but the offering would have to be registered on Form SF-1

\(^{footnote continued}\)

hedging or otherwise transferring the credit risk that the securitizer is required to retain with respect to the asset. These regulations would require a securitizer to retain not less than 5% of the credit risk for any asset that is transferred, sold or conveyed through the issuance of an asset-backed security or less than 5% if the originator of the asset meets underwriting standards to be prescribed for each asset class, in each case in a manner and for periods to be prescribed by the regulations. The regulations would permit such exemptions as may be appropriate in the public interest and for the protection of investors and provide for the allocation of risk retention obligations between a securitizer and an originator in the case of a securitizer that purchases assets from an originator.

\(^8\) In an Advance Notice of Proposed Rulemaking (ANPR) Regarding Safe Harbor Protection for Treatment by the FDIC as Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution in Connection with a Securitization or Participation issued on December 15, 2009, the Federal Deposit Insurance Corporation sought public comment on sample text (the “FDIC Sample Text”) for its securitization rule (12 C.F.R. §360.6) that among other things would require, for a securitization to be entitled to safe harbor protection from its repudiation powers or an exemption from the automatic stay provisions under the Federal Deposit Insurance Act, that the sponsor retain at least 5% of the credit risk of the financial assets in a securitization, either in the form of an interest in each of the credit tranches of the securitization or in a representative sample of the securitized financial assets equal to at least 5% of the principal amount of the financial assets at transfer. The FDIC Sample Text would also require that all residential mortgage loans transferred into a securitization be seasoned for at least 12 months.

\(^9\) Hedges related to overall market movements, such as movements of market interest rates, currency exchange rates or the overall value of a particular broad category of asset-backed securities, would not be treated as “directly related”, and so would not be required to be netted.
and would not be eligible for shelf registration, thereby providing additional time for investors to analyze the offering and ensuring that each such offering would potentially be subject to review by the staff.

The Commission indicated that it expects the effect of the FASB’s newly-issued guidance for consolidation of variable interest entities, together with the satisfaction of the Commission’s proposed risk retention condition, generally to increase the instances in which financial assets continue to be reported in the financial statements of the entity that transfers the financial assets. The Commission also acknowledges that the proposed risk retention requirement may have an impact on the legal isolation of the underlying assets or on the ability of legal counsel to provide “true sale” opinions in transactions where those are necessary for marketing or credit rating related reasons but observes that the requirement “should not impact” the bankruptcy and legal isolation analysis of the transaction.

**Third Party Review.** In the release, the Commission notes concerns about the effectiveness of contractual provisions requiring the sponsor or another party to repurchase or substitute assets that do not comply with the representations and warranties made in the transaction, as well as investor complaints about the lack of responsiveness by sponsors to potential breaches of these representations and warranties. As an additional condition for shelf eligibility, the Commission is proposing that the pooling and servicing agreement or another transaction agreement for each securitization contain a specified provision aimed at enhancing the protective nature of the representations and warranties. This provision would require the sponsor or other party with the repurchase obligation to furnish the opinion of an unaffiliated third party to the trustee, at least quarterly. The opinion would confirm that any asset not repurchased or replaced by the obligated party following the assertion of a breach by the trustee did not violate a representation and warranty that would have required the asset’s repurchase or replacement as to any asset that was the subject of an asserted breach.

In its request for comments, the Commission asks whether diligence firms that provide third party pre-securitization review of a random sample of assets should be allowed to provide this opinion, whether it should specify that the opinion must be a legal opinion and whether there are certain types of representations and warranties that an attorney or law firm would not be able to opine on.

**Depositor CEO Certification.** The Commission is proposing a requirement that the CEO of the depositor of the securitization certify, as a further condition to shelf eligibility, that, to the best of his or her knowledge, the assets 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

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10 The Dodd Bill would require the Commission to adopt regulations on the use of representations and warranties in the market for asset-backed securities that would require any securitizer 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.
to service payments on the securities as described in the prospectus. The Commission believes, as it did when it proposed certification for Exchange Act periodic reports, that a certification may cause these officials to review the transaction more carefully and to participate more extensively in its oversight and that the certification would make explicit what is already implicit in the disclosure. The proposed language could not be altered, so that any issues in providing the certification would need to be addressed through disclosure in the prospectus.

The Commission notes that the depositor is often a special purpose subsidiary of the sponsor and requested comment on whether it would be more appropriate to have an officer of the sponsor sign the certification.

**Ongoing Reports.** Asset-backed issuers other than master trusts typically have fewer than 300 record holders of their securities, and therefore their statutory reporting obligations under Section 15(d) of the Exchange Act typically lapse after they have filed one annual report. The Commission is proposing to require, as a final new transaction condition to shelf eligibility, that issuers undertake to continue to file with the Commission reports to provide disclosure that would be required under Section 13(a) or 15(d) and the rules thereunder and that they disclose such undertaking in the prospectus they file as part of the registration statement. This obligation would last as long as non-affiliates of the depositor hold any of the securities that were sold in registered transactions. Issuers would also be required to disclose any failure in the last year by any issuing entity established by the depositor or any affiliate of the depositor to file, or to file in a timely manner, an Exchange Act report required either by rule or by such an undertaking.

**Registrant Requirements.** To be eligible to use shelf registration, a registrant would also have to satisfy the following criteria:

- To the extent the sponsor, with respect to the depositor or an issuing entity previously established by the depositor or any affiliate of the depositor, was required to retain risk with respect to a previous ABS offering involving the same asset class, at the time of filing of the new shelf registration statement, it must be holding the required risk.
- To the extent the depositor or any issuing entity previously established by the depositor or any affiliate of the depositor is or was within the twelve calendar months and any portion of a month immediately preceding the filing required to comply with the third party review.

11 The Dodd Bill would require the Commission to issue rules relating to the registration statement required to be filed by any issuer of an asset-backed security that require the issuer of an asset-backed security to perform a due diligence analysis of the assets underlying the asset-backed security and to disclose the nature of that analysis.

12 Under the Dodd Bill, the suspension or termination of the duty to file ongoing reports under Section 15(d) of the Exchange Act would no longer be automatic for issuers of asset-backed securities but rather would be established by rules or regulations of the Commission, which would therefore be able to impose ongoing reporting requirements more broadly on issuers of asset-backed securities in registered offerings.
depositor CEO certification and ongoing disclosure requirements with respect to a previous shelf registration statement for securities involving the same asset class, each such entity:

- must have filed on a timely basis all transaction agreements containing the third party review requirement;
- must have filed on a timely basis all depositor CEO certifications; and
- must have filed all Exchange Act reports required by the undertaking for the previous 12 months.

The registrant must have provided disclosure in the registration statement that it has met the above registrant requirements.

To the extent the depositor or any issuing entity previously established by the depositor or any affiliate of the depositor is or was within the twelve calendar months or any portion of a month immediately preceding the filing, each such entity must have complied with its Exchange Act reporting requirements during such period.13 Those reports, with certain exceptions, must have been filed in a timely manner.14

D. EXCHANGE ACT RULE 15C-2(8)(B)

The Commission is proposing to eliminate the exception for asset-backed securities from the rule requiring a broker or dealer to deliver a preliminary prospectus at least 48 hours before sending a confirmation of sale, even for offerings involving a master trust that is required to file reports pursuant to Section 13(a) or 15(d) of the Exchange Act. Since each pool of assets in an ABS offering is unique, the Commission believes that an ABS offering is akin to an initial public offering, and that therefore the exception is not justified. The practical impact of this proposal may be limited in light of the filling requirements for preliminary prospectuses in Rule 424(h).

E. PRESENTATION OF INFORMATION IN THE PROSPECTUS

The Commission is concerned that the base and supplement format for prospectuses in shelf offerings of asset-backed securities has resulted in unwieldy documents with excessive and inapplicable disclosure that it not useful to investors, and that the length of the disclosure document as a result of this format is often overwhelming and burdensome for investors to navigate. Also, when an issuer excludes the base prospectus from the EDGAR filing at the time of a takedown, it can be unclear which information from the

13 The filing prior to a business combination of material by an affiliated depositor that became an affiliate in such business combination would generally be excluded from this requirement.

14 The timeliness requirement would not apply to Items 1.01 (Entry into a Material Definitive Agreement), 1.02 (Termination of a Material Definitive Agreement), 2.03 (Creation of a Direct Financial Obligation or an Obligation under an Off-balance Sheet Arrangement of a Registrant), 2.04 (Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement), 2.05 (Costs Associated with Exit or Disposal Activities), 2.06 (Material Impairments), 4.02(a) (Non-Reliance on Previously Issued Financial Statements or a Related Report or Completed Interim Review), 6.01 (ABS Informational and Computational Materials) or 6.03 (Change in Credit Enhancement or Other External Support) of Form 8-K. The timeliness requirement would, however, apply to the other asset-backed securities specific requirements of Form 8-K, including Item 6.05 (Securities Act Updating Disclosure).
base prospectus is applicable to the current offering or is superseded by the supplement, with the investor bearing the burden of determining which disclosures are relevant to a particular transaction. Proposed Rule 430D and an instruction to proposed Form SF-3 would require ABS issuers to file a form of prospectus at the time of effectiveness of the registration statement and to file a single prospectus for each takedown that includes all information required by Regulation AB.

In addition, each depositor would be required to file a separate registration statement for each form of prospectus, and each registration statement and form of prospectus would cover offerings by one depositor securitizing only one asset class from one country of origin or country of property. As a result, the current practice of including multiple depositors, multiple base prospectuses and multiple prospectus supplements in one registration statement would no longer be allowed under the proposed rules.

F. PAY-AS-YOU-GO REGISTRATION FEES
To alleviate the burden of managing multiple registration statements among ABS issuers, the Commission is proposing that filing fees would be payable upon filing of the preliminary prospectus under Rule 424(h) rather than at the time of filing of the registration statement.

G. SIGNATURE PAGES
Since asset-backed issuers are not required to file financial statements under the Commission’s rules, the Commission is proposing to exempt asset-backed issuers from the requirement that the depositor’s principal accounting officer or controller sign the registration statement. Instead, consistent with the signature requirements for the Form 10-K report and Sarbanes-Oxley Act Section 302 certifications, the Commission is now proposing to require that the senior officer in charge of securitization of the depositor sign the registration statement for ABS issuers.

II. DISCLOSURE REQUIREMENTS
The Commission believes that the recent financial crisis highlighted that investors and other participants in the securitization market did not have the necessary tools to be able to fully understand the risk underlying those securities and did not value those securities properly or accurately. To address this concern, the Commission is proposing significant changes to Regulation AB and other rules to require expanded disclosure at the time of an ABS offering and on an ongoing basis.

15 Under the proposal, a separate form of prospectus and registration statement must be presented for each country of origin or country of property securing pool assets that may be securitized in a discrete pool in a takedown of asset-backed securities. For both separate asset classes and jurisdictions of origin or property, a separate form of prospectus is not required for transactions that principally consist of a particular asset class or jurisdiction that also describe one or more potential additional asset classes or jurisdictions, so long as the pool assets for the additional classes or jurisdictions in the aggregate are below 10% of the pool, as measured by dollar volume, for any particular takedown.
Regulation AB currently requires only that aggregate information about the composition and characteristics of the asset pool be filed with the Commission and provided to investors, and limits the required disclosure to pool information that is material.\footnote{The Dodd Bill would amend Section 7 of the Securities Act to require the Commission to adopt regulations requiring each issuer of an asset-backed security to disclose, for each tranche or class of security, information regarding the assets backing that security, asset or loan-level data necessary for investors to independently perform due diligence, including data having unique identifiers relating to loan brokers and originators, the nature and extent of the compensation of the broker or originator of the assets and the amount of risk retention by the originator and the securitizer. The FDIC Sample Text also identifies certain specific information that would have to be disclosed.} The proposed rules would instead require for most securitizations disclosure of information for each loan or asset in the asset pool underlying the asset-backed securities. Issuers of asset-backed securities that are backed by credit card pools or charge card pools would be required to group the underlying accounts based on their account-level characteristics and to provide specified data about those groups. The asset-level and grouped account information would be presented in a machine-readable, standardized format so it will be easier for investors to analyze the information. In addition, most issuers would be required to provide the flow of funds, or waterfall, in a computer program that could be downloaded and used by investors to analyze the pool information. The proposal also includes refinements to other prospectus disclosure requirements, including those related to pool-level disclosure, the prospectus summary, transaction parties and static pool information.

The Commission is also proposing a variety of changes to parties’ ongoing disclosure obligations. In addition to expanding the periodic report disclosures to an asset or grouped account level, the proposed changes would also require new disclosure regarding material changes in the characteristics of pool assets, the parties’ retained interest in the ABS, repurchases or replacements of underlying assets and compliance with servicing criteria.

**A. ASSET-LEVEL AND GROUPED ACCOUNT DISCLOSURE**

1. **General Asset-Level Disclosure Requirement for Asset-Backed Securities**

As further discussed below, the asset-level information would include data regarding the quality of the obligor and the payment stream related to a particular asset, such as the terms, expected payment amounts, indices and whether and how payment terms change over time, as well as information regarding the asset origination process.

Proposed Item 1111(h) of Regulation AB and Schedule L would require the issuer of asset-backed securities not backed primarily by receivables due on credit cards, charge cards or stranded costs to disclose standardized information with respect to each underlying asset in the asset pool in the prospectus filed as part of a registration statement on Form SF-1 or, in the case of a shelf take-down, in the preliminary and final prospectuses. The Commission stresses that the usefulness of asset-level data...
is limited for most investors unless the individual data points are standardized. The asset-level information in the prospectus filed with a registration statement on Form SF-1 or in a preliminary prospectus for a shelf take-down would be provided as of a measurement date designated by the issuer that is as recent as practicable. Some information contained in a final prospectus would be updated to the cut-off date from which collections accrue for the benefit of asset-backed security holders. In a shelf offering registered on Form SF-3, if any material pool characteristic of the actual asset pool at the time of issuance of the asset-backed securities differs by 1% or more from the description of the asset pool in the prospectus (other than as a result of the pool assets converting to cash in accordance with their terms), the issuer would be required to provide the updated asset-level information to reflect the actual asset pool as of the cut-off date for the securitization. If any new asset is added to the pool during the reporting period, an issuer would also have to provide the asset-level information for each additional asset.

Proposed Schedule L provides for 28 general data points that are applicable to all asset classes and additional data points applicable to nine specific asset classes:

- residential mortgages,
- commercial mortgages,
- automobiles loans,
- automobile leases,
- equipment loans,
- equipment leases,
- student loans,
- floorplan financings, and
- corporate debt.

The Commission is proposing that issuers provide responses to the asset-level disclosure requirements as a date, a number, text or a coded response.

a. Asset-Level Information Required at the Time of the Offering

The following data points would be required at the time of the offering.

General Data Points. With respect to each asset underlying the asset-backed securities, the 28 general data points would cover its basic characteristics that the Commission believes would be useful to investors across ABS asset classes. These include:

- the unique identification number of each asset and the source of the number, which could be a number generated by CUSIP Global Services (CUSIP), the American Securitization Forum (ASF Universal Link) or MERS (Mortgage Identification Number);
- whether the asset is designated to a particular collateral group;
• the originator, origination date, original amount, original term and other information regarding origination;
• the asset maturity date, the original amortization term, the original interest rate, whether the interest rate is fixed or adjustable, the duration of any interest-only period, whether the interest is simple or actuarial (that is, compounded) and the first payment date;
• the identity of the primary servicer, the servicing fees and the servicing advance methodology;
• whether the loan or asset was an exception to defined or standardized underwriting criteria; and
• the measurement date.

As part of a final prospectus filed in accordance with Rule 424(b), issuers would be required to update the following Schedule L general data points as of the cut-off date for activity that could occur between the measurement date and the cut-off date:

• the current asset balance, current interest rate and current payment amount due;
• the number of days the obligor is delinquent and the number of payments the obligor is past due;
• if the obligor has not made the full scheduled payment, the number of days between the scheduled payment date and the cut-off date; and
• the remaining term to maturity.

Residential mortgages. The Commission is proposing 137 data fields relating to residential mortgages primarily based on information already typically provided by sellers of those mortgages to Fannie Mae and Freddie Mac or likely to be collected by participants in the American Securitization Forum’s Project RESTART. The asset-specific data points relating to residential mortgages include:

• information regarding the basic terms of the residential mortgage loans such as the loan purpose, lien position, prepayment penalties, origination channel, negative amortization terms and status, details of loan modifications, whether the loan is non-amortizing, amount of cash out in any refinancing, length of any buydown period, date through which interest is paid with the current payment, number of days after which a servicer can stop advancing funds on a delinquent loan and amount of junior mortgages on the same property, as well as certain additional information with respect to junior mortgages, adjustable rate mortgages or HELOCs;
• information regarding the underlying property securing the residential loans such as geographic location of the property,17 property type and occupancy status, sales price, valuation data, loan-to-value ratios and for no down payment loans the total value of collateral pledged at the time of origination, as well as various additional information for loans related to manufactured housing;

17 The proposed rules would only require the geographic location of the property to be designated by Metropolitan Statistical Area, Micropolitan Statistical Area or Metropolitan Division, as applicable. The detailed address of the property would not be required.
information regarding obligors of the loans such as credit scores, range of wages and other income (including level of verification), level of verification of other assets, length of employment and whether self-employed, liquid/cash reserves after closing, number of properties owned, other monthly debt, income ratio used to qualify the loan, type of payment used to qualify the obligor for the loan, percentage of down payment from obligor’s own funds, other than gift or borrowed funds, number of obligors, monthly payments due on the property other than principal and interest, number of months since bankruptcy or foreclosure; and

information regarding mortgage insurance such as whether it is required, name of insurer, coverage plan type, certificate number and insurance coverage percentage, whether lender or borrower paid, and if there is pool insurance, the name of the provider and stop loss percentage.

The Commission is specifically requesting comment regarding privacy concerns that might be implicated by requiring disclosure of the sale price of the property.

**Commercial Mortgages.** The Commission is proposing 61 data points for asset-backed securities backed by commercial mortgages, based primarily on the definitions included in the CRE Finance Council Investor Reporting Package, current Regulation AB requirements and staff review of current disclosure. They include:

- information regarding the basic terms of the commercial mortgage such as lien position, loan structure (including the seniority of participated mortgage loan components), current remaining term, payment terms, number of underlying properties, grace days allowed, current hyper-amortizing date, whether the loan is interest only or requires a balloon repayment, prepayment penalties, maximum amount of any permitted negative amortization, modifications and certain additional information relating to adjustable rate mortgages; and

- information regarding the underlying property securing the commercial loan (including particularly the property’s ability to generate income) such as the property name, geographic location designated by zip code, year built, current use of property (including net rentable square feet, number of units/beds/rooms and occupancy), valuation amount, source and date, total underwritten revenues and operating expenses, date when the defeasance option becomes available, net operating income and net cash flow, the ratios of underwritten net operating income and cash flow to debt service and the three largest tenants based on square feet (including square feet leased and lease expiration dates).

Some of these data points, such as location and use of property, net operating income and net cash flow information, current occupancy rates, and identity, square feet occupied by and lease expiration dates for the three largest tenants are currently required on a loan-level basis under existing Regulation AB, and issuers would continue to be required to provide such information in the prospectus in narrative form.

**Other Asset Classes.** Due to a lack of existing standardized data points for other asset classes, the Commission is proposing data points derived from the aggregate pool-level disclosure that is commonly provided in prospectuses for automobile loans and leases, equipment loans and leases, student loans, floorplan financings, repackagings of corporate debt and resecuritizations, and is proposing to add several data points related to obligor and co-obligor income, assets, employment and credit scoring. For the asset classes other than securities, the required information for each asset would relate to the loan or

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lease, the property underlying the loan or lease and the obligors, each tailored in accordance with the characteristics of the relevant asset class. For corporate debt securities, the data points would include the title, minimum denomination, currency, trustee, Commission file number, CIK number, whether the security is callable, payment frequency, and whether the security is interest bearing. For resecuritizations, the same information on each asset-backed security in the asset pool would be required as for asset-backed securities backed by corporate debt securities, as well as the asset-level information for each asset backing those asset-backed securities.

If the asset pool contains assets for which the proposed rules would not contain any asset-specific data points, the issuer would only need to provide the general data points.

b. Asset-Level Ongoing Reporting Requirements

In addition to asset-level information required at the time of the offering, the Commission is proposing to require performance information at the asset level in periodic reports required under Sections 13 and 15(d) of the Exchange Act. As discussed above, these reporting requirements would continue for as long as non-affiliates of the depositor hold any of the securities that were sold in registered transactions. The proposed asset-level performance data in periodic reports would differ from information that would be required at the time of the offering. The Commission believes that in periodic reports, the disclosure should focus on whether an obligor is making payments as scheduled, the efforts by the servicer to collect amounts past due, and the losses that may pass on to the investors. The proposed disclosure requirements are contained in proposed Item 1121(d) of Regulation AB and proposed Schedule L-D.

Similar to the asset-level information required at the time of the offering, each data point required in periodic reports would be presented in a standardized form, such as a date, a number, text or a coded response.

The proposed periodic disclosure would be required to be included in each Form 10-D, which is required to be filed within 15 days after each required distribution date of the asset-backed securities. If any assets are added to the pool during the reporting period, either through prefunding periods, revolving periods or substitution, disclosure would be required for each newly added asset, including the proposed Schedule L data (asset-level information required at the time of the offering).

Similar to the data points required at the time of the offering, the periodic report disclosure requirements would also include both general data points and asset-specific data points. The Commission is not proposing any asset-specific data points related to corporate debt for periodic reports, however, because it believes the general data points will provide appropriate disclosure to investors regarding asset-level performance.

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18 See “Ongoing Reports” in Section I.C.
The 46 general data points would require, among other things, the following information for each underlying asset in the pool:

- the unique asset number, collateral group designation, beginning and ending dates of the reporting period, the interest, principal and other payments scheduled to be collected and actually collected in that reporting period, any principal and interest adjustment, and the current and scheduled asset balance, delinquency and current payment status, the 12-month payment history, next due date, next interest rate and remaining term to maturity;
- information relating to servicing, including the current servicer, servicing fee earned, date of any transfer, amounts advanced by the servicer during the reporting period and the manner in which the servicer advanced the principal and/or interest, date on which the servicer stopped advancing payment, other fees earned or assessed by the servicer relating to the asset and cumulative assessed but uncollected late charges and other fees;
- whether the asset terms have been modified;
- whether a notice to repurchase has been received, whether the asset has been repurchased, date of repurchase, name of repurchaser and reason for the repurchase; and
- whether the asset has been liquidated, charged-off (including amounts of charged-off principal and interest) or paid-off and whether prepayment penalties have been paid or waived.

The asset-specific data points for periodic reports address the same concerns behind the general data points, but are tailored more specifically to the characteristics of the relevant asset class. The asset-specific data points would require updates of key economic terms of each underlying loan and its underlying property, such as the interest rate of adjustable rate mortgages on the next interest reset date. The asset-specific data points would also focus on significant developments in each loan, the property underlying each loan and the obligors that would affect the ability of the assets to maintain the scheduled repayment. For example, data points regarding loan modification, bankruptcy of any obligor, foreclosure proceedings, forbearance plans, loss mitigation efforts, real estate owned (REO) and insurance claims would be required for residential mortgage-backed securities. Issuers of resecuritization asset-backed securities would be required to provide relevant Schedule L-D data for the underlying securities in the asset pool.

2. Grouped-Account Level Disclosure Requirements for ABS Backed by Credit Cards or Charge Cards

The Commission is proposing a new Item 1111(i) and accompanying Schedule CC of Regulation AB prescribing required credit card pool information in lieu of asset-level data because it believes that asset-level information would result in an overwhelming volume of data that may not be useful to investors and that providing it may be cost-prohibitve for issuers. The proposed “grouped account data” would be created by compressing the underlying asset-level data into combinations of standardized distributional groups using asset-level characteristics and providing specified data about these groups.
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The proposals designate five parameters and specify grouping data to reflect the characteristics of the underlying accounts:

- **Credit score**: If the credit score used is FICO, the groupings would be: (1) less than 500; (2) 500-549; (3) 550-599; (4) 600-649; (5) 650-699; (6) 700-749; (7) 750-799; (8) 800 and over and (9) unknown.

- **Number of days past due**: (1) current; (2) less than 30 days; (3) 30-59 days; (4) 60-89 days; (5) 90-119 days; (6) 120-149 days; (7) 150-179 days; and (8) 180 days and over.

- **Account age**: (1) less than 12 months; (2) 12 to 24 months; (3) 24 to 36 months; (4) 36 to 48 months; (5) 48 to 60 months; and (6) over 60 months.

- **States**: the top 10 states for aggregate account balance, with the remaining accounts grouped into the category “other”.

- **Adjustable rate index**: (1) fixed; (2) prime; and (3) other.

The underlying accounts would be grouped by 14,256 possible combinations of the applicable characteristics for each parameter. For each possible combination, or grouped account data line, the Commission is proposing that issuers provide the aggregate credit limit, aggregate account balance, number of accounts, weighted average annual percentage rate and weighted average net annual percentage rate, which is the weighted average of the annual percentage rate less any servicing fees related to the account.

Schedule CC data would have to be provided in any preliminary or final prospectus as of a date designated by the registrant that is as recent as practicable, as well as when issuers would be required to report changes in material pool characteristics or to the waterfall under Item 6.0519 or 6.0720 of Form 8-K. In addition, because the asset pool underlying ABS backed by credit cards or charge cards varies over time, the Commission is proposing that the updated grouped account data be filed with each periodic distribution report on Form 10-D.

3. Asset Data File and XML

The Commission is proposing to require the asset-level information and grouped account data required by proposed Schedules L, L-D and CC be filed on EDGAR in XML (eXtensible Markup Language) as an “asset data file” under Regulation S-T accessible through EDGAR. XML is a computer-readable, standardized format language that can be used more broadly with commercial data-analyzing software.

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19 Under Item 6.05 as proposed to be amended, reporting would be required for offerings of asset-backed securities registered on Form SF-3 if any material pool characteristic of the actual asset pool at the time of issuance differs by 1% or more from the description of the asset pool in the prospectus filed pursuant to Rule 424, other than as a result of pool assets converting to cash in accordance with their terms.

20 Under new Item 6.07, reporting would be required if there is a change to the flow of funds that results in a change to the waterfall for a credit card master trust.
than the current format for data filed with the Commission. The Commission anticipates data filed in XML format will be able to be downloaded directly into spreadsheets and databases, analyzed by commercial off-the-shelf software or used within the data user’s own models in other software formats.

The XML asset data file would be filed as an exhibit to a Form 8-K (both in case of an offering, whether registered on Form SF-1 or SF-3, or a material change report) or to a Form 10-D (in the case of a periodic distribution report). When filed as an exhibit to a Form 8-K, the XML asset data file must be filed by the time of effectiveness of a registration statement on Form SF-1, or on the date the preliminary or final prospectus is filed or the filing date of a Form 8-K reporting a material change in asset pool characteristics under Item 6.05. The issuer would be required by Form SF-1 or SF-3 to incorporate by reference into the prospectus asset-level information that is, in the case of Form SF-1, filed prior to the time of effectiveness of the registration statement, or in the case of Form SF-3, filed prior to the termination of the offering.

The issuer could also use blank data tags in the XML asset data file to provide additional asset-level data or grouped account data that are not required in the proposed rules, filing any narrative explanation of the definitions or formulas for those additional tagged data as another exhibit.

**Hardship Exemption.** The Commission is proposing a self-executing temporary hardship exemption for filing the asset data file. If the registrant experiences unanticipated technical difficulties preventing the timely preparation and submission of an asset data file, a registrant would still be considered timely if the asset data is posted on a Web site on the same day it was due to be filed on EDGAR, the Web site address is specified in the required exhibit, a legend is provided in the appropriate exhibit claiming the hardship exemption, and the asset data file is filed on EDGAR within six business days. The proposals, however, contain no continuing hardship exemption; failure to file the confirming electronic copy within six business days would result in the loss by the depositor, and any issuing entity established by the depositor or any affiliate of the depositor, of Form SF-3 eligibility until 12 full calendar months have elapsed.

The Commission proposes to exclude the asset data file from the continuing hardship exemption under Rule 202 of Regulation S-T, which generally allows a registrant to apply for a continuing hardship if it cannot file all or part of a filing without undue burden or expense.

**B. POOL-LEVEL DISCLOSURE**

In addition to adding asset-level disclosure, the Commission is also proposing to revise certain disclosure requirements for the underlying asset pool under Regulation AB.

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21 For example, EDGAR currently accepts data in HTML or XBRL format.
First, the Commission is proposing to amend Item 1111 of Regulation AB to further detail and clarify the disclosure required for ABS offerings with respect to deviations from disclosed underwriting standards. Current Item 1111 explicitly provides that exceptions to loan origination criteria must be disclosed. The proposed rules would further require that disclosure regarding the underwriting of assets that deviate from the disclosed origination standards must be accompanied by specific data about the amount and characteristics of those assets that did not meet the disclosed standards. To the extent that disclosure is provided regarding compensating or other factors, if any, that were used to determine that the assets should be included in the pool despite not having met the disclosed underwriting standards, the issuer would be required to specify the factors that were used and provide data on the amount of assets in the pool that are represented as meeting those factors. Thus, data would be required on the number of assets not meeting the underwriting criteria, the number of such assets meeting particular compensating factors (if those factors are disclosed) and the number of such assets not meeting such factors.22

Second, the Commission is proposing to require disclosure of what steps were undertaken by the originator(s) to verify the information used in the solicitation, credit-granting or underwriting of the pool assets. Such information could include how the originator documented various criteria such as, for example, debt-to-income ratios, loan-to-value ratios or documentation type.

Third, the Commission is proposing amendments that would elicit more disclosure regarding modification of the underlying assets and representations and warranties in the transaction agreements. The current Regulation AB only requires disclosure of the ability of a servicer to waive or modify any terms, fees, penalties or payments on the underlying assets to the extent material, and the impact, if material, of such ability on the potential cash flow. Revised Item 1111 would require a description of the provisions in the transaction agreements governing modification of assets. In addition, the issuer would be required to provide disclosure regarding whether a representation was made that no fraud has taken place in connection with the origination of the assets on the part of the originator or any party involved in the origination of the assets.

C. WATERFALL

The Commission is proposing to require that ABS issuers (other than issuers of ABS backed by stranded costs) file a computer program that gives effect to the flow of funds, or “waterfall”, provisions of the transaction documents. The computer program would be filed on EDGAR in the form of downloadable source code in Python, an open source interpreted programming language. An investor would be able to download the source code for the waterfall computer program and run the program on the investor’s own computer properly configured with the Python interpreter to analyze the flow of funds after inputting the asset-level or grouped account information provided under the proposed rules. The Commission notes in

22 The FDIC’s Sample Text would require that all residential mortgage loans be originated in compliance with all statutory, regulatory and originator underwriting standards in effect at the time of origination.
the release that currently issuers and underwriters have no obligation to share their computer model of the waterfall with actual or potential investors and believes that the difficulties investors encounter in modeling and analyzing the waterfall have encouraged investors to rely unduly on credit ratings. The availability of asset-level data and the waterfall program are intended to address this concern.

1. Disclosure Requirement

The waterfall computer program would give effect to the priority-of-payment provisions in the transaction agreements that determine the funds available for payments or distributions to the holders of each class of securities and each other person or account entitled to payments or distributions from the pool assets, pool cash flows, credit enhancement or other support, and the timing and amount of such payments or distributions. Whether or not those provisions are required in the narrative description of the waterfall in the prospectus pursuant to Regulation AB, as long as they are used to determine the value of the inputs to the waterfall computer program, the waterfall computer program would be required to give effect to those provisions.

The filed source code, when downloaded and run by an investor, must provide the user with the ability to programmatically input the user’s own assumptions regarding the future performance and cash flows from the pool assets. The waterfall computer program must also allow the use of the proposed asset-level data file that will be filed at the time of the offering and on a periodic basis thereafter.

The Commission is also proposing to require that the waterfall computer program produce a programmatic output, in machine-readable form, of all resulting cash flows associated with the asset-backed securities, including the amount and timing of principal and interest payments payable or distributable to a holder of each class of securities and each other person or account entitled to payments or distributions in connection with the securities until the final legal maturity date, as a function of the inputs into the waterfall computer program.

In addition, the Commission is proposing to require that the issuer file as part of the waterfall computer program a sample expected output for each ABS tranche based on sample inputs provided by the issuer. This proposal is intended to allow investors to confirm that the filed program is functioning, and would not serve to make any representations about the actual expected performance of the pool assets or the transaction.

2. Time of Filing

The waterfall computer program, which would be filed as an exhibit to Form 8-K, would have to be filed by the time of effectiveness of a registration statement on Form SF-1 and on the filing date of any preliminary or final prospectus in accordance with Rule 424(h) or Rule 424(b), as applicable. Proposed Forms SF-1 and SF-3 would require the issuer to incorporate by reference in the prospectus any waterfall
computer program filed prior to the time of effectiveness, in the case of Form SF-1, or prior to the
termination of the offering, in the case of Form SF-3.

In addition, the Commission is proposing to require credit card master trusts to report changes to the flow
of funds that result in a change to the waterfall, filed as a waterfall computer program on Form 8-K,
together with updated grouped account data that will enable investors to evaluate the effect of the change
in the flow of funds using updated pool information.

3. Other Requirements
In connection with the waterfall computer program, the Commission is also proposing:

- to allow the issuer to file, in an additional exhibit, a waterfall computer program related
document to disclose additional program functionality that is not required by the proposed
rules but may be included to allow interoperability with other ABS quantitative analysis
software or for other purposes;
- to apply the same hardship exemption rules for the waterfall computer program as those
proposed for the XML asset data file;\(^\text{23}\) and
- to revise Item 1100 of Regulation AB to provide that the narrative description detailing the
flow of funds for the transaction (and related definitions of terms) must be included in one
location in the prospectus.

D. OTHER PROSPECTUS DISCLOSURE REQUIREMENTS
The Commission is proposing further changes to Regulation AB to require more disclosure with respect to
originators, obligations to repurchase assets, retained interests, the prospectus summary and static pool
information, to require the filing of exhibits with respect to an ABS offering registered on Form SF-3 by the
date the final prospectus is required to be filed, and to eliminate the investment grade credit ratings based
exceptions for providing financial information for significant credit enhancement providers and significant
obligors backed by the full faith and credit of a foreign government.

Identification of Originator. Item 1110 of Regulation AB currently requires the prospectus to identify
originators that are not a sponsor or an affiliate of a sponsor only if the originator has originated, or
expects to originate, 10% or more of the pool assets. The proposed rules would require an originator to
be identified even if it has originated, or expects to originate, less than 10% of the pool assets if the
cumulative amount originated by parties other than the sponsor or its affiliates comprises more than 10% of
the total pool assets.

Obligation to Repurchase Assets. If a sponsor or an originator of 20% or more of the pooled assets is
subject to an obligation pursuant to the transaction agreements to repurchase or replace assets upon the
breach of a representation and warranty, the proposed rules would require the prospectus to provide, on

\(^{23}\) See Section II.A.3, Asset Data File and XML.
a pool-by-pool basis, the amount, if material, of the publicly securitized assets originated or sold by the sponsor or obligor that were the subject of a demand to repurchase or replace for breach of the representations and warranties concerning the pool assets in the last three years pursuant to the transaction agreements. Required disclosure would include the percentage of that amount that was not then repurchased or replaced by the sponsor or originator. For those assets that were not then repurchased or replaced, the prospectus would disclose whether an opinion of a third party not affiliated with the sponsor had been furnished to the trustee confirming that the assets did not violate the representations and warranties.

In addition, the proposed rules would also require disclosure of the financial condition of a sponsor or 20% originator obligated to repurchase assets to the extent that there is a material risk that the financial condition could have a material impact on its ability to comply with its repurchase obligations or otherwise materially impact the pool (or in the case of the 20% originator, have a material impact on the origination of the originator’s assets in the pool). The required information would be similar to the financial information required for certain servicers.

**Economic Interest in the Transaction.** The proposed rules would require disclosure of any interest that the sponsor, a servicer or a 20% originator (including an affiliated originator group) has retained in the transaction, including the amount and nature of that interest. If the offering is registered on Form SF-1, the prospectus would be required to disclose clearly that the sponsor is not required by law to retain any interest in the ABS and may at any time sell any interest initially retained.

**Noncompliance of Servicer.** While not proposing any changes to Item 1108(b)(2) of Regulation AB requiring disclosure of the servicer’s experience in asset servicing, the Commission believes that the application of this requirement has not been consistent among issuers and that the disclosure should include any material instances of noncompliance noted in the assessment of servicer’s compliance with applicable servicing criteria or the attestation reports on the servicer’s assessment issued by a registered public accounting firm pursuant to Item 1122 of Regulation AB or in the servicer compliance statement required in Item 1123.

**Prospectus Summary.** The proposed rules would instruct issuers to provide statistical information regarding the types of underwriting or origination programs, exceptions to underwriting or origination criteria and, if applicable, modifications made to the pool assets after origination in the prospectus summary.

**Static Pool Information.** Current Regulation AB requires ABS issuers to disclose in the prospectus static pool information with respect to prior securitized pools of the sponsor for the same asset class if the information is material to the current transaction. Static pool information indicates how the performance of groups, or "static pools" of assets, such as those originated at different intervals, are performing over...
time. The Commission intends to increase clarity, transparency and comparability of the static pool disclosure by proposing the following requirements:

- The prospectus must contain a narrative disclosure describing the static pool information presented.
- The prospectus must describe the methodology used in determining or calculating the characteristics and describe any terms or abbreviations used.
- The prospectus must describe how the assets in the static pool differ from the pool assets underlying the securities being offered.
- If an issuer does not include static pool information or includes disclosure that is intended to serve as alternative static pool information, it must explain why it has not included static pool disclosure or why it has provided alternative information.
- For amortizing asset pools, the prospectus must provide graphical presentation of delinquency, losses and prepayments for amortizing asset pools and must present the static pool information related to delinquencies and losses in accordance with the guidelines outlined in Item 1100(b) of Regulation AB.24

The Commission is also proposing to require filing of static pool disclosure on EDGAR in PDF format and to eliminate the temporary exemption permitting static pool disclosure to be posted on an Internet Web site if certain conditions are met. The proposals are intended to centralize and preserve the disclosures on EDGAR and also to maintain an easy-to-use format for the data.

Under the proposals, the static pool information could be directly included in the prospectus or filed as an exhibit to Form 8-K25 and incorporated by reference into the prospectus.

**Exhibit Filing.** In order to change a common practice of filing agreements or other documents several days or even weeks following completion of an ABS offering, the Commission is proposing to require explicitly that the exhibits to be filed with respect to a Form SF-3 offering must be filed and made part of the registration statement (for example, by incorporation by reference) at the latest by the date the final prospectus is required to be filed pursuant to Rule 424. Although the issuers would still be allowed to file those documents on Form 8-K and incorporate them by reference into the prospectus, the proposed rules would make it impermissible to file those documents at closing under a regular T+3 settlement arrangement.

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24 Item 1100(b) requires that information be presented in a certain manner — for example, it requires that information regarding delinquency be presented in 30- or 31-day increments through the point that assets are written off or charged off as uncollectable.

25 If filed on Form 8-K, the static pool information would be required to be filed by the time of effectiveness of a registration statement of Form SF-1, or with respect to a Form SF-3 offering, on the date of the filing of a preliminary or final prospectus.
**SULLIVAN & CROMWELL LLP**

*Reliance on Credit Ratings.* The Commission is proposing to eliminate the exceptions for providing financial information for significant credit enhancement providers and significant obligors backed by the full faith and credit of a foreign government based on their having an investment grade credit rating.

*CIK Numbers for Depositor, Sponsor and Issuing Entity.* Currently, offering documents and Exchange Act reports related to one ABS offering may be filed with the Commission with different file numbers or under various parties’ names. In order to make it easier to locate related filings, the Commission is proposing to require that the cover pages of registration statements on Forms SF-1 and SF-3 include the Central Index Key (CIK) number of the depositor, and if applicable, the CIK number of the sponsor. The Commission is also proposing to require that the cover pages of Forms 10-D, 10-K and 8-K for ABS issuers include the CIK number of the depositor and of the issuing entity, and if applicable, the CIK number of the sponsor.

**E. OTHER PERIODIC DISCLOSURE REQUIREMENTS**

The Commission is proposing changes to distribution reports filed on Form 10-D, as well as some additional changes to annual and current reports of ABS issuers on Forms 10-K and 8-K.

1. **Distribution Reports on Form 10-D**

   The proposed changes relating to Form 10-D are as follows:

   *Previously Reported Information.* The Commission is proposing to require a reference to the CIK number, file number and date of the previous report on Form 10-D, for the convenience of locating previous filings that include information omitted from such Form 10-D in reliance on Instruction C(3) because it has been previously reported.

   *Asset Repurchase of Sponsors and Originators in the Reporting Period.* The Commission is proposing that Form 10-D include disclosure of any demands made of the party obligated to repurchase assets in the period covered by the report to repurchase the assets in the pool backing the securities due to a breach in the representations and warranties concerning the pool assets as provided in the transaction agreements, including the percentage of that amount that was not then repurchased or replaced by the originator. Of those assets that were not then repurchased or replaced, the Commission would require disclosure whether an opinion of a third party not affiliated with the obligated party had been furnished to the trustee confirming that the assets did not violate a representation or warranty.

   *Delinquency Presentation.* The Commission is proposing to reverse its position for delinquency presentation in periodic reports, which had been based on materiality, by adding an instruction to

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26 For example, an ABS offering with a particular file number may be associated with a registration statement with a different file number. Further, current reports on Form 8-K for ABS offerings may be filed under the depositor file number.
2. Form 10-K: Servicer’s Assessment of Compliance with Servicing Criteria

The annual report on Form 10-K of an ABS issuer is required to contain, among other things, an assessment of compliance with servicing criteria that is set forth in Item 1122 of Regulation AB by each party participating in the servicing function. In order to provide enhanced information regarding instances of noncompliance with servicing criteria, the Commission is proposing the following requirements:

- **Pool-Specific Information regarding Noncompliance.** Under current Item 1122, the servicer’s assessment is required to be made at the platform level, instead of for each specific asset pool. It may not be clear whether the asset-backed securities covered in the Form 10-K report have been affected by the material instance of non-compliance. Therefore, along with disclosure of material instances of noncompliance with servicing criteria, the body of the annual report would have to disclose whether the identified instance of noncompliance involved the servicing of the assets backing the asset-backed securities covered in the particular Form 10-K report.

- **Correction of Noncompliance.** The body of the annual report would have to discuss any steps taken to remedy a material instance of noncompliance previously identified by an asserting party for its activities made on a platform level. This disclosure would be required whether or not the instance of non-compliance involved the servicing of assets backing the securities covered in the particular Form 10-K report.

The Commission is also proposing to codify certain staff positions relating to the servicer’s assessment requirement, with some modification:

- **Aggregation and Conveyance of Information.** The staff has taken the position that the accurate conveyance of information between a servicer and another party is part of the same servicing criterion under which the activity that generated the information is assessed. To elicit better disclosure regarding a servicer’s compliance with its duties, any servicer that is responsible for aggregation or conveyance of information should assess whether the information is mathematically accurate and the information conveyed accurately reflects the information that was obtained.

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27 Item 1100(b) of Regulation AB requires delinquency experience to be reported in 30- or 31-day increments, including disclosure of the total amount of delinquent assets as a percentage of the aggregate asset pool, loss and cumulative loss information regarding charge-offs, charge-off rate, gross losses, recoveries and net losses, number and amount of assets experiencing a loss and the number and amount of assets with a recovery, the ratio of aggregate net losses to average portfolio balance and the average of net loss on all assets that have experienced a net loss. All delinquency and loss information must be categorized by pool asset type, and material information regarding delinquencies and losses particular to pool asset type(s), such as reposition information, foreclosure information and REO or similar information must be described.

28 Disclosure at the platform level means the servicer’s assessment is made with respect to all ABS transactions involving the asserting servicer that are backed by assets of the type backing the asset-backed securities covered by the Form 10–K report. Typically, one servicer’s assessment relating to several issuers backed by the same type of assets will be filed as an exhibit to each of the issuers’ Form 10-K.
• **Coverage of Assessment.** The proposed rules would require the servicer’s assessment to cover all ABS transactions involving the assessing party and that are backed by the same asset type backing the class of asset-backed securities covered by the Form 10-K report. The servicer may, however, take into account divisions among transactions that are consistent with its actual practices, but if the servicer includes in its platform less than all of the transactions backed by the same asset type that it services, it must include a description of the scope of the platform in the servicer’s assessment.

3. **Current Reports on Form 8-K**

The Commission is proposing to reduce the threshold for changes in material pool characteristics requiring the filing of a current report on Form 8-K from 5% to 1%, other than as a result of pool assets converting into cash in accordance with their terms. In addition, a narrative description of the changes that were made to the asset pool, including the number of assets substituted or added to the asset pool, would be included in the body of the current report on Form 8-K. Issuers would also be required to report any material change in the sponsor’s interest in the offered asset-backed securities, including the amount of change and a description of the sponsor’s resulting interest in the transaction. The proposals do not include any further guidance on what may constitute a “material” change in this context.

### III. DEFINITION OF ASSET-BACKED SECURITY

The Commission is also proposing revisions to the Regulation AB asset-backed security definition, which under current rules securities must satisfy to be eligible for registration on Form S-3 and for Regulation AB to apply. Under the proposal, only securities satisfying the definition of asset-backed securities would fall in the proposed registration and disclosure regime, including use of Forms SF-1 and SF-3 for securities registration. A core principle of the Regulation AB definition of an asset-backed security is that the security is backed by a discrete pool of assets that by their terms convert into cash, with a general absence of active pool management. Based on its experience with the existing definition, the Commission is concerned that asset pools that are not sufficiently developed at the time of an offering to fit within the ABS disclosure regime may nonetheless qualify for ABS treatment, and that as a result investors may not be receiving appropriate information about the securities being offered.

Under the existing definition, assets that are non-revolving can be added to the pool of assets backing all the securities issued by a master trust in connection with subsequent offerings of securities. The proposal would limit the master trust exception to the discrete pool requirement in the definition of asset-backed securities so that the exception would apply only to receivables and other financial assets that arise under revolving accounts. The proposal would also reduce the maximum revolving period during which cash flows from the pool assets may be used to acquire additional non-revolving assets from three years to one year. Finally, the proposal would reduce the maximum amount of prefunding for the future acquisition of additional assets from 50% of the offering proceeds (or, in the case of master trusts, of the aggregate principal balance of the total asset pool whose cash flows support the asset-backed securities) to 10%.
The Commission believes that the combination of shortening the revolving period and lowering the ceiling on prefunding should better align the offerings that use those features with its goal of maintaining the integrity of the definition’s discrete pool requirement, and that its proposals would not substantially change current market practice. In addition to requesting comment on the appropriateness of these changes, the Commission is requesting comment on whether it is appropriate for asset-backed securities structured as master trusts backed by non-revolving accounts to register on Form S-1.

IV. PRIVATELY ISSUED STRUCTURED FINANCE PRODUCTS

Noting that securitization in the private, unregistered market played a significant role in the financial crisis, the Commission is proposing significant revisions to the Rule 144A and Regulation D safe harbors for exempt offerings and resales of asset-backed securities to provide for specific disclosures for private offerings of structured finance products, as well as additional public information about private offerings of structured finance products conducted in reliance on these safe harbors. The Commission is also soliciting comment on whether it should adopt similar changes under Regulation S.

The Commission believes that under the current Rule 144A information requirement, which is oriented towards corporate issuers, purchasers of asset-backed securities in Rule 144A transactions may receive only a minimal amount of information about their investment, and notes further that the information requirements of Regulation D apply only to purchasers that are not accredited investors. Under the proposal, for a reseller of a “structured finance product” to rely on Rule 144A or for an issuer of a “structured finance product” to rely on Rule 506 of Regulation D, which exempts certain offers and sales without regard to dollar amount:

- the underlying transaction agreement for the securities must grant to purchasers (and in the case of Rule 144A, holders and prospective purchasers designated by holders) the right to obtain upon request from the issuer the information that would be required if such transaction were registered under the Securities Act on Form S-1 or proposed Form SF-1 and, in the case of Rule 144A, such ongoing information as would be required by Section 15(d) of the Exchange Act if the issuer were required to report under that section, and
- the issuer must represent that it will provide such information.  

In addition to asset-backed securities, the term “structured finance product” would cover:

- a synthetic asset-backed security; or
- a fixed-income or other security collateralized by any pool of self-liquidating financial assets, such as loans, leases, mortgages and secured or unsecured receivables, that entitles its holder to receive payments that depend on cash flows from the assets — including:

29 The FDIC’s Sample Text would also require disclosure that complies, at a minimum, with the requirements of Regulation AB even if the obligations are issued in a private placement or not otherwise required to be registered.
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- a collateralized mortgage obligation;
- a collateralized debt obligation;
- a collateralized bond obligation;
- a collateralized debt obligation of asset-backed securities;
- a collateralized debt obligation of collateralized debt obligations; or
- a security that at the time of the offering is commonly known as an asset-backed security or a structured finance product.

The definition is intended to cover managed CDOs as well as asset-backed commercial paper.

The proposals would also modify the Rule 144 current public information requirement for structured finance products, the issuer of which is not subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, to parallel the proposed revisions to the Rule 144A private placement safe harbor.

The proposals include a new Securities Act Rule 192 that would require a structured finance product issuer that has represented and covenanted to provide information as proposed to be required by Rule 144, Rule 144A or Rule 506 of Regulation D to provide such information upon request of the purchaser or holder. Under proposed Rule 192, a failure to provide this information “would constitute an engagement in a transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser of the securities”. The Commission is not intending to create a potential claim under Section 5 under the Securities Act for the failure to provide the information required by the representation and covenant, but does believe that investors should be able to take appropriate action under the transaction agreements and that the Commission should be able to bring an enforcement action for violation of proposed Rule 192.

The Commission is requesting comment on how feasible an exempt private offering will be in light of the proposed requirements and on the appropriateness of treating offers and sales in reliance on safe harbors substantially similar to public ones in terms of disclosure requirements.

Finally, the Commission is proposing to require for the first time the filing of a notice, to be made on a new Form 144A-SF, that would provide basic information on the principal parties, the securities being sold (including risk retention by the sponsor), the asset pool and other relevant data, signed by the issuer of structured finance products that are represented as eligible for resale under Rule 144A. The Form 144A-SF would have to be filed with the Commission no later than 15 calendar days after the first sale of securities in the offering. The Commission is proposing to modify Form D to require similar

30 Under the proposal, filing of the Form 144A-SF notice would not be a condition to availability of the Rule 144A safe harbor; however, if an issuer fails to file Form 144A-SF, the Rule 144A safe harbor would not be available for subsequent resales of newly issued structured finance products of the issuer or affiliates of the issuer until the required notice has been filed with the Commission.
V. MISCELLANEOUS

The Commission is proposing to codify certain staff positions relating to the registration of asset-backed securities backed by auto leases and the incorporation by reference of subsequently filed periodic reports to make them more transparent and readily available to the public.

The Commission preliminarily believes that a tiered approach to implementation of its asset-backed securities reforms based on the size of the sponsor would not be appropriate and that compliance dates should not extend past a year after adoption. It is cognizant of the significant burdens that may initially be imposed on sponsors and originators and is soliciting comments as to whether implementation of any of the proposals should be based on a tiered approach relating to other characteristics or should be phased in.

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31 The Dodd Bill would eliminate Section 4(5) of the Securities Act, a limited offering exemption for real estate mortgage notes (or participations in these notes) either: (i) originated by a banking or banking-type institution subject to state or federal supervision and examination when the minimum sales price per purchaser is not less than $250,000, or (ii) originated by a mortgagee approved by the Secretary of Housing and Urban Development pursuant to §§ 203 and 211 of the National Housing Act and offered or sold to specified banking institutions, insurance companies, any state or territory of the United States or the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association or the Government National Mortgage Association.
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