

## SEC Adopts Final Dodd-Frank Representation/Warranty Disclosure Rules *Requires Retroactive Disclosure of Asset Repurchase Activity*

On January 20, 2011, the SEC adopted final rules implementing Section 943 of the Dodd-Frank Act. Section 943 requires that the SEC prescribe regulations requiring securitizers to disclose instances of fulfilled and unfulfilled asset repurchase requests stemming from breaches of representations and warranties. The disclosure requirement under the rule is retroactive. Any securitizer covered by the rule that issued asset-backed securities within the three year period from January 1, 2009, through and including December 31, 2011, and who has outstanding asset-backed securities as of December 31, 2011, must file with the SEC the form prescribed under the rule by February 14, 2012. For new securitizers subject to the rule, filing must be made within 45 days following the end of the quarter in which the related asset-backed securities are issued.

### Applicability to Securitizers and ABS; Disclosure Requirements

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The rule, designated as Rule 15Ga-1, applies to any asset-backed security with respect to which the underlying transaction agreements include a covenant to repurchase or replace an underlying asset for breach of a representation or warranty. "Asset-backed security", as used in the rule (hereafter "ABS"), follows the broad definition included in the Dodd-Frank Act and now codified under Section 3(a)(77) of the Securities Exchange Act of 1934. The term includes both registered and unregistered fixed-income securities or other securities collateralized by any type of self-liquidating financial asset (such as loans, leases, mortgages, and receivables), the holder of which depends primarily on cash flow from such assets. The rule requires that any securitizer, defined as either the issuer of an ABS or a person who organizes and initiates an ABS transaction by selling assets directly, or indirectly through an affiliate, to an issuer, disclose in tabular format the amount of fulfilled and unfulfilled repurchase requests with respect to assets that it securitized. The stated purpose of the disclosures is "so that investors may identify asset originators with clear underwriting deficiencies."

The rule requires securitizers to report across all trusts aggregated by the securitizer, broken down by asset class and issuer, the number, dollar amount, and percentage of principal balance of:

- Total assets by originator
- Assets that were subject to repurchase demand
- Assets that were repurchased or replaced
- Assets pending repurchase or replacement (within cure period)
- Demands in dispute
- Demands withdrawn
- Demands rejected

This information is required to be compiled on new Form ABS-15G and filed on EDGAR. Only one affiliated securitizer is required to make the disclosures where multiple affiliated securitizers are involved in the same ABS transaction. The form must be signed by the senior officer of the securitizer in charge of securitization.

The SEC originally proposed that the disclosure requirement wouldn't be triggered until the first issuance of asset-backed securities following the effective date of the rule and that disclosures must look back five years. The final rule shortened the look-back period to 3 years, but the disclosures are required for any ABS issued within the three-year period and outstanding as of December 31, 2011. The proposed rule would have required monthly periodic disclosures, whereas the final rule requires only quarterly disclosures following the initial period.

Commenters requested that no requirement be imposed for issuers that have never experienced a repurchase demand. The final rule partially accommodates this request by providing that issuers that have never been subject to repurchase demands may check a box stating as such for the initial three-year period. Thereafter, such issuers would be relieved from the quarterly filing requirement for so long as no repurchase requests are made. Securitizers are, however, required to file an annual statement that no repurchase requests have been made during the preceding year.

## Publicly Registered ABS

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With respect to SEC-registered ABS, the rule requires that securitizers disclose the information required in the new form ABS-15G, but only for assets of the same category as the assets to which the prospectus relates. Such information may not be older than 135 days and must cover the prior three-year period. In order to provide for a transition period to establish processes and controls for collecting the necessary data, a phase-in period is provided under the rule. For prospectuses filed in the first year after the date of the rule (i.e. from February 14, 2012, through but excluding February 14, 2013), information may be limited to the prior year. For prospectuses to be filed in the second year after the date of the rule (i.e. from February 14, 2013, through but excluding February 14, 2014), information may be limited to the prior two years. Prospectuses filed thereafter must cover a three-year look-back period. Beginning in 2012, periodic reports filed by issuers on Form 10-D will also be required to include the repurchase information required under the rule for the reporting period and asset type covered by the Form 10-D.

## Municipal ABS

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Despite requests from industry participants, the SEC declined to exclude from the rule's scope ABS issued by municipal entities, such as housing and mortgage-backed bonds and student loan bonds. In the SEC's view, Congress intended to cover all ABS, without exception. The SEC did, however, prescribe a three-year delayed timetable for municipal securitizers subject to the rule, such that the initial reporting period would be the three-year period ending December 31, 2014. For the purpose of eligibility for the delayed timetable, municipal securitizers are limited to states and territories of the United States, the district of Columbia, and any political subdivision or public instrumentality thereof.

## Credit Rating Reports

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The SEC's release also includes its final Rule 17g-7 implementing the Dodd-Frank Section 943 requirement that each nationally recognized statistical rating organization (NRSRO) include in any report accompanying a credit rating of an ABS a description of the representations, warranties, and enforcement mechanisms available to investors and how they differ from similar securities. The rule expands the definition of "credit rating" in the legislation to include any expected

or preliminary credit rating issued by a NRSRO. Accordingly, the rule picks up pre-sale reports. The rule also clarifies that it applies to both registered and unregistered ABS. These requirements will be effective six months from the effective date of the rule, which is 60 days from the date the rule is published in the Federal Register.

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