

KIRKLAND ALERT

September 2014

Not So Fast: The SEC Adopts Reg AB II

Introduction

On August 27, 2014, the Securities and Exchange Commission (“SEC”) adopted a wide-ranging set of reforms to its rules for the registration, public offering and sale of, and reporting on, asset-backed securities (“ABS”). The package of reforms, known popularly as Reg AB II, has been a long time coming: the SEC first proposed reforms in [April 2010](#), and then requested further comments on aspects of the reforms in [August 2011](#) and [February 2014](#). That’s over 52 months from original proposal to final rules.

That may seem like a leisurely pace, as suggested by the title of this *Alert*. But we do not think it was a lack of focus or effort that slowed the SEC’s process. Rather, we think it is the extraordinary complexity of ABS structures, the breadth of asset classes, the delicacy of considerations such as individual privacy and the diversity of viewpoints in the ABS community that caused this rulemaking to take so long. The SEC was deluged with comments on its proposals. Kirkland lawyers led or participated actively in the submission of 12 different comment letters, totaling hundreds of pages, by various commenters.

The final Reg AB II package is not as sweeping as the original proposals. The SEC’s commissioners apparently could not develop a consensus on several areas, including some of the most controversial to the ABS industry, and they elected to proceed with a somewhat reduced set of reforms.

Of particular note, as we discuss further below, the SEC has not elected to extend the public market disclosure and reporting regime to the Rule 144A market. So issuers who rely on the Rule 144A market can rest somewhat more easily, as these rules do not apply.

Making Sense of Reg AB II

Although some proposed rules were dropped, Reg AB II is still quite lengthy and complicated. The [SEC’s release](#) (the “Adopting Release”) ran to 683 pages, comprised of 508 pages of commentary and 165 pages of rule changes. It’s “not so fast” a read, and many people no doubt are still working their way through the release. For those who are gluttons for punishment, the SEC’s more recently released draft [EDGAR ABS XML Technical Specification](#) manual has even more details relevant to asset level data dissemination, such as the formatting requirements and the “codes” that must be employed in a number of responses.

So, you may be asking, “How can I get my arms around Reg AB II and what it means for my business?”

We’re glad you asked! We have several ways we can help. Check out the following links, and keep an eye out for future *Kirkland Alerts*:

The package of reforms, known popularly as Reg AB II, has been a long time coming: the SEC first proposed reforms in April 2010, and then requested further comments on aspects of the reforms in August 2011 and February 2014.

Quick Reference Guide. We have prepared a Kirkland Quick Reference Guide to Reg AB II to summarize the new rules quickly and to facilitate reference to the Adopting Release. This Guide is organized into eight principal subject areas, each of which is then subdivided into key topics. For each topic, we have indicated the relevant rule(s), the page numbers in the SEC’s adopting release for both the new rules and for the related commentary, and the highlights of each rule.

Top 10 Changes that Reg AB II Will Make. Here is our view of the 10 most impactful changes in Reg AB II.

Top 10 Rules that Reg AB II Does Not Contain. There could have been even more in Reg AB II. Here is our list of the top 10 proposals that were not adopted.

Compliance Dates. We summarize here the times by which issuers and others must comply with these new rules.

Further Alerts. Over the coming weeks, we will be preparing and circulating in-depth *Kirkland Alerts* with analyses of the various subject areas listed in our Quick Reference Guide. We will provide more detail on the new rules, as well as our views on key consequences of Reg AB II.

We hope you find these materials to be useful. There’s a lot in Reg AB II, and considerably less time available to absorb it than the SEC took to finalize it.

Getting Moving on Reg AB II

Although our theme is that Reg AB II has not moved quickly, and although the compliance dates seem to be a long time away, we believe there is not a lot of time to be lost at this point. The amount of work to be done, and the interpretive questions and technical challenges that will inevitably arise, suggest that prudent issuers should start preparing promptly for the new regime. All public-market ABS issuers will need to revamp substantially their forms of prospectuses, file new registration statements, and add new sections to transaction agreements; issuers in the “asset level” sectors will need to prepare for the collection and disclosure of all that data. It will be a busy time. We look forward to working with many of you to implement these changes.

If you have any questions about the rules or their implications, please contact Ken Morrison, who authored this *Alert*, or any of the senior members of the Asset Finance & Securitization practice at Kirkland.

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Kirkland Quick Reference Guide to Reg AB II

Topic	Rule	Pages ^{1, 2}	Quick Highlights
Asset Level Data – Asset Classes			
Auto Loan	Reg AB, Item 1125 (Item 3)	C: 158-82 R: 585-93	72 data points total. 40 previously proposed data points dropped, 12 new ones added. Payment-to-income ratio replaces all other income-related data. Obligor location is by state, not MSA; FICO is exact; must indicate whether employment or income was verified and whether loan met the “first level” of underwriting criteria. Original interest rate must be shown, even if it changed pre-offering.
Auto Lease	Reg AB, Item 1125 (Item 4)	C: 158-82 R: 593-601	66 data points total. 57 previously proposed data points dropped (e.g., interest and principal payments), 15 new ones added. Securitization value and acquisition cost must be shown, as well as contract residual and base residual. Many others follow auto loan rules.
CMBS	Reg AB, Item 1125 (Item 2)	C: 147-58 R: 567-85	152 data points total. The SEC “aligned” its data points with the industry standard CREFC IRC, but did not follow it in various respects.
RMBS	Reg AB, Item 1125 (Item 1)	C: 105-47 R: 533-67	272 data points total (down from 362 previously). The SEC referenced Project RESTART a lot, but did not follow it entirely. Two-digit zip code for location.
Debt securities & resecuritizations	Reg AB, Item 1125 (Items 5 & 6)	C: 182-90 R: 601-08	60 data points for debt securities. Resecuritizations are pools that hold asset-backed securities (“ ABS ”), and they must provide the same data as for debt security ABS. Also, if those ABS must provide asset level data, then so must the resecuritization.
Asset Level Data Disclosure Implementation			
Requirement to file	Reg AB, Item 1111(h)(1)	C: 50-85 R: 525	If pool contains specified asset types, include the asset level data specified in Schedule AL (Item 1125), used both for offering and for periodic filings.
Format in which data must be filed	Reg AB, Item 1111(h)(3); Reg S-K, Item 601(b)(102)	C: 257-59 R: 525 C: 257-59 R: 514	1111(h) requires filing of Asset Data File as an exhibit to Form ABS-EE. Item 601 of Reg S-K includes Asset Data File in exhibit filing requirements for registration statements. (The codes for some responses, and other technical data, are in the draft EDGAR ABS XML Technical Specification on the SEC’s website.)
Measurement dates for data	Schedule AL	C: 101	Schedule AL specifies applicable date. Release says date is as of end of most recent reporting period unless otherwise specified, but rules don’t say that.
Asset Related Documents	Reg AB, Item 1111(h)(4) & (5); Reg S-K, 601(b)(103)	C: 255-57 R: 526, 514	Issuer is permitted, but not required, to file additional “Asset Related Documents” with explanations of the asset level data contained in a filed Schedule AL or with additional asset level data not required by Schedule AL.
Other Prospectus Disclosure			
Unitary prospectus	Form SF-3, Instr. IV	C: 430-34 R: 661	Disclosure needs to be in a single document, rather than a base and pro supp. Other writings, like FWP’s and computational materials, can still be used.
Prospectus summary	Reg AB, Instr. to Item 1103(a)(2)	C: 278-81 R: 517	Summary disclosure should be tailored to securitized pool. Summary “could” include types of underwriting programs, exceptions to underwriting criteria and modifications to pool assets.
Sponsor financial condition	Reg AB, Item 1104(f)	C: 267-72 R: 518	Provide info re sponsor financial condition if material risk exists that sponsor’s failure to honor rep & warranty repurchase “could have a material impact on pool performance or performance of the” ABS.
Retained interests	Reg AB,	C: 272-76	Describe any interest retained by sponsor or servicer in the transaction,

¹ Note that page numbers are to the original “draft” Adopting Release released on August 27. The pagination in the subsequent version that is linked to our Alert is slightly different—a topic there will start maybe 1 or 2 pages “earlier.”

² C = pages in Adopting Release with SEC commentary on this topic; R = pages in Adopting Release with final rule on this topic.

Topic	Rule	Pages ^{1,2}	Quick Highlights
of sponsor and servicer	Items 1104(g) & 1108(e)	R: 518, 521	including amount and nature and any hedge entered into to offset risk position held by sponsor or servicer.
Static pool disclosure	Reg AB, Item 1105 Intro, Instr. to 1105(a)(3)(ii)	C: 284-96 R: 519-20	For each static pool, describe how it differs from securitized pool, such as underwriting criteria and risk tolerances. Include graphical static pool data if doing so would aid understanding. Present delinquencies for static pool over its life in 30 or 31 day buckets, up to 120 days past due.
	Form 8-K, Item 6.06	C:296-300 R: 674	If static pool data is filed on Form 8-K (rather than in a prospectus), it must do so under new Item 6.06 and (to incorporate into prospectus) include it as Exh. 106.
Other originators	Reg AB, Item 1110(a)	C: 265-67 R: 523-24	If >10% of pool is from originators other than sponsor & its affiliates, identify all other originators and describe each one's retained interests in, or hedges related to, the securitized pool.
Asset modifications	Reg AB, Item 1111(e)(2)	C: 281-82 R: 525	Describe provisions in operative documents as to ability to effect asset modifications, including how a modification could affect cash flows on ABS.
Offering Procedures			
3 business day speed bump	Rule 424(h)(1)	C: 307-23 R: 613-14	Preliminary prospectus (red herring) must be filed with SEC at least 3 business days before first sale of ABS.
48 hour speed bump	Rule 424(h)(2)	C: 307-23 R: 613-14	Pro supp showing material changes from red herring must (i) be filed with SEC at least 48 hours before first sale and (ii) show how info has changed.
Delivery of red herring	Rule 15c2-8	C: 425-30 R: 671	Prior exemption from this rule dropped, so now red herring must be delivered to anticipated investors at least 48 hours prior to sending confirmation of sale.
Filing of final deal documents	Reg AB, Item 1100(f)	C: 444-50 R: 515-16	Final forms of operative documents for an offering must be filed on Form 8-K not later than the date the final prospectus must be filed.
Revisions to shelf prospectus	Rule 430D	C: 434-37 R: 614-20	Rule 430D replaces 430B for ABS. ¶(d)(2) says that revisions to an effective shelf prospectus to add a new structural feature or credit enhancement must be added via a post-effective amendment to the shelf.
Shelf Eligibility			
Registration statement to use	Form SF-3	C: 323-24 R: 641-70	New Securities Act form to use to register ABS for distribution in shelf offerings that meet the registrant requirements and transaction requirements.
Registrant requirements	Form SF-3, Instr. I.A.	C: 409-12 R: 651-53	I.A.1-Must have timely filed all CEO certifications and documents meeting Transaction Requirements previously; otherwise, a 90-day "timeout." I.A.2-Must have timely filed all Exchange Act reports in 12 months prior to date of filing new Form SF-3; otherwise, at mercy of SEC staff.
Transaction requirements	Form SF-3, Instr. I.B	C:326-409 R: 653-58	An offering must meet requirements B.1.(a) through (d) to be registered on the shelf.
Depositor CEO certification	Form SF-3, Instr. I.B.1(a); Reg S-K, Item 601(b)(36)	C: 327-63 R: 512-14, 654	Depositor's CEO must certify for each offering as to (1) familiarity with deal, (2) absence of misleading disclosure, (3) fair presentation in prospectus of info re assets, structure and risks, and (4) reasonable basis to conclude deal is structured (but not guaranteed) to produce expected cash flows to service scheduled interest payments and ultimate principal repayments.
Asset representation reviewer (" ARR ")	Form SF-3, Instr. I.B.1(b)	C: 363-91 R: 654-56	Deal document must appoint ARR, who will review assets for compliance with reps & warranties if (1) specified delinquency (" DQ ") threshold is exceeded <u>and</u> (2) investors vote to direct a review. Voting rules are specified. Investors can, it seems, be required to pay the expense of the review.
	Reg AB, Item 1101(c)	C: 516	(Definition of ARR) Person appointed to review assets for compliance with underlying reps & warranties; must be independent of most other parties.

Topic	Rule	Pages ^{1, 2}	Quick Highlights
	Reg AB, Item 1109(b)	C: 522-23	Prospectus must give ARR's background, duties, compensation, limits on liability, indemnities and investor actions needed to cause ARR review.
	Reg AB, Item 1113(a)(7)(i)	C: 527	Prospectus must describe how DQ threshold was determined to be appropriate and how it compares to DQs shown in static pool data.
Dispute resolution mechanics	Form SF-3, Instr. I.B.1(c)	C: 392-99 R: 656	Deal document must allow person who made a repurchase request for an asset, if no resolution is reached in 180 days, to choose arbitration (where arbitrator will decide who pays) or mediation (where parties agree on costs).
Investor communications	Form SF-3, Instr. I.B.1(d)	C:399-409 R: 657-58	Must agree to include in 10-Ds requests from investors to communicate with other investors re exercising rights, including requestor's contact info. Limits imposed on degree of proof that investor must provide re its status.
Form of shelf prospectus	Form SF-3, Instr. IV	C: 430-34 R: 661	Each shelf may have just one form of prospectus, and it must cover just one asset class and one country (with a 10% exception for pools on takedown).
Registration of ABS (other than Shelf Eligibility)			
Non-shelf registration	Form SF-1	C: 630-41	Available for registration of ABS for which no other form is available. In practice, will be rarely used — no S-1 registrations of ABS have been effected since at least 2008.
Definition of ABS	Reg AB, Item 1101(c)	C: 451-59 R: 516	Permissible level of prefunding reduced from 50% of proceeds to 25%; proposed changes to master trusts and length of revolving period not adopted.
Pay-as-you-go fees	Rule 456(c); Rule 457(s)	C: 437-40 R: 621-22	Payment of registration fees for ABS on Form SF-3 may be deferred until the time of each takedown and paid based on then-current rate.
Collateral certificates & SUBIs	Rule 190	C: 440-41 R: 609-10	Collateral certificates and special units of beneficial interest underlying ABS offerings must be registered along with ABS, but no separate fee is due.
Sales of MBS on a delayed basis	Rule 415(a)(vii)	C: 423-25 R: 611-12	Mortgage backed securities may only be sold on a delayed basis only if registered on Form SF-3, which eliminates prior SMMEA exemption.
Exchange Act Reporting – Forms 10-D, 10-K and ABS-EE			
Delinquency data (10-D)	Reg AB, Item 1121(a)(9)	C: 459-62 R: 528	Present historical DQ and loss data through no less than 120 days.
Asset reviews (10-D)	Reg AB, Item 1121(d)	C: 388-89 R: 528-29	Describe any event triggering an asset review; if ARR provided an asset review report, summarize it; if ARR changes, describe circumstances.
Investor communications (10-D)	Reg AB, Item 1121(e)	C: 403-09 R: 529	Disclose any request to communicate with other investors (if related to exercise of rights), how to contact requesting investor, and related info.
Sponsor's interest in ABS (10-D)	Reg AB, Item 1124	C: 463-67 R: 531-32	Describe any material change in interest of sponsor or affiliate in these ABS as a result of a purchase or sale of the ABS.
MINCs (10-K)	Reg AB, Item 1122(c)	C: 468-74 R: 530-31	If material instance of non-compliance (" MINC ") is reported, disclose if it relates to these ABS. Describe steps taken to remedy reported MINCs.
Electronic exhibits for ABS	Form ABS-EE	C: 257-59 R: 681-83	New form for the filing of Asset Data Files and Asset Related Documents for registered ABS.
Transition Periods			
Compliance dates for new rules		C: 477-85 R: 2	1. Asset level data must be provided starting on the date that is 60 days + 2 years after the rules are published in the Federal Register (" Publication Date "). 2. Registrants must comply with all other rules starting on the date that is 60 days + 1 year after the Publication Date.

The Top 10 Changes that Reg AB II Will Make

Reg AB II makes a lot of changes, as you can tell by looking at our Quick Reference Guide. It's rather hazardous to predict which of those have the most impact, but we will fearlessly give you our ranking.

1. *Asset level data.* The headline change is the “asset level data” dissemination that will be required for five asset classes — retail auto loans, auto leases, commercial mortgage backed securities (“CMBS”), residential mortgage backed securities (“RMBS”) and ABS backed by debt securities — and for resecuritizations of ABS.
2. *Three business day speed bump.* The preliminary prospectus, or red herring, will need to be filed on EDGAR at least three business days prior to the initial pricing of ABS in a public offering. That will slow down the typical ABS offering from a seasoned issuer by about a day, we think, from current practice.
3. *48 hour speed bump.* Separately from the three day speed bump, the rules will require that any material changes to the original red herring be filed on EDGAR at least 48 hours before initial pricing. The common practice for many issuers of “upsizing” their offerings shortly before pricing will be impacted by this change.
4. *Unitary prospectus.* The combination of a base prospectus and a prospectus supplement will no longer be permitted under an effective shelf registration statement. The offering will need to be described in a single, unitary document (although free-writing prospectuses and other types of writings will continue to be permitted). Further, although the new rule does not seem to us to say this, it seems fairly clear that the SEC believes that the unitary prospectus can describe only those structural features and forms of credit enhancement that will actually be part of the offered ABS; the SEC does not believe that the shelf prospectus can describe a variety of possible structures or forms of credit enhancement.
5. *Revisions to effective shelf prospectus.* The new unitary shelf prospectus cannot be revised to add a new structural feature or a new form of credit enhancement, except through a post-effective amendment to the registration statement. This amendment requirement, together with the unitary prospectus feature, may mean that a depositor that wishes to have several different types of credit enhancement or deal structures within a single asset class will need to maintain separate registration statements.
6. *Pay-as-you-go registration fees.* Instead of paying all registration fees at the time of effectiveness, issuers can now pay their registration fees as they take down ABS from the shelf. This change could ameliorate a lot of the pain that some issuers might otherwise feel from the possibility, described in the prior item, that they will need to maintain a number of registration statements for a single asset class.
7. *Transaction requirements for shelf registration.* In order to register ABS on the shelf (via new Form SF-3), the issuer will need to meet four new “transaction” requirements:

The headline change is the “asset level data” dissemination that will be required for five asset classes — retail auto loans, auto leases, commercial mortgage backed securities, residential mortgage backed securities and ABS backed by debt securities — and for resecuritizations of ABS.

- The depositor's chief executive officer will need to make a detailed certification at the time of each takedown about the quality of the disclosure and the expectation that the assets' cash flows will be sufficient to repay the registered ABS.
 - The transaction documents must appoint an asset representations reviewer, whose function will be to review assets for compliance with reps and warranties if (1) a delinquency threshold specified in the agreement is exceeded and (2) investors vote to initiate a review. Interestingly, the SEC seems to assume that investors will have to pay the costs of that review, although the rules do not address the fees — other than to require disclosure of how the fees will be paid.
 - The transaction documents must contain a dispute resolution mechanism under which, if a demand to repurchase an asset is unresolved 180 days after the demand was made, the person making the demand is entitled to select either mediation or binding arbitration.
 - The transaction documents must contain an agreement on behalf of the issuer to include in a distribution report on Form 10-D the name and contact information for an investor who wishes to communicate with other investors regarding the possible exercise of remedies under the transaction documents.
8. *Static pool disclosure.* Static pool disclosure will be required to include a description of “how the static pool differs from the [securitized] pool ..., such as the extent to which the [securitized] pool ... was originated with the same or differing underwriting criteria, loan terms, and risk tolerances than the static pools presented.” It's not entirely clear whether this description needs to be made on a static-pool-by-static-pool basis; if the circumstances permit, perhaps an issuer can use a single prefatory discussion that covers all of its static pools.
9. *Delinquency disclosures.* In both static pool disclosures and distribution reports, issuers will be required to report delinquencies in 30- or 31-day buckets, up to 120 days past due. This will result in a lot more delinquency data than has typically been presented, though current practice varies somewhat across platforms.
10. *Disclosure of sponsor financial condition.* Information regarding the sponsor's financial condition needs to be presented “if there is a material risk that the effect on its ability to comply with the provisions in the transaction agreements relating to the repurchase obligations for those assets resulting from such financial condition could have a material impact on pool performance or performance” of the ABS. We find this a hard rule to parse, but we are inclined to think it means (a) that disclosure about a financially strong sponsor is not needed, even if there are likely to be significant repurchase obligations, and (b) information about a financially weak sponsor is not needed, if the repurchase obligations are likely to be insignificant.

In both static pool disclosures and distribution reports, issuers will be required to report delinquencies in 30- or 31-day buckets, up to 120 days past due.

The Top 10 Rules that Reg AB II Does *Not* Contain

Reg AB II will have a substantial impact, but there could have been even more of an effect. Along the way, the SEC proposed a number of other rules that it did not adopt — at least not yet. Whether any of these unadopted proposals will eventually become law is unclear; remarks by some commissioners at the SEC’s public meeting made it clear that there is a division of views on these topics.

Along the way, the SEC proposed a number of other rules that it did not adopt — at least not yet.

Here is our list of the top 10 rules that were proposed as part of Reg AB II but not adopted:

1. *That Rule 144A offerings would have to comply with asset level data and other public offering disclosure rules.* The original April 2010 release (the “2010 Release”) proposed that investors in “structured finance products” would have the right, upon request, to obtain information about a Rule 144A offering that was the equivalent of the information required in a prospectus and in ongoing reports for a public offering. The genesis for that proposal was the epic failure in the financial crisis of many collateralized debt obligations (“CDOs”) backed by RMBS tranches; perhaps the fact that no new CDOs of that ilk have since been issued, or seem likely to ever be issued again, tempered the SEC’s enthusiasm.
2. *That issuers would have to provide “waterfall computer programs.”* The 2010 Release proposed that issuers make available to investors a computer program that would give effect to the distribution “waterfall” for the transaction, that would allow an investor to input its own assumptions about asset performance and that would produce an output of all cash flows associated with the ABS.
3. *That asset level data or grouped data would need to be provided for all asset classes.* The SEC’s original concept was that issuers of ABS backed by any asset class would need to provide asset level data, except that issuers of credit and charge card ABS would instead provide so-called “grouped data” and issuers of stranded cost ABS were entirely exempt. In addition to the five asset classes for which asset level data is now required, the 2010 Release contained proposed data points for dealer floorplan loans, equipment loans and leases and student loans. If the SEC does come back around and adopt further rules on asset level disclosure, these asset classes would seem to be the ones most directly in the line of fire.
4. *That issuers would have to establish their own websites to host loan level data.* In February 2014, the SEC released a staff memorandum floating the idea of requiring issuers to provide asset level data on their own websites, rather than via EDGAR. The staff was seeking a way to ameliorate the privacy implications of large-scale releases of asset level data, but this alternative proved unpopular with both issuers and investors.

5. *That the sponsor or an affiliate must hold risk retention of at least 5% in order to register ABS on the shelf.* This risk retention proposal predated, and was then superseded by, the Dodd-Frank Act risk retention provisions. The 2010 Release contemplated just two acceptable forms of risk retention — a 5% vertical slice and a 5% seller's interest for master trusts. Further, it applied just to shelf registrations, whereas the Dodd-Frank requirement will apply to all deals that constitute asset-backed securities under the Securities Exchange Act of 1934. We note, though, that Reg AB II does require disclosure regarding the retained interests of the sponsor and servicer, even before risk retention is required.
6. *That revolving pools of non-revolving assets could not qualify as "master trusts" within the definition of "asset-backed security."* The 2010 Release sought to limit "master trust" status to revolving pools backed by revolving assets, such as credit card accounts. This limitation would have meant that pools backed by non-revolving assets, such as insurance premium finance loans, could not qualify as master trusts, and therefore the securities backed by these pools would not constitute "asset-backed securities" that could be registered on the shelf. Both issuers and investors opposed this proposal, and they persuaded the SEC that the proposed distinction was an artificial one.
7. *That the revolving period for non-revolving assets be reduced from three years to one year.* Reg AB currently limits the length of revolving periods for transactions that do not constitute master trusts to three years in length. The 2010 Release proposed to reduce the permissible revolving period to just one year. But issuers and investors agreed that revolving periods for short-term non-revolving assets such as trade receivables and insurance premium finance loans needed to be longer than one year to enable the design of attractive securities, and the SEC relented.
8. *That a revised "initial pool" asset level data filing would need to be made under Item 6.05 of Form 8-K whenever pool assets changed by 1% or more during a prefunding or revolving period.* The 2010 Release contemplated one form — Schedule L — for disclosures about the base characteristics of the pool assets, and a second form — Schedule L-D — for ongoing monthly performance reporting. This rule would have required a new Schedule L, in addition to the Schedule L-D, in each month that pool assets changed by reason of a prefunding or revolving period. The final rules, which feature a single form of schedule, obviate the need for this rule.
9. *That final transaction agreements must be filed by the date that the preliminary prospectus is filed.* The 2010 Release noted that many ABS issuers waited to file final documents until days or weeks after the filing of a final prospectus. At that time, the SEC proposed that substantially final agreements be filed by the time the final prospectus is filed, shortly after pricing. Then, in the 2011 reproposal of Reg AB II, the timing was accelerated to require filing with the preliminary prospectus. However, the SEC backed away from that accelerated timing, and the final rule requires the filing contemporaneously with the final prospectus.

We note, though, that Reg AB II does require disclosure regarding the retained interests of the sponsor and servicer.

10. *That a material change to the preliminary prospectus resulting in a recirculated prospectus would restart the (then) five-business-day waiting period.* The SEC wanted to give investors time to understand changes to the transaction after the original distribution of the preliminary prospectus. Instead, the new rules require any material changes prior to pricing to be described in a supplement to the prospectus, rather than a whole new prospectus, and the supplement must be filed with the SEC at least 48 hours prior to pricing.

Compliance Dates: Fortunately, Not So Soon

It is not going to be easy to adapt to the Reg AB II regime. Many changes, large and small, to current practice will be necessary to implement these rules.

Fortunately, the SEC has been fairly generous in the timelines it has established for compliance. The relevant dates all tie into the date on which the adopting release is published in the Federal Register (the “Publication Date”). That date will presumably occur sometime between late September and mid-October, though the elapsed time between regulatory approval and publication varies significantly. Here are three data points on the time from agency approval to publication:

- 10 days for the July 2011 Reg AB II reproposal
- 23 days for the August 2013 risk retention reproposal
- 52 days for the December 2013 adoption of the Volcker Rule

The “effective date” for the Reg AB II rules will be 60 days after the Publication Date, which means sometime in November or December 2014. That date is not far away; fortunately, though, that date does not mean much.

The important dates are the “compliance dates” specified in the Adopting Release. The SEC has specified two separate compliance dates:

- **Publication Date + 60 days + one year** (roughly November or December 2015): On and after this date, public offerings of ABS must be registered on new Form SF-1 or SF-3 and all of the new rules, forms and disclosures (other than asset level data) must be observed for those offerings and for all periodic reports filed from that date forward.
- **Publication Date + 60 days + two years** (roughly November or December 2016): On and after this date, asset level data must be provided for public offerings backed by auto loans, auto leases, RMBS, CMBS and debt securities (and for resecuritizations of such transactions) and on the periodic reports on Form 10-D filed thereafter with respect to such offerings.

Fortunately, the SEC has been fairly generous in the timelines it has established for compliance.

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