

# Perspectives on Final Rules Implementing Regulation AB II

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# Introduction

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On August 27, 2014, the SEC unanimously adopted final rules under Regulation AB that substantially revise the offering process, disclosure and reporting requirements for registered offerings of asset-backed securities (ABS).

The final rules implement several key areas of reform, but the SEC has deferred taking action on several other significant aspects of its original rule proposals.

With regard to its most significant areas of reform, market commentary was often mixed, and in many cases the SEC's final rules reflect its attempt to balance the competing views and concerns expressed by different market constituencies.

As a result, while the final rules in some cases are more measured than initially proposed, they will still require significant changes in market practice over the upcoming months as the compliance dates for the new regulations approach.

# Background

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**April 2010:** SEC proposed “Regulation AB II,” a series of new and amended rules that, if adopted, would substantially revise the offering process, disclosure and reporting requirements for publicly-issued ABS and impose new disclosure standards for privately-issued structured finance products.

**July 2011:** SEC re-proposed certain of its Reg AB II rule proposals in light of the provisions of Dodd-Frank and comments received on its original proposals, including rules relating to the eligibility criteria for ABS shelf registration and filing deadlines for transaction agreements, and solicited additional comment on its proposal to require asset-level information about pool assets.

**February 2014:** SEC re-opened the comment period on Reg AB II to solicit further public comment on an approach to disseminate potentially sensitive asset-level data, which was discussed in a related staff memorandum and would have required issuers to make asset-level information available to investors/potential investors through an issuer-sponsored website with access restrictions as necessary to address privacy concerns.

# Overview

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## Offering Process Reforms

**Investor Review Period:** Requires ABS issuers using shelf registration to file a complete preliminary prospectus at least three (3) business days prior to the first sale of securities in the offering (with any material changes from the preliminary prospectus highlighted in a separate supplement at least 48 hours prior to first sale).

**New Forms for Registered ABS Offerings:** Replaces Forms S-1 and S-3 with new forms – Forms SF-1 and SF-3 – for registered ABS offerings. ABS offerings that qualify for shelf registration will be registered on Form SF-3 and all other ABS offerings will be registered on Form SF-1.

# Overview (cont'd)

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## Offering Process Reforms (cont'd)

**New Standards for Shelf Eligibility:** Replaces the prior investment grade requirement for ABS shelf eligibility with **new transaction requirements**, intended to encourage issuers to design and prepare ABS offerings with greater oversight and care, and to provide investors with effective tools to address the enforceability of repurchase obligations and help overcome collective action problems.

The new transaction requirements involve the filing of a CEO certification and the filing of transaction agreements that contain asset review, dispute resolution, and investor communication provisions in connection with each ABS offering.

Adds a **new registrant requirement** relating to compliance with these new transaction requirements by the depositor and its affiliates.

# Overview (cont'd)

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## Offering Process Reforms (cont'd)

**Ongoing Access to Effective Shelf:** Requires an ABS issuer to conduct an annual compliance evaluation to determine whether the registrant requirements have been satisfied during the 12-month look-back period immediately preceding the evaluation and, therefore, whether the issuer remains eligible to conduct takedowns off its effective shelf registration statement. The evaluation must be conducted as of 90 days after the end of the depositor's fiscal year end.

**48-Hour Rule:** Amendments to Exchange Act Rule 15c2-8 – the “48-hour rule” – to require delivery of a preliminary prospectus at least 48 hours before the sending of confirmations of sale (applicable to both shelf and non-shelf ABS offerings).

# Overview (cont'd)

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## Offering Process Reforms (cont'd)

**Integrated Prospectus:** ABS issuers must include a single “form of” prospectus in the shelf registration statement, and prepare a single, integrated prospectus at the time of each takedown, thereby eliminating the practice of preparing a base prospectus and a prospectus supplement.

**Pay-as-You-Go Registration Fees:** The final rules permit, but do not require, ABS issuers to pay registration fees as securities are offered off of a shelf registration statement, as opposed to paying all fees upfront at the time the shelf registration statement is filed. PAYG fees are due at the time the preliminary prospectus is filed.

**Accelerated Filing Deadlines for Transaction Agreements:** Accelerates the filing deadlines for final transaction agreements in connection with shelf takedowns – to no later than the date the final prospectus is required to be filed.

# Overview (cont'd)

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## Disclosure Reforms

**Asset-Level Information for Certain Asset Classes:** Requires asset-level information in the prospectus and in ongoing reports in a standardized, tagged format for ABS backed by certain asset classes – namely, residential mortgages, commercial mortgages, auto loans, auto leases, and debt securities (including resecuritizations).

SEC modified or omitted certain asset-level information originally proposed for residential mortgages, auto loans and auto leases to mitigate re-identification concerns.

Final rules include an exemption from asset-level information requirements for resecuritizations of ABS issued prior to the compliance date for the asset-level disclosure requirements.

# Overview (cont'd)

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## Disclosure Reforms (cont'd)

**Other Disclosure Reforms:** SEC adopted a series of other discrete but important disclosure reforms, including:

- In cases where the sponsor or its affiliates have originated less than 90% of asset pool, identification of each other asset originator;
- Disclosure of financial information relating to the party with a repurchase obligation;
- Disclosure about the economic interest in the transaction retained by a sponsor, a servicer, a 20% originator, or any of their affiliates;
- Statistical information regarding whether pool assets were originated in conformity with (or as exceptions to) disclosed underwriting/origination criteria, or modified after origination; and
- Efforts to increase the clarity, transparency, and comparability of static pool information, some of which apply to all issuers and others of which apply only to amortizing asset pools.

# Overview (cont'd)

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## Changes to Reg AB-ABS Definition

Reg AB-ABS definition currently requires that ABS be backed by a “discrete pool of assets” with 3 exceptions: a master trust exception, a revolving period exception, and a prefunding exception.

The SEC had proposed to further limit the current exceptions to alleviate concerns that the pools were not sufficiently developed at the time of an offering to ensure that investors had adequate information about the assets and asset pool.

Under the final rules, the SEC has adopted further limitations to the prefunding exception, decreasing the prefunding limit from 50% to 25%, but has not adopted the proposed further limitations to the master trust exception or the revolving period exception.

# Overview (cont'd)

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## Ongoing Reporting Reforms

The final rules include several changes to disclosure required in Forms 10-D, 10-K, and 8-K, including:

- Where a MINC has been identified in an Item 1122 report, requiring disclosure in the body of the Form 10-K report regarding (i) whether it has been determined that the noncompliance involved servicing of the pool assets, and (ii) whether steps have been taken to remedy the MINC.
- Requiring disclosure in Form 10-D reports regarding material changes in the sponsor's or an affiliate's interest in the ABS transaction during the related reporting period, whether due to purchase, sale, or other transfer of the ABS (but not pledges).
- Requiring pool-level delinquency reporting in Form 10-D reports to be presented in 30-day increments for not less than 120 days.

# Overview (cont'd)

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## Action Deferred on Other Proposed Reforms

The SEC has deferred action on several other significant aspects of its original Regulation AB II rule proposals, including:

- **Private Placements of Structured Finance Products:** Action has been deferred on the proposal to impose public-style disclosure requirements on private placements and resales of structured finance products.
- **Asset-Level Information for Additional Asset Classes:** Action has been deferred on the proposal to require asset-level information for asset classes beyond those identified above, including equipment loans and leases, student loans and floorplan financings.
- **Grouped Account Disclosure:** Action has been deferred on the proposal to require grouped-account disclosure for credit and charge card ABS.

# Overview (cont'd)

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## Action Deferred on Other Proposed Reforms (cont'd)

- **Computer Waterfall Program:** Action has been deferred on the proposal to require ABS issuers to file a computer program giving effect to the “waterfall” provisions of the transaction agreements.
- **Further Accelerated Filing Deadlines for Transaction Agreements:** Action has been deferred on the proposal to further accelerate the filing deadlines for transaction agreements in connection with shelf takedowns – to no later than the date the preliminary prospectus is required to be filed.

# Transition Provisions

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The SEC has adopted a one-year transition period for all new rules, except those relating to asset-level disclosure, and a two-year transition period for the new rules relating to asset-level disclosure. In each case, the transition period begins to run from the effective date for the new rules, which is November 24, 2014. As a result:

- Any registered offering of ABS commencing with an initial bona fide offer on or after November 23, 2015 must comply with the new rules, forms and disclosures, except for asset-level disclosure.
- Any registered offering of ABS backed by residential mortgages, commercial mortgages, auto loans, auto leases, or debt securities (including resecuritizations) commencing with an initial bona fide offer on or after November 23, 2016 must comply with the asset-level disclosure and reporting requirements.
- ABS shelf offerings conducted after completion of the one-year transition period must be conducted off of an effective Form SF-3 registration statement.
- Any Form 10-D or Form 10-K report that is filed after November 23, 2015 must comply with the new rules and disclosures, except for asset-level disclosure.

# Investor Review Period

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As proposed, the final rule revises the filing deadlines for ABS shelf offerings to provide investors with additional time to review the preliminary prospectus before making an investment decision.

New Securities Act Rule 424(h) requires that the ABS issuer file a preliminary prospectus with the SEC at least three (3) business days prior to the first sale of ABS in the offering.

Thereafter, the issuer must disclose any material changes in a supplement to the preliminary prospectus that must be filed at least 48 hours before the date and time of the first sale. The supplement must clearly describe what and how information in the preliminary prospectus has changed so the changes are apparent to investors.

New Securities Act Rule 430D requires that the Rule 424(h) preliminary prospectus be a “complete” preliminary prospectus – meaning that it must contain substantially all the information relating to the specific ABS takedown that is required in a statutory prospectus, except for pricing and price-dependent information.

## Revised Eligibility Criteria for ABS Shelf Offerings

Transaction Requirements	Registrant Requirements
<b>Current requirements previously located in Form S-3 and carried over to Form SF-3:</b>	
<p><b>Delinquent-Asset Test.</b> Delinquent assets &lt; 20% of asset pool, as measured by dollar volume as of a specified measurement date.</p> <p><b>Residual-Value Test.</b> In the case of lease-backed ABS, the portion of the securitized pool balance attributable to the residual value of the leased assets &lt; 65% of the securitized pool balance (in the case of motor vehicles) or &lt; 20% of the securitized pool balance (in the case of all other leased assets), as measured by dollar volume as of a specified measurement date.</p>	<p><b>Exchange Act Reporting.</b> If the depositor or its affiliates were required to file periodic reports (10-Ks, 10-Ds, 8-Ks) during the 12-month look-back period preceding the filing of the SF-3, for ABS backed by the same asset class, then the depositor and its affiliates must have timely filed all such reports, subject to limited exceptions.</p>

## Revised Eligibility Criteria for ABS Shelf Offerings

Transaction Requirements	Registrant Requirements
<p><b>New transaction requirements adopted in place of investment-grade credit rating requirement:</b></p>	<p><b>New registrant requirement:</b></p>
<p><b>CEO Certification.</b> Requires the depositor’s CEO to provide a certification at the time of each takedown regarding the disclosure in the prospectus and the structure of the securitization.</p> <p><b>Asset Review Provision.</b> The transaction agreements for each takedown must provide for review of the pool assets for compliance with the representations and warranties upon the occurrence of certain trigger events.</p> <p><b>Dispute Resolution Provision.</b> The transaction agreements for each takedown must set forth dispute resolution procedures – mediation or third-party arbitration (at the option of the party making a repurchase request) – to address assets not repurchased within 180 days of a repurchase request.</p> <p><b>Investor Communications Provision.</b> The transaction agreements for each takedown must provide for the reporting of requests by investors to communicate with other investors in connection with the exercise of their rights under the terms of the ABS.</p>	<p><b>Registrant Requirements Relating to Compliance with New Transaction Requirements.</b> If the depositor or its affiliates were subject to the new transaction requirements during the 12-month look-back period preceding the filing of the SF-3, for ABS backed by the same asset class, then the depositor and its affiliates must have timely filed:</p> <ul style="list-style-type: none"> <li>• All CEO certifications; and</li> <li>• All transaction agreements containing the required asset review, dispute resolution, and investor communication provisions.</li> </ul> <p><i>Cure provision:</i> If the depositor or any of its affiliates fails any portion of this new registrant requirement, the requirement will be deemed satisfied 90 days after all delinquent certifications and transaction agreements have been filed.</p>

**At-a-Glance Summary:  
Revised Eligibility Criteria for ABS Shelf Offerings**

Transaction Requirements	Registrant Requirements
<p><b>Current requirements previously located in Form S-3 and carried over to Form SF-3:</b></p> <p><b>Delinquent-Asset Test.</b> Delinquent assets &lt; 20% of asset pool, as measured by dollar volume as of a specified measurement date.</p> <p><b>Residual-Value Test.</b> In the case of lease-backed ABS, the portion of the securitized pool balance attributable to the residual value of the leased assets &lt; 65% of the securitized pool balance (in the case of motor vehicles) or &lt; 20% of the securitized pool balance (in the case of all other leased assets), as measured by dollar volume as of a specified measurement date.</p>	<p><b>Exchange Act Reporting.</b> To the extent the depositor or any issuing entity previously established by the depositor or its affiliates is or was at any time during the twelve-month look-back period immediately preceding the filing of the registration statement required to file Exchange Act reports with respect to a class of ABS involving the same asset class, such depositor and each such issuing entity must have filed all material required to be filed regarding such ABS, and such material, other than specified reports on Form 8-K, must have been filed in a timely manner.</p>
<p><b>New transaction requirements adopted in place of investment-grade credit rating requirement:</b></p> <p><b>CEO Certification.</b> The CEO for the depositor must make certain certifications for each ABS shelf offering to the effect that, among other things, (i) the prospectus is materially accurate and not misleading and (ii) the securitization is structured, but not guaranteed, to produce expected cash flows at times and in amounts to service scheduled or required payments or distributions on the registered ABS. The exact form and content of these certifications is set forth in the final rules.</p> <p><b>Asset Review Provision.</b> The transaction agreements for each ABS shelf offering must include provisions appointing an independent asset representations reviewer, with access to any relevant underlying documents (i) to review assets for compliance with the reps/warranties included in the underlying transaction agreements (but not to determine whether noncompliance constitutes a breach of any contractual provision), which review would be required upon the occurrence of certain triggering events, and (ii) to provide a report of its findings and conclusions to the trustee.</p> <p><b>Dispute Resolution Provision.</b> The transaction agreements for each ABS shelf offering must set forth dispute resolution procedures – mediation or third-party arbitration (at the option of the party making a repurchase request) – to address assets not repurchased within 180 days of a repurchase request.</p> <p><b>Investor Communications Provision.</b> The transaction agreements for each ABS shelf offering must provide for the reporting of requests by investors to communicate with other investors in connection with the exercise of their rights under the terms of the ABS.</p>	<p><b>New registrant requirement:</b></p> <p><b>Registrant Requirements Relating to Compliance with New Transaction Requirements.</b> To the extent the depositor or any issuing entity previously established by the depositor or its affiliates is or was at any time during the twelve-month look-back period immediately preceding the filing of the registration statement required to comply with the new transaction requirements, with respect to a previous ABS offering involving the same asset class, then such depositor and each such issuing entity must have timely filed:</p> <ul style="list-style-type: none"> <li>• All CEO certifications; and</li> <li>• All transaction agreements containing the required asset review provisions, dispute resolution provisions and investor communication provisions.</li> </ul> <p><i>Cure provision:</i> If any such depositor or issuing entity fails any portion of this new registrant requirement, the requirement will be deemed satisfied 90 days after all delinquent certifications and transaction agreements have been filed.</p>

# Revised Shelf Eligibility Criteria

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## **New Transaction Requirements**

The new transaction requirements for shelf eligibility are part of a broader ongoing effort by the SEC to remove references to credit ratings from its rules, in order to reduce the risk of undue reliance on those ratings.

Similar to the current requirement that shelf ABS carry an investment grade credit rating, the new transaction requirements are designed to establish a category of ABS transactions that are appropriate for public offering off a shelf without prior staff review.

The SEC believes that the new transaction requirements should encourage ABS issuers to design and prepare ABS offerings with greater oversight and care, and will provide investors with effective tools to address the enforceability of repurchase obligations and help overcome collective action problems.

# Revised Shelf Eligibility Criteria (cont'd)

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## CEO Certification

Under the first new transaction requirement, the CEO of the depositor must provide a certification at the time of each ABS shelf offering about the disclosure contained in the prospectus and the structure of the securitization.

The certification must be dated the date of the final prospectus and must be filed by the time the final prospectus is required to be filed.

The SEC believes that the depositor's CEO, as an officer at the highest level and a signatory to the registration statement, should be responsible for providing proper oversight of the transaction.

Final rules specify exact form and content of the CEO certification; certification language may not be altered. Issues in providing the certification must be addressed through disclosure in the prospectus.

In response to the concerns of commenters, the SEC has made a number of significant changes to the language of the final certification, most notably in paragraph 4.

## CEO Certification Relating to ABS Shelf Eligibility

(marked to show changes versus 2011 re-proposed version)

### Certification

I, [Identify the certifying individual,] certify as of [the date of the final prospectus under **Securities Act Rule 424 (17 CFR §239.424)§ 230.424 of this chapter**] that:

1. I have reviewed the prospectus relating to [title of all securities, the offer and sale of which are registered] ~~(the "securities")~~ and am familiar with ~~the structure of the securitization, including without limitation, in all material respects, the following,~~ the characteristics of the securitized assets underlying the offering, ~~the terms of any internal credit enhancements and the material terms of all contracts and other arrangements entered in to the effect the securitization (the "securitized assets"), the structure of the securitization, and all material underlying transaction agreements as described in the prospectus;~~
2. Based on my knowledge, the prospectus does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading;
3. Based on my knowledge, the prospectus and other information included in the registration statement of which it is a part, fairly present, in all material respects, the characteristics of the securitized assets ~~underlying the offering described therein, the structure of the securitization and the risks of ownership of the asset-backed securities described therein, including all credit enhancements and all risk factors~~ the risks relating to the securitized assets ~~underlying the offering~~ that would affect the cash flows ~~sufficiently available~~ to service payments or distributions on the ~~asset-backed securities as described in the prospectus in accordance with their terms;~~ and
4. Based on my knowledge, taking into account ~~all material aspects of~~ the characteristics of the securitized assets ~~underlying the offering~~, the structure of the securitization, ~~including internal credit enhancements, and any other material features of the transaction, in each instance, and the related risks~~ as described in the prospectus, ~~there is a reasonable basis to conclude that the~~ securitization is ~~designed/structured~~ to produce, but is not guaranteed by this certification to produce, ~~expected~~ cash flows at times and in amounts ~~sufficient~~ to service ~~expected~~ scheduled payments of interest and the ultimate repayment of principal on the ~~asset-backed securities offered and sold pursuant to the registration statement~~ securities (or other scheduled or required distributions on the securities, however denominated) in accordance with their terms as described in the prospectus.
5. The foregoing certifications are given subject to any and all defenses available to me under the federal securities laws, including any and all defenses available to an executive officer that signed the registration statement of which the prospectus referred to in this certification is part.

Date: \_\_\_\_\_

\_\_\_\_\_  
[Signature]

\_\_\_\_\_  
[Title]

The certification must be signed by the chief executive officer of the depositor, as required by General Instruction I.B.1.(a) of Form SF-3.

# Revised Shelf Eligibility Criteria (cont'd)

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## CEO Certification (cont'd)

Under the final rule, the certification consists of five paragraphs, the substance of which are as follows:

- 1. Review of prospectus, familiarity with transaction:** He or she has reviewed the prospectus relating to the ABS and is familiar with, in all material respects, the characteristics of the securitized assets underlying the offering, the structure of the securitization, and all material underlying transaction agreements as described in the prospectus;
- 2. 10b-5 certification:** Based on his or her knowledge, the prospectus does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading;
- 3. Securitized assets, structure, and risks of ABS ownership are fairly presented:** Based on his or her knowledge, the prospectus and other information included in the registration statement of which it is a part fairly present, in all material respects, the characteristics of the securitized assets, the structure of the securitization and the risks of ownership of the ABS, including the risks relating to the securitized assets that would affect the cash flows available to service payments or distributions on the ABS in accordance with their terms;

# Revised Shelf Eligibility Criteria (cont'd)

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## CEO Certification (cont'd)

- 4. Securitization structured to produce cash flows/service distributions on ABS:** Based on his or her knowledge, taking into account all material aspects of the characteristics of the securitized assets, the structure of the securitization, and the related risks as described in the prospectus, there is a reasonable basis to conclude that the securitization is structured to produce, but is not guaranteed to produce, expected cash flows at times and in amounts to service scheduled payments of interest and the ultimate repayment of principal on the ABS (or other scheduled or required distributions on the ABS, however denominated) in accordance with their terms as described in the prospectus; and
- 5. Securities law defenses:** The foregoing certifications are given subject to any and all defenses available to him or her under the federal securities laws, including any and all defenses available to an executive officer that signed the registration statement of which the prospectus referred to in this certification is a part.

# Revised Shelf Eligibility Criteria (cont'd)

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## Transactional Safeguards re Enforceability of Repurchase Obligations

The SEC notes the absence in most transaction documents of specific mechanisms to:

- identify assets that may fail to comply with reps/warranties,
- resolve questions as to whether any potential noncompliance constitutes a breach of the contractual provisions, and
- help investors to communicate with each other in connection with exercise of their rights under the terms of the ABS.

The SEC believes the remaining new transaction requirements will provide investors with effective tools to address the enforceability of repurchase obligations and help overcome collective action problems.

And believes these transactional safeguards should, in turn, provide incentives for parties that are obligated to repurchase to consider the characteristics and quality of the assets included in the pool.

# Revised Shelf Eligibility Criteria (cont'd)

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## **Asset Review Provision**

Under the second new transaction requirement, the transaction agreements for each ABS shelf offering must include provisions for review of the pool assets for compliance with the representations and warranties upon the occurrence of certain trigger events.

# Revised Shelf Eligibility Criteria (cont'd)

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**Selection of Reviewer:** PSA or other transaction agreement must provide for selection and appointment of an asset representations reviewer that is not:

- affiliated with any sponsor, depositor, servicer, or trustee; or
- the party (or an affiliate of any party) hired by sponsor or an underwriter to perform pre-closing due diligence work on the pool assets.

Prospectus must disclose reviewer's name, experience, and compensation; its duties and responsibilities; any limitations on its liability and any terms of indemnification; any arrangements regarding its removal, replacement, or resignation, and how related expenses are paid; and any known, material relationships among the reviewer and the other transaction parties.

If a reviewer resigns, or is removed or replaced, or if a new reviewer is appointed, then disclosure regarding the event and surrounding circumstances must be included in the Form 10-D report for the period in which it occurred.

# Revised Shelf Eligibility Criteria (cont'd)

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**Triggers for Review:** Review would be required upon the occurrence of a two-pronged trigger:

- When a threshold of delinquent assets is reached; and
- When an investor vote to direct a review; *provided* the agreement not require more than:
  - 5% of the total investors' interest in the pool to initiate vote, and
  - a simple majority of those interests voting to direct a review.

## *Delinquency prong*

Delinquency threshold must be specified in transaction agreements.

Prospectus must disclose how threshold was determined to be appropriate, including a comparison of the threshold against delinquencies for prior pools.

## *Investor vote prong*

Voting procedure must be specified in transaction agreements and disclosed in prospectus, and must incorporate restrictions on voting requirements outlined above.

Voting procedure must clearly delineate rules and eligibility criteria in the event some investors arise via a resecuritization.

# Revised Shelf Eligibility Criteria (cont'd)

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**Scope of Review:** Once triggers for review have been met, asset representations reviewer must review the pool assets for compliance with pool asset reps and warranties, but cannot be the party to determine whether any noncompliance constitutes a breach of any contractual provision (such determination reserved to the investors through the trustee).

Review must include all assets that are 60+ days delinquent, as reported in most recent periodic report.

Asset representations reviewer must have access to any underlying pool asset documents relevant to review.

A report of the reviewer's findings and conclusions must be provided to the trustee and a summary of the report must be included in a Form 10-D report.

# Revised Shelf Eligibility Criteria (cont'd)

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## Dispute Resolution Provisions

Under the third new transaction requirement, the transaction agreements for each ABS shelf offering must set forth dispute resolution procedures to address assets not repurchased within 180 days of a repurchase request made pursuant to the terms of the transaction agreements.

If a repurchase request remains unresolved at end of 180-day period, then party making the request may refer the matter, at its discretion, to either mediation or third-party arbitration.

# Revised Shelf Eligibility Criteria (cont'd)

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## Investor Communications Provisions

Under the fourth new transaction requirement, the transaction agreements for each ABS shelf offering must provide for the reporting of requests by investors to communicate with other investors in connection with the exercise of their rights under the terms of the ABS.

The party responsible for filing Form 10-D reports must include any such request in the Form 10-D report for the period in which the request was received.

Disclosure regarding the request must include: the name of requesting investor, date of request, that the investor seeks to communicate with other investors in connection with the exercise of rights under the transaction agreements, and a description of the method other investors may use to contact the requesting investor.

Where requesting investor is not the record holder of the ABS, the person obligated to make the disclosure may require a written certification of beneficial ownership and one other form of documentation, such as a trade confirmation, an account statement, a letter from the broker-dealer, or other similar document.

# Access to Effective Shelf

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## Annual Compliance Check

Under current rules, once a shelf registration statement is declared effective, an ABS issuer need not re-assess shelf eligibility until it files a new registration statement.

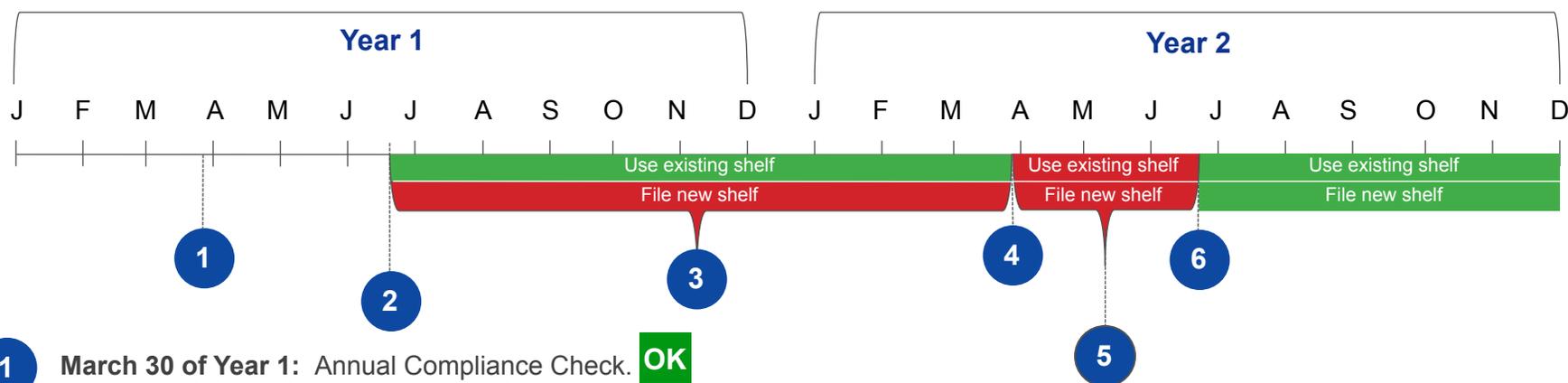
Under the new rules, an ABS issuer must make an annual compliance check to determine whether the registrant requirements outlined above have been satisfied during the 12-month look-back period immediately preceding the check and, therefore, whether the issuer remains eligible to conduct takedowns off its effective shelf. The compliance check must be made as of 90 days after the end of the depositor's fiscal year.

The new rules allow a depositor or an issuing entity to cure a deficiency in compliance with the new registrant requirements by subsequently filing the required information and waiting for 90 days, after which the depositor/issuing entity would be permitted to resume takedowns off its effective shelf.

Notably, however, no corresponding mechanism is specified to cure deficiencies in compliance with the Exchange Act reporting registrant requirement. In the absence of a cure mechanism, the related registration statement generally could not be used for further takedowns for up to one year from the date the depositor or the affiliated issuing entity that had failed to file Exchange Act reports then became current in its Exchange Act reports (assuming all other requirements had been met).

# Access to Effective Shelf (cont'd)

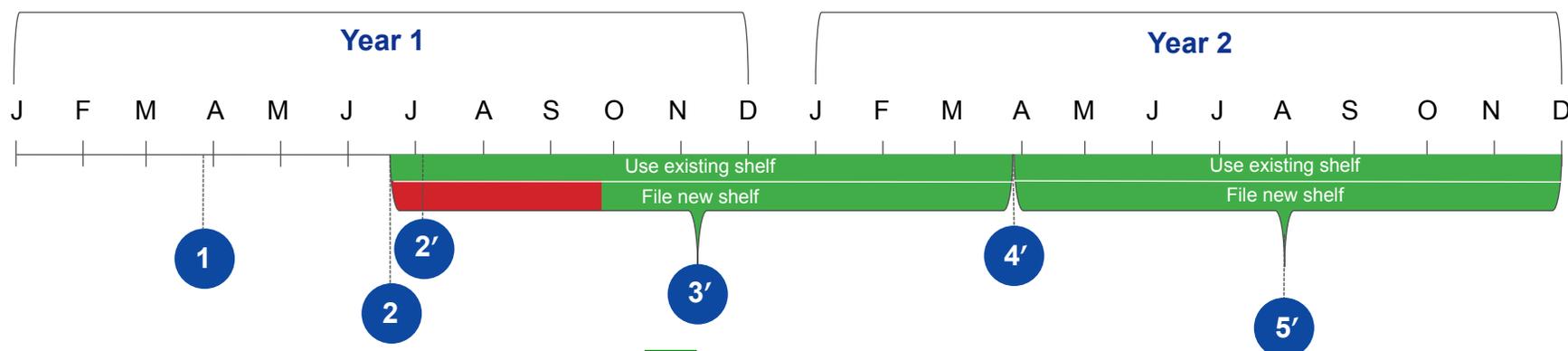
**Annual Compliance Check** – Depositor with a December 31 fye and an effective shelf



- 1 **March 30 of Year 1:** Annual Compliance Check. **OK**
- 2 **June 20 of Year 1:** Depositor conducts ABS takedown, but does not timely file transaction agreements that day.
- 3 **June 20 of Year 1 – March 30 of Year 2:** Depositor can continue to use existing shelf until it is required to perform its next annual compliance check, but would no longer be able to file a new shelf for a year.
- 4 **March 30 of Year 2:** Annual Compliance Check. **NO**
- 5 **March 30 of Year 2 – June 20 of Year 2 (1 year after agreements should have been filed):** Depositor would not be able to use existing shelf and would not be able to file a new shelf.
- 6 **June 20 of Year 2:** Depositor would again be able to file a new shelf and, based on the adopting release, may be able to resume using existing shelf.

# Access to Effective Shelf (cont'd)

**Annual Compliance Check** – Depositor with a December 31 fye and an effective shelf



- 1 **March 30 of Year 1:** Annual Compliance Check. **OK**
- 2 **June 20 of Year 1:** Depositor conducts ABS takedown, but does not timely file transaction agreements that day.
- 2' **July 1 of Year 1:** Depositor cures deficiency by filing delinquent transaction agreements.
- 3' **June 20 of Year 1 – March 30 of Year 2:** Depositor can continue to use existing shelf until it is required to perform its next annual compliance check, and would be able to file a new shelf 90 days after July 1 (i.e., September 29 of Year 1).
- 4' **March 30 of Year 2:** Annual Compliance Check. **OK**
- 5' **March 30 of Year 2 – March 30 of Year 3:** Depositor can continue to use existing shelf until it is required to perform its next annual compliance check and, assuming it continues to meet shelf eligibility criteria, would be able to file a new shelf.

# Access to Effective Shelf (cont'd)

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## Annual Compliance Check (cont'd)

Rule 401 sets out the “requirements as to proper form” when a registrant seeks to file a registration statement under the Securities Act of 1933.

- Rule 401(a) provides that the form and content of a registration statement must conform to the rules and forms as in effect on the initial filing date of the registration statement.
- Registrant determines that it is eligible to use SF-3 registration statement and, in signing SF-3 signature page, certifies that it has “reasonable grounds to believe that it meets all of the requirements for filing on Form SF-3.”
- Rule 401(g)(1) provides, in relevant part, that “a registration statement...is deemed filed on the proper registration form unless the [SEC] object to the registration form before the effective date.”
- New Rule 401(g)(4) provides, however, that, “notwithstanding that a registration statement may have become effective previously, requirements as to proper form...will have been violated for any offering of securities where the [registrant fails its Annual Compliance Check] as of 90 days after the end of the depositor’s fiscal year end prior to such offering.”

# Integrated Prospectus

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Under the final rules, an ABS issuer must include a single “form of” prospectus in the shelf registration statement, and prepare a single, integrated prospectus at the time of each takedown, thereby eliminating the practice of preparing a base prospectus and prospectus supplement.

Disclosure relating to structural features, enhancement and other features that might vary from one takedown to the next would be presented in brackets in the form of prospectus, but only the disclosure applicable to the transaction at hand would be included in the prospectus at the time of a takedown.

New Rule 430D requires an ABS issuer to amend its registration statement to add new structural features/forms of credit enhancement that were not previously contemplated in the form of prospectus, rather than simply describing them in the prospectus prepared at the time of a takedown.

The final rules also eliminate the option of including prospectuses for multiple asset classes (and for multiple depositors) all in one shelf registration statement, and instead limit each registration statement to one form of prospectus for one asset class.<sup>1</sup>

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<sup>1</sup> The SEC clarifies that this new requirement would not prevent a credit card ABS issuance platform with multiple affiliated depositor-registrants from filing a shelf registration statement.

# Pay-as-You-Go Registration Fees

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The final rules permit, but do not require, ABS issuers to pay registration fees as securities are offered off of a shelf registration statement, as opposed to the current practice of paying all fees upfront at the time the shelf registration statement is filed.

The fee table on the cover of the registration statement would simply list the class(es) of securities registered and indicate that fees will be paid on a pay-as-you-go basis.

The ABS issuer would pay the fee at the time the preliminary prospectus is filed and include a fee table on the cover page of the prospectus, calculated in accordance with the then-current fee rate.

The SEC indicates that fees associated with unsold securities from a previously-filed registration statement, or from an uncompleted takedown, can be used to offset pay-as-you-go fees due for future takedowns.

# Asset-Level Disclosure

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## Transactions Subject to Rule

SEC adopted a requirement for standardized asset-level disclosures for ABS where the underlying assets consist of:

- residential mortgages
- commercial mortgages
- auto loans & auto leases
- debt securities (including resecuritizations)

Disclosures are required to be provided in standardized **XML format** in a file referred to as an **Asset Data File**.

The SEC did not adopt asset-level disclosure requirements for other asset classes (e.g., equipment loans and leases, student loans, etc.) or grouped account disclosure requirements for credit and charge cards.

# Asset-Level Disclosure (cont'd)

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## Certain Modifications to Proposed Rule Driven by Privacy Concerns

In light of privacy concerns about the proposed asset-level requirements, SEC re-opened comment period in February 2014 for a proposed approach that would have required issuers to make asset-level information available to investors and potential investors through an issuer-sponsored website rather than filing all of the information on EDGAR.

Instead of adopting that proposal, **SEC modified or omitted certain of the asset-level disclosures** originally proposed for residential mortgages, auto loans and auto leases to mitigate re-identification concerns.

Under final rule, the **Asset Data File is to be filed and made publicly available on EDGAR.**

# Asset-Level Disclosure (cont'd)

## Standardized Data Points

Asset Class	Number of Data Points in Proposed Rule	Number of Data Points in Final Rule
RMBS	362	270
CMBS	182	152
Auto Loans	110	72
Auto Leases	116	66
Debt Securities	83	60

# Asset-Level Disclosure (cont'd)

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## Categories of Data Points

Data points generally fall into the following categories:

- Data points about the payment stream related to a particular asset (e.g., contractual terms, scheduled payment amounts, basis for interest rate calculations, etc.)
- Data points relating to collateral (e.g., geographic location of the property, property valuation data, loan-to-value ratio, etc.)
- Data points regarding performance of each asset over time (e.g., whether obligor is making payments, etc.)
- Data points about losses relating to each asset (e.g., loss mitigation efforts, possible losses, etc.)

# Asset-Level Disclosure (cont'd)

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## Data Reporting Dates

Unless otherwise specified in Schedule AL, the data is required to be reported as of:

<b>Preliminary or Final Prospectus</b>	as of the most recent reporting period
<b>Periodic Reports</b>	as of the end of the reporting period covered by the Form 10-D

The issuer must disclose the beginning and end date for its reporting periods.

If the data required is typically captured at a time other than the end of the reporting period, such as at origination, Schedule AL indicates the **“as of” date** of the data required.

# Asset-Level Disclosure (cont'd)

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## Form ABS-EE

Issuer **must** file Asset Data File as required by Schedule AL as an exhibit to new Form ABS-EE

Issuer **may** also file additional exhibits to Form ABS-EE, including exhibits providing:

- additional explanatory disclosure related to the Asset Data File
- other asset-level information in addition to the standardized data points required by Schedule AL

# Other Disclosure Reforms

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**Identification of Originators:** Regulation AB currently requires identification of originators apart from the sponsor or its affiliates only if the originator originates 10% or more of the pool assets. The final rule adds a requirement to identify each originator originating less than 10% of the pool assets if the cumulative amount originated by parties other than the sponsor or its affiliates is more than 10% of the pool assets.

**Financial Information About Party with Repurchase Obligation:** Adds a requirement that, if the sponsor or a 20% originator is required to repurchase or replace any asset for breach of a representation or warranty, the ABS issuer must provide information regarding that party's financial condition if its condition would affect its ability to repurchase to the degree that it could adversely impact the pool or the ABS.

**Economic Interest in Transaction:** Adds a requirement to (i) describe any interest that a sponsor, a servicer, a 20% originator, or any of their affiliates has retained in the transaction, including the amount and nature of that interest and (ii) disclose any hedge materially related to the credit risk of the securities that was entered into by such entity or, if known, by an affiliate of such entity to offset the risk position held.

# Other Disclosure Reforms (cont'd)

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**Prospectus Summary:** Adds an instruction to Item 1103(a)(2) to clarify that the prospectus summary should:

- be tailored to the particular asset pool backing the ABS; and
- include statistical information about: whether the loans in the pool were (i) originated under one or another underwriting/origination program, (ii) underwritten as exceptions to those underwriting/origination criteria and (iii) if applicable, modified after origination.

**Disclosure Regarding Modification Provisions:** Adds a requirement to describe any provision of the transaction agreements that governs changes to the terms of any asset, including how such change may affect the cash flows from the assets or to the ABS.

# Other Disclosure Reforms (cont'd)

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**Static Pool Disclosure Requirements:** In an effort to increase the clarity, transparency, and comparability of static pool information, the SEC has adopted new rules relating to the presentation of static pool information, some of which apply to all issuers and others of which would apply only to amortizing asset pools.

For all issuers, the final rules impose 5 new requirements:

- Provide narrative disclosure that provides introductory and explanatory information to introduce the static pool information presented.
- Describe the methodology used in determining or calculating the characteristics and describe any terms or abbreviations used.
- Describe how the assets in the static pool differ from the pool assets underlying the securities being offered.
- Present static pool information in a graph if doing so would aid in understanding.
- Explain why static pool disclosure is not included or why alternative information has been provided.

# Other Disclosure Reforms (cont'd)

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## **Static Pool Disclosure Requirements** (cont'd)

For amortizing asset pools, the final rules require that disclosure regarding delinquencies, cumulative losses and prepayment data:

- Must be presented in 30- or 31-day increments through no less than 120 days; and
- Must include a graphical presentation of this information.

# Other Disclosure Reforms (cont'd)

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**Filing Static Pool Data:** Amendments to Form 8-K and Item 601 of Regulation S-K are designed to make it easier for investors to search for static pool information filed on EDGAR.

If an issuer wishes to incorporate static pool information by reference to a Form 8-K filing (rather than to include it in the prospectus), then it must:

- File the static pool information as Exhibit 106 to a Form 8-K by the date that the preliminary prospectus is required to be filed; and
- Disclose in the prospectus that the incorporated static pool information is deemed to be a part of the prospectus and identify the related Form 8-K report and its filing date.

# Definition of “Asset-Backed Security”

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## Changes to Reg AB-ABS Definition

Reg AB-ABS definition currently requires that ABS be backed by a “discrete pool of assets” with 3 exceptions:

- A **master trust exception**, which permits master trusts to issue ABS that are backed by a dynamic pool of revolving or non-revolving assets;
- A **revolving period exception**, which permits amortizing trusts that issue ABS backed by non-revolving assets to include a revolving period of up to three years; and
- A **prefunding exception**, which permits ABS issuers to include a prefunding period of up to one year with prefunding limits of 50% of the offering proceeds or, in the case of master trusts, 50% of the total asset pool.

# Definition of “Asset-Backed Security” (cont’d)

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## Changes to Reg AB-ABS Definition (cont’d)

The SEC had proposed to further limit these exceptions to alleviate concerns that the pools were not sufficiently developed at the time of an offering to ensure that investors had adequate information about the assets and asset pool. These proposals would have:

- Revised the master trust exception to exclude ABS that are backed by non-revolving assets;
- Revised the revolving period exception to reduce the permitted length of the revolving period from three years to one year in the case of ABS backed by non-revolving assets; and
- Revised the prefunding exception to decrease the prefunding limit from 50% to 10%.

Under the final rules, the SEC has adopted further limitations to the prefunding exception, decreasing the prefunding limit from 50% to 25%, but has not adopted the proposed further limitations to the master trust exception or the revolving period exception.

The rule changes relate to the “Regulation AB-ABS” definition only; and not to the more encompassing “Exchange Act-ABS” definition added to the federal securities laws under Dodd-Frank.

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