

MEMO# 25405

August 11, 2011

SEC Re-Proposes ABS Shelf Eligibility and Disclosure Requirements; Call Scheduled for August 22

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TO: SEC RULES COMMITTEE No. 71-11
MUNICIPAL SECURITIES ADVISORY COMMITTEE No. 41-11
FIXED-INCOME ADVISORY COMMITTEE No. 62-11 RE: SEC RE-PROPOSES ABS SHELF
ELIGIBILITY AND DISCLOSURE REQUIREMENTS; CALL SCHEDULED FOR AUGUST 22

The Securities and Exchange Commission (the “SEC” or “Commission”) has revised and re-proposed rules that were initially proposed in April 2010 (the “2010 Proposal”) related to the disclosure, reporting, and offering process for asset-backed securities (“ABS”) (the “Re-Proposal”). [1] The Commission has revised and re-proposed the rules in light of provisions that were added by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) and comments the Commission received on the 2010 Proposal.

The significant aspects of the Re-Proposal are summarized below. The Commission notes in various parts of the release that those aspects of the rules that are not being re-proposed remain unchanged and outstanding.

Comments on the Re-Proposal are due to the SEC no later than October 4, 2011. We will hold a conference call on Monday, August 22, at 2:00 p.m. Eastern time, to discuss the Institute’s comments relating to the SEC’s Re-Proposal. The dial-in number is 888-324-7204 and the passcode is 53274. Please let Jennifer Odom (jodom@ici.org or 202-326-5833) know if you will participate on the call.

I. Securities Act Shelf Eligibility Criteria

In the 2010 Proposal, the Commission, as part of its ongoing effort to remove from its rules references to NRSRO credit ratings, proposed four shelf eligibility criteria that would replace an investment grade credit rating. Two of these proposed standards -- risk retention and ongoing reporting under the Securities Exchange Act of 1934 (“1934 Act”) -- will now be required for most registered ABS offerings as a result of changes mandated by the Dodd-Frank Act. [2] As a result, the Re-Proposal does not include as shelf eligibility criteria risk

retention and ongoing 1934 Act reporting requirements. The Commission has modified the other criteria from the 2010 Proposal. The Commission notes that its re-proposal of standards for ABS shelf registration eligibility are also part of several rule revisions it is considering in connection with Section 939A of the Dodd-Frank Act, which requires it to remove references to credit ratings in its rules. The re-proposed criteria are:

A. Certification

At the time of each takedown from a shelf registration statement, a certification would have to be provided by either the chief executive officer of the depositor or the executive officer in charge of securitization of the depositor. The certification would address the disclosure in the prospectus, as well as whether the securitization is designed to generate cash flows sufficient to make payments on the ABS.

The Re-Proposal, unlike the 2010 Proposal, permits either the chief executive officer or the executive officer in charge of securitization to make the certification, and revises the language of the certification.

B. Credit Risk Manager and Repurchase Request Dispute Resolution Provisions

The underlying transaction documents of each ABS offering would have to provide for appointment of a credit risk manager to review the underlying assets upon the occurrence of certain events and provide a report of the findings and conclusions of its review to the trustee. [3] The transaction documents would provide that a review would be required, at a minimum, when credit enhancements fall below required target levels specified in the underlying transaction agreements, or at the direction of investors, as provided in the transaction agreement and disclosed in the prospectus. The proposed investor direction provision is intended to provide a process for investors to direct the credit risk manager to review assets for potential breaches of a representation or warranty, in order to facilitate an investor's ability to pursue remedies under the transaction agreement.

The Commission proposes disclosure requirements in the prospectus and in ongoing reports about the credit risk manager. Ongoing reports would be required to disclose information about any events that trigger a review by the credit risk manager during the distribution period and information if a credit risk manager has resigned, or has been removed, replaced or substituted, or a new credit risk manager has been appointed. The Commission also proposes disclosures in the underlying transaction documents regarding repurchase request dispute resolution procedures. These provisions are designed to facilitate a timely resolution of repurchase claims.

These proposed requirements would be in lieu of the proposed condition in the 2010 Proposal that would have required a provision in the transaction agreements requiring the party obligated to repurchase assets for breach of representations and warranties to periodically furnish an opinion of an independent third party.

C. Investor Communication

An underlying transaction agreement would be required to include a provision to require the party responsible for making periodic filings on Form 10-D to include in the Form any request from an investor to communicate with other investors related to an investor's rights under the terms of the ABS. [4]

This proposed standard was not part of the 2010 Proposal. The Commission explains that it

added it to address concerns raised by commenters regarding the inability of investors to locate other investors to enforce rights contained in transaction agreements and, in particular, those relating to the repurchase of underlying assets for breach of representations and warranties.

II. Disclosure Requirements

A. Information to be Filed and Filing Deadlines

The Commission proposes to require ABS issuers to file copies of the underlying transaction documents, in substantially final form, at the same time as a preliminary prospectus would be filed. The Commission explains that it is proposing this requirement in response to commenters who recommended that registration statement exhibits be available for investor review prior to making an investment decision. In the 2010 Proposal, the Commission had proposed that ABS issuers be required to file a preliminary prospectus with the Commission for each shelf takedown at least five business days prior to the first sale in the offering. The Commission notes that it has not reached a conclusion on this aspect of the proposal and it remains outstanding.

B. Asset-Level Information

The Commission requests additional comment on those aspects of the 2010 Proposal that would require disclosure of asset-level information for registered offerings in light of Section 942(b) of the Dodd-Frank Act and comments the Commission received on the 2010 Proposal. Section 942(b) of the Dodd-Frank Act adds Section 7(c) of the Securities Act of 1933, which requires the Commission to adopt regulations requiring an issuer of an ABS to disclose, for each tranche or class of security, certain loan level information regarding the assets backing that security. The Commission believes that the provisions of the 2010 Proposal that would require asset-level data for registered offerings would satisfy the requirements of Section 7(c).

C. Privately-Issued Structured Finance Products

Under the 2010 Proposal, when an SEC safe harbor is relied upon for the unregistered sale of a “structured finance product” to an investor (including an “accredited investor” under Regulation D and a “qualified institutional buyer” under Rule 144A), the issuer would be required to provide to the investor, upon request, substantially the same information that the issuer would be required to provide to an investor in a public offering of the ABS. [\[5\]](#) The issuer would also have to represent that it would provide such information upon request, including asset-level disclosures, along with other disclosures required by Regulation AB.

Commenters expressed concern that clear information requirements do not exist for certain types of ABS that are not typically offered under Regulation AB, such as CDOs, CLOs, asset-backed commercial paper, and synthetic ABS. In response to these concerns, the Commission requests comment on whether it should only require asset-level disclosures where the structured finance product being sold in reliance on Rule 144A or Regulation D is backed by assets of an asset class for which there are prescribed asset-level reporting requirements in Regulation AB. [\[6\]](#)

D. Waterfall Computer Program

The 2010 Proposal would have required that most ABS issuers file a computer program that gives effect to the flow of funds, or “waterfall,” provisions of the transaction. Based on comments received, the Commission plans to re-propose the waterfall disclosure

requirement separately from the proposed requirements included in the Re-Proposal.

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endnotes

[1] Re-proposal of Shelf Eligibility Conditions for Asset-Backed Securities and Other Additional Requests for Comment, Securities Act Release No. 9244 (July 26, 2011), available at <http://www.sec.gov/rules/proposed/2011/33-9244.pdf>. For a summary of the 2010 Proposal and the ICI's comment letter on the 2010 Proposal, please see ICI Memorandum No. [24275](#) (April 28, 2010) and Letter from Karrie McMillan, General Counsel, ICI, to Elizabeth M. Murphy, Secretary, SEC, dated August 2, 2010, available at <http://www.ici.org/pdf/24465.pdf>.

[2] The Commission has proposed, but not yet adopted, rules to implement these provisions of the Dodd-Frank Act. See ICI Memoranda Nos. [24870](#) (January 12, 2011) and 25162 (May 2, 2011).

[3] The credit risk manager would be appointed by the trustee and could not be affiliated with any sponsor, depositor, or servicer in the transaction.

[4] The Commission is also proposing to revise Regulation AB and Form 10-D to include disclosure requirements related to the investor communication shelf eligibility condition. These disclosure requirements would apply only if the transaction was a registered shelf offering.

[5] Those aspects of the 2010 Proposal and the Re-proposal relating to privately-issued ABS would apply to any "structured finance product," which would be defined more broadly than "asset-backed security" under Regulation AB.

[6] As proposed, this would include: residential mortgage-backed securities, commercial mortgage-backed securities, automobile loans or leases, equipment loans or leases, student loans, floor plan financings, corporate debt, and resecuritizations.