



# STRUCTURED FINANCE CLIENT ALERT

March 21, 2011

## **SEC RELEASES IMPLEMENTING SECTIONS 943 AND 945 OF DODD-FRANK AFFECT ALL ISSUERS OF ASSET-BACKED SECURITIES**

On January 20, 2011, the Securities and Exchange Commission (“SEC”) adopted two separate releases implementing Section 943 and Section 945 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). This client alert summarizes the amendments to the disclosure and other requirements of asset-backed securities (“ABS”) securitization transactions, some of which also apply to transactions that are exempt from registration with the SEC. This client alert does not describe the other restrictions to securitization referenced in Dodd-Frank, or the pending or future rulemaking by the SEC required to implement other Dodd-Frank provisions.

### **SEC Release Implementing Section 943 of Dodd-Frank**

The SEC release implementing Section 943 of Dodd-Frank<sup>1</sup> adopted Rule 15Ga-1, amendments to Items 1104 and 1121 of Regulation AB<sup>2</sup> and Rule 17g-7 under the Securities Exchange Act of 1934, as amended (the “1934 Act”).

#### **Rule 15Ga-1**

Many securitization transactions include covenants to repurchase or replace a securitized asset for a breach of a representation or warranty relating to that securitized asset. Rule 15Ga-1(a) requires that for securitization transactions that include those covenants, a “securitizer” of an “asset-backed security” is required to disclose “fulfilled and unfulfilled repurchase requests” for assets securitized by the securitizer that were subject to a demand for repurchase or replacement during the reporting period. For asset-backed securities issued by government-sponsored enterprises such as Fannie Mae or Freddie Mac, the disclosure requirements would apply to the government-sponsored enterprise that securitizes the assets, but not to the financial institution that transferred assets that were later securitized by the government-sponsored enterprise. The disclosure requirement also does not apply if the asset-backed securities are held by an affiliate of the securitizer.

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<sup>1</sup> Securities Act Release No. 33-9175.

<sup>2</sup> A subpart of Regulation S-K.

### *What is an Asset-Backed Security?*

The definition of “asset-backed security” for purposes of Rule 15Ga-1 is the definition included in Section 3(a)(77) of the 1934 Act. “Asset-backed security” includes, among other things, securities that are typically sold in transactions that are exempt from registration under the Securities Act of 1933, as amended (the “1933 Act”), such as collateralized debt obligations, securities issued or guaranteed by a government sponsored enterprise, such as Fannie Mae and Freddie Mac, and municipal securities that otherwise come within the definition of asset-backed securities. Section 3(a)(77) of the 1934 Act defines “asset-backed security” as a:

fixed-income or other security collateralized by any type of self-liquidating financial asset (including a loan, a lease, a mortgage, or a secured or unsecured receivable) that allows the holder of the security to receive payments that depend primarily on cash flow from the asset, including: a collateralized mortgage obligation; a collateralized debt obligation; a collateralized bond obligation; a collateralized debt obligation of asset-backed securities; a collateralized debt obligation of collateralized debt obligations; and a security that the Commission, by rule, determines to be an asset-backed security for purposes of this section; and does not include a security issued by a finance subsidiary held by the parent company or a company controlled by the parent company, if none of the securities issued by the finance subsidiary are held by an entity that is not controlled by the parent company.

### *What is a Securitizer?*

Section 15G(a)(1) of the 1934 Act defines a “securitizer” as either an issuer of an asset-backed security or a person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuer.<sup>3</sup>

### *What Disclosure is Required?*

The disclosure requirements of the Rule are included in paragraph (a)(1) of the Rule, a copy of which is included as **Exhibit I** to this client alert. The disclosure required is on an asset-class and issuing entity basis, and includes all issuing entities with outstanding asset-backed securities during the reporting period. Some of the required disclosure includes:

- name of each issuing entity;
- whether a transaction was registered (and the CIK number if applicable);
- name of each originator in a transaction;
- total assets in the transaction by originator;
- assets that were subject to a demand for repurchase or replacement;
- assets that were repurchased or replaced;
- assets that are pending repurchase or replacement within the cure period specified in the transaction documents; and
- any repurchase or replacement demand in dispute, withdrawn or rejected.

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<sup>3</sup> Section 15G(a)(3) of the 1934 Act.

### *Unavailable or Costly Information.*

If some of the information that is required to be disclosed is unknown and not available without unreasonable effort or expense, and a securitizer makes a representation to that effect in the disclosure, that information can be omitted. A securitizer may also disclose that it requested but was unable to obtain all information with respect to investor demands prior to July 22, 2010.

### **Form ABS-15G**

Much of the disclosure required by Rule 15Ga-1 will be made by securitizers in the new Form ABS-15G adopted by the SEC. A copy of Form ABS-15G is attached to this client alert as **Exhibit II**.

### *Initial Form ABS-15G Filing.*

The timing of the initial filing of Form ABS-15G depends on whether the securitizer is a municipal securitizer. Municipal securitizers are defined to include “any State or Territory of the United States, the District of Columbia, any political subdivision of any State, Territory or the District of Columbia, or any public instrumentality.” For municipal securitizers that have issued asset-backed securities (or initiated an asset-backed securities transaction by securitizing an asset directly, indirectly or through an affiliate) during the three-year period ended December 31, 2014, the initial filing is required to be made no later than February 14, 2015 (for the three years ended December 31, 2014). For all other securitizers that have issued asset-backed securities (or initiated an asset-backed securities transaction by securitizing an asset directly, indirectly or through an affiliate) during the three-year period ended December 31, 2011, the initial filing must be made no later than February 14, 2012 (covering the three years ended December 31, 2011).

No securitizer has a disclosure obligation unless the transaction agreements provide a covenant to repurchase or replace an underlying asset for breach of a representation or warranty and the securitizer has asset-backed securities containing such a covenant, outstanding and held by non-affiliates as of the end of the applicable three-year period. If a securitizer has no activity to report, it is still required to make a filing (and shall indicate by checking the appropriate box on the Form that it has no activity to report). For affiliated securitizers in a single transaction, the filing by one securitizer to meet the obligations satisfies the filing obligation of the other affiliated securitizers.

### *Quarterly Form ABS-15G Filings.*

No later than 45 days after the end of each calendar quarter, a Form ABS-15G filing is required to be made by any securitizer that (a) issued an asset-backed security during the period, (b) organized and initiated an asset-backed securities transaction during such time period, by securitizing an asset, either directly or indirectly, including through an affiliate, *or* (c) had outstanding asset-backed securities held by non-affiliates during the period. The information required in the quarterly filings is similar to that required by the initial filing for the time period covered by the report (and to report on certain unresolved demands from prior periods). The SEC has taken the position in later discussions with market participants that the quarterly filing requirement applies (a) to those securitizers that sponsored or issued asset-backed securities during the related quarter and (b) also to any securitizer that had outstanding asset-backed securities (regardless of when they were issued) held by non-affiliates during the period, which position is contrary to the interpretation of many market participants.

### *Where is Form ABS-15G Filed?*

Municipal securitizers may satisfy Rule 15Ga-1’s filing obligation by filing the information with Electronic Municipal Market Access (“EMMA”). All other securitizers must file with the SEC on

EDGAR. For securitizers required to file with the SEC that have not previously had to file reports with the SEC, the securitizer will need to obtain filing codes by filing a Form ID with the SEC and obtaining a CIK number.

### ***Suspension and Termination of Filing Requirements.***

A securitizer may suspend its duty to provide quarterly reports on Form ABS-15G if no activity occurred during the initial filing period or during a calendar quarter, and a report will be required only if a change in the demand, repurchase or replacement activity occurs that is required to be reported. Any securitizer that has suspended its quarterly reports will be required to annually confirm that no activity has occurred by checking the appropriate box on and filing Form ABS-15G. If a securitizer has no asset-backed securities outstanding that are held by non-affiliates, the duty to file Form ABS-15G will be terminated immediately upon filing a notice of such on Form ABS-15G.

### **Prospectus and Form 10D Disclosure Requirements**

For securitizations registered with the SEC, Item 1104 of Regulation AB was amended to require disclosure in the prospectus of the same disclosures required by Rule 15Ga-1 as described above. The prospectus disclosure must also include a cross reference to the most recent Form ABS-15G filings made by the securitizer and the CIK number of the securitizer. The information presented in the prospectus must not be more than 135 days old. The new prospectus disclosure requirements are phased-in to address compliance concerns, with the new requirements effective for registered offerings of ABS on or after February 14, 2012. A prospectus filed in the first year after the compliance date (February 14, 2012 to February 13, 2013) may include only one year of repurchase activity; a prospectus filed in the second year would be permitted to include only two years of repurchase activity, and thereafter three years of repurchase activity information will be required.

For securitizations registered with the SEC, Item 1121 of Regulation AB was also amended to include the disclosures required by Rule 15Ga-1 described above as part of the disclosure included in the ongoing reports filed on Form 10D. The Form 10D disclosure must also include a cross reference to the most recent Form ABS-15G filings made by the securitizer and the CIK number of the securitizer. All Form Ds filed after December 31, 2011 must include the new disclosure.

### **Rating Agency Disclosure Requirements**

Rule 17g-7 requires each nationally recognized statistical rating organization (“rating agency”) to include in any report accompanying a credit rating with respect to an asset-backed security a description of the representations, warranties and enforcement mechanisms available to investors; and how they differ from the representations, warranties and enforcement mechanisms in issuances of similar securities. A credit rating includes any expected or preliminary credit rating issued by a rating agency. The term “similar securities” is undefined, and the SEC release provides that a rating agency is required to make its own determination as to what is a similar security for purposes of the required comparisons, including industry standards and its own experience with previously rated transactions and its knowledge of the market. Rating agencies must begin complying with the new Rule six months from its effective date.

### **SEC Release Implementing Section 945 of Dodd-Frank**

The SEC release implementing Section 945 of Dodd-Frank<sup>4</sup> adopted Rule 193 under the 1933 Act and amendments to Item 1111 of Regulation AB. The requirements set forth in Rule 193 and Item 1111 of Regulation AB apply only to registered offerings of ABS and not to unregistered offerings (whether a

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<sup>4</sup> Securities Act Release No. 33-9176.

private placement or an offering of exempt securities such as municipal securities). Any issuer registering the offer and sale of ABS with the SEC is required to perform a review of the assets underlying the ABS and to disclose the nature of its review of the assets and the findings and conclusions of the issuer's review of the assets. The new requirements are effective for registered offerings of ABS occurring after December 31, 2011.

## **Asset Review**

Rule 193 requires an issuer (the depositor or sponsor) of an asset-backed security<sup>5</sup> offering and selling such a security pursuant to a registration statement to perform a review of the pool assets underlying the asset-backed security. The asset review required by Rule 193 is subject to a minimum standard of review specified in the Rule: "at a minimum, such review must be designed and effected to provide reasonable assurance that the disclosure in the ... prospectus ... is accurate in all material respects."<sup>6</sup> Rule 193 does not specify the type of review of the assets to be performed, and the SEC adopting release provides that such review may vary depending on the circumstances, such as the asset class in question and the degree of continuing involvement by the sponsor.<sup>7</sup> A sampling of assets rather than a review of every asset securitized may be appropriate depending on the facts and circumstances, such as the type of ABS assets being securitized. Rule 193 permits an issuer to engage a third party for purposes of performing the review so long as the review complies with the minimum standard of review, but may not rely on a review performed by an unaffiliated originator.

## **Prospectus Disclosure Requirements**

Item 1111 of Regulation AB was amended to require disclosure in the prospectus of the nature of the review of the assets performed by an issuer or sponsor pursuant to Rule 193, including whether the issuer engaged a third party for purposes of performing the required review, and the findings and conclusions of the review of the assets by the issuer, sponsor or third party engaged to perform the required review. The new disclosure requirements are described in the instructions included in Item 1111. The new disclosure must provide an understanding of how the asset review related to the asset disclosure included in the prospectus. If the evaluation of the assets relied on benchmarks or criteria that are different from that specified in the prospectus, the differences must be disclosed, together with the findings and conclusions in the review process. If the asset review was based on a sample of assets in the pool, the sample size and criteria used to select the assets sampled is required to be disclosed.

To the extent any of the assets in the pool deviate from the disclosed underwriting criteria or other criteria or benchmark used to evaluate the assets, the prospectus is required to include disclosure of such deviation, data on the amount and characteristics of the assets that did not meet the disclosed standards, the name of the entity or entities that determined that the assets should be included in the pool despite such deviation, and the factors used to make such. To the extent compensating factors were used to make the determination, data must be included on the amount of assets in the pool or the sample that are represented as meeting each such factor and the amount that do not meet such factors.

### ***Reliance on Review of Third Parties.***

If a third party performed the review *and* the findings and conclusions of the review are attributed to the third party (rather than the issuer or the sponsor), the third party must be named in the prospectus and must consent to being named as an expert in accordance with Section 7 of the 1933 Act and Rule 436

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<sup>5</sup> As defined in Section 3(a)(77) of the 1934 Act.

<sup>6</sup> The minimum standard of review is similar to the standard used by reporting companies to design and maintain disclosure controls and procedures required under Rule 13a-15 promulgated under the 1934 Act.

<sup>7</sup> A footnote to the SEC adopting release provides that the review is a review of the assets for purpose of the transaction and not the review conducted to originate the assets.

promulgated thereunder. An issuer may engage a third party to assist in the review without naming the third party if the issuer attributes to itself the findings and conclusions of the review required.

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## **Disclaimers**

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## Exhibit I

### Disclosure Required by Rule 15Ga-1

Name of Issuing Entity	Check if Registered	Name of Originator	Total Assets in ABS by Originator			Assets That Were Subject of Demand			Assets That Were Repurchased or Replaced			Assets Pending Repurchase or Replacement (within cure period)			Demand in Dispute			Demand Withdrawn			Demand Rejected		
			(#)	(\$)	(% of principal balance)	(#)	(\$)	(% of principal balance)	(#)	(\$)	(% of principal balance)	(#)	(\$)	(% of principal balance)	(#)	(\$)	(% of principal balance)	(#)	(\$)	(% of principal balance)	(#)	(\$)	(% of principal balance)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)	(l)	(m)	(n)	(o)	(p)	(q)	(r)	(s)	(t)	(u)	(v)	(w)	(x)
Asset Class X																							
Issuing Entity A CIK #	X	Originator 1																					
		Originator 2																					
<b>Total</b>			#	\$		#	\$		#	\$		#	\$		#	\$		#	\$		#	\$	
Asset Class Y																							
Issuing Entity B		Originator 3																					
<b>Total</b>			#	\$		#	\$		#	\$		#	\$		#	\$		#	\$		#	\$	
<b>Total</b>			#	\$		#	\$		#	\$		#	\$		#	\$		#	\$		#	\$	

(1) The table shall:

- (i) Disclose the asset class and group the issuing entities by asset class (column (a)).
- (ii) Disclose the name of the issuing entity (as that term is defined in Item 1101(f) of Regulation AB (17 CFR 229.1101(f)) of the asset-backed securities. List the issuing entities in order of the date of formation (column (a)).

Instruction to paragraph (1)(ii): Include all issuing entities with outstanding asset-backed securities during the reporting period.

- (iii) For each named issuing entity, indicate by check mark whether the transaction was registered under the Securities Act of 1933 (column (b)) and disclose the CIK number of the issuing entity (column (a)).
- (iv) Disclose the name of the originator of the underlying assets (column (c)).

Instruction to paragraph (1)(iv): Include all originators that originated assets in the asset pool for each issuing entity.

- (v) Disclose the number, outstanding principal balance and percentage by principal balance of assets at the time of securitization (columns (d) through (f)).
- (vi) Disclose the number, outstanding principal balance and percentage by principal balance of assets that were subject of a demand to repurchase or replace for breach of representations and warranties (columns (g) through (i)).
- (vii) Disclose the number, outstanding principal balance and percentage by principal balance of assets that were repurchased or replaced for breach of representations and warranties (columns (j) through (l)).
- (viii) Disclose the number, outstanding principal balance and percentage by principal balance of assets that are pending repurchase or replacement for breach of representations and warranties due to the expiration of a cure period (columns (m) through (o)).
- (ix) Disclose the number, outstanding principal balance and percentage by principal balance of assets that are pending repurchase or replacement for breach of representations and warranties because the demand is currently in dispute (columns (p) through (r)).
- (x) Disclose the number, outstanding principal balance and percentage by principal balance of assets that were not repurchased or replaced because the demand was withdrawn (columns (s) through (u)).
- (xi) Disclose the number, outstanding principal balance and percentage by principal balance of assets that were not repurchased or replaced because the demand was rejected (columns (v) through (x)).

Instruction to paragraphs (a)(1)(vii) – (xi): For purposes of these paragraphs (vii) – (xi) the outstanding principal balance shall be the principal balance as of the reporting period end date and the percentage by principal balance shall be the outstanding principal balance of an asset divided by the outstanding principal balance of the asset pool as of the reporting period end date.

- (xii) Provide totals by asset class, issuing entity and for all issuing entities for columns that require number of assets and principal amounts (columns (d), (e), (g), (h), (j), (k), (m), (n), (p), (q), (s), (t), (v) and (w)).

Instruction 1 to paragraph (1): The table should include any activity during the reporting period, including activity related to assets subject to demands made prior to the beginning of the reporting period.

Instruction 2 to paragraph (1): Indicate by footnote and provide narrative disclosure in order to further explain the information presented in the table, as appropriate.

- (2) If any of the information required by paragraph (1) is unknown and not available to the securitizer without unreasonable effort or expense, such information may be omitted, provided the securitizer provides the information it possesses or can acquire without unreasonable effort or expense, and the securitizer includes a statement showing that unreasonable effort or expense would be involved in obtaining the omitted information. Further, if a securitizer requested and was unable to obtain all information with respect to investor demands upon a trustee that occurred prior to July 22, 2010, so state by footnote. In this case, also state that the disclosures do not contain investor demands upon a trustee made prior to July 22, 2010.

**Exhibit II**

**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549**

**FORM ABS-15G**

**ASSET-BACKED SECURITIZER  
REPORT PURSUANT TO SECTION 15G OF  
THE SECURITIES EXCHANGE ACT OF 1934**

Check the appropriate box to indicate the filing obligation to which this form is intended to satisfy:

\_\_\_ Rule 15Ga-1 under the Exchange Act (17 CFR 240.15Ga-1) for the reporting period  
\_\_\_\_\_ to \_\_\_\_\_

Date of Report (Date of earliest event reported) \_\_\_\_\_

Commission File Number of securitizer: \_\_\_\_\_

Central Index Key Number of securitizer: \_\_\_\_\_

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Name and telephone number, including area code, of the person to  
contact in connection with this filing

Indicate by check mark whether the securitizer has no activity to report for the initial period pursuant to Rule 15Ga-1(c)(1) [ ]

Indicate by check mark whether the securitizer has no activity to report for the quarterly period pursuant to Rule 15Ga-1(c)(2)(i) [ ]

Indicate by check mark whether the securitizer has no activity to report for the annual period pursuant to Rule 15Ga-1(c)(2)(ii) [ ]

**GENERAL INSTRUCTIONS**

**A. Rule as to Use of Form ABS-15G.**

This form shall be used to comply with the requirements of Rule 15Ga-1 under the Exchange Act (17 CFR 240.15Ga-1).

**B. Events to be Reported and Time for Filing of Reports.**

Forms filed under Rule 15Ga-1. In accordance with Rule 15Ga-1, file the information required by Part I in accordance with Item 1.01, Item 1.02, or Item 1.03, as applicable. If the filing deadline for the information occurs on a Saturday, Sunday or holiday on which the Commission is not open for business, then the filing deadline shall be the first business day thereafter.

**C. Preparation of Report.**

This form is not to be used as a blank form to be filled in, but only as a guide in the preparation of the report on paper meeting the requirements of Rule 12b-12 (17 CFR 240.12b-12). The report shall contain the number and caption of the applicable item, but the text of such item may be omitted, provided the answers thereto are prepared in the manner specified in Rule 12b-13 (17 CFR 240.12b-13). All items that are not required to be answered in a particular report may be omitted and no reference thereto need be made in the report. All instructions should also be omitted.

**D. Signature and Filing of Report.**

1. Forms filed under Rule 15Ga-1. Any form filed for the purpose of meeting the requirements in Rule 15Ga-1 must be signed by the senior officer in charge of securitization of the securitizer.

2. Copies of report. If paper filing is permitted, three complete copies of the report shall be filed with the Commission.

**INFORMATION TO BE INCLUDED IN THE REPORT**

**REPRESENTATION AND WARRANTY INFORMATION**

**Item 1.01 Initial Filing of Rule 15Ga-1 Representations and Warranties Disclosure**

Provide the disclosures required by Rule 15Ga-1 (17 CFR 240.15Ga-1) according to the filing requirements of Rule 15Ga-1(c)(1).

**Item 1.02 Periodic Filing of Rule 15Ga-1 Representations and Warranties Disclosure**

Provide the disclosures required by Rule 15Ga-1 (17 CFR 240.15Ga-1) according to the filing requirements of Rule 15Ga-1(c)(2).

**Item 1.03 Notice of Termination of Duty to File Reports under Rule 15Ga-1**

If a securitizer terminates its reporting obligation pursuant to Rule 15Ga-1(c)(3), provide the date of the last payment on the last asset-backed security outstanding that was issued by or issued by an affiliate of the securitizer.

**SIGNATURES**

Pursuant to the requirements of the Securities Exchange Act of 1934, the reporting entity has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

\_\_\_\_\_ (Securitizer)

Date \_\_\_\_\_

\_\_\_\_\_ (Signature)\*

\* Print name and title of the signing officer under his signature.