KIRKLAND & ELLIS LLP

KIRKLAND ALERT

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"If You Have Nothing To Say" … It Will Still Be A Lot of Work

The Surprisingly Complex Rule 15Ga-1 Regime for Securitizers with Nothing to Report

Rule 15Ga-1 went into effect on January 1, 2012. It requires the reporting of demands to repurchase assets from securitization trusts due to breaches of representations or warranties. Most securitizers outside of the mortgage-backed securities sectors have had no such demands. One might think that such exemplary corporate citizens would be excused from any reporting. But that's not the case. In fact, it's a lot of work to report nothing.

Let's see how we got here …

Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act (**Dodd-Frank**), enacted in July 2010, directed the Securities and Exchange Commission (**SEC**) to adopt a rule "on the use of representations and warranties in the market for asset-backed securities" that would

> require any securitizer to disclose fulfilled and unfulfilled repurchase requests across all trusts aggregated by the securitizer, so that investors may identify asset originators with clear underwriting deficiencies.

The SEC responded with Rule 15Ga-1, which is codified as part of the Securities Exchange Act of 1934, and companion regulations in Items 1104(e) and 1121(c) of Regulation AB. Rule 15Ga-1 was officially published in January 2011, with an "initial compliance date" (which, as we will explain, turns out not to be the first real date by which reporting must commence) of February 14, 2012.

Rule 15Ga-1 applies to any "asset-backed security" for which the underlying documentation contains a covenant to "repurchase or replace" an underlying asset for breach of a representation or warranty. A "securitizer" must report on all assets it securitized that were the subject of a demand to repurchase or replace.

Terminology

A good place to start is with the meanings of the terms used in Rule 15Ga-1, because they have some nuances that can be relevant to compliance.

Asset-backed security is defined in Dodd-Frank. The key part says:

> "Asset-backed security" means 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 assets …

The definition goes on to list several examples. It also gives the SEC the ability to designate any other *security* as an asset-backed security (but the SEC has thus far not done so directly).

We have italicized "security" above because we think that is a significant choice of term. Not all securitizations necessarily constitute securities under the U.S. securities laws. Some debt arrangements are not securities, although the limits are indistinct and the caselaw is inconsistent. We think that a good case can be made that a typical ABCP conduit transaction does not involve the issuance of a security, particularly where no notes are issued, just one or a few conduits are involved, the transaction is directly negotiated, the conduit agents have oversight responsibilities and there are limits on the transferability of the conduit's position. We will use "**ABS**" to mean asset-backed security as defined in Dodd-Frank.

Securitizer is defined in Dodd-Frank as either the "issuer" of an ABS or "a person who organizes and initiates an asset-backed securities transaction by selling or transferring assets … to the issuer." Usually, the first part of this definition would pick up the depositor — as that is the entity that the SEC treats as the "issuer" — and the second part would pick up the sponsor. However, in deals in which the party ordinarily considered to be the sponsor is not involved in transferring assets to the issuer, like a CLO manager, then that party would not seem to fall within the securitizer definition.

The phrase "**repurchase or replace**" is not defined in Dodd-Frank. For the most part, that raises no problem in analyzing Rule 15Ga-1, because most securitization documents have straightforward terms requiring a securitizer either to buy back assets that have breached representations or warranties (**defective assets**) or to substitute in new assets in the stead of the defective assets. The question has been raised whether a deal featuring either an indemnity for defective assets — in which money is paid but the asset is not transferred back — or a borrowing base mechanism that requires no action so long as sufficient other assets exist might be deemed to be outside of Rule 15Ga-1. We think that could be a difficult argument to sustain in most contexts.

Steps to Take

So what is a securitizer to do when that securitizer suspects it has no repurchase demands to report? Nothing at all? Sorry, that's not the right answer. Here are the five steps we think are relevant:

1. Figure out which securitizations are subject to Rule 15Ga-1
2. Complete the necessary diligence on covered securitizations
3. Add the appropriate disclosure to distribution reports on Form 10-D
4. File reports on Form ABS-15G when required (and figure out what to say)
5. Include appropriate disclosure in future prospectuses

We discuss each below.

1. Which Deals are Covered?

There are three different dimensions in which to evaluate which transactions are subject to Rule 15Ga-1, which we call Time, Territory and Terms. The first dimension is Time: was the deal outstanding during the time period covered by the applicable report or disclosure?

For a securitizer that effected one or more offerings during the three year period ended December 31, 2011 (**three year lookback period**), it will need to report on ABS outstanding at any point during that period — even if they were paid off prior to the time of the first report, unless it had no ABS at all still outstanding at the end of 2011. For a securitizer that did not effect any offerings during the three year lookback period, but that had ABS outstanding at the end of the calendar quarter ending March 31, 2012, it will need to report on ABS outstanding during that quarter.

The second dimension is Territory: can a securitizer exclude transactions that had no nexus to the United States? If a securitization was sold entirely offshore, we think it should not be subject to the U.S. reporting regime. However, the SEC has refused to provide any guidance on this issue, asserting that Congress gave it no authority to do so.

This territoriality issue is most pointed for U.S. sponsors who have offshore affiliates that have issued an occasional ABS tranche into the U.S. under Rule 144A, but have issued most of their transactions entirely offshore. Should those foreign securitizers

report on just the transactions sold into the U.S., or on all ABS, even though many had no U.S. nexus? Some sponsors are taking the more conservative position that they should report on all ABS.

The third dimension is Terms: do the terms of the securitization include a repurchase obligation and, if so, do the terms on which the transaction was designed and sold render it an "asset-backed security" under Dodd-Frank? We discuss these issues above under "Terminology." To us, the reason to spend some time thinking about whether a conduit transaction constitutes a "security" is that it seems much more possible that, in the course of an annual audit of receivables, a conduit agent might have spotted a defective receivable and asked to have it repurchased — an innocent request at the time, but one that now might trigger a reporting obligation.

2. What Diligence is Necessary?

Even if a securitizer thinks it received no repurchase demands during the relevant time period, it needs to do some diligence to confirm that information. A securitizer needs to check its own files for any correspondence that might constitute a demand, but internal inspections alone are not sufficient.

Rule 15Ga-1(a)(2) contemplates that the securitizer will request information with respect to investor demands upon a trustee. So securitizers need to get in touch with trustees. For transactions with both an indenture trustee and an owner trustee, emerging practice seems to be to ask each trustee to confirm the absence of any investor demands — even though it seems highly unlikely that a demand would be made on an owner trustee when all the trust certificates are held by the depositor. Our experience so far with trustees is that they have been pretty reasonable in responding to these requests, though they have asked for standard protections. We suspect that trustees have an onslaught of these requests, and don't have enough time to get too picky!

Securitizers need both to ask trustees about demands during the three year lookback period and to require trustees to report on an ongoing basis about existing and future deals. Over the past 18 months, securitizers have increasingly been adding reporting covenants to trust agreements and indentures, but that doesn't cover ongoing reporting on the legacy deals that do not have covenants.

Trustees seem to be amenable to entering into side letters and memoranda of understanding that document their obligations to report demands on an ongoing basis; they are not insisting upon separate amendments to the individual operative documents.

3. What Disclosure Needs to be Added to Form 10-D Reports?

For most securitizers, the first in time filing obligation will be the distribution report on Form 10-D required to be filed in late January, 2012. We're not sure the SEC really intended this result, but the adopting release says that the information required by Item 1121 of Regulation AB is required for all 10-Ds filed after December 31, 2011. So here we are.

Item 1121(c) has two parts. First, it calls for the information required by Rule 15Ga-1(1)(a) in respect of the securitized assets covered by that 10-D. In other words, this part of the 10-D disclosure pertains to just a single securitized pool. Second, it calls for a reference to the most recent Form ABS-15G filed by the securitizer, including the Central Index Key, or CIK, number for that securitizer.

A typical distribution report on Form 10-D consists largely of the monthly servicer report for the securitized pool. The rules for 10-D specify that required disclosure may be included either in the servicer report or in the 10-D itself; duplication is not necessary. We think most servicers will want to put their ongoing 1121(c) disclosure into the monthly servicer report. But what if this first report has already been sent and it doesn't include the 1121(c) disclosure? Not to worry. As long as the 10-D is not yet filed, the servicer can include the applicable language in the 10-D.

4. What New Reports Need to be Filed (and what do they say)?

Any securitizer who made an ABS offering during the three year lookback period needs to file a report on Form ABS-15G not later than February 14, 2012 (**Initial Report**), covering repurchase demands made during that period. Most auto securitizers will fit into this category.

If a securitizer filing the Initial Report had no repurchase demands during the three year lookback

period, it then has no further obligation to file reports until the sooner of (a) the first calendar quarter in which it has repurchase demand activity and (b) February 14 of the next year. Assuming it continues to have no demands, the securitizer will need to continue to make an annual filing.

Figuring out the correct information to include on a Form ABS-15G is tricky. For mortgage securitizers that have many repurchase demands, there are exquisitely difficult interpretive issues in deciphering the SEC's rather Delphic guidance. But even for securitizers with no repurchase demand activity, there are several ambiguities and choices to make.

For starters, sponsors need to decide which entities will file the reports. The SEC gave affiliated securitizers the benefit of an anti-duplication provision in Rule 15Ga-1; if one securitizer reports on particular transactions, no affiliated securitizer needs to report on the same entity. Most sponsors have several depositors, even if they focus just on a single asset class such as retail auto. If the sponsor elects to have the depositors file, then each one will need to file — including depositors that are used exclusively for private transactions. (Of course, if the depositor is used for transactions that do not constitute asset-backed securities under Dodd-Frank, then no filing is needed.) Sponsors that securitize multiple asset classes, or that have offshore affiliates for which reporting is required, have that many more choices to make.

We think a lot of sponsors with multiple depositors and no repurchase demands to report will elect to file at the sponsor level. Doing so reduces the number of filings that need to be made, and it avoids having to identify depositors used only in private ABS deals and having to obtain CIK numbers for those depositors.

Next, the filing securitizer needs to decide what information to put on the Form ABS-15G. The SEC's instructions include the guidance that "this form is not to be used as a blank form to be filled in, but only as a guide in preparation of the report." The SEC also commented in the adopting release that footnotes could be used to provide additional detail. It's good to have that flexibility, because the form itself seems surprisingly short on details.

An initial surprise is that the cover page of the form does not even call for the name of the filing entity, although it does call for both the CIK number of the filer and the name and telephone of a contact person at the filer. We think it would be helpful to readers to include the name of the filer, too, on the cover page. (Note that the filer does need to sign the report, so the name is required there, at least.)

An item that might raise some eyebrows on the cover page is the "Commission File Number of Securitizer." This is going to be a new identifying number that the SEC will assign to each filer of a Form ABS-15G after the filer files its Initial Report. It is *not* the file number assigned to a registration statement or to any other filing. So that part of the form should be left blank for the Initial Report, and then filled in on subsequent quarterly or annual reports.

The heart of Rule 15Ga-1 is a chart that must be filled out to report repurchase demand activity. The filer must report on every ABS transaction with repurchase demand activity, broken down by asset class, and showing a great many details, such as — for each originator in each reported transaction — the total assets originated for that deal, the assets subject to a demand, and various categories describing the status and resolution of that demand. To say the least, the chart is burdensome.

Fortunately, securitizers with nothing to report do not have to fill out this chart. Instead, these lucky (or, to be more positive, good) securitizers can simply check a box on the cover of Form ABS-15G that indicates that they have nothing to report.

Perhaps not surprisingly, the SEC seems to have put little thought into the amount of information required from these box-checking securitizers. The form does not require such a securitizer to identify anything more than its CIK number — no information is called for regarding which asset classes are covered by the report, which ABS offerings are covered, or which affiliated securitizers' filing obligations are covered by the filing, if any.

Inasmuch as this report will be referenced in prospectus disclosure, as noted in the section below, we think that securitizers might want to add something more than the minimum required information. One helpful item for readers might be to identify the asset class or classes covered by the filing, particularly in the case of sponsors filing on a

"consolidated basis" in lieu of having multiple depositors in multiple asset classes make separate filings. Another helpful item, when the sponsor is filing, could be to identify some or all of the relevant depositors — perhaps just those that are involved in public ABS offerings.

5. What Additional Prospectus Disclosure is Needed?

Finally, the SEC has amended Item 1104 of Regulation AB to specify required disclosures in ABS prospectuses. For any prospectus first used on or after February 14, 2012, the issuer must include the 15Ga-1 information for all ABS of the *sponsor* in the applicable asset class. The information should be provided for the prior three years, except that this requirement is phased in. So prospectuses first used between February 14, 2012 and February 13, 2013 need have just one year's worth of data, and prospectuses used for the 365 days thereafter must have just two years worth of data.

The SEC has chosen not to define "asset class," so it is up to the issuer to determine how broadly to construe that term. Our inclination is to think that the SEC considers "retail auto" to be an asset class, and that distinctions between prime and subprime, or between assets that fit an issuer's criteria for public offerings and those that do not, are not relevant to this determination. But no definitive guidance has been issued on this point.

The prospectus disclosure should also include a reference to the most recent Form ABS-15G filed by the depositor or sponsor, along with the CIK number.

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Got it? Seems like a lot of work to us for a filer that has nothing to report. Perhaps the motto of this story is, "No good deed goes unpunished."

Quick Overview of Reporting of Repurchase Demand Activity for ABS

Relevant Document	Due Date(s)	Filer	Period Covered by Report	Which ABS are covered?
Initial Form ABS-15G	Feb. 14, 2012	Sponsor or depositor	3 year period ending Dec. 31, 2011	All ABS outstanding at any point during the period from that sponsor (or, if filing made by depositor, that were issued by that depositor).
Annual Form ABS-15G	Feb. 14 of each year, starting in 2013	Sponsor or depositor	Prior year. (This report is for filers who have previously checked the box indicating no activity to report.)	Same as above, but the relevant period is the relevant calendar year.
Quarterly Form ABS-15G	45 days after calendar quarter end. (Filing not required if box previously checked re no activity to report.)	Sponsor or depositor	Calendar quarter	Same as above, but the relevant period is the relevant calendar quarter.
Distribution Report on Form 10-D	Monthly 10-D due date, starting Jan., 2012	Depositor, as issuer	Monthly period covered by distribution report	Just the ABS for that offering.
Prospectus	Any prospectus first used after Feb. 13, 2012	Depositor, as issuer	Prior 3 years (or shorter periods for prospectuses used before Feb. 14, 2015)	All ABS of the same asset class for that sponsor.

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland author or your regular Kirkland contact.

Kenneth P. Morrison, P.C.
Kirkland & Ellis LLP
300 North LaSalle
Chicago, IL 60654
www.kirkland.com/kmorrison
kenneth.morrison@kirkland.com
+1 (312) 862-2347