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Developments in Asset-Backed Securitization Since Dodd–Frank: *An Assessment of the Regulatory Landscape*

Enactment of the Dodd–Frank Wall Street Reform and Consumer Protection Act in July 2010 heralded fundamental change for the U.S. financial regulatory system, including the asset-backed securitization (ABS) industry[1] and credit rating agencies.[2] But enactment of Dodd–Frank was by no means the end of the story—Congress left it to the regulatory agencies to finalize Dodd–Frank's requirements through administrative rulemakings. Now, with the one-year anniversary of Dodd–Frank approaching, this article takes stock of where we are in the rulemaking process, reviewing what has been finalized, what remains outstanding, what has slipped behind, and areas of controversy for the ABS industry.

As far as ABS industry participants are concerned, the U.S. Securities and Exchange Commission (SEC) will issue most of the relevant rulemakings.[3] There is a tension inherent in the rulemaking process. The SEC must adopt rules within tight timeframes to provide certainty as to how the industry may conduct its business but not at the risk of unintended and unanticipated consequences that can result from haste.

Across the board, financial agencies are experiencing difficulty meeting the ambitious rulemaking deadlines in Dodd–Frank. The problem is particularly acute for the SEC, which is responsible for adopting more than 100 rulemakings and conducting more than 20 studies. To date, the SEC has proposed only 33 rules, adopted 7 rules, and completed 5 studies.[4] SEC rulemakings intended to reduce reliance on credit ratings are likely to be particularly problematic, given that no one has yet devised a viable alternative to credit ratings. Although to date, most of the deadlines pertaining to rules affecting the ABS industry have been met,[5] SEC Chairman Mary Schapiro was frank in publicly conceding that the SEC cannot meet all of the deadlines set by Dodd–Frank. Moreover, she asserted that the SEC would not sacrifice quality simply to achieve undue speed:

> There are lots of statutory deadlines in Dodd–Frank that require us to go very quickly, I think in part motivated by a desire to have certainty about what the regulatory framework would look like. … But where we have found the statutory deadline runs headlong into our ability to really do a good job in proposing a rule and really having sufficient consultation with industry and market participants and investors, we have taken the time to do that because we think that's really important, more important to get it right than to get it fast.[6]

The danger is that the industry may not reap either certainty or speed from the implementation process.

It is impossible to predict how the SEC will prioritize its time and resources (which may also be increased or reduced depending on the vagaries of the Congressional budget appropriations process). Even with recent rulemaking activity relating to ABS and credit rating agencies, the process will continue for some time. It is unknown, for example, whether rulemakings affecting the ABS industry will take a back seat to regulation of other financial market sectors, such as derivatives.

Recently, the U.S. Congress has also been actively examining the securitization process: for example, the Senate Banking Committee held a widely covered hearing on "The State of the Securitization Markets" on May 18, 2011 (Senate Securitization Hearing). It is unclear whether or how this increased Congressional attention will affect the rulemaking process for the industry.

CREDIT RISK RETENTION REQUIREMENTS

In the aftermath of the financial crisis of 2007 to 2008, the "originate to distribute" securitization model used by many lenders was criticized for giving loan originators insufficient incentive to adequately conduct due diligence of the quality of the loans destined for securitization. As a direct response to this perceived problem, Section 941 of Dodd–Frank inserts a new Section 15G into the Securities Exchange Act of 1934 (Exchange Act), requiring the SEC, the Board of Governors of the Federal Reserve System (Federal Reserve), the FDIC, the Office of the Comptroller of the Currency (OCC), the Secretary of Housing and Urban Development and the Federal Housing Finance Agency (together, the "Agencies") to jointly adopt rules imposing risk retention (or "skin-in-the-game") requirements on certain participants in the securitization process. Dodd–Frank gives the Agencies considerable flexibility in devising these rules, but it sets a floor for risk retention: unless an exemption otherwise applies, at least 5% of the credit risk of the securitized assets must be retained by either "securitizers" or "originators" in ABS transactions. For these purposes, a securitizer issues, or organizes the issuance of, an ABS while an originator originates or sells to the securitizer a financial asset backing the deal.[7] Dodd–Frank directs the Agencies to create an exemption for residential mortgage-backed transactions where the underlying loans meet specified underwriting criteria (referred to as "qualified residential mortgages" or QRMs), and to create separate rules for securitizations of commercial mortgages, commercial loans, and auto loans.

Key Post-Dodd–Frank Developments

The Federal Reserve submitted to Congress a report on risk retention, recommending that risk retention rules implementing Section 941 be specifically tailored to each major class of securitized assets.[8] Three months later, however, the Financial Stability Oversight Council (FSOC)[9] issued a report on the macroeconomic effects of risk retention requirements, which did not incorporate or even address the Federal Reserve's recommendation for tailored requirements.[10] Rather than providing detailed design recommendations for implementation of the requirements of Section 941, the FSOC report explored broader policy issues such as balancing the benefits of risk retention regulation (e.g., improved underwriting standards and better aligned incentives for originators, securitizers, and investors) against the risk of reduced availability of credit. In the rule that was jointly proposed by the Agencies on March 31, 2011,[11] the only distinction made with regard to asset classes was in the exemptions from the risk retention requirements; the retention requirements themselves do not vary by asset class.

The proposed rule requires the organizer (referred to as the sponsor) of a securitization transaction to retain 5% of the credit risk of the securitized assets at the closing of that transaction (in limited circumstances, sponsors are allowed to share some of their risk retention obligations with originators of the securitized assets). Although Dodd–Frank allowed the Agencies to set a higher risk retention requirement, the Agencies did not venture beyond the 5% minimum threshold.

The proposed rule allows sponsors to choose from the following alternative methods of retaining at least 5% of the credit risk: 1) retaining a representative sample of assets, 2) retaining a vertical strip of risk (a proportionate interest in every tranche of a securitization), 3) retaining a horizontal residual interest (a proportionate interest in the equity/first loss tranche of a securitization), or 4) L-shaped risk retention (the latter a hybrid of vertical and horizontal interests). Retained risk cannot be hedged: If sponsors could hedge away their exposure to the assets underlying the ABS, that could cancel out their "skin-in-the-game" from an economic standpoint, effectively weakening a sponsor's incentive to diligence those assets. Financial institutions, which are wary of retaining undue risk, may find the requirement counterintuitive.

Securitizations of certain residential mortgages, commercial loans, commercial mortgages, and auto loans that satisfy stringent underwriting criteria can qualify for exemption from the risk retention requirements.[12] The contours of these exemptions have been the subject of much discussion and debate. The extremely detailed underwriting criteria in the proposal for qualifying assets could lead to criticism that the Agencies are unduly restricting or rationing credit. Another source of controversy is that the rule would allow the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) to satisfy their risk retention obligations by simply guaranteeing the timely payment of principal and interest on securitizations, rather than requiring that they also retain interests in securitizations, because they are operating with capital support from the U.S. government. Private securitization issuers could well perceive that the Agencies are providing Fannie Mae and Freddie Mac the equivalent of an exemption from risk retention requirements and unfairly entrenching their competitive advantage over private sector competitors.[13]

Current State of Play and Next Steps

The comment period for the proposed rule will remain open until June 10, 2011. The SEC has announced that it expects to adopt a final rule by year-end 2011.[14] Commenters from the securitization industry will likely push for the expansion and simplification of the criteria for loans that can qualify an ABS transaction backed by such loans for exemption from risk retention requirements. These criteria and the hedging prohibition have the potential to greatly influence lending markets for years to come, since many ABS sponsors may not have either the risk tolerance or financial capacity to continue securitizing "non-qualifying" assets. An unintended consequence may be the imposition of effective limits on the availability of credit for persons and companies who do not meet the final criteria for qualifying retail mortgages, commercial loans, commercial mortgages, or auto loans.

DISCLOSURE AND REPORTING REQUIREMENTS FOR ABSs

In addition to requiring risk retention, Dodd–Frank also imposes new disclosure and reporting requirements for ABSs:

- Section 942 gives the SEC broad rulemaking powers to require detailed disclosure regarding securitized assets at the asset level, as well as compensation for and risk retention by the transaction organizers. The provision also eliminates the automatic suspension of filing and reporting requirements for ABS issuances under Section 15(d) of the Exchange Act[15] and allows the SEC to dictate when filing and reporting requirements for a specified class of ABS should be suspended or terminated.

- Section 943 gives the SEC authority to require credit rating agencies to describe in any report accompanying a credit rating the representations and warranties made by asset originators and/or securitization sponsors with regard to the pooled assets and the mechanisms available to investors to enforce those representations and warranties, including how these representations, warranties, and enforcement mechanisms differ from equivalent provisions in similar issuances. The SEC may require securitizers to make disclosures regarding the repurchase requests that they have received as a result of breaches of representations and warranties and whether those requests were honored.
- Section 945 authorizes the SEC to adopt rules requiring issuers of Securities Act registered ABSs to conduct due diligence on the underlying assets, and disclose the nature of the diligence review. (To some extent, this provision overlaps with Section 932 of Dodd–Frank, which is discussed in more detail later in this article).

These new requirements are intended to address the lack of transparency and due diligence in the ABS pipeline that led to the breakdown in these markets in the lead-up to and during the recent financial crisis.

Key Developments since the Enactment of Dodd–Frank

To date, the SEC has adopted two final rules relating to ABS disclosure and reporting requirements. The SEC published a largely procedural rule setting out the format and timing for disclosures required by Section 943[16] and a rule implementing Section 945 of Dodd–Frank.[17] This latter rule establishes the following standard for diligence of underlying assets by ABS issuers:

> The diligence review "must be designed and effected to provide reasonable assurance that the disclosure regarding the pool assets in [the prospectus] is accurate in all material respects."

The rule allows for outsourcing of due diligence to one or more third parties, so long as those parties agree to be named as experts in the registration statement for the offering (note that an issuer cannot rely on the diligence of an unaffiliated originator of the assets). Disclosures about the diligence process and findings, and the involvement of third parties in the diligence process, must be made. More detailed disclosure must be made regarding any asset included in the pool that does not meet the disclosed benchmarks/underwriting criteria for the transaction.

The SEC also proposed a rule to implement Section 942(a) of Dodd–Frank.[18] ABS issuers had previously been exempted from SEC filing and reporting requirements, but Dodd–Frank re-imposes the filing requirements, subject to any suspensions that the SEC deems appropriate. This proposed rule would suspend reporting obligations for ABS issuers, starting from the first fiscal year in which there are no longer any ABSs of the class sold in a registered transaction, other than to affiliates.

Current State of Play and Next Steps

The comment period on the proposal has closed,[19] but the industry still is awaiting a final rule implementing Section 942(a). The SEC has indicated that it does not know when it will adopt a final rule on the topic, nor is there a timeline for adopting rules to implement the other requirements of Section 942, including those relating to asset-level disclosures. The SEC also deferred proposing rules to require ABS issuers to make third-party diligence reports publicly available;[20] this was subsequently covered in the rules proposed on May 18, 2011 (this is discussed later in this article).

While final rules implementing Sections 943 and 945 became effective on March 28, 2011, compliance will be implemented as follows:

- From September 26, 2011, SEC Rule 17g-7 (made pursuant to Dodd–Frank Section 943(1)), will require credit rating agencies to make certain disclosures in any report accompanying a credit rating relating to an ABS.
- Any offering of ABSs after December 31, 2011, must comply with the rule implementing Section 945 of Dodd–Frank.
- Changes to Regulation AB made pursuant to Dodd–Frank Section 943 will apply to transactions that offer ABSs on or after February 14, 2012 (there is an earlier compliance date, December 31, 2011, for Item 1121 of Regulation AB, which requires disclosure of demand, repurchase, and replacement history of securitized assets).
- For private sector ABS transactions, the first disclosure filing under SEC Rule 15Ga-1 (made pursuant to Dodd–Frank Section 943, requiring securitizers to provide tabular disclosure of fulfilled and unfulfilled repurchase requests) is required to be filed by February 14, 2012. Where the securitizer is a government entity or public instrumentality, that date is extended to February 14, 2015.

THE CONFLICTS OF INTEREST RULES RELATING TO SECURITIZATIONS

Another issue highlighted by the financial crisis was the potential for conflicts of interest for participants in the ABS industry: Investors may not appreciate that the sponsor or seller in an ABS transaction may a have financial interest in the transaction that is not aligned with (or even at cross-purposes with) the interests of the investors. In response, Section 621 of Dodd–Frank inserted a new Section 27B into the Securities Act, requiring the SEC to adopt rules prohibiting underwriters, placement agents, initial purchasers, and sponsors of ABS transactions from engaging in any transaction that would involve a "material conflict of interest" for a period of one year after the closing of the securitization. Implementing rules should not prohibit activities that amount to market-making or the provision of liquidity with respect to an ABS or hedging activities with respect to positions arising out of the underwriting, placement, initial purchase, or sponsorship of an ABS.

Although Dodd–Frank required that implementing rules be issued by April 17, 2011, that date has passed without any proposed rules. The industry cannot begin to comply with the statute's requirements until the SEC at least provides its view as to what constitutes a "material conflict of interest" through the rulemaking process. SIFMA (Securities Industry and Financial Markets Association) expressed its views on this issue by submitting a comment letter to the SEC in advance of a proposal.[21] SIFMA has identified several activities that it believes should be excepted from any prohibition on conflicts of interest under Section 621 of Dodd–Frank, including:

- ownership of interests in ABSs;
- provision of asset-backed commercial paper liquidity facilities;
- provision of credit enhancement;
- retention and exercise of control rights over servicers and trustees;
- general hedging (this is broader than the carve-out in the new Section 27B, which only refers to hedging with respect to activities related to an ABS);
- provision of financing to facilitate the origination or purchase of assets;

- the activities of servicers, collateral managers, and trustees;
- the provision of derivatives for use in the ABS transaction;
- receiving payments ahead of payments to investors (e.g. for providing services in connection with the transaction); and
- paying credit rating agencies, accountants, and due diligence providers (SIFMA contends that these conflicts of interest are dealt with elsewhere in Dodd–Frank).

It remains to be seen whether the SEC will address these activities in its proposed or final rule. The SEC has announced that it intends to propose a rule on this subject before July 31, 2011, and adopt a final rule before December 31, 2011.

CREDIT RATING AGENCY REFORM

Much of the ABS business is reliant on ratings provided by credit rating agencies.[22] Congress enacted Title IX, Subtitle C, of Dodd–Frank to overhaul the regulation of credit rating agencies and to address their perceived systemic importance and the level of reliance placed upon them by investors. Congress also sought to remedy the failure of credit ratings, especially in structured finance, to anticipate the sudden decline in credit quality associated with the financial crisis of 2007 to 2008. Congress found that the use of credit ratings in structured finance was particularly problematic at that time.[23]

Five provisions in Subtitle C are particularly relevant[24] to the ABS industry:

1. Section 932(a)(8) governs the provision of due diligence services to ABS issuers and underwriters by third parties (this covers similar ground to Section 945 of Dodd–Frank, discussed earlier in this article).
2. Section 933 imposes expert liability standards (similar to those imposed on auditors) on credit rating agencies.
3. Section 935 requires rating agencies to consider, when rating a security, information other than the information provided by the issuer of the securities.
4. Section 939F calls for a study of the credit rating process for structured finance products (especially the conflicts of interest involved), after which the SEC is to adopt rules implementing its findings.
5. Section 939G in effect limits the ability of an issuer to disclose a rating in a registration statement for an ABS transaction to cases where the rating agency that provided that rating consents to be named as an expert.

Key Developments since the Enactment of Dodd–Frank

Until recently, the SEC did not propose any rules that specifically related to credit ratings and the ABS industry (although the SEC had proposed some rules to remove references to credit ratings from securities regulation generally).[25]

Before the SEC could act to adopt rules, even the bare text of the relevant Dodd–Frank provisions caused uncertainty and some difficulty.

Once Dodd–Frank passed, it was immediately clear that Subtitle C had the potential to adversely impact the ABS market. Under Regulation AB, if an ABS issuance were conditioned on the assignment of a minimum rating from a credit rating agency or agencies, the registration statement for the issuance had to disclose the rating(s) and identity of each rating agency. By requiring an issuer to obtain the prior consent of credit rating agencies to be named as experts with respect to any rating included in a registration statement, Section 939G effectively empowered rating agencies to preclude the issuance of rated ABS, endangering the functioning of the market for an entire class of securities. As many predicted, rating agencies withheld such consent, threatening a standstill to the industry and prompting the SEC to issue relief, indicating that it would not take action against issuers of ABSs in cases where disclosures did not contain the ratings required by Regulation AB.[26]

Current State of Play and Next Steps

On May 10, 2011, the SEC published a request for public comment for a study on the feasibility of a system in which a public or private utility or a self-regulatory organization would assign an NRSRO to determine credit ratings for structured finance products.[27] This request is part of a broader study the SEC is required to undertake on the credit rating process for structured finance products, which will address conflicts of interest, metrics to determine the accuracy of ratings, and alternative compensation—in each case with a view to creating incentives for accurate credit ratings. Although the Dodd–Frank deadline for the completion of this study is July 2012, the SEC has indicated its intention to defer completion until year-end 2012. The results of this study could form the basis for far-reaching reform of the rules that govern the industry.

On May 18, 2011, the SEC issued proposed rules for NRSROs that among other things defer prescribing factors an NRSRO must take into consideration with respect to its internal control structure. As part of the May 18 Release, the SEC proposed rules implementing the requirement under Section 932(a)(8) of Dodd–Frank that ABS issuers and underwriters publicly disclose third-party due diligence reports (this issue had been deferred in the final rule implementing the similar requirements of Section 945 of Dodd–Frank, as discussed earlier in this article In the section Disclosure and Reporting Requirements for ABSs). Also pursuant to Section 932(a)(8) of Dodd–Frank, the SEC proposed a rule and a form that third-party due diligence providers would need to provide to credit rating agencies in connection with ABS transactions.

The SEC Rulemaking Calendar is similarly silent with respect to Sections 933, 935, and 939G of Dodd–Frank, so there is little guidance available as to when these provisions will be implemented. In particular, we have no indication whether the SEC will issue a rule to formalize the No Action letter relief it granted to Ford Motor Credit Company and make clear that such relief is permanent and applies to all ABS issuers. If the SEC does not take action on this point, Congress may do so: House Financial Services Committee Chairman Spencer Bachus has indicated that he is working to amend Dodd–Frank to address this issue, but it is unclear whether the Senate would be receptive to this initiative.

ORDERLY LIQUIDATION AUTHORITY

Prior to the enactment of Dodd–Frank, the FDIC had authority to act as receiver and oversee the liquidation of banks but not a broader spectrum of companies that engaged in financial activities. The failure of Lehman Brothers[28] in September 2008 was governed by the bankruptcy code, resulting in well-documented uncertainty and unworkable proceedings for financial market participants. To avoid the recurrence of such a situation, and cognizant of the comparative smoothness with which bank failures are handled under receivership provisions of federal banking law, Title II of Dodd–Frank empowers the Treasury Secretary to appoint the FDIC as receiver of:

- bank holding companies;
- non-bank financial companies that have been designated as systemically important by the FSOC;
- companies that are "predominantly engaged in financial activities"; and

- certain subsidiaries of such companies in each case where a systemic risk determination has been made and the company is in default, or in danger of default.[29] The authority of the FDIC to act as receiver in these cases has been termed "orderly liquidation authority."

Key Developments Post-Dodd–Frank

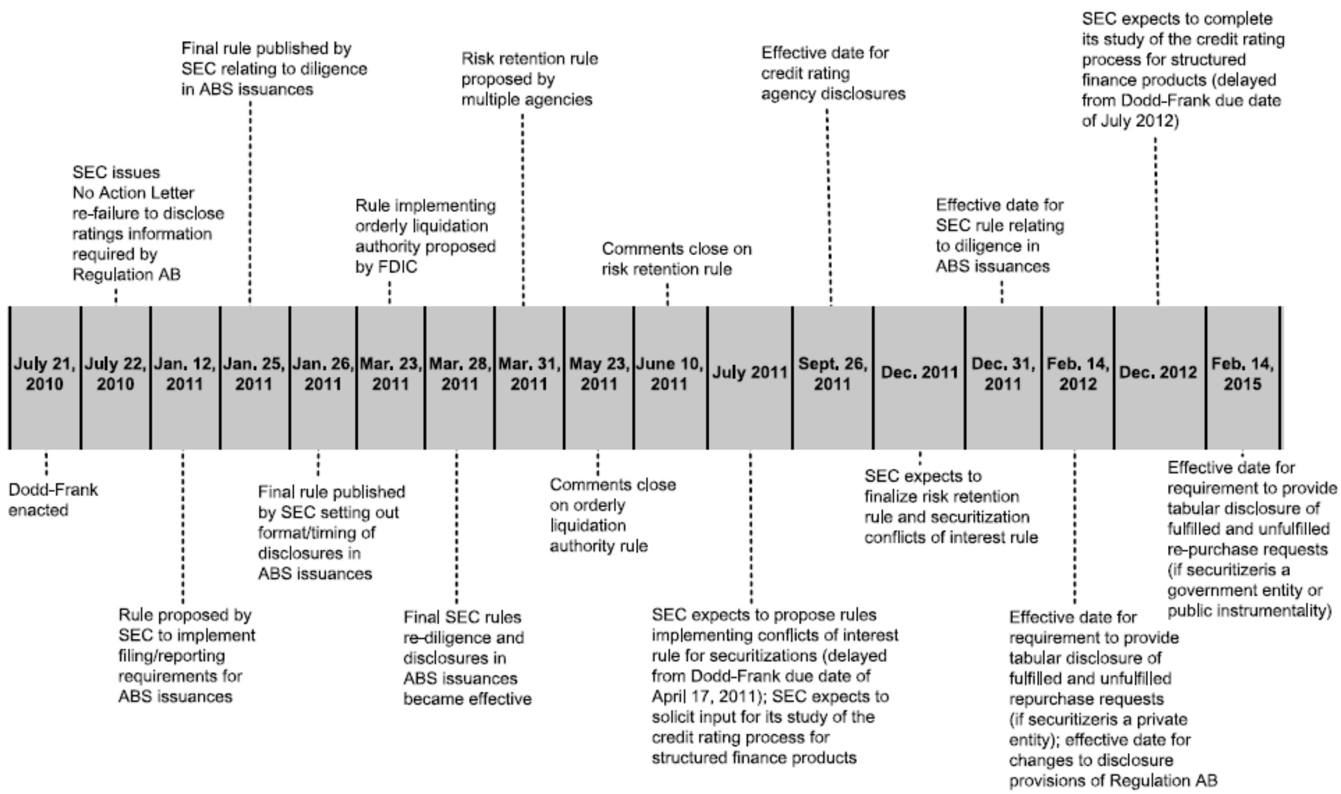
The FDIC recently proposed a rule implementing its "orderly liquidation authority" to clarify the boundaries of its application to companies that are "predominantly engaged in financial activities."[30] If at least 85% of a company's revenues are attributable to financial activities, then the company may be subject to the orderly liquidation authority. The proposal provides extensive detail regarding which activities are "financial activities" and which revenues must be included in the calculation. This proposal is particularly relevant to participants in the ABS industry because it purports to "ensure that the preferential and fraudulent transfer provisions of [Dodd–Frank] are implemented consistently with the corresponding provisions of the Bankruptcy Code," addressing concerns that this may not be the case.

Current State of Play and Next Steps

The FDIC's proposed rule on the orderly liquidation authority has raised many questions for the financial markets. For example, will companies that could be characterized as "predominantly engaged in financial activities" be treated differently by the markets because they could be subject to the FDIC's orderly liquidation authority? Could this anticipated status adversely affect the credit rating or price of debt for those companies? Particularly relevant to participants in the ABS industry is whether the FDIC, when acting as receiver, will seek to avoid sales of securities to special purpose vehicles as part of an ABS transaction, labeling such sales a preference or fraudulent transfer. There also is concern that the FDIC could use its authority to repudiate contracts to reclaim or recover assets that have been transferred to a securitization vehicle.[31] In an effort to calm the ABS market for companies that could potentially be subject to the orderly liquidation authority, the general counsel of the FDIC issued opinions on the appropriate interpretation of Title II provisions regarding repudiation and avoidable transfers. Until final rules have been issued, some uncertainty will remain. Because of this uncertainty, law firms might need to reconsider their approach to true sale opinions for ABS transactions. The comment period on the proposed rule closed on May 23, 2011.

APPENDIX

Timeline of Effective and Implementation Dates for the Foregoing Topics



CONCLUSION

This article has set out the state of play of several important Dodd–Frank provisions that affect the ABS industry. The agency rulemaking process to implement Dodd–Frank is ongoing, and to date, only two of the relevant rules have been finalized. The SEC has admitted that other rulemakings will not be completed by their statutorily mandated deadlines, and there is uncertainty about forthcoming studies and potential Congressional amendments to the Dodd–Frank legislation itself. Political wrangling over funding for the SEC adds to this sense of uncertainty. All of this creates a challenging environment for participants in the ABS industry, but it may be preferable to endure the uncertainty in order to give the SEC and other relevant agencies time to work through the consequences of their rulemakings.

[1] The ABS industry was a focus of regulatory attention even before the enactment of Dodd–Frank. On April 7, 2010, the SEC proposed changes to enhance the investor protection provisions of SEC Regulation AB, governing asset-backed securitizations. See 75 Fed. Reg. 23,328 (May 3, 2010). In recent testimony before a Congressional committee, an SEC official noted that the SEC would need to harmonize some of these proposed changes with certain requirements of Dodd Frank. Other pre-Dodd–Frank changes proposed by the SEC to Regulation AB addressed issues that are not covered by Dodd–Frank, including revisions to filing requirements and safe harbors for exempt offerings and re-sales of asset-backed securities. See House Subcommittee on Capital Markets and GSEs, Hearing on Understanding the Implications and Consequences of the Proposed Rule on Risk Retention, testimony of Meredith Cross, Div. of Corp. Finance, SEC (April 14, 2011).

[2] Subtitle D of Title IX of Dodd–Frank addresses improvements to the asset securitization process. Subtitle C addresses changes to the regulation of credit ratings agencies.

[3] The securitization industry also must comply with credit risk retention rules (discussed in more detail in the section Credit Risk Retention Requirements) that will be jointly issued by a number of U.S. financial regulators. Rulemakings by the Federal Deposit Insurance Corporation (FDIC) with respect to orderly liquidation authority (discussed in more detail in the Orderly Liquidation Authority section of this article) may also affect the securitization industry.

[4] See Jesse Hamilton, *Dodd–Frank Rule-Making Deadlines Slip, Delaying Dozens of Rules*, Bloomberg, April 15, 2011.

[5] The deadline for rules relating to conflicts of interest in the ABS industry has not been met. See the section The Conflicts of Interest Rules Relating to Securitizations of this article for further detail.

[6] See House Appropriations Subcommittee on Financial Services and General Government, Hearing on the Proposed Fiscal 2012 Appropriations for the SEC (March 15, 2011), testimony of Chairman Schapiro.

[7] See Section 941(b) of Dodd–Frank and Exchange Act Section 15G(a)(2).

[8] See Board of Governors of the Federal Reserve System, Report to the Congress on Risk Retention (October 2010).

[9] Dodd–Frank created the FSOC to act as a forum for macro-prudential supervisory oversight. The FSOC is chaired by the Secretary of the Treasury and includes the Federal Reserve, SEC, OCC, and FDIC among its members. For further discussion of the FSOC, see D.N. Lamson and H. Allen, *The Financial Stability Oversight Council: Completely New or Deja Vu?* 96 Banking Rep. (BNA) 974, 05/24/11 (96 BBR 974, 5/24/11).

[10] See T.F. Geithner, Chairman, FSOC, Macroeconomic Effects of Risk Retention Requirements (January 2011).

[11] 76 Fed. Reg. 24,090 (April 29, 2011).

[12] See Exchange Act Sections 15G(c)(2) and 15G(e).

[13] This topic was the subject of a *Wall Street Journal* opinion piece "Skin in the Game: But Not for Fannie and Freddie" (March 30, 2011), which states, "But by subjecting private lenders to more stringent risk-retention rules, regulators will make it harder for them to compete with their government counterparts."

[14] See "Implementing Dodd–Frank Wall Street Reform and Consumer Protection Act—Upcoming Activity" (SEC Rulemaking Calendar): http://www.sec.gov/spotlight/dodd-frank/dfactivity-upcoming.shtml.

[15] Dodd–Frank Section 944 deletes the provision which was formerly Section 4(5) of the Securities Act of 1933. That provision used to exempt transactions involving certain mortgages from SEC registration requirements.

[16] 76 Fed. Reg. 4,489 (Jan. 26, 2011).

[17] 76 Fed. Reg. 4,231 (Jan. 25, 2011).

[18] 76 Fed. Reg. 2,049 (Jan. 12, 2011).

[19] This proposed rule does not seem controversial, as the SEC received only seven comments from industry participants, most of which requested that the SEC consider a broader suspension of reporting obligations.

[20] See Part I, Background and Overview, 76 Fed. Reg. 4,231.

[21] Letter dated December 10, 2010, from Richard A. Dorfman and Christopher B. Killian of SIFMA to the SEC: http://www.sec.gov/comments/df-title-vi/conflicts-of-interest/conflictsofinterest-10.pdf.

[22] Credit rating agencies that have registered with, and are subject to the supervision of, the SEC are referred to as "nationally recognized statistical rating organizations" or "NRSROs," and Dodd–Frank has subjected these NRSROs to enhanced regulation. See Section 932 of Dodd–Frank.

[23] See Section 931 of Dodd–Frank.

[24] The remainder of Subtitle C seeks, generally, to reduce reliance on credit ratings, improve the quality of credit ratings and increase liability for credit rating agencies.

[25] Section 939 of Dodd–Frank aims to remove statutory references to credit ratings. To date, the SEC has proposed rules to remove reference to credit ratings from a diverse range of securities law rules, including rules that relate to short-form registration statements, confirmations of transactions, broker-dealer financial responsibility, distributions of securities, investment fund repurchase agreements, the net capital rule and money market funds. See 76 Fed. Reg. 8,946 (February 16, 2011); 76 Fed. Reg. 12,896 (March 9, 2011); 76 Fed. Reg. 26,550 (May 6, 2011). Concerns have been expressed, both within the SEC and externally, that removing statutory references to credit ratings is unworkable without a substitute metric. See D.S. Hilzenrath, *For SEC, Life After Ratings Agencies*, Washington Post, April 27, 2011.

[26] See Response of the Office of Chief Counsel, Division of Corporate Finance, to Ford Motor Credit Company LLC and Ford Credit Auto Receivables Two LLC (November 23, 2010): http://www.sec.gov/divisions/corpfin/cf-noaction/2010/ford072210-1120.htm. This extends and confirms the relief previously given to Ford Motor Credit Company in an SEC No Action Letter dated July 22, 2010.

[27] See SEC Press Release 2011-108 and Section 939F of Dodd–Frank.

[28] Lehman Brothers was an investment bank regulated by the SEC and not a commercial bank. Therefore, the FDIC did not have the authority to act as the receiver for Lehman Brothers.

[29] See Dodd–Frank Sections 201(a)(11) and 203(b).

[30] 76 Fed. Reg. 16,324 (March 23, 2011).

[31] In September 2010, the FDIC amended its safe harbor for securitizations by banks—the FDIC clarified that in a receivership of an insured depository institution, it would not seek to repudiate any asset transfer as burdensome if the securitization met certain criteria. These safe harbor criteria go beyond the usual requirements for a true sale, requiring that securitizations be subject to risk retention, reporting, and disclosure requirements, and, in some cases, requirements for simplified structures. See 12 C.F.R. § 360.6. Effectively, the FDIC has used the safe harbor as an indirect way of regulating the types of securitizations that insured depository institutions can enter into. The industry has criticized the lack of specificity in the FDIC's approach (see, in particular, the testimony of the American Securitization Forum at the Senate Securitization Hearing) and fears that the FDIC may take a more activist role in the future in determining whether an asset transfer should be reversed.

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