



## SEC Seeks Comment on Proposed Approach Under Regulation AB II for the Dissemination of Potentially Sensitive Asset-Level Data

On February 25, 2014, the Securities and Exchange Commission (the "SEC") re-opened the comment period on the series of proposed rules commonly referred to as "Regulation AB II." Specifically, the SEC is seeking comment on a proposed approach for the dissemination of potentially sensitive asset-level data to investors whereby an issuer would post such information on an issuer-sponsored website, which could be access-restricted, rather than file such information publicly with the SEC. This proposed approach is outlined in an SEC staff memorandum included in the public comment file for Regulation AB II (the "Staff Memorandum").<sup>1</sup>

The deadline for comments on the proposed approach is March 28, 2014.

### Background: Asset-Level Disclosure Under Regulation AB II

Regulation AB II consists of a series of new and amended proposed rules that, if adopted, would substantially revise the offering process, disclosure and reporting requirements for publicly-issued asset-backed securities ("ABS") and impose new disclosure standards for privately-issued structured finance products. Regulation AB II was initially proposed in April 2010 (the "April 2010 Proposal"), with certain portions re-proposed in July 2011 in light of the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act and comments received on the April 2010 Proposal (the "July 2011 Re-Proposal").<sup>2</sup>

### Contacts:

**Katharine Crost***Partner*

(212) 506-5070

[kcrost@orrick.com](mailto:kcrost@orrick.com)**Alan Knoll***Partner*

(212) 506-5077

[alanknoll@orrick.com](mailto:alanknoll@orrick.com)**Al Sawyers***Partner*

(212) 506-5041

[asawyers@orrick.com](mailto:asawyers@orrick.com)**Robert Moyle***Senior Associate*

(212) 506-5189

[rmoyle@orrick.com](mailto:rmoyle@orrick.com)**David Ridenour***Senior Associate*

(202) 339-8560

[dridenour@orrick.com](mailto:dridenour@orrick.com)

<sup>1</sup> The SEC release is available at <http://www.sec.gov/rules/proposed/2014/33-9552.pdf>. The Staff Memorandum is available at <http://www.sec.gov/comments/s7-08-10/s70810-258.pdf>.

<sup>2</sup> The April 2010 Proposal is available at <http://www.sec.gov/rules/proposed/2010/33-9117fr.pdf>, and Orrick's related Client Alert is available at <http://www.orrick.com/Events-and-Publications/Documents/2562.htm>. The July 2011 Re-Proposal is available at <http://www.sec.gov/rules/proposed/2011/33-9244fr.pdf>, and Orrick's related Client Alert is available at <http://www.orrick.com/Events-and-Publications/Documents/3935.pdf>.



In the April 2010 Proposal, the SEC indicated that investors in ABS transactions would benefit from more granular information about the pool assets supporting the ABS, both at the time of the offering and over the life of the ABS. Among these earlier proposed provisions of Regulation AB II is a requirement that issuers of most classes of ABS<sup>3</sup> disclose standardized asset-level information in prospectuses and, on an ongoing basis, in periodic reports.<sup>4</sup> As a result, issuers would be required to publicly file on the SEC's EDGAR system information about each asset in the pool, including information relating to the terms of the asset, the underwriting of the asset and the characteristics of the obligor.

While the proposed provisions of Regulation AB II would not require issuers to disclose personally identifying information such as an obligor's name or address, the SEC acknowledged in the April 2010 Proposal that privacy concerns could arise from the requirement to disclose other information about each asset and the related obligor, including data on the obligor's geographic location, credit score, income and debt. Nevertheless, the SEC also noted that these types of asset-level data would permit investors to perform better risk and return analysis on ABS supported by a pool of assets. In both the April 2010 Proposal and the July 2011 Re-Proposal, the SEC requested comment on these privacy concerns.

The Staff Memorandum describes certain of the privacy concerns that several commenters expressed with respect to the proposed asset-level data disclosure requirements, including concerns that:

- the identity of an obligor could be discovered based on the data publicly filed in connection with an ABS transaction and other publicly available information;
- the disclosure requirements could conflict with or undermine consumer privacy protections; and
- compliance with the disclosure requirements could subject issuers to liability under applicable privacy laws.

### **Proposed Approach: Dissemination of Sensitive Asset-Level Data Via Issuer-Sponsored Websites**

Under the approach proposed in the Staff Memorandum, an ABS issuer would not be required to publicly file potentially sensitive asset-level information on the SEC's EDGAR system and would instead make such information available to investors and potential investors through an issuer-sponsored website. Issuers would be permitted to establish specific safeguards and controls to restrict website access as necessary to comply with applicable privacy laws. Asset-level information that does not raise privacy concerns would still be required to be publicly filed with the SEC on EDGAR.

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<sup>3</sup> In the case of credit and charge card ABS, the SEC proposed to require that information be provided on the basis of distributional account groups rather than on the basis of individual assets. Therefore, as proposed, the "grouped account data" required for card ABS would be unlikely to result in the same privacy concerns discussed herein in connection with asset-level disclosures.

<sup>4</sup> The April 2010 Proposal identified certain information that would be required in all cases and additional information that would be required based on the type or types of assets comprising the pool (e.g., pools that include residential mortgages, commercial mortgages, automobile loans, automobile leases, equipment loans, equipment leases, student loans, floorplan financings, corporate debt securities of another issuer, or ABS of another issuer).



Additional elements of this proposed approach, as outlined by the SEC staff, include:

- website disclosure by the issuer of specific data with respect to each asset (e.g., exact credit scores and income and debt amounts) rather than coded ranges, as originally proposed;
- prospectus disclosure of the address for the website where the information would be accessible;
- maintenance of website information for at least five years;
- access to website information free of charge;
- incorporation of the website by reference to it in the related prospectus and periodic reports, which would subject such information to all liability provisions applicable to prospectuses, registration statements and periodic reports;
- website access to all other asset-level information (i.e., non-sensitive information that is publicly filed) so that investors could access all information in one location; and
- potential requirement that the information disclosed on the website be made available to the SEC in a non-public filing for purposes of record keeping and assessing compliance.

The SEC staff's proposed approach would diverge from the SEC's general requirement that all disclosures provided to investors as part of a registered offering be filed publicly on the SEC's EDGAR system. The SEC staff believes, however, that its proposed approach strikes a better balance between providing investors with the most useful information to evaluate ABS investments and addressing potential privacy concerns. The SEC staff identified a number of investor benefits that it believes could result from the proposed approach, as well as factors that it believes support, or mitigate the costs of, a transition to such approach, including:

- investors and potential investors would be receiving actual asset-level data;
- issuers are best situated to assess the applicability of, and compliance with, the relevant privacy laws;
- dissemination of the information through a website would lead to uniformity and clarity because all investors would be provided access to the information in the same manner;
- many issuers already use websites for the dissemination of certain ABS-related information, and some investors have expressed a preference for accessing information about ABS performance through websites;
- certain ABS issuers already have experience limiting website access to certain classes of persons, including investors;
- some asset-level data is already obtained by third-party data providers who provide restricted access to such data; and
- there are significant legal and resource constraints related to modifying the SEC's EDGAR system to accommodate the dissemination of potentially sensitive asset-level information in a manner that complies with privacy laws and other applicable laws.



The SEC has requested comment on the proposed approach but did not include specific questions.<sup>5</sup> The deadline for submitting comments to the SEC on the proposed approach is March 28, 2014.

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Please contact any of the below-listed authors of this Client Alert, any of the members of our Structured Finance Group or other Orrick attorneys with whom you work to discuss any questions you may have with regard to the foregoing.

|                        |                         |                |                      |
|------------------------|-------------------------|----------------|----------------------|
| <b>Katharine Crost</b> | <i>Partner</i>          | (212) 506-5070 | kcrost@orrick.com    |
| <b>Alan Knoll</b>      | <i>Partner</i>          | (212) 506-5077 | alanknoll@orrick.com |
| <b>Al Sawyers</b>      | <i>Partner</i>          | (212) 506-5041 | asawyers@orrick.com  |
| <b>Robert Moyle</b>    | <i>Senior Associate</i> | (212) 506-5189 | rmoyle@orrick.com    |
| <b>David Ridenour</b>  | <i>Senior Associate</i> | (202) 339-8560 | dridenour@orrick.com |

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<sup>5</sup> While neither the SEC release nor the Staff Memorandum included specific questions for comment, in his public statement on the re-opening of the Regulation AB II comment period, SEC Commissioner Michael S. Piowar identified a number of issues and questions that market participants might address in their comments:

“During the re-opened comment period, it would be helpful to receive comments on whether asset-level data is necessary for investors to independently perform due diligence on Auto ABS and other types of non-MBS offerings. In other words, do grouped account disclosures or grouped account and pool-level disclosures provide sufficient information to investors for these types of securities? If these types of disclosures are not sufficient, or if the markets for Auto ABS and other non-MBS offerings can be further improved with asset-level disclosures, I would be interested in commenters describing any associated quantitative or qualitative benefits and costs to the markets as they exist today.

I also look forward to reviewing the comments on our staff’s memo and whether market participants understand their obligations under the described approach to handle sensitive asset-level data. For instance, is there sufficient guidance to distinguish between potential investors and the general public? Are there concerns as to whether third-party investment advisers, broker-dealers, and consultants will be able to access asset-level data in order to provide advice to their clients or customers? Are the restrictions, conditions, and agreements that an ABS issuer might place on access to asset-level data (e.g., a liquidated damages provision) compatible with a requirement that such data be available free of charge? If not all investors and potential investors agree to the privacy conditions in order to access the asset-level data, will that result in an unfair secondary market for investors in that security? What should be the consequences to an issuer that mistakenly identifies a person as not an investor or potential investor and denies that person access to the asset-level data?”

Commissioner Piowar’s full statement is available at <http://www.sec.gov/News/PublicStmnt/Detail/PublicStmnt/1370540851698>.