

Manual of Publicly Available Telephone Interpretations

On Dec. 9, 2014, the Division of Corporation Finance published [Compliance and Disclosure Interpretations](#) (“C&DIs”) for Regulation AB, which replace and supersede the telephone interpretations in this document.

REGULATION AB AND RELATED RULES

Section 1. [Item 1100\(b\)](#)

- 1.01 Item 1100(b) provides requirements for presentation of historical delinquency and loss information that is called for by provisions in Regulation AB. For this information the delinquency experience must be presented in 30 or 31 day increments, as applicable, through the point that assets are written off or charged off as uncollectible. For instance, Item 1111(c) of Regulation AB requires disclosure of delinquency and loss information for the asset pool being securitized. This delinquency or loss information required by Item 1111(c) regarding the pool being securitized must be disclosed in the increments outlined in Item 1100(b) through the point that the assets are written-off or charged-off as uncollectible. Many issuers choose to include information not required by 1111(c), such as historical delinquency information for an asset group other than the asset pool (such as, a managed or total portfolio, servicer portfolio, etc.). Since this additional information is not presented in response to a specific Item requirement of Regulation AB but instead under general principles of materiality, the information may be disclosed in a manner other than that provided in Item 1100(b).

Section 2. [Item 1101\(d\)](#) and [Item 1101\(g\)](#)

- 2.01 Both the definition of “Delinquent” in Item 1101(d) and the definition of “Non-performing” in Item 1101(g) of Regulation AB provide three approaches for determining whether a pool asset is “delinquent” or “non-performing” focusing on the following items:

Delinquent:

- (1) The transaction agreements for the asset-backed securities;
- (2) The delinquency recognition policies of the sponsor, any affiliate of the sponsor that originated the pool asset or the servicer of the pool asset; or
- (3) The delinquency recognition policies applicable to such pool asset established by the primary safety and soundness regulator of any entity listed in paragraph (2) or the program or regulatory entity that oversees the program under which the pool asset was originated.

Non-performing:

- (1) The pool asset would be treated as wholly or partially charged-off under the requirements in the transaction agreements for the asset-backed securities;
- (2) The pool asset would be treated as wholly or partially charged-off under the charge-off policies of the sponsor, an affiliate of the sponsor that originates the pool asset or a servicer that services the pool asset; or
- (3) The pool asset would be treated as wholly or partially charged-off under the charge-off policies applicable to such pool asset established by the primary safety and soundness regulator of any entity listed in paragraph (2) or the program or regulatory entity that oversees the program under which the pool asset was originated.

In both definitions, the most restrictive of the three approaches governs. However, in each definition, the second alternative provides a choice among three specified policies of the sponsor, the affiliated originator, or the servicer. When choosing among these policies in choice (2), the registrant does not need to choose the most restrictive of these policies.

Section 3. Item 1101(j)

- 3.01 The definition of servicer in Regulation AB is a principles-based definition. An entity falls within the definition of servicer if it is responsible for the management or collection of the pool assets or making allocations or distributions to holders, regardless of the entity's title (vendor, trustee, etc.).

Section 4. Item 1101(l)

- 4.01 Whether a party is considered a "sponsor" involves a facts and circumstances analysis of whether its actions bring it within the definition in Item 1101(l) of Regulation AB. There are circumstances where more than one originator acts as a "sponsor," such as in the case of a "rent-a-shelf" where more than one originator offers to sell the underlying assets to back the asset-backed securities.

Section 5. Item 1105

- 5.01 Static pool information disclosure requirements are outlined in Item 1105 of Regulation AB. The starting point provided under Item 1105(a) should be used for non-revolving amortizing pools, such as a fixed pool of mortgage receivables. The starting point provided under Item 1105(b) should be used for a revolving master trust, such as a revolving pool of credit card receivables. An alternative starting point or points may be utilized under Item 1105(c) if the information provided by using the starting points under Items 1105(a) or 1105(b) would not be material.

- 5.02 Items 1105(d)-(f) outline certain transition provisions relating to static pool information.

The information in these subsections includes, but is not limited to:

- Information regarding prior securitized pools of a party or parties other than the sponsor that were established before January 1, 2006 but not including the currently offered pool.
- Information regarding the sponsor's overall portfolio, including information regarding purchases by the sponsor.
- Information regarding the overall portfolio of parties other than the sponsor, including information regarding originations or purchases by those parties.

- 5.03 Item 1105 states that static pool information, including static pool information regarding delinquencies, is required unless it is not material. As a result, the presentation of static pool information is governed by general principles of materiality and the requirements of Item 1105 and not the requirements of Item 1100(b).

Section 6. Item 1108

- 6.01 Under Item 1108, an issuer must include disclosure regarding any party, including outsource companies, which meets the principles-based definition of a servicer (i.e., is involved in the management or collection of the pool assets or is making allocations or distributions to holders of

the asset-backed securities) and meets the 20% threshold test. The disclosure required, however, only extends to information material to the servicing function the party performs for the pool assets. For example, some of the disclosure requirements for a primary servicer, such as experience in servicing payments for a particular asset type, may not be material for an outsourced third party that solely provides the lockbox function for payments received on 100% of the assets located in the asset pool. Thus, disclosure under each category of information for each servicer may not be required.

- 6.02 The disclosure of a servicer's procedures under Item 1108 should be limited to that which a reasonable investor would find material in considering an investment in the asset-backed securities and the servicing and administration of the pool assets and the asset-backed securities. The description of servicers' operating procedures should not include immaterial or technical data and should not obscure the material disclosure.

Section 7. Item 1108(a)

- 7.01 Item 1108(a) of Regulation AB requires disclosure of certain information if an unaffiliated servicer services 10% or 20% or more of the pool assets. The disclosure required by this item must be included in the registration statement. The calculation of the 10% and 20% thresholds in Item 1108(a) should be made as of the designated cut-off date for the transaction.
- 7.02 A change in the identity of the servicer for a particular servicing function from that disclosed in the initial registration statement must be disclosed if the new servicer is of the type described in Item 1108(a)(2). The issuer must disclose the change and related disclosure regarding the new servicer on a current report on Form 8-K within the time period allowed by that Form, or under Item 8 of Form 10-D, as appropriate. If there is a material change in the servicer's procedures from the disclosure provided in the prospectus, there is no requirement that the revised servicing procedures be disclosed in the Exchange Act periodic or current reports unless the information relates to the distribution and pool performance information that Form 10-D requires or if the disclosure is of a material fact necessary to make the rest of the disclosure not misleading.

Section 8. Item 1108(b)(4)

- 8.01 Item 1108(b)(4) requires disclosure of information regarding the servicer's financial condition to the extent that there is a material risk that the effect on one or more aspects of servicing resulting from such financial condition could have a material impact on pool performance or performance of the asset-backed securities. Where disclosure is required, the type and extent of information regarding the servicer's financial condition would depend upon the particular facts. Information does not have to include the financial statements of the servicer, unless the financial statements are necessary for investor understanding of the servicer's condition.

Section 9. Item 1111(c)

- 9.01 Historical delinquency information for the subject asset pool is always required under this item. If an issuer determines that historical delinquency information for another asset group (such as the managed or serviced portfolio, or all prior securitized pools) is necessary to make the information not misleading, then that information should also be included. General principles of materiality and not Item 1100(b) govern the disclosure of such additional information. See Rule 12b-20 and the interpretation above regarding Item 1100(b).

Section 10. Item 1114

- 10.01 Credit enhancements, to the extent material, must be described pursuant to Item 1114 of Regulation AB. The underlying obligor's arrangements in connection with the original extension of loan level mortgage insurance, hazard insurance, or homeowner's insurance would not be considered credit enhancement.

Section 11. Item 1122(d)

- 11.01 Servicers may not modify the servicing criteria set forth in Item 1122(d). If a servicer's process differs from one or more criteria in Item 1122(d), the servicer must disclose that it is not in compliance with those particular criteria. The servicer may disclose why the servicer's process is different from the servicing criteria in the report.
- 11.02 The servicing criterion in Item 1122(d)(3)(i) requires an assessment of whether "[r]eports to investors, including those to be filed with the Commission, are maintained in accordance with the transaction agreements and applicable Commission requirements." Application of this criterion, as with any Item 1122(d) criterion, depends on the role of the particular servicer. This criterion relates to the servicing activity of compiling and aggregating the information and timely filing or providing reports, which may or may not include preparing the underlying calculations depending on the role of the servicer. For example, if Servicer A calculates the waterfall and Servicer B compiles and files the Forms 10-D with the Commission but does not calculate the waterfall, Item 1122(d)(3)(i) requires only an assessment by Servicer B with respect to the waterfall of whether the information about the amount of distributions provided to Servicer B from Servicer A was appropriately included and timely filed on Form 10-D. It does not require that Servicer B assess whether Servicer A correctly calculated the information it gave to Servicer B. Other criteria within Item 1122(d) will govern the assessment from the appropriate servicer of the information contained in the reports. For example, Servicer A will assess the calculation of the waterfall under the next subsection of Item 1122(d)(3), Item 1122(d)(3)(ii), in its own report on assessment of compliance with servicing criteria. If, however, one servicer prepares all of the disclosure contained in the Form 10-D rather than compiling it from other sources, Item 1122(d)(3)(i) would require that servicer to assess whether the disclosure was calculated in accordance with the terms of the transaction agreements and prepared and filed in accordance with the time frames specified in the transaction agreements and Commission rules.
- 11.03 In many cases, a servicer will provide information to enable another party (e.g., another servicer) to complete its duties as set forth in the transaction agreements, and the information conveyed is generated by a servicing activity that falls under a particular criterion in Item 1122(d). In that situation, the accurate conveyance of the information is part of the same servicing criterion under which the activity that generated the information is assessed. For example, if Servicer A is responsible for administering the assets of the pool and passing along the aggregated information about the assets in the pool to Servicer B, and Servicer B is responsible for calculating the waterfall or preparing and filing the Exchange Act reports with that information, Servicer A's activity is assessed under Item 1122(d)(4). In addition to assessing Servicer A's maintenance of the records and other activities, this Item requires assessment of Servicer A's aggregation and conveyance of such information to Servicer B. If instead of aggregating the individual asset information, Servicer A conveys it un-aggregated, then Servicer B must include its own aggregation of the individual asset data in Servicer B's assessment of calculating the waterfall or preparing and filing Exchange Act reports.
- 11.04 The servicing criterion in Item 1122(d)(4)(i) requires an assessment of whether the mortgage and related documents, rather than the physical properties underlying the mortgages, are maintained

as required by the transaction agreements or related pool asset documents. Moreover, an auditor attesting to an assertion regarding the Item 1122(d)(4)(i) criterion is only required to verify that the mechanics of performing the loan perfection or loan defeasance prescribed in the transaction agreements or related pool asset documents have been performed. The auditor is not required for this or any other criterion to make a legal determination, such as whether the loan perfection and loan defeasance were successfully performed.

Section 12. Item 1123

- 12.01 A trustee calculating the distribution amounts paid to investors is a party participating in the servicing function for purposes of Rules 13d-18 and 15d-18 and Item 1122 of Regulation AB. However, the Instruction to Item 1123 of Regulation AB clarifies that if multiple servicers are involved, a servicer compliance statement is required only of each servicer that meets the criteria in Item 1108(a)(2)(i) through (iii) of Regulation AB. A trustee that only calculates the distribution amounts paid to investors and performs no other servicing function falls within Item 1108(a)(iv) and therefore is not required to provide an Item 1123 servicer compliance statement.

Securities Act Rules

Section 13. Rule 190(c)

- 13.01 A registration fee is paid in connection with registering the offer and sale of asset-backed securities. Some asset-backed securities are backed by a collateral certificate or special unit of beneficial interest (“SUBI”). The offer and sale of the collateral certificate and SUBI involved in these types of asset-backed transactions must also be registered. If the collateral certificate or SUBI meets the requirements of Rule 190(c), however, there is no additional registration fee for the collateral certificate or SUBI.

Section 14. Rule 457(p)

- 14.01 An asset-backed issuer inquired whether it could offset fees paid by another registrant/depositor if both registrant/depositors were wholly-owned subsidiaries of the same parent company. These “brother-sister” entities may use the fee offset provisions of Rule 457(p) to offset fees paid by the other “brother-sister” entity.

Securities Act Forms

Section 15. Form S-3

- 15.01 In a registered remarketing transaction the issuer must update the prospectus so that at the time of the remarketing the prospectus includes all of the information regarding the pool required to be in the prospectus. See footnote 193 of SEC Release 33-8518 (December 22, 2004). To the extent the issuer has not previously updated the prospectus to include all the updated information required by Form S-3, such as updated information required by Item 1111 of Regulation AB, through incorporation of Exchange Act filings (assuming the eligibility requirements of Form S-3 are still met), the issuer must file and incorporate by reference a Form 8-K containing the information regarding the pool assets or must file a prospectus supplement or post-effective amendment, as appropriate, to update the prospectus.
- 15.02 Item 12(b) of Form S-3 requires that the registrant incorporate by reference all its subsequently filed Exchange Act reports, prior to the termination of the offering. As noted in Section III.A.3.a of SEC Release No. 33-8518 (December 22, 2004), Item 12(b) of Form S-3 is required for asset-

backed issuers only “if applicable.” There are many applicable circumstances when an asset-backed issuer may be required to incorporate by reference its current reports on Form 8-K into the registration statement (e.g., to file tax opinions from legal counsel, to provide disclosure under Item 6.05 of Form 8-K). On the other hand, an asset-backed issuer’s distribution report on Form 10-D or annual report on Form 10-K may not necessarily contain information that is required to be, or that the issuer desires to be, incorporated by reference into a registration statement. An asset-backed issuer may modify the incorporation by reference language of Item 12(b) of Form S-3 to provide that only the current reports on Form 8-K subsequently filed by the registrant prior to the termination of the offering shall be deemed to be incorporated by reference into the prospectus.

Exchange Act Rules

Section 16. Rule 12b-25

- 16.01 Rule 12b-25(d) prohibits an issuer from using a Securities Act registration statement predicated on timely filed reports until the issuer actually files the Exchange Act report to which the extension applies. A depositor as defined in Item 1101(e) may create a new issuing entity and conduct a takedown off an effective Form S-3 between the filing of a 12b-25 notice and the 12b-25 extended due date of the periodic report, so long as the periodic report relates to a different issuing entity.

Section 17. Rules 15d-18 and 13a-18

- 17.01 If an asset-backed issuer has a trustee or bond administrator that calculates the waterfall, that party is participating in the servicing function and therefore pursuant to Rules 15d-18 and 13a-18 the issuer’s Form 10-K must include a *Report on Assessment of Compliance with Servicing Criteria* from the trustee or bond administrator along with the related attestation report. If the trustee or bond administrator does not calculate the waterfall but only receives allocations or distributions from a servicer and makes allocations and distributions to holders of the asset-backed securities out of the calculated amounts, and does not otherwise perform the functions of a servicer, the Form 10-K would not need to include a *Report on Assessment of Compliance with Servicing Criteria* from the trustee or bond administrator nor an attestation report.
- 17.02 Pursuant to Rule 13a-18, a Form 10-K must include from each party participating in the servicing function (even parties participating for only a portion of the year) a report regarding its assessment of compliance with the servicing criteria specified in Item 1122(d) of Regulation AB as of and for the period ending the end of each fiscal year. A report must be included for every person participating in the servicing function except that the notes to Rules 15d-18 and 13a-18 provide a *de minimus* exception. If a servicer’s activities relate to only 5% or less of the pool assets no report is required. Since the report is for the fiscal year, the measurement for this *de minimus* threshold must take into account the servicing function for the entire period covered by the Form 10-K and not a particular point in time. For example, assets are transferred to an issuing entity with a calendar year end in a closing on March 1st, so that the trust has a reporting obligation for 10 months of the year. The trust has three servicers. Servicer A serviced 50% of the assets for the entire 10 months, Servicer B serviced 40% of the assets for the same length of time and Servicer C serviced 10% of the assets for the first two months. On May 1st Servicer C is replaced by Servicer D. Servicer C serviced only 10% of the pool for only one fifth of the year. As such Servicer C serviced 2% of the assets for the period and falls below the *de minimis* requirements in Item 1122 and no report is required. Servicer D serviced 8% of the assets for the period and Servicer’s D report must be included in the Form 10-K.

- 17.03 Pursuant to Rules 13a-18 and 15d-18, an annual report on Form 10-K must include a report from each party participating in the servicing function regarding its assessment of compliance with servicing criteria specified in Item 1122 of Regulation AB, subject to the *de minimis* exception provided in the notes to the rules. As discussed in Section III.D.7.c of SEC Release No. 33-8518 (December 22, 2004), the reports should be made at the platform level. A platform should not be artificially designed; it should mirror actual servicing practices of the servicer conducting the assessment. The servicing platform is the group of transactions that the servicer services that are backed by the same asset type. However, if the servicer conducts the servicing of the transactions in a manner such that it is divided by geographic locations or segregated among separate computer systems, the servicer may take these factors into account in determining the platform. Absent changes in circumstances such as a merger between servicers, it is expected that the grouping of transactions included in a platform should remain constant from period to period. If the servicer includes in its platform less than all of the transactions backed by the same asset type that it services, the servicer should describe the scope of the platform in its Item 1122 report. See Exchange Act Rule 12b-20.
- 17.04 For the purposes of the assessment pursuant to Rules 13a-18 and 15d-18, a servicer's platform may, but is not required to, include transactions registered prior to compliance with Regulation AB. A servicer's platform may, but is not required to, include transactions that involved an offer and sale of asset-backed securities that were not required to be registered. Suspension of Exchange Act reporting obligations for a transaction that was subject to Regulation AB does not result in the exclusion of that transaction from the platform. The servicer must use the criteria contained in Item 1122(d) of Regulation AB to assess the servicing of any transaction in the platform.
- 17.05 Reports on assessment of compliance with servicing criteria under Item 1122 of Regulation AB do not have to include instances of noncompliance with the servicing criteria if the instances of noncompliance are not material to the servicing platform. However, a servicer may need to disclose in the Item 1123 servicer compliance statement an instance of noncompliance with servicing criteria that is material to the servicing of the specific asset pool covered by the report on Form 10-K, even if the instance of noncompliance is not disclosed in the Item 1122 report. Further, if known to the filing party, the instance of noncompliance may need to be disclosed in the issuer's Exchange Act reports.
- 17.06 A vendor engaged by a servicer to perform specific and limited activities or to perform activities scripted by the servicer would not be viewed as a party participating in the servicing function separate and apart from the servicer engaging such vendor, and would not need to submit separate assessment and attestation reports for inclusion in the related asset-backed issuer's Form 10-K report if:
- The vendor is not a "servicer" as defined in Item 1101(j) of Regulation AB;
 - The servicer engaging and monitoring the vendor elects to take responsibility for assessing compliance with the servicing criteria applicable to that vendor in the servicer's report regarding assessment of compliance with servicing criteria;
 - The servicer engaging the vendor has policies and procedures in place designed to provide reasonable assurance that the vendor's activities comply in all material respects with the servicing criteria applicable to the vendor; and
 - The servicer's report on assessment of compliance discloses:
 - the servicing criteria or portion of servicing criteria applicable to the vendor's activities for which the servicer is assuming responsibility;
 - any material instance of noncompliance by the vendor that the servicer identifies or of which it is aware; and

- any material deficiency that is identified in the servicer's policies and procedures to monitor the vendor's compliance.

In this situation, consistent with Item 1122(d)(1)(ii) of Regulation AB and Instruction 2 to Item 1122 of Regulation AB, the requirement to assess compliance with the servicing criteria applicable to a vendor's activities is satisfied if the servicer has instituted policies and procedures to monitor whether such vendor's activities comply in all material respects with such criteria. Compliance with the applicable servicing criteria is achieved if those policies and procedures are designed to provide reasonable assurance that such vendor's activities comply with such criteria and those policies and procedures are operating effectively.

Exchange Act Forms

Section 18. Form 10-K

- 18.01 The Form 10-K should be signed by the depositor. In the alternative, it may be signed on behalf of the issuing entity by the servicer. If the servicer is signing and multiple servicers are involved in servicing the assets, the master servicer must sign. A trustee that is a servicer may not sign an Exchange Act report for the depositor unless it is the master servicer.

Section 19. Items 6 and 7 of Form 10-D

- 19.01 Item 7 of Form 10-D refers to Items 1114 and 1115 of Regulation AB and requires updated information regarding a provider of a credit enhancement or derivative instrument supplier. Therefore, if at the end of the period for which the Form 10-D is filed either provider meets the thresholds of those items, disclosure is required, even if the provider did not previously meet such threshold. Item 6 of Form 10-D refers to Item 1112 of Regulation AB and requires updated information regarding significant obligors. Instruction 4 to the definition of significant obligor in Item 1101(k) of Regulation AB specifically notes that, if an obligor falls below 10% subsequent to the cut-off date, the obligor would no longer be considered a significant obligor. This would be the case even if the obligor subsequently moves back above the 10%. There is no similar provision related to the Item 7 requirements, so the determination as to whether or not the disclosure is required must be made at the end of the period, even if the provider or source has previously fallen below the threshold. See also Item 6.03 of Form 8-K.