

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR PART 232**

**[RELEASE NO. 33-9087; File No. S7-23-09]**

**RIN 3235-AK44**

**EXTENSION OF FILING ACCOMMODATION FOR STATIC POOL INFORMATION IN FILINGS WITH RESPECT TO ASSET-BACKED SECURITIES**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission is adopting an amendment to Rule 312 of Regulation S-T to extend its application for one year. Rule 312 provides a temporary filing accommodation for filings with respect to asset-backed securities that allows static pool information required to be disclosed in a prospectus to be provided on an Internet Web site under certain conditions. Under the rule, such information is deemed to be included in the prospectus included in the registration statement for the asset-backed securities. As a result of the extension, the rule will apply to filings with respect to asset-backed securities filed on or before December 31, 2010.

**EFFECTIVE DATE:** This amendment is effective December 31, 2009.

**FOR FURTHER INFORMATION CONTACT:** John Harrington, Attorney-Adviser, Division of Corporation Finance, at (202) 551-3430, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

**SUPPLEMENTARY INFORMATION:** We are adopting an amendment to Rule 312<sup>1</sup> of Regulation S-T.<sup>2</sup>

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<sup>1</sup> 17 CFR 232.312.

## I. BACKGROUND AND DISCUSSION OF THE AMENDMENT

In December, 2004, we adopted new and amended rules and forms to address the registration, disclosure and reporting requirements for asset-backed securities (“ABS”) under the Securities Act of 1933<sup>3</sup> (the “Securities Act”) and the Securities Exchange Act of 1934<sup>4</sup> (the “Exchange Act”).<sup>5</sup> As part of this rulemaking, we adopted Regulation AB,<sup>6</sup> a new principles-based set of disclosure items forming the basis for disclosure with respect to ABS in both Securities Act registration statements and Exchange Act reports. Compliance with the revised rules was phased in; full compliance with the revised rules became effective January 1, 2006. One of the significant features of Regulation AB is Item 1105, which requires, to the extent material, static pool information to be provided in the prospectus included in registration statements for ABS offerings.<sup>7</sup> While the disclosure required by Item 1105 depends on factors such as the type of underlying asset and materiality, the information required to be disclosed can be extensive. For example, a registrant may be required to disclose multiple performance metrics in periodic

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<sup>2</sup> 17 CFR 232.10 et seq.

<sup>3</sup> 15 U.S.C. 77a et seq.

<sup>4</sup> 15 U.S.C. 78a et seq.

<sup>5</sup> See Asset-Backed Securities, Release No. 33-8518 (December 22, 2004) [70 FR 1506] (adopting release related to Regulation AB and other new rules and forms related to asset-backed securities) (hereinafter, the “2004 Adopting Release”).

<sup>6</sup> 17 CFR 229.1100 et seq.

<sup>7</sup> See Form S-1 and Form S-3 under the Securities Act. Static pool information indicates how groups, or static pools, of assets, such as those originated at different intervals, are performing over time. By presenting comparisons between originations at similar points in the assets’ lives, the data allows the detection of patterns that may not be evident from overall portfolio numbers and thus may reveal a more informative picture of material elements of portfolio performance and risk.

increments for prior securitized pools of the sponsor for the same asset type in the last five years.<sup>8</sup>

As described in the 2004 Adopting Release, in response to the Commission's proposal to require material static pool information in prospectuses for ABS offerings, many commenters representing both ABS issuers and investors requested flexibility in the presentation of such information. In particular, commenters noted that the required static pool information could include a significant amount of statistical information that would be difficult to file electronically on EDGAR as it existed at that time and difficult for investors to use in that format. Commenters accordingly requested the flexibility for ABS issuers to provide static pool information on an Internet Web site rather than as part of an EDGAR filing.<sup>9</sup> In response to these comments, we adopted Rule 312 of Regulation S-T, which permits, but does not require, the posting of the static pool information required by Item 1105 on an Internet Web site under the conditions set forth in the rule.<sup>10</sup> We recognized at the time that a Web-based approach might allow for the provision of the required information in a more efficient, dynamic and useful format than was currently feasible on the EDGAR system. At the same time, we explained that we continued to believe at some point for future transactions the information should also be submitted with the Commission in some fashion, provided investors continue to receive the information in the form they have requested. Accordingly, we adopted Rule 312 as a temporary filing accommodation applicable to filings filed on or before December 31,

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<sup>8</sup> 17 CFR 229.1105.

<sup>9</sup> See 2004 Adopting Release, Section III.B.4.b.

<sup>10</sup> 17 CFR 232.312(a). Instead of relying on Rule 312, an issuer can include information required by Item 1105 of Regulation AB physically in the prospectus or, if permitted, through incorporation by reference from an Exchange Act report.

2009.<sup>11</sup> We explained that we were directing our staff to consult with the EDGAR contractor, EDGAR filing agents, issuers, investors and other market participants to consider how static pool information could be filed with the Commission in a cost-effective manner without undue burden or expense that still allows issuers to provide the information in a desirable format. We also noted, however, that it might be necessary, among other things, to extend the accommodation.<sup>12</sup>

In October 2009, we published for public comment<sup>13</sup> a proposed amendment to extend the temporary filing accommodation set forth in Rule 312 of Regulation S-T for one year so that it would apply to filings with respect to ABS filed on or before December 31, 2010.

We received three comment letters that addressed the proposed extension.<sup>14</sup> Two commenters expressed support for the Rule 312 filing accommodation and the proposed extension.<sup>15</sup> The ASF cited the strong preference among both its issuer and investor members for Web-based presentation of static pool information due to its efficiency, utility and effectiveness and the current lack of an adequate filing alternative.<sup>16</sup> The ABA Committees expressed their belief that the accommodation has been highly

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<sup>11</sup> 17 CFR 232.312(a); see also 2004 Adopting Release, Section III.B.4.b.

<sup>12</sup> 2004 Adopting Release, Section III.B.4.b.

<sup>13</sup> Extension of Filing Accommodation for Static Pool Information in Filings With Respect to Asset-Backed Securities, Release No. 33-9074 (October 19, 2009) [74 FR 54767] (hereinafter, the “Proposing Release”).

<sup>14</sup> The public comments we received are available online at <http://www.sec.gov/comments/s7-23-09/s72309.shtml>.

<sup>15</sup> See letters from the American Securitization Forum (the “ASF”) and the Committee on Federal Regulation of Securities and the Committee on Securitization and Structured Finance of the Section of Business Law of the American Bar Association (the “ABA Committees”).

<sup>16</sup> See letter from ASF.

successful and of great value to investors.<sup>17</sup> Neither the ASF nor the ABA Committees was aware of any difficulties that investors or other market participants had locating, accessing, viewing or analyzing static pool information disclosed on a Web site.<sup>18</sup> For these reasons, among others, both the ASF and the ABA Committees requested that the filing accommodation be made permanent or, in the alternative, extended for a longer period of time.<sup>19</sup> One commenter, in contrast, did not support the extension and suggested the Commission should require structured disclosure using an industry standard computer language.<sup>20</sup>

We are adopting as proposed a one-year extension to the temporary filing accommodation provided by Rule 312. Based on the staff's experience since Rule 312 became effective in 2006, the vast majority of residential mortgage-backed security issuers and a significant portion of ABS issuers in other asset classes have relied on the accommodation provided by the rule to disclose static pool information on an Internet Web site. Furthermore, we believe that it remains the case that it could be difficult to file the information electronically on EDGAR as it exists today and difficult for investors to use in that format.

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<sup>17</sup> See letter from ABA Committees.

<sup>18</sup> See letters from ASF and ABA Committees.

<sup>19</sup> Id. The ASF requested a five-year extension if the rule could not be made permanent and the ABA Committees requested an 18 to 24 month extension in such a case. Both the ASF and the ABA Committees expressed the belief that a permanent or longer extension would encourage continued use of the Web-based presentation by providing more of an incentive for issuers to make investments in developing and innovating Web sites for static pool disclosure. A longer extension would also, the ASF noted, give the Commission adequate time to consider alternatives.

<sup>20</sup> See letter from Paul Wilkinson. If the alternate approach supported by Mr. Wilkinson could not be implemented by January 1, 2010, he recommended that any extension only last until the alternate approach could be implemented. As discussed more fully below, the staff of the Division of Corporation Finance is in the process of exploring the feasibility of a filing mechanism for static pool information that would allow the information to be filed with the Commission in an efficient and useful manner.

During the extension, the existing requirements of Rule 312 will continue to apply. Pursuant to these requirements, the registrant must disclose its intention to provide static pool information through a Web site in the prospectus included in the registration statement at the time of effectiveness and provide the specific Internet address where the static pool information is posted in the prospectus filed pursuant to Rule 424.<sup>21</sup> The registrant must maintain such information on the Web site unrestricted and free of charge for a period of not less than five years, indicate the date of any updates or changes to the information, undertake to provide any person without charge, upon request, a copy of the information as of the date of the prospectus if a subsequent update or change is made to the information and retain all versions of the information provided on the Web site for a period of not less than five years in a form that permits delivery to an investor or the Commission. In addition, the registration statement for the ABS must contain an undertaking pursuant to Item 512(l) of Regulation S-K<sup>22</sup> that the information provided on the Web site pursuant to Rule 312 is deemed to be part of the prospectus included in the registration statement.<sup>23</sup>

As we noted in the Proposing Release, since the adoption of Rule 312 in December, 2004, technological advances and expanded use of the Internet have enabled the Commission to adopt additional rules incorporating electronic communications. The Commission continues to recognize that, in certain circumstances and under certain

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<sup>21</sup> 17 CFR 230.424.

<sup>22</sup> 17 CFR 229.512(l).

<sup>23</sup> 17 CFR 232.312. As we indicated in the 2004 Adopting Release, if the conditions of Rule 312 are satisfied, then the information will be deemed to be part of the prospectus included in the registration statement and thus subject to all liability provisions applicable to prospectuses and registration statements, including Section 11 of the Securities Act [15 U.S.C. 77k]. 2004 Adopting Release, Section III.B.4.b.

conditions, the Internet can present a reliable and cost-effective alternative or supplement to traditional disclosure methods.<sup>24</sup> On the other hand, we are mindful of the benefit of having information filed on the EDGAR system.

As we noted in the Proposing Release, the staff of the Division of Corporation Finance is currently engaged in a broad review of the Commission's regulation of ABS including disclosure, offering process, and reporting of ABS issuers. Along with this review, the staff of the Division of Corporation Finance is continuing to explore whether a filing mechanism for static pool information that fulfills the objectives identified above is feasible. Although we note the two commenters' requests that we make the filing accommodation permanent or extend it for a longer period of time as well as the other commenter's request that we immediately move to provide for structured disclosure using an industry standard computer language, we continue to believe a proposal for a longer-term solution for providing static pool disclosure would be better considered together with other possible proposals to revise the regulations governing the offer and sale of ABS. The one-year extension of Rule 312 that we are adopting today is intended to provide time to enable us to proceed in this manner.

The Administrative Procedure Act generally requires that an agency publish an adopted rule in the Federal Register 30 days before it becomes effective. This requirement, however, does not apply if the agency finds good cause for making the rule

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<sup>24</sup> See, e.g., Internet Availability of Proxy Materials, Release No. 34-55146 (Jan. 22, 2007) [72 FR 4148] (adopting release for voluntary E-Proxy rules) and Internet Availability of Proxy Materials, Release No. 34-52926 (December 8, 2005) [70 FR 74598] (proposing release for voluntary E-Proxy rules). See also Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, Release No. 33-8998, Section III.A.4.c (Jan. 13, 2009) [74 FR 4546] (adopting Item 11(g)(2) of Form N-1A under the Investment Company Act of 1940 [15 U.S.C. 80a-1 *et seq.*] which allows exchange-traded funds to provide premium/discount information on a Web site rather than in a prospectus or annual report) and Securities Offering Reform, Release No. 33-8591, Section VI.B.1 (July 19, 2005) [70 FR 44722] (adopting "access equals delivery" model for final prospectus delivery).

effective sooner.<sup>25</sup> Because the temporary filing accommodation expires on December 31, 2009, we believe it is necessary to make the amendment effective December 31<sup>st</sup> so that there is no gap between which an issuer would be required to convert its static pool data into an EDGAR filing. In addition, this extension creates no new requirements but maintains a voluntary accommodation that relieves a registrant from the obligation to file static pool data on EDGAR, provided it makes the information available on a Web site. The Commission therefore believes the extension grants or recognizes an exemption or relieves a restriction. On the basis of the foregoing, the Commission finds good cause to make the amendment effective December 31, 2009.

## **II. PAPERWORK REDUCTION ACT**

Rule 312 of Regulation S-T was adopted in 2004 along with other new and amended rules and forms to address the registration, disclosure and reporting requirements for ABS under the Securities Act and the Exchange Act. In connection with this prior rulemaking, we submitted a request for approval of the “collection of information” requirements contained in the amendments and rules to the Office of Management and Budget (“OMB”) in accordance with the Paperwork Reduction Act of 1995 (“PRA”).<sup>26</sup> OMB approved these requirements.<sup>27</sup>

Item 1105 of Regulation AB<sup>28</sup> requires certain static pool information, to the extent material, to be provided in prospectuses included in registration statements for

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<sup>25</sup> See 5 U.S.C. 553(d).

<sup>26</sup> 44 U.S.C. 3501 *et seq.*

<sup>27</sup> The collections of information to which Rule 312 of Regulation S-T relates are “Form S-1” (OMB Control No. 3235-0065) and “Form S-3” (OMB Control No. 3235-0073).

<sup>28</sup> 17 CFR 229.1105.

ABS offerings.<sup>29</sup> Rule 312 is a temporary filing accommodation that permits the posting of the static pool information required by Item 1105 on an Internet Web site under the conditions set forth in the rule.<sup>30</sup> The amendment to Rule 312 extends the existing temporary filing accommodation provided by the rule for one additional year. As is the case today, issuers may choose whether or not to take advantage of the accommodation during the extension. The conditions of Rule 312 remain otherwise unchanged. The disclosure requirements themselves, which are contained in Forms S-1 and S-3 under the Securities Act and require the provision of the information set forth in Item 1105 of Regulation AB, also remain unchanged. Therefore, the amendment will not result in an increase or decrease in the costs and burdens imposed by the “collection of information” requirements previously approved by the OMB. No commenter suggested the extension would impose any new paperwork burden.

### **III. COST-BENEFIT ANALYSIS**

In this section, we examine the benefits and costs of the amendment. In the Proposing Release, we requested that commenters provide views, supporting information and estimates on the benefits and costs that may result from the adoption of the proposed amendment. No commenter addressed the cost-benefit analysis of the Proposing Release.

#### **A. Benefits**

We initially adopted the filing accommodation provided by Rule 312 of Regulation S-T because commenters requested flexibility in the presentation of required static pool information.<sup>31</sup> Given the large amount of statistical information involved,

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<sup>29</sup> See Form S-1 and Form S-3 under the Securities Act.

<sup>30</sup> 17 CFR 232.312(a).

<sup>31</sup> See 2004 Adopting Release, Section III.B.4.b.

those commenters argued for a Web-based approach that would allow issuers to present the information in an efficient manner and with greater functionality and utility than might be available if an EDGAR filing was required.<sup>32</sup> We believe this greater functionality and utility has enhanced an investor's ability to access and analyze the static pool information and also removed the burden on issuers of duplicating the information in each prospectus as well as easing the burdens of updating such information.<sup>33</sup> As we discussed in the 2004 Adopting Release, since the information is deemed to be part of the prospectus included in the registration statement, the rule is designed to give investors access to accurate and reliable information.<sup>34</sup>

By extending the accommodation provided by Rule 312, these benefits to both issuers and investors will continue to apply. As discussed above, many ABS issuers rely on Rule 312 to provide static pool information on an Internet Web site rather than in an EDGAR filing.<sup>35</sup> We proposed the one-year extension of Rule 312 because we do not believe we can implement an alternative filing mechanism by the end of 2009 that would meet the objectives of both issuers and investors to present static pool information in an efficient, cost-effective form that would provide investors utility and functionality in terms of accessing and analyzing that information. Therefore, if we did not amend Rule 312 to extend its application as we are doing today, static pool information would have been required in EDGAR filings beginning on January 1, 2010. We believe this would have resulted in costs for issuers as they attempt to adjust their procedures in a short period of time in order to present the information in a format acceptable to the EDGAR

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<sup>32</sup> Id.

<sup>33</sup> See Section I above and 2004 Adopting Release, Section V.D.

<sup>34</sup> See 2004 Adopting Release, Section III.B.4.b.

<sup>35</sup> See Section I above.

system and could have resulted in costs to investors if the information filed on EDGAR was presented in a less useful format.

By extending Rule 312, we seek to avoid these potentially negative effects for issuers and investors as we continue to explore the best format in which to require the filing of static pool information. As indicated above, the staff of the Division of Corporation Finance is considering this issue along with other proposals addressing the disclosure, offering process and reporting of ABS issuers.

#### **B. Costs**

We do not believe the one-year extension of the Rule 312 accommodation will impose any new or increased costs on issuers. In the Cost-Benefit Analysis section of the 2004 Adopting Release, we noted that ABS issuers electing the Web-based accommodation provided by Rule 312 would incur costs related to the maintenance and retention of static pool information posted on a Web site and might also incur start-up costs.<sup>36</sup> While it is likely that certain of those costs will continue to impact ABS issuers that elect the Web-based approach during the extension period, we do not believe the amendment will impose any new or increased costs for ABS issuers because it does not change any other conditions to the accommodation or the underlying filing and disclosure obligations. As a result of the extension of the accommodation, ABS issuers will be able to continue their current practices for an additional year.

For investors, there may be costs associated with the static pool information not being electronically filed with the Commission. For example, when information is electronically filed with the Commission, investors and staff can access the information

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<sup>36</sup> See 2004 Adopting Release, Section V.D.

from a single, centralized location, the EDGAR Web site. We think these costs are mitigated by the fact that ABS issuers relying on the Rule 312 accommodation must ensure that the prospectus for the offering contains the Internet Web site address where the static pool information is posted, the Web site must be unrestricted and free of charge, such information must remain on the Internet Web site for five years with any changes clearly indicated and the issuer must undertake to provide the information to any person free of charge, upon request, if a subsequent update or change is made. Furthermore, because the information is deemed included in the prospectus under Rule 312, it is subject to all liability provisions applicable to prospectuses and registration statements.

Investors and issuers may have incurred costs to adjust their processes in anticipation of the lapse of the Rule 312 accommodation and potential reversion to a requirement to file static pool information on EDGAR. In this case, benefits to investors or issuers of not having to change their procedures regarding static pool reporting in a short time frame would be diminished by any costs already incurred in anticipation of the change. We believe such anticipatory action and any associated costs are minimal.

#### **IV. CONSIDERATION OF IMPACT ON THE ECONOMY, BURDEN ON COMPETITION AND PROMOTION OF EFFICIENCY, COMPETITION AND CAPITAL FORMATION**

Section 2(b) of the Securities Act requires us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to also consider whether the action will promote efficiency, competition, and capital formation.

As discussed in greater detail above, Rule 312 of Regulation S-T was adopted as a temporary filing accommodation so that issuers of ABS could present static pool

information on an Internet Web site. The amendment to Rule 312 of Regulation S-T that we are adopting today extends its application for one year. We are not changing the conditions of Rule 312 or the disclosure obligations to which it applies. We do not believe that the one-year extension will impose a burden on competition. We also believe the extension of the filing accommodation will continue to promote efficiency and capital formation by permitting ABS issuers to disclose static pool information in a format that is more useful to investors and cost-effective and not unduly burdensome for ABS issuers.

We requested comment on whether the proposed amendment, if adopted, would promote efficiency, competition, and capital formation. We did not receive any comments directly responding to this request.

## **V. REGULATORY FLEXIBILITY ANALYSIS CERTIFICATION**

In Part VI of the Proposing Release, the Commission certified pursuant to Section 605(b) of the Regulatory Flexibility Act<sup>37</sup> that the proposed amendment to Rule 312 of Regulation S-T would not have a significant economic impact on a substantial number of small entities. While the Commission encouraged written comments regarding this certification, no commenters responded to this request or indicated that the amendment as adopted would have a significant economic impact on a substantial number of small entities.

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<sup>37</sup> 5 U.S.C. 605(b).

## **VI. STATUTORY AUTHORITY AND TEXT OF THE FINAL AMENDMENT**

The amendment described is being adopted under the authority set forth in Sections 6, 7, 10, 19 and 28 of the Securities Act of 1933 (15 U.S.C. 77f, 77g, 77j, 77s and 77z-3).

### **List of Subjects**

17 CFR Part 232

Reporting and recordkeeping requirements, Securities.

### **TEXT OF THE AMENDMENT**

For the reasons set out in the preamble, the Commission hereby amends title 17, chapter II, of the Code of Federal Regulations as follows:

#### **PART 232 – REGULATION S-T – GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS**

1. The authority citation for part 232 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z-3, 77sss(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 78ll, 80a-6(c), 80a-8, 80a-29, 80a-30, 80a-37, and 7201 et seq.; and 18 U.S.C. 1350.

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2. Amend §232.312 by removing “December 31, 2009” and in its place adding “December 31, 2010” in the first sentence of paragraph (a).

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By the Commission.

Florence E. Harmon  
Deputy Secretary

December 15, 2009