CLIFFORD
CHANCE

May 2010

SEC's Proposed Changes to Regulation AB Will Significantly Impact U.S. Private Structured Financings

Introduction

On April 7, 2010, the U.S. Securities and Exchange Commission (the "**SEC**") published sweeping proposals to update and expand the regulation of offerings of asset-backed securities in the United States in both the public and, for the first time, the private markets. The proposals (Release Nos. 33-9117; 34-61858; File No. S7-08-10, the "**ABS Release**") would involve substantial revisions to Regulation AB ("**Regulation AB**") under the U.S. Securities Act of 1933, as amended (the "**Securities Act**"), and other U.S. rules and regulations regarding the offering process, disclosure and ongoing reporting for asset-backed securities ("**ABS**") and other structured finance products. The ABS Release can be found at: **http://www.sec.gov/rules/proposed/2010/33-9117.pdf**.

If adopted in substantially its current form, the ABS Release would have a wide-ranging impact on participants in the asset-backed securities markets in the United States. One of the principal aspects of the ABS Release is that the SEC proposes to require, for the first time in connection with registered ABS offerings, disclosure of asset-level data for each asset comprising the pool of assets in an ABS, in addition to the pool-level data already required by Regulation AB in its current form. The SEC also proposes to refine existing, and require additional, pool-level data disclosure obligations in connection with registered ABS offerings, in order to enhance the information available to analyze a pool.

With respect to the private ABS market, in the ABS Release the SEC stated that, in its view, investors in many cases did not have the information necessary to understand and properly analyze structured products, such as collateralized debt obligations ("**CDOs**"), that were sold in transactions in reliance on exemptions from SEC registration. As a result, to address these and other concerns, the SEC is proposing significant revisions to the safe harbors available for resales under Rule 144A ("**Rule 144A**") under the Securities Act and for exempt offerings under Rule 506 ("**Rule 506**") of Regulation D under the Securities Act, in order to require specific disclosures in private offerings of structured finance products, as well as additional public information about such private offerings.

The proposals were published in the U.S. Federal Register on May 3, 2010 (available at **http://edocket.access.gpo.gov/2010/pdf/2010-8282.pdf**) and are subject to a 90-day public comment period, scheduled to expire on August 2, 2010, during which industry participants may submit comments to the SEC. A substantial volume of comments is likely. Following the public comment period, the SEC may revise the proposals in response to the comments received. The SEC may choose to adopt some or all of the proposals contained in the ABS Release. Alternatively, the SEC may choose to re-propose portions of the proposals if it feels that there are sufficiently meritorious objections from commentators to portions of the original proposal to warrant re-consideration.

At this time, it is difficult to forecast whether or when some or all of the proposals will come into effect. If adopted, the provisions of the ABS Release will formally apply only to asset-backed securities and other structured finance products offered or sold in the U.S. after the effective date set by the SEC for implementation of the proposals. However, we expect that prior to adoption, the proposals will prompt the establishment of various new "best practices" in the securitization markets in the U.S. and possibly elsewhere. Further, the various proposals may start to shape investor expectations well before any formal effectiveness.

This memorandum focuses on the potential impact of the current proposals on asset-backed securities and other structured finance products offered or sold in the United States under the private offering exemptions most commonly used for such products – Rule 144A and Rule 506.[1] We identify questions that have emerged as a result of the ABS Release and suggest certain potential best practices that may (or should) develop among participants in the private ABS market in light of the SEC's expressed views and the possibilities of passage of

1 References herein to "**exempt private offerings**" refer only to offerings conducted in reliance on the safe harbors available under Rule 144A and Rule 506, which are the most common offering exemptions used for ABS offerings in the private markets and which are directly affected by and addressed in the ABS Release.

the various proposals within the ABS Release. If you have comments, questions or concerns relating to the impact of the ABS Release on your business, please do not hesitate to contact the authors of this memorandum or your normal Clifford Chance contacts.

Highlights of New Disclosure Requirements Affecting Non-Public Offerings

The ABS Release contains a number of proposed regulatory changes designed to increase transparency for investors in the U.S. securitization markets and reduce, and potentially even eliminate, reliance on nationally recognized statistical rating agencies ("**NRSROs**"). However, the ABS Release would also significantly expand the obligations of issuers and distributors of asset-backed securities. Highlights of the proposals contained in the ABS Release that impact (or will likely impact) the private asset-backed securities market include the following:

- Issuers of asset-backed securities or other structured finance products in most U.S. private transactions (including foreign issuers conducting a Rule 144A offering alongside a separate non-U.S. offering) will be required to undertake to provide, promptly upon request by any prospective purchaser of the securities, the same level of information as would be required in an SEC-registered transaction. In addition, for Rule 144A offerings, the issuer will be required to file a notification of the issuance of structured finance products with the SEC, setting out specified information about the offered securities and the underlying assets, within 15 days after the first sale of securities in the offering. This is similar to the filing that is currently required for offerings relying upon Rule 506 (which would also be amended to apply to structured finance products).
  - Significantly enhanced "loan-level" disclosure will be required on each of the underlying pool assets securing a structured finance product, with specific data fields identified by the SEC for 11 different asset types (although use of grouped data would be permitted for credit card ABS).
  - The required loan-level data will be required to be filed with the SEC in computer-readable form, together with a computer program based on the "waterfall" contained in the transaction documents that permits an investor to run its own analysis of the assets and the cash flows (the "**waterfall computer program**").
  - An issuer will be required to provide historical data with respect to assets that have been "put back" to the sponsor or originator for breaches of point-of-sale representations and warranties.
- The possibility that new requirements proposed in the ABS Release could lead to parallel adoption in certain private ABS markets of public-market procedures, including (i) the use of a single prospectus containing all material information (other than pricing-dependent information) similar to the single-prospectus requirement for shelf offerings (thus eliminating the option of public ABS issuers to use a base, or program, prospectus and a transaction-specific prospectus supplement for each individual issuance), and (ii) the delivery to investors of a disclosure document at least five business days prior to any sale of an asset-backed security.

New Conditions for Offerings Relying on Rule 144A and Rule 506

The ABS Release, if adopted, would for the first time require that an issuer make available disclosure in the private Rule 144A and Rule 506 markets that is consistent with that required in the U.S. public markets, effectively eliminating the flexibility of transaction parties to independently determine appropriate disclosure based upon what information may or may not be material in the context of a particular transaction. This aspect of the proposal represents a major change from prior practice and reflects a clear intention on the part of the SEC to close what it perceives as a gap in existing disclosure regulation.

Specifically, the SEC is proposing to make the availability of the safe harbors provided by Rule 144A and Rule 506 conditional on a requirement that, if the security offered or sold is a "structured finance product" within the meaning of the ABS Release, the underlying transaction agreement would have to grant any securities purchaser the right to obtain from the issuer promptly, upon request by the purchaser, such information as would be required if the offering were registered on Form S-1 or new Form SF-1 (for non-shelf offerings of ABS), as applicable, under the Securities Act. In addition, the issuer must represent in that transaction agreement that it will provide such information upon request. An issuer's failure to actually provide the required information would give rise to potential breach-of-contract claims, as well as the potential for SEC enforcement action against the issuer pursuant to proposed Rule 192, but would not, in either case, retroactively disqualify the issuer's compliance with the applicable safe harbor.

The ABS Release would introduce a definition of "structured finance product" which would include, in addition to traditional "asset-backed securities" (as defined under Item 1101(c) of current Regulation AB), synthetic asset-backed securities and any "fixed-income or other security collateralized by any pool of self-liquidating financial assets, such as loans, leases, mortgages, and secured or unsecured receivables that entitles its holder to receive payments that depend on the cash flow from the assets." This includes "a collateralized mortgage obligation, a collateralized debt obligation, a collateralized bond obligation, a collateralized debt obligation of asset-backed securities, a collateralized debt obligation of collateralized debt obligations," or a security that at issuance is "commonly known as an asset-backed security or a structured finance product." This broad definition is designed at least to encompass certain managed ABS, and, since there is no requirement of having a "discrete pool of assets," would also generally encompass all managed structure finance products.

Effect on Private Market: In light of the broad definition of "structured finance product" (which the ABS Release specifically states encompasses managed CDOs), sponsors and managers of private managed funds should begin to consider what are the distinguishing features of those funds that place them outside the scope of the definition of "structured finance products." Depending on the structure of the particular private managed fund, inclusion under the rules may hinge on narrow distinctions (such as

the meaning of the word "collateralized" within the definition of "structured finance product").

With respect to Rule 144A, the scope of the information that could be requested also includes ongoing information regarding the securities that would be required by Section 15(d) of the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"), if the issuer were required to file reports under that section, and the right to obtain the specified information would extend to any initial purchaser, any security holder or any prospective purchaser designated by a security holder.

Effect on Private Market: Under Exchange Act Section 15(d), for an issuer that does not otherwise have a class of securities registered under the Exchange Act, the duty to file ongoing reports is automatically suspended after the first year if the securities of each class to which the registration statement relates are held of record by less than 300 persons.[2] The ABS Release does not expressly address whether, by virtue of Exchange Act Section 15(d), an issuer of a "structured finance product" that relied on the Rule 144A safe harbor could suspend its ongoing reporting obligations after it makes available information equivalent to that which would otherwise be contained in its first annual report, as long as the issuer has less than 300 record holders and does not also have a class of securities registered under the Exchange Act. We expect that this particular question will be clarified during or following the public comment process.

The end-result of these disclosure rules would be to harmonize disclosure levels in the public and private ABS markets, allowing investors in an exempt private offering of a structured finance product to receive substantially the same level of disclosure as in a registered offering.

2 As noted in the ABS Release, typically the reporting obligations of asset-backed issuers (other than those with master trust structures) under Exchange Act Section 15(d) are suspended after they have filed one annual report because the number of record holders of each class of its securities is below the 300-record-holder threshold.

New Disclosure Requirements

Proposed Asset-Level Reporting Requirements

Under the proposals in the ABS Release, a public issuer would be required to include detailed asset-level data both in the prospectus at the time of initial offering and in ongoing Exchange Act reports. This asset-level data would have to be provided in a standardized, computer-readable format filed on EDGAR (the SEC's electronic system for data submission) at the time of issuance, whenever new loans or other assets are added to the pool underlying the securities, and on an ongoing basis in periodic reports pursuant to Section 13 and Section 15(d) of the Exchange Act.

The ABS Release establishes general data points, as well as asset-class-specific data points for 11 specific asset classes (residential mortgages, commercial mortgages, auto loans, auto leases, equipment loans, equipment leases, student loans, credit cards, floorplan financings, corporate debt and resecuritizations) that would be required to be disclosed for each asset in a pool. Further, the ABS Release states that resecuritizations issued after the implementation date of the ABS Release would also be subject to the new requirements, regardless of whether the issuance of the resecuritization's underlying securities predates the implementation date.

Effect on Private Market: Given the absence of grandfathering for resecuritizations having underlying securities that were issued prior to the ABS Release's implementation date, sponsors of such resecuritizations in exempt private offerings should begin to determine the type and level of disclosure that would satisfy disclosure obligations under the ABS Release (if adopted in its current form) with respect to an asset-backed security underlying a resecuritization. A sponsor should plan now its disclosure procedures for any asset-backed security to be resecuritized in the future. In certain cases a private resecuritization sponsor may wish to expedite resecuritizations contemplated for the near (and possibly intermediate) term so as to achieve completion prior to the effectiveness of any final proposal. Meanwhile, resecuritization sponsors should consider the other issues raised below regarding the appropriate asset-level disclosure for private offerings in the interim.

With respect to each individual asset in a pool (or, in a credit card ABS, each group of assets), the issuer would be required to provide specified data, including the terms of the asset, obligor characteristics, interest rates and primary servicer information. Issuers would also be required to update the asset-level data for changes to the pool prior to the date on and after which collections on the pool assets accrue for the benefit of the ABS holders (the "**cut-off date**"), if the initial data is from an earlier date. These data points would include the current asset balance, the number of days the obligor is delinquent, the number of payments the obligor is past due as of the cut-off date and the remaining term to maturity.

Credit card ABS issuers would be exempt from the foregoing asset-level data disclosure obligations, but would instead be required to disclose grouped account data in the same standardized format.

Effect on Private Market: Given the detailed asset-level disclosures required by the ABS Release, issuers in certain kinds of exempt private ABS offerings will need to balance their Securities Act disclosure obligations with any confidentiality restrictions that may apply to certain information about those assets. Although the ABS Release envisions disclosures to be in ranges or categories of coded responses to attempt to address this concern, a more granular focus is required to

assess permissible disclosure for each data point of each asset class where these and other privacy concerns are present.

Although the changes in the ABS Release as proposed will not apply retroactively upon becoming effective, in view of the considerable focus in the ABS Release on asset-level disclosure, an issuer in an exempt private ABS offering should consider now what, if any, additional asset-level disclosure is appropriate to meet its disclosure obligations for securities law purposes. Similarly, consideration should be given to implementing other types of disclosures that the ABS Release would require for registered ABS offerings, including the waterfall computer program, disclosures relating to transaction parties, and static pool information. Even issuers of structured finance products in private placements relying directly on Section 4(2) or "Section 4(1½)" of the Securities Act should consider the effect of these (and other) provisions of the ABS Release on their disclosure obligations and practices.

While issuers in public offerings of ABS in the U.S. would be required to file the relevant asset data (the "**asset data file**") on Form 8-K at various times during the offering process, including when a prospectus (both preliminary and final) is filed with the SEC and when updating disclosure is otherwise required, the ABS Release does not state that issuers in exempt private offerings of ABS will have to file the asset data file (though it is expected that they would be required to make it otherwise available).

If an SEC registrant experiences unanticipated technical difficulties that prevent the timely preparation and submission of an asset data file, the submission would still be considered timely if the asset data is posted on a website on the same day it was due to be filed on EDGAR, the website address is specified in the required exhibit, a legend is provided in the appropriate exhibit claiming the hardship exemption, and the asset data file is filed on EDGAR within six business days.

Waterfall Computer Program

Issuers of public asset-backed securities would be required to file on EDGAR a computer program (the "**waterfall computer program**") that gives effect to the contractual cash flow provisions of the securities in the form of downloadable source code in "Python," which (the SEC notes in the ABS Release) is a commonly used open source and interpretive computer programming language.

The filed source code for the waterfall computer program would have to provide a user with the ability to input its own assumptions regarding the future performance and cash flows from the pool assets, including assumptions about future interest rates, default rates, prepayment speeds, loss-given-default rates, and any other assumptions currently required to be described under Item 1113 of Regulation AB, in order to facilitate and better enable the investor to conduct its own evaluations. The waterfall computer program would be required to allow the user to integrate those assumptions with the asset data file that the issuer must make available at the time of the offering and on a periodic basis thereafter.

The waterfall computer program would also be required to produce a programmatic output, in machine-readable form, of all resulting cash flows associated with the offered securities (including the amount and timing of principal and interest payments payable or distributable to a holder of each class of securities), and each other person or account entitled to payments or distributions in connection with the securities, until the final legal maturity date, all as a function of the inputs entered into the waterfall computer program. The issuer would be required to file with the SEC an example of the expected output for each tranche based on sample inputs entered into the waterfall computer program.

Like the asset data file, the waterfall computer program would be an integral part of the prospectus, as an issuer would be required to provide the waterfall computer program at the time of filing a preliminary prospectus, with data accurate as of the filing date. Similarly, the waterfall computer program would be required to be filed with the final prospectus, with data accurate as of that date of filing. An SEC registrant would be entitled to a hardship exemption similar to that described above.

Effect on Private Market: Because a waterfall computer program would very likely be part of the marketing materials provided to prospective investors in exempt private offerings, initial purchasers in Rule 144A offerings, and placement agents in Rule 506 offerings, of structured finance products, which would otherwise have to be filed under new Form SF-1 if offered publicly, should consider what type and level of due diligence would need to be

conducted with respect to the waterfall computer program.

In addition, regardless of who logistically constructs or designs the waterfall computer program, an issuer of a structured finance product will nevertheless face significant ultimate exposure and potential liability for the waterfall computer program, and therefore must perform a proactive role in developing and understanding the waterfall computer program, irrespective of any proactive role performed by its underwriter or placement agent or its accountants.

Matters Relating to Transaction Parties

Identification of Originator

Regulation AB currently provides that any party that has originated 10% or more of the assets underlying a transaction must be treated as an originator, even if that entity is not affiliated with the issuer or the sponsor. The SEC has expressed concern that this may result in minimal disclosure about originators where a substantial part of the underlying assets comes from third-party originators but no single originator represents more than 10% of the asset pool.

To address this concern, the ABS Release would identify an entity as an originator even if it originated less than 10% of the pool assets, if the cumulative amount of originated assets by parties other than the sponsor (or its affiliates) comprises more than 10% of the total pool assets.

Effect on Private Market: This new proposal could limit the attractiveness, feasibility or economic viability of an asset manager accumulating pools of third-party-originated assets with a view to securitization.

Expanded Disclosure Regarding History of Assets Repurchased

The ABS Release proposes new disclosure relating to a sponsor's performance history with respect to asset-level warranties. Specifically, an issuer would be required to disclose on a rolling three-year basis the amount, if material, of securitized assets originated or sold by the sponsor or an identified originator that were "put back" to the sponsor or originator for repurchase as a result of a breach of any point-of-sale representation and warranty. This disclosure would be provided on a pool-by-pool basis, together with the percentage of such assets that had not then been repurchased or replaced by the sponsor or originator.

Effect on Private Market: Since disclosures relating to the history of "put backs" are proposed to cover a rolling three-year look-back period, as well as contain a breakdown of the amount of assets that were subject to "put back" requests but were not repurchased or replaced, issuers of ABS in exempt private offerings should ensure they have (or take necessary steps to obtain) operational and technical capacity to provide such information.

The issuer would also be required to disclose whether an independent third party had given an opinion to the trustee confirming that any such assets that had not been repurchased did not in fact violate a representation or warranty.

Financial information about the party required to repurchase a pool asset upon breach of a representation and warranty pursuant to the transaction agreements would also be required, including information about the interest of that party in the securitization. For example, information regarding the financial condition of an originator that accounts for 20% or more of the pool assets would be required if there is a material risk that its financial condition could have a material impact on the origination of its assets in the pool or on such originator's ability to comply with its repurchase obligations ("**put-backs**") for those assets. Information regarding the sponsor's financial condition would similarly be required to the extent that there is a material risk that its financial condition could have a material impact on its ability to comply with its repurchase obligations for those assets or could otherwise materially impact the pool.

In addition, for public offerings registered on Form SF-1, the issuer would be required to provide clear disclosure that the sponsor is not required by law to retain any interest in the securities and may sell any interest initially retained at any time.

Prospectus Summary Requirements

The SEC in the ABS Release expressed concern that existing prospectus summaries for ABS tend to describe structural features that are common to all securitizations of a particular asset class, rather than concentrating on the variances that might be material to the specific securities described in the prospectus. The ABS Release contains provisions requiring prospectus summaries to include statistical information relating to the types of underwriting or origination programs, exceptions to the underwriting or origination criteria and, where appropriate, modifications to pool assets after origination.

Effect on Private Market: Issuers in exempt private offerings should plan to adjust private offering disclosure to conform with the public disclosure requirements being proposed. Care will need to be exercised, however, in assessing whether particular requirements conflict with confidentiality restrictions under law or contract or call for commercially sensitive information. For example, it is unclear under this requirement how much detail an originator would have to provide about loans that did not meet its underwriting criteria. Identifying such loans may breach confidentiality provisions and disclosure of certain deficiencies may be commercially sensitive.

Enhanced Static Pool Disclosure

The current version of Regulation AB introduced the idea of providing investors with historic pool information on a "static" basis. The SEC in the ABS Release has proposed four new disclosure requirements regarding static pool information to be filed on EDGAR:

(1) narrative disclosure describing the static pool information presented;

(2) a description of the methodology used in determining or calculating the characteristics and a description of any terms or abbreviations used;

(3) a description of how the assets in the static pools shown in the prospectus differ from the pool assets underlying the securities being offered; and

(4) if an issuer does not include static pool information or includes disclosure that is intended to serve as alternative static pool information, an explanation of why that issuer has not included static pool disclosure or why it has provided alternative information.

Static pool information related to delinquencies, losses and prepayments would also need to be presented for amortizing asset pools.

Effect on Private Market: Whereas since the adoption of the existing Regulation AB, market practice with respect to most (if not all) asset classes of the exempt private ABS market has been to not include static pool information, under the ABS Release (as proposed) issuers of ABS in exempt private offerings would be required to provide enhanced static pool information and would thus need to consider how to comply with this requirement for each type of asset class.

Pool-Level Information

Deviations from Underwriting Standards

The issuer's disclosure regarding the underwriting of assets that deviate from the disclosed origination standards (for example, assets that are past due at the time of inclusion) must be accompanied by specific data about the amount and characteristics of those assets that did not meet the disclosed standards.

To the extent that disclosure is provided regarding compensating or other factors, if any, that were used to determine that the assets should be included in the pool, despite not having met the disclosed underwriting standards, the issuer would be required to specify the factors that were used in that determination and provide data on the amount of assets in the pool that are represented as meeting those factors. An example would be when a very low loan-to-value ratio for a particular residential mortgage loan is considered by the originator to offset a poor credit score on the part of the borrower.

Verification Methods

The issuer would be required to disclose what steps were undertaken by the originator(s) to verify the information used in the solicitation, credit-granting or underwriting of the pool assets.

Modification of Assets

The issuer would be required to include disclosure of the provisions in the transaction agreements governing modification of the assets, disclosure about how modification may affect cash flows from the assets or to the securities and disclosure of whether or not a fraud representation is included among the representations and warranties.

Effect on Private Market: To the extent an asset accumulator or asset manager purchases assets in the secondary market with an intent to securitize, it may not have access to the relevant data from the originator(s) of those assets. As such, it is not clear how an asset accumulator or asset manager making such secondary market purchases would comply with these new disclosure requirements under those circumstances.

Other Disclosure Requirements that Rely on Credit Ratings

The ABS Release would eliminate existing exceptions to disclosure rules which are based on investment grade ratings, including:

(1) removing an instruction to Item 1112(b), which provides that no financial information regarding a significant obligor is required if the obligations of the significant obligor are backed by the full faith and credit of a foreign government and the pool assets are securities that are rated investment grade by a NRSRO; and

(2) removing an instruction to Item 1114 which relieves an issuer of the obligation to provide financial information when the obligations of the credit enhancement provider are backed by a foreign government and the enhancement provider has an investment grade rating.

Effect on Private Market: It will be necessary to add corresponding disclosure in exempt private offerings of asset-backed securities and other structured finance products. While the requirements proposed for offerings relying on Rule 144A and Rule 506 are not contemplated to apply expressly to other types of private offerings, market participants must consider the degree, if any, to which an analogous and similar approach should be used in such offerings.

Issues Regarding "Waiting Period" and Format of Offering Documents

The SEC has expressed concern that shelf programs generally may have confused investors or presented a lower level of disclosure than stand-alone offerings, because the disclosure relating to the securities is split between a base, or program, prospectus and a transaction-specific prospectus supplement for each individual issuance. Specifically, in the ABS Release the SEC stated that the use of a base prospectus with a prospectus supplement has resulted in "unwieldy documents with excessive and inapplicable disclosure that is not useful to investors." To address these concerns, the SEC has proposed new Rule 424(h) and Rule 430D as a framework for shelf offerings of asset-backed securities.

With respect to each offering, proposed Rule 430D would require substantially all of the information that was omitted from the form of prospectus (except for pricing-dependent information) to be filed with the SEC at least five business days in advance of the first sale of securities in the offering in a preliminary prospectus that must be in near-final form. As a consequence, the proposals would result in each offering being made on the basis of a single prospectus, rather than the existing base-and-supplement format.

Effect on Private Market: As a result of this proposal, issuers of ABS in exempt private offerings may shift towards use of a single offering document and discontinue the use of a base offering document plus supplement.

Consistent with current practice, under the proposals, the form of prospectus which would be contained in a Form SF-3 shelf registration statement may continue to omit any transaction structure or asset- or pool-specific information or data at the time it is declared effective by the SEC. However, under proposed new Rule 424(h), the issuer would be required to file a preliminary prospectus (a "**Rule 424(h) filing**" or "**Rule 424(h) prospectus**") that contains all transaction-specific information about the proposed offering (except pricing-dependent information) at least five business days in advance of the first sale of securities in the offering. This five-business-day period is intended by the SEC to give investors sufficient time to analyze the transaction and loan-

level data and run their own scenario analysis using the waterfall computer program. If the preliminary prospectus is used earlier than such five-business-day period to offer the securities, the ABS Release would require it to be filed by the second business day after first use.

Effect on Private Market: In light of this proposed five-business-day waiting period in registered shelf offerings, ABS issuers in exempt private offerings should consider implementing a similar waiting period between the distribution to investors of a preliminary offering document and delivery of a final offering document.

Proposed Rule 430D would also provide that a material change in the information provided in the Rule 424(h) filing (other than pricing-dependent information), would require a new Rule 424(h) filing and consequently a new five-business-day waiting period.

Effect on Private Market: In light of this proposal, ABS issuers in exempt private offerings should consider using a similar waiting period in circumstances where there have been material changes to a final offering document from the preliminary offering document. Issuers of structured finance products in private placements relying directly on Section 4(2) or "Section 4(1½)" of the Securities Act should consider implementing procedures similar to those noted above with respect to waiting periods.

Similarly, the ABS Release eliminates the exemption for shelf-eligible ABS offerings from the so-called 48-hour rule, which requires a broker or dealer to deliver a preliminary prospectus to any person at least 48 hours before such person is sent a confirmation.

Conclusion

Beyond its effects on the public ABS markets, if adopted in its current form the ABS Release will have a significant impact on exempt private offerings of asset-backed securities and other structured finance products that are conducted in reliance on the safe harbors provided by Rule 144A and Rule 506 of Regulation D. The ABS Release would require substantially more disclosure in such offerings than is currently the market practice. The ABS Release is also likely to affect disclosure practices used by market participants in other types of private offerings of asset-backed securities and other structured finance products, such as private placements relying directly on Section 4(2) or "Section 4(1½)" of the Securities Act. By seeking to harmonize disclosure in the public and exempt private markets, the SEC in the ABS Release sends a strong signal that it expects a greater degree of disclosure and other "best practices" in exempt private offerings and sales of asset-backed securities and other structure finance products.

Participants in the exempt private markets for asset-backed securities and other structured finance products will be keenly following the comment process on the ABS Release over the coming weeks and months for signs of the level of acceptance of the proposals contained therein and the chance that they will either be adopted largely in their current form or, alternatively, substantially revised prior to adoption. Regardless of the outcome, the ABS Release justifies a current re-assessment of U.S. private offering practices for structured finance products and is certain to result in fundamental changes in U.S. private offerings of structured finance products in the future.

Contacts

Steven T. Kolyer
Partner
T: +1 212 878 8473
E: steven.kolyer@cliffordchance.com

Frederick Utley
Partner
T: +1 212 878 8356
E: frederick.utley@cliffordchance.com

Lewis R. Cohen
Partner
T: +1 212 878 3144
E: lewis.cohen@cliffordchance.com

Robert Villani
Partner
T: +1 212 878 8214
E: robert.villani@cliffordchance.com

Edgard Alvarez
Counsel
T: +1 212 878 3491
E: edgard.alvarez@cliffordchance.com

Victor Levy
Associate
T: +1 212 878 3416
E: victor.levy@cliffordchance.com

J201005240036183