



Finance ADVISORY ■

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New Securitization Rules for Third-Party Due Diligence Reports Adopted

Introduction and Executive Summary

On August 27, 2014, the U.S. Securities and Exchange Commission (SEC) adopted a number of highly anticipated rules related to securitization and nationally recognized statistical rating organizations (NRSROs). The SEC board approved the rules and issued a release (the "NRSRO Release").¹ The rules regarding third-party due diligence reports become effective on **June 15, 2015** (the "effective date").

A portion of the NRSRO Release relates to the responsibilities of issuers, underwriters and due diligence providers with respect to rated transactions.² These responsibilities primarily relate to two rules, Rule 15Ga-2 and Rule 17g-10. Rule 15Ga-2 requires any issuer or underwriter of asset-backed securities (ABS) (including, for this purpose, securitizations of residential and commercial mortgage loans as well as other asset classes) rated by an NRSRO to furnish a form via the EDGAR SEC database describing the findings and conclusions of any third-party due diligence report obtained by the issuer or underwriter. Notably, the filing requirements apply to both publicly registered and on-shore unregistered securitizations of assets such as those relying on Rule 144A.

A third-party due diligence report is any report containing findings and conclusions relating to due diligences services, which are defined as a review of pool assets for the purposes of issuing findings on: (1) the accuracy of the asset data; (2) determining whether the assets conform to stated underwriting standards; (3) asset value(s); (4) legal compliance by the originator; and (5) any other factor material to the likelihood that the issuer will pay interest and principal as required. These due diligence services are routinely provided by third-party due diligence vendors in ABS structured transactions, particularly residential mortgage-backed securities (RMBS), and affect their credit ratings.

The rules also set forth a form of certification that providers of third-party due diligence services will be required to deliver to each NRSRO producing a credit rating to which those due diligence services "relate." The delivery obligation is included in a new Rule 17g-10 and will be accomplished primarily by providing the certification to the issuer or underwriter for posting on its Rule 17g-5 website.

¹ Release No. 34-72936. The NRSRO Release may be found at: <http://www.sec.gov/rules/final/2014/34-72936.pdf>.

² See pages 360-431 for the relevant discussion of the NRSRO Release. The text of the actual rules and related forms can be found at the end of the release.

As described below, the obligations of due diligence providers, issuers and underwriters under the NRSRO Release are significant and material. They will potentially apply to any securitized asset currently being purchased if such asset is securitized in a rated transaction after the effective date. They impose potential liability not only on these entities but on the individual signatories to the EDGAR filings. In particular, the parties involved in preparing and furnishing disclosure documents to the SEC via EDGAR should consider the relevant securities laws on misstatements and omissions.

Also, these rules apply to all securitization asset classes, not just residential mortgage-backed securities. In particular, as described below, the check of the data tape by the accounting firm typically hired in an asset-backed transaction, and the very broad description of what constitutes due diligence, may result in these filings made on most rated securitization transactions after the effective date.

Disclosure by Issuers and Underwriters of Findings and Conclusions of Third-Party Due Diligence Reports

Section 15E(s)(4)(A) of the Securities Exchange Act of 1934 (the "Exchange Act"), as added by Section 932 of the Dodd-Frank Act, requires an issuer or underwriter of Exchange Act ABS to make publicly available the findings and conclusions of any third-party due diligence report obtained by the issuer or underwriter. Section 15E(s)(4)(A) applies to all Exchange Act ABS, whether offered publicly or privately, not just the more limited group of asset-backed securities subject to Regulation AB.

In order to implement this requirement, new Rule 15Ga-2 generally requires an issuer or underwriter of Exchange Act ABS that are rated by an NRSRO to furnish a Form ABS-15G, which will have a new section requiring disclosure of the findings and conclusions of any third-party due diligence report obtained by the issuer or underwriter. The form must be furnished to the SEC via EDGAR five business days before the first sale in the offering. If the issuer and one or more underwriters have obtained the same third-party due diligence report, only one of them will be required to furnish Form ABS-15G.

Notably, Form ABS-15G must be signed by a senior officer in charge of securitization of the depositor or a duly authorized officer of the underwriter. The filing will need to be made on EDGAR, which will impose additional costs and responsibilities.

The Scope of "Third-Party Due Diligence Report" and "Due Diligence Services"

Under Rule 15Ga-2(d), a third-party due diligence report is any report containing findings and conclusions relating to due diligence services performed by a third party, and the phrase "due diligence services" in turn is defined in new Rule 17g-10(d)(1).

A third-party due diligence report is not the same as the required issuer review of the assets under Rule 193. However, if an issuer uses a third-party due diligence report in connection with its Rule 193 review of the assets, then as required by Item 1111(a)(7) of Regulation AB, the issuer must include the findings and conclusions of the review in the prospectus and (if the issuer attributes the findings and conclusions to the third party) must obtain the third party's consent to being named as an expert in the registration statement.

Rule 17g-10 identifies four specific categories of due diligence services that the SEC believes are commonly provided in connection with offerings of RMBS, "because due diligence services traditionally have been performed with respect to RMBS," and, in addition to the four categories of existing due diligence services, the rule establishes a catchall for services that may in the future be provided for other asset classes, but which do not fall within one of the enumerated categories.

(A) The first category of due diligence services is a review of the underlying assets to determine the accuracy of the information or data about the assets provided by the securitizer or originator. The SEC determined that the scope of due diligence services should not include recalculating projected cash flows to investors nor performing agreed-upon procedures to verify most information included in the offering document. “However, comparing the information on a loan tape with the information contained on the hard-copy documents in a loan file is an activity that falls within the definition “because it involves reviewing the accuracy of information about the assets provided by the securitizer or originator. It should be noted that the comparison of the loan file to the data tape, which is typically done by the accounting firm hired to also run cash flows and provide an agreed upon procedures letter with respect to the offering document, is treated as “due diligence” under the rule.

(B) The second category of due diligence services is a review of the underlying assets to determine whether the origination of the assets conformed to, or deviated from, stated underwriting or credit extension guidelines, standards or other criteria. The rule notes that this could entail reviewing whether a sampled loan meets the originator’s underwriting guidelines or, if not, that the originator provided a reasonable and documented exception. This type of review would also encompass an examination of how the originator verified information in a sampled loan such as, for RMBS, the borrower’s occupancy status, income, assets or employment status.

(C) The third category of due diligence services is a review of the underlying assets to determine the value of collateral securities of those assets. The rule noted that this could entail analyzing how the originator verified the value of the asset, for example, for RMBS, an NRSRO might require that the review consider the quality of the appraiser of the property and the quality of the appraisal. It could include reviewing whether the appraiser used a valuation model such as an automated valuation model or a broker price opinion, as well as the performance of a separate valuation by the provider if it believes that the original appraised value of the property is less than the value presented by the originator.

(D) The fourth category of due diligence services is a review of the underlying assets to determine whether the originator of the assets complied with applicable laws and regulations. The rule noted that this could entail, for RMBS, analyzing the documentation in a sampled loan file to verify that the loan was made in conformance with applicable truth-in-lending requirements.

(E) The fifth catchall category entails a review of the underlying assets to determine any other factor or characteristic that would be material to the likelihood that the issuer will pay interest and principal in accordance with the transaction requirements (i.e., the likelihood of default or delinquency). According to the SEC, this category is intended to apply to due diligence services that may be used in the future for asset classes other than RMBS which, because the nature of the assets is different, may not fall within the other categories.

Form and Content of Required Certification by Provider of Third-Party Due Diligence Services

Whenever third-party due diligence services are provided to an NRSRO, issuer or underwriter, Section 15E(s)(4)(B) of the Exchange Act (as added by Section 932 of the Dodd-Frank Act) requires the due diligence services provider to provide to any NRSRO rating any of Exchange Act ABS to which those services relate a written certification in a format to be prescribed by rule. Section 15E(s)(4)(C) requires the SEC to “establish the appropriate format and content ... to ensure that providers of due diligence services have conducted a thorough review of data, documentation, and other relevant information necessary for [an NRSRO] to provide an accurate rating.” To implement this requirement, Rule 17g-10 will require the mandated written certification to be made on new Form ABS Due Diligence-15E.

Form ABS Due Diligence-15E will require the provider to state its identity and address, the identity and address of the issuer, underwriter or NRSRO that engaged it, and the identity of each NRSRO whose published criteria were satisfied by the performance of the provider's due diligence services. The provider will be required to describe the scope and manner of due diligence that it performed in a manner "that is sufficiently detailed to provide an understanding of the steps taken in performing the review," including the type of assets reviewed, the sample size and how it was determined, whether the accuracy of information about the assets provided by the securitizer of the originator was reviewed (and if so, how), whether conformity of the origination of the assets to stated underwriting or credit extension guidelines was reviewed (and if so, how), whether the value of collateral security of the assets was reviewed (and if so, how), whether the originator's compliance with applicable laws was reviewed (and if so, how), and any other type of review conducted. Most importantly, Form ABS Due Diligence 15E also will require the provider to summarize the findings and conclusions of its due diligence review.

The certification will have to be signed by an individual duly authorized by the provider of the due diligence services. In signing the certification, the individual must represent that the provider conducted a "thorough review" in performing the described due diligence and that the information in the certification (including the description of the due diligence performed and the findings and conclusions of that review) are "accurate in all significant respects" as of the date the certification is signed.

Rule 17g-5 requires each NRSRO engaged to rate a structured finance product to obtain from the issuer, sponsor or underwriter a representation that the arranger will maintain a password-protected website that is accessible to any NRSRO that certifies, among other things, that it will access the website solely for the purpose of determining or monitoring credit ratings. The SEC amended Rule 17g-5 to include within the required representation a commitment by the arranger to post on that website, promptly after receipt, any Form ABS Due Diligence-15E it receives from any third-party due diligence services provider that contains any information about the security being rated.

Because Rule 17g-5 filings are not publicly furnished on EDGAR, any liability under Rule 17g-10 is considerably more limited than the Rule 15Ga-2 filings. However, there may be potential liability to an unsolicited NRSRO that accesses a Rule 17g-5 website.

Securities Law Liability Issues

Liability under Section 10(b) of the Exchange Act

We should note at the outset that we do not believe that any of these new filings should give rise to a cognizable claim for violation of federal or state securities laws. We include the following discussion, however, to identify the potential grounds on which a creative plaintiffs' lawyer could assert a claim.

As noted above, Rule 15Ga-2 filings on Form ABS-15G are required to be furnished on EDGAR, which means investors will have access to the form. As a result, the various parties involved in making a Rule 15Ga-2 filing on EDGAR should consider the securities laws on disclosures and other statements to investors, as those laws would form the basis of a potential claim for alleged misstatements and omissions.

Of the relevant securities laws on disclosures, Section 10(b) and Rule 10b-5 provide a common basis for investor suits. To state a claim for a violation of Section 10(b) and Rule 10b-5, a plaintiff must plead that a defendant "(1) made misstatements or omissions of material fact, (2) with scienter, (3) in connection with the purchase or sale of securities, (4) upon which the plaintiff relied, and (5) that the plaintiff's reliance was the proximate cause of its injury." *ATSI Communs., Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 105 (2d Cir.2007); *Stoneridge Investment Partners, LLC v. Scientific-*

Atlanta, Inc., 552 U.S. 148, 157 (2008). “For purposes of Rule 10b5, the maker of a statement is the person or entity with ultimate authority over the statement. . . . And in the ordinary case, attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by—and only by—the party to whom it is attributed.” See *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302, 180 L. Ed. 2d 166 (2011).

As adopted, Rule 15Ga-2 mandates that Form ABS-15G contain the actual findings and conclusions of the due diligence provider, rather than a summary, because “the Commission believes it is important for the third-party due diligence provider’s findings and conclusions themselves to be made public rather than an issuer or underwriter’s summary of those findings and conclusions because a summary runs the risk of excluding information that could be important to a user of credit ratings.” See NRSRO Release at page 375. As a result of this requirement, the due diligence provider could be asserted to have control and authority over the substantive disclosures in a Form ABS-15G, because the disclosures must adopt, in full, the provider’s findings and conclusions.

As noted above, Rule 15Ga-2 requires Form ABS-15G to include the actual findings and conclusions of a due diligence provider. Form ABS-15G could also identify the relevant due diligence provider. Therefore, even if a court finds that the due diligence provider lacked the requisite authority and control over the disclosures in a Form ABS-15G to impose liability under Section 10(b), the court could, in the alternative, find “attribution within [the disclosures] or implicit from surrounding circumstances,” such that the disclosures are attributable to the due diligence provider. See *Janus Capital Grp., Inc.*, 131 S. Ct. 2296, 2302, 180 L. Ed. 2d 166 (2011).

Because only the maker of a statement can be liable for damages caused by the statement’s alleged falsity, an issuer or underwriter may attempt, when preparing a Form ABS-15G, to explicitly attribute to the due diligence provider the findings and conclusions disclosed within the form in order to limit its own potential liability. If the Form ABS-15G directly attributes the findings and conclusions to the due diligence provider, a court could find that the due diligence provider made the statements. See *In re Merck & Co., Sec., Derivative & “ERISA” Litig.*, MDL No. 1658(SRC), 2011 WL 3444199, at *25–26, 2011 U.S. Dist. LEXIS 87578, at *102–103 (D.N.J. Aug. 8, 2011) (holding executive vice president could be liable for misstatements in SEC filings, which he signed, and for quotations attributed to him appearing in articles and reports).

With respect to implicit attribution, in *In re Pfizer Securities Litigation*, 04 Civ. 9866, 2012 WL 983548, at *4 (S.D.N.Y. March 22, 2012), it was “adequately allege[d] that the Individual Defendants are liable for statements issued in Pfizer press releases because, in part, they ‘were involved in drafting, reviewing and/or disseminating the false and misleading financial statements that were issued by Pfizer, approved or ratified these statements and, therefore, adopted them as their own.’” The court held that, “[w]hile statements in Pfizer’s press releases were not explicitly attributed to the Individual Defendants... Defendants ‘approved or ratified’ any statements issued by Pfizer.” See *id.*

In addition, in *In re Allstate Life Ins. Co. Litig.*, CV-09-8162-PCT-GMS, 2012 WL 176497 (D. Ariz. Jan. 23, 2012), where the plaintiffs had alleged that the underwriter had made all of the alleged misstatements in the offering document and alleged that the underwriter’s name appeared prominently in the document, the court held that plaintiffs had adequately alleged that the underwriter made material misstatements in the offering document.

In a recent decision, *In re Puda Coal Sec. Inc., Litig.*, 11-CV-2598 KBF, 2014 WL 3427284 (S.D.N.Y. July 14, 2014), the Southern District of New York held that underwriters were the “makers” of alleged misstatements contained within a prospectus, because, among other reasons, the prospectus disclosed the names of the underwriters and the underwriters had the right to sign off on the final draft and jointly drafted the prospectus with the issuer. Taken together, the court found those facts “sufficient to show ‘attribution within a statement or implicit from surrounding circumstances’ such that the statements within the prospectus are attributable to the underwriters.”

The due diligence provider could also face a claim for purported omissions based on allegations that it failed to correct conclusions and findings that it knew were material misstatements. For example, in *Ackerman v. Schwartz*, 947 F.2d 841, 848 (7th Cir. 1991), the court found that an attorney had a duty to correct an opinion letter if the attorney came to doubt representations contained within the letter while the letter continued to circulate with the offering.

Rule 15Ga-2 also could give rise to claims against underwriters and issuers. Pursuant to the rule, if the issuer furnishes the Form ABS-15G, "it must be signed by the senior officer of the depositor in charge of the securitization," and, if the underwriter furnishes the Form ABS15G, "it must be signed by a duly authorized officer of the underwriter."

The officer who executes a Form ABS-15G on behalf of an issuer or underwriter could potentially face a claim under Section 10(b) based on alleged misstatements in the form because "courts consistently hold that signatories of misleading documents 'made' the statements in those documents, and so face liability under Rule 10b-5." *In re Smith Barney Transfer Agent Litig.*, 884 F. Supp. 2d 152, 163-64 (S.D.N.Y. 2012).

Liability under Section 11 of the Securities Act of 1933

Section 11 imposes liability on underwriters and experts for misstatements or omissions in registration statements. As adopted, however, Rule 15Ga-2 does not require Form ABS-15G to be included within the registration statement. Thus, the furnishing of a Form ABS-15G, without more, should not expose the due diligence provider to Section 11 liability as an expert who must consent to being named in the registration statement.

In contrast, if the issuer attributes the findings and conclusions of the due diligence provider to the provider, the provider could face liability as an expert. More specifically, "under Rule 193 and Item 1111 of Regulation AB, an issuer of a registered asset-backed security is required to perform a review of the assets underlying the asset-backed security and disclose the nature of the review. In meeting this requirement, an issuer may engage a third party to perform the required review of the underlying assets. If the third party's findings and conclusions are to be attributed to it, the third-party must consent to being named in the issuer's registration statement as an 'expert,' thus subjecting the third party to so-called 'expert liability' under the Securities Act." See Final Release at page 53 n. 146. As a result, due diligence providers could face liability under Section 11 if they consent to being named an expert.

Among other defenses that would apply to these claims, a specific affirmative defense to Section 11 liability exists for underwriters and experts, known as the "due diligence" defense. Underwriters and experts must satisfy different standards regarding that defense. An expert can avoid Section 11 liability by showing that, after a reasonable investigation, it had reasonable grounds to believe the statements were true. See 15 U.S.C. § 77k(b)(3)(B). An underwriter that relies on the sections supplied by the expert, in this case the due diligence provider, can avoid liability if the underwriter shows it "had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue" or contained material omissions. 15 U.S.C. § 77k(b)(3)(C)

Liability under Section 12 of the Securities Act of 1933

Section 12(a)(2) imposes liability for a misstatement or an omission in a prospectus. "[L]iability under Section 12(a)(2) is governed by the 'statutory seller' requirement." See *Fed. Hous. Fin. Agency v. UBS Americas, Inc.*, 858 F. Supp. 2d 306, 333 (S.D.N.Y. 2012). "An individual is a 'statutory seller'—and therefore a potential section 12(a)(2) defendant—if he: (1) 'passed title, or other interest in the security, to the buyer for value,' or (2) 'successfully solicit[ed] the purchase [of a security], motivated at least in part by a desire to serve his own financial interests or those of the securities owner.'" *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 359 (2d Cir. 2010).

If, under Rule 193, “an issuer were to use the third-party due diligence report in connection with its review of disclosure in the prospectus about the pool assets as required under Rule 193, it would be required to include the findings and conclusions in the prospectus.” See Final Release at page 364.

A claim under Section 12 against a due diligence provider would have to overcome the “statutory seller” requirement and the case law that has limited potential liability for third-parties not involved in any form of solicitation. For example, courts have “expressly cautioned that the draconian provisions of Section 12 must not be extended to include” professionals such as accountants and attorneys “who have performed only their usual professional functions in preparing documents for an offering.” *Wilson v. Saintine Exploration & Drilling Corp.*, 872 F.2d 1124, 1126 (2d Cir. 1989) (citing *Pinter v. Dahl*, 486 U.S. 622, 624, 108 S. Ct. 2063, 2066, 100 L. Ed. 2d 658 (1988)).

Like Section 11, Section 12(a)(2) provides an express “due diligence” defense which underwriters and issuers could rely on to avoid liability for alleged misstatements attributable to the due diligence provider. The underwriter or issuer would need to establish that it “did not know, and in the exercise of reasonable care, could not have known of the untruth or omission.” 15 U.S.C. § 771(a)(2).

Liability under Section 18 of the Exchange Act

No potential Section 18 liability exists for any party because Rule 15Ga-2 requires an issuer or underwriter to furnish—not **file**—Form ABS-15G with the SEC. A cause of action brought under Section 18 requires the allegedly false or misleading statement to have been contained “in a document filed with the SEC.” See 15 U.S.C.A. § 78r (emphasis added).

Liability under State Law

Alleged misstatements within Form ABS-15G could also give rise to state securities law and fraud claims. Plaintiffs’ lawyers have recently pursued state law claims with more vigor than in the past in connection with claims arising from securitizations.

Observations and Conclusions

Numerous industry commenters agreed that the requirements of Rule 15Ga-2 should only apply to third-party due diligence reports that are actually provided to an NRSRO. The SEC rejected those arguments.

In the rule, the SEC notes that commenters were concerned that requiring issuers and underwriters to make information available for private placements would violate rules prohibiting general solicitation, but goes on to reiterate its view that the required information can be disclosed “without jeopardizing reliance on private offering exemptions and safe harbors under the Securities Act of 1933 (the ‘Securities Act’), provided that the only information made publicly available on Form ABS-15G is required by the rule, and the issuer does not otherwise use Form ABS-10G to offer or sell securities or in a manner that conditions the market for offers or sales of its securities.” In any event, issuers may now use general solicitation to market securities offered pursuant to Rule 144A, which is the primary private offering exemption used for offerings of asset-backed securities.

Section 15E(s)(4)(B) of the Exchange Act requires that the certification be provided to any NRSRO producing a credit rating to which the due diligence services “relate,” a term that is not defined in Section 15E(s)(4)(B) or in Rule 17g-10. Commenters questioned the extent to which due diligence services provided in connection with a transaction should be deemed to relate to a credit rating if those services were not required by and their results were not provided to an NRSRO as a part of its rating process. In adopting the final rules, the SEC appeared to conclude that almost any third-party report regarding due diligence services provided in connection with a rated transaction relates to that credit

rating, because the certification will be required to be made available to any NRSRO that wishes to see it, regardless of whether it is required by that NRSRO's rating criteria. Therefore, a due diligence services provider will be deemed to have met its obligation to provide Form ABS Due Diligence-15E if it "promptly delivers" the form to:

- Any NRSRO that requests it, in writing, before or after the completion of the due diligence services, stating that the services relate to a rating the NRSRO is producing; and
- To the issuer or underwriter that maintains the Internet website required by Rule 17g-5 under the Exchange Act.

The certification requirement and process is likely to be a burden on due diligence vendors, raising concerns about additional liability as well as additional cost. It remains to be seen how and if due diligence providers will endeavor to pass along such additional cost to their clients, the issuer and underwriters.

In addition, the fact that Rule 15Ga-2 filings must be signed by the issuer or the underwriter will also raise significant concerns for individuals at financial institutions who are required to make the filings.

Issuers, underwriters and due diligence providers need to immediately consider the consequences of these new rules. In addition to determining relative allocations of liability for the filings and finding individuals willing to sign the Form ABS-15G, there are additional burdens in making EDGAR filings; and securitization participants will need to comply with the additional ABS-Due Diligence 15E filings. The application of these provisions to onshore private securitization transactions and the broad definition of due diligence means that few, if any, rated securitizations going forward will escape its grasp.

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