LATHAM & WATKINS LLP

Decoding the Exchange Act ABS Definition: A Practical Guide to Classifying Structured Finance Transactions

Key considerations when determining whether a securitization falls within the Exchange Act's definition of an asset-backed security

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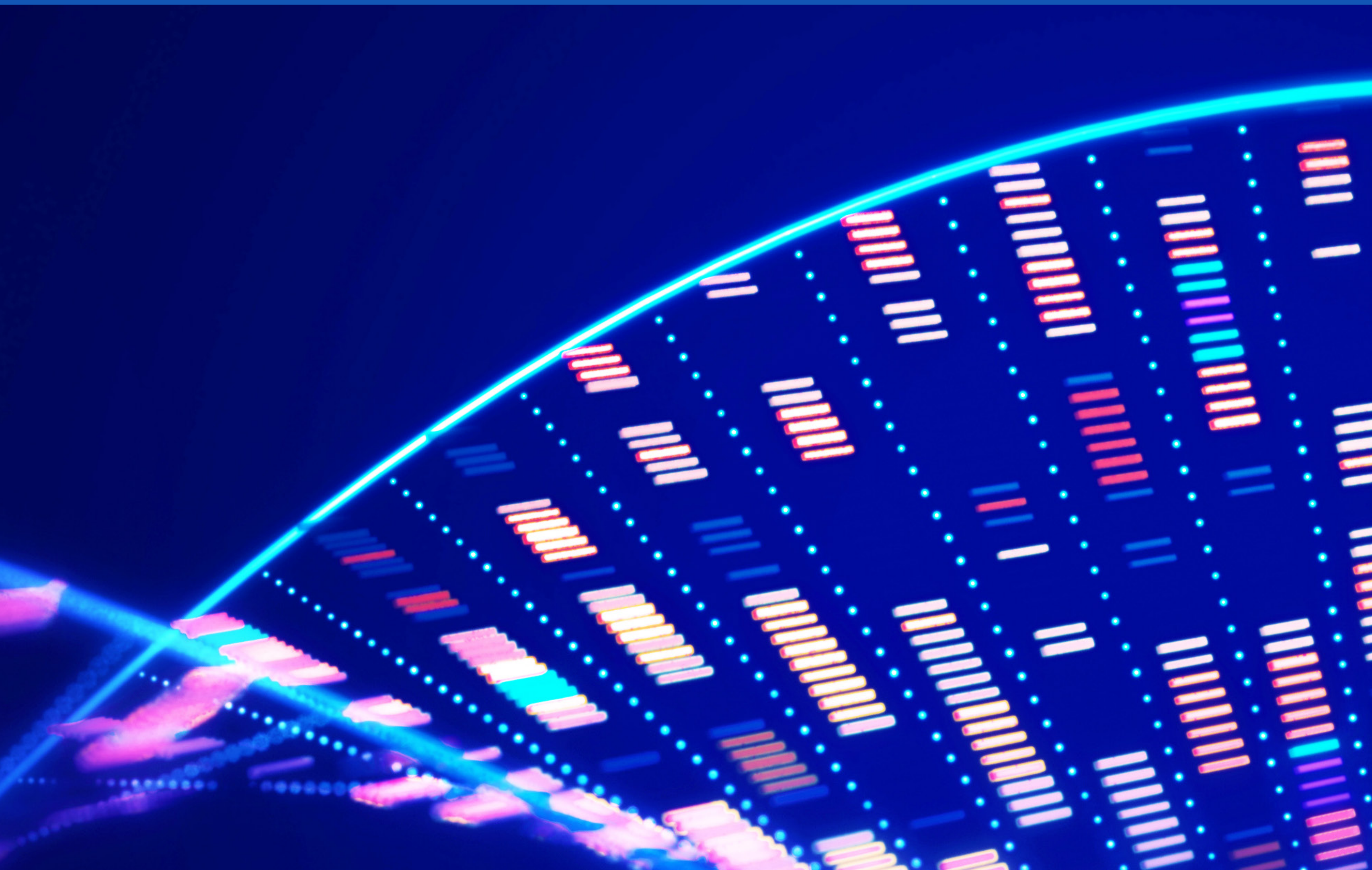

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Introduction

The definition of an asset-backed security (ABS) under the Securities Exchange Act of 1934 (the Exchange Act) — commonly referred to as Exchange Act ABS — is fundamental to the post-financial crisis regulatory framework governing securitizations.[1] Whether a security qualifies as Exchange Act ABS determines the applicability of risk retention requirements, conflicts of interest prohibitions, disclosure obligations, and rating agency transparency rules. Yet the statutory definition, introduced in 2010 by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), can be difficult to apply in practice, particularly as transaction structures have grown more complex.

This report provides a practical framework for analyzing the Exchange Act ABS definition. It traces the definition's regulatory origins from the Securities and Exchange Commission's (SEC's) 1992 shelf eligibility framework through Regulation AB and the 2010 Regulation AB II proposal, explaining how this "regulatory DNA" informs the statutory text. It then applies this framework to common and emerging transaction structures, addresses frequently asked questions, and summarizes the regulatory obligations triggered by Exchange Act ABS classification.

The analysis in this report is intended to guide structuring, due diligence, and compliance decisions for sponsors, issuers, underwriters, collateral managers, and investors. Given the complexity of determining whether a security qualifies as Exchange Act ABS, market participants should seek advice on applying these principles to specific transactions.

Regulatory History: Tracing the Evolution of the ABS Definition

The Exchange Act ABS definition entered the securities law framework in 2010 when Congress imposed new regulatory obligations on the securitization market. The preambles accompanying the SEC's implementing rulemakings offer guidance for interpreting the elements of the definition.[2] Any interpretive exercise, however, should also consider the broader regulatory framework, because the Exchange Act ABS definition is built from regulatory DNA.

The 1992 Blueprint

The regulatory definition of an asset-backed security can be traced to 1992, when the SEC first permitted shelf registration of ABS offers and sales.[3] The SEC noted that the definition was intentionally broad to provide sufficient flexibility and accommodate future market developments. The SEC also noted that the definition did not distinguish between debt and equity and intentionally omitted a list of eligible assets, which it viewed as too limiting. Instead, the framework focused on the core concept of a "self-liquidating asset" that by its terms converts into one or more cash payments within a finite time period.[4]

The concepts introduced in the 1992 definition formed the basis of the securities law framework, including the Regulation AB ABS and Exchange Act ABS definitions, and have guided subsequent interpretations. The 1992 definition, in relevant part, read as follows:

> [T]he term "asset-backed security" means a security that is primarily serviced by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period plus any rights or other assets designed to assure the servicing or timely distribution of proceeds to the security holders.[5]

The regulatory DNA embedded in this definition is detailed below.

Several key principles are embedded in this formulation. First, the definition focused on the source of the cash flows servicing the security, not on its legal form. In its proposal, the SEC used the phrase "a security the obligations of which are primarily serviced by cash flows," but removed "obligations" in the final rule to clarify that the definition encompasses both debt and equity ABS interests.[6] The relevant question was whether the instrument was "primarily serviced by the cashflows" of a qualifying asset pool. This form-agnostic approach is a central piece of regulatory DNA that informed both the Regulation AB ABS and Exchange Act ABS definitions, and is significant for the later discussion on intermediate interests in cash flows.

The 1992 definition also embodied the concept of "self-liquidating" through the phrase "discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period."[7] To avoid being overly restrictive, the SEC did not enumerate a list of eligible assets, instead using the broad phrase "receivables or other financial assets." The SEC provided examples such as notes, leases, installment contracts, interest rate swaps, small business loans, credit card receivables, accounts receivable, franchise or servicing arrangements, short-term trade receivables, home equity loans, and various other types of receivables. This regulatory DNA is foundational to interpreting the term "self-liquidating" in the Exchange Act ABS definition, as discussed below.

The 2004 Regulation AB Framework

In 2004, the SEC adopted Regulation AB to establish a comprehensive registration, disclosure, and reporting regime for certain ABS.[8] This framework was designed for ABS satisfying two core principles: (i) being backed by a discrete pool of self-liquidating assets (i.e., assets that by their own terms convert into cash) and (ii) an absence of active pool management.[9] The SEC made clear that ABS not meeting this definition must rely on non-Regulation AB form eligibility for registration.[10] As a result, most issuers of ABS that do not meet the Regulation AB ABS definition have not registered offerings and instead remain in the private markets.

In adopting Regulation AB, the SEC explained that the structure of an asset-backed security is designed to insulate investors from the sponsor's corporate credit risk, so the security's performance is primarily a function of the self-liquidating nature of the underlying assets.[11] The SEC also reaffirmed that the definition was intentionally broad.[12]

The Financial Crisis Response and Regulation AB II

The 2007-2009 financial crisis highlighted widespread risk-taking across the credit markets, affecting the US and global economies and spurring an investigation by the Financial Crisis Inquiry Commission (FCIC) into the causes of the crisis.[13] In its 2011 report, the FCIC concluded that the crisis was avoidable and was caused, in part, by widespread failures in financial regulation. Among its conclusions regarding regulatory failures, the FCIC found that the SEC failed at its core mission to protect investors because it did not adequately enforce disclosure requirements and exempted certain securities sales from its review.[14]

The FCIC highlighted that Rule 144A was adopted in 1990[15] with the intent to make US securities markets more attractive, noting that market participants viewed US disclosure requirements for registered offerings as more onerous than those in other countries.[16] The FCIC also observed that Rule 144A created a liquid market for qualified institutional investors that could freely trade Rule 144A restricted securities. However, when Rule 144A was adopted, debt securities were mostly corporate bonds.[17]

The SEC's focus on the Rule 144A market, however, predated the FCIC report and enactment of the Dodd-Frank Act. In April 2010, the SEC issued a proposed rulemaking to broaden the offering and disclosure framework for securitizations, commonly known as Regulation AB II. One of the most controversial proposed changes to the Rule 144A safe harbor would have required disclosure of additional information about structured finance products (SFPs) as well as a notice filing on the SEC's EDGAR system.[18] While never adopted, much of the SEC's proposed SFP definition serves as a key piece of the regulatory DNA needed to interpret the Exchange Act ABS definition.

In its Regulation AB II proposal, the SEC noted that SFPs "would be more broadly defined" than the Regulation AB ABS definition "in order to reflect the wide range of securitization products that are sold in the private markets" and that the broader definition was "intended to distinguish structured finance products from other types of securities."[19]

The text of the proposed SFP definition, in relevant part, read as follows:

> "[S]tructured finance product" means
>
> (i) A synthetic asset-backed security; or

(ii) A fixed-income or other security collateralized by any pool of self-liquidating financial assets, such as loans, leases, mortgages, and secured or unsecured receivables, which entitles the security holders to receive payments that depend on the cash flow from the assets, including —

(A) An asset-backed security as used in Item 1101(c) of Regulation AB (§ 229.1101(c)),

(B) A collateralized mortgage obligation,

(C) A collateralized debt obligation,

(D) A collateralized bond obligation,

(E) A collateralized debt obligation of asset-backed securities,

(F) A collateralized debt obligation of collateralized debt obligations; or

(G) A security that at the time of the offering is commonly known as an asset-backed security or a structured finance product.[20]

Key Takeaways

With the Regulation AB II proposal, the SEC:

- intended the "structured finance product" concept to be broader than the Regulation AB ABS definition;
- sought to capture securitizations sold in the private markets and to distinguish them from other types of securities;
- adopted the vocabulary of a security "collateralized by any pool of self-liquidating financial assets" whose payments "depend on" cash flow from those assets; and
- placed both synthetic and cash securitizations under a single conceptual umbrella.

This expanded concept of securitization's regulatory perimeter — encompassing public and private markets, and both traditional and synthetic structures — forms the third layer of regulatory DNA. The Regulation AB II proposal was developed in full view of Congress during the 2009-2010 drafting of the Dodd-Frank Act and directly informed the statutory text that became the Exchange Act definition of "asset-backed security."

Textual Analysis: The Exchange Act ABS Definition

The statutory text of the Exchange Act ABS definition is set forth below:

The term "asset-backed security" —

(A) means a fixed-income or other security collateralized by any type of self-liquidating financial asset (including a loan, a lease, a mortgage, or a secured or unsecured receivable) that allows the holder of the security to receive payments that depend primarily on cash flow from the asset, including —

(i) a collateralized mortgage obligation;

(ii) a collateralized debt obligation;

(iii) a collateralized bond obligation;

(iv) a collateralized debt obligation of asset-backed securities;

(v) a collateralized debt obligation of collateralized debt obligations; and

(vi) a security that the Commission, by rule, determines to be an asset-backed security for purposes of this section; and

(B) does not include a security issued by a finance subsidiary held by the parent company or a company controlled by the parent company, if none of the securities issued by the finance subsidiary are held by an entity that is not controlled by the parent company.

As is readily apparent, much of the Exchange Act ABS definition closely tracks the April 2010 proposed SFP definition. In fact, the initial bill introduced in December 2009[21] that developed into the Dodd-Frank Act expressly referenced the Regulation AB ABS definition. The current Exchange Act ABS definition was introduced by amendment in May 2010,[22] one month after the SEC published the Regulation AB II proposal. Although the enacted Exchange Act ABS definition is not a word-for-word adoption of the SEC's proposed SFP definition, Congress's word choices in certain respects support a broader application than the SFP definition.

The key differences between the Exchange Act ABS definition and the proposed SFP definition provide insight into legislative intent. For example:

- The Exchange Act ABS definition does not expressly reference "a synthetic asset-backed security" as was included in paragraph (i) of the proposed SFP definition. As discussed below, the SEC has interpreted the Exchange Act ABS definition to exclude synthetic asset-backed securities.[23]

- Paragraph (A) of the Exchange Act ABS definition mirrors paragraph (ii) of the proposed SFP definition; however, key differences inform interpretation of the Exchange Act ABS definition:[24]

  – Words supporting the interpretation that securitization of a single asset is within the scope of the definition:

    ▪ Paragraph (A) does not include the word "pool," which was used in the proposed SFP definition. It is not uncommon for structures to securitize a single financial asset; accordingly, the choice to omit the word "pool" was likely intended to eliminate any confusion on this point.[25]

    ▪ The reference in paragraph (A) to a "financial asset" is in singular form, as are the examples that follow in parentheses. This word choice differs from the proposed SFP definition and supports the interpretation that Congress intended to eliminate confusion about a "pool" and to include securitizations of a single asset within the scope of the Exchange Act ABS definition.

– Words supporting the interpretation that analysis of the entire cash flow structure is necessary:

- Paragraph (A) includes the term "self-liquidating," which is the same term used in the proposed SFP definition. Recall the regulatory DNA from the 1992 definition and the Regulation AB ABS definition discussed above. Although "self-liquidating" was not used in the text of those definitions, the SEC embodied the concept in the 1992 definition by using the phrase "discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period," which was carried into the Regulation AB ABS definition.[26] Given this regulatory framework, as well as the proposed SFP definition — both of which were available when the Dodd-Frank legislation was being deliberated — and the absence of any legislative history to the contrary, it is reasonable to conclude that Congress intended "self-liquidating" to be interpreted consistently with SEC precedent.

- Paragraph (A) uses the word "allows" in describing payments to security holders, rather than "entitles" as used in the proposed SFP definition. The plain meaning of "entitles" is narrow, implying a direct claim on the financial assets and their underlying cash flows, whereas "allows" is broader and does not necessarily require a direct contractual connection or entitlement. This interpretation is consistent with securitization structures commonly used in the market, including at the time of enactment. For example, many securitization structures are multilayered, employing intermediate special purpose entities between the entity holding the underlying assets that generate the cash flow and the entity issuing the securities to investors.

- Paragraph (A) includes the phrase "to receive payments that depend primarily on cash flow from the asset" — another example where regulatory DNA comes into play. Although the proposed SFP definition did not include the word "primarily," the Regulation AB ABS definition uses the similar phrase "primarily serviced by the cash flows." There is no public guidance defining "primarily" for purposes of the Regulation AB ABS definition; however, when the SEC adopted Regulation AB, it explained that the structure of the security is intended, among other things, to insulate investors from the corporate credit risk of the sponsor that originated or acquired the financial assets.[27] This is consistent with the common thread throughout the SEC's discussion that the performance of the security is primarily a function of the self-liquidating nature of the financial assets. Accordingly, analyzing whether payments depend "primarily on the cash flow from the asset" remains a facts-and-circumstances analysis that should consider how the SEC has interpreted the Regulation AB ABS definition.[28]

- The regulatory DNA of "collateralized by" in paragraph (A) is the phrase "serviced by" in the 1992 definition and the Regulation AB ABS definition. Accordingly, "collateralized by" should be interpreted consistently with "allows," "self-liquidating," and "to receive payments that depend primarily on cash flow from the asset." In adopting risk retention, the agencies adopted a definition of "collateral" clarifying that assets "collateralize" ABS interests whenever they provide the cash flow and related servicing assets that support payment, irrespective of legal structure.[29] This interpretation dovetails with the Exchange Act's use of "allows" rather than "entitles" and supports look-through analysis across intermediate entities. Although "allows" removes the need for a direct entitlement to the underlying assets, the phrase "to receive payments that depend primarily on cash flow from the asset" emphasizes that the analysis should focus on the security holder's expectation of receiving returns based primarily on the cash flow from the underlying financial assets.

- The list of examples following the core definition in paragraph (A) is largely the same,[30] with the following exceptions:
  - Unlike the proposed SFP definition, the Exchange Act ABS definition does not directly reference the Regulation AB ABS definition. However, this omission does not appear meaningful to interpreting the core Exchange Act ABS definition, as the SEC has interpreted the Exchange Act ABS definition to include all Regulation AB ABS.[31] As a matter of legislative drafting, it is preferable for statutory text to avoid references to regulations, which could change over time solely through agency rulemaking.
  - The list includes "a security that the Commission, by rule, determines to be an asset-backed security for purposes of this section," making clear that the SEC has rulemaking authority to expand the Exchange Act ABS definition. As with any statutory definition, however, it does not require the SEC to adopt rules to identify every security falling within the core definition. This framework is preferable to the proposed SFP definition's language referring to "a security that at the time of the offering is commonly known as an asset-backed security or a structured finance product."

Practical Application: Frequently Asked Questions

Although the analysis above is largely doctrinal, practitioners typically confront the Exchange Act ABS definition in concrete structuring contexts. The following discussion addresses practical questions that commonly arise in transaction structuring.

Since fees and royalties are not self-liquidating assets, are securitizations of these cash flows excluded from the Exchange Act ABS definition?

The answer depends on whether those cash flow streams have been converted into self-liquidating receivables. If the securitization vehicle holds contractual rights to receive defined fees or royalties for a finite term or up to a capped amount, and the securities are structured so that payments derive primarily from those receivables, the Exchange Act ABS definition can be satisfied. If, however, the securitization is effectively a financing of a perpetual, uncapped revenue share whose value depends on the indefinite continuation and growth of the underlying business, it functions more like an equity-like participation in enterprise value and would likely fall outside the Exchange Act ABS definition.

Are offerings that fall within an exception to the Regulation AB ABS definition still considered Exchange Act ABS?

Yes, securities can be Exchange Act ABS even if they are not Regulation AB ABS. For instance, some offerings may have features such as active portfolio management or a "series trust" structure that places them outside Regulation AB's core principles. Such offerings may nonetheless involve securities collateralized by self-liquidating financial assets with payments that depend primarily on asset-level cash flows. In these cases, Exchange Act rules governing risk retention, conflicts of interest, and rating agencies may apply even if the offering is not eligible for registration under Regulation AB.

Do synthetic ABS and/or hybrid cash/synthetic ABS fall within the Exchange Act ABS definition?

No. As discussed above, the Exchange Act defines an ABS as “a fixed-income or other security collateralized by any type of self-liquidating financial asset … that allows the holder of the security to receive payments that depend primarily on cash flow from the asset,” which by its terms excludes structures whose performance depends primarily on derivatives rather than on cash flows from assets held by the issuing entity.

The SEC has stated that synthetic securitizations are not within the scope of Exchange Act ABS-based rules. Further, the SEC has long taken the position that synthetic securitizations are not eligible for the Regulation AB regime because they are “primarily based on the performance of assets or indices not included in the ABS.”[32]

Accordingly, in implementing Section 27B of the Securities Act,[33] the SEC defined “asset-backed security” for purposes of Rule 192 to include Exchange Act ABS “and also … a synthetic asset-backed security and a hybrid cash and synthetic asset-backed security,” describing synthetic ABS as transactions “designed to create exposure to an asset that is not transferred to or otherwise part of the asset pool, generally effectuated through the use of derivatives.” The SEC’s expansion of the Rule 192 definition to include synthetic structures underscores that synthetic ABS and hybrid cash/synthetic ABS fall outside the Exchange Act ABS definition.[34]

Are all securities that allow the holder of the security to receive payments that depend primarily on cash flow from self-liquidating assets considered Exchange Act ABS?

No. A facts-and-circumstances analysis is necessary to determine whether the cash flow derives primarily from the self-liquidating asset or from some other source.

For example, as explained in a Compliance and Disclosure Interpretation (C&DI) published by the SEC’s Division of Corporation Finance, the SEC staff indicated that it would not consider funding agreement-backed notes to be Exchange Act ABS because, although the underlying funding agreement is a financial asset: (1) the notes are designed to replicate payments made by the insurance company under the funding agreement; (2) the funding agreement is a direct liability of the obligor insurance company; and (3) payments on the funding agreement-backed notes are based solely on the ability of the insurance company to make payments on the funding agreement.[35] In this case, the SEC staff determined that assessing the cash flows servicing the payments on the notes requires “looking through the funding agreement” to the general account of the insurance company.

This position is consistent with the SEC staff’s long-standing view that certain equipment trust certificates secured by lease receivables and leased property are not asset-backed securities and are instead treated as securities issued by the lessee obligor. For example, in a securitization of aircraft leases and aircraft, the application of the federal securities laws focuses on the link between distributions on the security and the general credit of the airline obligor, because the investor must look solely to the general credit of the airline obligor for repayment.[36]

Structure Examples: Common Securitization Transactions

To translate the foregoing analysis into practice, this section examines several common securitization structures and applies the Exchange Act ABS framework to each. For consistency, the following terminology is used throughout: "issuing entity" refers to the entity that issues securities to investors; "SPV" refers to the special purpose vehicle that holds the self-liquidating assets or the right to receive cash flows; and "intermediate entity" refers to one or more entities used to facilitate the flow of cash between the SPV and the issuing entity.

Cash flow from receivables → Issuing entity holds the receivables → Securities to investors

Direct receivable securitizations: A common securitization structure typically used to securitize auto loans, residential mortgages, and commercial mortgages.

Cash flow from receivables → SPV holds the receivables → Intermediate entity holds an interest in the SPV → Issuing entity holds an interest in the intermediate entity → Securities to investors

Master trust and intermediate-entity structures: A typical structure used to securitize credit cards and dealer floorplan loans. The intermediate entity may issue any type of interest to facilitate cash flow to the issuing entity (e.g., an equity interest or a receivable). For example, securities issued by an issuing entity that holds an interest (whether debt or equity) in a fund or other vehicle that originates loans could be deemed Exchange Act ABS depending on the facts and circumstances.

Cash flow from receivables (primarily) and property → SPV holds receivables (primarily) and property → Intermediate entity holds an interest in the SPV → Issuing entity holds an interest in the intermediate entity → Securities to investors

Lease-backed structures: A typical structure used to securitize leases. The intermediate entity may issue any type of interest to facilitate cash flow to the issuing entity (e.g., an equity interest, beneficial interest, trust interest, or receivable).

Cash flow from fees or royalties → SPV receives cash flow from fees or royalties → Issuing entity holds a receivable from the SPV → Securities to investors

Fee and royalty stream securitizations: A structure used to transform cash flow into a receivable when the intermediate entity issues an instrument to facilitate cash flow to the issuing entity up to a specified total amount and within a specified time period not exceeding the final maturity date of the securities issued to investors. For example, securitizations of fees assessed on customers' utility bills that are permitted to be imposed by utility companies could be deemed Exchange Act ABS depending on the facts and circumstances.

Cash flow from debt (primarily) and equity securities → SPV holds debt (primarily) and equity securities → Issuing entity holds an interest in the SPV → Securities to investors

Credit-focused investment vehicles: A structure that invests primarily in debt securities with the potential to hold some equity securities. The intermediate entity may issue any type of interest to facilitate cash flow to the issuing entity (e.g., an equity interest or a receivable). For example, securities issued in a collateralized fund obligation (CFO) that invests in or holds interests in credit funds could be deemed Exchange Act ABS depending on the facts and circumstances.

Direct Receivable Securitizations

Cash flow from receivables → Issuing entity holds the receivables → Securities to investors

Transaction Profile

A sponsor originates or acquires a discrete pool of self-liquidating financial assets (such as auto loans, residential mortgages, or commercial mortgages) and transfers such assets to an issuing entity that issues securities to investors. The receivables have defined payment schedules, maturities, and amortization requirements, converting into cash over a finite term.

Exchange Act ABS Analysis

This structure is the paradigm case for Exchange Act ABS. The securities are plainly "collateralized by" the underlying loans, and payments to investors "depend primarily on cash flow from the asset." The receivables satisfy the "self-liquidating" requirement because they convert into cash by their terms within a finite period. Although credit enhancements or limited sponsor recourse for representations and warranties may exist, the central economic engine driving investor payments is the pool of self-liquidating loans — not the credit of the sponsor or any other obligor.

Conclusion

Direct receivable securitizations constitute Exchange Act ABS, satisfying all elements of the statutory definition and representing the core use case for which the regulatory framework was designed.

Master Trust and Intermediate-Entity Structures

Cash flow from receivables → SPV holds the receivables → Intermediate entity holds an interest in the SPV → Issuing entity holds an interest in the intermediate entity → Securities to investors

Transaction Profile
An SPV holds a pool of receivables (such as corporate loans, credit card receivables, floorplan receivables, or trade receivables) and issues interests or other instruments to a separate issuing entity, which in turn issues securities to investors. The intermediate entity's interest may take various forms, including an equity interest or a receivable.

Exchange Act ABS Analysis
Under the Exchange Act ABS definition, these securities are "collateralized by" the underlying self-liquidating financial assets because the intermediate entity's interests serve as a conduit for their cash flows. The structure "allows" holders to receive payments that "depend primarily on cash flow from the asset," even where investors' direct contractual claim runs only to the issuing entity and the intermediate interest takes equity form. This is precisely where the statute's use of "allows" (rather than "entitles") and the long-standing form-agnostic regulatory approach become critical.

In adopting risk retention rules, the agencies explicitly treated property interests in, or rights to, cash flows as "collateral" regardless of whether the issuing entity holds direct title to the underlying assets — directly supporting the "allows" reading and foreclosing formalistic objections that only debt-form intermediate instruments qualify. Insisting on a direct contractual entitlement to the receivables would ignore established market practice and defeat the purpose of the Exchange Act ABS definition. Instead, the analysis must look through the chain of entities to economic reality: if the securitization's payments depend primarily on self-liquidating receivables held within the structure, the securities constitute Exchange Act ABS.

Securities issued in a delayed draw securitization established to invest in a fund that originates loans as its primary investment objective, for example, could be deemed Exchange Act ABS depending on the facts and circumstances.

Key Factors
The analysis should consider whether the SPV holds other material assets or engages in active management, and whether the structure relies on meaningful non-asset support (such as sponsor guarantees or third-party credit support) to meet payment obligations. The presence of intermediate entities does not, by itself, remove a transaction from Exchange Act ABS status.

Conclusion
Master trust and intermediate-entity structures generally constitute Exchange Act ABS where payments to investors depend primarily on cash flows from the underlying self-liquidating receivables. The form of the intermediate interest (i.e., whether debt or equity) is not determinative.

Lease-Backed Structures

Cash flow from receivables (primarily) and property → SPV holds receivables (primarily) and property → Intermediate entity holds an interest in the SPV → Issuing entity holds an interest in the intermediate entity → Securities to investors

Transaction Profile
An SPV owns a portfolio of leases and related leased property (such as vehicles or equipment). To minimize re-titling costs, the SPV issues special units of beneficial interest (SUBIs) representing the right to receive all proceeds from specified leases and leased property to an intermediate entity. The issuing entity holds an interest in the intermediate entity and issues securities to investors.

Exchange Act ABS Analysis
Lease-backed securitizations involve both receivable-type cash flows (scheduled rental payments) and residual interests in the leased property. Scheduled rental payments can qualify as self-liquidating financial assets because they convert into cash by their terms. However, the residual value component — representing the expected value of the leased property at lease termination — is not a self-liquidating financial asset.

Key Factors
The central analytical challenge is determining the relative importance of recurring rental payments versus residual property value in driving investor returns. Regulation AB provides useful breakpoints: for automobile leases, the residual value should not constitute 60% or more of the original asset pool (measured by dollar volume); for other leases, the threshold is 50%.

These breakpoints, while developed for Regulation AB purposes, can inform the Exchange Act ABS analysis. Additionally, certain lease securitizations have not been viewed as ABS by SEC staff where the economic reality is that investors must look to the general credit of the lessee obligor for repayment (e.g., in single-obligor aircraft lease transactions where the airline's creditworthiness, rather than the asset pool's self-liquidating nature, drives investor payments).

Conclusion
Lease-backed structures require a facts-and-circumstances analysis. Where scheduled rental payments constitute the primary source of investor returns and the structure does not depend on the general credit of a single obligor, the Exchange Act ABS definition can be satisfied. Where residual values or obligor operations and creditworthiness predominate, the securities may fall outside the definition.

Fee and Royalty Stream Securitizations

Cash flow from fees or royalties → SPV receives cash flow from fees or royalties → Issuing entity holds a receivable from the SPV → Securities to investors

Transaction Profile
An intermediate entity holds the right to receive ongoing fee or royalty payments (such as utility fees, franchise fees, or intellectual property royalties). The intermediate entity issues an instrument to the issuing entity entitling it to receive payments up to a specified cap and over a specified period not exceeding the maturity of the investor securities. The issuing entity then issues securities to investors backed by this instrument.

Exchange Act ABS Analysis
Fees, charges, royalties, and similar revenue streams are not, in their raw form, self-liquidating financial assets: they do not by their terms convert into cash within a finite period but instead represent ongoing, potentially perpetual revenue participation. The structuring solution is to transform these cash flows into a receivable. By creating an instrument with a defined cap and finite term, the intermediate entity generates a financial asset that converts into cash by its terms. This instrument can then serve as the self-liquidating financial asset that "collateralizes" the securities issued to investors.

Examples include utility rate securitizations (sometimes called "stranded cost" or "tariff" securitizations), where fees imposed on customers are structured into finite-term receivables under state statutory frameworks that define the collection period and amount. Similarly, music catalog financings that cap and term-limit royalty flows can satisfy the self-liquidating requirement by transforming indefinite royalty streams into instruments with defined caps and finite terms.

Key Factors
The critical structuring element is the creation of a finite, capped instrument that converts the revenue stream into a self-liquidating receivable. If the securitization is effectively a financing of a perpetual, uncapped revenue share whose value depends on the indefinite continuation and growth of the underlying business, it functions more like an equity-like participation in enterprise value and would likely fall outside the Exchange Act ABS definition.

Conclusion
Fee and royalty stream securitizations can constitute Exchange Act ABS where the structure transforms the underlying cash flows into a self-liquidating receivable with a defined cap and finite term. The key question is whether the instrument held by the issuing entity converts into cash by its terms.

Credit-Focused Investment Vehicles

Cash flow from debt (primarily) and equity securities → SPV holds debt (primarily) and equity securities → Issuing entity holds an interest in the SPV → Securities to investors

Transaction Profile
An SPV invests primarily in debt securities (such as corporate loans, bonds, or other credit instruments), with some allocation to equity securities or fund interests. Intermediate interests may be issued to an issuing entity, which then issues securities to investors.

Exchange Act ABS Analysis
The central question is whether the transaction is structured so that investor payments depend primarily on cash flows from the underlying credit instruments. Debt securities with defined payment terms can qualify as self-liquidating financial assets, and where the investment opportunity centers on such cash flows, the Exchange Act ABS definition may be satisfied. The presence of some equity allocation does not, by itself, defeat the classification; the statute requires only that payments depend "primarily" (rather than exclusively) on cash flows from self-liquidating assets.

By contrast, a CFO where the collateral consists primarily of limited partnership or equity interests in private equity funds typically falls outside the definition, because investor payments depend principally on asset appreciation and net asset value (NAV) realization rather than distributions of cash flows made on underlying assets.

Accordingly, securities issued by a CFO that holds interests in credit funds backed predominantly by loans or debt securities with defined payment schedules could constitute Exchange Act ABS depending on the facts and circumstances, whereas a CFO backed primarily by limited partnership or equity interests in private equity or venture funds would likely fall outside the definition.

Key Factors
The analysis turns on the composition of the asset pool and the source of expected investor returns. If equity and fund interests are substantial and returns are expected to derive principally from capital appreciation, trading gains, or other active efforts to generate proceeds on those interests, the securitization may fall outside the Exchange Act ABS definition because it would not meet the requirement that the security be "collateralized by any type of self-liquidating financial asset." The distinction is between structures where credit instrument cash flows drive returns and structures that function more like equity funds.

Conclusion
Credit-focused investment vehicles can constitute Exchange Act ABS where the asset pool consists primarily of debt securities and investor payments depend primarily on cash flows from those instruments. Structures with substantial equity or fund interests, or where returns depend on active management to generate capital appreciation, are less likely to satisfy the definition.

Unifying Principles

Across these structures, the unifying analytical approach is to look through formal labels and intermediate entities to the economic substance of the transaction. Key questions include:

- Are the underlying assets self-liquidating financial assets that convert into cash by their terms within a finite period?
- Do payments to investors depend primarily on cash flows from those assets, rather than on sponsor credit, active management, or other sources?

If both answers are yes, the Exchange Act ABS definition is likely satisfied — and the full suite of Dodd-Frank regulatory obligations will apply.

Regulatory Obligations: Rules Triggered by Exchange Act ABS Classification

The Exchange Act ABS definition is the triggering concept for a suite of Dodd-Frank regulatory requirements affecting sponsors, issuers, underwriters, collateral managers, rating agencies, and third-party due diligence providers across both public and private securitization markets. An accurate understanding of which securities constitute Exchange Act ABS is essential to determining which transactions and market participants must comply.

Risk Retention (Regulation RR)

Regulation RR[37] under the Exchange Act requires "securitizers" of asset-backed securities (defined as sponsors and issuers) to retain a specified minimum economic interest in the credit risk of the securitized assets. The rule includes a menu of options for retaining risk as well as certain exemptions. The term "asset-backed security" in the rule incorporates the Exchange Act ABS definition by reference.

As a result, if a security is an Exchange Act ABS, the risk retention framework must be considered. For sponsors and issuers, this means that where a transaction falls within the Exchange Act ABS definition, they must analyze whether they are securitizers under the rule, whether the transaction qualifies for any exemptions, and, if not, what form of risk retention is appropriate.

Underwriters, initial purchasers, and placement agents, while not typically securitizers, face potential anti-fraud and disclosure liabilities if they participate in offerings where risk retention is required but not properly implemented or disclosed.

Conflicts of Interest in Securitizations (Rule 192)

Rule 192[38] under the Securities Act prohibits a securitization participant from engaging in any transaction that would result in a material conflict of interest with an investor in the underlying asset-backed security. A material conflict of interest arises if the securitization participant engages in a "conflicted transaction," which occurs if there is a substantial likelihood that a reasonable investor would consider the transaction important to its investment decision.[39] Rule 192 enumerates three types of conflicted transactions:

1. a short sale of the relevant asset-backed security;

2. the purchase of credit derivative instruments that would entitle the securitization participant to payments upon specific credit events in respect of the asset-backed security; and

3. the purchase or sale of any financial instrument that is substantially the economic equivalent of scenario (1) or (2).[40]

Rule 192 provides exceptions for risk-mitigating hedging activities, liquidity commitments, and bona fide market-making, each subject to technical requirements that a securitization participant must satisfy to rely on the exception.[41] Under Rule 192, the definition of "asset-backed security" is broader than the Exchange Act ABS definition, as it expressly includes synthetic and hybrid cash/synthetic asset-backed securities.[42]

Similarly, "securitization participant" is a broad term encompassing underwriters, placement agents, initial purchasers, sponsors, and any affiliates acting in coordination with them or who have access to information about the ABS.[43]

Disclosure Requirements (Rule 15Ga-1, Rule 15Ga-2, and Rule 17g-10)

Several Dodd-Frank rules impose disclosure or filing obligations keyed to Exchange Act ABS.

Rule 15Ga-1

Rule 15Ga-1[44] requires securitizers to provide periodic repurchase history disclosure for asset-backed securities, capturing information about repurchase demands based on breaches of representations and warranties. This obligation applies where the securities in question constitute Exchange Act ABS. Sponsors and issuers must therefore determine whether their transactions fall within the definition and, if so, maintain systems to track and report relevant repurchase demand activity.

Rule 15Ga-2

Under Rule 15Ga-2,[45] if an issuer or underwriter of rated Exchange Act ABS obtains a third-party due diligence report, the issuer or underwriter must file the report's findings and conclusions on Form ABS-15G before the first sale in the offering. This rule ensures that investors and the market are informed about the substance of due diligence performed on securitized assets.

Underwriters, initial purchasers, and placement agents must therefore assess whether the securities they are distributing constitute Exchange Act ABS and whether any third-party due diligence reports trigger filing obligations. Sponsors, in turn, must coordinate with underwriters to ensure consistent and accurate disclosure.

Rule 17g-10

Under Rule 17g-10,[46] when a nationally recognized statistical rating organization (NRSRO) is paid to rate an Exchange Act ABS that used third-party due diligence services, the NRSRO must obtain and disclose a certification from the due diligence provider. This requirement ensures that rating agencies receive and pass along information about the scope and results of due diligence. Due diligence providers, sponsors, and underwriters must be prepared to deliver the necessary certifications for such transactions.

Communication With Rating Agencies (Rule 17g-5)

To address certain NRSRO conflicts of interest, Rule 17g-5[47] requires certain ratings-related information and communications to be posted and maintained on password-protected websites. Where Exchange Act ABS are involved, sponsors and underwriters often have contractual obligations to provide transaction information to NRSROs for posting on these websites, facilitating greater transparency and competition among rating agencies.

The requirements of Rule 17g-5 apply to "a security or money market instrument issued by an asset pool or as part of any asset-backed securities transaction," and NRSROs typically interpret Exchange Act ABS to fall within its scope. Accordingly, NRSROs in rated securitizations determine whether Rule 17g-5 website and posting arrangements are required. Sponsors often manage these sites, while underwriters and collateral managers must incorporate the associated information flows into their compliance frameworks.

Compliance Responsibilities: Allocation Among Market Participants

Responsibility for complying with these rules is distributed across various roles, with the Exchange Act ABS definition serving as a common trigger. Sponsors, issuers, underwriters, initial purchasers, placement agents, collateral managers, NRSROs, investment advisers, and their affiliates may each be implicated depending on the specific rule. The table below provides a high-level allocation of responsibilities among common securitization participants.

	Sponsor / issuer	Underwriter / initial purchaser / placement agent	Collateral manager / investment adviser
Risk retention	Direct obligation	General anti-fraud applies regarding disclosure requirements	If designated as a risk retention holder as permitted by rule
Prohibition on conflicts of interest	Direct obligation	Direct obligation	Direct obligation
Disclosures **Rules 15Ga-1, 15Ga-2, and 17g-10**	Direct obligation for Rules 15Ga-1 and 15Ga-2	Direct obligation for Rule 15Ga-2	
Rule 17g-5 website and postings	Direct obligation to maintain website and post	Direct obligation to maintain website and post	May have contractual obligations to provide information

	Affiliates	NRSRO	Due diligence provider
Risk retention	If designated as a risk retention holder as permitted by rule		
Prohibition on conflicts of interest	Affiliate as defined in rule and consider carveout provided by SIFMA no-action letter[48]		
Disclosures **Rules 15Ga-1, 15Ga-2, and 17g-10**	May have contractual obligations to provide information	Direct obligation for disclosures related to Rules 15Ga-2, 17g-10, and about representations and warranties	Direct obligation for Rule 17g-10
Rule 17g-5 website and postings	May have contractual obligations to provide information	Direct obligation for Rule 17g-5	

These allocations underscore the importance of correctly determining whether a security is an Exchange Act ABS. Misclassification can result in risk retention failures, prohibited conflicts of interest, missed filing requirements, or procedural breaches — each of which can carry significant consequences, including fines, penalties, investigations, or potentially litigation.

The consequences of misapplying the Exchange Act ABS definition depend on the specific facts and circumstances. Failure to comply with risk retention rules can expose sponsors and affiliates to enforcement actions, securities litigation, and contractual disputes. Violations of the conflicts of interest rule can lead to significant sanctions, particularly where investors suffered losses tied to undisclosed conflicted positions. Failure to make required disclosures under Rules 15Ga-1, 15Ga-2, 17g-5, or 17g-10 can attract regulatory scrutiny, undermine investor confidence, and expose transaction participants to SEC examination or enforcement actions. Moreover, the anti-fraud provisions of the federal securities laws apply to all statements and disclosures, independent of these rule-specific requirements.

Conclusion

Determining whether a security qualifies as Exchange Act ABS is a threshold question for compliance with the post-financial crisis regulatory framework. Risk retention, conflicts of interest prohibitions, disclosure requirements, and rating agency transparency rules all turn on this foundational classification. The statutory definition can be difficult to apply, however, particularly as securitization structures have grown more complex and expanded into the private markets.

This report has presented a framework grounded in regulatory history and textual analysis. The Exchange Act ABS definition is best understood as a statutory codification of concepts that developed over nearly two decades of SEC rulemaking — from the 1992 shelf eligibility framework through Regulation AB and the 2010 Regulation AB II proposal. Properly interpreted, the definition captures a broad range of modern securitization activity, including single-asset and multilayered structures, while excluding synthetic securitizations.

The unifying principle is to look through formal labels and intermediate entities to the economic substance of the transaction. If payments to investors depend primarily on contractually defined cash flows from self-liquidating financial assets, the Exchange Act ABS definition is likely satisfied — and the full suite of Dodd-Frank regulatory obligations will apply.

Navigating Exchange Act ABS classification requires legal counsel that combines technical sophistication with a practical understanding of structuring, compliance, and enforcement dynamics. Latham brings together premier structured finance, capital markets, and regulatory practices across financial centers worldwide. This deep market knowledge, developed through extensive work advising sponsors, issuers, underwriters, and investors on securitization transactions, enables clients to navigate these complex questions with confidence.

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Endnotes

1 *See* Section 3(a)(79) of the Exchange Act [15 U.S.C. 78c(a)(79)].

2 *See e.g.*, Disclosure for Asset-Backed Securities Required by Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Release No. 33-9175 (Jan. 20, 2011) [76 FR 4489]; Nationally Recognized Statistical Rating Organizations, Release No. 34-72936 (Aug. 27, 2014) [79 FR 55078]; Prohibition Against Conflicts of Interest in Certain Securitizations, Release No. 33-11254 (Nov. 27, 2023) [88 FR 85396] ("Rule 192 Adopting Release").

3 *See* Simplification of Registration Procedures for Primary Securities Offerings, Release No. 33-6964 (Oct. 22, 1992) [57 FR 48970] ("1992 S-3 Adopting Release").

4 *See* the 1992 S-3 Adopting Release at 48972.

5 Form SF-3 no longer contains the definition of "asset-backed security" that was previously in 17 CFR 239.13(b)(5), *but see* the 1992 S-3 Adopting Release at 48976 for the original text.

6 As noted in the 1992 S-3 Adopting Release, the proposed definition included the phrase "a security the obligations of which are primarily serviced" and the term "obligations" was deleted in order to clarify that the definition does not distinguish between debt and equity.

7 *See* the 1992 S-3 Adopting Release at 48973.

8 *See* Asset-Backed Securities, Release No. 33-8518 (Dec. 22, 2004) [70 FR 1506] (Jan. 7, 2005) ("2004 Regulation AB Adopting Release").

9 17 CFR 229.1101(c). *See also* Section III.A.2. of the 2004 Regulation AB Adopting Release.

10 *See* 2004 Regulation AB Adopting Release at 1515.

11 *See* Section I.A. of the 2004 Regulation AB Adopting Release.

12 *See* Section III.A.2. of the 2004 Regulation AB Adopting Release.

13 *See* Fin. Crisis Inquiry Comm'n, The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States (2011) ("FCIC Report"), https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf.

14 *See* FCIC Report at 187.

15 Rule 144A provides a safe harbor for resellers from being deemed an underwriter within the meaning of Sections 2(a)(11) and 4(a)(1) of the Securities Act of 1933 (the Securities Act) for the sale of securities to qualified institutional buyers. If the Rule 144A safe harbor is satisfied, sellers may rely on the exemption from Securities Act registration provided by Section 4(a)(1) for transactions by persons other than issuers, underwriters, or dealers. *See* Asset-Backed Securities, Release No. 33-9117 (Apr. 7, 2010) [75 FR 23328 at 23334] (2010 Regulation AB II Proposing Release).

16 *See* FCIC Report at 170 (noting that Congress further reinforced the Rule 144A exemption from registration by passing legislation the preempted state securities regulators from overseeing private placements). *See* also National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (1996).

17 *See* FCIC Report at 170.

18 *See* 2010 Regulation AB II Proposing Release at 23395.

19 *See* 2010 Regulation AB II Proposing Release at 23395.

20 *See* 2010 Regulation AB II Proposing Release at 23435-36.

[21] *See* Section 1502 of the draft text available here: https://www.congress.gov/congressional-record/volume-155/issue-185/house-section/article/H14496-4.

[22] *See* Section 941 of the draft text available here: https://www.congress.gov/bill/111th-congress/house-bill/4173/text/eas.

[23] 17 CFR 230.192.

[24] Our discussion focuses on Exchange Act ABS paragraph (A). Paragraph (B) does not require interpretation since it clearly excludes securities that are issued only to affiliates.

[25] The SEC has discussed its view that securitizations of single assets fall within the definition of Exchange Act ABS most recently in 2023. *See e.g.*, Rule 192 Adopting Release, Section II.A.3.A. (noting if the SEC were to adopt an exemption for transactions collateralized by a single, self-liquidating asset, it would provide the opportunity for securitization participants to structure offerings of a series of transactions that would serve to evade the rule).

[26] *See* discussion above under "The 1992 Blueprint."

[27] *See* 2004 Regulation AB Adopting Release at 1508.

[28] For example, the Regulation A exemption from registration is not available for offerings of Regulation AB ABS. *See* 17 CFR 230.261(c).

[29] *See* 12 CFR 244.2 "Collateral."

[30] Also note that some of the examples, such as a collateralized debt obligation of asset-backed securities, demonstrate the intent to include multi-layered structures.

[31] *See* fn. 1 above.

[32] *See* Credit Risk Retention Proposing Release, Release No. 34-64148, [76 FR 24090] (June 10, 2011) at fn. 2; 2004 Regulation AB Adopting Release at 1514.

[33] 15 U.S.C. 77z-2a.

[34] *See* Section II.A.3.B. of the Rule 192 Adopting Release.

[35] *See* C&DI 301.03, available at: https://www.sec.gov/rules-regulations/staff-guidance/compliance-disclosure-interpretations/asset-backed-securities.

[36] American Airlines, Inc., SEC No-Action Letter (pub. avail. July 28, 1987).

[37] 17 CFR Part 246.

[38] 17 CFR 230.192.

[39] 17 CFR 230.192(a)(2).

[40] 17 CFR 230.192(a)(3).

[41] 17 CFR 230.192(b).

[42] 17 CFR 230.192(c) "Asset-backed security."

[43] 17 CFR 230.192(c) "Securitization participant."

[44] 17 CFR 240.15Ga-1.

[45] 17 CFR 240.15Ga-2.

[46] 17 CFR 240.17g-10.

[47] 17 CFR 240.17g-5.

[48] SIFMA, SEC No-Action Letter (May 16, 2025), available at https://www.sec.gov/rules-regulations/no-action-interpretive-exemptive-letters/division-corporation-finance-no-action/sifma-051625.