# Reg AB II Revisited: Fourth and Goal

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Not only is football back, but so is Reg AB II. Just as enduring as our love of tailgating and touchdowns is our love of transparency in the capital markets. On the heels of yet another Reg AB comment deadline (see re-proposed rule here (pdf)) now is a good time to check the score. Dechert continues to participate in committee (and subcommittee) discussions with industry specialists and we were happy to serve as nose tackle for the drafting of CREFC's response/comment letter (see CREFC comment letter here (pdf)). So where do we stand with shelf registration eligibility requirements now that Dodd-Frank and its related regulations have addressed some of the issues included in the second round of Regulation AB from April 2010 (i.e., Reg AB II)?

There is still plenty to talk about with respect to Reg AB II, but some issues are now being dealt with elsewhere. Risk retention was addressed by March 2011's Dodd-Frank rules and on-going '34 Act reporting by ABS issuers was addressed by Dodd-Frank's Section 942(a) and Rule 15Ga-1. Both of those issues have been removed from the scope of Reg AB II. The previous discussion concerning confirmation of reps and warranties has evolved, as detailed below, into a discussion about the role of a credit risk manager and procedures related to repurchase dispute resolution. At least one thing that is still clear: credit ratings are to be eliminated from the shelf eligibility test.

But, again, there is still plenty to talk about. Following is the current Reg AB II playbook and some of the straight talk:

- Proposal – The chief executive officer or executive officer in charge of securitization of the depositor would have to file a certification concerning the disclosure contained in the prospectus and the design of the securitization.
    - Straight Talk – The CEO already signs the registration statement. Is a CEO realistically involved in offering document disclosure and the details of deal structure? Should an issuer's CEO really be charged with ensuring the design of a deal, when the mechanics of the deal are disclosed to investors?
- Proposal – The underlying transaction documents would have to contain provisions requiring the appointment of a credit risk manager to review assets upon the occurrence of certain trigger events.
    - Straight Talk – Operating trust advisor, part 2? Aren't existing deal parties capable of doing this? We at CrunchedCredit have written about this issue before (see here).

- Proposal – The underlying transaction documents would have to contain provisions requiring dispute resolution mechanics for repurchase requests/demands.
    - Straight Talk – In CMBS land, the number of repurchases has been low. Is this really an area for regulation or should private parties sculpt their own resolutions?
- Proposal – The underlying transaction documents would have to include certain investor communication provisions.
    - Straight Talk – Some investors already have access to other investors. Mandating access to communication through 10-D reporting raises anonymity concerns with respect to the same investors whose interests the regulations are intended to protect.
- Proposal – An annual evaluation would have to be filed with respect to compliance with registration requirements.
    - Straight Talk – Requiring annual certifications instead of quarterly ones (as originally proposed) is an improvement but there's still a 90-day delay in getting your shelf back after you cure non-compliance, which could stifle deal flow.
- Proposal – The underlying transaction documents, in substantially final form, would have to be filed by the date the preliminary prospectus is required to be filed.
    - Straight Talk – In the pre-crisis registration context, we got used to post-closing filings of servicing agreements, pricing documents and other material transaction documents, and in recent deals some issuers have been providing a red PSA at the time of the preliminary offering document, so this doesn't seem revolutionary, but shouldn't we limit the required documents to those required as exhibits to the registration statement?

Also, what about Reg AB II when it comes to Rule 144A resales and Reg D issuances? Still on the table is the idea that investors, upon request, can require a CMBS issuer to provide information that would have otherwise been required had the deal been publicly offered. Assuming that result, what are the benefits of the private placement market?

Stay frosty, Marines! It has been said that sunlight is the best disinfectant, but I'm not sure I can see the scoreboard through the sun's glare. The good news is that we have shed some of our Reg AB II baggage. A touchdown for the free market? Don't get too excited: Dodd-Frank has left quite a few issues on the horizon (and some others are already upon us). A pick 6 for the regulators? Or is the score tied? Regardless of the score, as we move through the regular season, we are making progress working through the issues on our Reg AB II checklist.