



August 8, 2011

**VIA E-MAIL: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)**

Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090  
Attn: Elizabeth M. Murphy, Secretary

**Re: Release No. 34-64514; File No. S7-18-11**

Ladies and Gentlemen:

The American Securitization Forum (“ASF”)<sup>1</sup> appreciates the opportunity to submit this letter in response to the request of the Securities and Exchange Commission (the “Commission”) for comments regarding Release No. 34-64514; File No. S7-18-11 (the “Proposing Release”),<sup>2</sup> relating to the implementation of Section 932 (Enhanced regulation, accountability, and transparency of nationally recognized statistical rating organizations) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”). ASF supports appropriate reforms within the asset-backed securities (“ABS”) market and we commend the Commission for seeking industry input regarding its proposed rules on this critically important issue. Over the past decade, ASF has become the preeminent forum for securitization market participants to express their views and ideas. ASF was founded as a means to provide industry consensus on market and regulatory issues, and we have established an extensive track record of providing meaningful comment to the Commission and other agencies on issues affecting our market. Our views as expressed in this letter are based on feedback received from our broad membership, which includes issuer, investor, ABCP conduit sponsor, accounting firm, law firm, credit rating agency, due diligence provider and financial intermediary members.

Section 932(a)(8) of the Dodd-Frank Act (“Section 932(a)(8)”) adds new subparagraph (s)(4) to Section 15E of the Securities Exchange Act of 1934 (the “Exchange Act”), containing a number

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<sup>1</sup> The American Securitization Forum is a broad-based professional forum through which participants in the U.S. securitization market advocate their common interests on important legal, regulatory and market practice issues. ASF members include over 330 firms, including issuers, investors, servicers, financial intermediaries, rating agencies, financial guarantors, legal and accounting firms, and other professional organizations involved in securitization transactions. ASF also provides information, education and training on a range of securitization market issues and topics through industry conferences, seminars and similar initiatives. For more information about ASF, its members and activities, please go to [www.americansecuritization.com](http://www.americansecuritization.com).

<sup>2</sup> See <http://www.sec.gov/rules/proposed/2011/34-64514.pdf>.

of provisions relating to due diligence services for asset-backed securities. These provisions apply to any “asset-backed security” (“Exchange Act ABS”) as defined in the definition added to the Exchange Act by the Dodd-Frank Act. New subparagraph (s)(4)(A) of Exchange Act Section 15E requires an issuer or underwriter to make publicly available the findings and conclusions of any report of a third-party due diligence service provider (in this letter, a “TPDDS Provider”) obtained by the issuer or underwriter. The Commission interprets this requirement in the Proposing Release, and proposes Rule 15Ga-2 under the Exchange Act to address this requirement, as well as changes to Form ABS-15G to accommodate such disclosure by an issuer or underwriter. New subparagraph (s)(4)(B) requires a TPDDS Provider to provide a written certification (in this letter, a “TPDDS Provider Certification”) to any nationally recognized statistical rating organization (“NRSRO”) that produces a rating to which such services relate, where the TPDDS Provider was engaged by the NRSRO, an issuer or underwriter. The Commission proposes Rule 17g-10 to address this requirement. New subparagraph (s)(4)(C) requires the Commission to establish the form and content of any such certification required to be provided by a TPDDS Provider, and the Commission has proposed Form ABS Due Diligence-15E in response to this requirement. Finally, new subparagraph (s)(4)(D) requires the Commission to adopt rules requiring an NRSRO, when producing a rating of an Exchange Act ABS, to disclose to the public the TPDDS Provider Certification, and the Commission proposes subparagraph (a)(2) of Rule 17g-7 to address this requirement.

This comment letter is limited to the above aspects of the Proposing Release. Set forth below are our members’ comments and concerns relating to the proposed rules.

### **I. When should a TPDDS Provider be required to provide a TPDDS Provider Certification?**

(Section II.H., Prefatory, general RFC)

The Proposing Release raises the threshold question of how a TPDDS Provider will know to whom and when it is obligated to provide a TPDDS Provider Certification.

Section 15E(s)(4)(B) is a provision that imposes a requirement on the TPDDS Provider to provide the certification in the required form directly to the NRSRO, but only to any NRSRO “that produces a rating to which such services relate”. While the provision may appear to be self-executing, a TPDDS Provider cannot comply unless it knows that its report “relates” to a rating of an Exchange Act ABS by an NRSRO.

Generally, at the time when a TPDDS Provider report is obtained, the TPDDS Provider may not know if the report will be provided to an NRSRO. In situations where a report is obtained prior to a decision to securitize the assets, such as when a report is obtained by an aggregator as pre-purchase diligence, the report would not “relate” to a rating at the time it was initially provided, but could at a later time “relate” to a rating as a result of a decision to provide the report to an NRSRO.

We believe that the party that is in the best position to identify TPDDS Provider reports that “relate” to a rating is the NRSRO rating the security. The issuer or underwriter will only be aware of such reports that it provides to an engaged NRSRO. But the issuer or underwriter would

not or may not know whether: a) an engaged NRSRO elected to disregard a report provided to it, b) an engaged NRSRO accessed and considered a report provided to a different engaged NRSRO via its Rule 17g-5 website, c) an engaged NRSRO directly retained a TPDDS Provider, or d) a non-engaged NRSRO accessed and considered a report provided to an engaged NRSRO via its Rule 17g-5 website. For these reasons, only an NRSRO rating the security will be able to identify the complete set of TPDDS Provider reports that “relate” to its rating of the security.

Proposed subparagraph (a)(2) of Rule 17g-7 requires that the report required to be published by an NRSRO when it rates an Exchange Act ABS include any TPDDS Provider Certification “related” to the rating that is received by the NRSRO. However, the NRSRO has additional, affirmative disclosure obligations in this regard. Subparagraph (a)(1)(ii)(F) would also require the NRSRO to disclose whether and to what extent TPDDS Provider services were “used” by the NRSRO. Again, only the NRSRO issuing the rating is in a position to know which TPDDS Provider reports were used by it.

**Recommended change:** Against this backdrop, we recommend that the proposed rules be revised to provide that a TPDDS Provider is required to deliver a TPDDS Provider Certification, in compliance with its obligations pursuant to Section 15E(s)(4)(B), upon the following triggering event:

promptly upon receipt of a written request from an NRSRO, in which request the NRSRO states that it has received or obtained the TPDDS Provider’s report in connection with the NRSRO’s issuing a rating on Exchange Act ABS backed in whole or in part by assets covered by such report.

This revision could appear in Rule 17g-10, or in an instruction to that rule. This provision would ensure that an NRSRO, in preparing its published report under Rule 17g-7, would have a legal basis for requiring the TPDDS Provider to deliver its TPDDS Provider Certification, if it had not previously been provided. We propose that this be the only specific triggering event in the regulations for the mandatory delivery of the TPDDS Provider Certification.

**Recommended change:** We also recommend that the Commission clarify, by language in the adopting release for these rules or by other means, that generally, for purposes of determining whether a TPDDS Provider report “relates” to a rating by any NRSRO, the report should be considered to relate to the rating if the report was received or obtained by the NRSRO for its use in connection with determining the rating, unless the NRSRO determined that the report was not relevant to its determination of the rating.

In practice, we would anticipate that when an issuer or underwriter engages a TPDDS Provider to issue a report on due diligence services, and the issuer or underwriter is aware at the time the report is obtained that NRSRO criteria would require such a report to be provided to an NRSRO in connection with rating any future ABS transaction backed by the subject assets, the issuer or underwriter might require the TPDDS Provider to deliver a TPDDS Provider Certification along with the initial delivery of the report. This would eliminate any uncertainty about whether the certification will be available in the future. We also note that the form of the TPDDS Provider Certification appears to allow it to be prepared and executed on a one-time basis, in that the certification does not need to be addressed to any specific NRSRO.

**II. What should be the scope of an issuer or underwriter's duty under Section 15E(s)(4)(A)?**

(Section II.H.1., general RFC)

Section 15E(s)(4)(A) on its face creates an expansive obligation on the part of the issuer or underwriter of an Exchange Act ABS to make public disclosure about “any” TPDDS Provider report obtained. However, as stated in the Proposing Release, the Commission has determined that this provision “should be interpreted more narrowly to relate to” the other provisions of new subparagraph (s)(4) discussed above. One direct result of this more narrow interpretation is the proviso to the issuer and underwriter’s obligation to furnish Form ABS-15G, discussed in detail below.

Proposed Rule 15Ga-2 would implement Section 15E(s)(4)(A) by requiring that the disclosure required by that section be provided by the issuer or underwriter by the means of furnishing Form ABS-15G<sup>3</sup>. The first part of paragraph (a) of proposed Rule 15Ga-2 requires disclosure via Form ABS-15G with respect to “the findings and conclusions of any third-party due diligence report” obtained by the issuer or underwriter. But the second part of paragraph (a) goes on to say that no Form ABS-15G is required to be filed, if a representation that can be reasonably relied on is obtained from the NRSRO that the disclosure required by such paragraph (a) will be provided by the NRSRO in a report pursuant to Rule 17g-7(a)(1).

We believe that the proviso in the second part of paragraph (a) strongly suggests that the scope of the issuer or underwriters’ disclosure obligation under the first part of paragraph (a) is significantly narrower than the plain reading of that language suggests. Our reasoning is as follows.

The structure of paragraph (a) is such that the first part requires the issuer or underwriter to provide disclosure in Form ABS-15G of the findings and conclusions of a group of TPDDS Provider reports. But the second part of the paragraph results in Form ABS-15G not being required, if the disclosure required by the first part of the paragraph will be provided in the NRSRO report required under Rule 17g-7(a)(1). This construction only makes sense if the complete set of reports about which disclosure is required in the first part of the paragraph is coextensive with the set of reports for which disclosure is required under Rule 17g-7(a)(1). In other words, if the NRSRO complies with its representation and publishes a report pursuant to Rule 17g-7(a)(1) on a timely basis, the publication of that report satisfies the issuer or underwriters’ obligation to furnish Form ABS-15G, and that creates a strong logical inference that a Form ABS-15G would otherwise be required only to address any TPDDS Provider reports that are required to be addressed in a report pursuant to Rule 17g-7(a)(1). The relevant portion of Rule 17g-7(a)(1) is subparagraph (a)(1)(ii)(F), which requires the NRSRO to disclose whether

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<sup>3</sup> We appreciate that the Commission determined to require this information to be “furnished”, rather than “filed”, thereby causing the information to not be part of the registration statement and therefore not subject to liability under Section 11 of the Securities Act. We believe this treatment is entirely appropriate for this type of information (unlike the alternative, which could have the significant unintended consequence of discouraging the sharing of due diligence information with NRSROs, or even discouraging the hiring of TPDDS Providers).

and to what extent TPDDS Provider services were “used” by the NRSRO, and to disclose the findings and conclusions of such reports.

Unfortunately, the language of the first part of paragraph (a) is expansive, in much the same way as Section 15E(s)(4)(A) is expansive, in that on its face it references “any third party due diligence report obtained by the issuer or underwriter.” This language simply does not match the more limited scope of the Rule 15Ga-2 disclosure requirement as evidenced by the Proposing Release. In addition to the intent to narrowly interpret Section 15E(s)(4)(A) discussed above, and the logical inference from the second part of paragraph (a) as discussed above, there is ample language in the Proposing Release that is consistent with a narrower scope of the disclosure required from the issuer or underwriter under Rule 15Ga-2. In describing the operation of Rule 15Ga-2, the Proposing Release states that “having the issuer or underwriter publicly disclose the same information an NRSRO must, when applicable, disclose pursuant to proposed new paragraphs (a)(1)(ii)(F) and (a)(2) of Rule 17g-7 with the publication of a credit rating would be redundant.”<sup>4</sup> This supports the view that the set of reports for which disclosure is required under Rule 15Ga-2 is coextensive with the reports required to be disclosed under Rule 17g-7. Furthermore, in discussing the differences between due diligence reports referenced in Rule 15Ga-2 and due diligence which may be used in connection with the review of the pool assets required in a registered offering under new Rule 193 under the Securities Act of 1933 (the “Securities Act”), the Proposing Release notes that proposed Rule 15Ga-2 relates to a “particular type of report that is relevant to the determination of a credit rating by an NRSRO,” and further states that “the information required by proposed Rule 15Ga-2 only pertains to the findings and conclusions of a third party due diligence report relevant to the determination of a credit rating.”<sup>5</sup> If the language of Rule 15Ga-2 is not revised as we suggest below, this mismatch between the literal language and its apparent intent will result in a conflict, which could lead issuers and underwriters to overcomply in practice in ways that could impair the new issuance process. For example, issuers and underwriters could take the view that the literal language of Rule 15Ga-2(a) requires a Form ABS-15G as to any TPDDS Provider reports that they obtained, regardless of whether they were given to or used by an NRSRO.

**Recommended change:** Accordingly, in order to effectuate the expressed desire of the Commission to interpret Section 15E(s)(4)(A) narrowly as described above, and in order to fully give effect to the apparent intent of the second part of paragraph (a) as discussed above, we recommend that Rule 15Ga-2(a) be revised to clearly state that:

the issuer or underwriters’ obligation to furnish Form ABS-15G is limited to those TPDDS Provider reports that were obtained by the issuer or underwriter and were provided by the issuer or underwriter to, and used by, an NRSRO engaged to issue a rating on Exchange Act ABS backed in whole or in part by assets covered by such report.

We note that, in the event the issuer or underwriter were not able to determine which reports that it provided to an NRSRO were actually used by the NRSRO, and if the NRSRO failed to publish the report required by Rule 17g-7(a)(1) on a timely basis, the issuer or underwriter could comply

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<sup>4</sup> Proposing Release, *Federal Register* version, at p. 33468

<sup>5</sup> Proposing Release, *Federal Register* version, at p. 33469

with Rule 15Ga-2 by simply including in the disclosure on Form ABS-15G information about all of the reports that it provided to the NRSRO. Note that under this proposed clarification, the issuer or underwriter would have no disclosure obligation with respect to any TPDDS Provider reports that were used by a non-engaged NRSRO.

Our proposed clarification is similar to the comment discussed at footnote 526 of the Proposing Release. However, our provision would turn not on whether the report was prepared “for the purpose” of sharing it with an NRSRO, but rather on whether the report was provided to and used by an engaged NRSRO. We submit that this difference is an improvement, because it removes a subjective element from the test (the original purpose for which the report was prepared) and because the provision better dovetails with the requirements of Rule 17g-7(a)(1) as well as the stated intent of the Commission to relate the scope of the Rule 15Ga-2 requirements to reports that are relevant to a rating determination.

We note that the effect of our proposed clarification is that there may be reports and other work product obtained by an issuer or underwriter that could fall within the definition of “third party due diligence report”, but which would not fall within the scope of disclosure required under Rule 15Ga-2 because they are not provided to and used by an NRSRO. We believe that is an appropriate result in light of viewing the provisions of Exchange Act Section 15E(s)(4) on a holistic basis, and also in light of the separate requirements relating to a review of the pooled assets for registered offerings under Rule 193. For example, an aggregator purchasing closed residential mortgage loans from various originators may engage TPDDS Providers to review these loans prior to the time of purchase by the aggregator. At the time of purchase, an aggregator may not necessarily intend to securitize; and could, alternatively, hold and finance the loans indefinitely, or use a whole loan sale to exit all or a portion of its investment in the loan pool. Similarly, diligence may be performed at the time of loan origination when it is impossible to know whether such loan might be securitized in the future and, consequently, whether the results of such due diligence might be required to be disclosed. In any event, there is no reason that the diligence at the time of purchase or at origination should be included in the Form ABS-15G disclosure, if that diligence was not given to and used by an NRSRO in generating a rating of any ultimate securitization. However, if that diligence was used to fulfill in part the issuer’s obligation to perform a review of the pool assets under Rule 193 in a registered offering, then the findings and conclusions of the review would have to be included in the disclosure in the prospectus pursuant to Item 1111(a)(7)(ii) of Regulation AB.

As another example, in connection with a registered offering of an Exchange Act ABS, there may be a review of numerical information in the prospectus performed by accountants, engaged by either the issuer or the underwriter, in accordance with agreed upon procedures (“AUP”) specified by the sponsor or the underwriter. Typically, underwriters of ABS obtain an AUP letter from an accounting firm addressing numerical information in the prospectus. Even though an AUP letter is not an audit, it is an important part of establishing the underwriter’s due diligence defense. While this type of review could be deemed to fall within the definition of “due diligence services” in proposed Rule 17g-10, these AUP letters are generally not provided to an NRSRO, nor have AUP letters traditionally been used by NRSROs for ratings purposes. AUP engagements are performed by accountants in accordance with strict professional standards established by the American Institute of Certified Public Accountants. If the AUP letter was

provided to an NRSRO, this would directly contradict the American Institute of Certified Public Accountants' standards (which restrict the use of the report to the parties specified in the letter) unless the NRSRO were a named addressee, which is generally not the case. Accordingly, there is no reason why such an AUP letter should generally be included in the Form ABS-15G disclosure, and our proposed clarification outlined above will prevent this result.

**Recommended change:** We also recommend that within proposed Rule 15Ga-2, the phrase “containing the findings and conclusions” be revised to “containing a summary of the findings and conclusions”. We further recommend that within proposed Rule 17g-7(a)(1)(ii)(F), the phrase “a description of the findings and conclusions” be revised to “a summary of the findings and conclusions”. This language as revised better aligns with the language in Item 5 in proposed Form ABS Due Diligence-15E. In each case, what should be provided is a summary of the findings and conclusions, not the findings and conclusions themselves, and there is no reason why the summary would not be substantially similar in each context.

**Recommended change:** Finally, we request a clarification that for purposes of paragraph (b) of proposed Rule 15Ga-2, the NRSRO will be deemed to have fulfilled its representation to “publicly disclose” the required disclosure if the NRSRO has met the requirements of Rule 17g-7 regarding publication.

In this regard, we note that the Proposing Release in discussing the publication requirement in the prefatory text to paragraph (a) of Rule 17g-7, states that if the NRSRO “operates under the subscriber pay business model, it would need to disseminate the form and any certifications to the subscribers only.”<sup>6</sup> On the other hand, in the portion of the Proposing Release discussing Rule 15Ga-2 and the NRSRO’s representation that it will publicly disclose the findings and conclusions of a TPDDS Provider report, in footnote 534 this statement appears: “Consequently, an NRSRO that agreed to make the findings and conclusions available only to its subscribers or prospective investors in the Exchange Act-ABS would not satisfy this requirement.” We respectfully request that the Commission revisit these two apparently inconsistent statements, and also make the clarification requested above.

### **III. Should Section 15E(s)(4)(A) apply only to registered offerings?**

(Section II.H.1., question 2)

The Commission specifically requests comment on whether Section 15E(s)(4)(A) should apply to both registered and unregistered Exchange Act ABS offerings. While the provisions of Section 15E(s) of the Exchange Act generally appear to be intended to apply to credit ratings of both registered and unregistered securities, we believe that Section 15(s)(4)(A) should apply only to registered offerings of Exchange Act ABS.

Assuming that the scope of the issuer and underwriter’s disclosure duty under Rule 15Ga-2 is narrowed as outlined in the previous Section, which we believe is consistent with the legislative intent behind Section 15E(s)(4)(A), it becomes apparent that the disclosure by the issuer or underwriter is nothing more than a backstop designed to come into play if the same substantive

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<sup>6</sup> Proposing Release, *Federal Register* version, at p. 33457

disclosure is not provided by the NRSRO via the report pursuant to Rule 17g-7(a) within the timeframe set out in Rule 15Ga-2. In the context of registered offerings, this backstop fits in with the overall regulatory scheme of issuer disclosure, because Commission rules mandate not only the content, but just as importantly the timing of required disclosure. This backstop makes even more sense in the registered context if the timing is synched with the required timing for providing a preliminary prospectus prior to the time of first sale pursuant to proposed revisions to Regulation AB (popularly known as “Regulation AB II”), which are still pending. In other words, in the registered context, since the issuer needs to make sure that all required disclosure is provided on a timely basis, Rule 15Ga-2 serves to plug the gap in disclosure that would result regarding TPDDS Provider reports if the Rule 17g-7(a) report were not published by the time that substantially all other disclosure is provided by the issuer. Importantly, Rule 17g-7 does not impose on the NRSRO a requirement that the report be published in accordance with the timeline set out in Rule 15Ga-2.

In the unregistered context, the timing related rationale for the issuer and underwriter’s disclosure duty under Rule 15Ga-2 is entirely inapplicable. There are no timing requirements for providing disclosures to investors at any specific time prior to the time of sale. In addition, Rule 17g-7 would require that the NRSRO report, containing disclosure about the findings and conclusions of any TPDDS Provider report, be published at the same time as the rating (including any preliminary rating) is published. Assuming that the NRSRO complies with its obligations under the rule, the disclosure would be required pursuant to Rule 17g-7 at a time that is consistent with the overall timing (which is not regulated) for disclosure to investors in an unregistered offering. There is no need for the issuer or underwriter to be required to provide the same disclosure at an earlier time, and there is no need for the issuer or underwriter to obtain any certification from the NRSRO that it would publish its report at a time earlier than mandated under Rule 17g-7. In other words, if Rule 15Ga-2 were modified to remove any timing requirement for unregistered offerings, there would be no regulatory purpose for having the rule apply to unregistered offerings at all, because the same disclosure would be provided by the NRSRO under Rule 17g-7. Rule 15Ga-2 would be entirely redundant for unregistered offerings.

We recommend that the Commission take the view that Rule 15Ga-2 should not impose a timing requirement on disclosure in an unregistered offering that differs from the timing requirement for the NRSRO’s publication of its report under Rule 17g-7. Since the timing of all disclosure to investors in an unregistered offering is not directly regulated, and is determined in the discretion of the issuer and underwriter with a view towards a variety of factors including investor requirements as well as potential securities law liability, we see no reason why this one aspect of disclosure should be singled out as being subject to a regulatory timing requirement imposed on the issuer or underwriter, especially since this same disclosure in the first instance is required to be made by the NRSRO.

**Recommended change:** For the above reasons, we strongly believe that Rule 15Ga-2 should be revised to apply to registered offerings only.

Indeed, Congress may have intended this result. Its choice of the word “underwriter” in Section 15E(s)(4)(A) would be consistent with this approach, in that the term “underwriter” is generally used in the registered offering context but not in unregistered offerings. In contrast, Section 621

of the Dodd-Frank Act, adding Section 27B to the Securities Act which prohibits material conflicts of interest as between various types of transaction parties to an Exchange Act ABS and any investor for a period of one year following the first closing in the sale of the ABS, refers not only to an “underwriter”, but also refers to a “placement agent” or “initial purchaser”, which terms are generally used in unregistered offerings. While it may not be possible to discern Congress’ specific intent as to whether Section 15E(s)(4)(A) should apply to unregistered offerings, we do submit that Congress could not reasonably have intended for the Commission to either a) adopt a rule under Section 15E(s)(4)(A) that imposes an entirely redundant requirement on unregistered offerings, or b) adopt a rule under Section 15E(s)(4)(A) that imposes a timing requirement for issuer disclosure in an unregistered offering that differs from the timing requirement imposed on the NRSRO for publication of its rating report. We further submit that Section 15E(s)(4)(A) does not require the Commission to adopt a rule that applies to unregistered offerings, if that rule in the context of the overall set of rules promulgated pursuant to the Dodd-Frank Act would serve no regulatory purpose.

#### **IV. How should the definition of “due diligence services” be clarified?**

(Section II.H.2., general RFC)

In addition to the above comments, we recommend that the Commission further clarify the intended meaning of the term “due diligence services” in proposed Rule 17g-10, in the following respects. We note that the Proposing Release does contemplate an appropriately limited scope for this definition. For example, the release states that the definition “could avoid overly broad interpretations... that cause entities not providing due diligence services to needlessly provide certifications to NRSROs.”<sup>7</sup>

**Recommended change:** First, while the definition consistently refers to a review of the assets underlying an Exchange Act ABS, in order to avoid any ambiguity, we recommend that the Commission clarify that the definition does not include any review of the creditworthiness, financial condition or operations of any transaction participant, including but not limited to any originator, servicer, sponsor, credit enhancer or derivatives counterparty.

**Recommended change:** Second, we recommend that the Commission clarify that references to persons providing the due diligence services, and who must therefore provide the TPDDS Provider Certification, refer only to the entity engaged to perform the review of the assets and to prepare the report relating to that review, and not to providers of services and resources that may be used by the entity performing the review. Specifically, the following categorically should not be deemed to be persons providing due diligence services: appraisers; brokers providing broker’s price opinions (“BPOs”); persons providing alternative valuation method (“AVM”) software or facilities; persons providing engineering or environmental reports; title insurers; attorneys rendering legal services; employment verification services; and persons providing compliance review software or facilities.

We believe that this clarification would eliminate unnecessary concern regarding this issue, and would be consistent with the Commission’s intent. In this regard, we note the statements in the

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<sup>7</sup> Proposing Release, *Federal Register* version, at p. 33472

Proposing Release that the proposed definition of “due diligence services” is intended to cover services provided by entities “typically considered to be providers of third party due diligence services in the securitization market and... not... every type of person that might perform some type of diligence in the offering process.”<sup>8</sup> Further, we note the following from the cost-benefit analysis section of the Proposing Release: “The Commission preliminarily believes there are approximately 10 firms that provide, or would begin providing, third-party “due diligence services” to issuers and underwriters of Exchange Act-ABS as the term “due diligence services” would be defined in paragraph (a) of proposed new Rule 17g-10.”<sup>9</sup>

**V. Is the timing of the disclosure requirements set forth in the Proposing Release appropriate?**

(Section II.H.1., question 9)

Proposed Rule 15Ga-2 generally contemplates that the required disclosure, whether by the issuer or underwriter pursuant to Form ABS-15G, or by the NRSRO by a report pursuant to Rule 17g-7(a)(1), be provided at least five business days prior to the first sale in the offering. We understand this to refer to the time of sale concept as embodied in Rule 159 under the Securities Act. This five business day requirement parallels a requirement that appears in proposed Regulation AB II under which in a shelf takedown a complete preliminary prospectus (subject only to pricing dependent information) would have to be provided within that same time frame, along with substantially complete transaction documentation under the recent re-proposals to Regulation AB II.

We have a number of concerns about this timeline.

**Recommended change:** First, in the event that the parallel timeline under Regulation AB II is shortened, then a corresponding shortening of the timeframe under Rule 15Ga-2 should be made. Since both of these rules directly relate to the timing of finalizing the composition of the asset pool, they should match.

We note that, in our previously submitted comment letter<sup>10</sup> on Regulation AB II as initially proposed, we requested that the timeframe for the delivery of the preliminary prospectus be narrowed to two business days, and to one business day for certain material changes in the preliminary prospectus, prior to the first sale.

Second, for the reasons set out in Section III of this letter, we believe that Rule 15Ga-2 should not be applicable to unregistered offerings. The preliminary prospectus timeline under Regulation AB II will not apply to unregistered deals. Therefore, for unregistered offerings of Exchange Act ABS, the proposed Rule 15Ga-2 timeline would in effect require that the composition of the asset pool be finalized significantly earlier than would otherwise be required. If it is determined that Rule 15Ga-2 will be applicable to unregistered offerings, we would recommend that the timeline be substantially shortened.

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<sup>8</sup> Proposing Release, *Federal Register* version, at p. 33472

<sup>9</sup> Proposing Release, *Federal Register* version, at p. 33499

<sup>10</sup> See <http://www.americansecuritization.com/uploadedFiles/ASFRegABIICommentLetter8.2.10.pdf>.

**VI. Responses to selected specific questions in the Proposing Release**

Definition of “rating action” (Section II.G.1., question 1)

We recommend that the Commission add language in the adopting release to clarify that “an affirmation of an existing rating” will not include an NRSRO providing a written statement, in response to a request by a transaction party pursuant to a requirement in an operative document for an Exchange Act ABS, that a specific action (such as an amendment to an operative document) will not result in a downgrade or other adverse rating action. Various known as a “rating agency consent” or “no downgrade letter”, these statements simply confirm that a specific contractual change or other action will not result in adverse effect on an existing rating. These statements do not reflect a comprehensive review of a transaction, unlike the type of review that would be undertaken in connection with an affirmation of a rating following on the placement of a rating on watch or review.

Receipt of TPDDS Provider Certification (Section II.G.5., general RFC)

We would recommend that proposed subparagraph (a)(2) of Rule 17g-7 be revised to accommodate situations in which an NRSRO indirectly obtains a copy of a TPDDS Provider Certification from another source, rather than directly from the TPDDS Provider. This could arise, for example, when an engaged or non-engaged NRSRO obtains a TPDDS Provider Certification and related report from the Rule 17g-5 website of another NRSRO, or when an engaged NRSRO receives a TPDDS Provider Certification from the issuer along with the report. The existing proposed language refers only to certifications received by an NRSRO from a TPDDS Provider.

Sample size (Section II.H.3., question 2)

Form ABS Due Diligence-15E should not impose any minimum sample size. These rules should not impose a sample size or other minimum criteria for a due diligence review, but rather should only require disclosure related to the due diligence that was performed. In this regard, we note that Rule 193 also does not impose any minimum sample size.

Implementation timeline (Section III, question 3)

We would generally recommend a single compliance date of not less than 180 days following publication of the final rules in the *Federal Register*. We believe this amount of time, at a minimum, will be required in order to get necessary systems and procedures in place, especially in light of other regulatory changes in the securitization markets coming into effect in the near term. In the event that the Commission does not use a single compliance date, we note that the compliance date for Rule 15Ga-2 must be no earlier than the compliance date for Rules 17g-7 and 17g-10. We also note that a 180-day period will minimize the possibility that a TPDDS Provider might issue a report prior to the publication date of the final rules, which would later be subject to the requirement for a TPDDS Provider Certification because it was provided to and used by an NRSRO in connection with a rating.

ASF very much appreciates the opportunity to provide the foregoing views in connection with the Commission's rulemaking process. We are available at your convenience to discuss our comments and requests. Should you have any questions or desire any clarification concerning the matters addressed in this letter, please do not hesitate to contact me at 212.412.7107 or at [tdeutsch@americansecuritization.com](mailto:tdeutsch@americansecuritization.com). You may also contact Evan Siegert, ASF Managing Director, Senior Counsel, at 212.412.7109 or at [esiegert@americansecuritization.com](mailto:esiegert@americansecuritization.com) or ASF's outside counsel on this matter, Stephen Kudenholdt of SNR Denton US LLP at 212.768.6847 or at [steve.kudenholdt@snrdenton.com](mailto:steve.kudenholdt@snrdenton.com).

Sincerely,

A handwritten signature in cursive script that reads "Tom Deutsch".

Tom Deutsch  
Executive Director  
American Securitization Forum