



November 12, 2010

Ms. Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

**Subject: Issuer Review of Assets in Offerings of Asset-Backed Securities  
File Number S7-26-10**

Dear Ms. Murphy:

The Mortgage Bankers Association<sup>1</sup> (MBA) welcomes the opportunity to comment on the Securities and Exchange Commission's (SEC) proposed regulations related to issuer review of assets in asset-backed securities (ABS) offerings (Proposal).<sup>2</sup> The Proposal implements Sections 945 and 932 of the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>3</sup> (Dodd-Frank Act) by requiring ABS issuers to perform a review of the assets underlying an ABS. In addition the Proposal would require the ABS issuer to disclose the nature of its review of the assets and the findings and conclusions of the issuer's review of the assets. If the issuer has engaged a third party for purposes of reviewing the assets, the issuer would be required to disclose the third-party's findings and conclusions and certain disclosures relating to the third-party due diligence provider.

New Securities Act Rule 193, specified in the Proposal, would require an issuer to perform a review of the assets underlying an ABS in a transaction. The Proposal does not specify the level or type of review an issuer is required to report. Rule 193 applies to issuers of ABS in registered offerings and not issuers of ABS in unregistered offerings.

New rule 15Ga-2 would require an issuer or underwriter of either registered or unregistered Exchange Act-ABS to make publicly available the findings and conclusions of any third-party due diligence report on the assets of a pool. The SEC is also proposing that a form (Form ABS-15G) be created to report the finding and conclusions of an asset review and that the form be filed five business days before the first sale of the offering so investors can determine which originators have underwriting deficiencies. The Proposal would require the form to be signed by

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<sup>1</sup> The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: [www.mortgagebankers.org](http://www.mortgagebankers.org).

<sup>2</sup> 75 Fed. Reg. 201, 64182-64197, (October 19, 2010).

<sup>3</sup> Public Law 111-203, (July 21, 2010).

the issuer's chief securitization officer. By filing in a prospectus in a registered issuance the findings and conclusions of a report provided by a third party, the issuer would satisfy this provision.

### **CMBS Background**

For the commercial mortgage-backed securities (CMBS) industry, there are detailed due diligence and reporting requirements that are part of the securitization process that provide transparency for CMBS. The CMBS industry currently provides asset-level disclosure to investors on the schedules attached to the prospectus (typically called "Annex A"), based on the specific types of commercial loans in the transaction. As the commercial assets are unique, and are not generally uniform like many other asset types, the type of asset-level reporting may vary based on the properties and loans offered in the transaction. Often the issuer will provide additional separate spreadsheets to augment the general asset-level data to highlight unique attributes of its transaction, including for example, information on the debt service payment schedule for the largest loans, detailed reserve account information, detailed characteristics of the multifamily loans and/or information at the pooled level on the loans (including cut off balances, mortgage rates, terms to maturity, debt service coverage ratio (DSCR), cut off and maturity date loan to value (LTV), etc.). In addition, the CMBS industry typically will also provide significant details, including asset-level data, on the top ten loans (by unpaid principal balance) in the prospectus.

In addition to Annex A, loan level due diligence documents that are generally required by rating agencies for CMBS include<sup>4</sup>:

- Financial History – Three years of financial statements and the trailing 12-month income statement.
- Underwriter's Analysis of Stabilized Cash Flow – Includes footnotes of assumptions used for all adjustments to revenue, expenses, capital expenditures, tenant improvements and leasing costs, if applicable.
- Appraisal – Complete MAI appraisal less than 12 months old.
- Property Condition Report – Assessment that is less than 12 months old of the property's conditions, building quality, immediately needed repairs and the future capital needs over the life of the loan prepared by a licensed engineer.
- Phase I Environmental Report – A current (less than 12 months) phase I report prepared in compliance with ASTM protocols by a licensed environmental engineer.
- Current Rent Roll – Should show the as-of date, tenant's name, space occupied, rent paid, beginning and ending lease dates and other pertinent lease data.
- Insurance Certificates – Should detail coverage levels and names of carriers.
- Seismic Report – Required for properties in higher risk seismic zones (seismic zones 3 and 4).

Finally, issuers have existing liability under securities laws if a prospectus contains an untrue statement of material fact or excludes a material fact required to be stated.

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<sup>4</sup> Standard & Poor's Property Evaluation Criteria, CMBS Property Evaluation Criteria, p.7.

### **RMBS Background**

Because of the large number of loans in a residential mortgage-backed security (RMBS) due diligence is usually performed on a statistically significant sample of loans rather than all loans in the pool. The sample can be randomly selected or adversely selected (such as where a certain loan characteristic might be of concern). The level of review also is usually based on factors such as the issuer's history and experience with the originator, the originator's experience, the representations and warranties to be provided to the issuer, the type of loan and the quality of the data.

Due diligence reviews typically include:

- Adherence to originator credit underwriting guidelines and issuer risk tolerances;
- Compliance with federal, state and local regulatory laws, and;
- The integrity of electronic loan data.

### **MBA Position**

MBA commends the SEC's efforts to implement the Dodd-Frank Act with the objectives of increasing market confidence and re-starting the securitization markets. Given the existing high level of disclosure for CMBS coupled with the issuer's existing legal requirement to disclose all material facts in the prospectus, the reporting of the issuer's asset review practices are duplicative of existing disclosure practices. Consequently, Rule 193 would not increase the transparency of CMBS for investors. Given the limited utility of this disclosure, MBA supports the SEC's position of not prescribing and not requiring the disclosure of the methodology for issuer's review of unregistered securities.

A further rationale against proposing minimum levels of review or dictating the types of review that an issuer needs to complete is the difficulty of imposing due diligence standards even within asset classes. For example, the level of issuer review for prime, seasoned residential mortgages vis a vis newly originated Alt A mortgages need not be identical.

Regarding New Rule 15Ga-2 for CMBS, MBA believes that unregistered CMBS should be exempt from Form ABS-15G because the information provided in this form would be inferior to existing disclosures made in Annex A of a CMBS perspective. As previously indicated, there is robust property level disclosure in Annex A that contains far more property and loan pool information than can be provided in summaries of third-party pool level reviews. In addition, Annex A and other portions of the perspective summarize key findings regarding environmental reports and the appraised value for every property in the securitization. MBA is also concerned that investors might substitute the third-party report summaries for their comprehensive analysis of the loan level and pool level data contained in Annex A.

MBA also believes government sponsored enterprises' (GSEs) issuance of multifamily ABS should also be exempted from New Rule 15Ga-2. The proposed requirement for the disclosure of summaries of third-party asset reviews was not contemplated in the GSE multifamily MBS model. The third-party review of the underlying assets in a multifamily MBS will duplicate the review done at origination, which provides an underwriting of each asset for credit, compliance and valuation. The pools of multifamily assets are typically very small, often consisting of a single asset. The assets are originated by GSE-approved originators, and each asset is chosen according to a rigorous set of standardized underwriting guidelines for multifamily property. The originator provides substantial information to investors of each multifamily MBS. Consequently,

investors would not be benefited by the application of the proposed New Rule 15Ga-2 to GSE multifamily ABS.

MBA also requests the SEC to reconsider the proposed approach to third-party due diligence providers. According to the Proposal, issuers are permitted to engage a third-party due diligence provider so long as the third party is named in the registration statement and consents to being named as an "expert" in accordance with Rule 436.

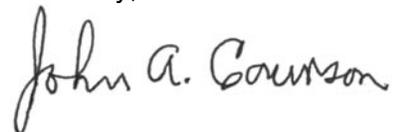
MBA is concerned that this requirement would have a "chilling effect" on third-party due diligence providers because it is unlikely that these providers would be willing to subject themselves to such liability. Moreover, we believe attributing liability to a third-party in this manner is redundant to an issuer's existing liability under current SEC regulations.

MBA therefore requests the SEC revise the Proposal to exempt third-party due diligence providers from the expert liability requirement. In addition, MBA requests that the Proposal does not classify mortgage bankers and brokers who source loans for issuers as "third-party independent reviewers".

### **Conclusion**

MBA appreciates the opportunity to comment and request that you consider our concerns. Any questions about MBA's comments should be directed to George Green, Associate Vice President, Commercial Real Estate, at (202) 557-2840 or [ggreen@mortgagebankers.org](mailto:ggreen@mortgagebankers.org); or Michael Carrier, Associate Vice President, Secondary and Capital Markets (202) 557-2870, [mcarrier@mortgagebankers.org](mailto:mcarrier@mortgagebankers.org).

Sincerely,



John A. Courson  
President and Chief Executive Officer  
Mortgage Bankers Association