Deloitte & Touche LLP
Ten Westport Road
P.O. Box 820
Wilton, CT 06897-0820
USA

www.deloitte.com

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

Re: File No. S7-26-10; Securities Nos. 33-9150, 34-63091, Issuer Review of Assets in Offerings of Asset-Backed Securities

Deloitte & Touche LLP appreciates the opportunity to respond to the request for comments from the Securities and Exchange Commission (the "SEC" or the "Commission") on its release *Issuer Review of Assets in Offerings of Asset-Backed Securities* (the "Release").

The Release seeks comments on proposed rules to implement Section 945 and a portion of Section 932 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Act"). To implement these provisions, the Commission has proposed three new rules: (1) Proposed Rule 193 under the Securities Act of 1933 (the "Securities Act"), requiring an issuer of asset-backed securities ("ABS") to perform a "review of the pool assets" underlying the ABS, which may be performed by the issuer or a third party, 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 of the Securities Act; (2) a proposed amendment to Item 1111 of Regulation AB, requiring the nature of the review of the ABS assets performed by the ABS issuer to be disclosed in the registration statement, along with disclosure about whether a third party was engaged to conduct the review and, if so, the findings and conclusions of the review; and (3) Proposed Rule 15Ga-2 under the Securities Exchange Act of 1934 (the "Exchange Act"), requiring any issuer or underwriter of an ABS to file with the Commission a Form ABS-15G, which contains the findings and conclusions of any report obtained by the issuer or underwriter from a third party engaged for the purpose of performing a review of the pool assets.

We believe the Commission should clarify the types of activities that will constitute a "review of the pool assets underlying the asset-backed security" (as used herein, a "pool asset review") for purposes of these proposed rules. We believe that Congress intended pool asset reviews to mean those activities performed in connection with an ABS offering that focus on qualitative assessments of the pool assets underlying the ABS. Examples of the activities that we believe Congress intended to cover would include qualitative assessments of the accuracy and completeness of source documents (e.g., notes, mortgages and leases relating to the collateral for the ABS), compliance of loans with underwriting criteria and applicable laws, and valuations of collateral.

Beyond these services, however, there are a range of activities undertaken in connection with ABS offerings that involve some reference to the pool assets but that do not involve a qualitative assessment of the credit quality, underwriting and valuation of the underlying assets. We do not

believe Congress intended these other types of activities, including, in particular, agreed-upon procedures ("AUP") engagements performed by accountants, to be subject to the disclosure requirements of Sections 932 and 945 of the Act, or the expertization requirement contemplated by the proposed rules. Because there are many types of third-party services related to ABS offerings and a wide range of pool asset types underlying ABSs, we urge the Commission to clarify the meaning of a "review of pool assets" so that issuers can identify the nature and extent of activities contemplated by the Act and, if desired, select appropriate service providers.

The proposed rules state that if an issuer engages a third party to review the pool assets, then an issuer may rely on the third-party review to satisfy its obligations under proposed Rule 193, provided the third-party service provider is named in the registration statement and consents to be designated as an expert within the meaning of Securities Act Rule 436. Because there are many services, such as M&A services and valuation services, that may be performed by third-party service providers for a potential issuer with respect to pool assets at various times that were not in connection with an ABS offering, but may be later used by the issuer in determining the scope of its own due diligence efforts with respect to the pool assets, we believe that the new rules should make very clear that unless the third-party service provider expressly agrees in writing that it consents to have its work treated as a "review of pool assets" and consents to subject itself to whatever the requirements of the final rules are governing such reviews, it will not be subject to the terms of the new rules.

Discussion

1. Issues Related to Pool Asset Reviews.

a. The Commission should provide a definition for pool asset reviews in the final rules.

The Commission seeks comment on whether it should define the type, level and characteristics of the pool asset review that must be performed and how such review should be designed. We urge the Commission to clarify the types of activity that would constitute a pool asset review so that service providers and issuers are able to understand, among other things, which activities will fall within the parameters of the final rules.

In deliberating this issue, the Commission should consider input from commentators on its recent *Asset-Backed Securities* proposing release[1] (the "ABS Release"), which identifies three general types of questions asked:

1. Were the underlying loans originated in accordance with the originator's underwriting criteria? The related analysis could include a number of factors such as the loan characteristics and documentation and credit profiles of the borrowers.

2. Were the loans originated in compliance with applicable law including predatory lending and Truth in Lending statutes?

[1] SEC Release No. 33-9117 (April 7, 2010).

3. Were the property values reported by the originators for the underlying collateral reasonable?

Notably, the ABS Release proposes requiring standardized disclosure of a number of "asset level data points" in an ABS registration statement. We believe that the Commission's focus on "asset level data points" provides a useful basis for developing guidance on what activities will qualify as a pool asset review. For example, substantive procedures to analyze and report on "asset level data points" would include qualitative assessments of the highly detailed asset level data that the Commission has already proposed requiring issuers to include in ABS prospectuses.[2] These types of assessments could involve steps to provide information about the nature and quality of the underlying pool assets, such as the credit quality of borrowers; the accuracy of information contained in the source documents relating to the collateral underlying the ABS; compliance with applicable laws and underwriting standards; and whether the stated value of the underlying collateral is reasonable. We believe that defining a pool asset review by focusing on qualitative assessments related to "asset level data points" will help distinguish a pool asset review from other third-party services that an issuer or underwriter may commission in connection with an ABS offering that do not provide such qualitative assessments of the underlying pool assets.

Among the services that we believe merit distinction in this latter regard are AUP services provided by accountants. As described further below, AUP services provide the issuer and underwriter with findings based on specific procedures designed by such issuer or underwriter for its use. In AUP engagements, for example, accountants perform limited tasks under criteria established and deemed sufficient by the specified parties (typically the issuer or the underwriter) to the engagement agreement, such as comparing numerical disclosures in the prospectus to certain underlying data (e.g., tapes of loan and property data points or delinquency reports). This often involves performing mathematical calculations that may be relatively straight-forward (e.g., recalculating the total of the outstanding balances of the loans in the pool) or quite complex (e.g., recalculating projected cash flows allocable to individual bond classes under hypothetical scenarios described in the prospectus). The accountant also may be asked to refer to certain aspects of the underlying documents, such as a note or mortgage, in order to determine whether specific statements about the document in the registration documents, for example about a note's term, interest rate or original principal balance, match the underlying documents. Often these reference checks are done on a sample basis. Significantly, the accountant does not perform any type of qualitative assessment of the asset level data points in an AUP engagement and does not undertake to verify the accuracy, authenticity or adequacy of the underlying source documents, confirm adherence to any stated underwriting guidelines, evaluate the quality of the loan assets or perform any procedures to determine whether the assets are valued appropriately. The accountant's role in an AUP engagement is to perform mathematical procedures, including those steps described above, as specifically designed by others.

Consequently, we believe AUP services are not what Congress intended to address when it mandated that an issuer conduct a "review of underlying pool assets." Instead, we believe Congress intended the reviews contemplated by Section 945 of the Act to encompass qualitative assessments

[2] *See* proposed Schedule L, setting forth information required to be included in ABS prospectuses by proposed Item 1111(h) of Regulation AB. SEC Release No. 33-9117 (April 7, 2010).

of the credit quality of the assets underlying the ABS through the more substantive, evaluative due diligence procedures described above.[3]

For these reasons, we believe that the Commission should provide a definition of a pool asset review in the final rules that makes clear that the review is intended to focus on qualitative assessment procedures related to the credit quality of the underlying assets themselves and associated asset level data.

In addition, the final rules should make clear that only services that a third-party service provider expressly agrees are part of a "review of pool assets" for purposes of proposed Rule 193 will be subjected to the provisions of the new rule. The proposed rule requires third-party reviewers to consent to be named and designated as experts in an ABS registration statement, but should also make clear that, in the absence of express acknowledgment by the third party reviewer that its services constitute a "review of pool assets", the third-party reviewer and its work will not be brought within the provisions of the proposed rules. This is necessary to make sure that other services performed in connection with the pool assets or the ABS offering are not inadvertently swept under the coverage of the rule. For example, accountants and others often provide M&A due diligence services in connection with a potential acquirer's pursuit of an institution that may hold either ABS securities or assets that could be securitized in the future. The nature and scope of these M&A due diligence services performed for a potential acquirer will vary, depending on the level of risk the acquirer desires to assume and the type of transaction under consideration. Similarly, financial institutions frequently engage accountants and others to perform valuation-related, internal control and other services on asset portfolios outside the context of an ABS offering. These services may include qualitative assessments of the type that, if performed in contemplation of an ABS issuance, would be subject to the proposed rules. The fundamental point is that the services described above are provided in relation to an acquisition, not an ABS offering. Although it is conceivable that the issuer or underwriter may consider the results of these M&A due diligence, valuation-related, internal control or other services in performing its own due diligence in an ABS offering, those services performed for purposes other than an ABS offering should not be swept into the rule simply because they may have some bearing on the due diligence that is performed in connection with an ABS offering. As noted above, the simplest way to limit appropriately the scope of the final rules would be to make clear that only if a third party service provider expressly consents to have its work used in connection with a "review of pool assets" will such work be subject to the terms of Rule 193.

b. Specific Exclusion for AUP Engagements.

Even if the definition of pool asset reviews is narrowly defined as recommended above, we believe the Commission should also specifically exclude AUP engagements performed by accountants from the scope of the final rules. AUP engagements constitute the lowest level of services that accountants can perform under the prescribed professional standards for attest services, which

[3] *See, e.g.*, Conference Report on The Restoring American Financial Stability Act of 2010 (April 30, 2010) at 133 (citing testimony by Professor John Coffee, which stressed the need to "re-introduce due diligence into the securities offering process" and described due diligence as including, for example, "checking credit scores and documentation"; and also stating that "If mortgage-backed securitizations are again to become credible, ratings agencies must be able to distinguish (and verify) whether an asset pool consists mainly of "liar's loans" or is instead composed of loans made to creditworthy borrowers.").

standards may not be consistent with the goals of the proposed rules regarding pool asset reviews and expertization. Accountants make no representations in AUP reports as to the characteristics of the assets or existence of the underlying documents, their legal status or the reasonableness of the information provided to them in the performance of the procedures. AUP engagements are performed in accordance with standards promulgated by the American Institute of Certified Public Accountants ("AICPA") as set forth in Statements on Standards for Attestation Engagements ("SSAE") Nos. 10 and 11, *AT Section 201 – Agreed-Upon Procedures Engagements*. These standards impose a number of specific requirements on the accountant and the client (which, in ABS securitizations, is typically the issuer or underwriter) and other "specified parties", among the most important of which are:

1. The client and other specified parties (not the accountant) determine the specific procedures to be performed.

2. The client and all other specified parties assume responsibility for the sufficiency of the procedures for their purposes.

3. The accountant does not perform an examination or review such as that conducted under the AICPA professional standards,[4] and does not express an opinion or provide negative assurance.

4. The accountant's report is in the form of procedures and findings and does not provide any independent assessments, judgments or other analysis to support a professional conclusion beyond such procedures and findings.

5. The accountant's report is restricted to use by the client and other specified parties who have agreed to the procedures performed and taken responsibility for the sufficiency of those procedures.

Thus, SSAE No. 10 requires that the client and other specified parties agree to the procedures and accept responsibility for the sufficiency of the procedures for their purpose, as a condition of the accountant performing the AUP services. The accountant's report is further restricted, by AICPA professional standards, to the use of those specified parties. If AUP services are deemed to constitute a pool asset review for purposes of the rules, then the rules would be in direct conflict with existing professional standards. As a result, it is likely that accountants would decline to perform AUP services in connection with ABS offerings because the requirement to be named in the registration statement with the attendant consequence that the report can be relied upon by any purchaser or potential purchaser of the securities would be in direct conflict with the restricted use provision of the applicable AICPA standards.

In addition, the accountant's AUP reports may be misconstrued by, be misunderstood by or otherwise cause confusion for purchasers or potential purchasers because such parties were not involved in the establishment of the procedures, and thus such reports likely would provide limited meaningful information to such purchasers or potential purchasers. This is one reason, among many, as to why the AICPA standards require the restriction on use to those parties who agreed to

[4] The terms "examination" and "review" are used here as specifically defined in the accounting literature.

the procedures and accepted responsibility for the sufficiency of the procedures for their purposes. For all the reasons discussed above, the Commission should include a specific exception in the final rules to exclude AUP engagements.

2. If the Commission defines a pool asset review as recommended above, we do not believe there is a need to specify further the type and nature of the review.

Section 945 of the Act clearly charges the issuer of an ABS with responsibility for the required review of the underlying assets. Because there are many different types of ABS securities and many different types of underlying assets, and because the securities markets evolve rapidly and in unpredictable ways, we believe that, although it is necessary to clarify the parameters of a pool asset review as discussed above, the degree and extent of a pool asset review that may be performed in a particular circumstance should be left to the judgment of the issuer. As the Commission points out in the Release, depending on the nature of the underlying assets, different levels and types of reviews may be more appropriate. In sub-prime residential mortgage-backed securities, for example, a sampling of the large pool of underlying assets may be adequate, whereas in an ABS backed by a small number of large commercial mortgages, analysis of each loan may be more appropriate.

If, however, the Commission does determine that it should provide some guidance in this area, a more general standard would provide appropriate flexibility to the issuer or underwriter to determine the desired technique and level of effort to achieve the objective. Adequate description of the nature and results of the review will allow potential investors to form their own judgments about the quality of the pool asset review and adjust their investment decisions accordingly. Because most ABS are sold to institutions that are recurring buyers, we would expect issuers and underwriters to be sensitive to the judgments and decisions of those investors.

3. The final rules should not limit the types of providers who can provide pool asset reviews.

We do not believe that any particular type of service provider should be either required to perform or precluded from performing the pool asset review, so long as the service provider can provide a review that meets the requisite criteria. Thus, valuation firms, specialty firms, accountants, lawyers or others should be permitted to perform the services so long as they can meet the terms that may be required under final rules, including any required standards of performance and any relevant professional standards that such parties may be obligated to follow. Because Section 945 of the Act clearly charges the issuer of an ABS with the responsibility for the required review of the pool assets, the issuer should have latitude in determining the service provider(s) that can best assist the issuer in discharging that responsibility.

4. Should a third-party pool asset reviewer be independent of the issuer?

As proposed, Rule 193 permits an issuer to perform the required pool asset review directly itself or by employing a third party. The questions of independence and conflict mitigation are not unique to situations in which third parties are involved in performing such a review. As a general matter, without taking mitigation efforts, an issuer cannot be independent or conflict-free with respect to itself. As third party involvement is not required or advocated by the proposed rule (or even

contemplated by the plain text of Section 945), neither "independence" nor mitigation of "conflicts" (however either such term may be defined) would seem to be contemplated as relevant to a pool asset review. If the Commission nevertheless concludes that the concepts of independence or conflict mitigation are relevant aspects of the pool asset review process, they should be equally applicable to all reviews, whether conducted directly by issuers or by third parties. We believe that any such proposal should be made available for public comment before adoption.

5. Third-party providers of pool asset reviews should not be required to consent to be named in registration statements and to be designated as experts.

Proposed Rule 193 requires that, if a third-party reviewer is engaged to review the pool assets underlying an ABS offering, the reviewer must consent to be named in the registration statement and to be designated as an expert for purposes of Securities Act Rule 436 and Sections 7 and 11 of the Securities Act. This requirement goes beyond the mandate of the Act.

There are a number of consequences that flow from requiring all third-party reviewers of pool assets in ABS offerings to be named and designated as experts under Securities Act Rule 436. For example, it diminishes the flexibility that appropriately should be left to the issuer and underwriter in determining whether to take sole responsibility for the disclosures. Requiring consents from third-party pool asset reviewers to be included in the registration statement also will significantly change the risk profile of such services for the providers. If named as experts under Rule 436, such providers potentially would become liable to securities purchasers under Section 11 of the Securities Act. There is no suggestion that Congress in adopting Sections 932 and 945 of the Act intended to subject third-party pool asset reviewers to this enhanced liability risk. And yet, such increased liability risk would likely substantially raise the cost of obtaining those services and related reports, and could result in some providers exiting the market. The Commission should consider the potential beneficial impact to investors in relation to the potential increased costs for ABS offerings and the availability of competent providers of such services.

We believe that the Commission staff's existing guidance for similar disclosures, set forth in an August 11, 2010 Compliance and Disclosure Interpretation ("C&DI") provides a more appropriate model for treatment of the disclosures and has not been superseded by the requirements of the Act. In Question 141.02 of the C&DIs, the staff answered the question concerning the circumstances under which an issuer filing a Securities Act registration statement had to disclose the name of the third-party expert and obtain its consent to be named in the registration statement. The staff concluded that the issuer had no obligation to make reference to a third-party expert in the registration statement simply because the issuer used or relied on the third-party expert's valuation or opinion in connection with the preparation of the registration statement. The staff set out three alternative courses of action:

1. The issuer makes no reference to the third-party expert report and takes full responsibility for the disclosures, even though it may have relied on the expert's report in preparing the registration statement.

2. The issuer states that the disclosures in the registration statement were prepared by management or the board but refers to the fact that they considered or relied in part on the report of an expert.

3. The issuer makes reference to the third-party expert and attributes statements to the third-party expert in the registration statement.

Only in the last instance would the requirements of Securities Act Rule 436 be applicable to the third party, with the third party being named in the registration statement and consenting to be an "expert" within the meaning of Securities Act Section 7. We believe this interpretive guidance also provides an appropriate framework for considering whether third-party pool asset reviewers should have to be named and designated as experts in registration documents for ABS offerings.

* * *

We would welcome an opportunity to discuss these matters with the Commission and its staff. If you have any questions or would like to discuss these matters further, please do not hesitate to contact William Platt at (203) 761-3755 or James Mountain at (212) 436-4742. We thank you for your consideration of these matters.

Very truly yours,

Deloitte & Touche LLP

cc: Mary L. Schapiro, Chairman
Luis A. Aguilar, Commissioner
Kathleen L. Casey, Commissioner
Troy A. Paredes, Commissioner
Elisse B. Walter, Commissioner
Meredith B. Cross, Director, Division of Corporation Finance
James L. Kroeker, SEC Chief Accountant