November 15, 2010

VIA ELECTRONIC MAIL (rule-comments@sec.gov)

U.S. Securities and Exchange Commission
100 F. Street, NE
Washington, DC 20549-1090
Attn: Elizabeth M. Murphy, Secretary

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

Ladies and Gentlemen:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to respond to the request for comment by the Securities and Exchange Commission (the "Commission") on the Commission's Release Nos. 33-9150; 34-63091, Issuer Review of Assets in Offerings of Asset-Backed Securities; Proposed Rule (the "Proposing Release"),[2] relating to (i) proposed rules that would implement Section 945 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), and (ii) proposed rules that would implement Section 15E(s)(4)(A) of the Exchange Act of 1934 (the "Exchange Act") as added by Section 932 of the Dodd-Frank Act.

SIFMA's comments on the Proposing Release were developed by its diverse membership, which includes financial institutions that act as securitization sponsors, broker-dealers that act as underwriters and placement agents, and asset managers that include some of the largest, most experienced investors in asset-backed securities ("ABS") and other structured finance products. The comments reflect SIFMA's goal of restoring

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[1] The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org.

[2] SEC Release Nos. 33-9150; 34-63091; File No. S7-26-10 (October 19, 2010).

capital flow to the securitization markets and increasing the availability of credit to American consumers and small businesses.

We wish to extend our thanks to the Commission for the obvious care and extraordinary effort involved in producing a proposed rulemaking as comprehensive as the Proposing Release. We appreciate and support many of the proposed rules, and while we believe that modification of some of the proposals is necessary, we are convinced that these modifications will help to restore investor confidence in, and stimulate the recovery of, the securitized products market.

Summary of Comments

SIFMA supports many of the Commission's proposals. We also present our own recommendations on key aspects of the Proposing Release. A summary of SIFMA's views on the Proposing Release is as follows:

- It would not be feasible or prudent to propose the minimum types of review that should be completed for the various types of asset classes covered by the proposed rules.

- Rule 193 due diligence should relate to the underwriting of the assets as opposed to merely verifying the accuracy of the disclosure in the prospectus.

- Rule 193 should only apply to issuers of Exchange Act-ABS that are issued in registered public offerings.

- The proposed rule should not be applicable to any securitizations in which all of the securities issued are fully guaranteed by Fannie Mae, Freddie Mac or Ginnie Mae.

- Firms that conduct due diligence on securitized assets are not "experts" as contemplated under the securities laws.

- For assets on which a due diligence review was conducted prior to the effective date of the final rule, the disclosure of such review should satisfy Rule 193 and Rule 15Ga-2 and no separate diligence review should be required to be conducted or disclosed by the issuer or underwriter. In addition, to the extent the Commission requires third party due diligence providers to consent to Section 11 expert liability, third party due diligence providers should be exempt from Section 11 expert liability with respect to any asset review conducted prior to the effective date of the final rule.

- The final rule should expressly provide that a review of assets may consist of a sampling and should not require a review of 100% of the assets in a pool.

- The Commission should modify the requirements of Item 1111(a)(8) of Regulation AB such that disclosure of deviations from underwriting criteria, without any materiality threshold, is not required and information with respect to who made the decision to include deviating assets as part of the pool and on what criteria should be excluded.

- The Commission should clarify that the issuer may rely on the diligence performed by an affiliated originator even in those cases where the affiliated originator is not the sponsor of the securitization.

- CMBS issuers should be able to rely on the diligence conducted by unaffiliated originators who are not sponsors in the securitization.

- Due diligence conducted by an underwriter for purposes of establishing its due diligence defense in connection with an offering of securities should be excluded from the requirements of the proposed Rule 15Ga-2.

- The scope of the rule should exclude any "foreign-offered ABS" that were initially offered and sold in accordance with Regulation S and that have foreign assets that comprise a majority of the value of the asset pool.

- The phase-in period for the final rule should be at least 18 months from the date of publication.

Comments

SIFMA supports many of the Commission's proposals. We have studied each aspect of the Proposing Release and request that the following recommendations are taken into consideration when drafting the final rules.

I. Required Due Diligence and Disclosure of Due Diligence Review

Section 945 of the Dodd-Frank Act amends Section 7 of the Securities Act of 1933 (the "Securities Act") and requires the Commission to adopt rules relating to the registration statement required to be filed by an issuer of ABS. Pursuant to Section 7(d) of the Securities Act, the Commission must issue rules requiring an issuer of ABS to conduct a review of the assets underlying the ABS and disclose the nature of that review in the registration statement. To implement Section 7(d) of the Securities Act, the Commission has proposed new Rule 193. Proposed Rule 193 requires an issuer of a registered "asset-backed security," as newly defined in the Dodd-Frank Act ("Exchange Act-ABS"), to perform a review of the assets underlying the registered Exchange Act-

ABS.[3] The proposed rule further provides that the issuer may conduct the review or an issuer may employ a third party to conduct the pool asset review provided the third party is named in the registration statement and consents to being named as an "expert" in accordance with Section 7 of the Securities Act and Rule 436 thereunder.

A. <u>We agree that it is not feasible or prudent to propose minimum review standards specific to various asset classes</u>.

SIFMA agrees with the Commission's statements in the Proposing Release to the effect that given the 180-day statutory deadline prescribed by the Dodd-Frank Act, it would not be feasible or prudent to propose the minimum types of review that should be completed for the various types of asset classes covered by the proposed rules.[4] Our members believe that setting minimum levels of review and specifying the types of review would require a substantial amount of time and resources on the part of the Commission and the industry as a whole in order to ensure that any such rulemaking is accurate and responsive to the needs of issuers and investors in each individual asset class of ABS. The due diligence process is complex, and is not something that can be quickly standardized, for a variety of reasons. Appropriate standards would address issues well beyond just sample sizes; consideration would also need to be made regarding 'upsizing' when issues arise, specific aspects of credit, value, compliance, and data reviews, and additionally, the qualifications of the diligence providers themselves may be considered. We note that even within asset classes, such as residential mortgage loans, there are numerous sub-categories that would have varying due diligence standards (e.g., performing, non-performing, prime, Alt-A, subprime, newly-originated, seasoned, second-lien, home equity loans). Outside of the residential mortgage-backed securities ("RMBS") asset class, there is less of a history of third party reviews of assets, and therefore the appropriate standards for diligence reviews would require further consideration. In addition, as the Commission recognizes in the Proposing Release, there are numerous types of due diligence that may need to be completed for a particular asset class with each type having its own minimum levels of review.[5] Therefore, any asset-specific standards would need to be subject to advance notice of a rulemaking proposal to receive the benefit of guidance from industry participants in order to ensure that any such rulemaking is accurate and responsive to the needs of issuers and investors in each individual asset class of ABS.

If, after there are a material number of ABS issuances completed following the effective date of Rule 193, the investor community or the Commission has reason to believe that the level of due diligence being completed is not in keeping with the legislative intent of the Dodd-Frank Act, then SIFMA would support the Commission's evaluation of the need to require detailed levels of due diligence and work with the Commission to develop asset-specific minimum standards to the extent appropriate.

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[3] 75 Fed. Reg. at 64183.
[4] 75 Fed. Reg. at 64183 (footnote 18).
[5] 75 Fed. Reg. at 64183.

We note that the Commission requested comment on a standard of due diligence that would, at a minimum, provide reasonable assurance that the disclosure in the prospectus regarding the assets is accurate in all material respects.[6] SIFMA members are concerned that the imposition of this "reasonable assurance" standard could conflict with existing disclosure and liability standards and create confusion in the securitization markets. For example, the "reasonable assurance" standard could create liability even where the prospectus disclosure is accurate and complete, because a separate claim could be made that the diligence review did not meet the reasonable assurance standard. This is an inappropriate outcome, therefore we request that the Commission clarify that any minimum due diligence review standard will apply only after a determination has been made that the disclosure in the prospectus is defective.

B. Rule 193 due diligence should relate to the underwriting of the assets as opposed merely verifying the accuracy of the disclosure in the prospectus.

We are not advocating at this point in time asset-specific standards or a more specific benchmark to be applied across all asset classes. We believe that over time, investors will be able to evaluate the sufficiency of the review undertaken by the issuer or third party engaged to perform the asset review and will make their preferences known to issuers for more or different types of due diligence either by direct communication with the issuers on this point or by "voting with their feet" as they steer investments to those issuers with the level and type of review preferred by the market.

We request that the Commission limit the scope of Rule 193 to due diligence that *relates to the underwriting of the assets* as opposed to due diligence that merely *verifies the accuracy of the disclosure in the prospectus*. We believe that this request is consistent with the types of due diligence reports that investors find useful and would expect to receive pursuant to Rule 193. We understand that Congress's intent behind Section 945 of the Dodd-Frank Act is to increase accountability and facilitate greater transparency in the asset review process as well as to provide investors with the information they need to make informed investment decisions. With that purpose in mind, we believe that it is appropriate for the Commission to clarify that due diligence reviews not specifically designed to verify the underwriting of the assets included in the pool do not serve this legislative intent and are therefore not captured by Rule 193. In light of the existing liability for issuers under the securities laws to the extent a prospectus contains an untrue statement of material fact or omits to state a material fact required to be stated therein or necessary to make the statements not misleading, we do not believe that it is necessary for the Commission to require that issuers conduct or disclose any particular review that merely verifies the accuracy of the disclosure in the prospectus. In addition, we do not believe that this type of review serves the legislative intent of proposed Rule 193 described above as such information only serves to confirm

[6] 75 Fed. Reg. at 64185.

for the investor or underwriter the accuracy of information already provided to the investor. As such, we are asking the Commission to craft the rule in a manner that excludes the type of review of assets that amounts to a mere comparison or comforting of data that relates to the prospectus disclosure versus the type of review that assesses the actual quality of the underwriting of the assets. An accountant's agreed upon procedures ("AUP") report adds no additional value to the investor as it only confirms for the issuer and underwriter that, for example, the data on the asset tape supplied by the issuer to the accountant is accurately reflected in the prospectus disclosure. Such review does not involve the accountants looking beyond the data tape supplied by the issuer. In contrast, as described above, we believe that the type of due diligence review that should be disclosed under Rule 193 is a review that relates to the underwriting of the assets.

In furtherance of the foregoing general qualification as to the type of review required by the rule, we also ask the Commission to expressly exclude from the scope of Rule 193 legal opinions and other work provided by law firms (other than validity and tax legal opinions that are filed as exhibits by the registrant). We note that were the Commission to require all legal opinions and work product to be disclosed, it would compromise the privileged flow of information between the issuer or underwriter and their respective counsel that is important to either in evaluating and proceeding with a transaction, especially in light of the potential for substantial liability imposed on issuers and underwriters under federal securities laws. We also ask the Commission to expressly exclude from the scope of Rule 193 AUP reports prepared by accounting firms which are designed to ensure the accuracy of the prospectus disclosure by "comforting" such disclosure. Not unlike a custodian's report setting forth the findings of its review of asset files in connection with a securitization transaction, these AUP reports are routinely provided to issuers and underwriters in every ABS offering, and the issuers and underwriters determine the scope of the procedures that they deem necessary to ensure the accuracy of the prospectus. Moreover, if these reports are included in the scope of Rule 193 and accounting firms are subject to expert liability as a result, we expect that this will materially decrease the number of accounting firms willing to provide such AUP reports. This could therefore lead to less accurate disclosure to the extent the issuers and underwriters have to perform this prospectus review function without third-party assistance. We know that across the various asset classes issuers and underwriters engage various third parties to perform other such reviews that do not specifically relate to reviewing the underwriting of the assets, and while we are not enumerating each such ancillary review party, we would also expect such third parties to be excluded from the rule as we suggest it be revised. Finally, we believe the criteria described here should be consistently applied by the Commission to all relevant aspects of the Proposing Release.

C. <u>SIFMA members believe that sampling satisfies the proposed rule</u>.

While we recognize that in some transactions it may be appropriate to conduct a due diligence review of every asset, SIFMA requests that the Commission make clear in the final rule that due diligence covering every asset in the pool is not required by Rule

193. The scope of review should be determined by a variety of factors, including the nature of the pool, the number of assets in the pool and the diversity of the pool. In a large diverse pool of assets, investors do not expect that due diligence will be completed with respect to each asset. Conducting due diligence on a sampling of assets underlying residential mortgage-backed securities, for example, is the market standard and is widely accepted in the investor community. Sampling is a widely accepted practice with a solid theoretical foundation and track record of use over the course of decades in many disciplines and industries. Our members agree that to the extent a review of assets is conducted on a sample basis, the method and description of the type of sampling employed should be disclosed to investors.

II. Considerations for Specific Asset Classes

Our members request that the Commission exclude Asset-Backed Commercial Paper conduits from the scope of the final rule. ABCP is relied upon by a diverse group of companies to finance their business operations. These companies are attracted to the ABCP market because their identity and the details of their financings through the conduit are kept confidential and are therefore not available to competing businesses. This is a critical component of ABCP that would be jeopardized by application of the proposed rule, and we believe that the public disclosures of the entities that utilize conduit financing, and/or the assets financed in the conduit, would result in many of these businesses seeking alternate forms of financing that would likely be more expensive and translate into higher costs for their products and clients, who very often are main-street consumers. Furthermore, investors in ABCP make their investment decisions based on the structural features of the ABCP conduit itself, including liquidity and credit facilities as well as the prior performance of the ABCP sponsor, as opposed to the specific assets that may reside in the conduit at a given time. The presence of these liquidity and credit facilities already sufficiently incentivizes an ABCP sponsor to conduct a significant amount of due diligence on ABCP assets as the sponsor has significant financial risk should assets underperform. We also note that conduits often finance very short-term assets, such as trade receivables, and therefore a diligence report created in one month may no longer be relevant in a rather short timeframe as assets cycle in and out of the conduit. For these reasons, investors in ABCP will not place a meaningful value on the disclosure or reports that would be produced under the proposed rule and we ask that the Commission clarify this point when it adopts final rules.

SIFMA also believes that the proposed rule should not be applicable to any securitizations in which all of the securities issued are fully guaranteed by Fannie Mae, Freddie Mac or Ginnie Mae. The added disclosure with respect to due diligence would not be material to an investor's decision to invest in fully guaranteed certificates. Investors in such GSE securities are primarily focused on the government or GSE guarantee of such debt. With this focus, investors purchased hundreds of billions of dollars of GSE and Ginnie Mae securities throughout the entire credit crisis. Practically speaking, it is unclear how diligence reports would be useful in the largest MBS market, the TBA market. In the TBA market, mortgage pools are traded on a forward basis, in many cases before the pools are even issued. The underwriting guidelines promulgated by the GSEs and FHA help to ensure that the loans that collateralize TBA pools are significantly homogeneous such that investors are comfortable making forward trades. Because of the clear underwriting requirements of the GSEs, and the significant threat of repurchase demands made by the GSEs for loans that do not comply with these guidelines, it is unclear how publication of diligence reviews would be beneficial (We note that the GSEs reserve remedies up to and including the loss of a seller's status as an approved servicer for GSE loans, which is a significant deterrent to noncompliance). Furthermore, the diligence process in the GSE MBS market is not conducted on a pool-by-pool basis, as a general matter. In many cases, collateral reviews occur after a delinquency, given the strict expectations of compliance with underwriting guidelines and the consequences for failures. In any case, at the time of a TBA trade, the identity of the pool that will be delivered is unknown, and therefore it is impossible for the investor to review a diligence report. For these reasons, SIFMA members believe that the proposed rules should not be applicable in the context of GSE and Ginnie Mae MBS.

If the Commission adopts proposed Rule 15Ga-2, we ask for clarification in the context of a collateralized loan obligation ("CLO") transaction that the CLO's collateral manager would not be deemed to be a third party engaged for purposes of performing a review of the pool assets to be purchased by the issuer.[7] The collateral manager is actively managing the assets and performing its review on an ongoing basis which is incompatible with the disclosure framework required by the proposed rule. In addition, the information related to the loan assets underlying the CLO may be highly confidential and the disclosure of any report on such assets pursuant to the rule would jeopardize the ability of the CLO to aggregate assets.

With respect to commercial mortgage-backed securities ("CMBS") transactions, the Commission notes in its Proposing Release that the issuer receives numerous reports from appraisers and engineers regarding the properties underlying the loan.[8] We want to make the Commission aware that these reports are provided to the first-loss ("B-piece") purchaser as part of the disclosure it receives for purposes of committing to purchase the securities that represent the first loss on the transaction. Such reports are provided under confidentiality agreements and such reports contain sensitive, confidential information related to the property. If these types of reports were required to be disclosed by the issuer, then issuers may no longer be able to request them. Furthermore, such disclosure would taint the private placement of the B Pieces. Without access to these reports, B-Piece purchasers will have a more difficult time committing to purchase the securities. Without the B-piece purchaser, the securitization might not happen. As a result, commercial real estate borrowers will likewise have increased difficulty finding attractive financing as commercial real estate lending would be left to a small group of balance

[7] 75 Fed. Reg. at 64186.
[8] *Id.*

sheet lenders. Moreover, as noted in the Dodd-Frank Act, the B-Piece purchaser plays an important role in the CMBS market and is considered a valuable substitute for risk retention by many industry participants, and as such, we would request that the Commission exclude from the coverage of the proposed rule such reports provided to B-Piece purchasers as part of their diligence for committing to purchase the B Pieces.

SIFMA's members active in municipal debt markets will submit a separate response to this proposal, highlighting their concerns with the rules.

For assets on which a due diligence review was conducted prior to the effective date of the final rule, our members agree that such review and the disclosure of the review should satisfy Rule 193 and Rule 15Ga-2 and no separate diligence review should be required to be conducted or disclosed by the issuer or underwriter. In addition, to the extent the Commission requires third party due diligence providers to consent to Section 11 expert liability, third party due diligence providers should be exempt from Section 11 expert liability with respect to any asset review conducted prior to the effective date of the final rule as such due diligence providers were not at the time compensated for this potential additional Section 11 liability exposure. Without the aforementioned changes, SIFMA is concerned that securitizers of currently held financial assets will be disadvantaged, as the proposed rule will make it difficult if not impossible for potential securitizers of such assets to successfully complete a securitization. The clarifications requested above will further the efforts of financial institutions to monetize such legacy assets and thereby increase the amount of funds available for new consumer lending.

III. Applicability of Diligence and Disclosure Requirements to Public versus Private Offerings

We believe that because Section 945 of the Dodd-Frank Act only requires the Commission to issue rules "relating to the registration statement," proposed Rule 193 would only apply to issuers of Exchange Act-ABS that are issued in registered public offerings. We agree that the scope of Rule 193 should, as proposed, be limited to issuers of registered ABS.

In addition, we believe it is appropriate to limit the applicability of Exchange Act Section 15E(s)(4)(A) to publicly registered offerings of ABS only. Applying the final rule to private transactions would be inconsistent with the history and purpose of the private placement exemptions from registration under the Securities Act. To the extent that the Commission intends to have the requirements apply beyond publicly offered transactions, SIFMA urges the Commission to exclude private placements that are made under the statutory exemptions of Section 4(2) and "Section 4(1 1/2)." In transactions completed under the statutory exemptions, the investors and issuers engage in a much more iterative process of sharing information, conducting appropriate diligence and providing feedback that makes the proposed requirements unnecessary.

To the extent that the reporting requirements for Form ABS-15G are applied to private transactions, we would urge the Commission to allow issuers and underwriters in private placements to make such form available on a password protected website because such parties would not otherwise be required to make any public filings. Investors are accustomed to such website disclosure in connection with private transactions, and they have not voiced dissatisfaction with that approach. This protects the privacy of the transaction parties and associated confidential information, which is often a significant factor in an issuer's decision to execute a transaction in the 144A market, and avoids concerns that public disclosure could undermine a private placement-based exemption. As a condition to issuers relying on an exemption from registration, the Commission could require that the offering document specify the password-protected website where such information is located.

IV. Unintended Consequences of Applying Expert Liability to Due Diligence Providers

Proposed Rule 193 allows the required due diligence review to be performed by a third party engaged for purposes of performing the review, provided that the third party is named in the registration statement and consents to being named as an "expert" in accordance with Section 7 of the Securities Act and Rule 436. By consenting to be named as an expert in an issuer's registration statement, third parties engaged for purposes of performing the review mandated by proposed Rule 193 will become subject to liability for material misstatements and omissions under Section 11(a)(4) of the Securities Act (commonly referred to as "expert liability"). We do not anticipate that a third party due diligence provider will be willing to consent to being named as an expert subject to liability under Section 11 of the Securities Act. SIFMA members believe that the application of expert liability to third party diligence providers would likely result in their withdrawal from providing these services to transactions where expert liability would attach. Even if diligence firms were to consent, SIFMA members expect that the firms would need to obtain significant insurance coverage or undertake other means of liability protection, which would materially impact the cost of such services. As a general matter, these costs would likely render securitizations non-economic for issuers. With fewer third party due diligence providers available to issuers and underwriters as an absolute matter or because of cost, more due diligence reviews for registered transactions will be conducted by issuers themselves. Or, if skilled third parties are not willing to consent to be named as experts, new thinly capitalized entities that are less experienced may form and due diligence will be provided by these less experienced entities. SIFMA questions whether the intention of Congress, the goal of the Commission and the best interests of securitization investors are best achieved by reducing the presence of experienced independent third party reviewers and increasing the amount of reliance on issuer diligence reviews of their own assets.

Should the Commission apply expert liability to third party diligence providers, and these providers refuse to consent to being named as experts, a more significant issue will arise that may potentially make registered ABS offerings impossible. SIFMA notes that many NRSROs require that a non-affiliated third party perform a due diligence review in order for a RMBS transaction to be rated.[9] If issuers are unable to obtain a third party review because of expert liability, and are unable to obtain a credit rating because of the lack of a third party review, registered RMBS transactions will become impossible. As the Commission is well aware, when the Dodd-Frank Act was enacted, NRSROs became subject to liability as experts for their credit ratings and NRSROs refused to consent to being named as experts. This led to the literal shutdown of the registered securitization markets until the Commission provided temporary relief from the obligation to include credit ratings in registration statements and statutory prospectuses. The resolution of this issue is as of yet unclear and of significant concern to SIFMA members. If expert liability is further extended to third party due diligence providers, we expect the registered securitization markets will not function as intended and ultimately decrease the availability of credit and lending.

SIFMA urges the Commission to exempt third party due diligence providers from the expert liability requirement in order to preserve the securitization industry's access to the valuable due diligence services provided by third-party diligence firms. By exempting the due diligence providers, the Commission will better serve Congress's goal of improving the quality of securitized asset pools and will make a broader array of due diligence firms available to the securitization industry.

Furthermore, expansion of expert liability to include third-party due diligence providers is inconsistent with the principles guiding Section 11(a)(4) of the Securities Act. Unlike the other parties subject to Section 11 liability, due diligence providers are not licensed professionals and are not part of a regulated industry that is governed by a formal professional association. Section 11(a)(4) of the Securities Act imposes liability on

> every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him.

Attorneys, in limited instances, and NRSROs have been subject to such liability. Furthermore, a due diligence provider is not the type of person "whose profession gives

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[9] Moody's, Fitch and S&P criteria can be found on each respective NRSRO's website. For example, S&P Criteria for third party due diligence reviews in RMBS can be found (with no required log-in) at: http://www2.standardandpoors.com/spf/pdf/media/rfc2_112508.pdf.

authority to a statement made by him" as set forth in Section 11. Due diligence firms do not have authority given to a recognized profession as contemplated by the statute and no particular authority is attributed to a due diligence firm's statements and findings.

SIFMA members believe that the asset review provided by third party diligence firms is entirely different from the work of professionals that have been included within the scope of Section 11(a)(4) because such asset reviews do not involve comparing assets against criteria specified by such diligence firms. Because the criteria and procedures for asset review are not established by the diligence firms themselves, such asset reviews do not necessitate the type of independent professional judgment provided by other types of professionals that fall within the scope of Section 11(a)(4). Due diligence firms simply compare assets to criteria provided to them and they determine if the criteria are met. Not unlike the review performed by an originator to determine whether a loan conforms to such originator's underwriting guidelines, a third party due diligence firm's review of assets against the underwriting criteria provided to them does not require a diligence firm to express any independent judgment about the quality of an originator's underwriting criteria itself against any independent standard. Due diligence firms simply express their views as to whether assets conform to the underwriting guidelines provided to them. The review performed by a third party diligence provider is no more "expert" than an originator's underwriting assessment, but the added value is that such party's review is independent.

Credit rating agencies that independently define ratings categories, criteria and methodologies and apply them to rate a security can be distinguished from the professionals mentioned above, but we note that such rating agencies can obtain the designation of an NRSRO which subjects them to regulation under the Exchange Act. In addition, credit rating agencies are subject to standards of conduct promulgated by the International Organization of Securities Commissions.

We also note that in transactions rated by an NRSRO, due diligence providers already attest that any omissions, misrepresentations, or inaccuracies in the information they provide to an NRSRO may be a basis for such NRSRO to refuse to rate and/or to withdraw any rating of the securities issued in connection with the contemplated transaction. We suggest that such attestation suffices in lieu of extending expert liability to due diligence providers. This NRSRO requirement causes issuers and underwriters to carefully select and monitor the performance of their chosen due diligence providers in order to ensure that the ratings are not jeopardized.

In light of an *issuer's* continuing liability under Section 11 for all of its disclosure related to due diligence, we believe that the additional comfort to the Commission and investors as to the accuracy of the diligence results gained by requiring expert liability is outweighed by the loss of many diligence firms that will not consent to becoming experts.

V. Scope of Due Diligence to be Disclosed under Item 1111 of Regulation AB

Proposed Item 1111(a)(7) of Regulation AB would require an issuer or sponsor to disclose the nature of the review of assets conducted by an issuer or sponsor and to also disclose the findings and conclusions of the review of the assets undertaken by the issuer, sponsor or third party. Proposed Item 1111 then continues in subparagraph (8) to require that if any assets in the pool deviate from the disclosed underwriting criteria, how those assets deviate must be disclosed, including data on the amount and characteristics of those assets. SIFMA supports the disclosure requirements contained in subparagraph (7). However, SIFMA requests that the Commission modify the requirements of subparagraph (8) such that asset level disclosure, without any materiality threshold, is not required. We believe that asset level disclosure on these points is not necessary to convey to investors the relevant findings of the due diligence. SIFMA asks that the Commission modify proposed Item 1111 of Regulation AB to permit issuers to make the disclosures in subparagraph (8) to the extent they are material to investors.

In addition, to the extent there is a material deviation, issuers should be permitted to categorize the types of deviations and disclose the number of deviations and a description of the nature of the deviation. We also ask the Commission to clarify that subparagraph (8) should not be read to require a 100% diligence of the pool such that to the extent that an issuer does a sampling of the pool (as discussed above), the deviations that are discovered in that sampling would need to be reported.

However, information with respect to who made the decision to include the deviating assets as part of the pool and on what criteria should be excluded as multiple transaction parties, most notably the issuer and underwriter, may collectively agree on what assets are to be included in the pool. To the extent that in a particular transaction a single party makes the decision as to what assets are included in the pool, our members also agree that disclosure of such entity is not material and does not warrant disclosure.

VI. Reliance on Due Diligence of Originator or Underwriter

In those instances where the originator is affiliated with the issuer, we seek clarification from the Commission that the issuer may rely on the diligence performed by such affiliate even in those cases where the affiliated originator is not the sponsor of the securitization. SIFMA does not believe that this will in any way diminish the quality of the diligence or the disclosure provided to investors. For example, auto and credit card issuers do not rely on third party due diligence providers. Throughout the credit card and auto origination process there are reviews that have been undertaken by the originator to ensure that the assets satisfy the applicable underwriting standards. We note that there is little evidence to suggest that the performance of such consumer ABS during the credit crisis suffered as a result of inadequate due diligence. Procedures that existed prior to and during the credit crisis generally proved to be adequate for the protection of investors in consumer ABS such as credit card and auto ABS. Requiring a second review would not add any additional value to investors. Originators who are also securitizers have a vested interest in quality underwriting not only because of their ongoing origination business but because they want their ABS to perform well so they can continue to access the ABS market to fund their origination business. For example, in credit card ABS, there are no distinctions in the underwriting practices and control procedures undertaken by the affiliated originator/sponsor for securitized assets versus unsecuritized assets. We believe that this internal review that is done concurrently with the origination of such assets satisfies the intent of Section 945 of the Dodd-Frank Act. Therefore, we seek clarification that the Commission would not expect such issuers to complete a separate level of diligence on financial assets originated by such issuer in accordance with its own guidelines.

SIFMA members request that the Commission permit CMBS issuers to rely on the diligence conducted by unaffiliated originators who are not sponsors in the securitization. In the context of CMBS, it is common to have multiple unaffiliated originators selling into an unaffiliated depositor. Some of these unaffiliated originators may not be sponsors of the transaction. Unaffiliated originators typically provide indemnification and representations with respect to the information they provide to the depositor. This mechanism should protect the integrity of the due diligence process and we note that the depositor has Section 11 liability for such information in a public offering of CMBS. Therefore, in the CMBS context, we believe that it is appropriate for the issuer to be able to rely on the significant diligence that is completed by unaffiliated originators in the course of their origination.

We also request that the Commission make clear that the due diligence conducted by an underwriter for purposes of establishing its due diligence defense in connection with an offering of securities (including where the underwriter may be affiliated with the issuer) is excluded from the requirements of the proposed Rule 15Ga-2. We also seek clarification with respect to proposed Rule 15Ga-2 that the reporting obligation falls only on the lead underwriter in a syndicated underwriting involved in assisting the issuer structure the securitization transaction and is not a burden shared by all underwriters in the syndicate.

VII. Timing of Filing Requirement and Signatory

We believe that the timing of the filing requirement should vary by asset class and be made consistent with the filing requirements for the proposed preliminary prospectus.

SIFMA recommends that the Commission revise the filing requirement for Form ABS-15G as follows with respect to the various asset classes:

- at least two business days before the date of the first sale in the offering, in the case of ABS backed by credit card or charge card receivables, motor vehicle loans or leases, student loans, or equipment loans or leases; and

- at least five business days before the date of the first sale in the offering, in the case of ABS backed by any other asset class, including residential or commercial mortgage loans.

The Proposing Release would require forms filed under Rules 15Ga-1 and 15Ga-2 to be signed by "the" senior officer in charge of securitization. Our members think it should be "a" senior officer in charge of securitization in order to provide flexibility.

VIII. Application to Foreign Issuances

We recommend limiting the scope of the proposed rule to exclude any "foreign-offered ABS" that were initially offered and sold in accordance with Regulation S and that have foreign assets that comprise a majority of the value of the asset pool. In addition, we recommend excluding from the definition of "issuer" any foreign private issuers who are selling Exchange Act-ABS in the United States pursuant to an exemption in an unregistered offering. We believe these exclusions are consistent with the Dodd-Frank Act's goals of increasing transparency in securitization transactions and promoting prudent underwriting practices for financial assets in the United States. These exclusions would also ensure that Form ABS-15G filings contain the information that will be most relevant to domestic investors. SIFMA members believe that foreign issuers looking to avoid the filing requirement would seek to exclude U.S. investors from purchasing ABS primarily offered outside of the U.S. depriving such investors of diversification and investment opportunities. We understand that the Association for Financial Markets in Europe intends to file a response to this rule proposal, and we generally support their response as it relates to cross-border impacts on European issuers and markets.

IX. Phase-in Period

The phase-in period for the final rule should be at least 18 months from the date of publication.[10] This will allow market participants and industry groups to develop procedures and systems required to comply with the final rule. We also request this phase-in period in light of the myriad of other requirements simultaneously affecting the securitization industry, including the proposed revisions to Regulation AB, the release of the FDIC Securitization Safe Harbor and changes to the accounting standards.

Conclusion

SIFMA commends the Commission for taking steps to restore investor confidence and increase transparency and accountability in the ABS markets. Although we generally support the proposed changes, we encourage the Commission to carefully consider the

[10] We note that transaction parties may require a longer phase-in period than 18 months if, for example, third party due diligence firms are subject to expert liability under the final rule and are unwilling to consent to such expert liability and as a result, issuers will need additional time to put in place a means to conduct such reviews.

recommendations set forth in this letter to avoid adopting rules that could impede the recovery of the securitization markets.

We would be pleased to have the opportunity to discuss these matters further with the Commission and its staff. If you have any comments or questions, please feel free to contact Richard Dorfman at (212) 313-1359 or rdorfman@sifma.org, or Chris Killian at (212) 313-1126 or ckillian@sifma.org.

Sincerely,

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