November 15, 2010

VIA E-MAIL: 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 Nos. 33-9150 and 34-63091; File No. S7-26-10

Ladies and Gentlemen:

The American Securitization Forum ("ASF")[1] appreciates the opportunity to submit this letter in response to the request of the Securities and Exchange Commission (the "Commission") for comments regarding Release Nos. 33-9150 and 34-63091; File No. S7-26-10 (the "Proposing Release"),[2] relating to the implementation of Section 945 (Due diligence analysis and disclosure in asset-backed securities issues) and a portion 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 "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, including our issuer, investor, ABCP conduit sponsor, accounting firm, due diligence provider and financial intermediary members.

Section 945 of the Act ("Section 945") requires the Commission to implement rules requiring the issuer of registered ABS to perform a review of the assets underlying such ABS and to disclose the nature of such review. Section 932(a) of the Act ("Section 932(a)") requires the Commission

[1] 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.

[2] See http://www.sec.gov/rules/proposed/2010/33-9150.pdf.

to implement rules requiring the issuer or underwriter of any asset-backed security to make publicly available the findings and conclusions of any third-party due diligence report obtained by such issuer or underwriter. In the Proposing Release, the Commission addresses the requirements of Section 945 by (i) promulgating Rule 193 ("Rule 193") under the Securities Act of 1933 (the "Securities Act") to require issuers to perform a review of the assets underlying any registered ABS and (ii) amending Item 1111 of Regulation AB ("Item 1111") to require issuers to disclose both the nature and the findings and conclusions of such review in the registration statement. Proposed Rule 193 permits an issuer to engage a third party to perform the requisite review, provided that the third party consents to being named as an expert in the issuer's registration statement. The Commission proposes giving effect to the relevant portion of Section 932(a) by implementing Rule 15Ga-2 ("Rule 15Ga-2") under the Securities and Exchange Act of 1934 (the "Exchange Act"), which would require the issuer or the underwriter of any ABS (whether registered or unregistered) to make available through public filing the findings and conclusions of any report obtained by it from a third party that is engaged for purposes of performing a review of the assets underlying an ABS. As to such reports obtained by the issuer in a registered offering, the requirements of Rule 15Ga-2 would not apply if the issuer has already made such information available pursuant to amended Item 1111. Set forth below are our members' comments and concerns relating to the proposed rules.

I. What Constitutes a "Review of the Pool Assets"?

Proposed Rule 193 uses the phrase "a review of the pool assets," Item 1111 as revised uses the phrase "a review of the assets", and proposed Rule 15Ga-2 uses the phrase "a review of the pool assets." Because the issuer would be mandated to make (or permitted to engage a third party to make) such a review under proposed Rule 193, and because the nature of that mandated review by the issuer as well as its findings and conclusions would have to be disclosed pursuant to revised Item 1111, the threshold issue is to clarify exactly what is meant by this key phrase.

We recommend that the Commission clarify that the phrase "review of the pool assets" as used in all of these provisions refers only to a review of the pool assets to determine compliance with the applicable underwriting guidelines (see our specific language proposal below). We believe that the essential goals of Section 945 and 932(a) of the Act in this regard were to provide better assurance that the assets included in an ABS are of the inherent quality that they are represented to be, and that steps taken to verify their inherent quality (as well as the findings) should be disclosed. We believe the Act's mandate should be limited to verification of the inherent quality of the pool assets, and we do not believe that this mandate should be expanded by regulation to encompass verification of the disclosure about the assets in the prospectus. The relevant provisions of the Act refer to a review of the assets, and not to a review of the disclosure about the assets.

We believe that a review against the applicable underwriting guidelines of the originator is the best indicator of inherent quality. These are the guidelines that determine whether a loan should have been made or credit should have been extended. Typically, these guidelines address matters including the creditworthiness of the borrower, the value of any collateral, and compliance with applicable law. But, we are mindful of the discussion in footnote 17 of the Proposing Release (which references a review against underwriting guidelines plus additional related reviews), and in focusing on compliance with underwriting guidelines we wish to be very clear about what should be included in the mandated review and in the required disclosure about any review while not specifying a minimum level of review beyond compliance with applicable underwriting guidelines.

Accordingly, we propose the following instruction to Rule 193:

> "Instruction to Rule 193: For all purposes of this rule, as well as 17 C.F.R. §229.1111(a)(7) and 17 C.F.R. §240.15Ga-2:
>
> > (1) the phrase "a review of the pool assets" shall in all cases include a review performed by the issuer, sponsor or underwriter or any third party engaged by any of them, of any or all of the pool assets against (a) the underwriting guidelines or approval procedures of the originator that were applicable to the origination of the asset, or (b) in the case of pool assets that are receivables generated under revolving accounts, the approval procedures of the originator that were applicable to the creation and maintenance of the account, and
> >
> > (2) with respect to residential mortgage-backed securities only, the phrase "a review of the pool assets" shall also include, but only to the extent performed by the issuer, sponsor or underwriter or any third party engaged by any of them, any review of any or all of the pool assets with respect to matters encompassed within underwriting such as the creditworthiness of the borrower, the value of any collateral, and compliance with applicable law."

We note that in some cases, particularly where the issuer or sponsor is the originator or is affiliated with the originator, the nature of a review of the pool assets as contemplated in part (1) of the proposed instruction would typically already be disclosed in the prospectus. Part (2) of our proposed instruction would be limited to residential mortgage-backed securities, because the types of reviews referenced, which are or may be in addition to a review against the underwriting guidelines themselves, are generally only made for residential mortgage loans.

Thus, for example, for a residential mortgage loan where the underwriting guidelines include a requirement that an appraisal be obtained that supports a specified maximum loan-to-value ratio, the review required under Rule 193 would address compliance with those specific requirements. However, if the issuer elected to go further and obtain a third party review of some or all of the loans to-re-verify property value by comparing the appraised value to a value determined by alternate means, then the nature of that further review would have to be disclosed as well as its findings and conclusions; <u>but</u> the issuer would not be required to make such a review under Rule 193. Essentially, we are suggesting that verification of underwriting guideline compliance by or on behalf of the issuer should be performed to meet the Rule 193 requirements and should be disclosed, and that further verification of matters encompassed within underwriting should be optional, but if made should be disclosed.

Importantly, we are also recommending that reviews that relate in some way to the pool assets, but that do not include a review against the underwriting guidelines or matters related to underwriting, should not be within the scope of these proposed rules at all, and should neither be expressly required to be made nor to be disclosed if made. For example, a review made to compare loan-level data against information included in the loan files is essentially made not to verify asset quality, but rather to verify accuracy of the loan-level data which in turn is used to derive numerical information disclosed in the prospectus. Such a review would not be a review of the assets, but rather a review of loan-level data. We see no reason to scope that into the Act's mandate. Issuers are already responsible for any material errors in pool-level data in the prospectus that result from any errors in the loan-level data, as well as any material errors in the loan-level data itself to the extent that it is filed and incorporated by reference in the registration statement.

Another effect of our proposal is that "review of the pool assets" would not include 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. We believe that this result is essential. 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. If the phrase "review of the pool assets" as used in the context of proposed Rule 15Ga-2 applied to such an AUP letter from an accounting firm engaged by the underwriter, then the underwriter would be required to file a Form ABS-15G disclosing the results and findings of the AUP letter. AUP engagements are performed by accountants in accordance with strict professional standards established by the American Institute of Certified Public Accountants. If the effect of filing these findings and conclusions on Form ABS-15G was that an investor could rely on the AUP letter, 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), effectively meaning that accountants could no longer perform these services in the form of an AUP engagement, even if they wanted to. We think that underwriters should not be precluded from continuing to use AUP letters in accordance with current practices.

The Proposing Release requests comment on whether the review required to be made under Rule 193 should at a minimum provide reasonable assurance that the disclosure in the prospectus regarding the assets is accurate in all material respects.[3] We believe that this standard is inappropriate and unnecessary to address the intent of the Act or to improve disclosure. As stated above, the new requirements mandated by the relevant provisions in the Act should address a review of the assets, not a review of the disclosure about the assets. We note that Item 1111 would require that the nature of any review performed to meet the requirements of Rule 193 be disclosed. Issuers already have strict liability for any untrue statement of a material fact in the prospectus or any omission to state a material fact required to be stated therein or necessary to make the statements made not misleading. Effectively, the "reasonable assurance" standard if applied to Rule 193 would require issuers to describe what they did to get comfortable that they met their disclosure obligations. This disclosure requirement could expose issuers to liability for failing to have used procedures that provided such "reasonable assurance", or for not having accurately described the nature of the procedures and their findings and conclusions, even if there was no material error or omission as to the actual disclosure in the

[3] See request for comment number 2 in the Proposing Release at page 11.

prospectus about the pool assets. We think ABS issuers, like other issuers, should be required only to meet their disclosure obligations, and not go further and disclose what procedures they followed to give themselves "reasonable assurance" that they met their disclosure obligations.

The inappropriateness of the "reasonable assurance" standard is further illustrated by considering the scope of the disclosure that relates to the assets, as well as the inability to obtain "reasonable assurance" about the accuracy of the disclosure from a third party. A typical prospectus in an ABS offering includes an enormous amount of disclosure "regarding" the pool assets, including not just numerical information about the assets and the pool but also narrative disclosure about: the pool assets generally; the originator's lending programs; the underwriting guidelines applicable to the pool assets; risk factors relevant to the pool assets; servicing of the pool assets; legal aspects of the pool assets (including a description of applicable law relevant to origination and enforcement) and so on. We simply don't believe that Congress had all of these topics in mind in requiring a review of the assets underlying an ABS. Requiring issuers to disclose the nature of a review that they performed to give themselves "reasonable assurance" of the accuracy of all of these elements would not improve reviews of the actual pool assets or improve disclosure, but would instead simply turn a well-intentioned reform into one more obstacle to the recovery of the securitization markets.

Third party reviews that would provide "reasonable assurance" of the accuracy of all disclosure in the prospectus regarding the pool assets are not available. Such a review would be very far beyond the scope of any services currently offered by Third Party Diligence Providers (as defined below). Moreover, such a review to a "reasonable assurance" standard, if performed by an accounting firm would not constitute an AUP engagement, but rather would be an audit or attestation engagement, and even if available would require the issuer to incur substantial additional costs that could result in increases to the cost of credit to consumers.

II. Expert Consent Requirement

By consenting to be named as an expert in the 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"). Our members (including our investor members) strongly believe that subjecting such third parties to expert liability is unnecessary to achieving the goal of assuring that adequate due diligence is performed and would actually be counterproductive to such goal. In addition, our members believe such requirement is inappropriate in light of the type of review to be performed and the nature of the third parties performing it.

We note as an initial matter that multiple types of parties generally perform reviews of assets on ABS transactions. In residential mortgage-backed securities ("RMBS") transactions, these reviews are customarily performed by specialized firms, called third party diligence providers, who are hired for the purpose of reviewing the assets and confirming that they comport to specified criteria (such firms referred to herein as "Third Party Diligence Providers").[4] These reviews may include a review of credit quality by re-underwriting loans against underwriting

[4] We note that this letter does not discuss diligence for commercial mortgage-backed securities.

guidelines or other criteria specified by the client, a review to determine compliance with specific consumer protection laws (which is typically performed by entering loan parameters into specially designed computer programs), and reviews to verify real property appraisals by using automated value models, broker price opinions and other procedures. In ABS transactions backed by non-mortgage assets, asset review is generally significantly less detailed (as discussed in Section III (Level of Review required pursuant to Proposed Rule 193) below) and is generally satisfied by relying on the original underwriting review in cases where the issuer or sponsor is the originator or is affiliated with the originator. In some cases, accountants may be engaged to perform services that constitute a review of the underwriting of loans, but not as part of an AUP engagement and, we believe, this would not be an activity within the scope of an accountant's role as an expert.[5]

a. Subjecting third parties engaged for purposes of reviewing assets to expert liability will negatively impact investors and the ABS industry

We have consulted with members of our accounting committee as well as with representatives of due diligence providers active in the RMBS market and have been informed that most of these firms are highly unlikely to consent to be named as experts because of the significant potential legal liability created by such consent.[6] Therefore, if the expert consent requirement is included in the final rule, sponsors will be forced to perform the required review themselves, instead of engaging these third parties to perform the review on their behalf. This would be an unfortunate and counterproductive consequence, because such third parties provide a disinterested review that investors prefer. Accountants and Third Party Diligence Providers are not affiliated with issuers or sponsors of securitizations, and therefore bring both impartiality and a fresh perspective to any review they perform, which may be lost if sponsors performed the requisite review themselves.

Even if issuers were able to engage skilled third parties who were willing to consent to be named as experts (which, as noted above, seems highly unlikely) such third parties would likely be inclined to perform a far more limited, "check the box" style review than they would perform if incurring expert liability was not a concern. Alternatively, the quality of loan review by existing providers of these services could be maintained, but at a much higher cost reflecting additional procedures required in order to operate under the higher liability standard, which would result in higher costs of credit to be borne by borrowers. It is also possible that the industry could see an influx of newly formed Third Party Diligence Providers who would be thinly capitalized and therefore more willing to take on expert liability. Such reviews would likely be substantially

---

[5] Our views expressed herein regarding assigning expert liability to accountants are limited to situations in which accountants are providing a review of assets in accordance with their client's instructions. We recognize that it is well established that there are other situations (for example, when accountants audit financial statements that are included in a registration statement) where expert liability for accountants may be appropriate.

[6] We note the similarities between the refusal by Third Party Diligence Providers and accountants to provide expert consent to the similar refusal by rating agencies to provide such consent in the wake of the repeal of Rule 436(g) of the Securities Act. Such refusal effectively caused the ABS markets to cease functioning until the Commission provided relief by temporarily allowing ratings to be omitted from registration statements, thus eliminating the need for expert consent from rating agencies.

poorer in quality than those performed by the skilled and experienced providers currently active in the market.

For these reasons, our membership, and our investor members in particular, do not support subjecting accountants and Third Party Diligence Providers to expert liability. Investors and others are extremely concerned that such a requirement will result in inferior due diligence being performed. This could potentially result in less investor confidence.

b. *Subjecting third parties engaged for purposes of reviewing assets to expert liability is inappropriate in light of the type of review that is performed and the nature of such parties*

The review necessary to perform due diligence on the assets underlying ABS transactions is not of a type that requires the expertise of a professional as contemplated within the scope of Section 11(a)(4) of the Securities Act, and therefore is not the type of review that should be subject to expert liability.

Section 11(a)(4) does not impose liability on all persons that can be considered “experts”. Rather, Section 11(a)(4) only imposes liability on persons included in the phrase “every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him”, who consents to be named in the registration statement and who prepared or certified any part of the registration statement or any report or valuation used in connection with the registration statement. While this is commonly referred to as “expert liability”, the liability does not extend to all experts, and the term “expert” only appears in the Section 11(b)(3) affirmative defense provisions.

To date, the categories of persons that have been considered to be subject to Section 11(a)(4), setting aside credit rating agencies (discussed briefly below), have been limited to the stated categories of accountants, engineers and appraisers, plus the additional categories of attorneys, as well as persons providing fairness opinions in corporate transactions.

Accountants, engineers, real estate appraisers and attorneys are all state licensed professionals, who in the practice of their profession must exercise unbiased judgment in applying to the matter at hand a body of knowledge or set of generally accepted principles or agreed upon best practices. Persons who provide fairness opinions are not licensed as such, but generally work at registered broker dealers. Fairness opinions involve expressing an opinion about a transaction against a standard of fairness or an objective valuation. Importantly, none of the foregoing involves testing or evaluation against a set of criteria that are entirely supplied or defined by the client.

The Act eliminates the regulatory exemption from expert liability for rating agencies whose ratings are disclosed in the registration statement (although such disclosure is currently not mandated due to a no-action letter issued by the Commission). Although rating agencies are in many respects different from the professionals noted above, there are also attributes of rating agencies and their function that are different from due diligence reviews conducted by Third Party Diligence Providers. While rating agencies and their employees are not regulated or required to be licensed by state authorities, rating agencies can of course obtain a designation as a "nationally recognized statistical rating organization" and NRSROs are subject to certain regulations under the Exchange Act. Credit rating agencies are also subject to standards of conduct promulgated by the International Organization of Securities Commissions. The essential role of a credit rating agency is to independently set ratings categories, criteria and methodologies, and then to apply a given issuer's security against those criteria and methodologies.

We maintain that the work of third parties performing a review of the assets underlying an ABS on behalf of an issuer is fundamentally different from the work of professionals that to date have been included within the scope of Section 11(a)(4), because these reviews involve comparing assets against criteria specified by the issuer, or reviewing assets or disclosure under procedures specified by the issuer. Because the criteria or procedures are set only by the issuer and are not established by the reviewer or grounded in some other body of knowledge or set of established procedures, these reviews do not require the kind of professional judgment that is provided by other categories of persons that are within the scope of Section 11(a)(4).

We also believe that Third Party Diligence Providers are not subject to expert liability under a fair reading of Section 11(a)(4) of the Securities Act. Because they are not specifically referenced in the statute, in order to be assigned expert liability, a Third Party Diligence Provider must fall within the category of a person "whose profession gives authority to a statement made by him."[7] In our view, Third Party Diligence Providers clearly do not fit within this language because no particular authority is accorded to their findings. Furthermore, Third Party Diligence Providers are not required to be licensed and are not governed by any formal professional or industry associations, and hence do not have authority given to a recognized profession as contemplated by the statute. In performing an asset review, such firms simply compare the assets to the criteria provided by their clients and determine if such criteria are met. In this sense, the review performed by Third Party Diligence Providers is analogous to the review that is carried out by a loan originator to confirm that a loan conforms to the originator's underwriting guidelines. When Third Party Diligence Providers review a loan against the underwriting criteria provided to them, they are not expressing an independent judgment about the value or riskiness or appropriateness of the loan against some independent standard - they are simply expressing a view as to whether the loan conforms to the underwriting guidelines provided. The value of this review is not that it is better or more "expert" than an underwriting assessment made by an originator or sponsor, but rather that the review is independent.

c. Preservation of Independence of Third Party Diligence Providers

One of the reasons the Commission has proposed to assign expert liability to Third Party Diligence Providers is because they wish to ensure that such firms are not unduly influenced by issuers who pay for their services. While retaining the independence of Third Party Diligence

[7] We note that at least one court has held that expert liability should seldom be found to apply to persons who are not specifically enumerated in the statute. *See* In re ZZZZ Best Sec. Litig., [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶94,485, 93,082–83 (C.D. Cal. 1989), stating (in the context of a claim that attorneys should be held liable under Section 11 for the entire registration statement) that "Liability for persons not especially enumerated in the statute should generally not be found" and noting that it would be inappropriate to subject "an entire field of professionals not specifically enumerated by Congress" to Section 11 liability.

Providers is a laudable goal that is wholeheartedly supported by our members, for the reasons discussed above, assigning expert liability is not the appropriate mechanism with which to achieve it and may have the opposite effect by requiring the issuer to perform its own review.

Instead, we propose that Third Party Diligence Providers (not including accountants) hired by issuers to perform the review required by proposed Rule 193 be required to provide a certification stating that (i) the Third Party Diligence Provider was not subject to any coercion or duress that either limited the scope of the review or limited the provider's ability to conduct an independent and thorough review and (ii) the review was conducted in accordance with specified loan-level review standards provided by the party engaging the Third Party Diligence Provider (which could be the standards of the rating agencies or of the underwriter, or the sponsor's underwriting standards or those of the originator). This is similar to the certification currently provided by Third Party Diligence Providers to rating agencies on RMBS transactions.

In addition, issuers could be required to disclose in the prospectus their relationship with the Third Party Diligence Provider (including the fact that the issuer paid the provider). This would enable investors to reach their own conclusions regarding whether the Third Party Diligence Provider is sufficiently independent.

Finally, as discussed above, we believe that one consequence of assigning expert liability to due diligence providers will be that such providers will abstain from performing the reviews mandated by Rule 193. As a result, sponsors will likely be forced to perform the required review themselves, and consequently transactions will no longer have the benefit of independent due diligence. Therefore, by relying on expert liability to protect against conflicts of interest in the review process, the Commission risks eliminating independent reviews altogether.

III. <u>Level of Review Required Pursuant to Proposed Rule 193</u>

The Commission has requested comment on whether proposed Rule 193 should mandate a minimum level of review that must be performed. As discussed in Section I (What Constitutes a Review of the Pool Assets?) above, we do believe that it is essential to clearly define what types of reviews are or could be included in the phrase "review of the pool assets," but the Commission should not define a minimum level of review. Under proposed Rule 193, with our proposed instruction added, the effect would be that in all cases the issuer or sponsor would have to perform some level of review of the pool assets against the underwriting guidelines that were applicable at origination. However, we believe that for all asset types, the regulations should not contain further requirements, and in particular should <u>not</u> specify requirements as to any of the following: (i) the sample size or method of selection of the sample for which the review should be performed, (ii) how recently the review required to be performed by the issuer or sponsor should have been performed, (iii) any reviews relating to matters encompassed within underwriting, in addition to the review against the underwriting guidelines applicable at origination, that should be performed, or (iv) any review of the pool assets against the representations and warranties made by the issuer or sponsor.

We believe that a review of the pool assets against the representations and warranties made by the issuer or sponsor should not be required to be made, as part of a minimum level of review, for the following reasons which are based on typical practices for RMBS. A standard set of representations and warranties includes representations that the mortgage loans were underwritten in accordance with the applicable underwriting procedures, and would include additional representations as to matters encompassed within underwriting including property valuation and legal compliance. Thus, the substance of the most important representations would be covered by the review of the pool assets as discussed in Section I (What Constitutes a Review of the Pool Assets?) above. However, the representations and warranties also typically include specific, objective requirements which are difficult to verify but as to which the parties intend to allocate risk to the seller. For example, a standard representation is that the mortgaged property has not been destroyed or materially damaged as of the closing date. While it is rare for this representation to be breached (and even if breached, such loss would be largely offset by hazard insurance), it would be impractical or impossible to verify the accuracy of this representation as of the closing date, since any property could have been damaged by fire or other hazard immediately prior to the closing date. In this case, the purpose of the representation is to be able to allocate this risk to the seller by contract, notwithstanding the fact that the accuracy of the representation cannot be verified. This example is just an illustration, and there are a number of representations where the likelihood of breach is very low but the cost of verifying the relevant facts are very high, yet the parties wish to allocate the risk of breach to the seller precisely because the accuracy of the representation cannot be verified.

Issuers or sponsors should be permitted to comply with Rule 193 by performing the review themselves, engaging a third party to perform all or any portion of the review on their behalf, or any combination thereof. Furthermore, where the issuer or sponsor is the originator or is affiliated with the originator, we believe that the review required by Rule 193 should be permitted to be the review against underwriting guidelines that was made by the originator in connection with the origination of the loan.

For all asset classes, we agree with the view expressed by the Commission in the Proposing Release that the disclosure required under the proposed amendment to Item 1111 will be sufficient to enable investors to evaluate the level and adequacy of the review.

With respect to mortgage loans underlying RMBS, we note that the industry is already well underway in developing best practices for third party diligence reports. Three of the major nationally recognized statistical rating organizations that rate RMBS have published detailed requirements for loan reviews to be performed by Third Party Diligence Providers. While we do not recommend that the Commission adopt these guidelines as regulatory requirements, we do believe that the existence of these guidelines, and the application of them in recent transactions, makes it clear that the industry is developing appropriate best practices in this regard, and that therefore there is no need to specify a minimum level of review by regulation.

We note that very little evidence exists to suggest that the performance of non-mortgage consumer ABS during the credit crisis suffered as a result of inadequate due diligence. Rather, the procedures that existed prior to and during the credit crisis generally proved to be adequate for the protection of investors in these asset classes.[8] The procedures generally consisted of a

[8] *See* The Board of Governors of the Federal Reserve System, Report to the Congress on Risk Retention, available at http://federalreserve.gov/boarddocs/rptcongress/securitization/riskretention.pdf, p. 55-60.

review by the originator at the time of origination and were performed in the same manner whether or not the assets were to be securitized. These procedures generally did not include detailed asset-level review, and we believe requiring any such review would be unnecessary and unduly burdensome to issuers, and hence result in an increase to the cost of credit to consumers. In particular, requiring an additional review of the assets at the time of securitization would be unlikely to provide any additional protections to investors.

We believe it is critically important to the continued recovery of the ABS market, and hence the continued availability of low cost credit to consumers, that no detailed minimum standard of review be promulgated by the Commission for any asset class. However, if the Commission believes it is necessary to establish a minimum standard of review, then it should only do so with due consideration of the views of a broad range of industry participants.

IV. Clarification Regarding When an Entity is a "Third Party Engaged for Purposes of Performing the Review" under Rule 193

Rule 193 permits issuers to perform the required review themselves or to engage a third party to perform the review on the issuer's behalf. We request that the final rule clarify that a report from a third party is only subject to the requirements of Rule 193 if it is actually used by the issuer to comply with its obligations under Rule 193. We expect that issuers will often either perform the requisite asset review themselves or, in the case of RMBS transactions, hire a Third Party Diligence Provider to perform the review on their behalf. Separate and apart from such obligation, however, the issuer may engage an accounting firm to provide an AUP letter, the purpose of which is to bolster the underwriters' due diligence defense by confirming the accuracy of certain information in the prospectus, but which may also contain some ancillary procedures regarding the underlying assets which are not intended to meet the issuer's obligation to review the pool assets under Rule 193. In addition, the issuer's attorneys may provide an opinion relating to the validity of the security interest in the assets. Since neither an AUP letter nor a legal opinion is being used for the purpose of meeting the issuer's obligations under Rule 193, these items should not be subject to the requirements of the rule.

V. Clarification Regarding When an Entity is a "Third Party Engaged for Purposes of Performing A Review" under Rule 15Ga-2

We request that the final rule clarify that the filing requirement under Rule 15Ga-2 will apply only to the findings and conclusions of reports that specifically pertain to a review of the pool assets. If a third party is engaged for multiple purposes including a review of the pool assets, only the findings and conclusions of the portion of the report pertaining to the review of the pool assets should be subject to the requirement. Furthermore, we ask the Commission to clarify that opinions provided by attorneys are not intended to be included within the scope of Rule 15Ga-2, unless and to the extent that they expressly address a review of the pool assets. Such opinions are clearly not due diligence reports as contemplated by the statute, nor do they generally contain a review of the assets underlying the ABS. We also refer to the discussion in Section I (What Constitutes a Review of the Pool Assets?) regarding why AUP letters in particular should not be subject to the requirements of Rule 15Ga-2.

VI. The Impact of Rule 15Ga-2 on Private Transactions

As proposed, Rule 15Ga-2 would apply to unregistered transactions as well as registered transactions. As an initial matter, we note that Section 932(a) imposes an obligation on "issuers and underwriters" to "make publicly available" the findings and conclusions of third party diligence reports. We believe that the Commission should consider that by using the word "underwriter" (which is commonly used only in the context of registered transactions), coupled with the phrase "make publicly available", Congress only intended this provision to apply to registered transactions.

If it is determined that Rule 15Ga-2 should nevertheless apply to unregistered transactions, we urge the Commission to allow compliance on such transactions by disclosure of the requisite information in the offering document. We do not believe it is appropriate or necessary for issuers and underwriters of privately offered ABS to be required to publicly file the findings and conclusions of third party diligence reports. Disclosure of the information in the offering document would accomplish the goal of making such information available to investors and potential investors, while respecting issuers' and underwriters' desire for confidentiality.[9]

In addition, permitting disclosure in the offering document in lieu of filing would alleviate concerns issuers and underwriters have regarding the effect public filing of such information might have on their ability to rely upon the private offering exemption in the Securities Act and the safe harbor for offshore transactions. We note that the Proposing Release indicates that filing the information required by Rule 15Ga-2 on unregistered transactions would not, standing alone, foreclose the issuer's ability to rely on such exemptions and safe harbors.

If it is determined that public filing of this information is necessary for unregistered transactions, we request that the Commission establish an express safe harbor provision in the actual rule. The safe harbor provision should state that disclosing information required by Rule 15Ga-2 will not be considered a public offering and would not jeopardize an issuer's reliance on an exemption from registration. Such a provision would permit an issuer to continue relying on a particular exemption or safe harbor from registration if the issuer included only the information required by the filing. For registered offerings, we request a corresponding safe harbor provision stating that disclosing information required by Rule 15Ga-2 will not be considered an offering communication.

Securitizations of financial assets through ABCP conduits ("ABCP Transactions") are a special category of unregistered transactions. In the Proposing Release, the Commission asks whether the due diligence reporting requirements of the new Exchange Act Section 15E(s)(4)(A) should not apply to certain ABS transactions.[10] We believe these reporting requirements should not apply to ABS financed by ABCP conduits.

---

[9] We understand that the Act uses the term "make publicly available" when stating the manner in which third party diligence reports must be provided. However, if this requirement is interpreted to apply to unregistered transactions at all, it should be read to only require disclosure to investors and potential investors, as these are the only persons to whom such information is of any legitimate value.

[10] See request for comment number 21 in the Proposing Release at page 30.

As used in this letter, the term "ABCP conduit" means a special purpose entity that (i) issues highly-rated asset backed commercial paper ("ABCP"), (ii) uses the proceeds thereof to acquire or finance financial assets, and (iii) has access to committed liquidity from one or more highly-rated liquidity provider(s) in an amount not less than the face amount (*i.e.*, principal plus interest through maturity) of all of its outstanding ABCP. Most ABCP conduits are also supported by credit facilities[11] from highly-rated providers, the sizes of which vary.[12] "ABCP conduit" is not intended to include ABCP issued by issuers such as structured investment vehicles or market value CDOs that do not have access to committed liquidity in support of the issuer's obligation to pay the ABCP in full on its maturity date.

ABCP conduits are sponsored by banks or other financial institutions. Customers of the sponsor sell assets to the ABCP conduit and receive financing from the ABCP conduit. Most ABCP conduits finance many different types of assets in numerous transactions, which are originated and serviced by different sellers/servicers. The assets are often revolving in nature and are frequently changing.

Support providers for an ABCP conduit may obtain or require a seller to obtain due diligence reports to confirm the accuracy of the seller's description of the assets. Such support providers assume the risk of the accuracy of their customer's representations concerning the nature and quality of assets being transferred in the transaction; therefore there is no potential conflict of interest as there could be if the support provider were seeking to transfer such risk. The ABCP conduit's investors are insulated from this risk by the liquidity commitments of the support providers, which will fund against assets that have been improperly reported by the customer. The coverage of this risk is a feature that differentiates ABCP Transactions from other securitizations.

ABCP conduit support providers will decide whether they need third party due diligence reviews to protect their own interests and they have the bargaining power to obtain or to require their customers to obtain these reviews. Section 15E(s)(4)(A) should not be construed to interfere with that decision by imposing a requirement for disclosing those reviews to ABCP investors. Such a requirement could be viewed as burdensome by sponsors of and support providers for ABCP conduit programs and, therefore, could perversely cause them not to engage the third party due diligence review. Moreover, because of the breadth and number of assets in many ABCP conduits and frequently changing composition, it is not practical for investors in ABCP to focus on asset-level information and due diligence reporting at this level would not be useful to these investors.

In response to Question 21 of the Proposing Release, for the reasons set forth above, we believe it is appropriate to exclude transactions financed by ABCP conduits that meet the definition of ABS under the Act from any Section 15E(s)(4)(A) reporting requirements.

---

[11] Certain ABCP conduit programs may have one agreement that provides both liquidity and credit support in one facility.

[12] Although the liquidity and credit support for the vast majority of ABCP conduits are provided by their financial institution sponsors, some ABCP conduits obtain liquidity and credit support from third-party providers.

VII. Clarifications Regarding the Meaning of "Findings and Conclusions" and Incorporation by Reference of Form ABS-15G Filings

The proposed amendments to Item 1111 require disclosure of the "findings and conclusions" of the review of the assets underlying the ABS. Likewise, proposed Rule 15Ga-2 requires filing of the "findings and conclusions" of a report of a third party engaged for purposes of performing a review of the assets. We ask that the Commission clarify that this would not require the disclosure or filing of all or a portion of the actual report provided by a third party and that the disclosure could be satisfied by a statement describing the findings and conclusions that were prepared by the issuer or underwriter, as applicable.

We do not believe that the filing of Form ABS-15G would cause the information included in such form to become part of an issuer's registration statement, unless such filing was specifically incorporated by reference into such registration statement. We request that the Commission clarify that it does not intend to require such incorporation by reference.

VIII. Performance of Rule 193 Review by the Sponsor

The Proposing Release appears to contemplate that the review of the assets required by proposed Rule 193 should be performed by either the sponsor or the depositor, depending on whether the transaction is structured as a "one-step" or "two-step" transfer. We note that depositors are generally special purpose entities with no employees and therefore it will usually not be practicable for that entity to perform the review itself. Therefore, we request that the Commission permit the required review to be performed by the sponsor in all transactions, whether structured as a "one-step" or "two-step" transfer.

IX. Clarification Necessary to Avoid Duplicative Filings under Proposed Rule 15Ga-2

Proposed Rule 15Ga-2 requires the filing of the findings and conclusions of any due diligence report "obtained by the issuer or underwriter." In transactions with multiple underwriters, each of whom receive the same report, this could be interpreted to require the filing of the same information by each underwriter. Such a result would be unduly burdensome for the parties while producing no appreciable benefit for investors. Therefore, we request that the final rule specify that the required report be filed by the lead underwriter on the transaction.

Likewise, in situations where clause (b) of proposed Rule 15Ga-2 does not apply, the rule could be interpreted to require filing of the same information by both the issuer and the underwriter. Therefore, we request that the rule be clarified to provide that in such situation the findings and conclusions of any particular report need only be filed once and that such findings and conclusions can be filed by either the issuer or the lead underwriter.

X. Transition Period

Compliance with the new due diligence, disclosure and reporting regime dictated by Rule 193 and Rule 15Ga-2 will require substantial efforts by issuers, underwriters, Third Party Due Diligence Providers and other market participants. Existing processes and procedures will likely need to be adjusted significantly, and new processes and procedures may need to be developed.

These efforts will be time consuming, especially since they will require the cooperation of various market participants. Accordingly, we request compliance with Rule 193 and Rule 15Ga-2 be made applicable to transactions issued no earlier than the later of one year following the date of publication of the final rule in the Federal Register and January 1, 2012.

* * * *

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 tdeutsch@americansecuritization.com. You may also contact Evan Siegert, ASF Associate Director, at 212.412.7109 or esiegert@americansecuritization.com or ASF's outside counsel on this matter, Stephen S. Kudenholdt of SNR Denton US LLP at 212.768.6847 or steve.kudenholdt@snrdenton.com.

Sincerely,

Tom Deutsch

Tom Deutsch
Executive Director
American Securitization Forum