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

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

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities and the Committee on Securitization and Structured Finance (the "Committees") of the Section of Business Law of the American Bar Association (the "ABA") in response to the request for comments by the Securities and Exchange Commission (the "Commission") in its October 19, 2010 release referenced above (the "Proposing Release").[1]

The comments expressed in this letter represent the views of the Committees only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the ABA Section of Business Law.

I. Proposed Rule 193: Proposed Requirement That an ABS Issuer Perform a Review of the Assets

Section 945 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act") adds a new § 7(d)(1) to the Securities Exchange Act of 1934, as amended (the "Exchange Act"). This new provision requires the Commission to adopt, within 180 days after enactment of the Dodd-Frank Act, rules requiring issuers of ABS to perform a review of the assets underlying registered ABS offerings. In the Proposing Release, the Commission proposes new Rule 193 to implement § 7(d)(1).

[1] 75 Fed. Reg. 64182 (October 19, 2010).

a. Minimum Standard of Review; Type of Review Required.

Proposed Rule 193 closely echoes the language of § 7(d)(1) of the Exchange Act, in that it requires simply a review of the pool assets, without specifying either a minimum standard for review or the types of review required. The Commission requests comment on whether this approach is sufficient to carry out the purposes of § 7(d)(1), asking if issuers will undertake a meaningful review absent a minimum review standard and whether the rule should further specify the types of matters covered by the review and the level of review that is required.[2]

We believe that the Commission strikes the proper balance with Rule 193 as it has been proposed. Congress did not impose any minimum level or type of review on issuers of ABS, or mandate that the Commission do so. As further described below, pursuant to proposed Item 1111(a)(7) of Regulation AB, an ABS issuer would be required to disclose the nature of the review undertaken to comply with Rule 193. We agree with the Commission that disclosure of the nature of the review "will give investors the ability to evaluate the level and adequacy of the issuer's review of the assets."[3] In our view (subject to our discussion below about certain customary reports that we do not believe should be covered by Rule 193), the marketplace should determine the level and type of review required for any particular asset class.

The Commission also requests comment on whether "reasonable assurance that the disclosure in the prospectus regarding the assets is accurate in all material respects" would be appropriate as a minimum level of review. While we believe that the proposed disclosure requirements will afford investors an adequate opportunity to make their own determinations regarding the adequacy of the issuer's review of the assets, if the Commission decides that a minimum level of review is appropriate, we agree that this reasonable assurance standard could provide a workable approach. Any issuer of securities registered under the Securities Act of 1933, as amended (the "Securities Act"), is already liable for any misstatement of a material fact in its disclosure, and for any omission necessary to make the statements it does make in that disclosure not misleading in any material respect.[4] Therefore, every issuer already should be taking appropriate steps to ensure the accuracy of its disclosure in order to avoid potential liability for material misstatements or omissions.

As noted above, we do not agree that the SEC should mandate that an ABS issuer perform any specific types of review. The Commission acknowledges that proposing any such mandate would be an "extensive undertaking."[5] In order to reflect appropriately the significant differences among types of transaction structures, and among disparate asset classes, we believe

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2 Proposing Release at 64185.

3 *Id.* at 64184.

4 *See* §§ 11 and 12 of the Securities Act, and Rule 10b-5 under the Exchange Act.

5 Proposing Release at 64183, n. 18

that such an endeavor would be monumental, comparable in complexity to the rulemaking currently in process regarding the addition of proposed asset-level disclosure to Regulation AB (the "2010 Regulation AB Proposal).[6] For this reason, should the Commission determine that it is appropriate to require any specific types of asset review by ABS issuers, we believe that it is incumbent upon the Commission to re-propose specific rules and give industry participants sufficient time to consider those proposals carefully and thoughtfully. As noted by the Commission in the Proposing Release, such an effort simply is not feasible in the 180 days permitted by the Dodd-Frank Act for the adoption of final rules.[7]

In the event that the Commission decides to re-propose rules requiring specific types of review, we urge that the Commission be mindful of several guiding principles. The relationship between the issuer and the originator is crucial in determining the appropriateness of any particular method of review. In our opinion, the most fulsome review is called for when the issuer is unaffiliated with the originator of the assets, such as in so-called "aggregator" transactions. A significantly less arduous *de novo* examination should be necessary when the issuer is the originator, or is an affiliate of the originator, inasmuch as the originator should be extremely familiar with the attributes of the assets. For example, in the Proposing Release, the Commission notes its belief that it may be appropriate for the issuer to review a representative sample of assets in a pool, though in a pool with a small number of assets it may be appropriate for the review to address every pool asset in some respect.[8] We agree that sampling should be permitted as a possible way of diligencing pools with a large number of assets, but we do not agree that even sampling should be required in all circumstances. For example, where the issuer and the originator are affiliated and the originator has conducted a review of its internal controls over its systems for originating assets and for tracking asset information, and that review has not identified any material deficiencies, it may be reasonable for the issuer to rely on the originator's evaluation of its internal controls rather than engaging in any direct review of the pool assets.

We also believe that the structure of the transaction is important in determining the type of diligence necessary to afford the issuer a sufficient level of comfort as to its disclosure regarding the pool assets. For example, where securities are backed by a revolving pool of assets, a due diligence review of the pool assets themselves at any point in time is not nearly as important as information regarding the criteria for adding new assets added to the pool. Similarly, where the securities are subject to significant credit enhancement (such as insurance), a diligence review is not nearly as important as information regarding the terms of the credit enhancement and the creditworthiness of the provider of the credit enhancement.

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6 *See* the rules proposed in Asset-Backed Securities, SEC Release Nos. 33-9117, 34-61858, 75 Fed. Reg. 23328, 23355 (May 3, 2010) (the "2010 Regulation AB Proposing Release"). The asset-level disclosure rules proposed by the Commission were highly complex, and the final product reflected great care and thought on the part of the Commission. Given the complexity of the proposed disclosures, they also engendered time-consuming and thoughtful consideration by the public, resulting in many lengthy and detailed comment letters from many industry participants, including the Committees.

7 Proposing Release at 64183, n. 18.

8 *Id.* at 64184.

The nature of the pool assets also is important in determining the type of diligence necessary to afford the issuer a sufficient level of comfort as to its disclosure regarding those assets. For example, with respect to residential mortgages, the party performing the diligence can examine the relevant mortgage loan files and verify the existence of the mortgage notes, the title insurance policies, the appraisals and the other loan documents. In contrast, credit card receivables typically are represented solely by electronic entries, and there is nothing tangible to review. Similarly, other types of ABS – such as stranded cost securitizations and tobacco settlement securitizations – are not backed by assets with data points in the traditional sense, so appropriate diligence may be limited to confirming the provisions of the contracts that generate the securitized cash flows.

b. Effect on Due Diligence Defense.

In the Proposing Release, the Commission indicates that the review requirement of Rule 193 is not intended to change the due diligence defense under § 11 of the Securities Act or the reasonable care defense under § 12 of the Securities Act,[9] and requests comment on this topic.[10] We agree, and request that the Commission reiterate this position in its final rules.

c. Allowing Third Parties to Perform the Required Review.

Proposed Rule 193 mandates that the required review of the pool assets be performed by the "issuer," which may be either the depositor or the sponsor, depending on the structure of the particular ABS transaction.[11] The Commission would, however, permit the review to be undertaken by a third-party due diligence provider, and the issuer could rely on that review to satisfy its obligations under proposed Rule 193, so long as the third party is named as an "expert" in the registration statement and consents to that status under § 7 of the Securities Act and Rule 436 thereunder. However, the Proposing Release indicates that the review could not be performed by an unaffiliated originator of the pool assets, because of the Commission's belief that an unaffiliated originator may have different interests and approaches.[12] The Commission requests comment on these topics.[13]

Generally, we agree that an ABS issuer should be able to rely on third parties engaged for the purposes of assisting with its required review. In adopting § 7(d)(1) of the Exchange Act, Congress specified only that the issuer must "perform a review of the assets." It did not specify how issuers must undertake their reviews, and there is no reason to assume that Congress meant

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9 *Id.* at 64183 n. 13.

10 *Id.* at 64185.

11 Rule 191 under the Securities Act; Item 1101 of Regulation AB (definitions of "depositor" and "sponsor"); Proposing Release at 64184, including n. 22.

12 Proposing Release at 64184.

13 *Id.* at 64186.

that these reviews had to be performed entirely by the issuer's personnel, rather than outside contractors or diligence providers on the issuer's behalf.

In our view, an issuer that engages a third party to perform its asset review should be able to disclose the nature of the review without identifying any third-party due diligence provider, thereby accepting full responsibility for the review. Alternatively, an issuer could choose to name the provider in its disclosure and make it clear that investors should relying on the particularized expertise of the provider, in which case the third party should be required to consent to expert status as required by § 11(a)(4) of the Securities Act.

Section 7(d)(1) of the Exchange Act does not address third-party due diligence providers in any way, and nothing in that section suggests that Congress was concerned about the quality of third-party due diligence reviews or intended to subject third-party due diligence providers to automatic expert status and the attendant potential liability. In contrast, Congress specifically addressed the expert status of nationally recognized statistical ratings organizations ("NRSROs") in the Dodd-Frank Act, by clearly and explicitly repealing the NRSROs' exception from expert status formerly provided by Rule 436(g).

We believe that a traditional due diligence provider is not the type of person that historically has been considered to be an expert under § 11(a)(4) of the Exchange Act. By its terms, § 11(a)(4) covers "every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him," but only when that person has been named as having prepared or certified a part of the registration statement (or a report or valuation used in connection with the registration statement) and given the requisite consent. Accountants, engineers and appraisers, as well as lawyers (who also have historically acted as experts in the limited context of the required opinion as to the legality of the securities being offered), are all licensed professionals who perform their tasks in accordance with strict professional standards. Other persons who have been treated as experts, such as providers of fairness opinions in corporate transactions, while not licensed professionals, issue fairness opinions that address a strictly defined standard or an objective valuation. NRSROs, while not regulated as professionals in the same manner as accountants, engineers, appraisers and lawyers, are subject to designation and regulation under the Exchange Act and various other industry standards of conduct, and their primary function is to determine independently a credit rating based on relevant methodologies. In contrast, due diligence providers are not subject to licensing, do not act in accordance with required professional standards, and do not exercise the sort of professional judgment that other experts do. Rather, they perform only the specific tasks required by the terms of their engagement

Most importantly, we are concerned that due diligence providers will refuse to accept expert status and liability. This is not an idle concern, as shown by the general refusal of NRSROs to allow any discussion of their ratings of securities in registration statements following Congress' repeal of Rule 436(g).[14] If any third-party due diligence provider were

[14] The Commission has acknowledged that this is a significant concern for issuers of registered ABS, which are required by Items 1103(a)(9) and 1120 of Regulation AB to disclose ratings of the registered ABS and related matters. For that reason, the staff of the Commission granted temporary no-action relief to ABS

required to be named as an expert, that requirement would significantly increase the likelihood that review of the pool assets will be performed only internally by the issuer and, accordingly, decrease the likelihood of independent review. We believe that this result would not be beneficial for investors.

Finally, we do not believe that the final rule should strictly preclude the issuer from relying on a review performed by an unaffiliated originator. In our view, whether the issuer should be able to rely on an originator, affiliated or not, depends on the particular characteristics of the transaction. For example, where a single unaffiliated originator originated the entire asset pool, this fact pattern would not run afoul of the Commission's concern that "each originator may have contributed a very small part of the assets in the entire pool, and may have differing approaches to the review."[15] Even where there are multiple originators that take differing approaches to reviewing the underlying assets, appropriate disclosure regarding the nature of those approaches should be sufficient for investors to evaluate the level and adequacy of each review. Under appropriate circumstances, we believe that issuers should be permitted to rely on reviews made by an unaffiliated originator, as well as by any other third party engaged for that purpose.

d. Which Entities Should Be "Third Parties" Subject to Rule 193.

In its requests for comment, the Commission asks what entities should appropriately be considered to be third parties engaged for purposes of performing Rule 193 reviews.[16] Among the types of third-party reports specifically mentioned by the Commission are various reports that already are customarily delivered in connection with ABS transactions, including "agreed-upon procedures" letters ("AUP letters") performed by accountants and legal opinions (such as perfection opinions) provided by attorneys. AUP letters and perfection opinions ordinarily are obtained by and addressed to an underwriter for purposes of performing a due diligence investigation under § 11 of the Securities Act and are not intended to be relied upon by the issuer. For that reason, we do not believe that such letters or opinions should fall within the scope of Rule 193. Third-party diligence reports should be covered by Rule 193 only if the issuer engages the provider to conduct the review and produce the report, explicitly relies on the report for purposes of its required Rule 193 investigation, and discloses that reliance to investors.

As noted in the Senate Banking Committee report of April 30, 2010 (the "Senate Banking Committee Report"), "[s]ection 945 directs the [Commission] to issue rules that require any issuer of an asset-backed security to perform a due diligence analysis of the assets underlying the asset-backed security . . . . Professor John Coffee, in congressional testimony, called for action

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issuers, permitting them to omit this otherwise-required disclosure in registered ABS offerings commencing on or before January 24, 2011. Ford Motor Credit Company LLC, Ford Credit Auto Receivables Two LLC, SEC No-Action Letter (July 22, 2010).

[15] Proposing Release at 64186.

[16] *Id.* at 64186.

to 're-introduce due diligence into the securities offering process.'''[17] As such, we believe that this provision requires some kind of investigation or evaluation of the pool assets themselves – an investigation that may not historically have been performed on a consistent basis. In providing AUP letters and opinions, accountants and lawyers do not investigate the pool assets themselves. Rather, in AUP letters accountants tie out reported numbers, and in legal opinions attorneys opine on legal conclusions with regard to the structure of the transaction. In any event, AUP letters and legal opinions already are customarily delivered in securitizations.

The meaning of a technical professional report such as a legal opinion may not be obvious on its face. For example, legal opinions generally are prepared and understood in accordance with the customary practice of lawyers who regularly give and review opinions for clients.[18] Therefore, a non-lawyer may not have the expertise to properly understand a legal opinion. Requiring that a legal opinion be disclosed and that the opining lawyers be treated as experts could result in investors being misled, and could subject the lawyers to potential liability for incorrect connotations that would not have been inferred by the intended recipients.

In any event, if the Commission decides to include these types of materials within the scope of Rule 193, for the reasons noted above, we continue to believe that expert status under § 11(a)(4) should not follow automatically with respect to the providers of these materials.

e. Potential Conflicts of Interest.

The Commission asks whether third-party diligence providers are subject to the same type of potential conflicts of interests as are NRSROs in the "issuer pays" model.[19] To the extent that such conflicts exist, we believe that they do not have the same adverse consequences as do similar conflicts for NRSROs. A third-party due diligence provider hired by an issuer will have every incentive to perform a thorough investigation, inasmuch as incomplete or erroneous conclusions may result in the issuer incurring more liability to repurchase problem assets than it expects. The issuer's desire to diligence the pool assets appropriately in order to minimize repurchase liability aligns the issuer's interests with those of investors. Moreover, as the statute would permit the issuer to perform the asset review itself, it would be incongruous to prohibit the issuer from engaging a third party to perform an independent review. Accordingly, we believe that to the extent that there are any conflict of interests issues for hired due diligence providers, disclosure of the conflict should be a sufficient cure.

f. Regulation D and Rule 144A.

The Commission asks whether it should condition the safe harbors of Regulation D and

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17 Calendar No. 349, 111th Congress, 2d Session, Senate Report 111-176, The Restoring American Financial Stability Act of 2010, at 133 (Apr. 30, 2010).

18 *See, e.g.*, *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 The Business Lawyer 1277 (2008).

19 Proposing Release at 64187.

Rule 144A under the Securities Act on a requirement that the underlying transaction documents contain a representation that the issuer has performed a review that complies with Rule 193.[20] We urge the Commission not to take this step. As the Commission acknowledges, § 7(d)(1) of the Exchange Act only requires ABS issuers to perform such reviews for "registration statements." In our view, the reference to "registration statements" demonstrates clear Congressional intent to require issuer reviews of assets only for publicly-registered ABS, and accordingly, Rule 193 should apply only to registered public offerings of ABS.

II. Proposed Disclosure Requirements: Issuer Diligence in Registered Offerings

Section 7(d)(2) of the Exchange Act, as added by § 945 of the Dodd-Frank Act, requires disclosure of the nature of an ABS issuer's required due diligence investigation regarding the pool assets. The Commission proposes to implement this requirement through proposed Item 1111(a)(7) of Regulation AB, which in addition to requiring disclosure of the nature of the issuer's review, would require disclosure of the findings and results of that review. The Commission acknowledges that § 7(d)(2) does not require disclosure of the issuer's findings and conclusions, but proposes this additional disclosure requirement in an attempt to harmonize § 7(d)(2) with the scope of Exchange Act § 15E(s)(4)(A) (as added by § 932 of the Dodd-Frank Act), which (as we discuss further below) requires public disclosure of the findings and conclusions of certain third-party due diligence reports. In the Commission's view, this would "avoid incentives for 'regulatory arbitrage' based merely on whether the review of assets was performed internally by the issuer, or whether instead the issuer hired a third party to perform the review."[21]

We do not believe that the Commission's approach to proposed Item 1111(a)(7) is mandated by § 945 of the Dodd-Frank Act. Congress adopted § 945 and § 932 of the Dodd-Frank Act at the same time, while using different language. We believe that these provisions should be read to require different kinds of conduct, in order to give meaning to the different language Congress chose to employ. Had Congress meant to require disclosure of the findings and conclusions of the issuer's required diligence review, it would (and could easily) have said so.

III. Proposed Disclosure Requirements: Third-Party Diligence Reports

Section 932(a)(8) of the Dodd-Frank Act amends § 15E of the Exchange Act – captioned "Registration of Nationally Recognized Statistical Rating Organizations" – by, among other things, adding several subsections entitled ""Transparency of Credit Rating Methodologies and Information Reviewed." One of those subsections, § 15E(s)(4)(A), states that it requires the issuer or underwriter of ABS to make publicly available the findings and conclusions of any third-party due diligence report obtained by the issuer or underwriter. Proposed Rule 15Ga-2 would implement § 15E(s)(4)(A) by requiring the issuer or underwriter of an "asset-backed

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[20] *Id.*

[21] *Id.* at 64187.

security" (as defined in § 3(a)(77) of the Exchange Act) to file, no later than five business days before the first sale of the offered ABS, a Form ABS-15G setting forth the findings and conclusions of any report obtained by the issuer or underwriter and prepared by a third-party engaged by it for purposes of performing a review of the underlying pool assets.

a. Timing of Rulemakings; Application of Rule to Reports Provided to NRSROs.

In the Proposing Release, the Commission requests comment on whether it should implement § 15E(s)(4)(A) in the context of later rulemaking regarding § 15E.[22] Because we believe that Congress intended that all of § 15E(s)(4) should be read as a whole, we think it would be inappropriate to address subsection (A) alone. As a threshold matter, therefore, we urge that the Commission defer consideration of any rules implementing subsection (A) of § 15E(s)(4) (including proposed Rule 15Ga-2) until the Commission proposes rules under the immediately succeeding subsections (B) through (D) of § 15E(s)(4).

Although we believe that postponement of the implementation of § 15E (s)(4)(A) is preferable, we nonetheless wish to convey to the Commission our substantive views on how that provision should be implemented. We do not believe that subsection (A) of §15E(s)(4) can or should be read separately from subsections (B) through (D). In the context of amendments to the provisions of the Exchange Act that regulate the activities of NRSROs, we do not believe that subsection (a) should be construed to regulate the conduct of issuers or underwriters outside of their interactions with NRSROs and the credit ratings process. Proposed Rule 15Ga-2 would construe § 15E(s)(4) in a vacuum, divorced from Congress' intent to regulate NRSROs and the credit ratings process. As a result, the scope of proposed Rule 15Ga-2 is, in our view, inappropriately broad. As described by the Commission, the proposed text would overlap the requirements of proposed Rule 193, encompassing the reports of "any third party on which the issuer relies to review assets in the pool."[23] In our opinion, a more appropriate construction of § 15E(s)(4)(A), when read together with the remaining subsections of § 15E(s)(4), would result in a much more precisely-tailored Rule 15Ga-2.

As we note above, all of Exchange Act § 15E (including new § 15E(s)) deals with NRSROs and the credit ratings process. It seems clear that Congress intended for all of the due diligence provisions of § 15E(s), including § 15E(s)(4)(A), to relate to NRSROs and the credit ratings process. Subsection (B) requires that a third-party due diligence services provider deliver a certification to any NRSRO rating the ABS in question. Subsection (C) in turn requires that the format and content of the certification be established by the Commission "to ensure that providers of due diligence services have conducted a thorough review of data, documentation, and other relevant information *necessary for a nationally recognized statistical rating organization to provide an accurate rating*" (emphasis added). Therefore, we feel strongly that § 15E(s)(4)(A) was not intended to be applied to all manner of third-party due diligence reports

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22 *Id.* at 64189.

23 *Id.* at 64185.

that may be obtained by an issuer or underwriter, but instead was intended to be applied more narrowly, to any third-party due diligence report prepared for an ABS issuer or underwriter specifically for the purpose of sharing it with a given NRSRO. We believe that proposed Rule 15Ga-2 should be modified accordingly.

Our conclusion that § 15E(s)(4)(A) addresses only third-party due diligence reports provided to NRSROs is supported by the legislative history of § 932. The Senate Banking Committee, in discussing this provision, states:

> Another disclosure that the NRSROs will have to make regards due diligence services. . . . Professor John Coffee described the effect of poor due diligence in the credit rating industry in testimony for the Senate Banking Committee: "Unlike other gatekeepers, the credit rating agencies do not perform due diligence or make its performance a precondition of their ratings. . . . [b]ut the credit rating agencies do not make any significant effort to verify the facts on which their models rely (as they freely conceded to this Committee in earlier testimony here). Rather, they simply accept the representations and data provided them by issuers, loan originators and underwriters. . . . Ultimately, unless the users of credit ratings believe that ratings are based on the real facts and not just a hypothetical set of facts, the credibility of ratings, particularly in the field of structured finance, will remain tarnished . . . ." Ms. Barbara Roper, Director of Investor Protection at the Consumer Federation of America, also believes that this provision is important. She wrote in congressional testimony that new legislation should address "lack of due diligence regarding information on which ratings are based."

In addition, for the reasons we discuss above in relation to proposed Rule 193, we believe that § 15E(s)(4) should relate to the sort of due diligence materials that Congress hoped would be provided to NRSROs for credit rating purposes, and not to documents (such as legal opinions and AUP letters) that historically have been separately provided to other parties or for other purposes.

b. Exemption from Prohibitions on General Solicitation

In the Proposing Release, the Commission notes that § 941 of the Dodd-Frank Act amended § 3(a) of the Exchange Act to add a definition of "asset-backed security" that applies to "asset-backed securities typically offered and sold in unregistered transactions."[24] Because, unlike § 945, § 932 does not refer to § 7 of the Securities Act or registration statements filed under the Securities Act, the Commission concludes that § 932 was intended to apply to

[24] *Id.* at 64188.

unregistered as well as to registered transactions. [25] The Commission requests comment on this conclusion.[26]

We believe that § 932 may be interpreted as applying only to registered public offerings. The disclosure obligation set forth in § 15E(s)(4)(A) specifically applies to issuers and underwriters. Section 3(a)(20) of the Exchange Act provides that the term "underwriter" has the same meaning as set forth in the Investment Advisers Act of 1940, which in turn defines "underwriter" in a manner substantially identical to § 2(a)(11) of the Securities Act. The latter definition identifies parties who perform certain functions in connection with "the *distribution* of [a] security,"[27] a term which has consistently been interpreted as having essentially the same meaning as "public offering."[28] There is no statutory "underwriter" in a private placement or Rule 144A offering. Furthermore, § 15E(s)(4)(A) requires "public availability" of the findings and conclusions of the due diligence provider as to the asset pool. We believe that this requirement is inconsistent with the nature of private placements, which ordinarily require that there have been no general solicitation with regard to the offered securities.[29] A "general solicitation" is any communication that could be deemed to constitute a public "offer" of the securities in question, with "offer" broadly construed to include any information that could be deemed to condition the market for those securities.[30] The information that Rule 15Ga-2 would require to be made publicly available would include detailed information about the pool assets underlying the offered ABS, and we are concerned that this information could easily be deemed to be conditioning the market for the related ABS.

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25 *Id.*

26 *Id.* at 64189.

27 Emphasis added.

28 *See, e.g, Geiger v. S.E.C.*, 363 F.3d 481, 487 (D.C. Cir. 2004) ("the term 'distribution' refers to the entire process in a public offering through which a block of securities is dispersed and ultimately comes to rest in the hand of the investing public"); *Ackerberg v. Johnson*, 892 F.2d 1328, 1335 (8th Cir. 1989) ("'distribution' should be read in terms of 'public offering'"); *Gilligan, Will & Co. v. S.E.C.*, 267 F.2d 461 (2d Cir. 1959) ("a 'distribution' requires a 'public offering'"); *S.E.C. v. Lybrand*, 200 F. Supp. 2d 384, 393 (S.D.N.Y. 2002), *aff'd*, 425 F.3d 143 (2d Cir. 2005) ("[a] 'distribution' is equivalent to a public offering of securities"); H.R. Rep. No. 1838, 73d Cong., 2d Sess. 41 (1934).

29 Securities Act Rule 502(c) expressly conditions the availability of the private offering exemptions in Regulation D on the absence of "general solicitation or general advertising." In the case of the statutory private placement exemption under § 4(2) of the Securities Act, the Commission has stated that "general solicitations of an unrestricted and unrelated group of prospective purchasers for the purpose of ascertaining who would be willing to accept an offer of securities is [sic] inconsistent with a claim that the transaction does not involve a public offering." Nonpublic Offering Exemption, SEC Release No. 33-4552 (Nov. 6, 1962); *see also, e.g.* ABA Federal Regulation of Securities Committee, *Section 4(2) and Statutory Law*, 31 Bus. Law. 485, 497 (1975) (distilling the factors considered by the courts in determining the availability of the § 4(2) exemption and concluding that the essence of the courts' "manner of offering" factor was that "[a]ll forms of general advertising and mass media circulation should be avoided.").

30 *See, e.g.*, Publication of Information Prior To or After the Effective Date of a Registration Statement," SEC Release No. 33-3844 (Oct. 8, 1957).

In the Proposing Release, the Commission notes that it is "of the view that issuers and underwriters can disclose information required by Rule 15Ga-2 without jeopardizing reliance on those exemptions and safe harbors, provided that the only information made publicly available is that which is required by the proposed rule, and the issuer does not otherwise use Form ABS–15G to offer or sell securities or in a manner that conditions the market for offers or sales of its securities."[31] We do not believe that the Commission's approach to these concerns would offer sufficient comfort to issuers of privately placed ABS (and their counsel) on this crucial matter. Therefore, to the extent that Rule 15Ga-2 is not limited to ABS offered and sold in registered transactions, we strongly urge the Commission to adopt regulations expressly providing that the public availability of the information required by § 15E(s)(4)(A) will not be deemed to constitute general solicitation for purposes of any applicable statutory or regulatory private offering exemption or safe harbor. Alternatively, in transactions in which general solicitation is a concern, we ask that that the Commission permit the disclosure of information required by Rule 15Ga-2 solely to offerees and investors in the relevant ABS, in the private placement memorandum or other disclosure document, and not to require its dissemination to the general public.

c. Public Availability by Website Posting.

The Commission requests comment on whether Internet website posting should be permitted to satisfy the public availability requirements of § 15E(s)(4)(A), instead of filing the information by EDGAR on Form ABS-15G.[32] In our view, website posting of this information should be permitted in lieu of EDGAR filing. We believe that the argument for permitting website posting of this information is particularly compelling in the context of private or exempt transactions if the Commission (contrary to our urging) applies Rule 15Ga-2 to such offerings, because many private issuers offer securities infrequently. In connection with offerings of securities that are exempt from the Securities Act (such as agency transactions), investors ordinarily would look to the issuer's ABS website, not EDGAR, for information relating to their offered ABS.

The Commission asks whether it should provide a hardship exception if Form ABS-15G cannot be filed timely on EDGAR.[33] Again, we believe that it is appropriate to permit website posting as an alternative in all circumstances.

The Commission also asks whether there would be any liability implications for permitting posting of this information on websites.[34] We believe that there should be no difference in liability regardless of where this information is posted and that it is likely that any liability for this information will be determined based on the well-established standards of Rule

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31 Proposing Release at 64188.

32 *Id.*

33 *Id.* at 64190.

34 *Id.*

10b-5 under the Exchange Act.

d. Timing of Required Public Availability.

In the Proposing Release, the Commission asks whether the proposed requirement that Form ABS-15G be filed five business days prior to first sale is appropriate and whether the timing should differ for unregistered transactions.[35] In our view, the timing requirement generally should be consistent with any requirements for filing the relevant disclosure document. Therefore, for registered public offerings, an underwriter's disclosure of the findings and conclusions of any then-existing relevant due diligence reports should be required to be made no earlier than the date by which the preliminary prospectus is required to be filed. We recognize that, in the 2010 Regulation AB Proposal, the Commission proposed that preliminary prospectuses filed in a registration statement on proposed Form SF-3 be filed no later than five business days prior to first sale,[36] but we note that there were many comments (including the letter dated August 17, 2010 from the Committees (the "ABA 2010 ABS Proposal Comment Letter"))[37] that this timeframe was not appropriate in all circumstances. In our view, the time by which the Commission ultimately concludes that the preliminary prospectus should be filed also would be the appropriate time to make available the findings and conclusions of any then-existing relevant due diligence reports. The deadline for unregistered transactions should be no earlier than the deadline for registered transactions.

If, despite our concerns, the Commission concludes that Rule 15Ga-2 should apply to diligence materials (such as AUP letters and legal opinions) that already are customarily delivered to parties other than NRSROs or are delivered for purposes other than credit ratings, we ask that the Commission take note of the times at which these materials ordinarily are delivered (*e.g.*, opinions ordinarily are delivered at the closing of the transaction) and provide that they be publicly disclosed a reasonable time thereafter.

e. Filing in Registered Transactions.

Among the Commission's specific requests for comment is whether the issuer in a registered transaction should be required to file a Form ABS-15G to note that it has provided the relevant information in the prospectus.[38] In our view, such an additional filing would be redundant and would serve no useful purpose, inasmuch as investors would look most naturally to the prospectus for information related to the offering.

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35 *Id.*

36 2010 Regulation AB Proposing Release at 23335.

37 Letter dated Aug. 17, 2010, from Jeffrey W. Rubin Chair, Committee on Federal Regulation of Securities, Business Law Section, American Bar Association.

38 Proposing Release at 64190.

f. Definition of "Asset-Backed Security."

In the Proposing Release, the Commission asks whether the universe of ABS that should be subject to § 15E(s)(4)(A) of the Exchange Act should be defined by the definition of "asset-backed security" in § 3(a)(77) of the Exchange Act, or by some other definition.[39] We believe that the breadth of the definition set forth in § 3(a)(77) presents serious interpretive difficulties, similar to those presented by the scope of "structured finance product" in the 2010 Regulation AB Proposal.[40] The Committees provided extensive commentary on this issue in that context, and we refer you to the ABA 2010 ABS Proposal Comment Letter for more information.[41] For the reasons we discuss in that comment letter, we urge the Commission to expressly exclude from its final rule inappropriate categories of products such as covered bonds, hybrid capital securities, and pooled investment vehicles that hold a broad array of financial and other assets such as money market funds, fixed income funds and hedge funds.

g. Application of Rule to Master Trusts.

The Commission's proposed rules to implement § 15E(s)(4)(A) of the Exchange Act do not contain any requirements specifically tailored to master trusts. The Commission requests comment on this issue, asking whether Form 8-K should require disclosure of updated diligence reviews or on reviews of assets added after completion of the offering.[42] In our view, the concerns of § 15E(s)(4)(A) are directed toward securities offerings, so no ongoing disclosures should be mandated other than those required to be made on Form 10-D currently (or in final rules adopted as a result of the 2010 Regulation AB Proposal).

h. Application of Rule to CMBS.

In the Proposing Release, the Commission notes that appraisal and engineering reports may be provided to B-piece buyers in commercial mortgage-backed securities ("CMBS") transactions to the extent that findings therein differ from the representations and warranties made in the transaction documents, and requests comment on the scope of disclosure with respect to these documents that should be required by Rule 15Ga-2.[43] The public disclosure of the findings and conclusions of these documents would raise special concerns. Because the information contained in these documents often is confidential, requiring public disclosure of their findings and conclusions would complicate the completion of CMBS offerings. Therefore, if the Commission adopts rules that would otherwise require public disclosure of the contents of these documents, then we request that the Commission specifically exempt those contents from

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39 *Id.*

40 2010 Regulation AB Proposing Release at 23395.

41 ABA 2010 ABS Proposal Comment Letter at 90-95.

42 Proposing Release at 64190.

43 *Id.* at 64189.

public disclosure. If the Commission declines to provide a blanket exemption, then (as suggested by the Commission) we request that the disclosure requirement extend only to such report findings as are inconsistent with the representations and warranties (and scheduled exceptions thereto) made by the issuer or obligors with respect to the related loans and underlying properties.

i. Application of Rule to Offshore Transactions.

In the Proposing Release, the Commission notes that § 15E(s)(4)(A) does not specify how it applies to offshore transactions, including unregistered offering by U.S. issuers to offshore investors, as well as offerings by foreign issuers primarily to foreign investors but also to U.S. investors.[44] While Rule 15Ga-2, as proposed, would require issuers and underwriters to disclose information about unregistered transactions, including those sold outside of the United States, the Commission cautions that foreign laws applicable to securities sold offshore and assets originated offshore may raise questions about the appropriateness of Rule 15Ga-2, and that "imposition of a filing requirement in connection with private placements of ABS inside the United States may result in foreign issuers seeking to avoid the filing requirement by excluding U.S. investors from purchasing portions of ABS primarily offered outside of the United States, thus depriving U.S. investors of diversification and related investment opportunities."[45] The Commission then seeks input on whether, and to what extent, proposed Rule 15Ga-2 should apply to "foreign-offered" ABS and to foreign issuers of ABS sold to U.S. investors in an exempt, unregistered public offering. [46] In our view, Rule 15Ga-2 should be clarified to exclude such offerings.

We believe that the application of Rule 15Ga-2 to the offshore transactions described above invokes the same issues and concerns that have been identified in connection with the extra-territorial reach of Rule 17g-5(a)(3), as reflected in the comments received by the Commission in response to its temporary exemption under Rule 17g-5(a)(3) for issuers that are non-U.S. persons.[47] Applying Rule 15Ga-2 to non-U.S. issuers and underwriters is, we believe, beyond the intended scope of the statute and impacts non-U.S. issuers, sponsors and originators that would not expect to be covered by a regulation intended to improve the quality of credit ratings issued by NRSROs. In addition to pointing out that the Rule's disclosure requirements may conflict with foreign securities laws and other applicable laws, such as privacy, corporation and trade practices,[48] we note that some of the commenters on Rule 17g-5(a)(3) worried about

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44 *Id.*

45 *Id.*

46 *Id.* at 64190.

47 Release No. 34-62120, Order Granting Temporary Conditional Exemption for Nationally Recognized Statistical Rating Organizations from Requirements of Rule 17g-5 under the Securities Exchange Act of 1934 and Request for Comment (May 19, 2010).

48 *See, e.g.*, letter dated May 12, 2010 from The European Banking Federation, and letter dated September 22, 2010 from The Investment Industry Association of Canada.

the ability of NRSROs to compel foreign arrangers (*i.e.*, the sponsor or underwriter) to comply with that Rule or whether credit rating agencies might withdraw from registration as an NRSRO rather than risk non-compliance with the Rule.[49] Just as commenters have urged the Commission to exempt non-U.S. ABS from the scope of Rule 17g-5(a)(3), we request that the Commission clarify that Rule 15Ga-2 would not apply to foreign issuers of unregistered ABS or to underwriters of such ABS.

If the Commission determines nonetheless that Rule 15Ga-2 should apply to foreign issuers of unregistered ABS and to underwriters of such ABS, then as discussed above, we think it appropriate to permit the use of an Internet website to post the required information or to permit the information to be disclosed solely to offerees and investors in the disclosure document, in lieu of filing Form ABS-15G.

j. Certification Process Under §§ 15E(s)(4)(B)-(D).

Although the Proposing Release purports to address only the obligation of issuers and underwriters to disclose third-party due diligence reviews, the Commission also solicits comments on the format and content of the certification required to be provided by due diligence providers to NRSROs pursuant to §§ 15E(s)(4)(B)-(D).[50] We note the difficulty of providing comments absent certainty as to what types of third-party reviews are covered by § 15E(s)(4), and we remain convinced that all of the rules implementing the disclosure and certification requirements of § 15E(s)(4) should be proposed and considered at the same time. However, because § 15E(s)(4) raises important issues, we ask that the Commission keep the following principles in mind as it considers rules implementing that provision's certification requirements.

Exchange Act § 15E(s)(4)(C) provides that the required certification must state that the provider "has conducted a thorough review of data, documentation and other relevant information necessary for a [NRSRO] to provide an accurate rating." We think this language misconstrues the scope and nature of traditional due diligence reviews of the pool assets. A typical due diligence provider will enter into a contract that specifically sets out the scope of the review of the pool assets that is to be performed. The contract generally would not authorize the provider to go beyond the scope of that review, so the provider would be unlikely to expand that scope. A third-party due diligence provider generally would not know what information a particular NRSRO believes to be necessary in order for it to issue an accurate rating or be able to certify to that effect. Therefore, we believe that the form of the certification should expressly permit the due diligence provider to rely on the scope of the specific procedures that it was engaged to undertake.

We discuss above the practical difficulties that would arise from forcing due diligence providers to become "experts" with respect to the issuer's description of their reports in a

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[49] *See* letter dated June 25, 2010 from Japan Credit Rating Agency, Ltd., and letter dated April 30, 2010 from Neal E. Sullivan, Bingham McCutchen LLP, on behalf of Rating and Investment Information, Inc.

[50] *Id.* at 64190.

registration statement. The Commission should consider those issues as it crafts certification rules under § 15E(s)(4). Just as we expect that due diligence providers will be reluctant to undertake the additional liability that comes along with being named in a registration statement as an "expert," we also expect that they would object to any required certification that is too broad. If the certification requirements are too broad, diligence services providers may simply decline to offer those services in connection with ABS offerings, which could lead to a significant reduction in the number of independent sources from which NRSROs could obtain accurate verifications of data significant to their ratings decisions. In our view, that result would be directly contrary to the intent of Congress in adopting these provisions.

The requirement of § 15E(s)(4)(D) that the required certifications be publicly disclosed in a manner allowing the public "to determine the adequacy and level of due diligence services provided by a third party" presents additional issues. This language could be construed to call for a certification so detailed that it might subject due diligence providers to a high (even expert) level of liability if the scope and level of the analysis were perceived as inadequate. As discussed above, we believe that it is inappropriate for third-party diligence providers to be automatically subject to expert liability, and we do not believe that it is any more appropriate for them to be subject to a similar level of liability due to overly broad certification requirements. If they are subject to increased liability, it is entirely possible that they will be reluctant to permit their findings and conclusions to be provided to persons other than the entities engaging them. We ask that the Commission, in adopting rules under § 15E(s)(4)(D), avoid subjecting diligence providers to an inappropriate level of liability.

Accordingly, we urge the Commission, in formulating the form of written certification required to implement § 15E(s)(4)(D), to consider whether it is appropriate and in the public interest to limit the certification to include a description of the scope of the due diligence review required to be conducted by the provider, a statement that the provider has performed the services required to be performed by the terms of its engagement, and a statement that the related report sets forth the findings and conclusions of the provider as a result of those services and is complete and accurate in all material respects.

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Once again, the Committees appreciate the opportunity to submit these comments and we respectfully request that the Commission consider our recommendations. We have endeavored to discuss the Commission's proposals in the level of detail they deserve, while also devoting attention to the many other ongoing legislative and regulatory initiatives affecting securitization. Members of the Committees are available to meet and discuss these matters with the Commission and its Staff and to respond to any questions.

Very truly yours,

/s/ Jeffrey W. Rubin
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