Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Proposed Rule –Issuer Review of Assets in Offerings of Asset-Backed Securities - File Number S7-26-10

Ladies and Gentlemen:

PricewaterhouseCoopers LLP ("PwC") appreciates the opportunity to comment on the Securities and Exchange Commission's ("SEC" or the "Commission") proposed rule on Issuer Review of Assets in Offerings of Asset-Backed Securities (the "Proposal").[1] PwC is a registered public accounting firm that provides assurance, tax and advisory services. PwC often performs agreed-upon procedures ("AUP") with respect to offering documents relating to issuances of asset-backed securities ("ABS").

PwC submits that accountants' AUP are not the kind of due diligence that Congress intended to cover in the ABS review provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"). These AUP are fundamentally different from the type of due diligence that is performed with respect to the characteristics and quality of the assets included in the pool underlying the ABS. Accordingly, as detailed below, we believe:

- AUP performed by an accountant in connection with an offering of ABS should not be considered a "review of the pool assets" within the meaning of the Proposal, and the accountant performing AUP should not be treated as a "third party engaged for purposes of performing a review."
- Even if accountants' AUP are considered a review for purposes of the Proposal, the accountants' AUP letters should be not be disclosed in a registration statement, and the accountants should not be subjected to expert liability under the Securities Act.
- The exclusion of an accountant's AUP from the definition of "third party engaged for purposes of performing a review" should also be applied in defining third-party diligence services for purposes of the Commission's future rulemaking with respect to credit-ratings agencies.

Purpose of the Dodd-Frank Act's Due Diligence Review Provisions

The Proposal seeks to implement two provisions regarding ABS in the Act: Section 7(d) of the Securities Act of 1933 (the "Securities Act") (added by Section 945 of the Act) and Section 15E(s)(4)(A) of the Securities Exchange Act of 1934 (the "Exchange Act") (added by Section 932 of the Act). First, Proposed Rule 193 would require any issuer registering the offer and sale of ABS to perform a review of the pool of assets underlying the ABS. Second, proposed amendments to Item 1111 of Regulation AB would require an issuer in a registered ABS offering to disclose the nature of the findings and conclusions of the issuer's review of the assets, including, if third parties engaged for purposes of reviewing the assets, the findings and conclusions of such third parties. Third, Proposed Rule 15Ga-2 would require issuers or underwriters of any ABS offering to file Form ABS-15G to disclose the findings and conclusions of any report of a third

[1] Issuer Review of Assets in Offerings of Asset-Backed Securities, Securities Act Release No. 33-9150, Exchange Act Release No. 34-63091 (Oct. 13, 2010).

party engaged for purposes of performing a review of the pool assets, unless that information was included in a prospectus for a registered offering.

We believe that the intent of the referenced provisions of the Act was to provide better information to investors in ABS about the quality of the assets that were included in the pool in which they proposed to invest. The legislative history makes clear that Congress was concerned that deterioration of due diligence standards in securitizations had contributed to the poor performance of ABS in the financial crisis. The relevant committee report and congressional hearings indicate that the concerns about due diligence were directed to whether issuers, underwriters and credit ratings agencies were performing adequate reviews of the underlying assets in the pools themselves.[2] In particular, it was noted that historically issuers or underwriters had hired third-party due diligence firms which would review the loans in a securitized portfolio, checking credit scores and documentation, but that this practice had declined in the 2000s.[3] As a result, Section 7(d) of the Securities Act directs the SEC to issue rules requiring an issuer of ABS to perform a "review of the assets underlying the asset-backed security" and disclose the nature of such review. Along the same lines, Section 15E(s)(4)(A) of the Exchange Act provides that "[t]he issuer or underwriter of any [ABS] shall make publicly available the findings and conclusions of any third-party due diligence report obtained by the issuer or underwriter." This section should be understood to refer to the reports of third party due diligence firms commissioned by the issuer or underwriter to evaluate the underlying loans or assets comprising the ABS. It should not be understood to refer to other types of services performed in connection with the structuring or offer or sale of the security itself, such as legal advice or AUP performed by accountants.

Applicability to Accountants and AUP

AUP performed by accountants do not fall within the scope of a "review of the assets underlying the asset-backed security" within the meaning of Section 7(d)(1) of the Securities Act and their reports do not constitute a "third-party due diligence report" within the meaning of Section 15E(s)(4)(A) of the Exchange Act. These AUP are fundamentally different from due diligence performed with respect to the characteristics and quality of the assets included in the pool underlying the ABS and are not the kind of due diligence that Congress intended to cover in the ABS review provisions of the Act.

As described more fully in the comment letter submitted by The Center for Audit Quality ("CAQ"), accountants perform AUP in connection with ABS offerings pursuant to American Institute of Certified Public Accountants Statements on Standards for Attestation Engagements, AT Section 201, *Agreed-Upon Procedures Engagements*. In the context of ABS offerings, these services include procedures performed on information included in the offering document in three general areas: comparing data tape to the loan file, recalculating calculations of projected future cash flows due to investors and performing activities on

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[2] *See* Senate Report No. 111-176, at p. 121 (2010); *Enhancing Investor Protection and the Regulation of Securities Markets – Part I: Testimony Before the U.S. Senate Committee on Banking, Housing and Urban Affairs*, 111th Congress, 1st session, p. 10, 54 (March 10, 2009) (Testimony of John C. Coffee, Jr.) (citation omitted); *Reforming Credit Rating Agencies: Testimony before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises of the U.S. House of Representatives Committee on Financial Services*, 111th Congress 1st session, p. 64 (September 30, 2009) (Testimony of Daniel M. Gallagher); *see also* The President's Working Group on Financial Markets, Policy Statement on Financial Market Developments, p. 2 (March 2008).

[3] *See Enhancing Investor Protection and the Regulation of Securities Markets – Part I: Testimony Before the U.S. Senate Committee on Banking, Housing and Urban Affairs*, 111th Congress, 1st session, p. 54 (Mar. 10, 2009) (Testimony of John C. Coffee, Jr.).

other information included in the offering document. Together, the services typically consist of agreeing information in the offering document back to the source data or recalculating to verify accuracy.

It is important to understand the role of AUP in the securitization process. Accountants have historically performed AUP to provide comfort to issuers or underwriters with respect to the accuracy of numerical information contained in the offering document. Issuers or underwriters request these AUP letters in connection with ABS to support their defense under Section 11(b)(3)(A) of the Securities Act.[4] In this regard, accountants' AUP letters serve a purpose similar to that of the traditional "comfort letter" in underwritten public offerings of other types of securities. AUP letters do not involve any review or assessment of the characteristics or quality of the underlying assets in the pool; rather, they simply provide assurance that numerical information disclosed in the offering document is correct. The AUP performed by accountants do not provide issuers or underwriters additional information with which to gauge the credit quality of the assets underlying the ABS. In light of this limited purpose, AUP letters are not made public, and accountants are not subject to expert liability under Section 11 with respect to them.

Disclosure of the accountants' AUP letter or the findings and conclusions of such letters would not help investors better assess the risk of an ABS offering. The numerical information contained in the offering documents, which is derived from underlying data regarding the assets in the pool, is the issuer's information and the issuer is responsible for the accuracy of this information. The AUP assist the issuers and the underwriters by confirming the accuracy of certain numbers included in the offering document, and the investors, in turn, rely on the issuer's representations in the offering document. Telling the investors that an accountant has reviewed the numbers does not materially enhance their ability to evaluate a particular offering.

Moreover, disclosing information about the accountants' AUP letter could in fact be confusing to investors. Under AT Section 201, accountants agree upon the procedures to be performed with issuers or underwriters to assist those parties in satisfying their obligations under the securities laws. As made clear in the customary text of an AUP report, the accountants do not verify the accuracy or completeness of the underlying data, or make any representation as to the sufficiency of the procedures. The accountant does not express any opinion on the information subject to the AUP. The AUP reports contain language illustrating that the sufficiency of the procedures performed is solely the responsibility of the addressees of the report, that other matters might have come to the attention of the accountants had they performed additional procedures and that the report is intended solely for the specified parties who agreed to the procedures. If the AUP letters were made available to investors, the investors might not appreciate the effect of the limited purpose and scope of the AUP letters and instead draw unwarranted conclusions that an accounting firm had attested to matters relating to the quality of the underlying assets.

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[4] Section 11(b)(3)(A) provides a defense to underwriters who "had, after reasonable investigation, reasonable ground to believe and did believe, at the time [the registration statement] became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading." Although this defense is universally called the "due diligence" defense, in fact that term is not used in the statutory language. Importantly, the function of "due diligence" for purposes of the underwriters' Section 11 defense is different and distinct from the purpose of "due diligence" with respect to ABS. *See* Issuer Review of Assets in Offerings of Asset-Backed Securities, Securities Act Release No. 33-9150, Exchange Act Release No. 34-63091, at p. 4 n.13 (Oct. 13, 2010).

In light of the foregoing considerations, we recommend that the proposed rules be modified to make it clear that AUP are not due diligence reviews within the meaning of the rules.[5] We suggest adding the following provision to each of the proposed rules:

> **["For purposes of this Rule, 'a review of the pool assets' shall not include the performance of agreed-upon procedures by accountants pursuant to applicable attestation standards, where those procedures do not include review or examination of information relating to the characteristics or quality of the underlying assets included in the pool."]**

Disclosure of Accountants' AUP Letters and Expert Liability

Even if the Commission were to determine that an accountant who provided an AUP letter in connection with an ABS offering was a "third party engaged for purposes of performing a review," the Commission should not require disclosure in a registration statement of the accountants' findings and conclusions as such or require the accountant to accept Section 11 expert liability with respect to the letter. As discussed above, the numerical information contained in the offering document is the issuer's information. The AUP assist the issuer and the underwriter to confirm the accuracy of the information and thereby satisfy their obligations under the securities laws. However, the accountant performing AUP does not analyze any of the underlying data or express any opinion with respect to the matters that are the subject of the procedures. Thus, the accountant does not provide the type of expert report or certification that is encompassed within Section 7(a) and Section 11(a)(4) of the Securities Act.

To require disclosure in a registration statement about accountants' AUP letters—much less to impose Section 11 expert liability on accountants with respect to such letters—would represent a radical departure from longstanding practice in registered ABS offerings. Nothing in the Act suggests that Congress meant to impose expert liability on accountants who provide AUP letters in connection with ABS offerings, which have never previously been considered expert reports subject to Section 11 liability.

Implications for Future Rulemaking

The Proposal and our comments described above relate to Section 7(d)(1) of the Securities Act and Section 15E(s)(4)(A) of the Exchange Act. However, we believe that similar considerations will apply to future rulemaking by the Commission pursuant to Section 15E(s) of the Exchange Act (also added by Section 932 of the Act) with respect to diligence performed by credit ratings agencies. Accordingly, in adopting any rule pursuant to the Proposal, the Commission should also make clear that the accountants' AUP will not constitute a third-party due diligence services, and that accountants who perform AUP shall not be deemed third-party due diligence service providers, for purposes of rules regarding credit ratings agencies transparency.

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We are available to discuss our comments and to answer any questions that the SEC staff may have. Please contact Derrick Stiebler (973-236-4904) regarding our submission.

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[5] To the extent accounting firms are engaged to perform the role of a third-party due diligence firm analyzing supporting data on the assets and performing an analysis on the credit quality of such assets, then in that context, it would be appropriate to include these engagements as within the ambit of the proposed rules.

Sincerely,

PricewaterhouseCoopers LLP

cc:

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Commissioner Kathleen L. Casey
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