STRUCTURED FINANCE ASSOCIATION

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Re: SFA's request for guidance regarding investor due diligence requirements of the Securitisation Regulation

The Structured Finance Association (formerly known as the Structured Finance Industry Group) ("SFA")[1] appreciates the opportunity to submit a request for guidance to the European regulators on whether institutional investors that are subject to the investor due diligence requirements of the Securitisation Regulation[2] (the "Securitisation Regulation") must verify compliance with the transparency requirements of the Securitisation Regulation in securitisations that do not involve European Union (EU) originators, sponsors or securitisation special purpose entities ("SSPEs").

SFA is a member-based trade industry advocacy group focused on improving and strengthening the broader structured finance and securitisation market. SFA's core charge is to support a robust and liquid securitisation market, recognizing that securitisation is an essential source of funding for the real economy. While the comments expressed in this letter represent the consensus views of our broad membership, this letter does not necessarily represent the perspectives of all SFA members. None of the recommendations expressed herein are binding on, or should be attributed to, any individual SFA member, each of which will decide for itself whether and to what extent to submit individual comments in response to the subject matter.

1 SFA provides an inclusive network for securitisation professionals to collaborate and, as industry leaders, to drive necessary changes, be advocates for the securitisation community, share best practices and innovative ideas, and educate industry members through conferences and other programs. Members of SFA represent all sectors of the securitisation market, including issuers, investors, financial intermediaries, law firms, accounting firms, technology firms, rating agencies, servicers, and trustees. Further information can be found at www.structuredfinance.org.

2 Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012.

1. Executive Summary

We write to you on behalf of our membership as to whether European Union "institutional investors" (as defined in the Securitisation Regulation), prior to holding a securitisation position in a securitisation where each of the originator, sponsor and SSPE are not established in the EU ("non-EU Securitisations"), would need to verify compliance with the transparency requirements set out in Article 7 in order to comply with Article 5(1)(e).

SFA has formed a task force on the implications of the Securitisation Regulation, and we will be examining issues other than the due diligence requirements in the near future.

It has come to our attention that market participants and legal advisers have come to different conclusions on this issue, which has led to confusion and uncertainty in the market. Some EU institutional investors are currently investing in non-EU Securitisations on the basis that their diligence satisfies the requirements of Article 5 despite the fact that they are not receiving asset-level data and other specific information required by Article 7 for transactions involving EU originators, sponsors and SSPEs. These EU institutional investors have based their decisions on the advice of a number of law firms that have interpreted Article 5(1)(e) not to require them to verify compliance by non-EU originators, sponsors and SSPEs with the transparency requirements set out in Article 7.

Other EU institutional investors, who have received different legal advice from other law firms, have refused to purchase non-EU Securitisations without full compliance with the requirements of Article 7. These differences in legal interpretations by law firms and market participants have created legal uncertainty and, as a result, some institutional investors will no longer invest in non-EU Securitisations.

We also wanted to share with you the market practice around and legal requirements for asset level disclosure in U.S securitisations. Asset-level data is not required to be provided for most US securitisation asset classes. Transactions in the US 144A market have no regulatory requirements for asset-level data. In US SEC-registered public offerings, only certain asset-classes (i.e., RMBS, CMBS and auto loans and leases) are required by regulators to provide asset-level data. For example, publicly offered US credit card ABS transactions have no asset-level data requirements. We understand that the other material non-EU Securitisation markets (e.g. Australia and Japan) also do not typically provide asset-level data. We would like to note that if the interpretation is that EU institutional investors must have access to asset-level data in order to invest in non-EU securitisations, then EU institutional investors will be precluded from participating in most non-EU securitisations. See Appendix A for the types of disclosures provided in US securitisation asset classes.

We hope the EU regulators will agree with the interpretation that Article 5(1)(e) does not require EU institutional investors to verify compliance by non-EU originators, sponsors and SSPEs with the transparency requirements set out in Article 7 since such requirements are not "applicable" in that case. We believe this interpretation reflects a sensible policy outcome consistent with the intention of the legislators. In any case, we hope the EU regulators will not effectively prohibit institutional investors from investing in non-EU Securitisations. Accordingly, we would request that any regulatory guidance or policy statement issued on this point is carefully worded so that it does not inadvertently result in uncertainty and potential exclusion of non-EU Securitisations that do not provide asset-level data.

Because most US securitisation transactions and many other non-EU Securitisations do not provide asset-level data, we hope that the EU regulators would not issue guidance which is limited to simply requiring that EU institutional investors ensure that non-EU Securitisations "substantively comply" with Article 7-like requirements. This is because such limited guidance would potentially still exclude the majority of non-EU Securitisations as it would not be clear to an EU investor whether or not a non-EU Securitisation which does not provide asset-level data by definition "substantively complies". Instead, more nuanced guidelines are desirable as to what "substantively comply" means in this context.

2. Does Article 5 require institutional investors to verify compliance with Article 7 for non-EU Securitisations?

Prior to holding a securitisation position, an institutional investor (other than the originator, sponsor or original lender), is required among other things, under Article 5(1)(e) to verify that "the originator, sponsor or SSPE has, *where applicable*, made available the information required by Article 7 in accordance with the frequency and modalities provided for in that Article" (emphasis added).

Many legal advisers have taken the view that because the Article 7 transparency requirements are not directly applicable to non-EU Securitisations, an institutional investor is not therefore required to verify compliance with those requirements in order to meet its obligations under Article 5(1)(e) of the Securitisation Regulation. However, an institutional investor will still need sufficient information from the originator, sponsor and/or SSPE in such non-EU Securitisation in order to comply with its other obligations under Article 5 (e.g. 5(1)(b) and (d), 5(3) and 5(4)) of the Securitisation Regulation.

Article 5(1) sets out different standards for institutional investors with respect to verification of the risk retention requirements and credit-granting standards, depending on whether the originator, original lender or sponsor, as applicable, is "established in the Union" or "established in a third country". Where the relevant party is established in the EU, Article 5(1) refers to compliance by that party with the relevant provisions of the Securitisation Regulation, and where it is not, Article 5(1) describes a standard similar to (or, in the case of risk retention, "determined in accordance with") the relevant provisions.

As regards verification of compliance with the transparency requirements (Article 5(1)(e)) the provision is worded differently from the provisions relating to risk retention and credit-granting, and does not set out a different requirement depending on whether the originator, sponsor or SSPE is established in the EU or not. Instead, Article 5(1)(e) requires that the institutional investor must verify that "the originator, sponsor or SSPE has, *where applicable*, made available the information required by Article 7 in accordance with the frequency and modalities provided for in that Article (emphasis added)".

A number of legal advisors have taken the view that the words "where applicable" indicate that the requirement to verify compliance with the transparency requirements does not apply in all cases, and should not apply where those transparency requirements have no direct application to an originator, sponsor or SSPE because it is not established in the EU. (In this regard these legal advisers note that the Securitisation Regulation does not provide for a supervisory or enforcement framework with regard to compliance with Article 7 requirements by originators, sponsors and/or SSPEs which are not established and/or are not supervised for regulatory purposes in the EU).

Such advisers also note that Recital (9) of the Securitisation Regulation states that (emphasis added): "…it is essential that institutional investors be subject to *proportionate* due-diligence requirements ensuring that they properly assess the risks arising from all types of securitisations…". That is, the institutional investors will need to demonstrate to the applicable regulators that the level and the nature of their due diligence on a non-EU Securitisation was proportionate to the risks of the relevant securitisation position and that such investors have otherwise complied with Article 5.

Arguably, if it had been intended that compliance with Article 7 requirements, or substantially similar requirements, applies to non-EU Securitisations as a pre-condition for EU institutional investors being able to invest, it would have been open to those drafting the Securitisation Regulation to have clarified this (as they did in relation to the requirement on the EU institutional investors to verify compliance with credit granting and risk retention). That the Securitisation Regulation did not do so suggests that a different outcome was intended.

3. Does Article 5 require an institutional investor to verify "substantial" compliance with Article 7 for non-EU Securitisations?

In contrast to the interpretation outlined in section 2 above, we would also note that some legal advisers have expressed the view that EU institutional investors seeking to invest in non-EU Securitisations should either comply in full, or substantively comply, with the requirements of Article 7.

However, even if the European Supervisory Authorities (ESAs) do not agree with the views under section 2 above, we believe that if the ESAs were to issue guidance requiring that EU institutional investors ensure that non-EU Securitisations "substantively comply" with Article 7, such guidance would give rise to significant practical challenges and compliance issues and would potentially still exclude the majority of non-EU Securitisations. Instead, more nuanced guidelines would be necessary.

4. Do non-EU Securitisations "substantially comply" with Article 7?

At a very high level, we think that, for most non-EU Securitisations, the level of information typically made available to investors and potential investors in the offering circular and the quarterly or monthly investor reports is such that an institutional investor may be able to conclude that such information "substantially complies" with Article 7, except for asset-level data.

However, our concern is whether institutional investors can conclude that non-EU Securitisations "substantially comply" with EU style template-based loan-level disclosures as required under Article 7(a). Therefore, if a non-EU Securitisation does not provide loan-level information reporting, it is unclear whether an institutional investor can conclude that such non-EU Securitisation "substantially complies" with Article 7.

Appendix A shows the type of the disclosure provided by US securitisation asset classes. Most US securitisations do not provide granular loan-level information on the underlying exposures, and asset-level data is not required for most US securitisation asset classes. Instead the offering materials for those securitisations provide information on the underlying exposures on an aggregate or group basis. Transactions in the US 144A market have no asset-level data requirements, and only certain asset-classes (i.e., RMBS, CMBS and auto loans and leases) are required to provide asset-level data in public offerings. For example, publicly offered US credit card ABS transactions have no asset-level data requirements. In addition it is also our understanding that Australian and Japanese securitisations also do not typically provide granular loan-level information.

Therefore, we think there is a material risk that institutional investors may not be able to conclude that a non-EU Securitisations "substantially comply" with Article 7(a), as there is no granular loan-level reporting for such non-EU Securitisation. This potentially completely precludes EU institutional investors from investing in a material portion of non-EU Securitisations.

Accordingly we are of the view that, if EU regulators conclude that EU institutional investors are required to verify equivalent compliance with Article 7-like disclosures and reporting for non-EU Securitisations, a more nuanced guidance than just requiring "substantial compliance" would be needed.

5. Our Suggested Approach

In light of the above, one potential approach for Article 5 guidance would be:

"In relation to securitisations where each of the originator, sponsor and SSPE are not established in the European Union ("non-EU Securitisations"), an institutional investor must be satisfied it has received sufficient information for it to carry out its due diligence obligations under Article 5 proportionate to the risk profile of the securitisation in order to properly assess the risk. However, the fact that the originator, sponsor or SSPE of such non-EU Securitisation makes available information on the underlying exposures or underlying receivables on an aggregate basis, rather than on a granular or exposure-by-exposure, or receivable-by-receivable basis, shall not in itself mean that an institutional investor cannot comply with Article 5."

We realize that this a complicated issue and there may be other potential approaches (for example, distinguishing between a primarily offered EU. securitisation and one that is not primarily directed at EU institutional investors)] which is new concept and one that has not been discussed but could be a potential way they could distinguish between EU investor driven deals versus deals which have only a few EU institutional investors. SFA is available to provide any additional information or assistance in helping you analyse this issue. SFA believes that securitisation is a tool that benefits the global economy and that dividing the global securitisation market, both in the primary and secondary market, hurts the overall global economy.

SFA appreciates your consideration of these comments and welcomes the opportunity to discuss further. If you have any questions about this matter, please contact Sairah Burki, Head of Policy, at (202) 524-6302 or sairah.burki@structuredfinance.org.

This submission is not a comprehensive treatment of the subject matter and is not intended to provide legal advice. Readers should seek legal advice before taking any action with respect to the matters discussed herein. SFA does not assume any liability to any person, company or other entity with respect to the views expressed herein.

Very truly yours,

Sairah Burki
Head of Policy
Structured Finance Association

Appendix A

DISCLOSURE SUMMARY FOR CERTAIN U.S. ASSET CLASSES

Asset Class	Disclosure Provided
RMBS	– **Trust Pool Stratifications:** product type, loan status, original principal balance, unpaid principal balance, APR, origination date/loan age, original term, remaining term, original/updated FICO score distribution, lien position, occupancy type, loan purpose, property type, LTV, employment status, documentation type, citizenship/residency status, original DTI, original DSCR, state, servicer identity, originator identity, ability to repay status, prior delinquency history – **Historical Tables for Managed Pool:** Delinquencies, Foreclosures – **Underwriting Criteria Summary** – **Compliance Review** – **Sensitivity Tables** (Yield-to-Maturity variable analysis based on different prepayment speeds) – **Asset-level Data:** Asset level disclosure is required only for public SEC-registered RMBS deals. However, most RMBS deals are sold in the Rule 144A market (rather than being public SEC-registered deals) where asset level data is not required by regulation. The RMBS industry has developed standardized asset level data fields, and in most Rule 144A RMBS offerings asset level data is made available to investors at the time of the offering, and in some cases periodically over the life of the transaction.
CMBS	– **Trust Pool Stratifications:** property type, property location (by state), cut-off date principal balance, interest rates, loan purpose, original term to maturity, remaining term to maturity, original amortization term, remaining amortization term, amortization type, interest-only periods, underwritten DSCR, LTV ratios at cut-off date, LTV ratios at maturity date, prepayment protection. – **"Dec" Tables** (Maturity and Prepayment variable analysis) – **Asset-level Data**: Asset level disclosure is required for public CMBS deals.

	– Additionally, CMBS deals often include a website where an investor who signs a confidentiality agreement can access additional information usually in the form of the "CREFC Investor Reporting Package" or "IRP"; usually accessed by B piece buyers. Furthermore, often 144A market CMBS deals will also provide asset level data.
Auto Loan and Lease ABS	– **Trust Pool Stratifications:** APR, state, original term, remaining term, principal balance, FICO score distribution, vehicle type, model – **Historical Tables (five years) for Managed Pool:** Delinquencies, Credit Losses and Residual Losses/Gains (for leases) – **"Dec" Tables (Maturity and Prepayment variable analysis)** – **Static Pool (past ABS transactions):** DQ, credit losses, residual losses/gains (for leases), prepayments – **Asset-level Data:** Asset level disclosure is required only for public SEC-registered deals. However most Auto Loan and Lease ABS deals are sold in the 144A market (rather than being public SEC-registered deals) where asset level data is not typically provided.
Credit Card ABS	– **Trust Pool Stratifications:** state, credit limit, account balance, account age, DQ status, FICO score distribution – **Historical Tables** (three or more years) for Trust Portfolio (seasonal pools) or Representative Segment of Managed Portfolio, based on materiality: DQ, charge-offs, payment rates, yield – **Static Pool (vintage data):** DQ, charge offs, payment rates, yield, if material – **No Asset-level Data:** Asset level disclosure is not required for public or private credit card deals and is not provided.