Her Majesty's Treasury
1 Horse Guards Road
London SW1A 2HQ
Submitted by email: SecuritisationReview@hmtreasury.gov.uk

Re: Review of the Securitisation Regulation: Call for evidence

September 2, 2021

Structured Finance Association (SFA) members are in agreement with the identical below responses that we understand have been submitted by the Association for Financial Markets in Europe (AFME) and UK Finance (together the "Joint Associations") to the Review of the Securitisation Regulation: Call for evidence (the CfE) published by Her Majesty's Treasury (HMT). In support of alignment across global securitization industries, SFA understands that the Australian Securitization Forum (ASF) is submitting a similar response. We welcome the opportunity to respond to the CfE and would be happy to answer any further questions that you may have.

5. ***In your views, has any ambiguity around the geographical scope of the Sec Reg's requirements impeded securitisation transactions? If so, what clarifications could be helpful?***

The Joint Associations are of the view that ambiguities (and limitations) in this respect have impeded securitisation transactions and these could very usefully be clarified.

As a preliminary matter, however, we wish to clarify that we are aware of the solutions proposed by the Joint Committee of the ESAs in their Opinion dated 26 March 2021 (the "**JSA Opinion**") and we do not support them. The significant majority of the issues they identify in respect of the EU regime are not, in our view, real market issues (either in relation to the EU or the UK), and the proposed solutions would broadly be harmful to the market without adding any additional supervisory benefits.

The two areas of concern with regard to the jurisdictional scope of application are outlined in more detail below:

<u>Scope of obligations in respect of third country transactions</u>

This is primarily to do with the due diligence obligations imposed on UK institutional investors when investing in third country securitisations. These problems could be addressed in a number of ways, but perhaps the simplest and most elegant would be to eliminate the distinction between Articles 5(1)(e) and 5(1)(f) and replace this with a general obligation to conduct due diligence proportionate to the risk of the securitisation position, which would amount to an extension of the existing statement at paragraph 2.9 of the PRA's SS10/18. This would include an obligation to ensure the investor had obtained sufficient information to have a good understanding of both the transaction and the underlying assets. It could then be supplemented by additional guidance from the PRA and the FCA (as appropriate) in a way that is more flexible and responsive to market needs than primary legislation.

A possible alternative solution would be a substituted compliance approach, where the UK regime either granted equivalence to other jurisdictions or simply required that investors check that the sell-side entities had complied with their local disclosure rules. We do not believe either of these is as sensible an approach for achieving interoperability, however. The equivalence approach would require constant monitoring, be at risk of change by the other jurisdiction and therefore be unstable requiring a cumbersome and ongoing equivalence assessment process from UK authorities. The second approach, on the other hand, would require individual investors to investigate and develop expertise on local rules for disclosure of information which was otherwise irrelevant because it would have no bearing on their particular credit analysis.

By way of background, HMT will be aware of the long-standing problem under Article 5(1)(e) of the EU Securitisation Regulation, which is not clear about what disclosure EU institutional investors are required to obtain from third country sell-side entities in order to fulfil their due diligence obligations. The UK sought to helpfully address this via modifications to Article 5(1)(e) and the introduction of Article 5(1)(f) of the Sec Reg, which goes some way to addressing the uncertainty by introducing a requirement to obtain "substantially the same" information provided "with such frequency and modalities as are substantially the same" as would have been required had the sell-side entities been established in the UK. There are two issues with this solution, both of which could helpfully be addressed:

(a) The "substantially the same" standard is uncertain. The UK market has so far been comfortable that entities complying with the EU Securitisation Regulation, for example, will meet the "substantially the same" standard, but substantial and unhelpful compliance uncertainty remains with virtually every other jurisdiction, which creates an unlevel playing field between those who take a conservative interpretation of the rules (e.g. interpreting the "substantially the same" standard as requiring templated asset-level data) and those willing to take greater regulatory compliance risks through a more liberal interpretation (e.g. interpreting the "substantially the same" standard as being satisfied by pool-level data on the asset).

(b) Even if it were sufficiently clear, the "substantially the same" standard is overly restrictive. To our knowledge, the disclosure requirements in the UK are unmatched anywhere in the world (bar the EU) both as to the content of the disclosure requirements (templated loan-level data disclosure across all asset classes) and the modalities of disclosure (the existence of repositories). There is a serious risk, then, that the requirement to restrict investments to jurisdictions where the standard is "substantially the same" disclosure as in the UK would mean restricting UK investors' choice of investments to UK and EU securitisations because non-UK (and non-EU) originators often do not provide the level of templated loan-level data required under the Sec Reg and would be either unable or unwilling to do so in order to attract UK investment. This would lead to higher concentration risks and lower returns for UK investors and their stakeholders than if a broader range of investments was open to them.

Our suggested approach of requiring proportionate due diligence to be carried out addresses these issues in an elegant and sensible way. To the extent that HMT adopt our preferred "proportionate due diligence" approach, these issues would therefore no longer arise. If, instead, HMT are minded to keep the "substantially the same" standard (which would not be our preferred approach), then it would at least need substantial clarification, notably to explicitly permit investing in securitisations without templated loan-by-loan data since many of the largest securitisation jurisdictions – notably the United States – do not require (and therefore originators do not produce) such data to the same extent. Similarly, it would be extremely helpful to clarify that the use of a designated "reporting entity" and securitisation repository would not be required in order to meet the test of "substantially the same" reporting modalities.

Scope of regulation

The Sec Reg does not contain any statement of its territorial scope, and this is problematic. This could helpfully and straightforwardly be addressed by including a provision in the legislation specifying that the Sec Reg only creates obligations on entities established in the UK.

Although the Sec Reg contains certain clues to the intended territorial scope of the regulation (e.g. the definition of certain categories of institutional investors referred to in Article 2(12) or the designation of competent authorities in Article 29), these are incomplete and leave room for ambiguity.

While the market has been functioning without clarification on this point, it has proved an irritant on the margins and could helpfully be clarified.

SFA greatly appreciates the opportunity to participate in the CfE process and provide our members' viewpoints. We would welcome any further questions that you may have.

Sincerely,

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