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Ms. Petra Hielkema
Chairperson, European Insurance and Occupational Pensions Authority
Chair, Joint Committee of the European Supervisory Authorities

Ms. Verena Ross
Chair, European Securities and Markets Authority

Mr. José Manuel Campa
Chairperson, European Banking Authority

9 December 2022

Dear Ms. Hielkema
Dear Ms. Ross
Dear Mr. Campa

Re: Request for guidance to national competent authorities to use enforcement powers in a proportionate and risk-based manner

Background

We, the associations named in the Annex to this letter (the "**Joint Associations**"), refer to the Report from The Commission to the European Parliament and the Council on the functioning of the Securitisation Regulation dated 10 October 2022 (the "**SECR Report**"). In general, we welcome the additional certainty that comes from the SECR Report providing interpretive guidance in relation to a number of areas of the Securitisation Regulation ("**SECR**"). We also welcome the Commission's invitations to ESMA both to review the existing disclosure templates for underlying exposures and to draw up a single, simplified, dedicated template

for private securitisation transactions¹. The Joint Associations believe that this is an elegant and appropriate solution to a number of significant operational difficulties that will be both effective and capable of implementation in the short to medium term.²

The Joint Associations do, however, have a significant concern about one relatively temporary – but nonetheless significantly harmful – effect of the SECR Report. We refer specifically to the Commission's interpretation of Article 5(1)(e) set out at section 11.2 of the SECR Report that requires EU institutional investors to obtain full Article 7 information even in relation to third-country securitisations by stating that "it is not appropriate to interpret Article 5(1)(e) in a way that would leave it to the discretion of the institutional investors to decide whether or not they have received materially comparable information". Third country reporting entities have, since the original date of application of the Securitisation Regulation, been reluctant to provide full Article 7 information since reporting entities would need to make substantial and costly adjustments to their reporting systems to comply with the Article 7 templates. We expect this reluctance to increase further now that the templates for private securitisations are expected to be significantly changed (and simplified so as to significantly reduce the scale of the changes and costs required) in the relatively short term. As the Commission correctly acknowledges, a strict interpretation of Article 5(1)(e) "de facto excludes EU institutional investors from investing in certain third-country securitisations". In fact, the effect of the SECR Report is to exclude EU institutional investors from investing in *most* third-country securitisations – significantly reducing the universe of securitised products in which they may invest.

The SECR Report goes on to make clear that it is the Commission's expectation and policy intention that the resulting competitive disadvantage imposed on EU institutional investors should be addressed by the introduction of a new private securitisation template that all private securitisations would use, whether EU or third country. If this happens, the *de facto* exclusion the Commission refers to would only be temporary³. This outcome is perverse – the more so because EU institutional investors are not, in general, taking as relaxed a view of the requirements of Article 5(1)(e) as the Commission might fear. For example, as required under Articles 5(3) and 5(4), EU institutional investors are already required to carry out a due-diligence assessment which enables them to assess the risks involved (including the risk characteristics of the individual securitisation position, the underlying exposures and the structural features of the securitisation) and that such investors have in place written policies and procedures for the risk management of their investments in securitisations. Indeed, EU institutional investors active in third country markets have rigorous systems in place to identify exactly what information they require to make a well-informed credit judgment, thus

¹ In this respect, we appreciate the proactive engagement by ESMA with the industry to date and look forward to ongoing engagement via a consultation in 2023.

² We would note that the effectiveness of this solution depends on the revised templates following the general theme set out by the Commission in the SECR Report. That is to say, it will only function if the revised templates include a private securitisation template that is simple, high-level and designed to give supervisors basic information needed to effectively supervise the markets, leaving the parties free to negotiate a bespoke, commercially useful disclosure package among themselves.

³ In this regard, the Commission itself notes in the SECR Report that amendments to private securitisation reporting "will make it easier also for sell-side parties from third-countries to provide the required information".

allowing them to determine the credit-relevance of any missing information and whether they might be able to get it from other reliable sources. Any increased risk or uncertainty resulting from the lack of data then forms part of these investors' risk-reward assessment when making an investment decision. EU institutional investors are also, of course, protected by other requirements that have never been ambiguous, such as requirements to check risk retention, disclosure of credit-granting standards, and more general due diligence aimed specifically at credit issues.

In the immediate, therefore the SECR Report's interpretation of Article 5(1)(e) denies EU institutional investors the ability to make suitable investment decisions and generate attractive yields balanced by the risk mitigation offered by global diversification, for both themselves and their clients. This loss of investment opportunity will create costs for European stakeholders of all kinds. To the extent that they are asset managers, it will negatively affect their ultimate stakeholders – who are broadly members of the public in the EU (e.g., via pensions). A further concern is that this will also result in a loss of liquidity for the non-EU borrowers who rely on EU lenders and other institutional investors to raise capital, with attendant harm to the global real economy as many markets are “experiencing broad-based and sharper-than-expected slowdown, with inflation higher than seen in several decades.”⁴.

Another, more pernicious, problem is that this exclusion will have longer term effects. The inability – even if it is only for a year or two – of market participants in the EU to make investments in third country securitisations will mean skills and resources may be permanently lost and relationships damaged. An institutional investor who cannot make attractive investments in third country securitisations is unlikely to keep paying the individuals and maintaining the systems necessary to that line of business in the meantime. Once lost, these skills are complicated, difficult, time-consuming and expensive to get back. What is more, an investor who is unable to continue investing in an originator or sponsor's transactions will struggle to maintain the relationships and continual data reports needed to make efficient, well-informed investment decisions once the ban is eventually lifted. In relationship driven transactions, that investor also risks developing a reputation for being unreliable, which may lead to a reduction in investment opportunities being offered to them in the future (either in the form of diminished allocations or simply not being invited to form part of a lending syndicate). For banks specifically (see illustrative example no. 1 below) securitisation can also be a relationship tool. If they cannot offer it as a service to a client, their ability to access the most profitable business lines with that client will be affected.

Illustrative examples

Three illustrative examples of EU institutional investors whose business risks needlessly being damaged by the approach set out in the SECR Report are set out below:

1. **An EU bank with a significant New York branch:** A large part of this bank's US business consists of providing receivables financing to local corporates. This business is profitable and accretive to the overall profitability of the bank. The transactions are securitisations because the financing is tranching, with recourse limited to the assets

⁴ <https://www.imf.org/en/Publications/WEO/Issues/2022/10/11/world-economic-outlook-october-2022>

being financed. If, during this interim period, this bank is forced to require full Article 7 templates in order to lend, then the relevant corporates will simply choose another bank – one that is not similarly constrained – to join the syndicate. The EU bank may well never get its position on the syndicates back, and even if it does it will come back with a substantially less current understanding of the relevant corporates' businesses, making it more difficult and expensive to conduct appropriate diligence for future investments.

2. **An EU pension fund that makes significant returns by investing in non-EU on-balance-sheet securitisations:** This pension fund is highly sophisticated and is therefore able to consistently and responsibly invest in the junior or mezzanine tranches of on-balance-sheet synthetic securitisations. One element of the investment strategy that allows them to maximise their risk-adjusted returns on these investments is a diversification strategy, meaning that they invest not only in EU banks' transactions but also in third country synthetic securitisations (e.g. Swiss or Canadian bank transactions). If, during this interim period, this pension fund had to require full Article 7 templates, it would simply not be able to invest, since the relevant third country banks would not be willing (or in many cases would not under local law be permitted) to provide these. Given that banks tend to choose their synthetic securitisation investors with care and a view to a long-term relationship, this inability to participate will damage the pension fund's ability to do this business well beyond the currency of the temporary requirement to get the current versions of the full Article 7 templates.
3. **An EU AIFM who manages funds invested in by EU pension funds, insurers and other EU investors:** Similar to the pension fund, the AIFM's risk management strategy includes diversification of investment portfolios, such that they invest heavily in EU securitisations of all asset classes, but also Australian RMBS, Japanese RMBS and equipment lease securitisations, US credit card securitisations and US managed CLOs. If, during this interim period, this AIFM had to require full Article 7 templates, it would have to restrict its securitisation investments to EU-originated securitisations. The resulting geographic concentration risk might mean that investments in EU securitisations would have to be reduced in order to appropriately hedge the risks in its overall portfolio, with a logical corollary of reduced liquidity in the product. Given that this will make investments in securitisation overall less effective and reduce the level of familiarity the AIFM has with third country securitisation structures and regulatory regimes, there is a significant risk that the systems and expertise necessary to maintain this line of business will be lost, making them very costly and operationally difficult to recover as a result of the notionally temporary restriction on their ability to invest in third country transactions.

Proposed solution

All of this said, it is clearly not sensible to simply ignore the requirements of Article 5(1)(e) and we would not suggest such an approach. Rather, the Joint Associations respectfully submit that the best solution to address the period between now and the finalisation of the new private securitisations template would be the issuance of enforcement guidance by the Joint Committee of the ESAs addressed to national competent authorities ("NCAs"). That guidance would set the expectation that NCAs would apply their supervisory powers in their

day-to-day supervision and enforcement of Article 5(1)(e) in a proportionate and risk-based manner. This approach would entail that NCAs can, when examining EU institutional investors' compliance with Article 5(1)(e) of the SECR, take into account the type and extent of reliable information already available to them, regardless of format or source. This approach would not entail general forbearance, but a case-by-case assessment by the NCAs of the degree of compliance with the Securitisation Regulation and the risks associated with any non-compliance identified. This approach also entails that NCAs can take into account the simplification of the Article 7 templates for private securitisations proposed in the SECR Report which “will make it easier also for sell-side parties from third-countries to provide the required information”.

The Joint Associations believe that this solution balances, on the one hand (i) the immediate need identified in the SECR Report for a more uniform understanding of the required compliance standards; and (ii) the medium-term policy goals of the Commission, with, on the other hand (iii) the potential for market disruption in the short term; and (iv) damage to markets and market participants in the longer term. Further, to the extent any are not already doing so, this approach will encourage all institutional investors to undertake the type of rigorous gap analysis (and resulting risk assessment) described above, such that they would be able to demonstrate to their NCA the level of any non-compliance and that it does not entail significant (or perhaps any) risk.

We further believe this solution is justified as a transitional measure, since the SECR Report's clarification as to the correct interpretation of Article 5(1)(e) comes after several years of that provision being in force, and just as many years of that provision being the subject of industry requests for clarity. The result of those years of ambiguity is a set of market systems and practices that will need time to be unwound in an orderly fashion so as to minimise the costs of implementing the necessary changes.

In closing, we wish to thank the Joint Committee of the ESAs for their attention and willingness to engage with market participants on issues related to the SECR. The Joint Associations would welcome the opportunity to discuss the above proposal with you and would be happy to answer any further questions that you may have.

Yours faithfully,

Shaun Baddeley
**Managing Director, Securitisation
Association for Financial Markets in
Europe (AFME)**

Tanguy van de Werve
**Director General, European Fund and
Asset Management Association
(EFAMA)**

Som-Lok Leung
**Executive Director, International
Association of Credit Portfolio
Managers (IACPM)**

Olav Jones
**Deputy Director General, Director
ECOFIN, Insurance Europe**

Jiří Król
**Global Head of the Alternative Credit
Council (ACC)
Deputy CEO, Alternative Investment
Management Association (AIMA)**

Jennifer W. Han
**Executive Vice President, Chief
Counsel & Head of Global Regulatory
Affairs, Managed Funds Association
(MFA)**

Bryan Pascoe
**Chief Executive Officer, International
Capital Market Association (ICMA)**

Scott O'Malia
**Chief Executive Officer
International Swaps and Derivatives
Association (ISDA)**

Jan-Peter Hülbert
**Managing Director, True Sale
International (TSI)**

Chris Dalton
**Chief Executive Officer, Australian
Securitisation Forum (ASF)**

Christopher B. Killian
**Managing Director, Securitization
and Credit, Securities Industry and
Financial Markets Association
(SIFMA)**

Kristi Leo
**President, Structured Finance
Association (SFA)**

CC:

Sean Berrigan, Director-General, Directorate General for Financial Stability, Financial Services and Capital Markets Union, European Commission

ANNEX

Descriptions of the Joint Associations

The **Association for Financial Markets in Europe (AFME)** represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society. AFME is listed on the EU Register of Interest Representatives, registration number 6511006398676.

The **European Fund and Asset Management Association (EFAMA)** is the voice of the European investment management industry, which manages over EUR 30 trillion of assets on behalf of its clients in Europe and around the world. We advocate for a regulatory environment that supports our industry's crucial role in steering capital towards investments for a sustainable future and providing long-term value for investors.

Besides fostering a Capital Markets Union, consumer empowerment and sustainable finance in Europe, we also support open and well-functioning global capital markets and engage with international standard setters and relevant third-country authorities. EFAMA is a primary source of industry statistical data and issues regular publications, including Market Insights and the authoritative EFAMA Fact Book.

More information is available at www.efama.org

The **International Association of Credit Portfolio Managers (IACPM)** is a global industry association established in 2001 to further the practice of credit exposure management by providing an active forum for its member institutions to exchange ideas on topics of common interest. The IACPM's institutional member firms comprise the world's largest financial institutions, and as such overlap the membership of several other financial industry associations. Our perspective is different, however, in that the IACPM represents the teams within those institutions who have responsibility for managing credit portfolios, including actively controlling concentrations, adding diversification, managing the return of the portfolio relative to the risk and applying capital to new lending. In carrying out these responsibilities successfully, credit portfolio managers contribute to maintaining the safety and soundness of their respective financial institutions. Effective credit portfolio management is critically important to our prudential supervisors and to policy makers more broadly because of its role in supporting financial institutions' ability to lend.

Insurance Europe is the European insurance and reinsurance federation. Through its 36 member bodies — the national insurance associations — it represents all types and sizes of insurance and reinsurance undertakings. Insurance Europe, which is based in Brussels, represents undertakings that account for around 95% of total European premium income.

Insurance makes a major contribution to Europe's economic growth and development. European insurers pay out almost €1 000bn annually — or €2.7bn a day — in claims, directly employ nearly 950 000 people and invest over €10.4trn in the economy.

The **Alternative Investment Management Association (AIMA)** is the global representative of the alternative investment industry, with around 2,100 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than US\$2.5 trillion in hedge fund and private credit assets.

AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programmes and sound practice guides. AIMA works to raise media and public awareness of the value of the industry.

AIMA set up the **Alternative Credit Council (ACC)** to help firms focused in the private credit and direct lending space. The ACC currently represents over 250 members that manage US\$600 billion of private credit assets globally.

AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the first and only specialised educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors).

The **Managed Funds Association (MFA)**, based in Washington, DC, New York, and Brussels, represents the global alternative asset management industry. MFA's mission is to advance the ability of alternative asset managers to raise capital, invest, and generate returns for their beneficiaries. MFA advocates on behalf of its membership and convenes stakeholders to address global regulatory, operational, and business issues. MFA has more than 150 member firms, including traditional hedge funds, crossover funds, and private credit funds, that collectively manage nearly \$2.6 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time.

The **International Capital Market Association (ICMA)** is the trade association for the international capital market with over 600 member firms from more than 65 countries, including banks, issuers, asset managers, infrastructure providers and law firms. It performs a crucial central role in the market by providing industry-driven standards and recommendations for issuance, trading and settlement in international fixed income and related instruments. ICMA liaises closely with regulatory and governmental authorities, both at the national and supranational level, to help to ensure that financial regulation promotes the efficiency and cost effectiveness of the capital market. www.icmagroup.org

Since 1985, the **International Swaps and Derivatives Association (ISDA)** has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 1,000 member institutions from 79 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org.

True Sale International GmbH (TSI) is dedicated to support the development of the securitization market in Germany and Europe, its regulation and the further development of its legal framework. Through training courses and specialist conferences, we contribute to the qualification of the participants and to an open exchange between market participants, supervisory authorities and science. In doing so, we do not narrowly define the securitisation issue and include related fields from the broad field of structured finance and asset-based finance. <https://www.true-sale-international.com/>

The **Australian Securitisation Forum (ASF)** is the peak body representing the securitisation industry in Australia and New Zealand. The ASF's role is to promote the development of securitisation in Australia and New Zealand by facilitating the formation of industry positions on policy and market matters, representing the industry to local and global policymakers and regulators and advancing the professional standards of the industry through education and market outreach opportunities. The ASF is comprised of a National Committee, specific subcommittees and a national membership of over 170 organisations.

The **Securities Industry and Financial Markets Association (SIFMA)** is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development.

The **Structured Finance Association (SFA)** is the leading trade industry advocacy group focused on improving and strengthening the broader structured finance and securitization market. Members of SFA represent stakeholders across the entire securitization market, including consumer and commercial lenders, issuers, institutional investors, financial intermediaries, law firms, accounting firms, technology firms, rating agencies, servicers,

and trustees. SFA was established with the core mission of supporting a responsible, robust, and liquid securitization market, recognizing that securitization is an essential source of core funding for the real economy. As part of that core mission, SFA is dedicated to furthering public understanding among members, policy makers, consumer and business advocacy groups, and other constituencies about structured finance, securitization, and related capital markets. Further information can be found at www.structuredfinance.org.