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European Securities and Markets Authority
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RE: Consultation paper on CRA3 implementation – Draft regulatory technical standards on information on structured finance instruments (SFIs)

On behalf of the Association for Financial Markets in Europe (**AFME**)[1] and its members, we welcome the opportunity to comment on the consultation paper (**Consultation Paper**) published by the European Securities and Markets Authority (**ESMA**). In particular, we wish to provide feedback on the section of the Consultation Paper that focuses on the regulatory technical standards (**RTS**) to be made under article 8b (information on structured finance instruments) of Regulation 1060/2009 (**CRA Regulation**).

This response seeks to summarise the key concerns and comments raised by members on the proposals relating to article 8b in general and to specifically address in turn each of the questions on the draft RTS included in the Consultation Paper.

AFME members are extremely concerned by the proposals

It should be highlighted at the outset that our members are extremely concerned about the proposals in the Consultation Paper with respect to the scope of application of article 8b and, in particular, about the proposed application of the requirements to private and/or unrated transactions. We respectfully submit that this approach to application is not supported by provisions of the CRA Regulation itself, raises heightened issues under other aspects of the proposals and risks effectively removing access to an essential funding source for real economy assets in Europe (such as SME loans, trade receivables, residential mortgages and other commercial and consumer financing receivables). Based on a recent AFME survey of ABS market participants (**AFME Survey**) (described in Annex I), a majority of respondents indicated that the application of public disclosure requirements (such

[1] AFME represents a broad array of European and global participants in the wholesale financial markets, and its 197 members comprise all pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. AFME was formed on 1 November 2009 by the merger of the London Investment Banking Association and the European operations of the Securities Industry and Financial Markets Association. AFME provides members with an effective and influential voice through which to communicate the industry standpoint on issues affecting the international, European and UK capital markets. AFME is the European regional member of the Global Financial Markets Association (GFMA) and is an affiliate of the U.S. Securities Industry and Financial Markets Association (SIFMA) and the Asian Securities Industry and Financial Markets Association (ASIFMA). AFME is listed on the EU Register of Interest Representatives, registration number 65110063986-76.

as article 8b) to private securitisation transactions would "significantly affect" their decision to invest in and/or originate such transactions and approximately a third of respondents indicated that they would "definitely not" continue these activities.

In addition, AFME members have significant concerns with certain other proposals included in the Consultation Paper. These other areas of concern relate primarily to the proposals to (a) adopt a disclosure standard under article 8b that is not aligned with the principles-based approach applied under (overlapping) article 409 of the Capital Requirements Regulation (**CRR**) and pursuant to which certain information would be required to be disclosed in respect of all transactions regardless of the nature of the structure and/or the underlying assets, (b) require the use of specified templates without flexibility for use of other appropriate formats and seemingly without provision for completion on a "comply or explain" basis, (c) require event-based reporting notwithstanding existing (separate) European regulation of this and (d) seemingly require full uploading of relevant information to ESMA's new website, rather than permitting hyperlinks to be made to the information published via other websites despite the significant additional data submission work that this will involve.

The engagement of ESMA with market participants on issues related to securitisation disclosures is greatly appreciated, although AFME and its members are disappointed that very little of our constructive dialogue with ESMA before and after the submission of our response to the previous discussion paper has been reflected in the terms of the Consultation Paper. While certain comments made in this response letter overlap with the concerns raised by AFME members in the context of that previous engagement, we urge ESMA not to dismiss these points and to properly re-assess any preliminary views taken. We appreciate that ESMA is bound by the Level I text; however, as noted below, we are of the view that certain of the most problematic proposals included in the Consultation Paper are inconsistent with such text (e.g. the proposed application to private and/or unrated transactions and the proposed introduction of event-based reporting), meaning that re-assessment on these fronts is imperative.

Executive summary

The European securitisation market remains fragile, and regulations which could threaten its recovery should be calibrated with great caution

The European securitisation market remains very fragile and new issuance is very low, having dropped further since we responded to the previous discussion paper consultation. AFME's most recent data report shows that while total public issuance for 2013 was €181 billion, only some €76 billion was placed with investors. The rest was retained by issuers and used for repo purposes under the central bank frameworks. By comparison, we note that in 2007, the market was €454 billion, of which nearly all was placed, meaning that the market has shrunk by more than 80 per cent. over six years. The trend across the market in 2014 remains discouraging.

Recent statements made by the EU authorities in support of the need to revive the market for high-quality securitisations clearly indicate that access to securitisation as a funding tool should be encouraged, not restricted. The European Commission's paper on *Long-Term Financing of the European Economy* published in March 2014,

expressly calls for the promotion and revival of securitisation as a funding tool and Commissioner Barnier has said that securitisation needs a "second wind". In addition, at the beginning of this month, President Draghi of the European Central Bank (**ECB**) again highlighted in a speech the need for revitalisation of the ABS market and the important role of regulation and regulators, such as the European Commission, in this regard. ECB Executive Board member Yves Mersch has similarly called for the promotion of "…other forms of finance to complement the banking channel […] through strengthening capital markets and in particular securitisation…" and noted the need to remove key impediments to the functioning of the ABS market.

It is against this background that we have considered the proposals raised in the Consultation Paper with respect to the implementation of article 8b. We believe that the proposals exceed their remit, are unjustifiably intrusive in an area which is already well regulated and go against the grain of high level policy. We therefore once again urge ESMA, and the European authorities in general, to adopt a balanced approach when making the RTS. To the extent that the RTS do not provide sufficient compliance certainty and feasibility (for example, by failing to acknowledge the necessary private nature of aspects of the ABS market), the revival of the securitisation market in Europe will be further restricted and, as a result, the available funding options for real economy assets (such as SME loans, trade receivables, residential mortgages and other commercial and consumer financing receivables) will be limited, damaging prospects for growth. As the results from the AFME Survey highlight, the proposed scope of application of article 8b runs the risk of having a significant negative impact on the European ABS market (see Annex I for further details).

Regulation should address a real, identified problem, and be proportionate

AFME members strongly support transparency in respect of the ABS markets and measures which incentivise investors to conduct their own independent risk review. For private transactions, issuers and investors should be free to negotiate and agree mutually acceptable levels and frequencies of information disclosure. Standards of transparency in ABS have always been good in Europe, but are even better today in light of already existing regulations and central bank and industry-led initiatives (such as the Prime Collateralised Securities (**PCS**) labelling initiative) with which ESMA is already familiar. We consider that a disproportionate approach to the implementation of article 8b risks the creation of a highly onerous regulatory framework beyond legislative intent. In particular, our key priority at this stage is to ensure that article 8b is implemented in a manner which is consistent with the Level 1 text and with existing regulation in this area and is proportionate.

Other EU authorities have recently acknowledged the need for proportionate regulation of securitisation, and suggested that certain regulatory initiatives have not achieved the proper balance in this regard. We note that ECB Executive Board member Yves Mersch has cautioned regulators with comments critical of "the potentially uneven and disproportionate treatment of ABS in forthcoming regulations", and further observed that some ABS regulatory initiatives are akin to "calibrating the price of flood insurance on the experience of New Orleans for a city like Madrid". Care should be taken in the implementation of article 8b to avoid such an approach.

The Consultation Paper expressly refers to the need for proportionate regulation in the implementation of article 8b in the cost-benefit analysis section. Unfortunately, however, this section does not include any meaningful discussion of scope, notwithstanding the foundational effect that this issue has on other aspects of the proposals, including those relating to content. The limited discussion of this point is disappointing, particularly given the acknowledgement earlier in the Consultation Paper that a majority of the responding stakeholders to the previous consultation "stressed the need to limit the scope of application of Article 8b to publicly rated SFIs that are the subject of a public offer or admission to trading on a regulated market". While it is suggested in the Consultation Paper that the Level 1 legislation extends to private transactions, we strongly disagree with this view (see below for further discussion of this) and consider that compelling arguments support the opposite view. These arguments justify a full and proper cost-benefit analysis being undertaken with respect to the scope of application of article 8b.

We note that the cost-benefit analysis section in the Consultation Paper includes a statement that "…higher asset pool transparency is likely to reduce issuance of SFIs compared to the pre-crisis period, mainly because issuers may not want to publish detailed information". This statement is worrying in that it suggests that issuer disclosure practices are a simple matter of desire or choice, without recognition of the significant commercial and practical pressures involved. For example, no mention is made of the fact that in certain contexts asset information will be highly commercially sensitive. So commercially sensitive in fact that it will effectively not be possible for the information to be publicly disclosed without significant business risks arising for the relevant originator. While most European securitisations are undertaken on a listed basis, in certain cases the advantages to this are heavily outweighed by other factors and the significance of these factors should not be dismissed.

We further note that the statement set out above from the cost-benefit section is worrying in that it suggests that there is an acceptance that article 8b may result in decreased securitisation issuance, notwithstanding the recent acknowledgement by the EU authorities of the importance of reviving the securitisation market in Europe. This goes against the grain of recently announced high-level policy and risks the creation of a regime which is disproportionately onerous.

We thank ESMA for its practical and helpful approach in certain areas

As a final introductory matter, we wish to emphasise that we appreciate the practical and helpful approach taken by ESMA in two specific areas of the Consultation Paper.

These items include the references in the Consultation Paper to the scope of application not extending to existing SFIs. AFME members strongly support the application of article 8b to relevant SFIs issued on or after the date of entry into force of the RTS. To be clear, if a different approach is taken in the final RTS, we consider that the new regime will give rise to significant compliance issues, as was highlighted in our response to the previous discussion paper. We urge ESMA, and the Commission, to ensure that the same approach to existing SFIs is taken in the final RTS.

We also strongly support ESMA's recommendation not to pursue the development of separate loan-level data reporting templates under article 8b. That said, we consider that further flexibility should be provided to permit the use of any template generally accepted by market participants (including the Bank of England templates and any templates introduced by the U.S. authorities under the so-called "Reg AB II" proposals or otherwise) rather than allowing for the use of templates based only on the ECB requirements. This is discussed further below.

General concerns and comments

As noted above, this response seeks to summarise the key general concerns and comments raised by AFME members with respect to the article 8b proposals and also to specifically address in turn each of the questions on the draft RTS included in the Consultation Paper. We consider it appropriate to start with our general concerns given that these matters set the scene for other portions of our response. These general concerns are summarised below.

ESMA should revisit the scope of application of the proposals

As a starting point, we note that the feedback statement section of the Consultation Paper indicates that "the draft RTS to be adopted by ESMA have to comply with the relevant requirements of the Level 1 legislation, i.e. article 8b of the CRA Regulation". We strongly agree with this statement and note that this is consistent with related provisions of European law which restrict regulatory technical standards from implying strategic decisions or policy choices.

In this regard, we note that there are a number of provisions within the Level 1 text of the CRA Regulation which are relevant for the purposes of interpreting the scope of article 8b and, as such, are required to be taken into account. It is our view that the proposals in the Consultation Paper are not always consistent with these Level 1 provisions. Accordingly, we submit that aspects of the current proposals with respect to scope should not be pursued and indeed it is essential that they are revised.

Prospectus Directive scope applies

Recital 3 to the draft RTS indicates that "private and bilateral transactions are within the scope of this Regulation, as well as transactions that are not offered to the public or admitted to trading in the EU". AFME members strongly disagree with this view on the basis that it is inconsistent with certain provisions of the Level 1 text.

We consider that the better view is that the scope of article 8b should be limited to those SFIs in respect of which an obligation arises under the EU Prospectus Directive (**PD**) to publish a prospectus. Given the usual wholesale denomination of asset-backed securities, this will arise primarily where an application for admission to trading on an EEA regulated market is made rather than in a non-exempt public offer scenario. Most European securitisations are undertaken on a listed basis due to factors relating to withholding tax, central bank eligibility requirements and/or investor expectations (with admission to trading on a regulated market under the PD typically being sought). This better view interpretation is supported by at least two provisions in the CRA Regulation.

In particular, we note that article 8b refers to the application of the requirements to an "issuer", which is defined by reference to the definition that applies under the PD. This clearly demonstrates the legislative intention to limit the requirement to scenarios involving a PD-relevant issuer only. If a wider universe of vehicles was intended to be targeted, then a more comprehensive term and corresponding definition would have been used (such as issuing entity, obligor entity or conduit) and/or the PD definition would not have been cross-referred to. There is no basis to support a wider interpretation.[2]

Secondly, we consider that our interpretation is strongly supported by the Level 1 provisions relating to the enforcement and supervision of article 8b, which provisions are set out in article 25a of the CRA Regulation. Under article 25a, specified sectoral competent authorities are identified as being responsible for the supervision and enforcement of article 8b and certain other articles. Revealingly, such authorities are defined as including "national competent authorities designated under the relevant sectoral legislation for the supervision of … prospectuses" and "sectoral legislation" is defined to mean certain legislative acts, including the Prospectus Directive and the corresponding implementing regulation. Article 25a does not include provision for the regulation of issuing vehicles in respect of private transactions and the corresponding definitions also do not refer to this (directly or indirectly). If article 8b was intended to apply in respect of private unlisted transactions, then an effective enforcement and supervision mechanism would have been provided for. The reference to the Prospectus Directive in this regard is a clear indication of the intended scope.

Based on the foregoing, we do not agree that the CRA Regulation is silent on whether private transactions should be excluded, as we consider that this is implicit in the Level 1 provisions described above. To the extent that ESMA disagrees with this, then we submit that, as a bottom line, the converse view put forward in the Consultation Paper (ie. that article 8b applies to private transactions) is not clear and should not be assumed given the inherent policy decision resulting and the significant consequences for the market. While it is suggested in the Consultation Paper that the application of article 8b to private transactions is justified by the wide definition of SFI, we do not consider that this is the only provision which is relevant with respect to scope and, as such, relevant instruments for the purposes of article 8b must be interpreted in the wider context which applies under the CRA Regulation.

In considering this wider context, we believe that it is appropriate and helpful to bear in mind both the Level 1 provisions that are highlighted above and the original intention behind the legislative provisions. In this regard, it should be noted that the impact assessment work previously undertaken by the European Commission, which work ESMA refers to with support in the Consultation Paper, expressly indicates that article 8b is intended to apply in respect of SFIs involving the publication of a Prospectus Directive prospectus only (and to enhance ongoing

[2] We understand that it has been (informally) suggested by certain EU authorities that the intended application of article 8b in respect of private transactions is demonstrated by the application of the requirements to a "sponsor", which is defined as an entity which establishes and manages certain securitisation schemes including ABCP programmes, which programmes are typically unlisted. This argument is highly flawed in that it fails to take into account the conflicting indication provided by the issuer definition and the fact that certain arrangements involving defined sponsors are listed.

disclosures only, discussed further below). In particular, the Commission paper refers to this in the extract set out below:

> "*According to article 11 and Annex VIII of the Commission Implementing Regulation of the Prospectus Directive issuers of asset-backed securities have to disclose information on the securities, the underlying assets, structure and cashflow of the transaction. However, such disclosure is only mandatory when asset-backed securities are offered to the public or admitted to trading on a regulated market, while post issuance reporting is voluntary. This option [ie. option 4 in the report, described as "Improve disclosure requirements for issuers of structured finance products on an ongoing basis"] would entail some costs for issuers of structured finance instruments being required to disclose existing information on structured finance instruments on an ongoing basis.*"

In addition to clarifying the intended scope of article 8b, the above extract suggests that, to the extent that the European authorities may be seeking to extend the application of the requirements to private unlisted transactions, further impact assessment work would need to be undertaken as this did not form part of the original work done. The preliminary work undertaken in this regard via the AFME Survey suggests that the application of article 8b to private transactions would have a significant impact on this section of the European securitisation market.

We consider that the better interpretation set out above gives rise to an appropriate outcome from a policy perspective given the confidential nature of most unlisted transactions, the significant commercial issues that would arise from public disclosure of such transaction terms and corresponding asset details and the fact that there is no clear need to regulate disclosures made by issuers to sophisticated investors in this context.

Further, recital 30 of the CRA Regulation indicates that the new disclosure requirements are intended to "reduce investors' dependence on credit ratings" – what better example in practice is there of this than a privately negotiated, unrated transaction between a sophisticated issuer and investor undertaking their own credit analysis and using their own judgment?

For further discussion of the considerations which arise in the context of ABCP conduits, please see the section headed "*Position of ABCP conduits and private underlying transactions*" below. Please also refer to Annex I for further information on the AFME Survey and, in particular, the responses provided by market participants to questions relating to the proposed application of public disclosure requirements (such as article 8b) to private transactions and how this would affect their investment and funding strategies.

Arrangements involving the issuance of securities only

As noted above, an issuer is defined for the purposes of article 8b by reference to the PD definition. This definition cross-refers to the PD definition of "securities", which in turn refers to "transferable securities" as defined by the EU Markets in Financial Instruments Directive (MiFID) with the exception of money market instruments having a maturity of less than 12 months (such as commercial paper).

While the Consultation Paper indicates that the scope of article 8b should be determined by the breadth of the SFI definition only, we disagree. We submit that such scope should instead be determined by applying *all* the various relevant definitions cumulatively, including the issuer definition. That is, we consider that while an arrangement might involve an SFI and so potentially be within the scope of article 8b as a starting point, if the arrangement does not involve a relevant issuer (e.g. because the relevant entity does not issue "securities" as defined), then the requirements would not apply.

A wider interpretation of article 8b would give rise to a number of significant concerns. For example, in addition to the issues which arise from an ABCP perspective (discussed in further detail below), such an interpretation risks drawing in certain private asset financing arrangements involving credit risk tranched loans to a special purpose borrower. These structures are widely used, including in the context of funding and disposal transactions related to bank deleveraging initiatives,[3] and would include funding structures involving "warehouse" vehicles and other common asset financing arrangements.

The application of a public disclosure requirement in this context would be completely at odds with the private nature of the loan market, give rise to commercial sensitivity concerns and likely affect the economic feasibility of private funding. Moreover, the need for public disclosure in the context of these deals is highly questionable given that these transactions typically involve sophisticated lenders, who are able to negotiate and assess the information that they require (both at the outset and on an ongoing basis) and to ensure that the contractual terms of the financing arrangement reflect this.

There is nothing in article 8b, the CRA Regulation and/or the previous impact assessment work which indicates that loan arrangements are targeted by the requirements and indeed the reference to the application of the requirements to arrangements involving an "issuer" of securities (rather than a borrower under a loan) clearly supports the opposite view.

Arrangements involving a public rating

It is proposed in the Consultation Paper that article 8b "applies to structured finance instruments with and without credit ratings assigned by an EU registered credit rating agency". Once again, we disagree with this proposed approach from both a legal interpretation and policy perspective.

As noted above, we consider that the scope of article 8b is not determined by the SFI definition alone. Such an approach is highly artificial and ignores related provisions of the CRA Regulation. The SFI definition is but one factor among others which are relevant to determining the scope of article 8b.

In particular, we consider that the scope of article 8b should also be interpreted in a manner which is consistent with the general scope of the CRA Regulation. As

[3] For instance, these transactions may involve an entity disposing of a portfolio of assets, such as a bank selling a portfolio of non-performing loans as part of a deleveraging programme. Often, the bidder/purchaser of these assets is a special purpose vehicle (SPV), established by the "equity" investor (such as a private equity group or joint venture). The SPV will be funded by (i) senior bank debt and (ii) subordinated debt from the equity investor or a related party.

indicated in article 2, the scope of the Regulation is restricted to arrangements involving a relevant credit rating connection and, in particular, arrangements involving "credit ratings issued by credit rating agencies registered in the Community and which are disclosed publicly or distributed by subscription". This general principle of application is a Level 1 matter and applies across all of the provisions of the CRA Regulation. Accordingly, we believe that ESMA has no legal basis to selectively disapply article 2 in respect of article 8b. Such disapplication is not permitted and seems at odds with the matters which may be addressed through regulatory technical standards.

It should also be noted that recital 30 of the CRA Regulation indicates that the new disclosure requirements are intended to "reduce investors' dependence on credit ratings" and to "reinforce competition between credit rating agencies". This recital is revealing of the intention behind article 8b and clearly indicates that the authorities had rated arrangements in mind when making the requirements.

On this basis, we consider that the obligations in article 8b should not be construed to apply other than in the context of structured finance instruments in respect of which a relevant credit rating agency has issued or is expected to issue a relevant public credit rating.

Factors must be applied cumulatively when determining the scope of application

We see the above scope "indicators" as cumulative in nature. That is, in order for the article 8b requirements to apply, the relevant arrangement would need to involve:

- a PD issuer and the issuance of securities;
- the application of the PD requirement to publish a prospectus; and
- a public rating.

In addition, in keeping with ESMA's proposals, the relevant SFIs would need to be newly issued. We strongly disagree with the proposed approach that determines the scope based on the SFI definition only and ignores the other Level 1 provisions which are relevant in this regard.

Position of ABCP conduits and private underlying transactions

We note that ESMA refers expressly in the Consultation Paper to ABCP conduits as being within scope in general under article 8b, although it is suggested that these arrangements (for which an ECB template does not currently exist) would be addressed via a separate template to be developed in the future. However, ABCP conduits usually acquire (unlisted) interests issued via a number of underlying arrangements *at the underlying transaction level*, which interests may themselves be SFIs.

While we consider that these underlying SFIs should not be within the scope of article 8b where such SFIs are not within the scope of the PD and/or do not have a public rating (for the reasons outlined above), under the proposals described in the Consultation Paper such underlying interests would be caught in general.

Accordingly, based on the proposals, it appears that the disclosure requirements would apply to the underlying transactions to the extent that the relevant

underlying assets correspond to a category as described in article 5 of the RTS. This outcome would be highly problematic given that relevant underlying transactions will usually be negotiated and executed on a private basis due to commercial sensitivity issues relating to the underlying asset information or financing transaction terms. In many cases, these issues will be such that it may not be possible for the information to be publicly disclosed without significant business risks arising for the relevant originator. Separate legal considerations may also arise in respect of the public disclosure of asset and other information for certain transactions (see the section headed "*Need to avoid potential conflicts with other laws*" below).

In addition, the size of these underlying transactions may be relatively small (in part driving the decision to finance through a conduit, rather than on a stand-alone basis), meaning that the increased costs and resource implications of complying with article 8b will be more difficult to overcome. The effective removal of the feasibility of using ABCP conduits to finance relevant assets will place more pressure on other funding sources in the system.

We consider that ABCP conduits and corresponding private underlying transactions should be outside the scope of article 8b from a wider policy perspective, as well as from a technical perspective as we have outlined above.

Such arrangements are rarely listed on an exchange and are almost always offered only to sophisticated institutional investors in private transactions. The private nature of the market is one of its defining features, as originators and sellers of the securitised assets often require the conduit issuer and its sponsor to agree not to disclose confidential information about the originator's assets or customers or even, in many cases, the originator's name or the fact of its entering into the transaction. Such private nature is often considered key for financing certain real economy assets (including SME loans, trade receivables, credit card receivables and auto loans and leases). The application of public disclosure requirements in this context risks the effective removal of this funding option for many relevant corporate originators as the disclosure of the confidential information described above would give rise to significant concerns. In this regard, we note that 90% of the respondents to the AFME Survey agreed that the non-public nature of private transactions is a defining feature of these arrangements and described such feature as "crucial" or "very important" for their origination or investment purposes.

It should be noted that fulsome (and properly adjusted) disclosure practices are currently applied in the ABCP market, including the provision of monthly investor reports using market accepted templates which provide pool-level data. Examples of these have been shared with ESMA already. Such practices are considered appropriate by sponsors, originators and investors alike given the highly granular, diverse and often short-term nature of the underlying assets financed through conduits.

The application of article 8b to asset-backed commercial paper would be out of step with the nature of the market and will interfere with the established robust disclosure practices already applied and accepted, damaging funding for the real economy. In this regard, we note that the AFME Survey results further indicate that 80% of respondents consider current disclosure practices in private transactions to

be sufficient and do not consider public disclosure of transaction documentation and/or corresponding asset-level information to be necessary in this context. In addition, as noted above, a majority of respondents also indicated that the application of public disclosure requirements (such as article 8b) to private securitisation transactions would "significantly affect" their decision to invest in and/or originate such transactions and approximately a third indicated that they would "definitely not" continue these activities. While not surprising, these results demonstrate that the current proposals go against the grain of recently announced high-level policy with respect to securitisation and are not proportionate.

Need for further clarification of relevant entities triggering application; EU market participant competition concerns

We note that ESMA proposes that article 8b should apply "to all SFI on [the] condition that one of the three entities mentioned in article 8b, i.e. the issuer, originator or sponsor, is established in the Union". ESMA has further indicated that where article 8b applies, "the issuer, originator, and sponsor are jointly responsible for complying…". There are a number of questions and potential issues which arise under these proposals.

Firstly, it appears that obligations may arise for both EU and non-EU established entities under article 8b in certain circumstances (for example, where a relevant transaction involves non-EU established entities in general but has an EU established sponsor or originator (possibly acting via a non-EU branch)). However, there is no clear authority for imposing such obligations on non-EU regulated entities. We note that there is no supervision or enforcement mechanism in the CRA Regulation for non-EU regulated entities and that article 1(2) indicates that the Regulation "lays down obligations for issuers, originators and sponsors established in the Union regarding structured finance instruments", confirming that only EU established entities are intended to be subject to article 8b. It would be helpful to better understand ESMA's thinking with respect to the perceived jurisdictional basis for application of the requirements to non-EU established entities that may act as "issuer, originator or sponsor" as this approach is inconsistent with the Level 1 provisions of the CRA Regulation.

Secondly, it appears that obligations may arise under article 8b where a single originator is established in the EU and no other parties are established in the EU, notwithstanding that the originator may not have any involvement in the transaction (and indeed may not have any knowledge of it). For example, this could be relevant in the context of any U.S. transactions involving assets originated by multiple originators (who may not each be involved in the securitisation and/or even aware that their assets are being securitised) and such (unaware) originators include an EU established entity. It would not be possible for the originator to comply in these circumstances and, as noted above, it is not clear how jurisdiction would be established with respect to the non-EU entities involved in the arrangement. We note that the originator definition may capture a range of entities, including entities involved in the creation of the relevant asset and an intermediary purchaser entity, regardless of whether such entity is actually involved in the securitisation. The operation of the proposals makes some sense in circumstances where the relevant transaction is a traditional true sale structure involving a single EU established originator/seller and an EU established issuer, but is much less clear

outside of this context. Any attempt to impose obligations on entities without any involvement (or knowledge) of the securitisation would be contrary to the principles of natural justice.

Thirdly, not all securitisations will involve all of the entities referred to in article 8b. To the extent that the relevant arrangement does not involve an issuer as defined under the PD, as noted above, we consider that the requirements should not apply. However, structures may lack other entities, such as a sponsor. Other structures may involve a large number of originators and/or more than one originator with respect to the same asset (e.g. if the asset was originated by one entity and purchased by another intermediary entity). It is not clear based on the current proposals how the requirements should be interpreted to apply in this context. Please see our response to Q1 below for further discussion of the issues in this regard.

Fourthly, we note that concerns have been raised by certain AFME members that business activities undertaken outside of the EU could be affected if their participation in such transactions (as an EU established entity) could trigger the application of article 8b and result in an obligation being imposed on non-EU established entities. By way of illustration, this could arise where an EU established entity acting through its U.S. branch is an originator or sponsor of a U.S. domestic transaction as, based on ESMA's proposals, article 8b would seem to apply and compliance would seem to be required not only by the EU established originator or sponsor, but also by the non-EU established issuer and any other non-EU established originator or sponsor. Such an outcome may discourage third country firms from working with EU established counterparties (including those acting through local branches) on non-EU transactions, creating competitive disadvantages for EU established counterparties to win business in third countries. The issues in this regard will be heightened if the current proposals with respect to information presentation are pursued given that they do not provide flexibility for use of any applicable locally accepted disclosure templates (such as those which would apply under the U.S. Reg AB II initiative, discussed further below).

Need for consistency with other disclosure initiatives; need for a principles-based approach

Significant concerns have been raised by AFME members with respect to the proposed approach under the draft RTS of requiring certain types of information for relevant transactions as a matter of course, rather than providing for the application of a principles-based test on a case-by-case basis to determine the information which is materially relevant. This proposed approach results in a mismatch in interpretation between article 8b and (overlapping) article 409 of the CRR and does not provide for appropriate flexibility for adjustment between transaction structures and assets, thereby giving rise to significant compliance concerns in the context of certain transactions (including private transactions).

ESMA's rationale for proposing to require the same information for all relevant transactions (including loan-level data) is not clear and we do not support this approach in general. That said, AFME members do not object in principle to a requirement to publicly disclose relevant transaction documents (with proper provision for redaction of commercially sensitive information) for all public

transactions. The disclosure of such documents in the context of private transactions would be highly problematic as noted above.

Please see our response to Q3 below for further discussion of our concerns in this regard.

Need for flexibility to use other templates

In addition, while AFME members strongly support ESMA's proposal to endorse existing templates for use where loan-level data is required to be disclosed under article 8b rather than developing separate new templates, we consider that it should be possible to comply by using a format other than the ECB templates. In general, flexibility should be provided for use of other generally accepted templates and formats as appropriate for the particular transaction, subject to satisfaction of the materiality assessment principle described above.

This flexibility would accommodate the use of the Bank of England templates as well as the ECB forms and will become increasingly important if the U.S. authorities pursue the introduction of loan-level data reporting requirements, including for U.S. offered transactions as has been discussed in the context of the so-called "Reg AB II" initiative. In the absence of flexibility for the use of any templates adopted and required by the U.S. authorities (or any other relevant authority), EU market participants seeking to place relevant transactions on a cross-border basis may be required to produce and file two separate completed templates, which will significantly increase transaction costs and have material resource implications. We urge ESMA and the EU authorities more generally to ensure that there is appropriate coordination with the U.S. authorities on securitisation disclosure requirements. The adoption of a principles-based approach to article 8b and flexibility for the use of different templates would largely achieve this.

Please see our response to Q3 below for further discussion of our concerns in this regard.

Need to avoid potential conflicts with other EU laws, such as competition law

We note that, pursuant to article 101(1) of the Treaty on the Functioning of the European Union, concerted practices which have as their effect the distortion of competition within the EU are restricted. A range of practices may be relevant for these purposes, including the sharing of commercially sensitive information in certain circumstances.

Concerns have been raised that article 8b could create practices which would fall within the scope of EU competition law and, as such, we urge ESMA to properly take into account such considerations.

For example, this may be the case for many private transactions, where the information disclosed under the proposals could extend to non-public pricing and supply information. While it is not clear, considerations may also arise for certain public transactions, such as those backed by credit card receivables, where it is proposed that asset information with respect to charge-offs (individual and pool

level), delinquency rates and triggers would be required to be reported. Any uncertainty with respect to the potential interaction of article 8b and other EU laws is unhelpful and may operate to further discourage the use of securitisation as a funding tool.

Lastly, we note that while we appreciate that ESMA has proposed to adopt the ECB template for credit card transactions, this template is untested and it is not yet clear whether market participants will determine that they are able to comply with the ECB reporting requirements (which requirements are optional in nature given their link to collateral eligibility, rather than being a regulatory requirement).

Event-based reporting should not be required under article 8b

AFME members are strongly opposed to the adoption of "event-based" disclosure requirements under article 8b, in whole or in part. Our concerns in this regard relate to the fact that event-based disclosure requirements already apply under existing law and the proposed event-based requirement referred to in article 6 of the draft RTS is not sufficiently clear.

Moreover, there is nothing in the Level 1 text of the CRA Regulation to suggest that article 8b should extend to event-based reporting and indeed references to the "frequency" of information "updates" are strongly indicative of periodic disclosures being targeted, rather than trigger dependent event-based disclosures. We believe that the proposals go beyond the legislative provisions and should not be pursued given the inherent policy decision that such an approach would imply.

Please refer to our response to Q4 below for further discussion of our concerns with the current proposals.

ESMA website should allow for the linking of information

AFME members would also like to comment on the centralised website to be set up and operated by ESMA. Recent experience in the context of the ECB reporting requirements and use of the corresponding European DataWarehouse has highlighted the significant challenges which can accompany the establishment of a new forum for the full publication of ABS reporting information, particularly where use of such a forum requires new centralised software systems and information access policies.

While it is not clear, aspects of the draft RTS (including article 7) suggest that ESMA may require full uploading of relevant information to its new website, rather than permitting hyperlinks to be made to information published via other websites, including the European DataWarehouse. This will result in significantly more work for market participants as well as increased costs, without an obvious advantage for those accessing the information and again disadvantaging securitisation both in absolute terms and compared with other forms of capital markets funding. In addition, this will create confusion for investors, for whom it will not be clear which site to use.

As a bottom line, we strongly encourage ESMA to pursue the development of a website platform allowing for hyperlinks to underlying published information. We

consider that the policy objective of article 8b would be satisfied by this approach and note that there is nothing within the text of the CRA Regulation itself which requires ESMA to establish a direct publication system.

Responses to specific questions

Q1: Do you agree that issuers, originators or sponsors of a structured finance instrument established in the EU shall jointly agree upon and designate the entity responsible for providing the information to ESMA?

While AFME members generally support the implementation of article 8b in a manner which does not require separate (and duplicative) information filings by each of the issuer, originator and sponsor, questions have been raised as to how the proposed joint delegation process should work in practice in certain contexts.

We note that provision for designation allows for the sensible operation of the requirements in the context of a relevant transaction involving entities which clearly fall within each of the issuer, originator and sponsor definitions, but it is less clear how this provision should work in other scenarios. In particular, challenges arise in circumstances where the transaction involves more than one possible originator of the same asset, or where there is no originator and/or sponsor involved in the transaction. There may not be an entity which falls within the relevant definition or the (originator) entity that might satisfy the definition may have no involvement in the securitisation. Indeed, it may have no knowledge of it.

To take one example, a bank may acquire a previously originated asset portfolio and later seek to securitise the relevant assets. In this context, both the bank securitising the assets and the original lender would be originators of the relevant assets under a strict reading of the relevant originator definition. Notwithstanding this, it would be an absurd outcome if both entities were regarded as an originator for the purposes of article 8b; compliance would not be possible if this was the case as the original lender (who would have had no involvement in the later securitisation) would not wish to assume any obligation under article 8b and would be highly unlikely to participate in any joint designation process.

The above example illustrates that not all securitisations will slot neatly into article 8b in terms of the entities involved. Accordingly, we are concerned that joint delegation will not work in all cases. For this reason, we consider that it is preferable for flexibility to instead be provided for one relevant entity (ie. the issuer, originator or sponsor) to agree to take on the disclosure requirements without the need for delegation by the other entities. We consider that it would be appropriate for flexibility to be provided for the issuer to be able to do this, particularly when one considers that the issuer will own the relevant underlying assets and, technically speaking, at that point the originator will generally have access to information regarding such assets and the transaction cashflows etc only in its role as servicer or other service provider to the issuer (for example, as administrator or cash manager) and, as such, may be replaced in certain (limited) circumstances.

On related fronts, AFME members support the proposal in the draft RTS to expressly permit the outsourcing of the disclosure obligations to another entity, although we

consider that this should be subject to one of the issuer, originator and sponsor remaining responsible for compliance, given our comments above.

In addition, we note that the draft RTS would seemingly permit outsourcing only to "the servicer or the management company of a structured finance instrument". This wording is somewhat confusing as, in general, there will not be a servicer or management company with respect to the SFI itself, as the relevant service providers will instead usually be appointed to act on behalf of the issuer or other relevant vehicle. If a relevant entity remains responsible, it is not clear why any restrictions should be applied with respect to the eligible agent which may act on its behalf, and accordingly we urge ESMA to remove the restrictive references referred to above. This will more clearly provide sufficient flexibility for all transaction structures.

Q2: Do you consider that national laws on protection of personal data could impact the publication of the information contained in this draft Regulation?

Yes, we consider that national laws relating to data protection and/or bank secrecy could impact the publication of the information referred to in the draft RTS. The consequences of a breach of such laws are not insignificant and in a number of countries may give rise to criminal sanctions, such as France.

As recent experience in the context of the central bank requirements has illustrated, the analysis of data protection and bank secrecy laws is complicated by differences in such laws between EU member states. The complexity of the issues is heightened given that ESMA seems to be seeking to apply article 8b in respect of third-country originated transactions and/or entities, meaning that the laws of those other jurisdictions will also need to be considered. The analysis is further complicated by the fact that personal identification issues must take into account the possibility of the information disclosed under article 8b being combined with all other information in the public domain via the internet or otherwise.

While certain national laws may include limited carve-outs for disclosures of certain personal information if required by law, such carve-outs would not appear to provide complete flexibility to comply with article 8b in all relevant jurisdictions. For example, carve-outs may not be available if the trigger for the application of the relevant legal disclosure requirement (here, doing a securitisation) is itself regarded to be optional rather than mandatory under the law.

In order to identify the potential issues in this regard, AFME members consider that ESMA should obtain detailed legal advice in all of the relevant jurisdictions. While ESMA indicates in the Consultation Paper that, by including existing loan-level templates in the draft RTS, it has built on existing work done by other EU authorities with respect to confidentiality and processing of personal data (which seems a sensible starting point), we do not consider that ESMA should assume that issues could not arise in this regard under the RTS and/or that further (independent) assessment work is not required. Any previous work done in other contexts will be subject to certain assumptions and/or qualifications and will need to take into account the full package of information proposed to be required to be disclosed under article 8b and the laws of all relevant jurisdictions. In addition, as highlighted

elsewhere in our response, the ECB loan-level reporting requirements are not mandatory under the law, meaning that market participants are not forced to comply if they are concerned about possible breaches of applicable data protection and bank secrecy laws – they always have the option to choose not to seek Eurosystem eligibility for the relevant securities.

While it is not possible for AFME members to identify all relevant data protection and bank secrecy issues in all relevant jurisdictions in this response, it is possible to illustrate the potential issues by way of example. In this regard, we note that, under German law, significant restrictions apply with respect to data protection and bank secrecy and it will be necessary for these laws to be considered carefully in connection with the proposed loan level reporting templates. In particular, confidentiality obligations arising under banking secrecy (which is recognised by German customary law (*Gewohnheitsrecht*) and which is not subject to EU-wide harmonisation) apply to both individuals and legal entities and require credit institutions to maintain secrecy on all customer-related data and assessments obtained in connection with the business relationship in relation to their customers, and there is no general exemption for disclosures required by law. In connection with the loan level templates, this means that an entity disclosing information could be considered to be in violation of its obligations under German law if the disclosed information practically permits, whether on its own, or when combined with other publically available information, a recipient of such information to draw conclusions regarding the identity of the data subject.

While the use of rounded or shortened data fields or coded ranges (e.g. with regard to the borrower's primary income, the original loan balance, the loan origination date and the postcode as referred to in the RMBS loan-level template) may help to avoid the possibility of drawing such conclusions, flexibility for such rounding or coding is not clearly provided for in the proposals. As a bottom line, in order to be able to conclude that all information proposed to be required to be disclosed would not practically permit a recipient to draw such conclusions on the identity of the data subject, a detailed analysis for each loan-level template would be required taking into account all information available in the public domain.

With respect to the data protection and bank secrecy considerations which may arise under the laws of third countries, we note that the United States provides an example in this regard. As ESMA may be aware, the U.S. Securities and Exchange Commission (**SEC**) recently consulted on certain follow-up matters relating to its previous proposals to introduce asset-level reporting requirements (its so-called "Reg AB II" proposals) and the responses filed by various industry groups, including AFME's sister organisation, the Securities Industry and Financial Markets Association (SIFMA), which highlighted a number of significant concerns relating to the possible disclosure of information which may allow a recipient to identify an underlying borrower.[4] These issues are acknowledged in the SEC staff memorandum published in connection with its most recent consultation.[5] Given the proposed scope of application of article 8b, such issues may also be relevant and should be taken into account by ESMA. Indeed, we consider that it would be appropriate for ESMA to ensure that its work under article 8b is appropriately coordinated in general with that currently being undertaken by the SEC in the

[4] SIFMA response linked here: http://www.sifma.org/issues/item.aspx?id=8589948242.
[5] SEC staff memorandum linked here: http://www.sec.gov/comments/s7-08-10/s70810-258.pdf

context of its work on Reg AB II, particularly given the statements about the need for harmonisation in securitisation transparency initiatives made in the recent report from the European Commission on the long-term financing of the European economy.

As an additional point, to ensure that it is clear in the draft RTS itself that the obligations described therein are subject in all cases to article 8b(2), this should be expressly referred to in the RTS.

We note that, in the context of article 409, the EU authorities are seeking to provide clarification (as was provided in the case of previous article 122a(7)) that the disclosure requirements are subject to "any other legal or regulatory requirements applicable to the retainer". Consistent general guidance should be expressly provided in the RTS made under article 8b to avoid compliance confusion and to ensure that market participants are not potentially required to provide information which, on its own or with other publicly available information, would give rise to a breach of confidentiality arising from legislation, common law or the provisions of market documentation. In the absence of this guidance, market participants may be subject to conflicting requirements.

It should also be noted that disclosure of personal data gives rise to concerns with respect to possible identify theft and fraud.

Q3: Do you consider the list of information requested pursuant to article 4 as appropriate?

AFME members have significant concerns about the list of information proposed to be required under draft article 4. While we support transparency in the ABS markets and do not object to the disclosure of most of the items referred to in article 4 in the context of many relevant *public* transactions, we do not agree with the suggested approach of setting disclosure requirements for all relevant transactions using a "one size fits all" approach.

In particular, we consider that a principles-based approach should be applied under article 8b when assessing the types of information required to be disclosed, rather than an approach which mandates the provision of loan-level information and certain other information for all transactions regardless of the structure or nature of the underlying assets. It should also be noted that the concerns raised by the approach contemplated by the Consultation Paper are exacerbated by the fact that it is proposed that article 8b should be interpreted to apply in respect of private transactions.

Principles-based approach should apply as under article 409 CRR

The wording of article 8b(1) overlaps to a large extent with the disclosure requirement applied to EU institution originators and sponsors under article 409 of the CRR. In the context of article 409 (and previous article 122a(7) of the Capital Requirements Directive), significantly, the EBA has indicated that the level of information required to be disclosed will depend on what is materially relevant in the context of the transaction and, in keeping with this, that the provision of loan-level information will not be appropriate in all cases – for example, where the

securitisation involves a highly granular pool of assets or where the assets or asset pool revolve(s). In doing so, the EBA has supported an approach based on the general principle of material relevance, rather than seeking to adopt more specific requirements. This has allowed for the sensible adaptation of the disclosure requirements in the context of different types of transactions.

While the point set out above was made in our response to the previous discussion paper, we note that the Consultation Paper adopts a fundamentally different approach by requiring certain information (including loan-level information) to be disclosed as a matter of course for all relevant transactions. Indeed, no more than a passing reference is made in the Consultation Paper to article 409 and no reference is made to our detailed request for a principles-based approach. No explanation is provided for why it is considered acceptable to have fundamentally different interpretations of two EU law requirements described in substantially the same terms.

Consistent with our previous comments, AFME members are extremely concerned about the proposed adoption of an approach under article 8b which is not consistent with that which applies under article 409 of the CRR. This risks creating compliance uncertainty and confusion between the two (very similar) requirements.

Loan-level information should not be required for all relevant transactions

The Consultation Paper indicates that "ESMA considers that, irrespective of the structure of the transaction or the nature of the assets backing an SFI, loan-level information is the approach to be applied". The Paper further indicates that this view is supported by the objectives of article 8b itself, which are "increasing competition between CRAs, reducing overreliance on ratings in the area of SFI and providing investors with more information on the underlying assets to allow them to perform a comprehensive and well-informed risk assessment". AFME members disagree with this view and would note that the objectives of article 8b simply support the need to provide materially relevant information in the context of the particular transaction, rather than for loan-level information *per se* to be disclosed.

Furthermore, it should be noted that, while the wording of article 409 is very similar to article 8b(1), it is not exactly the same. In particular, whereas article 409 refers to the provision of information on "the credit quality and performance of the *individual* underlying exposures…" (emphasis added), article 8b(1) refers only to "the credit quality and performance of the underlying assets…" (i.e. without a reference to "individual"). Given that the text of article 8(b)(1) was clearly taken from article 409 (or, to be more precise, its predecessor, article 122a(7)) and presumably modified intentionally and that the EBA emphasised in its guidance relating to the provision of loan-level data under article 122a(7) that reference to the word "individual" was considered to be significant in this regard, it is arguable that, as a threshold matter, article 8b is not intended to result in a formal legal requirement to disclose loan-level information across the board.

AFME members wish to highlight that the issues and concerns with respect to the disclosure of loan-level information are shaped in part by the proposed very broad scope of application of article 8b and, in particular, by the proposed application to private transactions. As noted above, asset information in these transactions is

often highly commercially sensitive and the application of a public disclosure requirement would present an effective barrier to the continued use of securitisation to finance relevant underlying assets.

It should also be noted that pool-level or stratified information can be just as, if not (in some circumstances) more, useful for investors as loan-level information. This may be the case in the context of, for example, transactions involving highly granular pools of short-term revolving assets (such as transactions backed by credit card receivables and trade receivables). The application of loan-level reporting requirements to these deals is also disproportionate given that relevant entities could be required to provide information with respect to hundreds of thousands of assets, which would be overwhelming for both reporting parties and investors. Recent informal indications from investors suggest that a sufficient level of information is being made available in general in the context of most European securitisations and key concerns relate not to the quantity or level of information available but instead to technology challenges regarding the ability to process such information efficiently.

The utility of pool-level information for highly granular asset transactions is particularly striking when one applies a cost-benefit analysis and considers the significant practical issues which would arise if loan-level reporting is required. These practical issues should not be underestimated. The investment of time, resources and cash in the development of systems sufficient to provide loan-level data for highly granular asset classes such as auto and consumer loans, credit cards and trade receivables will be very significant with little (if any) increased value to investors, and in some cases may not be possible at all. Separate legal considerations may also arise in respect of the public disclosure of asset and other information in respect of certain transactions (see the section headed "*Need to avoid potential conflicts with other laws*" above for further details on this).

As noted above, to the extent that loan-level information is required under article 8b, then AFME members generally support the proposal for such information to be published using the ECB templates, rather than separate templates designed by ESMA. That said, AFME members consider that flexibility should be provided for other templates to be used subject to the materiality assessment principle described above.

AFME members would also caution ESMA against making the assumption that, because it is proposed that the ECB templates will be used as a starting point, issues will not arise. In this regard, it is important to bear in mind that the ECB templates are used as part of an eligible collateral framework and, while there are strong incentives to comply, the requirements are, at the end of the day, optional. This means that to the extent that such templates do not work in practice for certain transactions, market participants can choose not to comply. This is very different from a regulatory requirement, which is mandatory in nature. We would also note that aspects of the ECB's reporting requirements are relatively untested and, as such, may not work as intended. This would include the reporting requirements for credit card receivables transactions, which only very recently took effect.

Lastly, to the extent that use of any particular template is required, it is essential that flexibility is provided for completion of such template on a "comply or explain"

basis. In the absence of this, significant compliance issues are likely to arise in connection with the use and completion of the templates given that the information available to originators in respect of existing assets will be limited to that captured by their current systems. We note that it is not clear under the proposals contemplated by the Consultation Paper that the "comply or explain" flexibility provided by the ECB would be available when complying with article 8b. This is a source of concern and an area where clarification is required. In addition, it would be helpful to better understand what approach would be used to develop and adopt any further templates (for other asset class categories) in the future and, in particular, to know that there will be sufficient opportunity for public comment.

Other proposed information types should not be required for all transactions

We note that ESMA has proposed that it should also be necessary under article 8b for certain other items of information to be disclosed as a matter of course, including standardised investor reports, cashflow models, transaction documents and transaction summaries. To be clear, AFME members are not opposed in principle to the disclosure of these items of information in the context of many transactions (and certainly in UK public transactions such disclosure already takes place under the Bank of England rules). However, whether or not such items need to be disclosed should be determined on the basis of the principles-based test described above, so that appropriate flexibility is available between transaction structures and asset types. We note that the EU authorities have not indicated that the proposed other items of information should be disclosed as a matter of course under article 409, meaning that the inconsistencies between article 409 and article 8b would also extend to these items.

Moreover, AFME members wish to highlight that the issues and concerns which arise relating to any requirement to disclose the additional documents and information referred to above are shaped in large part by the scope of application of article 8b and whether clear guidance is provided that the relevant requirements do not extend to confidential information (whether arising from legislation, common law or the provisions of market documentation). In particular, AFME members have significant compliance concerns with any requirement to disclose such additional documents and information in light of the proposals to regard private transactions as being within scope, which we consider to be inconsistent with the Level 1 text (please see above for our arguments against these proposals being subject to article 8b).

Notwithstanding the foregoing, AFME members do not object in principle to a requirement to publicly disclose relevant transaction documents (with proper provision for redaction of commercially sensitive information) for all *public* transactions. The disclosure of such documents in the context of private transactions would be highly problematic for the reasons outlined in this response and, in particular, we note that such documents will contain highly sensitive commercial and financial information with respect to originators, arrangers and sponsors that should not be made available to other market participants. In this private transaction context, we note that the text of article 8b does not expressly refer to the disclosure of transaction documents and, as such, the proposals go beyond the Level 1 position and should not be pursued given the significant issues

which would arise and the corresponding policy decision which would accompany such an approach.

As noted above, it is expected that the guidance under article 409 of the CRR will make it clear (as the guidance did under previous article 122a(7)) that information subject to confidentiality restrictions is not required to be disclosed. We consider that the same principles should apply under article 8b or market participants may be subject to conflicting obligations. We also consider that, consistent with the Bank of England requirements, clarification must be provided to expressly permit redaction of commercial terms from transaction documents, where such documents were previously not public and the terms relate to "sunk costs" that do not impact on the cashflows of the transaction.

Q4: Do you consider the frequency of the information to be reported pursuant to article 6 as adequate?

Event-based reporting

As noted above, AFME members are strongly opposed to the adoption of "event-based" disclosure requirements under article 8b, in whole or in part. Our concerns in this regard relate to the fact that event-based disclosure requirements already apply under the European regulatory regime and the proposed event-based requirement referred to in article 6 of the draft RTS is not sufficiently clear.

As ESMA will be aware, under the European regime for listed securities which applies under the Market Abuse Directive, event-based disclosure requirements already apply where the information is material/price sensitive and not publicly available. This makes sense, particularly where the information is not publicly available, as in this context investors would otherwise not have access to the information. In addition, these market abuse rules include provisions on the test to be applied in determining relevant information for these purposes. This includes when information should be considered to be price sensitive under the reasonable investor test and when information will be sufficiently precise. Notwithstanding these provisions, the assessment of when the test under the market abuse rules will have been met is a complicated one. The introduction of a parallel regime without any of the corresponding explanation will result in heightened confusion. It should also be noted that the market abuse rules permit an issuer to delay the public disclosure of inside information in certain circumstances if necessary to avoid prejudicing the relevant issuer's legitimate interests. Such provisions provide important relief from the continuing disclosure obligations. The proposed parallel regime does not include a similar carve-out and risks effectively removing the benefit of the relief under the market abuse regime as a result.

In the context of an issuer defined largely by the underlying assets that it holds, information relating to material matters in respect of those assets would, to the extent that the information was not public and that it otherwise triggered the Market Abuse Directive provisions, be required to be disclosed under the event-based disclosure requirements under the Directive. In practice, such disclosures have been limited to date given that significant information is already made available at regular and frequent intervals (typically monthly or quarterly – much more frequently than in other fixed-income sectors such as corporate bonds or

equities) under current securitisation disclosure practices, and so securitisation issuers are less likely to be in possession of non-public material information. As a result, in an ABS context, regular investor reporting will typically already capture material event reporting.

In short, the case for developing an additional parallel event-based disclosure regime for SFIs has not been made. If improvements are considered appropriate to the existing market abuse regime, then this should be advanced through the current MAD review, rather than through article 8b. It should also be noted that other provisions already apply under the EU regime for listed securities relating to ongoing disclosure, such as the requirement to supplement prospectus disclosure in certain circumstances under the PD and the requirement to make certain financial information and other information available under the Transparency Directive.

Proposed article 6(4) of the draft RTS indicates that disclosure should be required with respect to "any significant change or event either likely to affect the creditworthiness or the risk characteristics of the underlying exposures or of the structured finance instrument or representing a breach of transaction documentation of the structured finance instrument". This wording is unclear in a number of respects (e.g. it is not clear what "risk characteristics" should mean for these purposes) and it appears that a materiality test is to be applied only in respect of changes or events and not with respect to the actual effect on the transaction. In addition, a reasonable investor test is not referred to, thereby giving rise to confusion with respect to the standard to be applied when assessing changes and breaches.

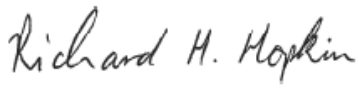
There is also no carve-out in draft article 6(4) for information which is already public, suggesting that relevant entities would be required potentially to republish information already made publicly available via the proposed periodic reporting requirements or separately through disclosures made by others. This is disproportionately onerous, given that public information will already be available to investors. To be clear, we are strongly opposed to an approach that would result in article 8b functioning as a reporting mechanism with respect to market information and/or information otherwise able to be monitored by investors directly via other public information sources. Any required disclosures should relate specifically to the relevant transaction (including the underlying assets) only and not to market events or other information which can be accessed by investors through other sources (such as Bloomberg).

It is our understanding that the article 8b regime is intended in general to enable investors to better monitor asset quality and performance. Recital 30 to the CRA Regulation expressly refers to this. On this basis, we consider that periodic disclosure is the intended focus of article 8b, as information provided at regular intervals allows for charting data movements over time. Disclosure of asset performance is already made by many issuers on a regular (usually monthly or quarterly) basis, as this is what investors (rightly) require.

In closing, we note that the engagement of ESMA with market participants on issues related to securitisation disclosure is appreciated, as is the opportunity to comment on the Consultation Paper. We urge ESMA to take note of the key concerns outlined in this response and of the general need to implement article 8b in a manner which

is proportionate, consistent with the Level 1 text and does not threaten the recovery of the securitisation market. Lastly, we note that we would be happy to answer any further questions you may have.

Yours faithfully,



Richard Hopkin, Managing Director

Association for Financial Markets in Europe

ANNEX I

AFME SURVEY OF MARKET PARTICIPANTS

Given the non-public nature of private securitisation transactions, it is difficult to determine via usual market information sources the full size of the market and the corresponding implications of the proposed application of article 8b in respect of these arrangements. In an attempt to gather some preliminary information on this, AFME prepared a survey for market participants in late March 2014.

The questions included in the survey were targeted primarily at ABS investors and originators. Approximately 30 entities participated in the survey, although not all respondents answered all of the survey questions. A quarter of the respondents were investors and the balance were originators. Below is an overview of certain key points from the responses provided.

For the purposes of the survey, private transactions was defined to mean a securitisation which does not involve the issuance of securities which are admitted to trading on a regulated market and instead involves investment by sophisticated investors on a non-public basis.

1. In response to a question asking respondents about what proportion of their investment/origination portfolio is comprised of private transactions, 70% of the respondents indicated that more than a quarter of their portfolio is made up of private transactions and 30% of the respondents indicated that private transactions constitute more than three-quarters of their portfolio.

2. In response to a question asking respondents about the types of assets that are financed via the private transaction section of their portfolio, respondents indicated that such assets include SME loans, auto loans and leases, credit card receivables and other consumer finance receivables. In particular, SME loans were described by respondents to make up a large part of the assets financed via private transactions.

3. In response to questions asking respondents whether they considered the non-public nature of private transactions to be a defining feature and how important this feature is for their origination or investment purposes, 90% of the respondents agreed that this nature is a defining feature and described such feature as “crucial” or “very important” for their purposes.

4. In response to questions asking about current disclosure practices in private transactions, 80% of respondents indicated that they consider such practices to be sufficient and also indicated that they do not consider public disclosure of transaction documentation and/or corresponding asset-level information to be necessary.

5. In response to questions asking respondents whether public disclosure of transaction documents and asset-level data in the context of a private transaction would significantly affect their decision to invest in or originate such transactions, more than half of the respondents indicated that this would “significantly affect” such decisions and approximately a third of respondents indicated that they would “definitely not” continue these activities if public disclosure requirements are

introduced. 80% of respondents indicated that they are “very concerned” with the proposals to apply public disclosure requirements in the context of private transactions.