

20th May 2015

European Securities and Markets Authority
103 rue de Grenelle
75345 Paris
France

Submitted online: www.esma.europa.eu

Dear Sir or Madam,

RE: Call for Evidence – Extension of the disclosure requirements to private and bilateral transactions for Structured Finance Instruments (SFIs)

This response has been prepared on behalf of the Association for Financial Markets in Europe (AFME)¹ and its members. AFME represents a broad array of European and global participants in the wholesale financial markets, and its members comprise all pan-EU and global banks, as well as key regional banks, brokers, law firms, investors and other financial market participants.

AFME and its members welcome the opportunity to comment on the above described call for evidence (**Call for Evidence**) on article 8b of the CRA Regulation published by the European Securities and Markets Authority (ESMA) on 20 March 2015. However, as this response has been prepared by a trade association, it has been filed in the form of a letter and not all of the questions raised in the Call for Evidence have been addressed. In particular, we have not been able to respond to those questions included in the Call for Evidence which seek detailed feedback on firm specific matters (such as individual investor due diligence procedures). Where possible, however, we have provided high-level feedback to certain questions on the basis of information gathered through a recent AFME survey of market participants (**AFME Survey**) (described in Annex I).

We also wish to provide comments in this response letter on certain points which closely relate to matters referred to in the Call for Evidence. In particular, we note that on 12 May 2015, the Joint Committee of the European Supervisory Authorities published a report on securitisation (**JC Report**). The JC Report makes a number of recommendations on disclosure related topics, including matters related to the scope of application of article 8b and the information which should be made available under the corresponding implementing measures set out in the CRA3 RTS. AFME members are still reviewing the detail of the JC Report. However, significant concerns have been identified on a preliminary basis with respect to certain recommendations, particularly those which call for further changes to securitisation disclosure requirements.

¹ 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 the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia. AFME is registered on the EU Transparency Register, registration number 65110063986-76.

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We fully support sensible disclosure and the calls in the JC Report for greater harmonisation and consistency with respect to the due diligence requirements which apply to different types of investors. However, a number of the recommendations in the JC Report seek to re-open matters recently determined by the EU authorities in the context of last year's consultations on the CRA3 RTS. These matters include whether cashflow models are required to be made available (and any corresponding technical standards, verification process and required inputs), the required data fields for mandatory loan-level information (including whether disclosures should be required with respect to borrower credit scores and other data items which may give rise to confidentiality or other concerns) and the required information on key counterparties and service providers.

Seeking to re-open these matters and indeed, in some cases, to go beyond previous proposals, presents the possibility of further changes being made to the disclosure regime which will apply under article 8b before market participants have even had a chance to come to grips with the recently finalised obligations contemplated by the CRA3 RTS. Moreover, aspects of the relevant recommendations are intrusive, unnecessary and risk damaging both confidentiality obligations to customers and legitimate commercial interests in proprietary know-how such as credit scoring. As a result, such recommendations, and the corresponding regulatory uncertainty which they bring, send a very negative signal and are not consistent with the current high level policy objective in the EU to revive the securitisation markets. AFME members would welcome an opportunity to discuss the recommendations in the JC Report with ESMA and the other European Supervisory Authorities.

With respect to other related matters addressed in our response, we note that the final section of this letter provides comments on certain issues which arise for highly granular consumer asset-backed transactions (including those done on a public basis) where loan-level information is required to be reported as contemplated by the CRA3 RTS and on certain matters in respect of the SFI website to be established by ESMA.

Executive summary

Below is an overview of key points covered by this response letter.

- AFME members consider that private and/or bilateral transactions represent an important segment of the market and raise additional and heightened considerations from a disclosure perspective.
- We accept the position adopted by ESMA and the Commission that article 8b of the CRA Regulation applies to private and/or bilateral transactions, (even though we respectfully disagree with this view) - and have sought constructively to assist with the identification of a sensible way forward.
- However, we believe strongly that further consideration is needed for private and/or bilateral transactions, that measures to reflect the different arrangements required for them are critically important, and that the EU authorities hold significant discretion to implement such requirements.
- We support transparency in the ABS markets and consider that our recommended approach achieves the overarching objective identified by ESMA (i.e. to ensure that investors have the ability to make an informed assessment of the creditworthiness of the relevant transaction).
- The first step for identifying relevant transactions should be to define private transactions as a separate category within SFIs. Then, as a second step, a basis for identifying certain separate sub-categories of private transactions should be developed to include transactions which are bilateral, supported (in full or in part) or intra-group. For an overview of our proposed categories and how they interrelate, please see the decision tree in Annex II (the **Decision Tree**).

- The following key principles should be applied when determining the basis to be used to identify relevant arrangements within SFIs: the need for clarity and certainty, for an appropriate EU focus, for consistency, for sufficient flexibility and for focus on appropriate outcomes and arrangements which satisfy the “spirit” of article 8b.
- Private transactions should be identified as those where no obligation arises under the EU Prospectus Directive to publish a prospectus. ABCP programmes and other common private asset financing arrangements would therefore be characterised as private.
- For private transactions (that are not also bilateral, supported and/or intra-group in nature) only the disclosure requirements outlined in article 3(b) (transaction documents) and (d) (investor reports) of the CRA3 RTS should apply, and the obligation to publicly disclose this information via the SFI website should be disapplied. The general disclosure obligation in article 8b(1) of the CRA Regulation should also be applied in respect of the transaction with the specification that the issuer, originator and sponsor jointly should ensure that investors have access to “all materially relevant data” on the items referred to in article 8b(1).
- Bilateral transactions should be identified as a sub-category of private transactions and separately from supported and intra-group transactions.
- For private and bilateral transactions, the disclosure requirements outlined in the CRA3 RTS should not apply and instead a principles-based requirement should be implemented through a separate implementing measure. This measure should directly apply the general disclosure obligation in article 8b(1), with the specification that the issuer, originator and sponsor jointly should ensure that investors have access to “all materially relevant data” on the items referred to in article 8b(1). This approach is consistent with the disclosure obligation which applies under article 409 of the Capital Requirements Regulation.
- Supported transactions should also be identified as a sub-category of private transactions and separately from bilateral and intra-group transactions.
- For private and supported transactions there should be a principles-based disclosure requirement on the same basis as suggested above for private and bilateral transactions, as well as specific requirements to entrench certain existing practices, including an information memorandum that describes the programme’s legal structure and operative documents, and investor reports (on at least a monthly basis) setting out information about the programme, the liquidity and programme credit support providers and the underlying transactions (consistent with established market practice).
- Intra-group transactions should also be identified as a sub-category of private transactions and separately from bilateral and supported transactions.
- For private and intra-group transactions, by definition these arrangements will not involve third party investors. Therefore an exemption should be provided. If such an exemption is not considered possible, then a principles-based requirement on the same basis as suggested above for private and bilateral transactions should be adopted to provide appropriate flexibility.

Responses to questions

Q2. Please explain whether you issue/structure SFIs on a private and/or bilateral basis.

Yes, many AFME members use private and/or bilateral transactions involving the issue of SFIs to finance assets or otherwise participate in such transactions. In this regard, we note that approximately 14 firms responded to the AFME Survey and 86% of them indicated that they either originate or invest in private transactions.

In response to a question asking respondents about what proportion of their investment/origination portfolio is comprised of private transactions, approximately half of the respondents indicated that up to 25% of their portfolio is made up of private transactions and almost 20% of the respondents indicated that private transactions constitute more than three-quarters of their portfolio.

While it is difficult to provide figures on the size of the relevant market for these purposes given its private nature, some sense of its significance may be conveyed by the issuance information available for certain key sections of it, such as the European ABCP market. In 2014, ABCP conduits rated by Moody's Investor Service in Europe had outstanding commercial paper issuance of more than US\$70 billion, most of which was invested in European business and consumer assets.² Such arrangements are rarely listed on an exchange and are almost always offered only to sophisticated institutional investors in private transactions. We further note that the importance of this market has been acknowledged by the European authorities, including the European Commission as evidenced by its recent request for feedback on the criteria which should be developed for simple, transparent and standardised short-term securitisation instruments.

If yes, please indicate:

- *What are the main categories/types of SFIs you usually issue/structure; and*

Respondents to the AFME Survey indicated that they use private transactions involving the issue of SFIs to finance a range of asset types including trade receivables, SME loans, auto loans and leases, equipment leases, corporate loans, credit card receivables and other consumer finance receivables.

Relevant transactions may be structured as underlying transactions in respect of ABCP conduits (i.e. underlying asset purchase and other transactions funded by ABCP programmes), funded directly on originating banks' balance sheets or as other standalone arrangements. As noted above, such transactions provide an important source of funding for businesses and for financial institutions providing financing to their businesses and customers. For example, such transactions may provide working capital facilities to business enterprises by buying their short-term trade or other receivables and financing those investments by issuing commercial paper and/or facilitate consumer finance by investing in securitisations of consumer credit assets, including revolving "warehouse" facilities that bridge to longer-term ABS issuance.

It should also be noted that key private transaction structures such as ABCP programmes are especially well adapted to financing short-term assets and revolving pools of assets where the aggregate outstanding amount changes over time, as the amount of funding can easily be adjusted to accommodate changes in the underlying assets or the originator's funding needs.

² Moody's Investors Service, materials from Moody's 12th Annual ABCP Conference (Nov. 2014), available at https://www.moody's.com/research/Moodys-12th-ABCP-Conference-shows-optimism-about-European-ABCP-market--PR_313380, pages 5, 11.

- ***What is your motivation for issuing such instruments?***

The motivation for issuing private and/or bilateral transactions in SFIs may vary depending on matters specific to the originator, the underlying assets and/or the needs of the relevant investors. In particular, in certain circumstances, there may be significant sensitivity from a commercial and/or legal perspective with respect to the disclosure of the existence of the financing transaction, of information relating to the underlying assets and/or of the (often proprietary) underwriting or credit scoring techniques used to originate the assets in the first place, which originators see as providing a competitive advantage in their marketplace.

The use of private and/or bilateral transactions can also allow a transaction to be better tailored to the needs of particular borrowers and investors. Many corporate borrowers favour private transactions because such arrangements are relatively flexible and allow for efficient amendment, extension and restructuring as a result of the fact that the investor will typically be a bank with whom the borrower has a relationship (as opposed to public transactions involving investors with no direct business relationship with the borrower). In certain circumstances, such transactions may operate to provide an important additional line of credit to businesses and are essentially viewed by the parties involved as private loans, the terms of which are determined through direct negotiation between such parties. The application of public and standardised disclosure obligations in this context would be inconsistent with usual market expectations and needs.

In keeping with the above, all of the originator respondents to the AFME Survey described their motivation for using private transactions to include reasons related to (i) the sensitivity of any disclosure of information related to the occurrence of the financing transaction and/or related to the underlying assets, (ii) the relative flexibility provided by the nature of a private transaction which allows for the arrangement to be better tailored to the needs of the relevant investor(s) and/or (iii) more efficient funding costs.

Q3. Please indicate whether you intend to make greater or lesser use of private and/or bilateral transactions in SFIs and outline the main reasons.

Over 20% of the respondents to the AFME Survey indicated that, all things being equal, they intend to make greater use of private transactions in SFIs. Other respondents did not answer this question, which suggests that they are unable to confirm whether or not they intend to make greater or lesser use of private and/or bilateral transactions at this time. This uncertainty may be linked in part to the fact that the disclosure requirements which will apply to such transactions under article 8b have not yet been determined.

In this regard, we note that, 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 a number of investor respondents also noted that they consider that they already receive the information that they require in the context of private transactions. Approximately a quarter of respondents indicated that they would “definitively not” continue these activities if public disclosure requirements are introduced, and less than 10% of respondents were able to confirm that they would continue these activities in such circumstances.

It should also be noted that more than two-thirds of the respondents to the AFME Survey indicated that they are “very concerned” with proposals to apply public disclosure requirements to private transactions and approximately 85% of respondents indicated that they consider current disclosure practices in private transactions to be sufficient.

Q4. In your opinion, how should private and/or bilateral transactions in SFIs be defined for the purpose of applying the above indicated CRA3 RTS and/or developing additional templates?

We accept the position adopted by ESMA and the Commission that private and/or bilateral transactions are in scope

We note that the Call for Evidence states that article 8b applies in general to transactions involving SFIs, including those that are private and/or bilateral in nature and that such transactions cannot, therefore, be exempted by means of “Level 2 legislation” such as the CRA3 RTS. While AFME members respectfully disagree with this view and consider that there are a number of provisions within the Level 1 text of the CRA Regulation that support a different interpretation,³ we do not intend to repeat our previous arguments. Instead, for the purposes of this response we have accepted the position adopted by ESMA (and the Commission) and sought to constructively assist with the identification of a sensible way forward for private and/or bilateral transactions, as well as intra-group arrangements.

However, we believe strongly that further consideration is needed for private and/or bilateral transactions

In this regard, AFME members strongly support the need for further consideration of private and/or bilateral transactions and appreciate ESMA’s corresponding engagement with market participants (through the publication of the Call for Evidence and otherwise). We welcome ESMA’s acknowledgement in the Call for Evidence that “there may be legitimate cases for which the disclosure requirements could be adapted to the specificities of private and bilateral transactions in SFIs”. This reflects our understanding that, while ESMA may consider that private and/or bilateral transactions cannot be fully exempted, it remains possible (and indeed is necessary) for article 8b to be interpreted and implemented for such transactions in an appropriate manner and such manner is unlikely to be the same as that applied in a public transaction context given the fundamentally different nature of such arrangements.

Measures to reflect the different arrangements required for private and/or bilateral transactions are critically important, and the EU authorities hold significant discretion to implement them

Any extension of the disclosure requirements under article 8b to private and/or bilateral transactions without appropriate adaptation would send a very negative signal, and would in our view be wholly inconsistent with the high level policy objective endorsed by President Juncker and Commissioner Hill to revive the securitisation markets in Europe and to widen and deepen Europe’s capital markets more generally through building a stronger capital markets union. In this regard, the significance of the private and/or bilateral portion of the market should not be underestimated.

The application to private and/or bilateral transactions of requirements which depart (even significantly) from the obligations set out in the CRA3 RTS does not result in the provision of an exemption from article 8b itself for such transactions. Rather than being an exemption from the scope of article 8b, this constitutes the implementation of the appropriate specificities under the Level 1 requirement for such transactions and we note that the Level 1 text does not indicate that the appropriate implementing provisions for private and/or bilateral transactions should be measured against the CRA3 RTS. We consider that the EU authorities hold significant discretion with respect to the specific implementing measures that may be made under article 8b and that these may be adjusted as appropriate for different arrangements.

³ These provisions were described in detail in the response submitted by AFME to ESMA’s consultation paper on the implementation of certain provisions under CRA3 (including article 8b) dated 10 April 2014. The AFME response is linked here: http://www.esma.europa.eu/system/files/afme_response_to_esma_consultation_paper_on_cra3_implementation_-_information_on_sfis.pdf

We note that the JC Report indicates that the “public disclosure requirements laid down in the CRA3 RTS should be applied to all private and bilateral SFIs irrespective of the structure of the transaction and irrespective of the fact that such disclosure, when applied to certain instruments, might have limited added value”.⁴ While the report goes on to acknowledge that there may be legitimate cases for the adaptation of the requirements in the context of certain private and bilateral transactions, the above statement is concerning in that it appears to disregard the overarching objective identified by ESMA in the Call for Evidence (i.e. the ability of investors to make an informed assessment of the creditworthiness of the relevant transaction), which objective seems to implicitly support the need to take into account whether any value is added through the application of the CRA3 RTS requirements to particular types of transactions. In addition, the statement does not reflect the significant discretion held by the EU authorities with respect to the implementation of article 8b for private and bilateral transactions and the fact that, as noted above, there is nothing in the Level 1 text which indicates that the standards set out in the implementing measures for public transactions (namely, the CRA3 RTS) must form the basis of the requirements applied in respect of other arrangements.

It is important to avoid creating market disruption or compliance uncertainty: due account should be taken of existing market practices undertaken in good faith, and we oppose any retrospective application of new rules

We also note that, given that the article 8b requirements apply with respect to certain SFIs issued on or after 26 January 2015 (being the date of entry into force of the CRA3 RTS) provided the relevant transactions are not “of a private or bilateral nature” as described in recital 4 of the RTS, it has been necessary in the context of certain recent transactions for market participants to consider and take views with respect to what “private or bilateral” means. While AFME members appreciate that it is not necessary to disclose the relevant information under article 8b until the start of 2017, more immediate views were required to be taken to ensure that later compliance with the requirements was properly anticipated and provided for. This response letter reflects the general views taken by a number of market participants to date. Should ESMA adopt an approach to defining private transactions which is materially different from that recommended by AFME members (see our response to Q5 below), we note that this could result in market disruption and compliance uncertainty in respect of certain existing transactions.

Market disruption and compliance uncertainty could also arise in the event that the article 8b requirements are applied to existing private and/or bilateral transactions. AFME members assume that, like the CRA3 RTS requirements applied in respect of public transactions backed by certain asset types, the requirements made for private and/or bilateral transactions will be applied on a going forward basis only from the date of entry into force of the relevant implementing measure. Compliance would be extremely difficult to achieve for private and/or bilateral transactions if the requirements are applied on any other basis, and AFME members urge ESMA to ensure that appropriate grandfathering is provided for, consistent with the CRA3 RTS approach.

We strongly support transparency in the ABS markets and consider that our recommended approach achieves the overarching objective identified by ESMA

As a final preliminary matter, we wish to highlight that AFME members strongly support transparency in respect of the ABS markets in general. There should be no assumption that simply because a transaction is private and/or bilateral in nature, the disclosure obligations thereunder are ipso facto in some way defective or fall short. Indeed, many private and/or bilateral transactions can have disclosure obligations that go further and deeper than public transactions, because of the greater direct negotiating power of investors typically involved in these transactions. Like ESMA, members agree that adaptations to the requirements should only be made if they do not compromise the ability of investors to make an informed assessment of the creditworthiness of the relevant

⁴ See the discussion in paragraphs 116 and 117 in the context of Recommendation 7 relating to definitions and terms in relevant EU legislation.

transaction. Indeed, members have sought to bear this overarching objective in mind throughout the preparation of this response and we consider that our recommended approach sensibly achieves this.

Significant additional issues may arise for private and/or bilateral transactions if other obligations are applied under the CRA3 RTS

We note that the JC Report includes certain recommendations which support further changes to securitisation disclosure requirements, including to the implementation of article 8b through the CRA3 RTS. These recommended changes include proposed new requirements relating to the provision of cashflow models and enhanced loan-level data reporting obligations. Given that the changes have only been recommended at this stage, full details are not available and the scope of application of any adjusted requirements has not been confirmed.

This response has been prepared on the basis of the current (and recently finalised) CRA3 RTS and does not seek to take account of any changes which may be made to it as a result of the JC Report recommendations or otherwise. However, it should be noted that significant and heightened concerns may arise in the context of private and/or bilateral transactions to the extent that any amendments are made to the CRA3 RTS and applied to such transactions. To the extent that any changes to the CRA3 RTS are pursued (which we are not supportive of in general, other than as described below in the “Additional comments” section of this response letter), we urge the EU authorities to ensure that an appropriate opportunity for stakeholder engagement and feedback is provided.

Q5. Which are in your opinion the key elements that should be used as a basis to identify private and bilateral SFIs:

- ***The type of procedure used for the placement of the SFIs (e.g. private placement or public offer by reference to article 3 of the Prospectus Directive)?***
- ***The transferability of the SFIs?***
- ***The nature and/or the number of parties involved in the transaction?***
- ***Other elements?***

AFME members consider that the first step for identifying relevant transactions should be to define private transactions as a separate category in SFIs.

As a second step, a basis for identifying certain (separate) sub-categories of private transactions, including:

- bilateral transactions,
- transactions where the SFIs are supported (in full or in part) by the sponsoring institution, and
- intra-group transactions

should be developed. For an overview of these recommended transaction classifications, please see the Decision Tree.

We consider these classifications to be appropriate and necessary. Firstly, issues arise in general under article 8b in the context of transactions which are private in nature. Secondly, heightened or additional considerations arise in respect of certain types or sub-categories of private arrangements, such as those which are also bilateral, supported and/or intra-group in nature. This approach allows for adaptation of the requirements in a manner which is proportionate to, and more specifically caters for, the issues raised by the application of the requirements to the particular transaction, and which also more properly reflects the overarching investor protection objective of article 8b as identified by ESMA in the Call for Evidence.

Key principles should be applied

As a general matter, AFME members consider that certain key principles should be applied when determining the basis to be used to identify relevant arrangements. These principles are outlined below.

- *Need for clarity and certainty* – the basis used to identify relevant transactions should enable the position of a particular transaction to be ascertained with certainty at all times by those required to comply with article 8b (i.e. issuers, originators and sponsors) and also by those who may invest in the relevant SFIs. In the absence of such certainty, compliance confusion may arise. Moreover, investors may struggle to confirm the information that they will receive on an initial and ongoing basis, thereby compromising their ability to determine whether they will have access to all information required by them to make an informed assessment of the creditworthiness of the transaction.
- *Need for an appropriate EU focus* – in interpreting the article 8b requirements, ESMA and the Commission have focused on EU arrangements and concepts (as evidenced by the confirmation that the requirements apply to arrangements involving an EU established issuer, originator or sponsor and the adjusted requirements already provided for by articles 3 and 5 of the CRA3 RTS which turn on whether certain EU securities law related frameworks apply). This focus is in keeping with the definition of “issuer” under the CRA Regulation, which cross-refers to the definition that applies under the EU Prospectus Directive and with the enforcement provisions set out in article 25a of the CRA Regulation which focus on, in the context of issuers, national competent authorities for the purposes of the Prospectus Directive. We consider that a similar focus should be applied when determining the basis to be used to identify relevant transactions and, in particular, that there should be a clear link to existing EU frameworks for investor protection such as the Prospectus Directive. Such a link would seem to be consistent with certain recommendations in the JC Report which highlight the enforcement considerations which may arise where other EU connection points are sought to be used.
- *Need for consistency* – to the extent possible, AFME members consider that the basis used to identify relevant transactions should be adapted from, and consistent with, existing EU disclosure related legal frameworks and concepts, rather than being based on entirely new frameworks and concepts. While we appreciate that the definitions used for article 8b purposes must be “fit for purpose” and that some further work may be required to achieve this, concerns have been raised that a failure to consider and use existing concepts where possible and appropriate may give rise to inappropriate inconsistencies in treatment between EU disclosure frameworks and result in unintended consequences.
- *Need for sufficient flexibility and for focus on appropriate outcomes* – as ESMA will be aware, the SFI definition in the CRA Regulation cross-refers to the “securitisation” definition in the EU Capital Requirements Regulation. The securitisation definition is broadly drafted and aspects of it are unclear. In particular, it may capture certain arrangements not traditionally considered to be securitisations. We note that the potential broad scope of the definition is expressly acknowledged in the JC Report. It is important that the basis used to identify private and/or bilateral transactions operates sensibly across a wide range of structures and does not refer to transaction features or concepts that may *only* be understood and applied in a *traditional* securitisation context. At the same time, however, it is important

to bear in mind the outcomes produced by the features and concepts used and to measure those outcomes by reference to the arrangements targeted by the article 8b requirements.⁵

- *Need to satisfy the “spirit” of article 8b* – as ESMA has noted in the Call for Evidence, any adjustments or adaptations of the requirements under article 8b for private and/or bilateral transactions should be developed such that they do not preclude “the attainment of the overarching objective of article 8b, i.e. allowing investors to make an informed assessment of the creditworthiness of the transaction”. AFME members fully support this and, as a result, in developing our proposals we have made efforts to “test” the outcomes produced under our suggestions and recommended approaches to ensure that such outcomes would not compromise the ability of relevant investors to perform their assessment. In this regard, AFME members have sought to take into account the usual practices of market participants in the context of different types of transactions, including our understanding of typical expectations of market participants and whether or not investors in respect of the relevant arrangement have the ability to directly negotiate the terms of the relevant transaction documents (including disclosure and reporting related terms).

Private transactions in SFIs should be identified as those where no obligation arises under the EU Prospectus Directive to publish a prospectus

Bearing in mind the principles outlined above, AFME members consider that the appropriate basis for identifying private transactions in SFIs is that no obligation arises under the EU Prospectus Directive to publish a prospectus in respect of the relevant SFIs. As ESMA will be aware, under the Prospectus Directive, an obligation to publish a prospectus arises in respect of a transaction (regardless of the location of origination of the underlying assets) when transferable securities are offered to the public in the EEA in circumstances where an exemption under article 3(2) of the Directive does not apply and/or when the securities are admitted to trading on a regulated market (as defined in article 4(14) of EU Directive 2004/39/EC) situated or operating within an EEA state. Accordingly, a securitisation should be regarded as public (in other words, not private) in circumstances where a non-exempt public offer of transferable securities is made in the EEA and/or where admission to trading on an EEA regulated market is sought, i.e. in all circumstances where an obligation arises under the Prospectus Directive to publish a prospectus.⁶

This is because where the prospectus publication obligation arises, the relevant transaction is generally understood by market participants to be in the public domain and there is an expectation across the parties involved that a well defined framework of disclosure and reporting requirements will apply. Moreover, issues of confidentiality or commercial information sensitivity are less likely to arise.

This approach would ensure that the full suite of requirements under the CRA3 RTS (i.e. without adjustment) would apply in respect of Prospectus Directive compliant transactions backed by relevant asset types. This “bright line” would provide certainty to the market and, in particular, allow investors to focus their activities appropriately to the extent that they consider unadjusted CRA3 RTS compliance in respect of a transaction to be necessary for an informed assessment of the creditworthiness of the transaction to be made.

⁵ In this regard, it should be noted that the impact assessment work previously undertaken by the European Commission expressly indicates that article 8b is intended to apply in respect of SFIs involving the publication of a Prospectus Directive prospectus only. 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 [i.e. 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.”

⁶ While uncommon, sometimes admission to trading on an EEA regulated market is sought in respect of a previously issued (unlisted) SFI. In this scenario, it is accepted that the full suite of requirements under the CRA3 RTS (to the extent that the relevant transaction is backed by a relevant asset type for which a reporting template has been made) should apply upon the obligation arising under the Prospectus Directive to publish a prospectus.

ABCP programmes and other common private asset financing arrangements would be characterised as private

It is acknowledged by AFME members that the approach to identifying private and public transactions described above would result in asset-backed commercial paper arrangements being characterised as private transactions in general (at both the underlying transaction and the conduit level), given that commercial paper will typically be a money market instrument having a maturity of less than 12 months and, accordingly, outside the scope of the Prospectus Directive. Our recommended approach would also result in other common private asset financing arrangements being regarded as non-public, including arrangements involving credit risk tranching loans to a special purpose borrower which may in certain circumstances be regarded to be a securitisation, including certain “warehouse” vehicles. Given the widely accepted private nature of all of these arrangements, we believe this is an appropriate outcome which has been taken into account in the context of our comments on Q10 below and the adapted requirements which should apply under article 8b for relevant arrangements.

Benefits of this approach include certainty, consistency, appropriate EU focus and flexibility

This approach delivers certainty at all relevant times in respect of transactions, builds on existing EU concepts and is appropriately EU focused, and is sufficiently flexible to operate sensibly in the context of a range of transaction structures. AFME members consider that using a Prospectus Directive related basis is preferable to using certain other features referred to in the Call for Evidence (such as the number of parties to a transaction, the type of procedure used for the placement, etc) given that these matters may be difficult to ascertain and/or may change over the life of the transaction, thereby giving rise to possible compliance confusion.

Bilateral transactions in SFIs should be identified as a sub-category of private transactions and separately from supported and intra-group transactions

Bilateral transactions should be treated as a sub-category of private transactions.

This is appropriate because transactions which are both private *and* bilateral in nature give rise to additional considerations under article 8b and the obligations set out in the CRA3 RTS do not reflect these considerations. In particular, it should be noted that in scenarios where the SFIs are bilateral in nature, investors are typically sophisticated professionals who have the expertise and negotiating power to identify the information required by them in connection with the investment, and who have the opportunity to negotiate the transaction terms, including the disclosure and reporting obligations. Given this context and the fact that investors are able to determine the information that they receive, the actions necessary to satisfy the overarching objective of article 8b as identified by ESMA in the Call for Evidence are significantly shifted and reduced.

While market participants may use the term “bilateral” to refer to various different arrangements, AFME members consider that there are certain common features which may be identified for these purposes and which reflect the key principles identified above. These features are described below.

- *Institutional investors only* – the initial investors are non-connected parties comprising only one or more institutional investors, including their related and/or consolidated entities. Institutional investors should be defined for these purposes to mean a range of sophisticated entities regardless of their jurisdiction of incorporation or regulation and should include (without limitation) credit institutions, investment firms, insurance companies, fund managers, asset management companies, asset-backed commercial paper programme conduit vehicles with full or partial support from a sponsor bank and, in each case, any affiliate or (where relevant) any entity covered by consolidated prudential supervision (whether as a result of EU legislation, applicable national legislation or an equivalent third country legal framework). For these purposes, any positions held by connected entities should be disregarded, including positions held by the originator or sponsor or, in each case, any affiliate or consolidated entity. This carve-out for connected entities would ensure that the institutional investor requirement could be satisfied regardless

of the nature of the originator or sponsor, which may hold positions in the transaction (directly or indirectly) for various reasons, including risk retention compliance. The term “asset-backed commercial paper programme” should be defined by reference to article 242 of the CRR.

- *No underwriting role in freely transferrable securities performed in the transaction* – the transaction relating to the issue of the SFI does not involve an arranger which performs an underwriting role in securities which may be transferred without restriction. For these purposes, “underwriting role” should mean the underwriting of relevant instruments or the placing of relevant instruments on a firm commitment basis as described in point 6 of section A of annex I to Directive 2004/39/EC (MiFID). For the avoidance of doubt, such a role should not extend to any work undertaken by an entity in respect of arrangements involving assets other than securities (such as loans) and/or involving securities which are not freely transferable (such as securities where transfers on restriction apply including issuer consent requirements). In addition, such a role should not extend to any activities to facilitate or assist with the documentation or marketing processes, or to assist with coordinating pricing and/or hedging arrangements.
- *Investor identification possible* – the terms of the transaction include provisions (i) allowing the issuer to obtain information relating to the identity of the investors/lenders of record from time to time or (ii) providing for each investor/lender of record to be identified in any transfer documents under which it becomes an investor/lender of record and/or in any corresponding register.

An arrangement should be considered to be bilateral if *all* of the features described above are present. If one or more feature is not satisfied in respect of a private transaction, then such transaction should not be classified as private and bilateral but, depending on the facts and circumstances, should instead be classified as:

- private only,
- private and supported, or
- private and intra-group

as contemplated by the Decision Tree.

AFME members consider that these bilateral features are appropriate because, as noted above, they operate to ensure that:

- the initial investors are restricted to sophisticated professionals who are able to analyse the creditworthiness of the transaction and to determine themselves the information required for this analysis on a case-by-case basis,
- in the absence of a traditional underwriter, such initial investors will have the opportunity to be involved, directly or indirectly, in the negotiation of the underlying contractual documentation including the terms relating to disclosure and ongoing reporting, and
- in contrast to other arrangements, the bilateral or two-sided nature of the arrangement is preserved through the inclusion of provisions in the documentation which will operate to permit the issuer to obtain information relating to the identity of the investors/lenders of record or for this information to be recorded in some manner.

In addition, used in combination with our recommended basis for identifying private transactions as suggested above, relevant arrangements would also not involve admission to trading on an EEA regulated market and/or a non-exempt public offer under the Prospectus Directive.

It should not be necessary to anticipate possible changes to a transaction's classification as private and bilateral given that the features identified above would be assessed at the time of completion of the transaction and should not change during the life of the SFI.

The features described above should be sufficiently clear so as to be able to be determined with certainty by both those required to comply with article 8b and also by investors. AFME members do not consider that additional features (relating to, for example, the number of parties involved in the transaction) should be employed to identify bilateral transactions as these features may be difficult to ascertain, arguably do not determine whether the transaction is bilateral in nature (as the concept of bilateral is most commonly understood in the market) and may change over the life of the transaction.

While "bilateral" could be interpreted *literally* to extend to arrangements involving only two parties, we reject this interpretation and instead consider that it is more appropriate to identify features which focus on arrangements which are *bilateral in nature*, in that negotiations may be undertaken by only two *sides* equally (i.e. by the issuer/borrower on one hand and the investor(s) on the other), without the involvement of a traditional underwriter as is typical in arrangements intended to allow for potentially wider distribution.

Q6. Do you think private transactions in SFIs should be defined separately from bilateral transactions in SFIs? If yes, please provide reasons.

Yes, AFME members consider that private transactions in SFIs should be separately defined from bilateral transactions in SFIs. See our answer to Q5.

We do not consider that separate relief is needed for transactions which are bilateral and public (i.e. not private) assuming private arrangements are defined using Prospectus Directive related concepts as we have suggested above. This is because bilateral and public transactions are relatively uncommon and not a key area of concern for market participants. Moreover, there is a general understanding that a transaction is in the public domain when it is structured such that an obligation to publish a prospectus under the Prospectus Directive arises and there is an expectation across the parties involved that a defined framework of disclosure and reporting requirements will apply.

Supported transactions in SFIs should also be identified as a sub-category of private transactions and separately from bilateral and intra-group transactions

We consider that transactions where the SFIs are supported by the sponsoring institution should also be separately defined from private transactions (and from bilateral and/or intra-group transactions). As with bilateral transactions, AFME members are of the view that supported transactions (regardless of whether such support is full or partial) should be a further sub-category of private transactions.

We consider it to be appropriate to identify this further sub-category because transactions in SFIs that are both private and supported give rise to additional considerations under article 8b and accordingly justify the application of an adapted set of requirements. In particular, it should be noted that in scenarios where the SFIs are supported, timely repayment to investors will be materially linked to, and will depend in part on, the sponsor bank rather than the performance of the underlying assets. This link significantly shifts the actions necessary to satisfy the overarching objective of article 8b as identified by ESMA in the Call for Evidence, and supports the

view that detailed information in respect of the underlying transactions and corresponding assets should not be required.

This view is further supported by the fact that an ABCP programme's underlying asset purchase or financing transactions are negotiated by the sponsor bank, which has extensive information about, and retained exposure to, the underlying assets and the seller or borrower, while the ABCP investors rely on the bank's support facilities at least in part for timely payment. These underlying transactions are typically negotiated by the sponsor bank with its customers and structured to at least investment grade credit quality. Because the bank sponsor, through the programme-level support facilities, has primary exposure to the risks of the transactions, its interest in seeing them perform well is not just aligned with, but is much stronger than, those of the ABCP investors. In keeping with this, ABCP investors do not typically require, and the sellers and borrowers generally would not permit, disclosure of details relating to the sellers and underlying assets.

For the purposes of identifying relevant supported transactions in SFIs, we would propose that a high-level definition should be adopted based in part on principles referred to in the context of recital 64 to the EU Capital Requirements Regulation (which recital clarifies that certain ABCP conduit arrangements will not constitute a re-securitisation given their supported nature). In particular, the definition could refer to the "aggregate outstanding amount of the SFIs being covered in full or in part by liquidity facilities or by a combination of credit enhancement and liquidity facilities, in each case, provided by the sponsor or another institution". For these purposes, each of "sponsor" and "institution" should be defined as set out in the Capital Requirements Regulation. This would ensure that in all cases the relevant entity was a credit institution or investment firm.

It should not be necessary to anticipate possible changes to a transaction's classification as private and supported given that the suggested definition would be assessed at the time of completion of the transaction and should not change during the life of the SFI.

Our suggested approach is consistent with the key principles described in the response to Q5 above as it is sufficiently clear and builds on concepts and terms used elsewhere in the EU regulatory framework. While it is acknowledged that the definition is ABCP conduit focused, wider flexibility is not requested on the basis that, in general, SFIs will not be supported outside of an ABCP conduit context. Moreover, we have sought in this response to seek flexibility only for known issues and corresponding transactions, rather than broader relief.

We set out below in our response to Q9 and Q10 our views on the adjustments that should be made to the application of the article 8b requirements as they apply to different types of relevant arrangements. Such adjustments are also summarised in the Decision Tree.

Q7. Are you aware of differences with respect to the definitions of terms used in private and bilateral transactions in SFIs or with respect to the data provided for such transactions (e.g. Loan-to-Value date is provided for certain transactions while Loan-to-Foreclosure data is provided for others)? Please provide examples.

It is extremely difficult to comment on differences in definitions of terms given that a wide range of transactions involving various different types of underlying assets may be securitised on a private basis. Individual firm respondents to the Consultation Paper may be better placed to comment on this.

With respect to the data provided, as noted above, this will generally be determined by the relevant investors, particularly in the context of transactions which are private and bilateral in nature as the initial investors will have the ability to negotiate (and, as a result, receive) any information that they consider necessary to their assessment. This means that, once again, it is difficult to comment on the differences in data provided, as this

will depend on the information requested by the investors and such requests are likely to reflect the nature of the transaction and the corresponding underlying assets, which features can vary significantly between arrangements.

Q8. Do you consider that intra-group transactions should be treated as a separate sub-category of private and/or bilateral transactions? If yes, please provide a detailed justification/explanation.

Intra-group transactions should be identified as a sub-category of private transactions and separately from bilateral and supported transactions

Yes, AFME members consider that intra-group transactions should be treated as a separate sub-category of private transactions in SFIs. In short, we consider that this sub-category should be developed and applied in a manner similar to the proposed bilateral transaction and supported transaction sub-categories discussed in our response to Q5 and Q6 above.

It is our view that adjusted treatment is appropriate for transactions which are both private and intra-group in nature on the basis that, in these circumstances, the overarching objective of article 8b (i.e. allowing investors to make an informed assessment of the creditworthiness of the transaction) does not arise as a result of the fact that the transaction does not involve third party investors. That is, given that the only investor is the originator or sponsor, or a related or consolidated entity, concerns with respect to investor access to all necessary information do not arise. As the creator or purchaser and securitiser of the assets, originators will have access to all available information. Similarly, a sponsor, which by definition is required to be a credit institution or an investment firm which establishes and manages the transaction, will not need to rely on the application of regulatory disclosure obligations to obtain access to any information required by it.

With respect to how intra-group transactions could be identified for these purposes, we would suggest that the relevant test should be whether (i) any originator or sponsor in respect of the securitisation and (ii) each of the investors in respect of the SFIs (at the outset and on an ongoing basis) are within the same group from either an accounting or a prudential supervision perspective. The relationship of any service providers in the relevant transaction to any of these entities should not be a relevant factor, as it is the lack of a third party relationship between the originator or sponsor and the investors which should result in effective equivalency of information access.

In addition, consideration should be given to applying an existing concept under an EU regulatory framework if possible. This approach may assist with market participant understanding of the relevant definition and allow for some consistency. For example, it may be possible to adapt the intra-group transaction definition set out in article 3 of EU Market Infrastructure Regulation (EMIR), although further consideration would be required with respect to the necessary modifications and to fully rule out any unintended consequences. AFME members would be keen to work further with ESMA to identify the appropriate basis for identifying intra-group transactions.

The proposed intra-group transaction definition would require testing on an ongoing basis. It is accepted by AFME members that if a transaction started off as being intra-group in its classification but a position was later transferred to a third party, then the arrangement should no longer be classified as private and intra-group. In this scenario, the arrangement would need to be reclassified as private only in nature and the obligations applicable to these transactions (discussed below) would apply.

We set out below in our response to Q9 and Q10 our views on the adjustments that should be made to the application of the article 8b requirements as they apply to different types of relevant arrangements. Such adjustments are also summarised in the Decision Tree.

Adjusted requirements are not required for public intra-group transactions

Where a prospectus is published under the Prospectus Directive but the transaction is intra-group, as noted above, market participants generally regard such transactions as being in the public domain and there is an expectation that a defined framework of disclosure and reporting requirements will apply. Accordingly, AFME members are not seeking adjusted requirements for transactions which are public (i.e. in respect of which an obligation to public a Prospectus Directive compliant prospectus arises) and intra-group in nature.

Q9. Do you consider that the disclosure requirements as outlined in the CRA3 RTS with respect to issuers, originators and sponsors of SFIs established in the Union can be used in full and with the same level of detail for private and/or bilateral transactions in SFIs? If yes, please explain what would be the advantage of this option.

No, AFME members do not consider that the disclosure requirements as outlined in the CRA3 RTS should be applied in full and with the same level of detail for private transactions, private and bilateral transactions or private and supported transactions. In addition, AFME members do not consider that it is appropriate and/or necessary for such requirements to be applied in full and with the same level of detail in respect of private and intra-group transactions.

While we have, for the purposes of this response, accepted ESMA's position that private and/or bilateral transactions are within the scope of application of article 8b, we do not in turn consider that the adoption of appropriate implementing measures for these transactions constitutes an exemption from the Level 1 text. The obligations set out in the CRA3 RTS reflect the public nature of the transactions that the RTS applies to and should not be used as the measure against which the appropriate requirements for private transactions are assessed. Instead, we consider that "fresh thinking" should be applied in general when considering the appropriate measures to be made for these private arrangements.

AFME members consider that additional considerations arise in respect of, and as a result different requirements should be made for, transactions in SFIs that are: (i) private and not also bilateral, supported and/or intra-group in nature, (ii) private and also bilateral in nature (but are not intra-group transactions), (iii) private and also supported in nature (but are not intra-group transactions) and (iv) private and also intra-group in nature. Our reasoning and corresponding suggested adaptations to the requirements are described below and summarised in the Decision Tree.

Private transactions in SFIs that are not also bilateral, supported and/or intra-group in nature

The application of the CRA3 RTS requirements in the context of private transactions gives rise to significant issues. This is because these transactions are typically undertaken on a private basis due to confidentiality and/or commercial sensitivity issues.

In particular, commercial issues may arise in respect of any disclosure of information relating to the underlying assets or the financing transaction terms, or of the (often proprietary) underwriting or credit scoring techniques used to originate the assets in the first place, which originators see as providing a competitive advantage in the marketplace. Separate legal considerations may also apply in respect of the disclosure of asset and other information for certain transactions. The imposition of an obligation in private transactions to publicly disclose

any portion of the information referred to in the RTS may mean that it will no longer be viable to use securitisation as a funding method.

In particular, the disclosure of loan-level information in the context of private transactions, even on a non-private basis, has also been identified as problematic by AFME members. To our knowledge, investors in private transactions have not indicated that loan-level information is necessary for them to make their investment decision, and indeed the AFME Survey results suggest that investors are satisfied with current disclosure practices on private transactions (which would not typically involve disclosure of loan level information).

Based on the foregoing, AFME members consider that in respect of private transactions that are not also bilateral, supported and/or intra-group in nature, the adapted requirements described below should apply:

- In terms of obligations under the CRA3 RTS, only the disclosure requirements outlined in article 3(b) (transaction documents) and (d) (investor reports) should apply, and the obligation to publicly disclose this information via the SFI website should be disapplied; and
- As an additional implementing measure, the general disclosure obligation in article 8b(1) should be applied in respect of the transaction with the specification that the issuer, originator and sponsor jointly (acting directly or via a jointly appointed reporting entity) shall ensure that investors have access to “all materially relevant data” on the items referred to in article 8b(1). Guidance should be provided that, for these purposes, materially relevant data should be determined as at the date of the securitisation and where appropriate due to the nature of the securitisation thereafter. Once again, no method should be specified for the provision of such information and, in particular, public disclosure on the SFI website should not be required.

The above requirements sensibly reflect the private nature of relevant transactions and appropriately balance the interests and needs of investors and originators with respect to the asset information provided.

Private transactions in SFIs that are also bilateral in nature (but are not intra-group transactions)

In the case of private transactions which are also bilateral in nature, additional issues and considerations arise under article 8b.

In particular, as private transactions, the confidentiality and commercial sensitivity issues discussed above will apply. Indeed these issues will typically be heightened for private and bilateral transactions, thereby explaining the decision to structure the transaction such that it involves more direct engagement with sophisticated investors.

In addition, the nature of these arrangements is significantly different given their bilateral component. This is because the initial investors in these transactions will by definition be sophisticated institutional entities with the ability to identify the information required by them and also to negotiate and determine the disclosure and ongoing reporting obligations under the terms of the transaction. In these circumstances, it is not necessary for detailed disclosure requirements to apply and the standards set by the CRA3 RTS are simply not appropriate.

Based on the foregoing, AFME members consider that in respect of private transactions that are also bilateral in nature, the disclosure requirements outlined in the CRA3 RTS should not apply and instead a principles based requirement should be implemented through a separate implementing measure. This measure should directly apply the general disclosure obligation in article 8b(1), with the specification that the issuer, originator and sponsor jointly (acting directly or via a jointly appointed reporting entity) shall ensure that investors have access to “all materially relevant data” on the items referred to in article 8b(1). Guidance should be provided that, for these purposes, materially relevant data should be determined as at the date of the securitisation and, where

appropriate, depending on the type of securitisation, thereafter. Once again, no method should be specified for the provision of such information and, in particular, public disclosure on the SFI website should not be required.

We note that the above described principles based approach is consistent with the disclosure obligation which applies under article 409 of the Capital Requirements Regulation, which obligation is considered to operate sensibly for private and bilateral transactions (as well as other transactions).

Private transactions in SFIs that are also supported (but are not intra-group transactions)

Private transactions in SFIs which are also supported give rise to additional issues and considerations under article 8b.

As noted above, timely repayment to investors will be materially linked to, and depend at least in part on, the credit quality and liquidity profile of the sponsor bank and will not be fully dependent on the performance of the underlying assets. As a result, it should not be necessary for investors to receive detailed information in respect of the assets to satisfy the overarching objective of article 8b.

More generally, AFME members note that fulsome (and properly adjusted) disclosure practices are currently applied in the ABCP market, including the provision of an information memorandum that describes the programme's legal structure and operative documents and disclosure of monthly investor reports using market accepted templates which provide pool-level data. Examples of these reports have been previously shared with ESMA. 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.

On the basis of the foregoing, it is the view of AFME members that it should not be necessary for the detailed requirements of the CRA3 RTS to apply in the context of private and supported transactions to satisfy the overarching objective of article 8b (i.e. to allow investors to make an informed assessment of the creditworthiness of the transaction). Instead, we consider that this objective may be satisfied through the application of a principles based disclosure requirement on the same basis as suggested above for private and bilateral transactions, as well as specific requirements to entrench certain existing practices. In particular, in addition to the application of a principles based disclosure requirement, obligations should be introduced requiring disclosure to investors of:

- an information memorandum that describes the programme's legal structure and operative documents, including its liquidity facilities and programme credit support agreements as applicable, the programme's administrator, its liquidity and credit support providers and other material service providers and its credit and investment policy; and
- investor reports (on at least a monthly basis) setting out information about the programme, the liquidity and programme credit support providers and, bearing in mind any confidentiality and/or commercial sensitivity issues, the underlying transactions (consistent with established market practice).

No method should be specified for the provision of any information (including the information memorandum and investor reports described above) and, in particular, public disclosure on the SFI website should not be required.

Private transactions that are also intra-group in nature (regardless of whether they are bilateral transactions or supported transactions as well)

Once again, AFME members consider that private transactions in SFIs which are also intra-group in nature give rise to additional considerations under article 8b.

In particular, members note that by definition these arrangements will not involve third party investors (upon completion or at any point during the life of the transaction). As a result, the overarching objective of article 8b as identified by ESMA in the Call for Evidence does not arise and there will be no potential for information mismatch and/or deficiency.

An exemption should be provided for private and intra-group transactions. If such an exemption is not considered possible, then we suggest that a principles based disclosure obligation in keeping with our recommendations above for private and bilateral transactions should be adopted for these arrangements to provide sufficient flexibility.

Q10. If your answer to question 9 is no, please provide detailed answers to the following additional questions.

- ***What specific types/categories of information among those listed in the CRA3 RTS could be problematic in the context of private and bilateral transactions in SFIs?***

General constraints on identifying specific issues for private transactions

As noted above, confidentiality and commercial sensitivity issues will arise in general in respect of private transactions. However, the specific issues which arise and their severity may vary between transactions. As a result, it is very difficult to identify the information types listed in the CRA3 RTS that could be problematic in general. Issue identification requires assessment on a case-by-case basis (taking into account the transaction structure and the nature of the underlying assets) and, as a result, is highly fact specific.

In the context of some transactions involving significant commercial sensitivity issues, it will be highly problematic for any information (including information that the financing transaction has taken place) to be disclosed.

In the context of other private transactions, it may be less problematic for certain basic information in respect of the transaction to be disclosed but significant confidentiality considerations may arise in respect of the disclosure of loan-level data or of the (often proprietary) underwriting or credit scoring techniques used to originate the assets in the first place, which originators see as providing a competitive advantage in the marketplace. For example, disclosure of loan-level data for trade receivables securitisations could divulge the trading strategy, key clients and even pricing information of a business to its competitors. We understand that this would deter many businesses from using such financing techniques, which would therefore cut off an important line of credit to these businesses. It could also be problematic from a competition law perspective to publicly disclose such information. Certain general issues which may arise in connection with the disclosure of loan-level information are described below.

While the specific issues and severity of the concerns raised may vary between private transactions where any disclosure obligations are imposed without flexibility, AFME members have expressed particular concerns with the application of any requirements to *publicly* disclose information in respect of these transactions. Such disclosures are inconsistent with the very nature of private arrangements.

As a result of the foregoing, AFME members have worked to identify a way forward that will preserve securitisation as a funding option in general for those who typically use private transactions and to balance this against the overarching objective of article 8b as identified by ESMA in the Call for Evidence. Our recommendations in this regard are discussed above and summarised in the Decision Tree.

General data protection and bank secrecy concerns

National laws relating to data protection and/or bank secrecy could impact the publication of certain loan-level information referred to in the CRA3 RTS. These issues are often heightened in the context of private transactions, which may be why such transactions are done on a private basis in the first place. 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 article 8b may apply in certain circumstances 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 already 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 indicated in the context of its previous consultations on article 8b that it intended to build on existing work done by other EU authorities with respect to confidentiality and processing of personal data (which seems a sensible starting point), 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 required to be disclosed under article 8b, the prevalence or absence of information already in the public domain and the laws of all relevant jurisdictions. In addition, we note that 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 any loan-level reporting obligations. 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 publicly available information, a recipient of such information to draw conclusions regarding the identity of the data subject.

General competition law concerns

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, particularly in the context of private transactions, and, as such, we urge ESMA to properly take into account such considerations.

AFME members consider that the application of the CRA3 RTS requirements to private transactions could result in an obligation to disclose certain non-public pricing and supply information. 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.

- ***Please provide some examples as to why disclosure of specific data fields would be problematic with respect to private and bilateral SFIs, indicating in particular:***
 - *Which data fields are most likely to be problematic;*
 - *For what reason (e.g. protection of trade secrets) and under what circumstances;*
 - *For which asset classes and/or for what type or group of private and bilateral transactions in SFIs would the application of the disclosure requirements laid out in CRA3 RTS be problematic?*

Please see our response to the question above.

- ***Please indicate what kind of safeguards (e.g. use of ranges instead of specific figures) could be put in place in order to address the above concerns, while still ensuring an appropriate level of information for investors, in line with the requirements of article 8b of the CRA Regulation.***

As noted above, various issues may arise in the context of private transactions from a disclosure perspective and this requires assessment on a case-by-case basis taking into account the nature of the transaction and the underlying assets and the different legal regimes which may be relevant.

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 CRA3 RTS RMBS loan-level template) may help to avoid the identification of data subjects and assist with mitigating possible data protection issues in certain scenarios, such safeguards do not provide a real solution for private transactions.

Focusing on data protection concerns only, 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. However, as noted above, other issues (related to competition law and general commercial sensitivity of information) also arise in the context of private transactions and these concerns are unlikely to be addressed through the disclosure of information using ranges instead of specific figures.

Moreover, AFME members consider that additional considerations arise in the context of private transactions which justify the application of adjusted requirements and, in particular, a principles based disclosure obligation for asset information as described above.

Q11. Please provide an estimate of the likely costs to your business of complying with article 8b in the event that the current disclosure requirements of the CRA3 RTS were to be extended to private and bilateral transactions in SFIs. Please provide some detailed information on the types of costs involved and indicate whether these costs are likely to be particularly high for specific categories of assets.

In general, costs information in respect of proposed requirements is difficult to capture as it is based in part on speculation and estimates which may vary significantly in practice. Certain respondents to the AFME Survey indicated that they would expect the costs of complying with the disclosure requirements under the CRA3 RTS in the context of private and/or bilateral transactions to be between €50,000 and €100,000 per transaction (with such costs being comprised in large part of IT systems and resourcing fees).

However, such survey respondents and AFME members more generally have made it clear that the key concerns which arise in respect of the application of the CRA3 RTS requirements to private transactions are not costs related. Instead, such concerns have been expressed to relate to the fundamentally private nature of the transactions and the significant issues which may arise from a legal and commercial perspective to the extent that information is required to be disclosed. Certain AFME members have indicated that they will not continue to use private securitisations as a funding tool if disclosure is required in line with the obligations contemplated by the CRA3 RTS. As noted above, in response to questions as to 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 a number of investor respondents also noted that they consider that they already receive the information that they require in the context of private transactions.

AFME members also encourage ESMA to take into account the relative cost-benefit analysis with respect to applying the CRA3 RTS requirements to private transactions. In this regard, we note that the size of transactions may be relatively small (e.g. as in the case of underlying transactions financed through a conduit, which size may in itself in part drive the decision to use such financing structure), meaning that the increased costs and resource implications of compliance will be more difficult to overcome. Any effective removal of the feasibility of using ABCP conduits to finance relevant assets will place more pressure on other funding sources in the system.

The relative cost-benefit analysis is also revealing in the context of highly granular asset transactions when one considers the significant practical issues which would arise if loan-level reporting is required. These practical issues should not be underestimated. The required investment of time, resources and cash in the development of systems sufficient to provide loan-level data for highly granular asset classes such as credit cards and trade receivables will be very significant with little (if any) increased value to investors. We note that over 80% of the respondents to the AFME Survey indicated that they consider current disclosure practices in private transactions to be sufficient.

Additional questions for investors

Q13. Please explain whether you invest in private and bilateral transactions in SFIs and if so, in which type/categories of SFIs.

Please see our response to Q2 above which includes certain investor related information gathered through the AFME Survey.

In addition, AFME members note that certain private transaction investments, such as ABCP, offer unique investment opportunities to investors. This is because ABCP is short-term and simple in nature, often being issued with maturities of one year or less, and typically issued at a discount to face amount and providing for a single payment of the face amount on the maturity date. Moreover, as noted above, in a bank-sponsored ABCP programme, repayment of ABCP is supported by bank liquidity facilities (or, sometimes, a combination of credit enhancement and liquidity facilities). These facilities operate to support the prompt payment of commercial paper to investors on the stated maturity date. In transactions which are supported, the payments to investors depend at least in part on the credit quality and liquidity profile of the sponsor bank, rather than on the underlying assets. The ABCP market has a long-standing practice of providing information to investors in appropriate detail and in relatively standardised format. AFME members have sought with this response to identify a way forward for ABCP under article 8b which takes proper account of, and builds on, these established and widely accepted disclosure practices (discussed above).

Additional comments

Application of the CRA3 RTS loan-level reporting obligations and the obligations to be made for private and bilateral arrangements to highly granular asset transactions

While AFME members have sought in this response letter to accept the position adopted by ESMA (and the Commission) in the CRA3 RTS in general, we wish to reiterate our concerns regarding the application of loan-level reporting obligations in the context of highly granular pools of short-term revolving assets (such as credit card receivables and trade receivables), which concerns arise in the context of both public and private transactions.

In this regard, we note that pool-level or stratified information can be just as, if not (in some circumstances) more, useful for investors as loan-level information and this may be the case in the context of, for example, transactions involving highly granular pools of short-term revolving assets. 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 or millions 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 as discussed in our response to Q12 above and considers the significant practical issues which arise in connection with loan-level reporting. These practical issues should not be underestimated.

Separate legal considerations may also arise in respect of the public disclosure of asset and other information in respect of certain transactions. In particular, concerns have been raised that article 8b could create practices

which would fall within the scope of EU competition law. As noted above, these issues may arise where the information disclosed could extend to non-public pricing and supply information. While it is not clear, considerations may also arise for certain public and private transactions, such as those backed by credit card receivables, where asset information with respect to charge-offs (individual and pool level), delinquency rates and triggers may 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.

AFME members would also caution ESMA against making the assumption that, because the ECB templates have been used as a starting point in the CRA3 RTS, issues will not arise for public transactions. 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.

While AFME members appreciate that the CRA3 RTS has been finalised (including as it applies in respect of public transactions backed by credit card receivables), we encourage ESMA to reconsider this aspect of the requirements. We also encourage ESMA to bear the issues outlined above in mind in the context of formulating its advice on the appropriate requirements for private transactions.

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. 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 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 CRA3 RTS 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 article 8b itself which requires ESMA to establish a direct publication system.

Technical specifications for the ESMA website are required as soon as possible

Article 6 of the CRA3 RTS requires ESMA to publish the technical instructions relating to the required disclosures on its website by 1 July 2016. Once again, AFME members refer to recent experience in the context of the ECB reporting requirements and use of the corresponding European DataWarehouse, which experience has highlighted the challenges which can arise in connection with the technical aspects of uploading and accessing information through a new website platform.

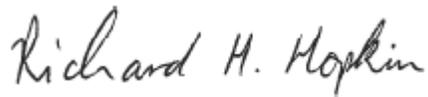
In particular, members wish to highlight that it can take a significant amount of time to develop and prepare necessary IT resources, systems and procedures to efficiently access and use new platforms. Concerns have been raised that more than six months will be required by firms in general to be in a position to start uploading and disclosing the required information via the SFI website from the beginning of 2017.

AFME members strongly encourage ESMA to develop and publish the technical specifications which will apply under the CRA3 RTS as soon as possible.

In closing, we note that the engagement of ESMA with market participants on issues related to disclosure is appreciated, as is the opportunity to respond to the Call for Evidence. We urge ESMA to take note of the key concerns outlined in this letter, including our concerns relating to the JC Report, and note that any widening of the application of the disclosure requirements under article 8b without appropriate adaptation and adjustment would send a very negative signal, and would in our view be wholly inconsistent with the high level policy objective endorsed by President Juncker and Commissioner Hill to revive the securitisation markets in Europe and to widen and deepen Europe's capital markets more generally through building a stronger capital markets union.

If you have any questions, please contact the undersigned.

Yours faithfully,



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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 April 2015.

The questions included in the survey were targeted primarily at ABS investors and originators. Approximately 14 entities participated in the survey, although not all respondents answered all of the survey questions. Approximately a third of the respondents were investors and the balance was originators. Below is an overview of certain key points from the responses provided to the survey.

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

1. In response to a question asking respondents about what proportion of their investment/origination portfolio is comprised of private transactions, approximately half of the respondents indicated that up to a quarter of their portfolio is made up of private transactions, and almost 20% 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 trade receivables, SME loans, auto loans and leases, credit card receivables and other consumer finance receivables. In particular, auto loans and trade receivables 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, approximately two-thirds of the respondents agreed that this nature is a defining feature and 80% of respondents described such feature as “crucial” or “very important” for their purposes.
4. In response to questions asking about current disclosure practices in private transactions, approximately 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 a number of investor respondents also noted that they consider that they already receive the information that they require in the context of private transactions. Approximately a quarter of respondents indicated that they would “definitely not” continue these activities if public disclosure requirements are introduced and less than 10 % of respondents were able to confirm that they would continue these activities in such circumstances. More than two-thirds of the respondents indicated that they are “very concerned” with the proposals to apply public disclosure requirements in the context of private transactions and approximately 85% of respondents indicated that they consider current disclosure practices in private transactions to be sufficient.

ANNEX II
APPROACH OVERVIEW - DECISION TREE

