

11 November 2010

Ms. Elizabeth Murphy, Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-1090

Dear Ms. Murphy,

**Re: Order granting temporary conditional exemption for nationally recognised statistical rating organisations from requirements of Rule 17g-5 under the Securities Exchange Act of 1934; Request for permanent exemption**

On behalf of the Association for Financial Markets in Europe / European Securitisation Forum (**AFME / ESF**)<sup>1</sup>, we wish to provide comments with respect to the temporary conditional exemption granted for certain credit ratings by the Securities and Exchange Commission (the **Commission**) on 19 May 2010 (the **Temporary Exemption**) from the requirements in Rule 17g-5(a)(3)(iii) (the **Rule**) under the Securities Exchange Act. In particular, we are seeking a permanent exemption from the Rule for credit ratings where the conditions which apply in respect of the Temporary Exemption are satisfied. We consider that a permanent exemption for non-U.S. offered transactions is appropriate for the reasons set out herein.

We appreciate the opportunity to raise our concerns with the Commission and wish to thank the Commission in advance for its consideration of the matters referred to in this letter. We would be happy to discuss our comments with the Commission when convenient.

**Key messages**

In our view the policy rationale for applying the Rule to non-U.S. offered transactions is not clear. First, the European authorities have committed themselves to the process of determining whether and how any requirements targeted at issuer-pay rating arrangements should be introduced in Europe and this process is continuing. Second, there is likely to be a mismatch between any adopted European requirements and the Rule. Third, compliance with the Rule raises significant data protection and bank confidentiality issues under European laws. In particular, we consider that such an application is not justified in circumstances where the only U.S. connection arises as a result of the agency itself registering its non-U.S. ratings entities under the NRSRO rules. We would therefore strongly urge the Commission to provide the requested relief for non-U.S. offered transactions. Our detailed reasoning in this regard is set out below.

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<sup>1</sup> A description of the association is provided in Annex I.

## Concerns and considerations

*European authorities are considering appropriate requirements for Europe now; potential conflict of Rule with existing regulatory regime in Europe*

The European authorities are in the process of considering whether new requirements should be introduced to address perceived issues in respect of the issuer-pays model in a structured finance context and, to the extent it is determined that such requirements are appropriate, the form such requirements should take. In particular, in June 2010, the European Commission put forward formal proposed amendments to Regulation (EC) No 1060/2009 on credit rating agencies (the **Regulation**), including new requirements intended to introduce a "similar system" in Europe to that introduced by the Rule.

It is expected that the relevant ongoing deliberations by the European authorities will take into account the particular features of the securitisation market in Europe and corresponding recent ABS rating experience. The importance of this work should not be underestimated. We consider that these European specific features are not reflected in the Rule and were not taken into account in the context of the corresponding impact assessment work done by the Commission. As such, application of the Rule in a non-U.S. offered context may be disruptive to local markets. We respectfully submit that the non-U.S. experience and any corresponding regulatory "needs" are best assessed and addressed by local regulators rather than by the Commission. In keeping with this, we encourage the Commission to leave the regulation of credit rating arrangements in respect of non-U.S. offered transactions to the appropriate local authorities. In Europe, the authorities are clearly already focused on the relevant issues.

The work under way with the European authorities is also expected to take account of the existing regulatory regime in Europe. Application of the Rule in a non-U.S. offered context may be disruptive to this regime. In this regard, we note that it is not clear that compliance with the Rule in the context of non-U.S. offered transactions would not conflict in certain circumstances with European bank confidentiality and/or data protection laws. In recognition of this, the proposals put forward by the European Commission provide for the adoption of corresponding detailed rules specifying "the conditions of access and the requirements of the website in order to ensure the accuracy and the confidentiality of data and the protection of personal data" in accordance with relevant European laws. The issues in this regard range from restrictions in the EU Data Protection Directive on the transfer of personal data (which may include asset-level information in certain circumstances) to a country outside the European Economic Area (EEA) (via a website or otherwise) to strict bank confidentiality regimes in place in certain jurisdictions (such as Germany and France) which restrict the disclosure of personal data to third parties unless certain requirements are satisfied.

*Overlapping requirements raise significant compliance challenges without policy justification; unlevel playing field concerns*

Notwithstanding that the proposals put forward by the European Commission were modelled on the Rule, they differ in a number of important respects. While it is not clear at this time where the European authorities will come out with respect to any adopted requirements (various drafts have been published to date), there is a real risk that any requirements adopted in Europe will not be consistent with the Rule in all respects. In such a scenario, European market participants in particular may face significant compliance issues and an increased execution burden, resulting in an unlevel playing field for arrangers involved in rated transactions which are subject to both regimes. It is not clear what would be gained from a policy perspective in such circumstances.

In addition, it should be noted that the global application of the Rule may have a heightened impact for certain European market participants due to the potential intersection of the Rule with other requirements which may be relevant to such participants (and which are unlikely to be relevant to U.S. participants). In this regard, we note that the European Central Bank has introduced changes to the rating requirements under its eligible collateral framework such that it will be necessary for second ratings to be sought in respect of a large number of existing EU asset-based securities transactions in the coming months (prior to 1 March 2011). Given this background, application of the requirements contemplated by the Rule in respect of credit ratings provided for EU ABS transactions will have significant implications for EU arrangers and Eurosystem counterparties in general. To the extent that such market participants are unable to comply with the Rule in respect of ABS collateral (which will turn in part on any conflict with data protection and bank confidentiality laws, any conflict with any requirements introduced by the European authorities, etc), this will impact on access to Eurosystem funding for relevant counterparties.

*The primary focus of the Commission should be on non-U.S. offered transactions; effectiveness of Rule is unclear*

We note that U.S. federal securities laws focus on the regulation of offerings to U.S. persons. This guiding principle of U.S. investor protection is reflected in the preamble to, and the findings set out at the start of, the Credit Rating Reform Act of 2006 and in the general mandate of the Commission itself. Consistent with this, it is clear that the Commission has a limited interest in regulating securities offered solely outside the U.S. and this is evidenced by certain existing provisions and practices, including the Regulation S safe harbour and the *Goodwin Proctor* no-action letters. Given this background, it is arguable that the application of the Rule to all credit ratings provided by an NRSRO or a registered affiliate – regardless of whether the relevant structured finance product transaction involves a U.S. investor connection (i.e. via a U.S. offering) – is inconsistent from a policy perspective with the wider U.S. legislative and regulatory framework.

It is our understanding, based on an informal survey of our members and following discussions with representatives at other industry organisations, that to date very few non-hired NRSROs have requested access to the arranger websites established under the Rule in respect of U.S. offered transactions. It is not clear that the experience in respect of ratings issued on non-U.S. offered transactions would be any different, particularly given the lack of a developed investor-pay ratings market in Europe. In addition, we note that feedback from our members confirms that compliance with the Rule would add to the execution burden on relevant transactions. Given that the effectiveness of the Rule remains unclear and that the only U.S. connection in the context of many European deals will arise as a result of the agency itself registering its non-U.S. ratings entities under the NRSRO rules, such an increased execution burden is arguably not justified. In summary, application of the Rule to non-U.S. offered transactions may give rise to significant costs and operational burdens for European market participants (particularly smaller originators) without any corresponding clear regulatory benefit.

### **Conclusions**

Based on the foregoing, we are seeking a permanent exemption from the Rule for credit ratings where the conditions which apply in respect of the Temporary Exemption are satisfied. We consider that setting the scope for application by reference to whether or not there is a U.S. offering of the relevant securities would satisfy the Commission's policy objectives, provide sufficient certainty for market participants and regulators in other jurisdictions and avoid certain unintended consequences which might otherwise arise in the context of rated deals involving non-U.S. arrangers. Moreover, the successful operation in practice of the Temporary Exemption to date supports the feasibility of such an approach.

In closing, we ask the Commission to please bear in mind the potentially significant impact of the Rule on the European ABS market and, in turn, on the funding of real economy assets in Europe.

Thank you once again for the opportunity to comment on the Rule. Should you have any questions or desire additional information regarding any of the comments set out above, please do not hesitate to get in touch with the undersigned on +44 (0)20 7743 9375).

Yours sincerely



Association for Financial Markets in Europe / European Securitisation Forum  
Rick Watson, Managing Director

cc. Mr. Randall W. Roy

## Annex I

The AFME / European Securitisation Forum (AFME / ESF) is a part of the Association for Financial Markets in Europe (AFME). AFME was formed on 1 November 2009 following the merger of LIBA (the London Investment Banking Association) and the European operation of SIFMA (the Securities Industry and Financial Markets Association) and incorporates a number of former affiliate organisations, including the ESF. AFME represents a broad array of European and global participants in the wholesale financial markets and its membership comprises pan-EU and global banks, as well as key regional banks, brokers, law firms, investors, issuers, accounting firms, credit rating agencies, service providers and other financial market participants. AFME provides members with an effective and influential voice through which to communicate the industry standpoint on issues affecting the international, European, and UK capital markets. AFME is the European regional member of the Global Financial Markets Association (GFMA) and is an affiliate of the US Securities Industry and Financial Markets Association (SIFMA) and the Asian Securities Industry and Financial Markets Association (ASIFMA). For more information, visit the AFME website, [www.AFME.eu](http://www.AFME.eu).