March 28, 2014

VIA ELECTRONIC FILING

Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Asset-Backed Securities
(Release Nos. 33-9552; 34-71611; File No. S7-08-10)

Ladies and Gentlemen:

The Commercial Real Estate Finance Council ("CRE Finance Council" or "CREFC") appreciates the opportunity to respond to the request of the Securities and Exchange Commission (the "Commission") for comments on the approach for the dissemination of potentially sensitive asset-level data for asset-backed securities ("ABS").[1] Prior to the reopening of this comment period, the CRE Finance Council submitted comments in response to both the 2010 proposed rulemaking for ABS[2] and the Re-proposal of Shelf Eligibility Conditions for Asset-Backed Securities and Other Additional Requests for Comment.[3]

Introduction and Overview

The CRE Finance Council is the collective voice of the entire $3.1 trillion commercial real estate finance market. Its members include all of the significant portfolio, multifamily, and

[1] SEC Release Nos. 33-9552; 34-71611; File No. S7-08-10.

[2] *See* SEC Release Nos. 33-9117; 34-61858; File No. S7-08-10 [75 Fed. Reg. 23328] (May 3, 2010) (hereinafter "2010 ABS Proposing Release"); *see also* CRE Finance Council Comments re: Asset-Backed Securities, Release Nos. 33-9117; 34-61858; File No. S7-08-10, *available at* http://www.crefc.org/uploadedFiles/CMSA_Site_Home/Government_Relations/CMSA_Issues/Regulation_AB/CREFC_Comments.pdf (Aug. 2, 2010) (hereinafter "2010 Letter").

[3] *See* SEC Release Nos. 33-9244; 34-64968; File No. S7-08-10 [76 Fed. Reg. 47948] (Aug. 5, 2011) (hereinafter "2011 ABS Re-Proposing Release"); *see also* CRE Finance Council Comments re: Re-proposal of Shelf Eligibility Conditions for Asset-Backed Securities and Other Additional Requests for Comment, Release Nos. 32-9244;34-64968; File No. S7-08-10, *available at* http://www.crefc.org/uploadedFiles/CMSA_Site_Home/Government_Relations/Financial_Reform/Regulation/CREFCResponseRegulationABRe-Proposal10-3-11.pdf (Oct. 4, 2011) (hereinafter "2011 Letter").

commercial mortgage-backed securities ("CMBS") lenders; issuers of CMBS; loan and bond investors such as insurance companies, pension funds, specialty finance companies, REITs and money managers; servicers; rating agencies; accounting firms; law firms; and other service providers. Our industry plays a critical role in the financing of office buildings, industrial complexes, multifamily housing, retail facilities, hotels, and other types of commercial real estate that help form the backbone of the American economy.

Our principal functions include setting market standards, facilitating the free and open flow of market information, and education at all levels. Securitization is one of the essential processes for the delivery of capital necessary for the growth and success of commercial real estate markets. One of our core missions is to foster the efficient and sustainable operation of CMBS.

To this end, we have worked closely with policymakers to educate and inform legislative and regulatory actions to help optimize market standards and regulations. As we have stated in our 2010 Letter and 2011 Letter, we work with all market constituencies to develop industry standards, which continue to provide marked improvements in the CRE finance arena. The CRE Finance Council's "Annex A" initial loan-level disclosure package and the Investor Reporting Package ("IRP")[TM] for ongoing disclosures and surveillance by investors are two relevant examples or our work in making the CRE finance arena more efficient and transparent.

The CRE Finance Council generally supports the potential approach in dealing with sensitive asset-level data, as described in the Division of Corporation Finance Memorandum of February 25, 2014 ("Commission Memo"),[4] and has been broadly supportive of the Commission's goals of enhanced transparency and alignment of interest between issuers and investors. CMBS market participants have developed practices – such as the Annex A and IRP – that provide investors with clear, timely and useful disclosure and reporting that is specifically tailored to the needs of CMBS investors. We believe that these practices have proven effective, and in fact, note that part of the potential approach offered by the Commission aligns with our current industry practice.[5]

The CRE Finance Council believes however, that given the uniqueness of the CMBS market and current effective industry standards, any potential approach regarding sensitive asset-level data should harmonize with these standards currently in place. Such harmonization will ensure transparency while protecting privacy, and at the same time eliminate redundancy while promoting efficiency in the CMBS market.

[4] *See* Memorandum from the Division of Corporation Finance to Commission File No. S7-08-10, re: Disclosure of Asset-Level Data (Feb. 25, 2014) (hereinafter "Commission Memo").

[5] *See* Commission Memo at p. 12 (stating that "[o]ne commenter, for example, noted that for commercial mortgage-backed securities, it is current industry practice to use Web sites to provide information to investors and to enable investors to communicate with each other.") (quoting 2011 Letter).

Executive Summary

The CRE Finance Council generally supports the potential approach described in the Commission Memo, which aligns with current CMBS market practice. In order to ensure the potential approach is effective, while at the same time achieving its goals of protecting sensitive asset-level data, the CRE Finance Council would like to confirm that:

- ***Proprietary borrower information should be considered sensitive information***
- ***For the CMBS market, Schedules L and L-D should not be filed on EDGAR, because the information included on those schedules is considered proprietary by borrowers;***
- ***Third party, secure websites are most-suited to host the sensitive asset-level data;***
- ***Sensitive asset-level data should be made available to all prospective investors upon request and within 3 business days of an executed confidentiality agreement; and***
- ***The five year document retention requirement begins on the date of posting.***

Additionally, the CRE Finance Council would like to reiterate its concerns made in the 2010 Letter and 2011 Letter, mainly that Annex A and the IRP should be acceptable forms of disclosure for the CMBS market.

Further, the CRE Finance Council maintains its strong opinion that the proposed rule should not apply to Rule 144A transactions and that, to do so, would be to eliminate the safe harbor that is the private placement market. The 144A market contains sophisticated investors, and as we have said in our 2010 Letter, "Sophisticated institutional investors can demand (and have demanded, as in the case of the IRP) the information they need to make their investment decisions and do not need additional protection."[6] Both Annex A and the IRP are currently used in the 144A market, and "[i]nvestors also have the right in the private securities market to request and receive additional information regarding a transaction."[7] The information provided is much more robust in the 144A market and therefore contains a significant amount of proprietary data. It is current industry standard for investors to sign a confidentiality agreement before this data can be accessed. Given the way the private market currently treats the various data associated with its transactions, to force that data to be placed in front of the public, via EDGAR, would effectively destroy the foundation of the market and impose new reporting costs on transactions. Additionally any proposed approach should not impose a duty to audit or provide financial statement disclosures for the 144A market.

[6] 2010 Letter at 28.

[7] 2010 Letter at 27.

Proprietary borrower information should be considered sensitive information

The Commission Memo describes a potential approach to disclosure for certain sensitive asset-level information, one which would "require issuers to make asset-level information available to investors and potential investors through an issuer's Web site which would enable issuers to address privacy concerns associated with such disclosures, including through restricting access to potentially sensitive information."[8] The Commission Memo stated that the approach "strikes a better balance between addressing potential privacy concerns and providing investors with information to better evaluate investment risk than the approach described in the 2010 ABS Proposing Release."[9] The CRE Finance Council agrees, and as the Commission Memo notes, "for CMBS, it is current industry practice to use Web sites to provide information to investors and to provide the ability for investors to communicate with each other."[10]

We believe the Commission is correct in allowing each industry to determine what data should be considered "sensitive," as each market is different in terms of the type of information and type of asset at issue. While disclosure in the residential mortgage backed security (RMBS) market must deal with potential sensitive asset-level information related to personal privacy concerns,[11] disclosure in the CMBS market would have to address issues related to proprietary information of the business and properties involved. In the CMBS market, proprietary borrower information is considered sensitive and access is either restricted or subject to confidentiality agreements.

In order to be certain that proprietary borrower information – akin to the asset-level data requested on Schedule L or Schedule L-D – is protected from public disclosure, we would seek clarification from the Commission that the potential approach described in the memo is not unduly limited to personal consumer information but covers sensitive information in other markets as well, and that current industry practice can determine what information will fall into this category.

For the CMBS market, Schedules L and L-D should not be filed on EDGAR, because the information included on those schedules is considered proprietary by borrowers

The specific asset-level data requested in Proposed Sec. 1111A (Schedule L) and Proposed Sec. 1121A (Schedule L-D) overlap significantly with the CMBS market's Annex A and IRP. We have commented in the past on the need for Schedule L and Schedule L-D to be harmonized with Annex A and the IRP in order to prevent market disruption and increased cost to the investor.[12] It is current industry practice to treat the asset-level data included on Annex A

[8] Commission Memo at 1.

[9] *Id.* at 18-19.

[10] *Id.* at 15 (citing 2011 Letter); *see also id.* at 12.

[11] *See discussion at* 75 Fed. Reg. 23357; 76 Fed. Reg. 47967.

[12] *See* 2010 Letter at 15-16, 2011 Letter at 14-15

and the totality of information included on the IRP as sensitive and subject to a confidentiality agreement to obtain access. If such information would be made available to the general public on EDGAR, without a confidentiality agreement, borrower proprietary information would be compromised, which would be a borrower disincentive for using CMBS and ultimately would constrict the CMBS market unnecessarily.

Further, the CRE Finance Council's member constituencies, including investment-grade investors, believe that most – if not all – of the information on Schedule L and Schedule L-D should be considered sensitive, and therefore should continue to be hosted on the issuer's (or trustee's or third-party's – see below) website. There was no support for filing such Schedules on EDGAR, even in a redacted form. Given that the information will also be filed privately with the Commission for its records, we would like to confirm that Schedules L and L-D would not need to be filed at all on EDGAR.

Third party, secure websites are most-suited to host the sensitive asset-level data

The CRE Finance Council believes that, similar to current industry practice, the obligation on the trustee to host sensitive asset-level data may be assigned to any third party, and that the investors will be notified of the Web site in the prospectus. The Commission Memo proposes that the sensitive asset-level data be made available via the issuers' website, or "[i]f an issuer determines it could meet its obligations under the privacy laws through the use of a Web site operated and maintained by a third party on the issuer's behalf, our approach would not prohibit issuers from doing so."[13] We read the current Regulation AB to define an issuing entity as "the trust or other entity created at the direction of the sponsor or depositor that owns or hold the pool assets and in whose name the asset-backed securities supported or serviced by the pool assets are issued."[14]

The CRE Finance Council would like to confirm that the obligation to host private information on a website can be assigned to any third party. Under the current regulations, any party to the transaction is allowed to host the various transaction documents, including Forms 10-K, 10-D, and 8-K.[15] Similarly, any party should be able to host the sensitive asset-level data, subject to the various privacy safeguards, such as confidentiality agreements, provided that investors are notified where the information will be hosted in the prospectus as the Commission is contemplating.

[13] *See* Commission Memo at 1, n. 2.

[14] *See* 17 C.F.R. § 229.1101(f)

[15] *See, e.g.*, 17 C.F.R. § 229.1118(c) (allowing the Web site of a "specified transaction party" to make available an issuing entity's annual reports on Form 10-K, distribution reports on Form 10-D, current reports of Form 8-K, and amendments to those reports).

Sensitive asset-level data should be made available to all prospective investors upon request and within 3 business days of an executed confidentiality agreement

All CREFC member constituencies – including investment grade investors – were supportive of maintaining sensitive asset-level data on trustees' or other third-parties' websites. It is current industry practice to require an executed confidentiality agreement as a prerequisite for access, and the Commission should expressly clarify that execution of such an agreement is a permissible prerequisite to accessing sensitive asset-level data *provided that* access to the data must be provided to any qualified investor or potential investor within *three* business days of submitting a fully executed confidentiality agreement. The three-day access requirement was particularly important for CREFC's Investment-Grade investor members.

The five year document retention requirement begins on the date of posting

The potential approach outlined in the Commission Memo states "the data must remain available on the Web site for five years."[16] The CRE Finance council would like to confirm that this date is five years from the date of posting.

Conclusion

The CRE Finance Council appreciates the amount of effort and work the Commission has put forth in the development of the Proposed Rule, and in preparation of the Commission Memo. We have always valued the opportunity to work with the Commission to further explain our ideas and to alleviate any concerns the Commission may have with those ideas, and we are happy to discuss at your convenience.

Sincerely,

Stephen M. Renna
President & CEO
CRE Finance Council

[16] Commission Memo at 18.