

## MEMORANDUM

**To:** Commission File No. S7-08-10

**From:** Robert Errett  
Special Counsel  
Office of Structured Finance  
Division of Corporation Finance  
U.S. Securities and Exchange Commission

**Date:** April 11, 2014

**Re:** Meeting with Representatives from the Securities Industry and Financial Markets Association and the Financial Services Roundtable (SIFMA/FSR)

---

On April 9, 2014, Karen Garnett, Kathy Hsu, Rolaine Bancroft, Robert Errett, Hughes Bates, Michelle Stasny, and Kayla Florio of the Division of Corporation Finance and Igor Kozhanov of the Division of Economic and Risk Analysis met with representatives of SIFMA/FSR. The participants discussed topics relating to the Commission's April 7, 2010 proposing release regarding asset-backed securities and the Commission's February 28, 2014 release that re-opened the comment period for the asset-backed securities release. A list of participants from SIFMA/FSR and handouts are attached.

Attachment

**SIFMA/FSR Participants**

Chris Killian	SIFMA (via telephone)
Melissa MacGregor	SIFMA (via telephone)
Dave Oxner	SIFMA
Felicia Smith	Financial Services Roundtable
Lewis Cohen	Clifford Chance
Lee Schneider	Debevoise
Brendon Tavelli	JP Morgan
Larry Platt	KL Gates
David Tillman	KL Gates (via telephone)
James Y. Lee	Morgan Stanley



FINANCIAL  
SERVICES  
ROUNDTABLE

---

## REG AB2 AND PRIVACY

---

APRIL 9, 2014

---

# Agenda

1. Tension between disclosure and privacy obligations – access and materiality
2. Legal Risk and Reputational Risk
3. Cross-border issues
4. Solutions

*Appendix: Overview of SIFMA/FSR Comment Letter*

# Overview of Industry Concerns

## **Tension between disclosure and privacy obligations – Access and Materiality**

- Issuers cannot verify identities, nor can they enforce terms of any click-throughs or other access conditions. What happens if a user lies about being an investor, or if access to a real investor is denied because they do not agree to issuer access restrictions?
- The ABS release and Memorandum do not discuss materiality of ALD -- but the industry needs to understand whether or not dissemination in accordance with the Commission's requirements (including through the exercise of any discretionary authority to grant or deny access) is consistent with issuers' general obligation to disclose all material information in ABS offering documents.

## **Legal Risk and Reputational Risk**

- The proposal leaves many important legal and regulatory issues unresolved – FCRA, GLBA, FTC Act, state laws, etc...These issues should be clarified before the industry begins compliance with a regime, not after.
- It is not clear to what extent the Commission has sought assurances from relevant regulators that the proposed framework for disclosure of ALD would comport with applicable requirements under various privacy laws. What happens if an issuer believes it cannot disclose a specific ALD data field(s)?
- Recent data breaches (Target, Neiman Marcus, Sony, etc...) and attacks (Ellie Mae) have been major focuses in the industry and in policy circles. Cybersecurity is a very high priority at our member firms, and concerns around customer information security are broader than simply legal obligations.

## **Cross-Border Issues**

- A mutual recognition or substituted compliance regime should be implemented to address conflicting disclosure regimes in Europe and the US. Securitization is a global market, and is able to provide maximum benefit to consumers when capital can be sourced globally. This is not only a concern here, but also with respect to risk retention and other rules.

# Clarifications That Will Help Industry Develop Solutions

- Please help the industry understand what it is being asked to opine on in this reopening of comments on Reg AB2. This may be best accomplished through a re-proposal of the ABS release, including at a minimum the ALD discussion.
  - Clarify what data fields will be required;
  - Clarify whether or not 144A disclosure will be required to be equivalent to registered transaction disclosure (upon request, as proposed);
  - Clarify the materiality standards that apply to ALD, and how they relate to issuer website access and disclosure issues.
- The re-proposal or any final rule should include definitive, coordinated federal guidance on whether the disclosure of asset-level data in accordance with the Commission's requirements would be consistent with issuers' obligations under privacy and consumer protection laws. Issuers are very concerned they may become "consumer reporting agencies".
  - This responsibility should not be placed on issuers, and this clarity should come before issuers have compliance obligations for ALD, or there is a risk that issuers won't issue.
- Work with foreign regulators on a mutual recognition or other regime whereby US issuers will be able access Europe, and European issuers will be able to access the US without conflicting requirements, and subject to their compliance with home-jurisdiction rules.

## Appendix

# Overview of SIFMA/FSR Comment Letter

# High Level Summary of Comments

- SIFMA members have serious reservations about the asset-level disclosure mechanism proposed in the Commission's Staff Memorandum. There are fundamental tensions between the disclosure of this asset-level data and issuers' other legal and regulatory obligations. We don't necessarily know the best way to resolve these issues at this time but we do not believe the Staff Memorandum is the way.
- The proposal would force issuers to serve as gatekeepers with respect to the data, which puts them in an untenable Catch-22 – they could be liable to investors for restricting access to the information or to consumers for making it more freely available.
- Rushing to finalize the rule would be a mistake, because issuers need to be comfortable with the risks that they are assuming if they are going to continue to participate in the ABS markets. The Commission should re-propose the ABS releases, including the portions relating to asset-level disclosure, in order to accommodate a more comprehensive reconsideration of these issues.

# Issuer Websites

# Access To and Control Over ALD

- The Offering and Reporting Data Files would appear to be available to any person who accesses the issuer's website, certifies that the person is an actual or potential investor, and agrees to the issuer's terms of access.
- Issuers generally would not be equipped to verify prospective users' identity or credentials or be able to enforce compliance with the terms of access.
- In fact, the proposal outlined in the Memorandum actually may increase the risk to consumers, because requiring issuers to disclose specific credit scores, income and debt amounts in place of coded ranges would make the Offering and Reporting Data Files more attractive for and susceptible to reverse engineering and abuse.
- The proposal leaves unclear to what extent an issuer could be liable to investors, consumers, or regulators if access is either granted or denied incorrectly.

# Materiality

# The Question of Materiality

- Neither the ABS Releases nor the Memorandum discuss whether the asset-level data would be considered material” to investment decisions, such that issuers could be liable under the Securities Act of 1933 for restricting access to such information.

# Tension Between Disclosure and Protection

- This puts issuers in an untenable position; the more carefully an issuer may restrict access to its website to protect customer data, the more risk it bears of an investor suit for failing to disclose all material information.
- Such claims could come not only from investors that are denied access to the asset-level data, but also from investors unwilling to agree to the issuer's terms of use and/or unable to access the issuer's website.

# Clarifications Needed

- To the extent that the Commission proposes to allocate responsibility for the dissemination of asset-level data to issuers, it must confirm:
  1. Whether such information will be considered “material” for purposes of the securities laws, and, if so,
  2. Whether the dissemination of such information in accordance with the Commission’s requirements (including through the exercise of any discretionary authority to grant or deny access) is consistent with issuers’ general obligation to disclose all material information in ABS offering documents.

# Intersection With Other Laws/Regulations

# General Concern

- The proposal leaves many important legal and regulatory issues unresolved.
- It is not clear to what extent the Commission has sought assurances from relevant regulators that the proposed framework for disclosure of ALD would comport with applicable requirements under various privacy laws.
- Members are concerned by discussion in the Memorandum that potential costs include “potential litigation and liability” for compliance with this proposal.

# Fair Credit Reporting Act

- The Memorandum suggests that FCRA “provides an exclusion” for disclosure to a person who “intends to use the information, as a potential investor ... in connection with a valuation of, or an assessment of the credit or repayment risks associated with an existing credit obligation.”
- While the FCRA does provide that a consumer reporting agency (or “CRA”) may provide a consumer report to a person who intends to use the report for such a purpose, it is unclear whether that “permissible purpose” is broad enough to accommodate the disclosure of consumers’ personal information by an ABS issuer in public securities filings or on a generally accessible website.
- Disclosing certain kinds of consumer information to a third party for a “permissible purpose” could cause an issuer to *become a CRA*, thus subjecting the issuer to a variety of burdensome regulation.

# Other Laws and Regulations

- The extent to which required asset-level information is considered personally identifiable for purposes of federal (and state) law, including the Gramm-Leach-Bliley Act (the “GLBA”), the FCRA, the FTC Act, and state financial privacy and information security laws (e.g., in California, Massachusetts, and Vermont);
- Whether an issuer’s disclosure of personally identifiable information as required by the Commission falls within one or more exceptions to GLBA notice and opt-out requirements;
- Whether the GLBA and/or state information security laws would require issuers to maintain particular administrative, physical, and technical safeguards to protect the confidentiality and security of personally identifiable asset-level data, including whether an issuer would be required to verify the identity and qualifications of investors and others who may access the asset-level data, and how it could do so;
- The extent to which the GLBA or other information security laws would prohibit investors and other recipients of the asset-level data from using or disclosing the asset-level data for business purposes other than evaluating the original investment opportunity, including in connection with re-securitizations?

# Other Laws and Regulations

- The extent to which the Right to Financial Privacy Act (the “RFPA”) permits issuers to provide asset-level information to the Commission, whether in an EDGAR filing or otherwise;
- For issuers or servicers that may be acting as “debt collectors” under the Fair Debt Collections Practices Act (the “FDCPA”) with respect to a consumer obligation, whether the disclosure of asset-level information to investors or the Commission would violate the prohibition on communicating with unauthorized third parties “in connection with the collection of any debt”;
- Whether asset-level data disclosed to the Commission in a confidential (*i.e.*, *non*-EDGAR) filing would be subject to public disclosure under the Freedom of Information Act (“FOIA”);
- Whether the proposed disclosures and use of asset-level information are consistent with international privacy laws to which certain issuers may be subject, such as the E.U. Data Protection Directive; and
- The extent to which the dissemination of personally identifiable asset-level data in accordance with the Commission’s requirements might be considered an unfair, deceptive, or abusive act or practice.

# Cross-Border Issues

# Cross-Border Issues

- Due to the global nature of our financial system, an effective securitization market requires seamless operation across borders.
- As currently proposed, European issuers seeking to offer ABS to U.S. investors and, potentially, certain U.S. issuers seeking to offer ABS to European investors, would be required to comply with non-aligned standards regarding privacy protections as well as categories and/or formats of asset-level disclosure.
- Some kind of mutual recognition/substituted compliance regime should be implemented to address these issues.

# Solutions and Re-Proposal Request

# More Information Needed to Develop Solutions

- Our members do not feel prepared to offer a simple solution at this point. In order to do so, members would need information that is not available in the Memorandum or the ABS Releases, as we have discussed. This would include:
  1. Which data fields will be required, which would be subject to more limited distribution or enhanced protections, and the extent to which the Commission still intends to require asset-level disclosure with respect to certain non-RMBS asset classes; and
  2. The extent to which any of the asset-level data might be considered “material” information for purposes of the securities laws;
  3. The extent to which issuers could be legally responsible under privacy and/or securities laws for either providing or limiting access to asset level data;
  4. Regulatory expectations with respect to user authentication, terms of access, information security, and the enforcement of contractual obligations;
  5. Whether the Commission could offer assurances that the data fields that it would require to be disclosed on EDGAR cannot reasonably be linked to an individual consumer;
  6. The views of the Commission, the CFPB, the FTC, and other regulatory authorities regarding ABS issuers’ and investors’ obligations under the GLBA, the FCRA, and other privacy laws.

# Re-proposal Request

- We believe the SEC should re-propose the ABS release including the asset level disclosure portions.
- This would allow for a more comprehensive reconsideration of the legal and public policy concerns raised by the disclosure of asset-level information and related matters.

# Contact Information

## **About SIFMA**

*SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit [www.sifma.org](http://www.sifma.org).*

## **About FSR**

*The Financial Services Roundtable represents the largest integrated financial services companies providing banking, insurance, payment and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for \$92.7 trillion in managed assets, \$1.2 trillion in revenue, and 2.3 million jobs. Learn more at [FSRoundtable.org](http://FSRoundtable.org)*