



April 28, 2014

**Via Electronic Mail (rule-comments@sec.gov)**

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
Attention: Elizabeth M. Murphy, Secretary

Re: Dissemination of Asset-Level Data (File Number S7-08-10)

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association[1] and the Financial Services Roundtable[2] (together, the "**Associations**") appreciate the opportunity to provide further comments on the Commission's February 25, 2014, staff memorandum (the "**Memorandum**"),[3] suggesting that issuers might use their websites to disseminate asset-level data and other offering information to investors and potential investors with respect to the disclosure and reporting requirements for asset-backed securities ("**ABS**").[4]

As we discussed in our March 28, 2014, comment letter (the "**March Comment Letter**"), the Associations' dealer, sponsor, and issuer members[5] continue to believe that the

[1] The Securities Industry and Financial Markets Association ("**SIFMA**") brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to develop policies and practices which strengthen financial markets and which encourage capital availability, job creation and economic growth while building trust and confidence in the financial industry. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association.

[2] As *advocates for a strong financial future*™, the Financial Services Roundtable ("FSR") 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. FSR member companies provide fuel for America's economic engine, accounting directly for $2.7 trillion in managed assets, $1.2 trillion in revenue, and 2.3 million jobs. Learn more at FSRoundtable.org.

[3] Securities and Exchange Commission Staff Memorandum, Disclosure of Asset-Level Data (Feb. 25, 2014), *available at* http://www.sec.gov/comments/s7-08-10/s70810-258.pdf (hereinafter, "**Memorandum**").

[4] Release Nos. 33-9117; 34-61858; File No. S7-08-10, dated April 7, 2010, Asset-Backed Securities, 75 Fed. Reg. 23328 (May 3, 2010). Release Nos. 33-9244; 34-64968; File No. S7-08-10, dated July 26, 2011), Re-Proposal of Shelf Eligibility Conditions for Asset-Backed Securities, 76 Fed. Reg. 47948 (Aug. 5, 2011).

[5] Please note that this letter expresses the views of the Associations' dealer, sponsor, and issuer members, but not necessarily the views of the Associations' investor members.

website-based disclosure mechanism that the Commission proposed in its Memorandum would expose both issuers and consumers to unwarranted liabilities. After our follow-up our meeting with the Commission's staff on April 9, 2014, the Associations' members have worked diligently to develop alternative asset-level disclosure approaches that might be more protective of consumer privacy while enabling ABS issuers to meet their other legal and regulatory obligations. In this letter, we suggest two such possibilities.

We would like to emphasize, however, that we consider each of these alternatives to be in the preliminary stages of development, because they each raise a number of issues that would need to be more fully considered before they could be fully endorsed by the Associations' members. In particular, members believe that it is critically important for the Commission to work in close coordination with the Consumer Financial Protection Bureau (the "**CFPB**"), the Federal Trade Commission (the "**FTC**"), and other federal regulators with consumer privacy responsibilities before settling on any particular asset-level disclosure mechanism. We also wish to stress that is absolutely necessary for the Commission to provide issuers with an express guarantee of relief from omissions liability in connection with any disclosure mechanism that places ABS sponsors in a position in which they must limit or restrict access to asset-level data.

The Associations' members also do not intend to suggest that these options are the best or only approaches to the disclosure of asset-level data. For example, we believe that many of the practical and legal issues related to the disclosure of asset-level information would be resolved if the Commission or another federal authority were to assume responsibility for maintaining a central asset-level data repository. We have not devoted substantial attention to this option only because the Memorandum suggests that the Commission would not be open to it. However, if the Commission were to reconsider its position, we would welcome the opportunity to address the advantages and disadvantages of such an approach.

## I. COMMENTS

The Associations' asset-level disclosure working group has come up with two possible alternatives to the asset-level disclosure mechanism that the Commission suggested in its Memorandum. The first would involve taking a less prescriptive approach to the underlying asset-level information disclosure obligation, such that issuers still would disclose the asset-level data through their own websites, but would have greater flexibility to withhold, aggregate, or modify particular data fields as reasonably necessary to protect consumer privacy, to comply with other legal and regulatory obligations, or to limit the disclosure of non-material information. Under the second approach, issuers would remain required to disclose all of the asset-level data fields specified by the Commission in its final ABS release, but would be able choose between either of the following two parallel options with respect to any given ABS transaction: (i) disclosing the asset-level data directly through their own websites, subject to reasonable access and security controls (and relief from omissions liability); or (ii) providing the data to one or more central repositories administered by a consumer reporting agency ("**CRA**"), which would be responsible for making the information available to actual and potential investors.

### A. The Less Prescriptive Approach

The Memorandum would require issuers to disclose asset-level data directly to investors and potential investors through their websites, but would allow issuers to impose reasonable access controls and other information security safeguards. The Associations appreciate that this mechanism represents the Commission's considered attempt to balance investors' interests and the statutory asset-level disclosure mandate against the serious erosion of consumer privacy and attendant fraud risk that would be raised by the disclosure of asset-level information in publicly accessible EDGAR filings. Unfortunately, as discussed in more detail in our March Comment Letter, if the Commission were to incorporate the website-based disclosure mechanism into its final ABS release without providing issuers with any alternative, both issuers and consumers would be exposed to unwarranted risks and liabilities.

Significantly, however, by permitting issuers to impose reasonable access controls and other safeguards to limit the use and dissemination of asset-level data, the Memorandum at least implicitly suggests that issuers would not face omissions liability under the Securities Act of 1933 for restricting investors' access to material information when an investor is unable to obtain asset-level data because the investor is unable or unwilling to agree to the issuer's reasonable terms of use or because the issuer's reasonable controls otherwise cause the investor to be denied access to the issuer's website. As discussed in our March Comment Letter, ABS sponsors would still require more express assurances from the Commission regarding omissions liability relief before they could be comfortable with any asset-level disclosure mechanism that requires them to perform such "gatekeeper" functions. Given, however, that the Commission appears willing to allow issuers to impose reasonable access controls and that such controls may prevent even legitimate investors and potential investors from accessing *any* of the asset-level data, we believe that it would be appropriate for the Commission to provide issuers with equivalent latitude with respect to the particular data fields that they decide to disclose. For example, if an investor or potential investor is unwilling to agree to an issuer's terms of access, an issuer does not have full confidence in an investor's information security controls, or an investor or potential investor otherwise is denied full access to the asset-level data, the issuer still might be able to disclose a useful amount of asset-level data to that person by withholding, aggregating or modifying the data fields that present the greatest risks to consumer privacy under the circumstances.

This type of flexibility would be equally necessary even when an investor or potential investor agrees to an issuer's terms of use and other access conditions, because issuers reasonably might determine that it still would be necessary to withhold, aggregate or modify certain asset-level data fields in order to safeguard consumers' privacy and to protect themselves from liability. For example, an issuer might determine that it is unable to disclose certain data fields on an asset-level basis in a manner that is consistent with the requirements of the Fair Credit Reporting Act ("**FCRA**"). An issuer also might determine, based on the ABS asset class, the other sources of consumer information that may be available to a particular person, new technologies or data analysis capabilities, updated guidance from other federal regulators, or other factors, that the disclosure of certain data fields in certain circumstances or to certain parties presents undue "reverse engineering" risks. Similarly, in the context of a particular transaction, asset class, or ABS tranche, an issuer might decide that it is appropriate to protect

consumer privacy by withholding or aggregating certain data fields that are unlikely to be material to investment decisions.

Thus, if the Commission decides to incorporate the website-based disclosure mechanism into its final ABS release without alternative, we urge the Commission to adopt a less prescriptive approach to the asset-level information disclosure obligation. Specifically, we suggest that issuers be allowed the flexibility to make case-by-case determinations to withhold, aggregate, or otherwise modify the asset level data fields made available to investors and potential investors, as reasonably necessary to: (i) comply with other applicable legal and regulatory obligations; (ii) reduce "reverse engineering" risk or otherwise protect consumer privacy; and/or (iii) limit the unnecessary disclosure of information that is unlikely to be material to an investment decision. The Commission also should expressly confirm that issuers will not face any liability or other exposure under the federal securities law in connection with such determinations,[6] as long as: (i) each such determination is reasonable under the circumstances; and (ii) the issuer informs each investor and potential investor of the data fields it is withholding, aggregating, or modifying, and of the basis for its decision to do so.

### B. CRA Model

The Associations' members also are in the process of considering and refining an alternative asset-level disclosure mechanism that has the potential to resolve many of the issues raised in our March Comment Letter. Under this approach, issuers would be able choose between either of the following two options with respect to any given ABS transaction: (i) disclosing the asset-level data through the website-based disclosure mechanism described in the Memorandum (preferably in conjunction with the less prescriptive approach to the underlying disclosure obligation); or (ii) providing the asset-level data to investors and potential investors through one or more CRA-administered repositories.

Under the second of these two options, an issuer would disclose all of the asset-level data fields for the assets underlying an ABS offering to a CRA-administered repository, along with a unique identification number for each particular asset (an "**Asset ID**"). The issuer then would disclose the Asset IDs to investors and potential investors in the offering documents filed on EDGAR, so that such persons may provide those Asset IDs to the CRA and obtain the information necessary to make an informed investment decision. Note that this is similar to the approach taken under the Project RESTART industry initiative,[7] but differs in at least two material respects. First, the issuer would disclose *all* of the asset-level data fields through the CRA, instead of just data fields that come directly from consumer reports (*e.g.*, credit score, the existence and amount of subordinate liens, *etc*.). Second, the disclosure mechanism would be

[6] Once again, such an explicit assurance of relief from omissions liability is absolutely necessary for any asset-level disclosure mechanism that places ABS sponsors in a position in which they must limit or restrict access to asset-level data.

[7] Note that it also is similar to certain international asset-level disclosure mechanisms, such as the asset-level disclosure requirements that the European Central Bank established for ABS within the Eurosystem collateral framework, which similarly centralizes and standardizes the collection and dissemination of asset-level data. Please refer to the concurrent comment letter submitted by the Global Financial Markets Association for additional information about these international disclosure regimes.

available for all ABS asset classes and not just for residential mortgage-backed securities ("**RMBS**").

The Association's members believe that there are several potential advantages to this disclosure mechanism. Disclosing all of the data fields through a CRA appears to solve most of the issuers' FCRA risks, because the CRA would be the entity that provides consumer information to investors for an FCRA permissible purpose, which is the activity that the CFPB and other regulatory authorities would be most likely to consider a consumer reporting function. The mechanism also presents significant advantages from a consumer privacy perspective, because the asset-level data required to be disclosed in connection with ABS prospectuses and periodic reports (the "**Offering and Reporting Data Files**" or the "**Data Files**") now would be subject to the same legal protections under the FCRA as consumer reports. The CRAs also will be better positioned than issuers to obtain use certifications from investors, to review investor qualifications, to monitor and control investors' use and disclosure of the Data Files, and to maintain other appropriate information security controls, because they already routinely perform these core functions in connection with their consumer reporting lines of business.[8] At the same time, materiality concerns should be alleviated by the fact that all of the asset level data fields would be available to investors and potential investors without aggregation or modification.

The CRA-based mechanism also brings even greater uniformity and clarity to the asset-level data disclosure process than the website model, further improving investors' access to the data, offering greater certainty to investors about how they would receive the Data Files, and simplifying compliance. For example, the CRA model results in a more streamlined disclosure process that does not involve disclosing asset-level data through multiple channels, as proposed in the Memorandum (*e.g.*, over EDGAR, on websites, and in private filings to the Commission). The Data Files also would not be subject to different levels of protection and different formatting requirements. Investors also should appreciate the convenience of only having to register with one (or two or three) CRA(s) instead of with each individual issuer. Finally, the overall quality and reliability of the Offering and Reporting Data Files should improve, because the CRAs would be in a position to supplement the asset-level data fields provided by the issuer with updated information from other sources on a continuing basis.

Note, however, that despite these evident advantages, there are a number of regulatory ambiguities that would need to be resolved before a CRA-based disclosure mechanism could be implemented. First, issuers would need assurances from the CFPB and the Federal Trade Commission ("**FTC**") that they would be able to provide the CRA with asset-level data that extends beyond the issuers' own "transactions and experiences" with consumers without becoming CRAs in their own right.[9] The CRAs also may need assurances that a permissible

[8] The reuse of asset-level data by resecuritizers also becomes less of a concern, because issuers would not need to provide any non-public personal information directly to resecuritizers. Instead, a resecuritizer simply would provide its investors with the already-public Asset IDs for the assets underlying the resecuritization.

[9] This conclusion appears to be supported by existing FTC guidance that allows a non-CRA to transmit consumer information to a "successor in interest" pursuant to the transfer of all or a portion of the underlying consumer asset without becoming a CRA itself (*i.e.*, "because its purpose is to consummate the sale rather than to furnish consumer reports"). *See* FTC, 40 Years of Experience with the Fair Credit Reporting Act (July 2011), available at http://www.bankersonline.com/launch/fcrainterps201107.pdf. Under the same reasoning, an issuer or servicer

purpose exists under the FCRA to provide the Data Files to current investors (instead of only to potential investors). Finally, the Commission still would need to clarify that issuers would not be liable under the securities laws for restricting investors' access to material information when an investor is unable to obtain asset-level data because the investor is unable or unwilling to agree to the CRA's user agreements or because the CRA's reasonable controls otherwise cause the investor to be denied access to the Data Files.

There also are operational issues that would need to be resolved. The first obviously would be to identify one or more CRAs that are willing to perform this function. Other operational issues include structuring the CRAs' compensation in a manner that does not reintroduce materiality issues by requiring investors to pay for access to material information, creating standardized reporting and disclosure formats, and establishing consumer access and dispute resolution mechanisms (if applicable). Note that the Associations are reaching out to some of the CRAs to discuss possible ways to structure this type of relationship, but these discussions remain in very preliminary stages. One issue that has been raised in these discussions (and which would need to be resolved with input from the Commission and other regulators) is whether a CRA would be able to use the asset-level data in connection with its other consumer reporting activities. In any event, given that there does not appear to be any established means in the marketplace to disclose asset-level data in this manner (beyond the more limited Project RESTART disclosure mechanism), the Commission would need to give the industry time to work through these operational issues and to set up the procedures and relationships that will be necessary to make a CRA-based disclosure mechanism work.

## II. CONCLUSION

As discussed in our March Comment Letter, we believe that the website-based disclosure mechanism suggested in the Memorandum does not adequately protect consumer privacy and places ABS issuers in an untenable position. We believe that adopting one or both of the alternative approaches to asset-level disclosure discussed in this letter could resolve many of the most difficult issues. While these ideas show considerable promise, they require more extensive consideration by the Commission, other federal regulators, and the financial community. If the Commission decides to pursue a less prescriptive approach to the underlying asset-level disclosure obligation, it should re-propose its ABS release in order to specify the nature and scope of the flexibility that it would afford to issuers. If the Commission were to pursue a CRA-based disclosure mechanism, we urge it to solicit broader input from interested parties in a concept release, as it did with respect to the issuer website model, and to open a new comment period.

In addition, if the Commission ultimately decides not to adopt a less prescriptive approach to the underlying disclosure obligation, we urge it to delay the effective date of the asset-level disclosure obligation for an additional year beyond the effective date of the rest of its final ABS release, in order to accommodate the establishment of a viable CRA-based disclosure mechanism. During this initial period, issuers would have flexibility to make case-by-case determinations to withhold, aggregate or otherwise modify the asset-level data fields (with relief

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should be able to communicate with a CRA and, by extension, to actual and potential investors, in order to effectuate a securitization.

from omissions liability), but then would be required to disclose the full Offering and Reporting Data Files, either through their own websites or through any CRA-based disclosure mechanism that may have been established by that time.

We continue to appreciate the Commission's efforts to promote more efficient and transparent ABS markets and to facilitate dialogue on its regulatory proposals. The Associations' staff and members remain available as a resource to the Commission upon request. We would be glad to discuss these proposals with the Commission in greater detail and to answer any questions that you may have.

Should you have questions, or desire additional clarification of the matters discussed in this letter, please do not hesitate to contact Chris Killian at 212-313-1126 or ckillian@sifma.org, or Richard Foster at Richard.Foster@FSRoundtable.org.

Sincerely,

Christopher B. Killian
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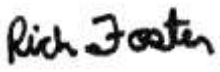

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