afme/esf

2 August 2010

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

Re: Proposed rule for revisions to Regulation AB and other rules regarding the offering process, disclosure and reporting for asset-backed securities, File number S7-08-10

Dear Ms. Murphy,

On behalf of the Association for Financial Markets in Europe / European Securitisation Forum (**AFME / ESF**), described in Annex I, we welcome the opportunity to provide input with respect to the proposed rule for revisions to Regulation AB and other rules regarding the offering process, disclosure and reporting for asset-backed securities (the **Proposed Rule**) put forward by the Securities and Exchange Commission (the **Commission**).

Our response focuses on the key considerations raised by the Proposed Rule from the perspective of European market participants. As such, the comments set out below relate primarily to matters which present particular challenges for European transactions. This response has been prepared by a working group of AFME / ESF members comprised primarily of issuers/originators, arrangers and legal advisers. In particular, representatives of the investors group of AFME / ESF members did not participate in the drafting of this letter. As such, this response may not reflect the views of all AFME / ESF members.

We wish to stress the global nature of the asset-backed market and the corresponding issues which would arise if the Commission adopted changes which did not take account of the views of non-U.S. market participants. While the Proposed Rule focuses on U.S. originated transactions in a number of respects, the proposals are equally relevant in the context of European (and other non-U.S.) originated transactions to the extent that such transactions involve an offering of securities into the U.S. In particular, the proposed changes to the disclosure requirements to be applied in the context of offerings conducted in reliance on Rule 144A or Regulation D are potentially significant to a wide range of European issuers. The importance of the Rule 144A offering regime to the European asset-backed market should not be underestimated. Although it is difficult to provide precise figures as to the level of reliance on Rule 144A by European market participants given the private nature of the market, industry estimates (calculations by AFME and SIFMA, based on Dealogic data) suggest that up to 25% of total issuance of European originated securitisations was offered in reliance on Rule 144A prior to the financial crisis. Moreover, the Rule 144A regime has played an important role in the success of recent UK originated RMBS issues and, as such, has assisted with raising confidence levels in the market.

Association for Financial Markets in Europe
St. Michael's House, 1 George Yard, London EC3V 9DH T: +44 (0)20 7743 9300 F: +44 (0)20 7743 9301
www.afme.eu

Notwithstanding the European focus of this response, it should be noted that our members have expressed significant concerns relating to more general matters referred to in the Proposed Rule. In this regard, our working group members (comprised primarily of issuers/originators, arrangers and legal advisers) support many of the general concerns raised by the dealer and sponsor members of the Securities Industry and Financial Markets Association (**SIFMA**) in the response provided by SIFMA to the Proposed Rule, subject to the comments set out in this response.

We would be happy to discuss our response with you at your convenience.

1. Executive Summary

As a starting point, AFME / ESF supports the Commission's efforts to improve investor protection and promote more efficient asset-backed markets. Our members recognise that appropriate disclosure and reporting standards are key measures to facilitate effective risk identification, assessment and management in respect of securitisations by investors and other market participants. We therefore acknowledge and support the general need to reconsider current prospectus disclosure and reporting standards with the ultimate aim of restoring confidence in the securitisation market.

We encourage the Commission to ensure that any changes made to the current disclosure and reporting regime do not give rise to uncertainty for market participants. In our view, a lack of coordination with other relevant authorities and/or the adoption of unclear requirements, or requirements which conflict with local (non-U.S.) laws, may result in compliance uncertainty. In the context of the Proposed Rule, we are particularly concerned that potential inconsistencies between the Commission's proposals and other reform initiatives also targeted at improving ABS disclosure and reporting may result in significant compliance challenges and increased costs for European market participants. These inconsistencies raise concerns given the importance of regulatory equivalence in general and the need to preserve a level playing field for all market participants. In this regard, we recommend that any final rules adopted by the Commission allow some flexibility for non-U.S. originated transactions to accommodate local laws and regulatory initiatives and relevant transaction structures and products. For example, it would be helpful if flexibility was provided to permit the satisfaction of certain requirements (such as those relating to the provision of loan level information) by the provision of the relevant information in compliance with any local or other relevant requirements and also to permit necessary adjustments to the requirements to reflect the information available outside of a U.S. context.

Moreover, we encourage the Commission to acknowledge the fundamental differences between asset-backed securities and other structured finance products, on the one hand, and covered bonds, on the other. While a substantial covered bond market has yet to develop in the U.S., covered bonds represent a significant funding source in Europe. Application of the Proposed Rule to covered bonds would have a disproportionate effect on European market participants and would result in a

regulatory regime that is inconsistent with previous views taken by regulators in other jurisdictions.

2. Detailed comments

Our detailed comments with respect to the Proposed Rule are set out below.

- ***Conflict with non-U.S. laws*** – compliance with the disclosure and reporting requirements contemplated by the Proposed Rule would give rise to certain non-U.S. legal considerations and potentially to certain legal conflicts. In particular, we note that compliance with the Proposed Rule by foreign issuers would conflict in certain circumstances (particularly in the context of deals backed by consumer assets) with bank secrecy and/or data protection laws in place in some European jurisdictions. The EU Data Protection Directive (which has been implemented throughout the EU) restricts certain data processing activities (including information transfers) in respect of personal data, which is widely defined as data relating to a living individual who can be identified from that data. In circumstances where a number of data inputs are provided with respect to underlying consumer assets, it can be difficult to ensure that such data is sufficiently anonymised and does not result in the provision of personal data. In addition, strict bank secrecy regimes in place in certain EU countries (including Germany and France) further restrict the disclosure of personal data (even when anonymised) to third parties unless certain requirements are satisfied. Such requirements include the provision of confidentiality undertakings by relevant third party recipients, which is not consistent with public disclosure as contemplated by the Proposed Rule. Non-compliance with data protection and/or bank secrecy laws may result in significant sanctions, including criminal liability. Certain European authorities (such as the ECB, the BoE and the European Commission) have recently acknowledged the tension between asset-level disclosure and the bank secrecy and data protection laws referred to above, although a solution has not yet been put forward. Borrower information, such as credit bureau score information, may also be treated as confidential.

- ***Coordination with other disclosure and reporting initiatives to avoid conflicting requirements*** – we note that a number of regulators and other authorities in the U.S., Europe and elsewhere have recently put forward proposals related to ABS disclosure and reporting standards. In particular, detailed proposals have been published by each of the Bank of England (**BoE**) and the European Central Bank (**ECB**). These proposals are framed as eligible collateral requirements to access central bank financing and it is expected that they may become market standard for all European securitisations. Our members have been active in engaging directly with the BoE and the ECB to assist with the development of the proposals, including the development of corresponding standardised reporting templates. Significant work has already been done to advance these projects and to develop disclosure and reporting standards which reflect the reality of the European market.

- At the moment, there are important differences between the disclosure and reporting requirements contemplated by the Proposed Rule and each of the central bank proposals mentioned above. A preliminary examination of the proposed reporting templates indicates that it is very difficult to compare the initiatives as each one reflects the data fields and terminology commonly used in the relevant jurisdiction of origin and the meaning of certain key terms is not harmonised. Some definitions are jurisdiction-specific and even, in certain cases, originator specific (for example, arrears and past due loans). In addition, there are inconsistencies between the various proposed requirements relating to when the relevant information should be provided and how such information should be presented.

- It should also be noted that, following on from the final recommendations on ABS disclosure published by the International Organisation of Securities Commissions (**IOSCO**) in April 2010 and given the recent focus on the EU Prospectus Directive (**PD**) regime by the European authorities, it is expected that a formal review of the ABS disclosure requirements will be undertaken soon under the PD. This review may extend to matters relating to loan-level information disclosure and may conflict with any requirements adopted by the Commission. In the absence of a mutual recognition and acceptance policy between the different authorities, any inconsistencies between the requirements imposed by such authorities will result in significant compliance challenges for European market participants.

- ***Potential inconsistencies with European prospectus disclosure regime*** – the proposed changes to the disclosure requirements for offerings conducted in reliance on Rule 144A or Regulation D would involve modifying the communication and offering process for relevant transactions. In particular, the communication and offering process would have to be adjusted to accommodate the required separate filings of asset-level information and cashflow waterfall programmes on EDGAR, with provision for such filed information to form part of the prospectus. Although the U.S. securities offering regime, which applies in the context of SEC-registered offerings, already provides for the filing of written communication during an offering in addition to the prospectus, such filings are not contemplated by the EU PD regime which requires all material information to be disclosed via the prospectus.

- Given the nature of the additional information which would be required to be disclosed under the Proposed Rule, it would be difficult for such information to be included as part of the prospectus itself. While the PD regime refers to the incorporation of information into the prospectus by reference, competent authorities in different member states have adopted different requirements and restrictions on the information which may be incorporated by reference. Under the current regime, in the absence of a derogation from the relevant competent authority, it would not be possible for information filed with the Commission to be incorporated either directly or by reference in certain member states where asset-backed securities are commonly listed.

- ***Uncertain application for European transactions*** – the Proposed Rule draws on and refers to certain transaction parties, data reporting fields and other concepts that are specific to the U.S. securitisation market. In certain cases, such terms and concepts lack a direct European equivalent and, as a result, there is significant uncertainty as to how the proposed requirements may be satisfied in the context of a relevant foreign transaction. We note that underlying assets (e.g. mortgage products) can vary significantly between European jurisdictions. Therefore, any new disclosure and reporting requirements are likely to present challenges for European market participants to the extent that such requirements require the use of a standardised template without the flexibility to accommodate local products and practices.

- Moreover, certain European transaction structures do not fit easily with terms and concepts referred to in the Proposed Rule. For example, the "sponsor" concept is appropriate in a U.S. context but does not appear to work in the context of certain common EU structures, such as a secured loan transaction, which does not involve a transfer of assets. In general, the proposals do not acknowledge non-U.S. transaction structures (e.g. UK mortgage master trust structures, which differ significantly from common U.S. standalone trust structures). Without provision for some flexibility to reflect local parties, transaction structures and product types, European market participants will struggle to comply with the proposed requirements, which may operate as an effective barrier to offerings in the U.S. of European issues.

- Such a barrier would create an uneven playing field for European issuers and may result in significant disruption in the already fragile European ABS market. We note that the Commission has previously worked with European market participants (e.g. in the context of Regulation AB) to appropriately apply U.S. specific concepts and terms in the context of non-U.S. transactions. It would be helpful if the Commission would consider adopting a similar approach with respect to the Proposed Rule, in order to reduce the uncertainty regarding its implementation.

- ***More onerous compliance burden for European transactions*** – features and practices prevalent in the European securitisation market may make compliance with certain requirements under the Proposed Rule more onerous for European market participants. For example, the relatively limited use of third party servicers in the European market arguably makes compliance with reporting requirements more difficult – as such requirements will need to be factored into each relevant originator's systems and procedures directly, rather than being addressed via adjustments to a third party servicer's systems.

- In addition, the provision of loan-level information has not been common practice in the context of European transactions to date, while a loan tape is commonly made available – in the context of certain asset classes (e.g. mortgages) – to investors in the U.S. securitisation market. Accordingly, European market participants are less likely to have existing reporting systems and operations in place to provide such information and would

therefore incur additional costs in complying with the new requirements. While there are a number of regulatory and other initiatives in Europe aimed at introducing enhanced asset-level disclosure requirements, these initiatives have not been finalised and are inconsistent in a number of respects with the requirements contemplated by the Proposed Rule: therefore, compliance with these other initiatives, if adopted, would not satisfy the Proposed Rule (see below for further discussion of this).

- The provision of static pool data with respect to prior securitised assets is also not market standard in Europe. Such information by its nature may be difficult to interpret in certain circumstances (e.g. if origination policies have subsequently changed over time, the performance of past vintages may not provide useful information as to the expected performance of the securitised pool of assets), even if accompanied by the proposed narrative description. European originators may struggle to comply with this requirement since the relevant information may be confidential and/or may not be available for all relevant periods. Some countries in Europe impose strict legal obligations of confidentiality on originators regarding their customers' personal data (discussed further above). Similar concerns arise in respect of proposals to provide information relating to historical asset and servicing performance.

- The issue of confidentiality may also be a concern in the context of transactions involving existing commercial loan assets as it is not uncommon in the European loan market for corporate loan arrangements to include information disclosure restrictions (and such restrictions typically will not include relevant carve-outs) and necessary borrower consents may be difficult to obtain. In general, we would encourage the Commission to ensure that the requirements contemplated by the Proposed Rule do not run counter to regulatory equivalence and the preservation of a level playing field for non-U.S. market participants.

- ***Major compliance challenges for ABCP structures; restriction of the ABCP market may lead to funding and liquidity instability*** – compliance with the disclosure and reporting requirements contemplated by the proposed changes to Rule 144A would be extremely difficult in the context of asset-backed commercial paper (**ABCP**) structures given that the securities are usually backed by asset pools that revolve and/or are comprised of a number of different types of assets.

- In addition, the short-term nature of the securities and the relative frequency of issuance would result in the imposition of a more onerous regime in practice for ABCP issuers compared to issuers of term securities, without clear benefit for investors. Our members have also raised concerns about the feasibility from a cost and resource perspective of the relevant information being provided in the context of ABCP backed by trade receivables originated by relatively unsophisticated operating companies, and with respect to the potential corresponding liability considerations for ABCP issuers/sponsors.

- More generally, it is not clear how certain proposed requirements should operate in an ABCP context (e.g. the provisions relating to static pool data and waterfall computer programmes). The ABCP market in Europe and the U.S. is an important source of low cost short-term financing for operating businesses of all kinds, from industrial companies to finance and service companies, as well as providing a vital liquidity tool for bank sponsors. According to statistics publicly available in the AFME / ESF Securitisation Data Report (sources: Dealogic, Moody's Investors Service, AFME and SIFMA), as at March 2010, ABCP conduits had outstandings of US$ 294.4 billion (in the U.S.) and US$ 13.5 billion (in Europe). Given the significant practical issues presented by the application of proposed Rule 192 in respect of ABCP, we are concerned that application of the proposed changes to relevant structures will cause ABCP conduits to pull out of the market, thereby removing a significant source of financing to businesses and consumers. ABCP market practice already provides for appropriate disclosure of the programme, typically comprising offering documentation supplemented, on an ongoing basis, by detailed monthly investor reports.

- We are firmly of the view that the manner and content of disclosure in the ABCP market should continue to be market driven. To the extent that changes are made which apply to ABCP, such changes should focus on reporting requirements and should be appropriately tailored to the needs of the ABCP market. Lastly, we note that the current U.S. securities law regime provides for certain exemptions for ABCP and so provision for similar adjustment in the context of any changes adopted under the Proposed Rule would represent a consistent approach.

- ***Similar disclosure requirements should not be adopted under Regulation S*** – the Proposed Rule requests feedback on whether the Commission should also adopt changes under Regulation S similar to those proposed under Rule 144A and Regulation D to cover sales of structured finance products outside the U.S.

- As a starting point, 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 general mandate of the Commission itself and has shaped the current U.S. securities offering regime. Given this background, the adoption of changes under Regulation S would be inconsistent from a policy perspective with the wider U.S. legislative and regulatory framework. Such an approach would also interfere with the operation of the securities offering regimes established by non-U.S. competent authorities worldwide. On this basis, we believe that it would be inappropriate for the Commission to adopt changes under Regulation S, particularly in respect of category 1 securities, and we assume that the relevant feedback request in the Proposed Rule should not be read in such a wide manner.

- ***Inconsistent risk retention requirements may result in excessively burdensome and costly consequences*** – the Commission's proposed risk retention requirement for shelf eligibility is significantly different from the risk retention provisions which come into effect under the EU Capital Requirements Directive at the end of 2010. In particular, key differences include the entity which may hold the retained interest and the manner in which the interest may be held (i.e. the EU requirements permit the interest to be held by way of vertical slice, seller share, first loss position or randomly selected equivalent exposures held on balance sheet). Moreover, the European requirements are framed as a restriction on EU regulated credit institutions from taking on the credit risk of a securitisation position, unless the originator, sponsor or original lender discloses that it will retain the required interest. It is possible that U.S. and EU originators alike will be required to comply with both the European retention requirement and any retention requirement adopted by the Commission. This may give rise to unnecessary duplication along with corresponding additional costs which may effectively discourage market participants from seeking shelf registration and negatively impact the efficiency of the global securitisation market. We encourage the Commission to confirm that retention in accordance with the EU requirements (if applicable) would be sufficient for the purposes of satisfying any requirements adopted by it. Lastly, we wish to confirm our support for both of the proposed retention holding options put forward by the Commission (i.e. the vertical slice and the seller share options).

- ***Reduced flexibility for mortgage master trust issuers*** – the proposals refer to the amendment of the definition of "asset-backed security" under Regulation AB such that current exemptions to the discrete pool requirement would no longer extend to non-revolving asset master trusts. As noted in the Proposed Rule, the proposed change would result in mortgage master trusts (including the structures commonly used in the UK) no longer being eligible for shelf registration (although it would still be possible for such transactions to be publicly offered in the U.S. using a new registration statement for each offering). European market participants are concerned that the proposed change would reduce the ability of mortgage master trust issuers to place their bonds in the U.S. market. Given the success of recent UK master trust issues and the corresponding apparent investor appeal of the product, changes, which effectively reduce the efficiency of issuances under master trust programmes, may go against the Commission's stated general goal of improving overall efficiency of the asset-backed market.

- ***Uncertainty as to appropriate disclosure standard for UK mortgage master trust issues involving a U.S. offering in reliance on Rule 144A*** – as noted above, the Proposed Rule considers the imposition of new disclosure requirements for offers, sales or resales of structured finance products in reliance on Rule 144A or Regulation D. Given that proposed changes would impact on the classification of UK mortgage master trusts as "asset-backed securities" for the purposes of Regulation AB, there may be some uncertainty as to how the proposed amendments to Regulation AB should be factored in

(if at all) in determining the level of disclosure required for UK mortgage master trust issues involving a U.S. offering in reliance on Rule 144A.

- While it is clear that the general disclosure standard of materiality should apply in the context of such issues, the de-linking of the Regulation AB "touchstone" for disclosure may create some confusion. Notwithstanding this, given the nature of UK mortgage master trusts, we wish to make it clear that we consider that it would be inappropriate to apply the proposed amended Regulation AB disclosure requirements to UK mortgage master trusts without adjustments similar to the ones currently adopted by the Commission under Regulation AB. For example, loan-level information is arguably less relevant for a UK mortgage master trust, given the number of individual loan exposures which may be involved (more than 500,000 in some trusts) and that such loans in the securitised pool can continuously change (albeit the new loans are required to demonstrate certain common characteristics in accordance with the terms of the transaction documents). Market participants would face significant operational challenges if a disclosure standard based on the proposed amended Regulation AB was applied without appropriate adjustment in the context of UK mortgage master trusts offered in reliance on Rule 144A. Similar concerns have been raised with the BoE and other authorities in respect of the European initiatives put forward to date.

- We note that the Commission has proposed allowing standarised group account data in the context of ABS backed by credit card pools due to the relative granularity of the asset pools involved. We consider that similar flexibility is justified for other securitisations involving highly granular asset pools, such as UK mortgage master trusts.

- ***Uncertainty as to application of proposed changes to Rule 144A regime to covered bonds*** – as a result of the broad definition of "structured finance product" used in the Proposed Rule, the industry has raised questions about the position of covered bonds. In this regard, we encourage the Commission to recognise the fundamentally different nature of covered bonds from traditional asset-backed securities and, as a result, to not seek to apply the Proposed Rule to covered bonds.

- Covered bonds are full recourse debt instruments typically issued by an EU credit institution that are fully secured or "covered" by a pool of high-quality on-balance sheet collateral (e.g. residential or commercial mortgage loans or public sector loans). The majority of European covered bonds are issued under specific legislative frameworks which implement the defining characteristics of covered bonds set out in Article 22(4) of the EU UCITS Directive. Covered bonds differ from traditional asset-backed securities in a number of key ways. Firstly, covered bonds are full recourse with respect to the issuer. Secondly, covered bonds are typically not tranched. Thirdly, the way they are rated is linked to the credit quality of the issuer and based on asset liquidation rather than run-off. In addition, covered bonds benefit from protections (imposed by legislation or structural and contractual arrangements) aimed at ensuring that asset pool capability tests are satisfied

and that the cover pool is available on a priority basis to pay covered bondholders. Such protections are taken one step further in the case of UCITS Directive-compliant covered bonds, as the specific legislative framework under which the bonds are created allows for public supervision by local authorities.

- Covered bonds and asset-backed securities are fundamentally different products. We believe that the proposed changes should not be applied in the context of covered bonds offerings conducted in reliance on Rule 144A. We encourage the Commission to provide clarification on its position in order to avoid any confusion in the market.

- ***Authorities have recognised differences between covered bonds and asset-backed securities; different approach may affect stability of European market*** – it should be noted that grouping covered bonds with asset-backed securities would be a departure in general from the approach adopted by other regulatory authorities. To date, with limited exceptions, authorities have recognised the differences between covered bonds and traditional asset-backed securities in a number of EU Directives and other legislative initiatives. For example, in keeping with Basel II, the Capital Requirements Directive defines securitisation in a manner which turns on the tranching of credit risk, effectively excluding the majority of covered bonds which are typically single tranche. Moreover, in recognition of the significance of the issuer's credit in the case of covered bonds (like other full recourse instruments), the EU Prospectus Directive expressly provides for disclosure of covered bond transactions on the basis of requirements applicable to bank issuer bonds rather than asset-backed securities.

- The ECB clearly differentiates between covered bonds and asset-backed securities under its eligible collateral requirements by applying more onerous reporting requirements in respect of the latter. As an exception to this, we note that the BoE has proposed new disclosure and reporting requirements as part of its eligibility criteria which are proposed to apply equally to covered bonds and asset-backed securities. The BoE's approach in this regard is arguably inconsistent with the approach of many covered bond investors, who typically regard covered bonds as a separate product and require different levels of disclosure as a result.

- We note that covered bonds have proved to be an invaluable funding tool for EU credit institutions during the financial crisis. We would encourage the Commission to consult EU regulators as well as industry participants on the specific features of covered bonds prior to taking any action which may affect the stability of this important funding market for European institutions.

Thank you once again for the opportunity to comment on the Proposed Rule. Should you have any questions or seek additional information regarding any of the comments set out above, please do not hesitate to get in touch with the undersigned.

Rick Watson
Managing Director
Chief Operating Officer
Association for Financial Markets in Europe / European Securitisation Forum

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 November 1st 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 U.S. Securities Industry and Financial Markets Association (SIFMA) and the Asia Securities Industry and Financial Markets Association (ASIFMA). For more information, visit the AFME website, www.AFME.eu.