21 August 2013

European Banking Authority
Tower 42
25 Old Broad Street
London EC2N 1HQ
UK
By email: EBA-CP-2013-14@eba.europa.eu

RE: Public Comment on European Banking Authority Consultation Issued May 22, 2013 regarding proposed Regulatory Technical Standards in relation to risk retention (EBA/CP/2013/14)

The Structured Finance Industry Group ("**SFIG**") appreciates the opportunity to comment on the consultation paper (the "**Consultation**") issued May 22, 2013 by the European Banking Authority (the "**EBA**") regarding revised proposed securitization regulations for the European Union. SFIG was created to be a broad-based, member-directed non-profit organization dedicated to providing education and advocacy on matters relating to the structured finance, securitization and related debt capital markets, and to providing a forum for exchanging ideas and career development for members.[1] Our views as expressed in this letter are based on feedback received from our broad membership.

We recognize that the level 1 text of the Capital Requirements Regulation (the "**CRR**") is final and has been published in the Official Journal and that the Regulatory Technical Standards (the "**RTS**") concerning risk retention requirements, which are being drafted by the EBA, must operate within, and may not contravene, the boundaries of the CRR. The comments provided herein are intended to highlight the concerns of our members in respect of the RTS as currently drafted in the Consultation.

I. Introduction and Background

The Consultation is a component of an overarching effort by the European Union to reform securitization markets in the wake of the 2007 global economic crisis.[2] The Consultation suggests that situations involving potential misaligned interests among various market participants contributed to a loss of investor confidence in securitization products and constitute

---

[1] Structured Finance Industry Group, "FAQs" (available at http://www.sfindustry.org/uploads/SFIG_FAQ_070813.pdf).

[2] European Banking Authority Consultation Paper (EBA/CP/2013/14): Draft Regulatory and Implementing Technical Standards on securitisation retention rules, issued May 22, 2013 at 5.

a further barrier to the full recovery of global financial markets.[3] Furthermore, the G20 Leaders' statement from its September 2009 Pittsburgh Summit as well as both the September 2009 and November 2012 reports of the International Organization of Securities Commissions ("**IOSCO**") have highlighted retention of risk in securitization products as being an area in need of reform.

Until the issuance of the recent Consultation, risk retention requirements in the European Union were governed by Article 122a of the EU Capital Requirements Directive ("**Article 122a**"). The implementation of Article 122a was heavily informed by extensive guidelines ("**Guidelines**") that had been published by the EBA's predecessor, the Committee of European Banking Supervisors, in December 2010 along with an associated EBA Q&A published in September 2011. Following the CRR coming into effect on January 1, 2014, risk retention requirements in the European Union will be governed by Articles 404-410 ("**Articles 404-410**") of the CRR and the RTS. In the United States, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**"), passed into law in 2010, adds new regulatory frameworks for, among other things, securitizations, with the similar policy objective of stabilizing securitization markets. In particular, Section 941(b) of the Dodd-Frank Act generally requires a number of US regulatory agencies to jointly prescribe regulations that: (i) require a securitizer to retain not less than 5% of the credit risk of any asset that the securitizer, through the issuance of an asset-backed security, transfers, sells, or conveys to a third party; and (ii) prohibit a securitizer from directly or indirectly hedging or otherwise transferring the credit risk that the securitizer is required to retain. In April 2011, the US Federal Deposit Insurance Corporation, the US Federal Reserve Board of Governors, the US Office of the Comptroller of the Currency, the US Securities and Exchange Commission (the "**SEC**") and, with respect to the securitization of residential mortgage assets, the US Federal Housing Finance Agency and the US Department of Housing and Urban Development jointly issued a notice of proposed rulemaking to implement Section 941(b) of the Dodd-Frank Act (the "**US Risk Retention Proposal**").[4] This proposal has not yet been adopted and remains subject to change.

Article 122a and its successor Articles 404-410, while maintaining similar objectives to their counterpart US proposals, ultimately adopted very different policy approaches. While both approaches contemplate retention by sponsors or originators of 5% of the economic interest of a securitized asset pool, the key difference between the two approaches is that, whereas the US Risk Retention Proposal would place requirements on "securitizers"[5] for meeting risk retention requirements, Article 122a and its successor Articles 404-410 place the burden of compliance on certain regulated credit institutions and investment firms who are investors to obtain appropriate disclosures and ensure that risk retention requirements have been met by the sponsors and issuers of the securities they purchase.

---

[3] Specifically, the Consultation aims to deter "situations where certain participants in the securitization chain have incentives to engage in behavior which, while furthering their own interests, is not in the interest of – and may be detrimental to – others in the securitization chain or the broader efficient functioning of the market".

[4] *See* Proposed Rules: Credit Risk Retention, 76 Fed. Reg. 24,090 (Apr. 29, 2011) (available at http://edocket.access.gpo.gov/2011/pdf/2011-8364.pdf).

[5] For purposes of the proposed U.S. risk retention regime, the term "securitizer" means: "(A) an issuer of an asset-backed security; or (B) a person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuer." *See* 15 U.S.C. 78o–11(a)(3).

With the issuance of the Consultation, there is now a real possibility to reduce cross-border transactional frictions. We recommend that the opportunity created by the Consultation's issuance be used to more closely harmonize EU, US and other securitization regulation regimes, thereby reducing, rather than exacerbating, the pressure placed on the securitization markets from non-aligned regulatory structures. To accomplish this, we recommend adopting a framework for "passporting" other risk retention regimes, which recognizes that regulators in the major jurisdictions around the world share similar policy objectives, and applies similar regulatory methods to achieving these objectives. Recently, in other contexts, both the US Commodity Futures Trading Commission ("**CFTC**") and the SEC have reaffirmed their interest in cooperating closely with regulators in the European Union and other counterparts to encourage greater harmonization of their respective regulatory regimes.[6] It would therefore seem to be an opportune time for the EBA to seek to reduce challenges and complications of regulatory non-alignment for cross-border securitization transactions that have significant potential to inhibit or preclude beneficial economic activity.

II. Industry benefits from harmonization of regulatory approaches to risk retention

A. Benefits of Regulatory Harmonization

The draft RTS will be a Commission regulation and therefore, according to EU law, will be binding in its entirety and directly applicable in all EU member states. This approach ensures a level-playing field across the European Union by preventing divergent national interpretations in transposition, thereby facilitating the cross-border provision of EU financial services.

Greater harmonization of regulatory approaches to risk retention and securitization would benefit the real economy as well as the securitization industry and the structured debt markets generally. Securitization is well known as a vehicle for economic recovery.[7] It is an efficient tool for capital-raising and risk transfer from originators of financing products, which can drive growth in the real economy, to the capital markets. Due to the global nature of our financial system, securitization, in order to be most effective, requires seamless operation across borders.

Cross-border marketing of securitizations allows originators of credit facilities provided to consumers and businesses to finance in an efficient and cost-effective manner a wide range of

---

[6] The CFTC's efforts have primarily been focused in the area of derivatives, with a special emphasis on regulations relating to transparency and risk mitigation, in order to minimize opportunities for regulatory arbitrage. U.S. Commodity and Futures Trading Commission, Release 6640-13 "The European Commission and the CFTC reach a Common Path Forward on Derivatives" published July 11, 2013 (available at http://www.cftc.gov/PressRoom/PressReleases/pr6640-13).

The SEC has recently signed a Memorandum of Understanding with a number of EU member state regulators to enhance clarity in regulations pertaining to the asset management industry. "SEC, European Regulators Establish Supervisory Cooperation Arrangements Related to the Asset Management Industry". Release 2013-131 published July 19, 2013 (available at http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539728294).

[7] *See, e.g.*, IOSCO, Global Developments in Securitisation Regulation: Final Report, 9 (Nov. 16, 2012) (available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD394.pdf).

assets that can drive real economic growth (such as auto loans, residential and commercial mortgages, and credit card receivables) by offering securities backed by pools of these assets to a broad range of domestic and international investors. The capital markets are able to accomplish better price discovery when as many originators of credit as possible have access to as many potential investors as possible, and vice versa. Sophisticated investors such as credit institutions, investment firms, insurance companies, pension funds and money managers benefit from being able to select from the widest range of investments, including securitized investment products, which best match their investment objectives, thereby enabling them to maintain well-diversified portfolios with wide risk exposures. As banking institutions are increasingly constrained in the amount and type of credit they can supply, the ability of these other investors to provide an alternative source of financing for consumers and businesses is highly dependent upon seamless cross-border capital markets. The transactional challenges and complications resulting from non-aligned regulatory regimes can cut off potential options to investors and impede price discovery and efficiency. Given the powerful benefits which accrue to open, unhindered capital markets, absent compelling domestic policy considerations, pragmatic alternatives to inconsistent national regulatory regimes should be considered in order to facilitate the operation of efficient international capital markets.

Given the similar policy objectives of the proposed EU and US regulatory structures relating to securitization, objectives which are shared globally by other regulators, it is difficult to justify increasing transactional frictions (such as increased costs of compliance and loss of flexibility) caused by two potentially inconsistent regulatory regimes, that unintentionally may limit the amount, and increase the cost, of credit available to consumers and businesses.

B. Risk Retention

Particularly in the area of risk retention, the differing regulatory approaches proposed to be taken by the European Union and the United States will likely cause significant problems in cross-border securitizations. The differing characteristics of the US and European markets and the differing characteristics of the securitization structures typically utilized in these markets have led to differing regulatory approaches aligned with the most common structures seen in the respective markets. The effect of such differing regulatory approaches would be that securitizers in Europe, the United States, and elsewhere seeking to sell asset-backed securities ("**ABS**") to foreign investors would need to comply simultaneously with non-aligned risk retention requirements of multiple jurisdictions.

The complexity of complying with multiple sets of risk retention regulations could effectively prevent some transactions from occurring at all, which is precisely the opposite desired result of a robust global capital market. For example, compliance with the EU risk retention requirements, as proposed in the Consultation, risks directly conflicting with the proposed "Volcker Rule" in the United States.[8] Many global financial institutions based in

[8] *See* Proposed Rules: Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 76 Fed. Reg. 68,846 (Nov. 7, 2011) (available at http://www.gpo.gov/fdsys/pkg/FR-2011-11-07/pdf/2011-27184.pdf). These proposed regulations would implement Section 619 of the Dodd-Frank Act, which generally prohibits US regulated banking entities from engaging in proprietary trading or from acquiring or retaining an ownership interest in, sponsoring, or having certain relationships with certain funds (which may include securitizations), subject to certain exemptions. A narrow exemption that would exclude some securitizations from the scope of these prohibitions has been

Europe (and elsewhere) would be subject to this rule, which would prohibit them from holding certain fund interests (including some types of securitizations).[9] Even where securitizers are able to comply with multiple sets of regulations and the attendant costs which accompany such compliance, it is very likely that such costs ultimately will be passed on to consumers and the real economy. Further, even if costs are manageable, navigating inconsistent sets of risk retention regulation will introduce unnecessary rigidity and discourage innovation in the securitization marketplace.

i. Retention Mechanisms

Under the US Risk Retention Proposal, securitizers offering ABS to US investors may choose to satisfy one of a number of proposed credit risk retention mechanisms, tailored to meet the needs of specific asset classes. These include vertical, horizontal, retention by a sponsor of a representative sample and several asset-specific types of retention. In contrast, Article 122a, and its successor Articles 404-410, adopt a more limited approach.

Accordingly, the resulting inconsistencies between the proposed US and EU risk retention mechanisms could have adverse consequences for various securitized investment products, including asset-backed commercial paper programs, managed collateralized loan obligations ("**CLO**s"), commercial mortgage-backed securities ("**CMBS**"), and certain "qualifying" residential mortgage backed securities ("**RMBS**"). For example, with respect to CMBS offerings, proposed US regulations would allow an originator to meet its risk retention requirements via a third-party buyer. By contrast, a third-party buyer arrangement is not permitted under the RTS contained in the Consultation.

ii. "Qualified Assets"

The divergence between the proposed US and EU risk retention requirements may be particularly problematic with respect to ABS offerings collateralized by qualified residential mortgages ("**QRMs**") and certain other "qualified" high-quality assets. Under the US Risk Retention Proposal, such offerings would be exempt from risk retention requirements (as they would be considered high quality assets), while such offerings would still be subject to risk retention requirements in the European Union. Accordingly, European investors would not be able to gain exposure to these segments of the US ABS market. Clearly, such a narrowing of the market for these types of securities would be detrimental to US homebuyers, mortgage and other lenders and European investors, and should be addressed before the respective regulatory regimes are finalized.

---

proposed and has not yet been finalized. It remains to be seen whether the exception, once finalized, will be broad enough to accommodate the practical needs of the cross-border securitization industry.

[9] In this regard, the exemption from Part Five of the CRR provided in Article 14(3) of the CRR would in many cases not be applicable because: (i) it only applies to subsidiaries of EU institutions and therefore this exemption would not be available to entities that do not have an EU parent, and (ii) it is only available to investors in a securitization and appears to not apply to the retention of a material net economic interest by an originator or sponsor that would be necessary for EU institutions to be exposed to the credit risk of a securitization.

iii. Retention on a Consolidated Basis

Paragraph 2 of Article 405 of the CRR allows the retention requirement to be met by examining the situation of each institution included within the scope of supervision on a consolidated basis. Paragraph 2 is limited to (a) groups including an EU parent credit institution, an EU financial holding company or an EU mixed financial holding company and (b) securitizations where more than one entity within the group is an originator or original lender. The Guidelines recognized, at Paragraph 71 thereof, that the ability to fulfill the requirements of Article 122a on a consolidated basis should also apply to originators or original lenders other than credit institutions. That is, entities that may be consolidated for accounting purposes but not for supervisory purposes. Furthermore Q21 of the EBA Q&A also provided that as long as the parent/affiliate of a collateral manager is consolidated at the group level, the retention requirement may be met by a parent/affiliate.

The proposed RTS refer to retention on a consolidated basis only in the circumstances provided for in paragraph 2 of Article 405 of the CRR and do not contain any provisions equivalent to those of paragraphs 71 of the Guidelines and EBA Q&A 21. As there is no discussion in the Consultation Paper regarding this, it is not clear what the EBA intends.

iv . Multiple Sponsors and Originators

Paragraph 29 of the Guidelines provided that in circumstances where the securitized exposures are those of multiple originators or original lenders, then retention of the net economic interest must be fulfilled by each original lender or originator with reference to the proportion of total securitized exposures in the securitization for which it is the originator or original lender – the requirement cannot be undertaken by one originator or original lender retaining a net economic interest while none of the other multiple originators or original lenders retain any net economic interest. EBA Q&A 16 went beyond paragraph 29 of the Guidelines and provided further flexibility by providing that an originator/sponsor can satisfy the retention requirement as long as this originator/sponsor has provided "the majority" of the portfolio in the securitization transaction and is involved in structuring the transaction, selecting the initial portfolio and defining the eligibility criteria and tests. This means that the originator/sponsor does not need to be the originator/sponsor in relation to the whole of the portfolio of loans, although would be required on an on-going basis to be involved in material changes to the deal including for example changes to eligibility criteria, tests or the appointment of a new collateral manager. This provided for flexibility in connection with the use of an originator SPV – so long as the majority of the loans were passed through the originator SPV, the originator SPV could satisfy the retention requirement and loans acquired during any ramp-up or reinvestment periods would not need to be passed through the originator SPV.

The proposed RTS restate the position in the Guidelines that where there are multiple originators, sponsors or original lenders, the retention must be fulfilled by each originator, in relation to the proportion of the total securitized exposures for which it is the originator, or by each original lender, in relation to the proportion of the total securitized exposure for which it is the original lender, or by each sponsor, in relation to the proportion of the total securitized exposures for which it is the sponsor. The proposed RTS does not include the interpretation contained in EBA Q&A 16. It may be that this interpretation is no longer to apply, but equally it may be that the EBA are in agreement with this interpretation. In the context of a sponsor, it

could also be difficult to ascribe a proportion of the total securitized exposures in the same way as is possible for originators and original lenders.

v. Disclosure Requirements

Under Article 409 of the CRR, originators and sponsors are required to ensure that prospective investors have readily available access to all materially relevant data on the credit quality and performance of the individual underlying exposures, cash flows and collateral supporting a securitization exposure as well as such information as is necessary to conduct comprehensive and well informed stress tests on the cash flows and collateral values supporting the underlying exposures. Article 23 of the draft RTS states that "materially relevant" data shall generally be perceived as loan-by-loan data but that there may be instances where data may be provided on an aggregate basis depending upon factors such as the granularity of the pool and whether management of the exposures is done on the basis of the pool itself or on a loan-by-loan basis. While the determination of what would constitute "materially relevant" data is inherently transaction and investor specific, we note that certain securitization transactions have customarily not included loan-level information because issuers have not considered such information to be materially relevant in the context of transactions involving highly granular asset pools (which would include, but not be limited to, ABS involving portfolios of credit card receivables or auto loans with relatively small balances).

We welcome the fact that these requirements are not overly prescriptive but rather adopt a principle-based approach. The obligations under Article 409 and Article 23 of the draft RTS have, however, the potential to conflict with obligations binding sponsors or originators as to the confidentiality or privacy of loan-level data and also any regulatory requirements relating to, for example, data protection, market abuse, and client relationships. While the comprehensive disclosure templates of the European Central Bank developed for securities to be eligible for the Eurosystem collateral framework promote standardization and transparency within Europe, we note that application of these disclosure standards could unduly prevent non-EU originators that are not readily able to provide such information from offering their ABS to EU investors. In addition, we are concerned about potential compliance challenges and significant costs for cross-border securitizations where comparable, but not identical, disclosure requirements are imposed by non-EU jurisdictions. Furthermore, we are sensitive to the fact that, in the context of certain publicly-issued securitization transactions, such as student loan ABS, and privately-placed securitization transactions (i.e., transactions that do not involve any public marketing), loan-level data has customarily not been required by regulators or market participants. In such contexts, loan-by-loan data should be considered not "materially relevant".

vi. "Passporting"

To mitigate the impact of differing regulatory approaches on cross-border securitizations, we recommend adopting a framework for passporting pursuant to which non-EU sponsors or originators of ABS offered at least in part in a non-EU jurisdiction that maintains comparable risk retention and, if applicable, portfolio disclosure requirements to those of the European Union ("**Qualified Non-EU Jurisdiction**") may choose to satisfy the European Union's risk retention and portfolio disclosure requirements by complying with the risk retention regime and any applicable portfolio disclosure rules of such Qualified Non-EU Jurisdiction. Specifically, we recommend that non-EU securitization transactions should be passported when:

- the ABS transaction complies with the risk retention regime and any applicable portfolio disclosure rules of a Qualified Non-EU Jurisdiction with respect to which the EBA has made a comparability determination;

- the ABS are also offered to persons in such Qualified Non-EU Jurisdiction; and

- the ABS are offered in the European Union pursuant to an offering document that: (a) contains an affirmative undertaking by the relevant non-EU sponsor or originator to retain a net economic interest in accordance with the risk retention regime of the relevant Qualified Non-EU Jurisdiction; and (b) provides portfolio disclosure in accordance with any applicable portfolio disclosure requirements (if any) of such Qualified Non-EU Jurisdiction.

A passporting regime can evaluate whether the risk retention regime and related disclosure requirements of a non-EU jurisdiction is comparable to that of the EU on a jurisdiction-by-jurisdiction basis in the future, as such other regimes (such as that in the United States) are finalized and become effective. Such a regime would be not only in keeping with principles of international comity but would also avoid costly, unnecessary regulation of ABS transactions when they are also subject to regulation that is comparable to EU regulations.

We would like to provide for your consideration the following brief summary of two examples of passporting regimes that have been proposed or adopted recently in the United States. These are the result of consultation and coordination efforts mandated by the Dodd-Frank Act intended to promote the establishment of consistent international standards with respect to the regulation of swaps and security-based swaps.[10]

1. The CFTC recently adopted a substituted compliance framework in connection in connection with specified regulatory requirements applicable to cross-border swaps.[11] A foreign regulator, an entity subject to CFTC regulation (or a group of such entities) or a trade association may apply to the CFTC for a determination that a non-US swap regulation regime is comparable and comprehensive. To make a comparability determination, the CFTC will evaluate whether the requirements of the non-US jurisdiction are comparable and comprehensive compared to the applicable US requirements, which will be based on a consideration of all relevant factors, including the comprehensiveness of the non-US regulator's supervisory compliance program and its authority to support and enforce its oversight with regard to the activities to which substituted compliance would apply. The CFTC has discretion to issue a comparability determination subject to various conditions and expects most comparability analyses to involve consultations with foreign regulators. In addition, the CFTC expects to enter into a memorandum of understanding or similar arrangement regarding information sharing and enforcement with the relevant non-US regulator in connection with making a comparability determination. If the CFTC issues a comparability determination with respect a particular jurisdiction, it will apply to all entities or transactions in such

[10] *See* Section 752(a) of the Dodd-Frank Act.

[11] *See* Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45,292 (July 26, 2013) (available at http://www.gpo.gov/fdsys/pkg/FR-2013-07-26/pdf/2013-17958.pdf).

jurisdiction, to the extent provided in such determination. The CFTC has already received, and is in the process of considering, substituted compliance applications with respect to the following jurisdictions: Australia, Canada, the European Union, Hong Kong, Japan and Switzerland.

2. The SEC has proposed its own version of a substituted compliance framework for four specified categories of regulatory requirements applicable to cross-border security-based swaps.[12] If adopted as proposed, this framework would permit a non-US registered security-based swap dealer to apply to the SEC for a determination that a non-US swap regulation regime is comparable to the SEC's rules. To make a comparability determination, the SEC would consider whether the requirements of the non-US regulatory system "are comparable to otherwise applicable requirements, after taking into account such factors as the [SEC] determines are appropriate, such as the scope and objectives of the relevant [non-US] regulatory requirements, as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised, by a [non-US] financial regulatory authority or authorities in such system to support its oversight of such [dealer]…."[13] The SEC would have discretion to issue a comparability determination subject to various conditions, and may make a determination with respect to only a subset of its rules or only certain classes of dealers. The SEC would only make a comparability determination after it enters into a supervisory and enforcement memorandum of understanding or other arrangement with the relevant non-US financial regulatory authority or authorities. If the SEC issues a comparability determination with respect a particular non-US regulatory system and a particular class of dealers under the proposed framework, then non-US dealers that are part of the relevant class would be able to rely on that determination to satisfy a specified US rules by complying with the corresponding requirement of such regulatory system, provided they satisfy any conditions specified in the relevant determination.

To the extent the EBA concludes that passporting would not be appropriate for certain cross-border offerings of ABS that are subject to a differing approach to risk retention in the relevant Qualified Non-EU Jurisdiction than they would be under Articles 404-410, we encourage the EBA to adopt a limited portfolio exception with respect to such offerings. For example, in the United States, as discussed above, QRM-backed securities are exempt from US risk retention requirements because they are considered to be high quality assets. We note that the EU risk retention regime as proposed in the Consultation does not provide for a comparable exemption. If such offerings were determined to not be eligible under a passporting regime, we suggest that regulated European investors could nevertheless be permitted to hold such investments, subject to reasonable portfolio limitations. Similarly, a limited portfolio exception could be permitted for high-quality ABS where the sponsor or originator is unable to retain an

---

[12] *See* Proposed Rule: Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, 78 Fed. Reg. 30,967 (May 23, 2013) (available at http://www.gpo.gov/fdsys/pkg/FR-2013-05-23/pdf/2013-10835.pdf) (the "SEC Proposal").

[13] §240.3a71–5 as proposed in the SEC Proposal.

interest in the ABS as contemplated in the RTS due to another jurisdiction's separate regulatory requirements (such as the US Volcker Rule).

vii. Sponsor Definition Constraints

The CRR and draft RTS make clear that the required retained interest in a securitization transaction must be held by a sponsor, originator or original lender of the securitization. If such interest retention requirements are to be satisfied by a sponsor, the sponsor must be a credit institution or EU investment firm. US (and other non-EU) CLO collateral managers are unlikely to be able to satisfy risk retention requirements under the CRR and RTS because they are unlikely to satisfy the proposed definition of "sponsor" under the rules as they are neither credit institutions nor EU investment firms. Investment firms, as defined, include Markets in Financial Instruments Directive (MiFID)-regulated portfolio managers but apparently not alternative investment fund managers either regulated under the Alternative Investment Fund Managers Directive (AIFMD) or non-EU investment advisers. As a result, it would appear that US managers (and other non-EU regulated managers) who are not MiFID-regulated managers may be unable to qualify as sponsors that fulfill the retention requirements as currently proposed. SFIG is concerned that such a result would create an unlevel playing field and place non-EU collateral managers at a competitive disadvantage relative to those based in the EU. The effect of this could be to limit investor choice, reduce innovation, and leave a limited number of large EU collateral managers in a relatively secure and protected position, in a market with high barriers to entry. It appears to us to be more appropriate from a policy perspective for all types of EU regulated entities and firms that are in compliance with any applicable regulations of their respective jurisdictions to be eligible to serve as sponsors.

C. Key Requests

The Consultation focuses primarily on updates to risk retention and presents a unique opportunity to reduce cross-border transactional frictions. The Consultation, itself a paper on the draft regulatory technical standards and draft implementing standards, was issued in respect to the capital requirements regulation which is planned to replace in its entirety Article 122a.

i. Retention on a Consolidated Basis

We would request that the EBA clarify that the ability under Paragraph 2 of Article 405 for the risk retention requirements to be satisfied:

a. does not only apply where there is a securitization of exposures from several credit institutions, investment firms or other financial institutions but also applies where there is only one such entity which is securitizing exposures, thus enabling this one entity to satisfy the risk retention requirements on a consolidated group basis; and

b. is not limited to solely EU entities, as again this creates an unlevel and anti-competitive playing field between EU and non-EU entities (even if they are subject to substantial equivalent regulatory supervision as EU entities) but rather that non-EU entities may also satisfy the risk retention requirements on a consolidated basis.

ii. Multiple Sponsors

We would request that the EBA clarify that:

a. an originator or original lender can satisfy the whole of the retention requirement as long as this originator/sponsor has provided "the majority" of the portfolio in the securitization transaction and is involved in structuring the transaction and defining the parameters pursuant to which future assets can be acquired; and

b. where there is more than one sponsor but where each can be said to have established and be managing the whole of the securitization, that one sponsor may satisfy the retention requirements on behalf of all the sponsors, or in the alternative that such sponsors may appropriately apportion the risk retention requirements as agreed between themselves.

iii. Disclosure Requirements

We request that the finalized RTS observe and provide clarity on the following points:

- The obligations under Article 409 and Article 23 of the RTS respect, and do not conflict with, any obligations binding sponsors or originators as to the confidentiality or privacy of loan level data and also any regulatory requirements relating to, for example, data protection, market abuse, and client relationships.
- In the context of certain publicly-issued securitization transactions, such as student loan ABS, as well as privately-placed securitization transactions (not publicly marketed), loan-by-loan data should be considered not "materially relevant" for purposes of Article 409 and Article 23 of the RTS.

iv. Passporting

To mitigate the impact of differing regulatory approaches on cross-border securitizations, we recommend adopting a framework for passporting pursuant to which non-EU sponsors or originators of ABS offered at least in part in a Qualified Non-EU Jurisdiction may choose to satisfy the European Union's risk retention and portfolio disclosure requirements by complying with the risk retention regime and any applicable portfolio disclosure requirements of such Qualified Non-EU Jurisdiction. Specifically, we recommend that non-EU securitization transactions should be passported when:

- the ABS transaction complies with the risk retention regime and any applicable portfolio disclosure rules of a Qualified Non-EU Jurisdiction with respect to which the EBA has made a comparability determination;
- the ABS are also offered to persons in such Qualified Non-EU Jurisdiction; and
- the ABS are offered in the European Union pursuant to an offering document that: (a) contains an affirmative undertaking by the relevant non-EU sponsor or originator to retain a net economic interest in accordance with the risk retention regime of the relevant Qualified Non-EU Jurisdiction; and (b) provides portfolio disclosure in accordance with any applicable portfolio disclosure requirements of such Qualified Non-EU Jurisdiction.

To the extent the EBA concludes that passporting would not be appropriate for certain cross-border offerings of ABS, we encourage the EBA to adopt a limited portfolio exception with respect to such offerings.

v. Sponsor Definition Constraints

Following the apparent reduction in the flexibility provided by the Guidelines and the related EBA Q&A, there are legitimate doubts regarding the continued viability of the cross-border CLO market. We urge the EBA to take into consideration the unintended negative impact on the real economy that would be triggered by this. We encourage the EBA, to the extent possible, to pursue changes that would permit all types of EU regulated entities and firms that are in compliance with any applicable regulations of their respective jurisdictions to be eligible to serve as sponsors.

Conclusion

SFIG is a strong supporter of EBA initiatives to strengthen the EU securitization markets so that the European Union plays a central role in the global financial marketplace. It is in this spirit that we have made the foregoing comments and recommendations. SFIG will work cooperatively with our various industry partners and regulatory agencies to provide constructive suggestions to promote the continued growth of securitization markets across borders.

Very truly yours,

Richard Johns
Executive Director