sifma®
Invested in America

October 21, 2019

Submitted electronically to Comments@FDIC.gov

Robert E. Feldman
Executive Secretary
Attention: Comments,
Federal Deposit Insurance Corporation
550 17th Street NW, Washington, DC 20429

Re: Response to RIN 3064-AF09: Securitization Safe Harbor Rule

Dear Mr. Feldman,

SIFMA[1] is pleased to provide these comments on the FDIC's proposal ("Proposal")[2] to revise the requirements of its Securitization Safe Harbor Rule ("Rule"). SIFMA's members are active participants in securitization markets, in particular as issuers, sponsors, and liquidity providers of securitization transactions.

In the Proposal, the FDIC indicates that *"the policy objective…is to remove unnecessary barriers to securitization transactions, in particular the securitization of residential mortgages, without adverse effects on the safety and soundness of insured institutions".*[3] SIFMA strongly supports this policy objective, and is pleased to see this objective being addressed in concert with other parts of the Administration.[4] The Proposal would remove requirements in the current Rule that require transactions to comply with the provisions of Regulation AB of the Securities and Exchange Commission ("SEC"), 17 C.F.R. 229.1100 *et. seq.* ("Regulation AB") even if Regulation AB does not apply to those transactions. SIFMA strongly supports this proposed change for the reasons set forth in section A of this letter.

In section B this letter we provide commentary on additional aspects of the Rule (that are beyond the scope of the Proposal) that hinder securitization by insured depository institutions ("IDIs"), and impediments created by regulatory capital standards that impair IDI securitization issuance and investment.

---

[1] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).
[2] Available here: https://www.govinfo.gov/content/pkg/FR-2019-08-22/pdf/2019-15536.pdf
[3] Proposal at 44733.
[4] See, e.g., U.S Treasury Housing Reform Plan (available here: https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf), U.S. Treasury Paper on Capital Markets (available here: https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf).

A. SIFMA Strongly Supports the Proposal

SIFMA strongly supports the Proposal as it would permit IDIs to sponsor private (non-GSE) residential mortgage-backed securities ("RMBS") using the Rule. There have been no public RMBS offerings in the U.S. since the amendments to Regulation AB that went into effect in November 2016 (such amendments, the "Regulation AB II Amendments", and Regulation AB, as so amended, "Regulation AB II") imposed asset level data ("ALD") disclosure requirements. Instead, RMBS issuers have been offering RMBS under Rule 144A of the Securities Act of 1933, as amended ("144A Issuances"), because many of the ALD disclosure fields are imprecisely defined (e.g., front-end and back-end DTI ratios), inconsistent with mortgage industry (MISMO) reporting standards, unavailable (e.g., appraisals, AVM and credit scores obtained by *any* transaction party or its affiliates) or cannot be included in publicly accessible securities filings without creating unacceptable legal and reputational risks for RMBS sponsors and privacy risks for borrowers.[5] The Proposal would allow IDIs to offer RMBS structured under the Rule in 144A or other unregistered issuances, the only currently viable offering form for RMBS in the U.S. market.

When the Regulation AB II Amendments were initially proposed they would have required the same disclosure to be provided to investors in 144A Issuances and placements pursuant to Rule 506 of Regulation D under the Securities Act of 1933, as amended, as would be required in registered offerings. SIFMA did not believe these provisions were necessary (and indeed believed they would harm securitization markets),[6] and ultimately the SEC declined to include them in the Regulation AB II Amendments. This outcome is consistent with the expectations of Rule 144A and other private placement market participants as those markets are for sophisticated counterparties who are able to negotiate their desired form and amount of disclosure. Indeed, in some respects Rule 144A and other private placement transaction disclosure can be superior to that of registered markets, in terms of the granularity or specificity of the information that is provided. The FDIC's unnecessary inclusion of the requirement that disclosure required for registered securitizations also be provided for private securitizations creates an insurmountable obstacle for on-balance sheet IDI sponsored RMBS and substantial disincentives for on-balance sheet IDI sponsored securitizations of assets other than residential mortgage loans. This should be corrected.

The Proposal would correct this situation and is justified for a number of reasons, including but not limited to the following:

- The Proposal is a logical approach that removes regulatory conflicts and is a step toward leaving the regulation of securitization disclosure to the regulator statutorily charged with that responsibility and accordingly best suited to that task;
- The Proposal removes a roadblock to increased RMBS activity by IDIs; and
- The Proposal is consistent with the principles regarding the need for increased private securitization activity laid out by the Administration in the Treasury Department's report on Capital Markets[7] as well as the Administration's recent paper[8] on housing finance reform.

---

[5] For an explanation of these ALD disclosure issues, see the comment letters to the SEC submitted by SIFMA and the Financial Services Roundtable at https://www.sec.gov/comments/s7-08-10/s70810-281.pdf and https://www.sec.gov/comments/s7-08-10/s70810-294.pdf and the comment letter to the SEC submitted by SIFMA at https://www.sec.gov/comments/s7-08-10/s70810-79.pdf.

[6] See footnote 5 *supra* for comment letters to the SEC submitted by SIFMA for our views on the proposed Regulation AB II Amendments..

[7] https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf

[8] https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf

We believe the Proposal, if implemented, would make IDIs more likely to fund lending with non-agency securitization. This would provide benefits to consumers, who would see an additional avenue for mortgage and other credit capital to enter the markets; to IDIs, who would see additional risk management paths that would allow them to maintain lending through a variety of economic circumstances; and to the economy, as weaning the mortgage market off of its significant dependency on government backed securitization programs would reduce risk to taxpayers and diversify the sources of capital for consumer lending.

Accordingly, SIFMA strongly supports the Proposal and encourages the FDIC to adopt it as soon as is practical.

B. Other Impediments to IDI Securitization that FDIC Should Explore and Revise

1. Impediments Created by Other Provisions of the Rule

Our members have identified other provisions in the Rule that constrain their securitization activity. While the priority for today is the Proposal, these issues bear review and we believe they should be considered for action in the future.

a) Additional Requirements re: Loan Level Data

> *360.6(b)(2)(ii)(A) "Prior to issuance of obligations, sponsors shall disclose loan level information about the financial assets including, but not limited to, loan type, loan structure (for example, fixed or adjustable, resets, interest rate caps, balloon payments, etc.), maturity, interest rate and/or Annual Percentage Rate, and location of property"*

This section of the Rule requires the disclosure of loan level information in instances where it may not be required by the SEC's rules. While many transactions issued today include this information, to be consistent with the revisions to 360(b)(2)(i)(A), the FDIC should also review this provision and we suggest revise it in a manner like the Proposal by removing the provision. This is suggested in the spirit of reducing regulatory overlap and the potential for conflict among rules, and leaving securities disclosure regulation to the SEC.

b) Requirement for Reserve Fund

> *360.6(b)(5)(ii)(A) "The documents shall require the establishment of a reserve fund equal to at least five (5) percent of the cash proceeds of the securitization payable to the sponsor to cover the repurchase of any financial assets required for breach of representations and warranties. The balance of such fund, if any, shall be released to the sponsor one year after the date of issuance."*

We believe this requirement can materially affect the economics of transactions and may make some otherwise viable transactions non-economic or otherwise less attractive to the issuer. While it may be possible to build such a reserve fund into the structure of a securitization, there is no compelling argument for this requirement. It simply creates dead capital in a securitization for a period of time. We do not believe that there is a high risk of an IDI issuer or other obligated party in an IDI securitization being unable to fund repurchases. We are similarly unaware that IDI sponsors have refused to repurchase loans when they are obligated to do so due to a lack of funds. Other provisions in the deal documents should adequately address any such concerns and give aggrieved parties an appropriate cause of action if a worstcase scenario were to occur. Accordingly, this provision should be reviewed by the FDIC and we suggest that it should be removed.

2. Impediments Created by Regulatory Capital Rules

As mentioned above we support the FDIC's focus on increasing IDI securitization. While the issue the FDIC proposes to address in this Proposal is important, and the other rule-related items we point out in the previous section are also important, there is another regulatory roadblock to increased IDI securitization and risk transfer to be addressed – capital requirements. The roadblock is that U.S. IDIs face significant, and in many cases prohibitive, challenges in achieving regulatory capital relief for RMBS transactions.

Under the U.S. regulatory capital rules, securitizations must meet several operational criteria including that the transferred exposures are not reported on the originating bank's consolidated balance sheet under GAAP. Under US GAAP, the consolidation determination is based on an assessment of whether the originating bank has control over the securitization trust and to a lesser extent the amount of risks and/or reward of the securitization trust's assets and operations. Therefore, de-recognition of the securitized assets (and the commensurate capital relief) in the consolidated financial statements of the originating bank is not achieved in a traditional securitization in which the originating bank retains control (e.g., as servicer of the assets) and some economics. We do not believe it is appropriate for regulatory capital treatment to be so tied to accounting treatment. Accounting and regulatory capital standards are intended to address different things, and one is not an appropriate substitute for the other.

In contrast, under European rules a fundamental requirement for banks to recognize the capital benefit of securitization activity is to demonstrate that the transaction achieves significant risk transfer. For banks in the EU, a consistent and quantifiable rules-based framework related specifically to risk transfer is employed regardless of whether the underlying transaction is a traditional or synthetic deal. In the US, there is no such quantifiable method available and the rule requirements are inconsistent between deal types, putting U.S. IDIs at a competitive disadvantage.

We note that FHFA, in its recent proposal for capital rules for the GSEs, highlighted this point and proposed a capital-neutral framework for the GSEs' risk transfer exercises. If the FHFA's proposed rules are finalized in that manner, U.S. IDIs will be placed at a further competitive disadvantage to the GSEs.

We believe the prudential regulators should continue to explore how the U.S. regulatory capital rules could be amended to provide a more reasonable approach to receiving regulatory capital relief for securitization transactions. Achieving such an approach would mitigate a competitive disadvantage versus our EU counterparts (and potentially the GSEs) and open a pathway to bring more private capital into the US securitization market. We encourage the FDIC to work with the Federal Reserve and the OCC further on this issue.

+++

SIFMA thanks you for your attention to our comments. We would be pleased to discuss this issue further at your convenience. I may be reached at ckillian@sifma.org or 212-313-1126.

Regards,

[redacted]

Christopher B. Killian
Managing Director, Securitization and Corporate Credit