JUNE 2015

COMMENTARY

Spain Passes New Securitization Act

On April 27, 2015, the Promotion of Business Financing Act (*Ley de Fomento de la Financiación Empresarial*, "Act 5/2015") was passed in Spain, introducing, *inter alia*, a new simplified and consolidated regime for securitization transactions.

Act 5/2015 in its Title III integrates previously separate regulations of securitization vehicles, aligning the regulatory treatment of these instruments with those in place in other European jurisdictions, removing restrictions that hampered the Spanish securitization market, and allowing a higher degree of flexibility and innovation in securitization schemes.

Title III introduces the following provisions:

Consolidation of Legal Regime of Securitizations

Until the approval of Act 5/2015, the regulation of securitization vehicles in Spain was dispersed across various regulations at different levels. The new regime unifies the previous distinction between asset securitization funds (*Fondos de Titulización de Activos*) and mortgage securitization funds (*Fondos de Titulización Hipotecaria*) into one single type of fund: securitization funds (*Fondos de Titulización*, "FTs").

Introduction of Compartment Structure

Act 5/2015 expressly permits that FTs can be formed by separate and independent compartments and that their assets and liabilities (including costs and expenses) will have an independent legal treatment. Creditors of one compartment will have claims only to the assets of that particular compartment and not with respect to any other compartment. Each compartment may be liquidated independently of the others. Also, FTs will be permitted to issue different types of securities with different payment profiles either per compartment or across various compartments.

Flexibility of Securitizable Assets of FTs

Act 5/2015 also provides for greater flexibility of assets to be securitized and removes the previous limitation of mortgage loans as the only securitizable asset class. FTs are entitled to acquire:

- Any kind of existing claims, including any type of receivables, corporate loans, consumer loans, auto loans, and mortgage securitization instruments such as mortgage quotas linked to particular mortgage loans ("*Participaciones Hipotecarias*") and mortgage transfer certificates ("*Certificados de Transmisión Hipotecaria*"); and

- Future claims, if the future income is measurable by objective criteria, including (i) toll highway receivables and (ii) any other receivable analogous to toll highway receivables authorized by the Spanish Securities Market Commission ("CNMV"), and provided that the transfer is by way of true sale and is contractually documented (note that as of the present date, the CNMV has not passed a circular in this regard).

FTs are allowed to acquire ownership over their assets by any legal means, including, without limitation, assignment or subscription (in the case of bonds) in a primary market. FTs also will be authorized to register their ownership of the assets and any *in rem* rights of security over said assets at the Land Registry and any other relevant public registries.

Transfer of Assets to FTs

All transfers of assets to an FT must be documented in a written agreement. The previous prohibition of any recourse against the originator has been removed. Therefore, recourse of the FT against the originator is now permitted and does not jeopardize insolvency remoteness of the transfer.

The former requirement that the originator retain the administration and management of the assigned assets has also been removed. It is now possible for an FT to use third-party service providers for the administration and management of the asset pool.

Act 5/2015 in turn introduces the requirement for the originator to have its financial statements for the last two years audited. However, this requirement will not be necessary if:

- The originator or the issuer has been incorporated in the last two years and has received a waiver from the Spanish Securities Commission;
- The securities issued by the FT are not going to be traded in a secondary market and will be addressed only to qualified investors; or
- The guarantor or debtor of the assets being transferred to the FT is the Spanish state, a Spanish autonomous region, a municipality, or an international institution where Spain is a member.

Indebtedness of FTs

FTs will be entitled to refinance themselves by (i) securities and/or (ii) any other type of debt, such as loans, granted by any third parties (not only banks) to the FT. The restriction that the loan refinancing of FTs was not to exceed 50 percent of the indebtedness of an FT is eliminated. FTs also will be authorized to grant security over the asset pool as security for the (refinancing) debts of third parties.

Synthetic Securitization

FTs can also be used for synthetic securitizations of receivables, assuming their credit risk totally or partially by entering into derivatives with, or by granting guarantees in favor of, the originator as the holders of said loss or credit rights.

In connection with synthetic securitization transactions, FTs can hold deposits in bank entities and fixed income securities and enter into securities lending and repo transactions. In addition, Act 5/2015 provides that the regulation applying to synthetic securitizations will be supplemented by secondary legislation dealing with this type of securitization scheme in further detail (which has not been passed as of the present date).

Open vs. Closed FTs

FTs are divided into two types:

- Closed FTs, which are those that will not acquire any assets nor incur in any indebtedness at any point later than four months after its incorporation (i.e., allowing for ramp-up periods). Closed FTs will be allow to substitute assets in certain circumstances and also may acquire quality assets to cover mismatches between cash flows of the assets and the securities issued by the FT.
- Open FTs, which will be allowed to modify the composition of their debt and extend or modify the range of assets included in the funds at any time during their life. Open FTs must be expressly incorporated as such in their deed of constitution.

Open FTs will be allowed to carry out an active management of their portfolios with the aim of maximizing the return on the assets, improving their quality, raising their risk profile, or keeping the conditions set forth in the deed of constitution of the fund, which shall expressly include the fund's investment policy.

Creditors Meeting

Act 5/2015 also provides for the creation of the institution of the "creditors meeting" (*Junta de Acreedores*) of the fund, which shall be expressly foreseen in the deed of constitution of the FT.

This deed will regulate the composition, function, and faculties of the creditors meetings similarly to "bondholders meetings" in capital companies. The Spanish Companies Act will be applied supplementarily in this respect. The deed of constitution will regulate the majorities needed for changes in the administration of the FT and particular decisions to be taken (e.g., restructuring of the FT).

Managing Companies

Managing companies are no longer restricted to serving a mere corporate administrative role of a securitization vehicle. They are now authorized to carry out an active management of the assets included in Open FTs, in accordance with the constitutional documents of the FT. In turn, there will be capital requirements for managing companies that will be linked to the volume of assets managed, e.g., a managed pool of assets of EUR250 million will require capital of EUR5 million.

Conclusion

Due to the restrictions in place until now, the Spanish securitization market traditionally has been focused on true sale residential mortgage-backed securities and has seen only very limited activity in other asset-backed securities such as credit cards, auto loans, and consumer loans. There have not been any synthetic securitization schemes.

The new legislation removes most of the existing restrictions and introduces a simplified, more flexible legal regime of the securitization fund, broadening the classes of securitizable assets and permitting synthetic securitizations. Even though not all details of the new regime have been passed yet, and some areas remain to be clarified, the new law is a big step forward to stimulate the use of alternative financing structures and to facilitate the financing of the current growth of the Spanish real economy, in line with the European Commission's overarching goal of a European Capital Markets Union.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

Andrés Lorrio
Madrid
+34.91.520.3945
alorrio@jonesday.com

Iván Martín-Barbón
Madrid
+34.91.520.3936
imartinbarbon@jonesday.com