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WHITE PAPER

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The European Securitisation Regulation: The Countdown has Begun....

Draft Technical Standards Published for Consultation by the European Supervisory Authorities—An Update and Overview

Regulation (EU) 2017/2402, which is known as the “Securitisation Regulation” and lays down a general framework for securitisation and creates a specific framework for simple, transparent and standardised securitisation, came into force on 18 January 2018 and will apply to European credit institutions, insurance companies and pension funds as well as alternative investment fund managers from 1 January 2019 onward. The Securitisation Regulation tasks the three European supervisory authorities with developing regulatory technical standards and implementation technical standards for a number of key areas addressed in the Securitisation Regulation.

This Jones Day *White Paper* summarizes the draft technical standards on disclosure requirements to be fulfilled by originators, sponsors and securitisation special purpose entities in securitisations as proposed by ESMA in its Consultation Paper of 19 December 2017.

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Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation (“Securitisation Regulation”) came into force on 18 January 2018. It promotes two purposes: first, the harmonisation and consolidation of certain key elements in the European securitisation market across the financial industries and, second, the creation of a specific legal framework for simple, transparent and standardised (“STS”) securitisations. The concept of STS securitisations has been introduced following the strong request of market participants for a recalibrated risk-weighting regime that distinguishes between “normal” securitisations and securitisations that meet certain quality standards. The Securitisation Regulation will apply to credit institutions, insurance companies and pension funds as well as alternative investment fund managers from 1 January 2019 onwards.

The Securitisation Regulation mandates—one could also say challenges—the three European supervisory authorities, i.e., the European Securities and Markets Authority (“ESMA”), the European Banking Authority (“EBA”) and the European Insurance and Occupational Pensions Authority (“EIOPA”) with developing regulatory technical standards (“RTS”) and implementation technical standards (“ITS”) for a number of key areas addressed in the Securitisation Regulation.

So far, the following draft RTS and ITS have been published for consultation and feedback:

- Draft technical standards on disclosure requirements to be fulfilled by originators, sponsors and securitisation special purpose entities in securitisations (ESMA Consultation Paper of 19 December 2017—ESMA33-128-107);
- Draft technical standards on operational standards for securitisation repositories data collection, data aggregation and comparison, data access and procedures to verify completeness and consistency of information (ESMA Consultation Paper of 19 December 2017—ESMA33-128-107);
- Draft technical standards on content and format of the STS notification under the Securitisation Regulation (ESMA Consultation Paper of 19 December 2017—ESMA33-128-33);
- Draft technical standards on third-party firms providing STS verification services under the Securitisation Regulation (ESMA Consultation Paper of 19 December 2017—ESMA33-128-108);

- Draft regulatory technical standards on the homogeneity of the underlying exposures in securitisations under Art. 20(14) and 24(21) of the Securitisation Regulation (EBA Consultation Paper of 15 December 2017—EBA/CP/2017/21) and
- Draft regulatory technical standards specifying the requirements for originators, sponsors and original lenders relating to risk retention pursuant to Article 6(7) of the Securitisation Regulation (EBA Consultation Paper of 15 December 2017—EBA/CP/2017/22).

The consultation and feedback phase for each set of draft technical standards is three months from the date of its publication. On 16 January 2018, EBA and ESMA announced a public hearing scheduled for 19 February 2018 covering the above-listed consultation papers.

In a series of Jones Day *White Papers*, we will provide an overview of the various consultation papers and the status of the draft technical standards published by the mandated European supervisory authorities.

In this first Jones Day *White Paper*, we will focus on ESMA’s consultation paper (“Consultation Paper”) on draft technical standards on disclosure requirements under the Securitisation Regulation (see above) (herein referred to as “Draft Technical Standards”).

LEGAL BACKGROUND AND TIMETABLE

The draft regulatory technical standards on disclosure requirements are based on Articles 7(3) and 17(2) of the Securitisation Regulation. ESMA sees an overlap between Articles 7(3) and 17(2)(a) and concludes that this overlap should be addressed by one set of “combined” draft technical standards. In fact, since Article 17(2)(a) duplicates the wording set out in Article 7(3), it is in the interest of all market participants to have consistent and non-conflicting disclosure and reporting standards. So, ESMA’s combined approach is welcome.

The deadline for the submission of the final draft regulatory technical standards to the European Commission is 18 January 2019. The consultation period ends on 19 March 2018.

REPORTING ON UNDERLYING EXPOSURES

Article 7(1)(a) of the Securitisation Regulation requires the originator, sponsor and SSPE of a securitisation (each defined in the draft RTS as a “reporting entity”) to make information on the underlying exposures available to the holders of a securitisation position, to the competent authorities and to potential investors. The Securitisation Regulation does neither specify the level of detail nor address the format in which such information is to be submitted. Instead, Article 7(3) mandates ESMA to develop RTS to specify the information which the reporting entity must provide in order to comply with their reporting obligations under Article 7(1)(a).

To master this task, ESMA has adopted the template approach that already exists in the securitisation market, in particular the current European Central Bank (“ECB”) loan-level data templates and the proposed templates provided by the CRA3 RTS.¹ The templates have been updated to incorporate additional features which, in ESMA’s view, are required by the Securitisation Regulation, and to reflect the various needs of securitisation market user groups as well as the lessons learned since the implementation of these templates. The set of templates now proposed by ESMA captures new information that is considered relevant and necessary for the due diligence to be conducted by investors and potential investors, as well as for the performance of certain market monitoring and supervisory tasks imposed on public authorities. The updated template design is set out in Annex 2 to the Consultation Paper and will ultimately be annexed to the corresponding ITS.

ESMA summarises the goals to be achieved by using standardised templates as follows:

- Providing greater clarity for investors and potential investors on the performance and likely performance of securitisations;
- Assisting the public bodies listed in the Securitisation Regulation to accomplish their respective tasks and obligations, in particular with regards to market monitoring and financial stability assessments;
- Contributing to restoring confidence in the securitisation market, by explicitly identifying a distinct underlying exposure type and

- Providing certainty to reporting entities on the extent and manner of information to disclose for their respective securitisations.

Different Sets of Templates

ESMA’s proposal distinguishes between templates for non-asset-backed commercial paper (“ABCP”) securitisations and templates for ABCP securitisations.

Non-ABCP Securitisations

For non-ABCP securitisations, the proposed templates so far cover the following underlying exposure types: residential mortgages, commercial mortgages, corporates (comprising loans to SMEs as well as large corporates), leasing, auto loans/leases, consumer loans and credit card receivables. These categories follow by and large the regulatory technical standards on disclosure requirements set out in the CRA3 RTS and the external commercial borrowing loan-level data requirements, and they cover a substantial part of securitisation underlying exposure types across the European Union.

For other exposures, such as collateralised debt obligations/collateralised loan obligations (“CDOs/CLOs”), whole business securitisations and “rare and idiosyncratic underlying exposures” (named examples are health care receivables, student loans or dealer floorplan receivables, but excluding non-performing loans), no templates exist as yet. Based on the goals described above, ESMA is of the view that for CDOs/CLOs and rare and idiosyncratic underlying exposures, it would be useful to develop specific underlying exposure templates, whereas for whole-business securitisations, the development of an underlying exposures template would be less useful.

ESMA further clarifies that public securitisations for which a template is not available will nevertheless be required to submit information about the underlying exposures to securitisation repositories. According to ESMA, the absence of a template does not release the reporting entity from its reporting obligation but simply implies that such information is not standardised. More importantly, ESMA also confirms that the absence of a standardised template does not appear to imply that the STS label could not be obtained by a securitisation.

With respect to NPLs, ESMA refers to the [draft standardised reporting templates for NPL exposures](#) developed by the EBA and, with a view to developing a functioning secondary market for NPLs in the European Union, proposes to use such EBA templates.

The Consultation Paper contains helpful guidance on the template structure and level of detail² but also highlights the differences to the existing templates,³ such as:

- The introduction and expansion of risk-related fields;
- The introduction of fields to cover whether the enterprise is classified as a micro/small/medium/large enterprise as per Eurostat;
- The removal of certain optional or mandatory fields which in the past have not been completed or seem unnecessary;
- Ensuring consistency with the AnaCredit Regulation;⁴
- Ensuring consistency in the way in which assets in arrears are reported and
- The introduction of an energy performance field for STS securitisations, as provided for in Article 22(4) of the Securitisation Regulation.

ABCP Securitisations

For ABCP programmes, sub-paragraph 4 of Article 7(1) of the Securitisation Regulation requires the information on the underlying exposures to be made available in aggregated form to investors and potential investors and, upon request, to the competent authorities. To comply with this requirement, ESMA has developed a separate draft aggregate underlying exposure template for ABCP securitisations. The draft is set out in Annex V of the Consultation Paper and will ultimately be annexed to the corresponding ITS (Annex 9). The proposed template is designed to disclose aggregated information according to different types of exposures. ESMA suggests that, given the structural and systematic differences between the underlying portfolios and their sellers, rather than one template for the entire ABCP programme, a separate exposure template be completed for each transaction within the ABCP programme.

Treatment of Inactive Exposures

Where exposures have become inactive (e.g. because the loan has been repaid), ESMA considers it preferable to no longer report such exposures and going forward to remove them

from the reporting templates. Other than for RMBS and CMBS exposures (which need to be reported on a continuous basis, even after they have become inactive), this proposal is broadly in line with the ECB loan-level templates.

INVESTOR REPORTS

Article 7(1)(e)(i) of the Securitisation Regulation, which refers to “all materially relevant data on the credit quality and performance of underlying exposures”, overlaps with Article 7(1)(a), which refers to “information on the underlying exposures”. However, according to ESMA, the provision of a periodic investor report pursuant to Article 7(1)(e) is to be distinguished from the obligation to disclose information about the underlying exposures. As a consequence, an investor report needs to be made available irrespective of whether or not a template for the underlying exposures exists.

Following a review of investor reports from a substantial number of existing securitisations and with a view to creating a standardised template, ESMA proposes an investor report template that reflects the information commonly found in the reviewed securitisations and, in addition, takes into account the recommendations of the Joint Committee Report.⁵ Hence, the proposed templates include details about triggers and tests, types of accounts used in the securitisation and the amounts credited thereto, swaps and other hedging arrangements, outstanding issuance amounts, counterparty creditworthiness and information on credit enhancement.

Two Standardised Investor Report Templates

ESMA proposes two standardised investor report templates, one for non-ABCP securitisations and one for ABCP securitisations.⁶ The final templates will be annexed to the corresponding implementing Technical Standards. The templates aim at consolidating the needs of the users listed in Article 17(1) of the Securitisation Regulation, on the one hand, and the due diligence obligations imposed on investors under Article 5 of the Securitisation Regulation, on the other hand, and provide for the following information to be delivered:

- General information about the securitisation, addressing the type of securitisation, the waterfall type, the pool prepayment rate and the compliance with risk retention requirements;

- Account-level information considering the types of accounts, target and actual balance, and their amortising nature;
- Counterparty information including applicable rating thresholds;
- Tranche-level information addressing the outstanding balance of each tranche of debt instruments, its credit enhancement (where applicable), its maturity date and the presence of any call or maturity extension options;
- Information about applicable triggers and tests as well as their compliance and
- Cash-flow information.

In addition, for ABCP securitisations, the templates provide for: (i) transaction-level information for each transaction included in the ABCP programme (such as financial information about

the originator, information on risk retention requirements, the remaining weighted average life of the pool of exposures and details about the liquidity facility and any swap; and (ii) programme-level information covering details of any programme-wide credit support, the programme limit and non-compliance with certain STS requirements (where relevant).

Finally, for synthetic non-ABCP securitisations, in addition to the above, ESMA proposes the introduction of a “protection information” section as well as an “issuer collateral information” section to allow investors and authorities to comply with the due diligence, monitoring and supervisory tasks.

ESMA proposes templates applicable to each securitisation type/exposure type which will be attached to the corresponding implementation technical standards as follows:

Securitisation type/exposure type	Underlying exposures template (Art. 2 ITS)	Investor report template (Art. 3 ITS)
ABCP	Annex 9 ITS	Annex 11
Auto loans and leases	Annex 5 ITS	Annex 10
Commercial real estate loans	Annex 3 ITS	Annex 10
Consumer loans	Annex 6 ITS	Annex 10
Credit card receivables	Annex 7 ITS	Annex 10
Leases (individual/business)	Annex 8	Annex 10
RMBS	Annex 2 ITS	Annex 10
SME/Corporate ABS	Annex 4 ITS	Annex 10

“No Data” Options

To provide investors and authorities with information about non-completed data fields, ESMA proposes the introduction of a “no data” option to indicate where specific data fields cannot be completed, because the information is either irrelevant or not available. The coding for the “no data” options (ND1 to ND5) corresponds to the coding under the ECB loan-level requirements.

Data Cut-Off Dates

Articles 7(1)(a) and 7(1)(e) of the Securitisation Regulation require the information on the underlying exposures and the investor reports to be delivered on a quarterly or, in the case of ABCP securitisations, monthly basis. Further, subparagraph

3 of Article 7(1) states that the information on the underlying exposures and the investor reports must be made available simultaneously. However, the Securitisation Regulation is silent on two aspects: first, whether the templates for the underlying exposures and the templates for the investor report refer to the same cut-off date and, second, how old or recent the reported data must be.

To minimise the risk of inconsistencies between the underlying exposure templates and the investor report templates, and to ensure the availability of updated information, the draft RTS introduce the concept of a “data cut-off date” as a reference in time for both the applicable underlying exposure templates as

well as the investor report templates. The data cut-off date may not be older than (i) two months before the submission date in the case of non-ABCP securitisations (which is in line with the ECB loan-level requirements) and (ii) one month before the submission date in the case of ABCP securitisations.

Public vs Private Securitizations

Article 7(2) of the Securitisation Regulation requires the reporting entity to make the information for a securitisation transaction (i.e., the information required to be disclosed pursuant to Article 7(1)) available by means of a securitisation repository,⁷ unless it is a securitisation for which “no prospectus has to be drawn up in compliance with Directive 2003/71/EC”⁸ (ESMA defines them as “private securitisations”). In this context, it should be noted that most (if not all) ABCP securitisations actually constitute private securitisations. This does not release sponsors of ABCP programmes from the obligation to make the information and data under Article 7(1) of the Securitisation Regulation available to investors, potential investors and regulatory authorities, but they are not required to transfer such information and data to a securitisation repository. Instead, such information has to be made available by means of a website pursuant to sub-paragraph 4 of Article 7(2) of the Securitisation Regulation.

Legacy Transactions and Effective Date

The transitional provisions of Article 43 of the Securitisation Regulation distinguish between three categories of transactions:

- Securitizations with all debt instruments issued on or before 31 December 2018 that do not claim STS status (“legacy non STS securitisations”). ESMA concludes that, although there is no obligation, legacy non-STS securitisations are also able to comply with the disclosure and reporting requirements.
- Securitizations with debt instruments issued from 1 January 2019 onwards (“new securitisations”) which, pursuant to Article 43(1), undoubtedly need to comply with the Draft Technical Standards.
- Securitizations with all debt instruments issued on or before 31 December 2018 that claim STS status (“legacy STS securitisations”) which, by virtue of Articles 43(2) and 43(3), need to comply with the Draft Technical Standards.

In respect of new securitisations and legacy STS securitisations, compliance with the Securitisation Regulation will create a challenge for the industry.

For new securitisations, this is because originators, sponsors and SSPEs are required to comply with the disclosure and reporting requirements under Article 7(1) of the Securitisation Regulation from 1 January 2019, even if the technical standards have neither been finalized nor adopted by the Commission (the deadline for submission to the Commission is 18 January 2019).

For legacy STS securitisations, this is because any changes to existing securitisations and the related documentation with a view to making them STS compliant are made on the basis of draft technical standards which themselves are subject to further changes. Changes to existing securitisations (in particular public securitisation) are extremely time- and cost-consuming and often subject to a number of (economic) sacrifices to be made by the originator or sponsor.

And more importantly, this also means that any STS notification will be given on the basis of draft technical standards and, therefore, will be provisional by nature.

ESMA concedes in the Consultation Paper that reporting entities will require time to adapt their reporting systems to comply with the Draft Technical Standards (once finalised) and proposes that this could be achieved by either determining a date for the application of the Technical Standards that is after 1 January 2019 or by allowing for a transitional period after the Technical Standards have come into effect. However, these proposals do not overcome the issues described in connection with existing legacy STS securitisations.

In the following Jones Day *White Paper*, we will have a close look at ESMA’s Consultation Paper regarding the draft regulatory technical standards and draft implementing technical standards on operational standards and access conditions under the Securitisation Regulation.

LAWYER CONTACTS

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ENDNOTES

- 1 Commission Delegated Regulation (EU) 2015/3 of 6 January 2015 in connection with Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies (known as “CRA3 Regulation”).
- 2 Paragraph 33 et seq. of the Consultation Paper.
- 3 Paragraph 36 et seq. of the Consultation Paper.
- 4 Regulation (EU) 2016/867 of the European Central Bank of 18 May 2016 on the collection of granular credit and credit risk data (ECB/2016/13).
- 5 Joint Committee Report on Securitisation of 12 May 2015 (JC 2015 022).
- 6 See Article 3 of the draft IST.
- 7 Details will be covered in a separate *White Paper*.
- 8 Also known as the Prospectus Directive.

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