

Clients & Friends Memo

ESMA Publishes Q&As and Revised Disclosure Templates for Securitisation Reporting

4 February 2019

Introduction

On 31 January 2019, the European Securities and Markets Authority ("**ESMA**") published an Opinion (the "**Opinion**") containing a revised set of draft disclosure technical standards (the "**Disclosure Technical Standards**") and a first set of Questions and Answers under the EU Securitisation Regulation (the "**Q&As**"). The Q&As mainly focus on issues arising from the templates annexed to the draft Disclosure Technical Standards.¹

These revised Disclosure Technical Standards have been produced as a result of a letter sent by the European Commission to ESMA dated 30 November 2018 (the "**Commission's Letter**")², in which the Commission stated that it only intended endorsing ESMA's draft Disclosure Technical Standards once certain amendments had been made.

Background: The Securitisation Regulation's Transparency Requirements

The Securitisation Regulation has applied to securitisations, the securities of which are issued (or where no securities are issued, the securitisation positions of which are created) on or after 1 January 2019. The Securitisation Regulation provides that the originator, sponsor and Securitisation Special Purpose Entity ("**SSPE**") (i.e. the issuer) of a securitisation must make certain prescribed information relating to the securitisation available to investors, competent authorities (i.e. national regulators) and, upon request, to potential investors³. The originator,

¹ Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012.

² At: https://www.esma.europa.eu/sites/default/files/library/6771757_-_maiioor.pdf

³ For "public securitisations" i.e. those where a Prospectus Directive compliant prospectus has to be drawn up – which is the case where securities are admitted to trading on an EU regulated market, the information is to be made available by means of a securitisation repository registered with ESMA. None is yet registered and until a securitisation repository is registered the information is to be made available by means of a website that meets prescribed conditions.

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sponsor and SSPE are to designate one of them to fulfil the disclosure requirements (the “reporting entity”).

One of the requirements of Article 7 of the Securitisation Regulation is the provision of quarterly⁴ underlying exposure and investor reporting to be made using standardised templates. Article 7 directed ESMA to develop draft technical standards specifying the form and content of these reporting templates. ESMA's August 2018 Final Report⁵ annexed draft Disclosure Technical Standards including the detailed draft reporting templates for these obligations and for “Inside Information” and “Significant Events” reporting⁶. The Commission declined to endorse these August draft Disclosure Technical Standards by way of its letter.

The Commission's Requested Amendments

The Commission's Letter noted the risk of “*disproportionately strict disclosure requirements*” disrupting securitisation issuance in the EU, particularly in light of the sanctions that can be imposed for non-compliance. It focused on the availability of the “No Data” option in the draft templates and requested ESMA to examine whether the “No Data” option could be available for additional fields in the draft templates, especially those for ABCP securitisations⁷.

The Commission's Letter also requested ESMA to monitor closely the use of, and need for, the “No Data” options in each template field, as part of its future contributions to the reports of the Joint Committee of the European Supervisory Authorities to be published by 1 January 2021, and every three years thereafter, pursuant to the Securitisation Regulation.

Under the legislative procedure ESMA had six weeks in which to amend the draft Disclosure Technical Standards on the basis of the Commission's proposed amendments and resubmit them in the form of a formal opinion to the Commission (with a copy to be sent to the European Parliament and to the Council). The Commission's Letter noted that it intended to endorse the draft Disclosure Technical Standards once the amendments have been made by ESMA.

Informal Feedback from Industry Participants

Following the receipt of the Commission's Letter, ESMA sought feedback on the proposed changes from relevant industry associations. Cadwalader, together with the Loan Market

⁴ Monthly for ABCP.

⁵ At: <https://www.esma.europa.eu/press-news/esma-news/esma-defines-disclosure-standards-under-securitisation-regulation>

⁶ Please see our Clients and Friends Memorandum dated 28 August 2018 at: <https://www.cadwalader.com/uploads/cfmemos/9387e192222c1edb69cd33fa4d3e6cff.pdf>

⁷ Please see our Clients and Friends Memorandum dated 19 December 2018 at: <https://www.cadwalader.com/uploads/cfmemos/7c20701334b51dd6c0a0541f81dfef83.pdf>

Association, participated in this feedback process and a number of the points made have been recognised by ESMA in their Opinion.

The ESMA Opinion Published on 31 January 2019

ESMA's Opinion annexes revised Disclosure Technical Standards and associated templates. ESMA has expanded the ability for reporting entities to use the "No Data" options in the respective disclosure templates, in particular in the templates for ABCP securitisation. However, given its reluctance to allow a "No Data" response in the template fields except where appropriate, ESMA has also adjusted and clarified the content to report in certain fields. In addition, ESMA has published a first set of Q&As on its website mainly dealing with questions about the templates, even though the Disclosure Technical Standards and templates have not yet been formally adopted by the Commission.

The use of "No Data" Options in the Templates

ESMA's amendments regarding the "No Data" options reflect the points raised by market participants, as reinforced by the Commission's Letter, as regards the difficulties (or impossibility) of completing the templates where the relevant information is not available. For example, the Loan Market Association has pointed out that one of the fundamental problems in completing the templates is that it would, in practice, be very difficult for originators who purchase a third party's exposures for their own account and then securitise them ("limb (b) originators"), and for sponsors, to obtain much of the information sought in the August draft templates. Some of this information may simply not be available to originators who are not original lenders, or to sponsors.

In response to such concerns, ESMA has significantly extended the availability of the "No Data" options to a number of new fields. There are five different "No Data" options⁸ in the templates: "ND1-4" relates to situations where there is no available data and "ND5" to where the field is not applicable.

ESMA's primary focus has been on the ABCP underlying exposures template, reflecting the Commission's request. As regards ABCP securitisations, a total of 33 additional fields across all ABCP templates now allow options "ND1-4" options and 45 additional fields allow "ND5" to be entered.

However, significant adjustments have also been made in many of the other templates. In respect of non-ABCP securitisations, the "ND5" can now be entered in 102 additional fields across the

⁸ There are five "no data" options in the templates: (a) ND1: data not collected as not required by the lending or underwriting criteria; (b) ND2: data collected on underlying exposure application but not loaded into the originator's reporting system; (c) ND3: data collected on underlying exposure application but loaded onto a separate system from the originator's reporting system; (d) ND4: data collected but will only be available from specified date; and (e) ND5: "not applicable".

combined non-ABCP securitisation templates (i.e. those concerning underlying exposures, investor reports, inside information and significant events). ESMA also adjusted the ability to use the “ND1-4” options, for a total of 120 fields across the underlying exposure templates. ESMA notes that it has paid particular attention to the Corporate Underlying Exposures Template (Annex 4 to the draft Disclosure Technical Standards), given its application to a wide variety of securitisations, including CLOs.

Therefore, in total, ESMA has allowed options “ND 1-4” to be used in 153 additional fields and option “ND5” to be used in 147 additional fields across the templates.

ESMA nevertheless emphasises that the “No Data” options should only be used in legitimate cases where information cannot be provided, or where the template field in question is not applicable. ESMA said that it will closely monitor the use of the “No Data” options.

ESMA has also pointed out that there are some fields in the underlying exposure templates where it considers it to be essential that a minimum amount of information is provided and, therefore, no tolerance is given for the use of “No Data” options. These fields include: (i) the underlying exposure currency denomination; (ii) the performance of the underlying exposure, including the account status, arrears, and servicing status; and (iii) basic information on the type of collateral backing the underlying exposure.

Adjustments of the Content to Report in Certain Fields

As well as increasing the availability of “No Data” options, ESMA has made adjustments to the content to report in certain fields. ESMA has adjusted fields relating to borrower employment status, it has changed how certain income-related fields can be completed for corporate borrowers and has adjusted the calculation method for the “current balance of the underlying exposure in arrears”.

The collateral sections of the underlying exposure templates for residential real estate and commercial real estate have been adjusted by inserting a new field to capture collateral type.

Inside Information and Significant Events Templates – Issues Raised in the Feedback Process

Earlier versions of the draft Disclosure Technical Standards and the templates had given rise to some concern as to how ESMA had interpreted the “Significant Events” reporting obligations in the Securitisation Regulation.

First, it was difficult to understand why certain CLO reporting in a “CLO Securitisation information section” and a “CLO Manager information section” appeared in the draft template for Significant Events annexed to the August draft Disclosure Technical Standards.

Secondly, whereas Article 7(1)(f) of the Securitisation Regulation relates to the reporting of any Inside Information relating to the securitisation that the originator, sponsor or SSPE is obliged to make public in accordance with the Market Abuse Regulation⁹, Article 7(1)(g) relates to the reporting of any Significant Event *“where point (f) does not apply”*. Although the wording is not totally clear, a general understanding of these provisions is that they are alternative, rather than cumulative, obligations. If this is the correct interpretation, there is only an obligation to report Significant Events where the transaction is outside the scope of the Inside Information reporting obligations in the Market Abuse Regulation. The August draft Disclosure Technical Standards were not clear on this point, which was therefore raised with ESMA during the feedback processes.

Thirdly, the August draft Disclosure Technical Standards contained a provision (the **“August RTS Article 7”**) stating that a submission of underlying exposure information and investor report information *“shall be considered a significant event for the purposes of Article 7(1)(g)”*. This was despite underlying exposure information and investor report information not being contained on the list of Significant Events contained in Article 7(1)(g) of the Securitisation Regulation and despite their being specifically set out in different subparagraphs of Article 7(1).

In the light of these points, questions were asked of ESMA regarding its treatment of Significant Events reporting by organisations such as the Loan Market Association during the feedback process.

ESMA was questioned as to whether the purpose of August RTS Article 7 was that the submission of quarterly underlying exposure reporting templates and investor report templates were deemed to be Significant Events in order to make the submission of the quarterly reports a trigger for the submission of the Significant Events template which includes the CLO reporting fields.

Inside Information and Significant Events Templates – ESMA’s Response

ESMA acknowledges these points in its Opinion. As regards the August RTS Article 7 point, this provision was deleted and a description of the requirement to report the Significant Event template at the same time as the reporting of underlying exposures and investor report information has been moved to a redrafted recital. This amended recital explains the need for Inside Information or information on Significant Events to be up-to-date and, consequently, the need for this information to be provided at the same time as the underlying exposures and investor report templates. The recital now says: *“It is also important for this information to be up-to date. An appropriate way to achieve this would be to make inside information or significant event information available at the moment in which information on underlying exposures and investor report is made available via a securitisation repository.”*

⁹ Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC

ESMA's other way of dealing with these points has been to merge the templates for Significant Events and Inside information Reporting. Therefore, for non-ABCP securitisations, the former Annexes 14 and 16 in the August draft Disclosure Technical Standards have been merged to a new Annex 14, covering both Inside Information or Significant Event information.

In this new Annex¹⁰, ESMA has also added an "any other information" section, with a view to permitting market participants to meet any specific further information requirements not captured elsewhere in the Annex.

ESMA considers that its adjustments provide a more comprehensive and clearer explanation for the motivation behind connecting the timing of the Inside Information and Significant Events reporting with the other reporting requirements.

It is important to appreciate, as ESMA stresses in its Opinion, that the Inside Information and Significant Events reporting templates only apply to "public securitisations". Private securitisations do not have to use these templates in order to fulfil these obligations. Nevertheless, the information contained in these templates may well indicate the type of Significant Event information that private securitisations will need to report in order to meet their Article 7 obligations.

Jurisdictional Issues

There continues to be considerable uncertainty as regards the jurisdictional scope of the Securitisation Regulation's disclosure obligations under Article 7, since they are not expressly stated to be restricted to EU-established originators, sponsors and SSPEs and so appear to have a potential extra-territorial effect. It is unclear if the Securitisation Regulation's disclosure obligations could apply to non-EU established originators, sponsors and SSPEs. Furthermore, these obligations can also apply on a consolidated basis to non-EU subsidiaries of firms subject to the Capital Requirements Regulation.¹¹ These issues have significant implications for US securitisations sold into the EU.

However, in its Opinion ESMA once again has declined to give any guidance on this point, saying that changes to the disclosure requirements with respect to their geographic scope were neither within its mandate, nor within the scope of the changes requested by the Commission.

The Q&As

As well as its Opinion, ESMA also published on 31 January 2019 Q&As on the Securitisation Regulation. As ESMA has pointed out, these have been published in advance of the relevant delegated legislation and so are potentially subject to change. This is the first version of the

¹⁰ And in the equivalent new Annex 15 for ABCP securitisations.

¹¹ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

Securitisation Regulation Q&As which will be developed over time. ESMA is publishing these Q&As now in order to address some of the uncertainties surrounding the interpretation as to what is required by the templates. ESMA has provided Q&As which apply across asset classes and which cover a number of areas including, but not limited to:

- Confirmation that the disclosure templates must be completed for securitisations that issue any securities from 1 January 2019.
- The method of reporting of information for private securitisations.
- Reporting static data.
- Reporting active and inactive underlying exposures.
- Rounding of numerical fields.
- Geographic region reporting.
- Anonymity and confidentiality of obligors, underlying exposures, and collateral fields.

Next Steps and the Application Date of the Disclosure Technical Standards

The application date of the Disclosure Technical Standards and their associated templates has not yet been determined. It will be specified in the final form of the delegated regulation to be made by the Commission.

The next stage in the legislative process is that the Commission, if it is satisfied with the revised Disclosure Technical Standards, will adopt them in the form of a delegated regulation. As soon as it adopts the Disclosure Technical Standards, the Commission has to notify the European Parliament and the Council, who may object to the Disclosure Technical Standards within a period of 3 months from notification. If, on the expiry of the 3 month period, neither the European Parliament nor the Council has objected, the Disclosure Technical Standards will be published in the Official Journal of the European Union and will enter into force on the twentieth day following their publication. It is possible that the Disclosure Technical Standards may be published in the Official Journal and enter into force before the expiry of the 3 month period if the European Parliament and the Council have both informed the Commission of their intention not to raise objections. The key date however will be when the delegated regulation is stated to apply. Given, these timescales, the application date is not expected to be earlier than some months from now.

As noted above, one of the Q&As confirms that the disclosure templates will have to be completed for securitisations that issue any securities from 1 January 2019 (i.e. even if the issue took place before the application date of the templates). Although not said explicitly, it is understood that this means that reporting for such securitisations should be made using the new

templates as from the application date of the Disclosure Technical Standards (and that it does not mean that reporting already performed between 1 January 2019 and the application date has to be performed again on the new templates).

The Transitional Arrangements

Ideally, the Disclosure Technical Standards would have been ready for 1 January 2019, the application date of the Securitisation Regulation. Since this did not occur, the Securitisation Regulation's transitional provisions have taken effect and the templates in Delegated Regulation (EU) 2015/3 (the "**CRA3 Templates**") now apply in the period since 1 January 2019 until the application date of the Disclosure Technical Standards and the associated disclosure templates. We discussed the CRA3 Templates in our Clients & Friends Memorandum dated 3 December 2018¹².

Conclusion

While not without issues, ESMA's revised draft Disclosure Technical Standards are a significant improvement on the previous draft. The substantially increased availability of No Data options shows that ESMA has listened to market concerns (as reflected in the Commission's Letter) about the practical consequences of the new templates on EU market participants.

Cadwalader has worked with the Loan Market Association in alerting ESMA and the Commission to the problems that would result from the adoption of ESMA's draft Disclosure Technical Standards, particularly in relation to CLOs. Cadwalader will continue to raise issues surrounding the implementation of the new Securitisation Regulation regime with the relevant European institutions and supervisory authorities, either directly or through its work with the Loan Market Association.

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If you have any questions on these matters, please feel free to contact any of the Cadwalader attorneys below.

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¹² Please see our Clients & Friends Memorandum dated 3 December 2018 at: <https://www.cadwalader.com/uploads/cfmemos/63c1757ef1b58dc81617ba9fc2de5468.pdf>

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