Clients&FriendsMemo

The UK Consults on New Securitisation Rules

01 August 2023

The Prudential Regulation Authority ("**PRA**") has published Consultation Paper 15/23 – Securitisation: General requirements ("**CP 15/23**") setting out its proposed rules to replace retained EU law requirements on:

1. Those provisions of the Financial Services and Markets Act 2000 (Securitisation) Regulations 2018 ("**UK SecReg**") for which the PRA has responsibility;

2. Risk Retention Technical Standards; and

3. Disclosure Technical Standards.

CP 15/23 also proposes: (a) adjustments to supervisory statement 10/18 on General requirements and capital framework; (b) how the PRA will use its power under the newly revised Financial Services and Markets Act 2000 (law since 29 June 2023) ("**FSMA**") to disapply or modify certain rules under new s 138BA; and (c) clarification that the rules also apply to one-off securitisations by PRA-authorised firms that are non-CRR and non-Solvency II. CP 15/23 also seeks views on the distinction between public and private securitisations and associated transparency requirements which may be the subject of a future consultation.

While the PRA's proposals are mainly re-stated from retained EU law and largely preserve current requirements when retained EU law is transferred to the PRA Rulebook there are targeted adjustments which we set out below. The PRA considers that these adjustments are broadly in line with market expectations.

Scope

CP 15/23 applies to PRA-authorised persons established in the UK (including insurers), qualifying parent undertakings and financial institutions that are subsidiaries of these firms. It does not apply to non-UK firms with UK branches.

Due-diligence Requirements for Institutional Investors

The PRA is proposing a "more principles-based and proportionate approach" when replacing the requirements for verification by institutional investors of disclosures by both UK and non-UK manufacturers. This will be achieved by requiring investors to verify that manufacturers have made sufficient information available to enable assessment of the risks, and by requiring that the information includes at least certain types of information at certain times but without the level of detail currently included in the retained EU legislation. Note that, regardless of the new scope of

obligations on institutional investors to verify the information set out below, the obligations of originators, sponsors and securitisation special purpose entities ("**SSPEs**") to make certain prescribed disclosures remain as before.

The Draft Securitisation Rules instrument appended to CP 15/23 sets out at new Article 5(1)(e) that the originator, sponsor or securitisation special purpose entity must make available "sufficient information to enable the institutional investor independently to assess the risks of holding the securitisation position and has committed to make further information available on an ongoing basis, as appropriate." This information must include at least the following:

- For non-ABCP transactions, details of underlying exposures provided at least quarterly;
- For ABCP transactions, information on the underlying receivables or credit claims provided at least monthly;
- Investor reports (including credit quality, performance, triggers, cash flows and the calculation and modality of the risk retention) on a quarterly or monthly basis as set out above;
- All information on the legal documentation needed to understand the transaction to be provided in draft or initial form before pricing and in final form no later than 15 days after closing;
- Information on any changes or events materially affecting the transaction (including breaches of obligations);
- Any approved prospectus or other offering or marketing documents to be provided in draft or initial form before pricing and in final form no later than 15 days after closing; and
- Any simple, transparent and standardised (STS) notification.

Delegation of Due Diligence to a Managing Party

CP 15/23 proposes clarification of the enforcement position of a managing party delegate for failure to fulfil delegated due diligence obligations. Provided that the managing party is subject to equivalent due diligence rules, the delegating party will not be responsible for a failure to comply with those obligations.

Non-performing Exposures ("NPE")

The PRA is proposing to allow the calculation of the risk retention requirements in UK SecReg for NPE to be assessed at their net value (the non-refundable purchase price discount or NRPPD).

Making Information Available "Before Pricing"

The PRA is proposing clarifying the requirement in UK SecReg Article 7(1) for manufacturers to make certain information available "before pricing" to align it with the requirement in Article 22(5) for the information for STS securitisations to be made available before pricing at least in draft or initial form, with final documentation available to investors no later than 15 days after closing.

Resecuritisations

The current position under Article 8(2) of UK SecReg allows the PRA power to give permission to manufacture resecuritisations when this can be said to be for a legitimate purpose including:

- Facilitating winding-up of a regulated firm;
- Ensuring the viability as a going concern of a regulated firm;
- Preservation of investors' interests when the underlying exposures are non-performing.

While the current draft of the Securitisation Regulations 2023 does not include this power, the PRA understands that the UK Government intends to use section 34 of FSMA to switch on a new power for the PRA under section 138BA of FSMA to disapply or modify its rules. CP 15/23 therefore appends a proposed statement of practice on the PRA's approach to using this power in relation to resecuritisations, which is broadly in line with its current remit.

Risk Retention

While the PRA proposes to retain current provisions, CP 15/23 includes a number of adjustments to reflect changes to the securitisation market that have occurred since the current risk retention technical standards were formulated in 2014.

We have published separate notes following: (i) the publication of the Final Draft Regulatory Technical Standards (the "**RTS**") specifying the requirements for originators, sponsors and original lenders in relation to risk retention (see our previous Clients and Friends memo from April 2022), and (ii) following the 7 July 2023 European Commission adoption the final text of the risk retention RTS (the "**Final Text**"). With respect to risk retention, CP 15/23 and the Final Text do not contain any material differences, but we have noted some minor nuances below:

A. *Change of the risk retainer*: the PRA is proposing to allow a change of the retainer and a transfer of the retention in the event of the retainer's insolvency (the Final Text also mentions instances where the retainer, for legal reasons beyond its control and beyond the control of its shareholders, is unable to continue acting as a retainer);

B. *NPE securitisations*: see above;

C. *Sole purpose test*: the PRA is consulting on taking into account when assessing whether the retention entity has been established or operates for the sole purpose of securitising exposures: (1) whether the entity has a business strategy and payment capacity consistent with a broader business enterprise that involves material support from capital, assets, fees or other income that relies neither on the securitised exposures nor on retained assets; and (2) whether members of the management body have the necessary experience to enable the entity to pursue the established business strategy and the entity has adequate corporate governance arrangements. The PRA's expectation is that these requirements are broadly in line with market standards (the Final Text refers to the "sole or predominant source of revenue" while CP 15/23 does not contain references to "predominant" sources);

D. *Risk retention for resecuritisations*: the PRA is clarifying that risk retentions in permitted resecuritisations will require the retainer to retain the interest in relation to each transaction level, meaning that in resecuritisations the retention would be at the levels of

the underlying securitisation and the resecuritisation. In addition, the PRA is also proposing that: (a) when the originator is the retainer in the underlying securitisation, securities only exposures or positions in excess of the minimum net economic interest in the underlying securitisation with no maturity mismatch will render a retention in the underlying securitisation sufficient; (b) fully supported ABCP programmes that are not considered resecuritisations under UK SecReg Article 8 will not be resecuritisations for risk retention purposes; and (c) retranching by an originator into contiguous tranches will not be a resecuritisation for risk retention purposes;

E. *Synthetic/contingent retention*: the PRA is proposing to exempt all PRA-authorised CRR and Solvency II firms from the requirement to fully collateralise in cash and segregate synthetic or contingent retentions;

F. *Selection of "comparable assets"*: in order to satisfy the requirement that originators must not select weaker assets for transfer to the SSPE, the PRA is proposing to clarify that assets will be eligible for transfer if; (a) the expected performance of the assets to remain on balance sheet and those to be transferred is determined by similar relevant factors; and (b) it can be reasonably expected that the performance of the on-balance-sheet assets would not be significantly better over the relevant time. In addition, the PRA is clarifying that the requirements will be complied with when, after the securitisation, no comparable assets are left on the originator's balance sheet and this is communicated to investors. (CP 15/23 refers to "similar relevant factors" while the Final Text refers to "similar factors" and also, in the second limb of this requirement, CP 15/23 looks at the "result of that similarity and on the basis of indications" [as enumerated] while the Final Text only mentions the [enumerated] indications).

Disclosure Templates

The PRA proposes to retain the substance of the current requirements, but will be working with the FCA to review and possibly consult on changes to these in a future consultation exercise. The PRA has also confirmed that, provided transitional provisions are included in the final Securitisation Regulations, the PRA and FCA's Joint Direction on the Reporting of private securitisations will continue to have effect. The Joint Direction speaks to the manner in which the originator, sponsor or SSPE makes available the information required under Article 7(1)(a) to (g) of the EU Securitisation Regulation 2017 (Regulation (EU) 2017/2402) to the FCA or the PRA concerning private securitisations.

Transparency Requirements

While the PRA and FCA are currently reviewing transparency requirements, CP 15/23 is not making any proposals in this area. However, the PRA is interested in any comments on possible approaches for revising the distinction between "public' and 'private" securitisations and on whether disclosure templates for private securitisations could be made more proportionate. CP 15/23 flags that the FCA's upcoming consultation on "Rules relating to Securitisation" will consider both these questions in Chapter 7.

Next Steps

Comments are due by 30 October 2023 and the proposed implementation date for the new rules is Q2 2024.

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