

# Clients & Friends Memo

## European Commission Adopts Disclosure Templates for EU Securitisation Reporting

21 October 2019

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### I. Introduction

The Securitisation Regulation<sup>1</sup> applies 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.

On 16 October 2019, the European Commission adopted a Regulation comprising the regulatory technical standards specifying the information and the details of a securitisation to be made available by the originator, sponsor and SSPE (the “**Reporting Templates RTS**”)<sup>2</sup>.

The adoption of the Reporting Templates RTS follows on from the publication in July 2019 by the European Securities and Markets Authority (“**ESMA**”) of additional resources to assist market participants in the implementation of the draft technical standards on disclosure requirements originally published on 31 January 2019. In this regard, ESMA updated its Questions and Answers in respect of the Securitisation Regulation (the “**Q&As**”) and published a set of reporting instructions and XML schema (the form required by Article 7 of the Securitisation Regulation).

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<sup>1</sup> 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.

<sup>2</sup> The adopted Reporting Templates RTS can be found at <https://ec.europa.eu/transparency/regdoc/rep/3/2019/EN/C-2019-7334-F1-EN-MAIN-PART-1.PDF> with the Annexes to the Reporting Templates RTS at <https://ec.europa.eu/transparency/regdoc/rep/3/2019/EN/C-2019-7334-F1-EN-ANNEX-1-PART-1.PDF>

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This memorandum provides an update to previous Clients & Friends Memoranda dated 29 March 2019<sup>3</sup> and 4 February 2019<sup>4</sup> which provide more background information on this topic.

## II. Background: The Securitisation Regulation's Transparency Requirements

Article 7 of the Securitisation Regulation ("**Article 7**") 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 investors.<sup>5</sup> The originator, sponsor and SSPE are to designate one of them as a reporting entity to fulfil these disclosure requirements.

The items of information which Article 7 provides are to be made available include periodic reporting of information on the underlying assets of the securitisation and investor reporting, in each case using prescribed reporting templates. Such reporting is required to be made on a quarterly basis except in the case of asset-backed commercial paper transactions when it is required to be made on a monthly basis.

Article 7 provided for the form and content of the reporting templates to be set out in regulatory technical standards to be adopted by the European Commission on the basis of a proposal from ESMA.

## III. Scope of Applicability of the Securitisation Regulation's Transparency Requirements; Jurisdictional Scope

The general understanding<sup>6</sup> is that a securitisation which has no EU entity as issuer, originator or sponsor is not within the jurisdictional scope of Article 7. EU entities includes non-EU branches of EU established institutions, however EU entities does not include subsidiaries of EU entities if those subsidiaries are incorporated/established outside of the EU (for example, a U.S. subsidiary of an EU bank).

Article 14 of the CRR<sup>7</sup> has been amended so that Articles 6 through 10 of the Securitisation Regulation no longer apply on a consolidated basis, thus a non-EU subsidiary of an EU

<sup>3</sup> Please see our Clients and Friends Memorandum dated 29 March 2019, "Further Delays in the Expected Application Date of the Disclosure Templates for EU Securitisation Reporting" available at: <https://www.cadwalader.com/resources/clients-friends-memos/further-delays-in-the-expected-application-date-of-the-disclosure-templates-for-eu-securitisation-reporting>.

<sup>4</sup> Please see our Clients and Friends Memorandum dated 4 February 2019, "ESMA Publishes Q&As and Revised Disclosure Templates for Securitisation Reporting" available at: <https://www.cadwalader.com/resources/clients-friends-memos/esma-publishes-qas-and-revised-disclosure-templates-for-securitisation-reporting>.

<sup>5</sup> For "public securitisations" (*i.e.*, those where a prospectus compliant with the Prospectus Directive must be produced), information is to be made available by means of a securitisation repository registered with ESMA.

<sup>6</sup> This point has been expressly confirmed by the European Banking Authority ("**EBA**") in relation to Article 6 of the Securitisation Regulation, but not expressly in relation to Article 7 for which the relevant EU regulatory authority is not the EBA but ESMA.

<sup>7</sup> The Capital Requirements Regulation, Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central

institution may now act as originator or sponsor on a non-EU securitisation without any need to comply with these provisions of the Securitisation Regulation. However, note that Article 14 of the CRR continues to provide that the due diligence requirements under Article 5 of the Securitisation Regulation apply on a consolidated and sub-consolidated basis.

Article 5(1)(e) of the Securitisation Regulation provides that “[p]rior to holding a securitisation position, an institutional investor, other than the originator, sponsor or original lender, shall verify that: [...] the original, sponsor or SSPE has, where applicable, made available the information required by Article 7 in accordance with the frequency and modalities provided for in that Article”. There continues to be uncertainty as to whether an institutional investor subject to the Securitisation Regulation is required to receive all of the information required under Article 7 of the Securitisation Regulation to fulfil its due diligence requirements under Article 5 where the originator or sponsor is not established in the EU (for the more on the impact of Brexit on these jurisdictional issues, see section VI. A Note on Brexit).

#### **IV. Timing for Application of the Reporting Templates RTS**

Following a lengthy delay, the Reporting Templates RTS were finally adopted by the European Commission on 16 October 2019 (in a form very close to the revised draft proposed by ESMA in January 2019), with no material changes to the substance of the requirements. In respect of the prescribed reporting templates, no new fields have been added or removed, and no additional clarificatory guidance has issued in connection with reporting practices.

Following adoption by the European Commission, there is now an objection period during which the European Parliament<sup>8</sup> or the Council of Ministers<sup>9</sup> may object to the Reporting Templates RTS as adopted by the European Commission. It is very rare that the European Parliament exercises its rejection right and we do not expect that it will do so in relation to the RTS. It is also possible for the European Parliament to positively endorse the Reporting Templates RTS thereby ending the scrutiny period sooner than three months but that would be very unusual.

The Reporting Templates RTS will become effective only after:

- such objection period has expired;
- the Reporting Templates RTS has been published in the Official Journal of the European Union; and
- twenty calendar days has elapsed from (and including) the date of such publication.

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counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, as amended by Regulation (EU) 2019/876 of 20 May 2019, such amendment coming into force on 27 June 2019.

<sup>8</sup> Comprising members directly elected by voters in EU member states in quinquennial elections, the most recent of which occurred in May 2019.

<sup>9</sup> Comprising representatives of the governments of the EU member states.

Based on the above, we do not expect the Reporting Templates RTS to become effective and applicable earlier than mid-February 2020. See section VI (*A note on Brexit*), below, for additional commentary as to how this date may impact UK institutional investors.

Following the Reporting Templates RTS becoming effective and applicable, all securitisations within the jurisdictional scope of the Securitisation Regulation will need to report in the form of the applicable reporting templates. However, ESMA has advised that it will not be necessary to re-report any previously-reported information from dates prior to the date on which the Reporting Templates RTS has become applicable.<sup>10</sup>

The securitisation industry now has the benefit of viewing the finalised reporting templates in 'XML schema' format, which is the form in which data can be mapped and integrated into systems in advance of the application date. Market participants should therefore have time to prepare for the application of these templates early next year.

#### **V. Updated Q&As**

The Q&As were updated on 17 July 2019 and provided some high level guidance, in particular in respect of the asset-level reporting of transactions where the underlying assets are trade receivables.

The Q&As confirmed that the esoteric asset template should be used for reporting trade receivables securitised as part of a non-ABCP securitisation; there had been previously a lack of clarity on this point. A growing number of market participants had expected that trade receivables should be reported on Annex 9 notwithstanding that the 'plain English' meaning of the term esoteric did not seem appropriate for such a large asset class. The Q&As further note that a report will be published by the Joint Committee of the European Supervisory Authorities by 1 January 2021 in respect of the functioning of the 'esoteric' template in the context of trade receivables.<sup>11</sup>

Further, in ABCP-funded transactions there was uncertainty as to how the ABCP reporting template would be used in the context of co-funding structures amongst multiple ABCP conduits. The Q&As clarified that this template should be reported once per each conduit that is co-funding each transaction, in respect of the amount of underlying assets transferred to the SSPE (not in respect of the amount of underlying exposures financed by each individual conduit).<sup>12</sup> Therefore, if two conduits were to be co-purchasing/co-funding one transaction, each of these conduits must be report (on Annex 11) once for each exposure type that is securitised as part of this particular transaction. This is pertinent in the trade receivables marketplace where we often see securitisations co-funded by more than one (and sometimes

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<sup>10</sup> See the response provided at 5.1.1.1(c) (in particular) of the Q&As.

<sup>11</sup> See the response provided at 5.9.1 of the Q&As.

<sup>12</sup> See the response provided at 5.1.1.4 of the Q&As.

numerous) conduits, and this approach makes sense from a practical perspective as it minimises the amount of duplicative reporting.

The updated Q&As further provided clarity at a granular level as to how several fields in the templates should be completed, including:

- confirmation that under no circumstance can ND5 (*i.e.*, “non-applicable”) be entered in instances where the reporting entity deems that the information is not relevant to the risk assessment – instead use of ND5 is limited to being used where the information is not applicable to the field in question;<sup>13</sup>
- confirmation that multiple variants of ND should not be entered as a response to the templates – instead the reporting entity should judge which ND-option (*i.e.*, ND1, ND2, ND3, ND4 or ND5) is most relevant and enter that option;<sup>14</sup>
- the method in which ‘inactive’ exposures should be reported (which generally should follow the factual situation on the data cut-off date);<sup>15</sup>
- the method in which certain numbers and amounts such as interest rates, interest rate indexes, margins, currency swaps, partial bullet repayments, loan-to-value ratios (and other ratios) are reported;<sup>16</sup> and
- how triggers, tests and other events are reported in the context of the investor-level template reports.<sup>17</sup>

## VI. A Note on Brexit

The Securitisation (Amendment) (EU Exit) Regulations 2019 (the “**Securitisation Exit Regulations**”) was made a statutory instrument (UK Statutory Instrument 2019 No. 660) on 25 March 2019 and is deemed to come into force on ‘exit day’,<sup>18</sup> providing for a parallel ‘Securitisation Regulation’ at the domestic level of UK law.

Although the form of Brexit is still unclear at the time of writing, recent pronouncements from the new UK government state that Brexit will occur on 31 October 2019. In reality this “exit day” might well be the date falling at the end of a transition period included as part of the revised withdrawal agreement negotiated between the EU and UK in October 2019. If that agreement makes it through the legislative process, the transition period would be scheduled to end on 31 December 2020 (subject to a possible extension). The occurrence of a ‘hard Brexit’,

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<sup>13</sup> See the response provided at 5.1.2.9(c) of the Q&As.

<sup>14</sup> See the response provided at 5.1.2.9(d) of the Q&As.

<sup>15</sup> See the response provided at 5.1.3.2 of the Q&As.

<sup>16</sup> See the responses provided at 5.1.4.20, 5.1.4.21, 5.1.4.5, 5.1.5.5, 5.1.5.6 and 5.1.5.17.

<sup>17</sup> See the response provided at 5.12.1 (in particular) of the Q&As.

<sup>18</sup> We note that Part 3 (Amendment of the CRA Regulation) of the Securitisation Exit Regulations is deemed to come into force in accordance with Part 10 of the Credit Rating Agencies (Amendment, etc.) (EU Exit) Regulations 2019 (which is also set to come into force on ‘exit day’).

taken to mean a Brexit without any type of agreement, means that 'exit day' would likely occur on 31 October 2019.<sup>19</sup>

The changes to the full text of Article 5(1) of the Securitisation Regulation which will come into effect on exit day are as follows (with additions shown in underline and deletions shown in strikethrough):

*Prior to holding a securitisation position, an institutional investor, other than the originator, sponsor or original lender, shall verify that:*

- (a) where the originator or original lender established in the ~~Union~~ United Kingdom is not a credit institution or an investment firm as defined in points (1) and (2) of Article 4(1) of Regulation (EU) No 575/2013, the originator or original lender grants all the credits giving rise to the underlying exposures on the basis of sound and well-defined criteria and clearly established processes for approving, amending, renewing and financing those credits and has effective systems in place to apply those criteria and processes in accordance with Article 9(1) of this Regulation;*
- (b) where the originator or original lender is established in a third country, the originator or original lender grants all the credits giving rise to the underlying exposures on the basis of sound and well-defined criteria and clearly established processes for approving, amending, renewing and financing those credits and has effective systems in place to apply those criteria and processes to ensure that credit-granting is based on a thorough assessment of the obligor's creditworthiness;*
- (c) if established in the ~~Union~~ United Kingdom, the originator, sponsor or original lender retains on an ongoing basis a material net economic interest in accordance with Article 6 and the risk retention is disclosed to the institutional investor in accordance with Article 7;*
- (d) if established in a third country, the originator, sponsor or original lender retains on an ongoing basis a material net economic interest which, in any event, shall not be less than 5 %, determined in accordance with Article 6, and discloses the risk retention to institutional investors;*
- (e) if established in the United Kingdom, the originator, sponsor or SSPE has, where applicable, made available the information required by Article 7 in accordance with the frequency and modalities provided for in that Article;*
- (f) if established in a third country, the originator, sponsor or SSPE has, where applicable:*

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<sup>19</sup> Under this scenario, we expect that the timing of 'exit day' will be midnight Brussels time or 11:00 pm London time on 31 October 2019.

- (i) **made available information which is substantially the same** as that which it would have made available in accordance with point (e) if it had been established in the United Kingdom; and
- (ii) has done so with such frequency and modalities as are substantially the same as those with which it would have made information available in accordance with point (e) if it had been so established.

Therefore, post-exit day, a UK institutional investor<sup>20</sup> will be required to verify that a non-UK originator, sponsor or SSPE has **made available information which is substantially the same** as the information required by Article 7. There is no guidance from the PRA or FCA as to the meaning given to “substantially the same” in this context.

Furthermore, as noted above, as the Reporting Templates RTS will not be applicable from the start of 1 November 2019 (and therefore the reporting templates will not technically be in force in the UK in advance of an early ‘exit day’). However, the Securitisation Exit Regulations adapt Articles 6 and 7 of the Securitisation Regulation to provide that the regulatory technical standards in relation to risk retention be adopted thereunder in relation to risk retention and the reporting templates shall be made by the “FCA and the PRA, acting jointly”.

Therefore, if ‘exit day’ were to occur on 31 October 2019, it seems certain that the FCA and the PRA will need to adopt separate reporting templates for the UK. The FCA and PRA have made no statement about the approach that they will take in this regard.

Our expectation is that the FCA and PRA will follow the forms of reporting templates adopted by the European Commission sufficiently closely so that the information made available under the UK reporting templates and the EU reporting templates will be considered “substantially the same”. If this is the case, therefore, EU securitisations reporting on the EU reporting templates will be sufficient for a UK institutional investor to satisfy its obligations under Article 5(1)(e) of the Securitisation Regulation (as adapted by the Securitisation Exit Regulations).

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<sup>20</sup> The term “institutional investor” is defined in Article 2(12) of the Securitisation Regulation and includes banks, investment firms, pension providers, fund managers and insurance undertakings. A “UK institutional investor” will be such a firm that is authorised by one of the PRA or the FCA.

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