

Clients & Friends Memo

The Commission Fails to Endorse ESMA's Draft Disclosure Technical Standards Under the Securitisation Regulation

19 December 2018

Introduction

The European Securities and Markets Authority (“ESMA”) published on its website late on 18 December 2018, a letter from the European Commission to ESMA dated 30 November 2018 (the “Commission’s Letter”)¹, in which the Commission stated that it only intended endorsing the draft technical standards on disclosure requirements under the EU Securitisation Regulation² prepared by ESMA, once certain amendments have been made.

The draft technical standards that the Commission has declined to endorse at this stage are those annexed to ESMA’s August 2018 Final Report (the “Final Report”)³ which draft technical standards included detailed draft reporting templates (the “draft Disclosure Technical Standards”).

Background: The Securitisation Regulation’s Transparency Requirements

The Securitisation Regulation will apply 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 investors⁴. The originator,

¹ At: https://www.esma.europa.eu/sites/default/files/library/6771757_-_mai_joor.pdf

² 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.

³ At: <https://www.esma.europa.eu/press-news/esma-news/esma-defines-disclosure-standards-under-securitisation-regulation>

⁴ 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 Cadwalader, Wickersham & Taft LLP (Cadwalader) is a registered limited liability partnership established under the laws of the State of New York. The personal liability of our partners is limited to the extent provided in such laws. Additional information is available upon request or at www.cadwalader.com. A list of our partners, who are Solicitors or Registered Foreign Lawyers in England and Wales, is available for inspection at the above address. Regulated by the Solicitors Regulation Authority.

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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 quarterly⁵ 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 Final Report annexed draft Disclosure Technical Standards including the detailed draft reporting templates for these obligations and for “Inside Information” and “Significant Events” reporting⁶.

The Commission’s Letter

Although the Commission’s Letter is dated 30 November 2018, the ESMA website states that it was received by ESMA on Friday 14 December 2018. The Commission notes that it agrees with ESMA’s approach in the draft Disclosure Technical Standards, but the standards could, if not designed properly, place an excessive burden on the reporting entity, especially since they represent the first comprehensive EU-wide disclosure regime for securitisations. The Commission notes 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. Such a consequence would be counter to the objectives of the Securitisation Regulation.

The Commission stresses the importance of proportionality in ensuring a balance between giving users the necessary available information on the one hand, and in promoting a well-functioning securitisation market in line with objectives of the Securitisation Regulation on the other.

The Commission focuses on the availability of the “No Data” option in the draft templates. It requests ESMA to examine whether “*at the present juncture*” the “No Data” option could be available for additional fields in the draft templates. The Commission stresses that this is particularly important for the templates for ABCP securitisations (for which there are no similar harmonised disclosure templates currently in use). The ability to use “No Data” options in more fields would help to address a number of concerns raised by market participants.

The Commission’s Letter referred explicitly to the proposed templates for ABCP securitisations. Sponsors of ABCP conduit programmes are responsible for compliance with the Securitisation’s Regulation’s transparency requirements, but do not have the contractual right to

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.

⁵ Monthly for ABCP.

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

request this information from the sellers to the ABCP conduits. It is therefore difficult to see how sponsors could comply with completing the draft disclosure templates in full. This could have had the effect of deterring ABCP conduits from making new issuances after 1 January 2019. In other words, the possibility of a major disruption to the ABCP conduit market, with the resulting deleterious economic consequences, was a serious prospect, had the Commission not taken its action in not endorsing the draft Disclosure Technical Standards in their current form.

The Commission's Letter also notes that it requests 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.

What Happens Next?

The Commission's Letter is written in accordance with the legislative procedure which provides that where the Commission intends to endorse draft regulatory technical standards with amendments, it is required to send them back to ESMA, explaining the reasons for those amendments.

The legislative procedure further provides that within a period of six weeks, ESMA may 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). If, on the expiry of that six week period, ESMA has not submitted amended draft Disclosure Technical Standards, or has submitted draft Disclosure Technical Standards that are not amended in a way consistent with the Commission's proposed amendments, the Commission may adopt the Disclosure Technical Standards with the amendments it considers relevant, or it may reject them.

The Commission notes that it intends to endorse the draft Disclosure Technical Standards once the amendments have been made by ESMA.

Background: The Joint Statement of 30 November 2018

The Commission's Letter should be read in conjunction with the joint statement published on 30 November 2018 (the "**Joint Statement**")⁷ by the European Supervisory Authorities which noted that the reporting templates being prepared by ESMA for the purposes of fulfilling the ongoing disclosure requirements under the Securitisation Regulation were unlikely to be adopted

⁷ https://esas-joint-committee.europa.eu/Publications/Statements/JC_Statement_Securitisation_CRA3_templates_plus_CRR2_final.pdf

by 1 January 2019, and that, as a result, the Securitisation Regulation transitional provisions would apply for the period following 1 January, until the application of the these templates.

The Joint Statement said that ESMA and the Commission were “currently considering how to address market concerns raised about some aspects of the ESMA Disclosure Templates”.

The Securitisation Regulation provides that the templates in Delegated Regulation (EU) 2015/3 (the “**CRA3 Templates**”) apply in the period from 1 January 2019 until the application date of the Disclosure Technical Standards and the associated disclosure templates. Although the European Supervisory Authorities noted that they were aware of “*severe operational challenges*” for reporting entities in their having to report using the CRA3 Templates on a transitional basis, they also said in the Joint Statement that they did not have any formal legal power to allow the disapplication of the CRA3 Templates. In an attempt to encourage competent authorities to be flexible in the use of their supervision and enforcement powers, they said that competent authorities could “*take into account the type and extent of information already being disclosed by reporting entities*” and that competent authorities should carry on a “*case-by-case assessment*” of the degree of compliance with the Securitisation Regulation’s transparency obligations.

As we discussed in our Clients & Friends Memorandum dated 3 December 2018⁸, there is uncertainty about how much comfort can be obtained from the Joint Statement where reporting entities do not intend to report using the CRA3 Templates. The Commission’s Letter does not provide any more certainty in this respect.

Conclusion

The Commission’s decision not to endorse ESMA’s draft Disclosure Technical Standards in their current form was widely expected. The potential for substantial market disruption from the proposed rushed adoption of such complex and detailed reporting requirements appears to have been recognised by the Commission. Sensibly, it is asking ESMA to reconsider these proposals, in particular regarding the use of the No Data options where information is not available. This delay in the adoption of the Disclosure Technical Standards may also allow market participants a more realistic timeframe in which to develop their reporting systems necessary to comply with the new requirements.

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

⁸ <https://www.cadwalader.com/uploads/cfmemos/63c1757ef1b58dc81617ba9fc2de5468.pdf>

surrounding the implementation of the new Securitisation Regulation regime with the relevant European bodies, 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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