Clients&FriendsMemo

CRA3 – Final Draft Regulatory Technical Standards in relation to Disclosure Requirements for Structured Finance Instruments

8 September 2014

On 24 June 2014, ESMA[1] published its Final Report on the draft regulatory technical standards under CRA3 (as defined below) (the "**Final Report**").[2] With respect to structured finance instruments, the Final Report sets out draft standards for the information to be disclosed, the frequency of disclosure and the presentation of the applicable information in relation to the disclosure requirements for structured finance instruments pursuant to Article 8b of the CRA Regulation (as defined below).

The key points in relation to the disclosure requirements for structured finance instruments are as follows:

- Certain information will be required to be disclosed in relation to structured finance instruments.
- The disclosure requirements will apply where any one or more of the issuer, originator and sponsor is established in the European Union (the "**EU**").
- The required information to be disclosed and the applicable reporting templates are set out for structured finance instruments with the following underlying assets:
  - residential mortgages;
  - commercial mortgages;
  - SME loans;
  - auto loans;
  - consumer loans;
  - credit card loans; and
  - lease transactions.

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1 The European Securities and Markets Authority.

2 Final Report - Draft Regulatory Technical Standards under the CRA3 Regulation, ESMA/2014/685.

- The following information will be required to be disclosed in relation to the structured finance instruments referred to above:
  - loan level information;
  - the prospectus and the key transaction documents;
  - a transaction summary, where a prospectus has not been issued in compliance with the Prospectus Directive;[3]
  - investor reports; and
  - ongoing event-based information.
- For other structured finance instruments, such as those backed by trade receivables, and asset-backed commercial paper ("**ABCP**"), a "phase-in approach" will apply, with the disclosure requirements to be published at a later date.
- Private and bilateral transactions are within the scope of the rules, but are also subject to a "phase-in approach" and further discussion.
- The disclosure requirements will apply to structured finance instruments issued from the date of entry into force (expected to be towards the end of this year) and which are still outstanding on the application date of 1 January 2017. However, there will be no requirement to keep a backlog of information before the application date.

Background

On 20 June 2013, the European Regulation known as CRA3 came into force ("**CRA3**").[4] CRA3 amended Regulation (EC) No. 1060/2009 on credit rating agencies[5] (as amended, the "**CRA Regulation**"). The CRA Regulation sets out certain conditions for the issuance of credit ratings and rules on the organisation and conduct of credit rating agencies ("**CRAs**"), and also includes certain obligations for issuers, originators and sponsors established in the EU in relation to structured finance instruments.

CRA3 included the following new provisions with respect to structured finance instruments:

- rotation requirements for CRAs in relation to re-securitisations (Article 6b);
- a requirement for the issuer, the originator and the sponsor of a structured finance instrument established in the EU jointly to publish certain information on a website to be set up by ESMA (the "**Website**") (Article 8b) (the "**Disclosure Requirements**");

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3 Directive 2003/71/EC

4 Regulation (EU) No. 462/2013 of 21 May 2013.

5 Regulation (EC) No 1060/2009 of 16 September 2009 on credit rating agencies. The CRA Regulation was previously amended by Regulation (EC) No 513/2011 of 11 May 2011.

- a requirement for the issuer or a related third party[6] who intends to solicit a rating of a structured finance instrument to appoint at least two CRAs (Article 8c); and
- a requirement for the issuer or a related third party who intends to appoint at least two CRAs in respect of the same issuance or entity to consider appointing at least one CRA with no more that 10% of the total market share, which can be evaluated by such issuer or related third party as capable of providing the rating, provided there is a CRA available to do so. Where such a CRA is not appointed, this is required to be documented (Article 8d).

For further information on CRA3 and its impact on structured finance instruments, please see our Clients & Friends Memo entitled "CRA3 – New Requirements Affect Issuers, Originators and Sponsors as well as Rating Agencies" dated 30 July 2013.

The Disclosure Requirements (Article 8b)

Article 8b of the CRA ("**Article 8b**") provides that the issuer, originator and sponsor of a structured finance instrument established in the EU must jointly publish information in relation to:

- the credit quality and performance of the underlying assets of the structured finance instrument;
- the structure of the securitisation transaction;
- the cash flows;
- any collateral supporting a securitisation exposure; and
- any information that is necessary to conduct comprehensive and well-informed stress tests on the cash flows and collateral values supporting the underlying exposures.

In connection with the Disclosure Requirements, ESMA was required to develop draft regulatory technical standards in relation to the relevant information to be disclosed, the frequency with which it is to be updated and the presentation of such information by means of a standardised disclosure template (the "**Draft Disclosure RTS**").

The required information is to be published on the Website. However, Article 8b does not require information to be disclosed where this would breach national or EU law in relation to confidentiality or the processing of personal data.

The stated aim of the Disclosure Requirements is to improve the ability of investors to make an informed assessment of the creditworthiness of structured finance instruments, thereby reducing their reliance on credit ratings. It was also considered likely that the publication of such information will reinforce competition between CRAs by encouraging unsolicited credit ratings.

6 "related third party" means "the originator, arranger, sponsor, servicer or any other party that interacts with a credit rating agency on behalf of a rated entity, including any person directly or indirectly linked to that rated entity by control".

On 10 July 2013, ESMA published a Discussion Paper[7] (the "**Discussion Paper**") requesting comments from market participants in preparation for drafting the various regulatory technical standards required to be drafted under CRA3, including the Draft Disclosure RTS.[8] Interested parties provided their responses to the Discussion Paper to ESMA.

This was followed by a Consultation Paper in February 2014[9] (the "**Consultation Paper**") which included a first draft of the Draft Disclosure RTS, together with a summary of the comments received and an impact assessment. Market participants submitted their comments on this version of the Draft Disclosure RTS as part of the consultation process.

The Final Report was then published on 24 June 2014, with a revised draft of the Draft Disclosure RTS, including various reporting templates, a feedback statement with a discussion of the responses received to the Consultation Paper (the "**Feedback Statement**") and a cost-benefit analysis (collectively, the "**Final Draft Disclosure RTS**").

In the remainder of this Clients & Friends Memo, we consider the Disclosure Requirements for structured finance instruments in light of the Final Draft Disclosure RTS.

Who Must Disclose?

Article 8b requires the issuer,[10] the originator[11] and the sponsor[12] of a structured finance instrument established in the EU jointly to publish certain information on the Website.

The Final Draft Disclosure RTS do not specifically deal with the situation where a particular transaction does not have an "issuer", such as where a structured finance transaction is funded

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7 Discussion Paper on CRA3 Implementation, 10 July 2013, ESMA/2013/891.

8 The other regulatory technical standards in ESMA's Final Report are in relation to the new European rating platform and the periodic reporting of fees charged by CRAs.

9 Consultation Paper on CRA3 Implementation, 11 February 2014, ESMA/2014/150.

10 "issuer" is defined in CRA3 by reference to the definition in Article 2(1)(h) of the Prospectus Directive, i.e. "a legal entity which issues or proposes to issue securities".

11 "originator" is defined in CRA3 by reference to the definition in point (41) of Article 4 of Directive 2006/48/EC. This Directive has now been replaced by the Capital Requirements Regulation, which defines "originator" as:

"an entity which:

(a) itself or through related entities, directly or indirectly, was involved in the original agreement which created the obligations or potential obligations of the debtor or potential debtor giving rise to the exposure being securitised; or

(b) purchases a third party's exposures onto its balance sheet and then securitises them".

12 "sponsor" is defined in CRA3 by reference to the definition in point (42) of Article 4 of Directive 2006/48/EC. The corresponding definition in the Capital Requirements Regulation defines it as follows:

"an institution other than an originator credit institution that establishes and manages an asset-backed commercial paper programme or other securitisation scheme that purchases exposures from third party entities".

"institution" is defined as "a credit institution or an investment firm", each of which is defined in the Capital Requirements Regulation.

via a loan. However, it seems likely that the Disclosure Requirements would still apply to the originator and sponsor of such a transaction.

There has been some discussion regarding the identity of the "originator" in particular transactions, and the Final Report acknowledges that concerns had been expressed regarding situations where there were multiple originators, where the originator was not involved in the securitisation or if no entity fell within the definition of originator. The Final Draft Disclosure RTS clarify that one or multiple entities can be designated as the Reporting Entity, so this could be useful in the event of multiple originators, for example, where there are a number of originators of the underlying loans in a CLO transaction. However, the situation of an uninvolved originator (for example, an original lender that has sold its interest in a loan to another entity and is unaware of the securitisation) is not addressed. The definition of "originator" appears to indicate that the Disclosure Requirements could apply both to the original originator, or creator, of the underlying assets, and a subsequent purchaser of those assets. It would seem strange if an originator that had sold the relevant assets and no longer had any interest in them were still liable to comply with the Disclosure Requirements, at the same time as the purchaser, i.e. the new originator, of those assets, particularly if the original originator were unaware of the securitisation. It may be that the Disclosure Requirements can be interpreted to apply to the new originator in place of the old originator (as with the risk retention requirements under Article 405 of the Capital Requirements Regulation[13]), but it should be noted that this point has not yet been clarified and therefore may be of concern to originators who transfer their assets.

Joint Obligation and Delegation

The obligation to comply with the Disclosure Requirements is imposed jointly on the issuer, originator and sponsor. However, under the Final Draft Disclosure RTS such parties may designate another entity (the "**Reporting Entity**") to publish the relevant information. The identity of any Reporting Entity must be notified to ESMA without undue delay and is without prejudice to the responsibility of the issuer, originator and sponsor to comply with the Disclosure Requirements.

This is different from the wording in the original draft of the Draft Disclosure RTS in the Consultation Paper which required the issuer, originator and sponsor jointly to agree upon and designate the entity responsible for providing the information, and proposed to allow such duties to be outsourced to the servicer or the management company of the structured finance instrument.

The new wording can be seen as an improvement as there is now no need for a joint agreement on the Reporting Entity, and the Feedback Statement indicates that the Reporting Entity may be one or more of such parties or a third party, although it is clear that the issuer, originator and sponsor cannot avoid their responsibilities under the Disclosure Requirements. It seems likely that the issuer, originator and sponsor will want to have a clear agreement among themselves

[13] Regulation (EU) No 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

as to which entity will be the Reporting Entity, and the other parties may well want to have the ability to be indemnified by the Reporting Entity if it fails to comply with those obligations.

Jurisdictional Scope

There had previously been some uncertainty about how the reference in Article 8b to the issuer, originator and sponsor of a structured finance instrument "established in the [European] Union" should be interpreted. The Discussion Paper had raised the possibility that Article 8b would apply not only jointly to issuers, originators and sponsors established in the EU, but also to issuers, originators and sponsors whose structured finance instruments were traded in the EU. However, this interpretation has been rejected, and the Final Report makes it clear that the Disclosure Requirements apply if the issuer, originator or sponsor is established (and for that purpose has its statutory seat) in the EU.

It is important to note that if any one or more of the issuer, originator or sponsor is established in the EU, then each of them will be have a responsibility for complying with the Disclosure Requirements, even if the other parties are established outside the EU. This means that the Disclosure Requirements could have extra-territorial scope, and could apply to non-EU branches of an entity established in the EU, or to non-EU entities if another entity falling within the definition of an issuer, originator or sponsor in relation to the transaction is established in the EU.

Meaning of Structured Finance Instrument

One significant discussion point during the course of the development of the Final Draft Disclosure RTS has been the issue of which "structured finance instruments" should fall within the scope of Article 8b.

Firstly, it had been argued that since "issuer" is defined in CRA3 by reference to the Prospectus Directive, the reference to "structured finance instrument" in Article 8b should be interpreted in accordance with the Prospectus Directive definition of "securities", i.e. "transferable securities… with the exception of money market instruments",[14] and should therefore exclude ABCP and other transactions such as certain loans.

However, the Final Report states that it should not be limited in this way and should include any other financial instruments and assets resulting from a securitisation transaction or scheme,

[14] "securities" is defined in the Prospectus Directive as "transferable securities as defined in Article 1(4) of Directive 93/22/EEC with the exception of money market instruments as defined by Article 1(5) of Directive 93/22/EEC, having a maturity of less than 12 months". Directive 93/22/EEC has been replaced by Directive 2004/39/EC of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC and repealing Council Directives 93/22/EEC ("**MIFID**"). MIFID defines "transferable securities" as those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as: (a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares; (b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities; (c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures. MIFID defines "money-market instruments" as "those classes of instruments which are normally dealt in on the money market, such as treasury bills, certificates of deposit and commercial papers and excluding instruments of payment".

using the wider Capital Requirements Regulation definition, in other words, any financial instrument or other asset resulting from a securitisation transaction or scheme, the key characteristic of which being whether the credit risk has been tranched,[15] which could also encompass certain other transactions which are not generally considered to be securitisations.

Secondly, the majority of the respondents to the Consultation Paper had forcefully argued that private and bilateral transactions and unrated transactions should be excluded from the Disclosure Requirements.

Respondents questioned the value of public disclosure for private and bilateral structured finance instruments, where there are no investors besides the bank providing the funding. In addition, there was concern about the implications of disclosure for private deals, in particular the risks of having to disclose information which may be the subject of confidentiality agreements and commercially sensitive information.

As regards unrated transactions, it was argued that these should be outside the scope of the text of CRA3 (the CRA Regulation was originally aimed at setting out a revised regulatory framework for rating agencies and the issuance of credit ratings), and in particular, that imposing these requirements on unrated deals would be inconsistent with one of the stated aims of CRA3 of reducing investors' dependence on credit ratings.

Many market participants will therefore be disappointed by the conclusion in the Final Draft Disclosure RTS that private, bilateral and unrated structured finance instruments are within the scope of the Disclosure Requirements.

What Must be Disclosed and How?

Notwithstanding the application of Article 8b to all structured finance instruments where the originator, issuer or sponsor is established in the EU, the disclosure obligations will initially only apply to structured finance instruments backed by certain specified asset classes, and other structured finance instruments will be subject to a "phase-in approach".

Asset Classes

Article 6 of the Final Draft Disclosure RTS ("**Article 6**") provides that the information requirements in Article 5 of the Final Draft Disclosure RTS (as described below) apply to structured finance instruments backed by the following assets:

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[15] Article 3(1)(l) of the CRA Regulation defines a "structured finance instrument" as "a financial instrument or other assets resulting from a securitisation transaction or scheme referred to in Article 4(36) of Directive 2006/48/EC". Article 4(1)(61) of the Capital Requirements Regulation (which has replaced Directive 2006/48/EC) contains the following definition of "securitisation":

"a transaction or scheme, whereby the credit risk associated with an exposure or pool of exposures is tranched, having both of the following characteristics:

(a) payments in the transaction or scheme are dependent upon the performance of the exposure or pool of exposures;

(b) the subordination of tranches determines the distribution of losses during the ongoing life of the transaction or scheme."

(a) residential mortgages, including prime and non-prime mortgages and home equity loans;

(b) commercial mortgages, including retail or office property loans, hospital loans, care residences, storage facilities, hotel loans, nursing facilities, industrial loans and multifamily properties;

(c) loans to small and medium-sized enterprises;

(d) auto loans;

(e) consumer loans;

(f) credit card loans; and

(g) leases to individuals and/or businesses.

In the case of structured finance instruments with underlying asset classes other than those listed above, these would be subject to a "phase-in approach" and further disclosure requirements will be issued by ESMA. The structured finance instruments to which this "phase-in approach" will apply will include those relating to the following underlying asset classes:

(a) trade receivables;

(b) store cards;

(c) corporate loans or leases;

(d) ABCP;

(e) structured finance instruments where the underlying assets comprise other structured finance instruments (i.e. resecuritisations);

(f) synthetic structured finance instruments; and

(g) structured finance instruments where the underlying assets are heterogeneous.

Information to be Disclosed

To the extent that a structured finance instrument is backed by any of the initial asset classes, or by an asset class which has been "phased in", specified information will be required to be disclosed on the Website.

Article 5 of the Final Draft Disclosure RTS specifies that where a structured finance instrument is backed by any of the asset classes specified in Article 6, the following types of information should be disclosed:

(a) loan level information, as set out in the applicable standardised disclosure template ("**Loan Level Information**");

(b) the following documents (where applicable) ("**Transaction Documentation**"):

(i) the final offering document or prospectus, together with the closing transaction documents (including any public documents referred to in the prospectus or which govern the workings of the transaction, but excluding legal opinions);

(ii) the asset sale agreement, assignment, novation or transfer agreement (and any relevant declaration of trust);

(iii) the servicing, back-up servicing, administration and cash management agreements;

(iv) the trust deed, security deed, agency agreement, account bank agreement, guaranteed investment contract, incorporated terms or master trust framework or master definitions agreement;

(v) any relevant inter-creditor agreements, swap documentation, subordinated loan agreements, start-up loan agreements and liquidity facility agreements; and

(vi) any other relevant underlying documentation.

The above documents are required to include a detailed description of the waterfall of payments of the structured finance instrument;

(c) where a prospectus has not been drawn up in compliance with the Prospectus Directive, a transaction summary or overview of the main features of the structured finance instrument is required ("**Transaction Summary**"). This must include the following information:

(i) deal structure;

(ii) the asset characteristics, cash flows, credit enhancement and liquidity support features;

(iii) the note holder voting rights and the relationship between note holders and other secured creditors;

(iv) the transaction triggers and the consequences of breach;

(v) structure diagrams containing an overview of the transaction, the cash flows and the ownership structure;

(d) investor reports containing certain specified information ("**Investor Reports**"); and

(e) ongoing disclosure of the following event-based information ("**Event-Based Information**"):

(i) where the requirements under the market abuse regime apply, any disclosure of any information required to be disclosed under the market abuse regime; and

(ii) disclosure of any other significant change or event in any of the following:

(A) a breach of the obligations in the documentation relating to the structured finance instrument;

(B) structural features that can materially impact on the performance of the structured finance instrument; and

(C) the risk characteristics of the structured finance instrument and of the underlying assets.

The above disclosure requirements have been modified in some respects from those in the Consultation Paper. In response to comments from market participants, the previous requirement for cash flow models has been removed and it has been clarified that a transaction summary is required only if there is no prospectus issued in compliance with the Prospectus Directive. In addition, the Investor Reports are no longer required to be disclosed monthly, but quarterly.

Furthermore, some changes were made in response to concerns about the event-based disclosure requirements. There is recognition of disclosures under the market abuse regime (although such disclosures are also required to be disclosed on the Website) and, in addition, the requirement in the previous draft to disclose a significant change or event likely to affect the creditworthiness of the underlying exposures or the structured finance instrument has been replaced with the requirement to disclose a significant change or event in relation to structural features that can materially impact on the performance of the structured finance instrument.

However, there is no carve-out for information which has already been publicly disclosed and there appears to be no provision which would allow the parties to redact commercially sensitive information, or which would allow the use of a "comply or explain" approach. We note though that the Final Report indicates that ESMA will issue technical reporting instructions which will contain further information on how to deal with information that cannot be provided, for example due to the specific features of the transaction.

We note that although Article 8b contains similar wording to the disclosure requirements in Article 409 of the Capital Requirements Regulation ("**Article 409**"), Article 409 requires sponsors and originators to make a determination as to what is "materially relevant data" for the

purposes of those disclosure requirements,[16] while the disclosure requirements under the Final Draft Disclosure RTS are more specific and prescriptive.

Disclosure Templates for Loan Level Information

Standardised templates for disclosure of Loan Level Information in relation to the initial asset classes are included in Annexes 1 to 7 of the Final Draft Disclosure RTS.

ESMA considered the existing loan level templates used by both the Bank of England ("**BoE**") and the European Central Bank ("**ECB**") for eligible collateral and decided to follow the ECB templates. The decision to use these templates may be welcomed by market participants where they already have some familiarity with them, although it has been noted that until now such templates have been optional, in the sense that market participants have had the choice whether to obtain ECB funding, and there is no flexibility under the Final Draft Disclosure RTS which would allow the use of another form of template instead. It was also noted that the ECB credit card template had only recently been introduced and was largely untested.

Some market participants had felt that the disclosure of loan level data was not suitable for certain transactions, such as credit card securitisations. The Final Report indicates that ESMA has noted the concerns expressed in relation to the suitability of this approach for structured finance instruments backed by credit card loans and intends to monitor and follow up on any new developments in this respect.

Where a structured finance instrument does not fall within one of the categories specified in Article 6 and no standardised template has been provided, the applicable standardised disclosure templates are intended to be developed and provided as soon as technically possible.

In addition, the Feedback Statement indicates that it is not yet possible to say to what extent the disclosure templates included in the Final Report will apply to private and bilateral structured finance instruments. ESMA is intending to start immediate cooperation with all relevant stakeholders to specify which disclosure templates will apply to these structured finance instruments and will develop new disclosure templates suitable to the specific nature or features of the remaining private and bilateral structured finance instruments. It is noted in the introduction to the Final Draft Disclosure RTS that developing disclosure requirements for private and bilateral transactions may be complex, and ESMA is intending to propose an amendment to the Final Draft Disclosure RTS which will include a public consultation and cost-benefit analysis.

[16] Article 409 requires sponsors and originators to ensure that prospective investors have access to all materially relevant data on the credit quality and performance of the individual underlying exposures, cash flows and collateral supporting a securitisation exposure as well as information necessary to conduct stress tests on the cash flows and collateral values supporting the underlying exposures. For that purpose, materially relevant data is to be determined as at the date of the securitisation and where appropriate due to the nature of the securitisation thereafter.

Frequency of Disclosure

The Transaction Documentation and, if applicable, the Transaction Summary, are required to be disclosed without delay after the issuance of the structured finance instrument.

The Loan Level Information and Investor Reports are required to be made available on a quarterly basis, no later than one month following the due date for payment of interest on the applicable structured finance instrument.

The Event-Based Information is required to be published on the Website upon disclosure of any information under the market abuse regime, or in the case of any other required Event-Based Information, as soon as possible.

The Reporting Entity is required to store the files sent to the Website in electronic form for at least five years. If the Reporting Entity, or the issuer, originator or sponsor, identifies any factual errors in the data that has been provided to the Website then it is required to replace such data without undue delay.

Timing

ESMA submitted the Final Report to the European Commission (the "**Commission**") on 24 June 2014. The Commission has three months from that date to decide whether to endorse the Final Draft Disclosure RTS contained therein, after which they will be submitted to the European Parliament and the Council of the EU for approval.

The Final Draft Disclosure RTS state that they will enter into force on the 20th day following publication in the Official Journal.

It is important to note that the Final Draft Disclosure RTS effectively provide a grandfathering provision for existing transactions, which is likely to be welcomed by market participants. Compliance will be required only in relation to structured finance instruments issued from the date of entry into force which are still outstanding at the date of application, i.e. 1 January 2017. In addition, issuers, originators and sponsors will not be required to keep a backlog of the relevant information between those two dates.

It is also worth noting that the Website will need to be developed by ESMA, and this may take some time.

As mentioned above, the disclosure requirements for certain asset classes and private and bilateral transactions are still to be finalised.

Conclusion

It appears that many of the issues that have been under discussion for some months have now been resolved by the Final Draft Disclosure RTS, albeit in many cases not in the way that many market participants had hoped. However, a number of points still remain uncertain.

Issuers, originators and sponsors are likely to be pleased that, while they still remain liable for their reporting obligations, they can delegate these obligations to a Reporting Entity.

The clarification of the meaning of "established in the [European] Union" will also be welcomed by market participants, in that they can look at the statutory seat of the issuer, originator and sponsor. However, the extra-territorial effect of this wording will be of concern for entities outside the EU who are caught by the requirements because one of the issuer, originator or sponsor is an EU entity, and it remains to be seen whether this will discourage involvement in securitisation transactions by non-EU entities.

Many market participants will be disappointed that the scope of the Disclosure Requirements extends to private, bilateral and unrated transactions, given the questions raised about the value of this for investors, and the risk that this may act as a disincentive to enter into these transactions. For example, a company new to obtaining funding via securitisation may find the obligation to disclose the required information in relation to the assets it has originated challenging in terms of the administrative burden and confidentiality concerns, and these may discourage it from entering into such a transaction and obtaining a potential source of funding.

However, comfort may be taken from the fact that the requirements set out in the Final Draft Disclosure RTS will not apply to private and bilateral transactions at this point as ESMA will need to develop the applicable reporting obligations. The scope of these reporting obligations therefore remains to be seen and we expect there to be further discussions on this issue.

ESMA has confirmed that loan level data will be required to be disclosed, even where market participants might have considered pool level data might be more useful, such as in the case of granular classes of underlying assets such as credit card loans (although ESMA has indicated that they will monitor this asset class) and trade receivables (although the reporting requirements for trade receivables are yet to be determined).

There remains uncertainty about what the disclosure obligations will be in the case of asset classes where the reporting requirements are not yet specified in the Final Draft Disclosure RTS, although it is to be hoped that they will be proportionate and appropriate to the particular asset class, and market participants may still have opportunities to influence the approach to be taken for these asset classes.

The Final Draft Disclosure RTS have certainly clarified certain aspects of the actual information to be disclosed, as summarised above. However, we expect that in practice there will be a number of questions on how to interpret the requirements. For example, in the event of a transaction where there is no prospectus, the requirements for exactly what needs to be disclosed for a particular transaction may not be entirely clear. Furthermore, the ongoing disclosure obligations are likely to raise some interesting questions. Concerns about confidentiality remain, particularly where parties are subject to contractual disclosure restrictions. In addition, market participants will be awaiting the technical reporting instructions from ESMA on how to deal with information that is required by the Final Draft Disclosure RTS

but that cannot be provided, and will also be waiting for the establishment of the Website to understand how this will operate.

Market participants will generally be pleased by the confirmation that the Disclosure Requirements will not apply to existing structured finance instruments, and will only apply to those issued from the date of entry into force which are still outstanding at the date of application, without a requirement to keep a backlog of information. However, what that does mean is that as soon as the Final Draft Disclosure RTS enter into force, the Disclosure Requirements will need to be kept in mind with respect to new structured finance instruments.

In summary, although many market participants are supportive of increased transparency, many are still likely to feel that the reporting requirements are disproportionately burdensome, and could be detrimental to the recovery of the securitisation market and the important funding source that this provides. Furthermore, it will not be easy for market participants to negotiate their way through many different disclosure requirements which may apply to them, considering the potential overlap and/or conflict with Article 409, the Prospectus Directive, the market abuse regime, the BoE and ECB reporting templates, Rule 17g-5[17] and Regulation AB II.[18]

It is significant that there have now been a number of recent statements, from the European Commission, the BoE and the ECB, such as the recent BoE and ECB Discussion Paper in May 2014,[19] which have expressed support for revitalising the securitisation market and recognising its importance as a funding source. In the light of these statements, any steps that could be taken to mitigate or adjust some of the aspects of the Final Draft Disclosure RTS which many consider to be unjustifiably wide in scope, particularly burdensome or simply unclear would certainly be welcomed by market participants.

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[17] Rule 17g-5 under the US Securities Exchange Act of 1934.

[18] On 27 August 2014 the US Securities and Exchange Commission approved Final Rules, commonly known as Regulation AB II, relating to asset-backed securities disclosure and regulation. For more details see the Cadwalader Clients & Friends Memo entitled "At Long Last – SEC Adopts Final Regulation AB II" dated 5 September 2014.

[19] The case for a better functioning securitisation market in the European Union – A Discussion Paper, May 2014, published by the Bank of England and the European Central Bank.

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