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The Draft EU Securitisation Regulation of 30 September 2015

The new draft regulation ‘laying down common rules on securitisation and creating a European framework for simple, transparent and standardised securitisation’ (the “STSR”) proposes new rules relating to:

1. risk retention: including revisions to the CLO originator definition and the possibility of criminal sanctions and large fines for non-compliance;
2. simple, transparent and standardised securitisation (“STS securitisation”);
3. due diligence: including retrospective provisions applicable to existing securitisations; and
4. disclosure: including obligations to disclose to both investors and regulators.

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This client briefing summarises some of the headline features of each of these four new sets of rules. We will circulate further briefings when the STSR is finalised and published in the Official Journal.

1. Risk retention

Article 4 of the STSR sets out the revisions to the risk retention rules; these include:

- a direct obligation on the ‘originator, sponsor or the original lender’ to ensure risk retention compliance (the existing regime imposes the obligation to ensure compliance on investors only and does not directly sanction the originator, sponsor or original lender);
- a prohibition on any originator which ‘has been established or operates for the sole purpose of securitising exposures’ from acting as risk retainer;
- grandfathering for investors in all deals issued prior to the entry into force of the STSR; and
- the possibility of further revisions within six months of the finalisation of the STSR by way of new regulatory technical standards to be proposed by the EBA.

Article 19 of the STSR permits Member States to impose criminal sanctions for non-compliance and Article 17 of the STSR permits Member States to impose fines of at least EUR 5,000,000 or up to 10% of annual turnover for legal persons. Such sanctions could be imposed on originators, sponsors or original lenders.

2. Simple, transparent and standardised securitisations

Articles 6 to 10 of the STSR set out the criteria for transactions to qualify as an STS securitisation; STS securitisations look set to receive more favourable capital treatment for banks and investment firms under the proposed revisions to the Capital Requirements Regulation.

The criteria include prohibitions on:

- actively managed portfolios (such as CLOs);
- market value structures (such as most CMBS which have an element of market value risk in relation to the sale or refinancing of the properties);

- resecuritisations (such as CDOs and SIVs); and
- structures which include derivatives as investments.

RMBS, auto loans/leases and credit card transactions look like some of the most likely beneficiaries of the new STS securitisation regime.

3. Due diligence

Article 3 of the STSR sets out new and ongoing due diligence obligations. Under Article 28(3) of the STSR, these new due diligence obligations apply to securitisations issued after 1 January 2011 (and to revolving transactions issued before then which have added assets since 1 January 2015). The due diligence obligations imposed on ‘institutional investors’ include the requirements:

- to establish written procedures to monitor the risk profile of securitisation positions and their underlying exposures;
- to regularly perform stress tests;
- to ensure adequate reporting of material risks to management; and
- to be able to demonstrate to regulators a comprehensive and thorough understanding of their securitisation positions.

4. Disclosure

Article 5 of the STSR sets out new disclosure rules which require the ‘originator, sponsor and SSPE’ to provide enhanced disclosure to investors and regulators including obligations to disclose:

- performance data on the underlying assets on a quarterly basis;
- all transaction documents and offering documents; and
- a ‘transaction summary’ for all deals which do not have a Prospectus Directive compliant offering circular: one application of this rule is that all private securitisations will now have to produce an ‘OC lite’.

If you would like to discuss any aspects of the STSR in more detail, please contact your regular Ropes & Gray contacts or one of the authors.