FINANCIAL MARKETS LAW COMMITTEE

ISSUES OF LEGAL UNCERTAINTY ARISING IN THE CONTEXT OF SECURITISATION DISCLOSURE REGIMES

MAY 2015

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FINANCIAL MARKETS LAW COMMITTEE

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1. EXECUTIVE SUMMARY AND INTRODUCTION

1.1 The role of the Financial Markets Law Committee (the "**FMLC**") is to identify issues of legal uncertainty or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks and to consider how such issues should be addressed.

1.2 The European Commission (the "**EC**") has published a Green Paper entitled "Building a Capital Markets Union" (the "**Green Paper**"), which is supplemented by a separate consultation paper entitled "An EU framework for simple, transparent and standardised securitisation" (the "**Securitisation CP**").

1.3 The Securitisation CP views the development of a high-quality securitisation market as constituting a "building block" of the Capital Markets Union ("**CMU**"), contributing to the EC's priority objective to support a return to sustainable growth and job creation.[2] A simple, transparent and standardised securitisation framework:

> should increase the transparency, consistency and availability of key information…and promote the growth of secondary markets to facilitate both issuance and investments.[3]

1.4 Question 6 of the Securitisation CP relates to securitisation disclosure requirements. In consideration of the overarching aims of the Green Paper, the FMLC would like to respond to question 6B in particular which asks how the existing disclosure obligations could be improved.[4] The conclusions and recommendations drawn by the FMLC in this paper are informed solely by the aims of legal certainty and avoidance of regulatory conflict or confusion.

1.5 This paper considers the existing EU securitisation disclosure regimes and their interaction with each other and with certain third country regimes. Considering only EU rules, a securitisation transaction would generally have to comply with as many as five different general standards of prospectus disclosure in addition to a set of detailed requirements, the whole as interpreted and applied by three different regulators. This is in addition to the provision of loan level data in three different formats and three

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2 Page 2 Securitisation CP.

3 Page 11 Green Paper.

4 Page 10 Securitisation CP.

different places and the provision of various other kinds of initial transaction documentation to two different websites. The requirements for ongoing disclosure are no better co-ordinated, with continuing obligations to provide loan level data in three different formats to three different websites, further updated transaction documentation to two different standards and to two different websites, a general requirement to ensure all information is made available to investors for their ongoing due diligence pursuant to four different standards administered by three different regulators and timely disclosure of inside information three different ways.

1.6 To emphasise the issues raised by the existing regimes and by the lack of harmonisation or mutual recognition and substituted compliance with third countries, this paper introduces a cross-border perspective, looking at the equivalent regimes in the United States of America (the "**US**") and Japan. It should be self-evident that the multiplicity of disclosure requirements is only increased when third countries are taken into account.

1.7 Because the practical implications of the multiplicity of disclosure regimes applicable to securitisations are best appreciated by way of a practical example, Annex 1 sets out a case study.

1.8 The FMLC is also aware that certain work has recently been undertaken by the European Supervisory Authorities (the "**ESAs**") on the existing EU securitisation disclosure regimes and their interaction. In particular, the FMLC notes that on 12 May 2015, the Joint Committee of the ESAs published a report on securitisation (the "**JC Report**") which focuses in part on the nature and content of such disclosure regimes. While the JC Report calls for greater harmonisation and coherence with respect to the EU due diligence requirements which would enhance legal certainty in this regard, the discussion of the disclosure requirements (and the corresponding recommendations) focuses primarily on their interaction with due diligence obligations. As a result, notwithstanding the spotlight brought by the JC Report on the overlapping nature of, and the differences in, the EU securitisation disclosure regimes, these matters remain unaddressed and indeed the recommendations made support further extension of these regimes.

1.9 The FMLC would welcome the rationalisation of the securitisation disclosure regimes and the establishment of a single repository for regulatory disclosures. Not only would this serve legal certainty, benefitting all securitisation parties, it would also facilitate and further the wider aims of the Green Paper and CMU project.

2. BACKGROUND

2.1 Securitisation is a financing technique that can help to provide funding on an asset-backed basis to originators and (where those originators are institutions with regulatory capital requirements) in some cases can also provide regulatory capital relief in respect of the assets securitised.

2.2 Investors in securitisation transactions, as in any other bond transaction, perform due diligence, including credit analysis on the securitisation bonds. Because the risk on a securitisation debt instrument is ultimately the risk on the underlying securitised assets,[5] it is central to investors' ability to conduct an appropriate assessment of their (prospective) investment that investors should be in a position to assess the credit characteristics of the underlying asset pool. Indeed, the need for transparency in respect of securitisation instruments is one of the key lessons drawn from the global financial crisis that began in 2007-08.

2.3 Since the height of the financial crisis, a number of regimes have either been introduced or expanded which impose disclosure requirements in respect of securitisation transactions. Despite being introduced in many cases by the same authorities, or pursuant to the same global priorities, these requirements are not meaningfully coordinated and result in a patchwork of obligations to disclose often very similar information but by different parties, in different ways, in different formats or to different people or repositories. This means the providers of this information are required to monitor and comply separately with a large number of different disclosure regimes all of whose purposes are the same: to ensure investors have the necessary information to assess the securitised products in which they are considering investing or have invested.

2.4 Moreover, investors are harmed as well as securitisers, because a prudent investor will have to check in all of the places provided for regulatory disclosure to ensure that it is making a well-informed decision. Having to check multiple sources to ensure that they have complete information leads to a greater likelihood of investors missing a material piece of information entirely.

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[5] These risks may be modified—sometimes very significantly—by the structuring of the securitisation transaction, but the essential nature of a securitisation transaction is to pass the risk on a pool of underlying assets from the originator of those assets to the investors in the securitisation.

2.5 In addition to the tensions between disclosure regimes, confusion is also caused for sponsors and originators by their sometimes conflicting duties under the various disclosure rules and under privacy and data protection rules, which may require them to make finely balanced decisions about what information can be made public without risking identifying individual consumer obligors. These tensions, however, are a substantial subject in themselves and are beyond the scope of this paper.[6]

2.6 Examples of the disparate disclosure regimes mentioned are discussed below.

3. EU REGIMES

3.1 Prospectus Directive and Transparency Directive[7]

3.1.1 The Prospectus Directive contains disclosure rules applicable, broadly, to offerings of securities and the Transparency Directive contains ongoing disclosure rules which are applicable to securities in public transactions. Although these are two distinct pieces of legislation, they are well-coordinated and are better conceived of as a single disclosure regime applicable in respect of securities which are either (a) the subject of a so-called "on-exempt offer to the public" in Europe or (b) admitted to trading on a regulated market.[8] These directives together (and arguably also together with the Market Abuse Regulation ("**MAR**"),[9] discussed below) contain the main securities law disclosure rules of a type that is common to most developed jurisdictions dealing with initial and ongoing disclosure. Broadly speaking, the requirements of the Prospectus Directive and of the Transparency Directive are complementary and mutually reinforcing, rather than overlapping or duplicative.

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6 The FMLC has previously published four letters and a paper on the EC's proposed Regulation and Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data. See "Letter to the European Commission on Proposed EU Data Protection Reforms" (2 April 2015); "Letter to the European Commission enclosing FMLC publications on Proposed EU Data Protection Reforms" (11 December 2014); "Letter to HM Ministry of Justice suggesting amendments to draft legislative instruments in the context of proposed European Data Protection Reforms" (21 November 2014); "Paper discussing issues of legal uncertainty arising in the context of European Data Protection Reform Proposals" (4 November 2014) and "Letter to the European Commission on Proposed EU Data Protection Reforms" (8 July 2014), all of which are available on the FMLC website (www.fmlc.org).

7 Directive 2003/71/EC and Directive 2004/109/EC respectively.

8 This is the scope of application of the Prospectus Directive. The scope of application of the Transparency Directive is slightly different but these differences are not material for the purposes of this paper. "admitted to trading on a regulated market" is a term defined by reference to the Markets in Financial Instruments Directive (recently recast as Directive 2014/65/EU).

9 Commission Regulation (EC) No 596/2014.

3.1.2 The Prospectus Directive requires the publication of a prospectus in respect of any non-exempt offer of securities to the public and also in respect of any request for admission to trading of securities on a regulated market.[10] While the Prospectus Directive is supplemented by a regulation that sets out a detailed list of information that must be contained in the prospectus (a list that will vary according to the nature of the issuer and the securities to be issued—and it should be noted that there are tailored disclosure items for asset backed securities),[11] the Prospectus Directive itself contains the general rule that the prospectus:

> shall contain all information which, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market, is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities.

This, taken together with the annexes to the Prospectus Regulation, lays out a comprehensive obligation to disclose all material information at the point of the offering (or admission to trading) to which the prospectus relates.

3.1.3 The Transparency Directive is considerably less comprehensive. The main requirement which it imposes on issuers is to publish periodic financial information in the form of annual and half-yearly financial reports. Securitisation issuers, however, will generally be exempt from these obligations.[12] Clearly, there is a gap in the Prospectus Directive and Transparency Directive regime as far as ongoing information relating to securitised products is concerned. This gap is partly addressed by the requirement to publish price-sensitive information under the market abuse regime (see below), but this alone would arguably be unsatisfactory, *inter alia*, because the market abuse regime is a regime designed primarily to deter dishonest behaviour,

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10 With respect to the former, as in most systems of securities laws, exemptions from the obligation to publish a prospectus are available in a number of circumstances, including exemptions on the basis of number of offerees, sophistication of offerees or minimum denomination of the securities offered. In these circumstances, a prospectus need not be published unless admission of the relevant securities to trading on a regulated market is sought.

11 Commission Regulation (EC) No 809/2004 (the "**Prospectus Regulation**").

12 Article 8(1)(b) of the Transparency Directive exempts from the obligations to publish annual and half-yearly financial reports any issuer exclusively of debt securities with a minimum denomination of €100,000 or equivalent. The market for securitised products in Europe is more or less exclusively a "wholesale" market – that is, a market where the minimum denominations are always at least €100,000 or equivalent in another currency. However, the Transparency Directive is a so-called "minimum harmonisation" directive and ongoing financial disclosure requirements are frequently imposed under local listing regimes. These would often add a further level of disclosure requirements in respect of transactions listed in the EU – a level that is beyond the scope of this paper.

rather than a regulatory regime designed to ensure investors can make enlightened investment decisions at all stages of the bond's life cycle. In addition, because the market abuse regime is designed to promote efficient (largely secondary) markets, it focuses on relatively immediate and short-term price-sensitivity of information. In contrast, in a "buy to hold" market like the securitisation markets, investors require information that will allow them to model the expected performance of the underlying portfolios over several years or even decades, albeit with regular subsequent updates of that data.

3.2 Capital Requirements Regulation ("CRR")[13]

3.2.1 The next disclosure regime this paper considers is the CRR. The CRR risk retention rules include an obligation on sponsors and originators at Article 409 to:

> ensure that prospective investors have readily available 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 such information that is necessary to conduct comprehensive and well informed stress tests on the cash flows and collateral values supporting the underlying exposures.[14]

This provides another broad, comprehensive disclosure requirement, this time administered by the European Banking Authority (the "**EBA**")—as opposed to the European Securities and Markets Authority, which is the ESA whose remit includes the Prospectus Directive and the Transparency Directive.

3.2.2 Partly as a result of its inclusion in the CRR, this obligation only applies when there is an "institution" acting as sponsor or originator on the transaction.[15] It is important to note that the risk retention rules (Articles 404 to 410 of the CRR) generally apply to institutions in their role as investors, and the disclosure rules are intended in part to complement the obligations on investors to undertake their own due diligence in respect of their investment, a theme that recurs in two delegated Commission

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13 Regulation (EU) No 575/2013.

14 The predecessor to Article 409 CRR, being Article 122a(7) of Directive 2006/48/EC, contained an obligation in substantially the same terms. It was introduced by Directive 2009/111/EC and applied from 1 January 2011.

15 "[I]nstitution" is a defined term that encompasses credit institutions and investment firms regulated under the CRR.

Regulations: the Alternative Investment Fund Managers Regulation ("**AIFMR**") and the Solvency II Delegated Act ("**Solvency II**"), discussed below.[16]

3.2.3 As a practical matter, the obligation under Article 409 is generally fulfilled in respect of public transactions via the prospectus and the subsequent publication of investor reports providing periodic (typically quarterly) updates on the underlying asset pool. In the case of transactions designed to be eligible for either (or both) of the Bank of England ("**BoE**") or European Central Bank ("**ECB**") schemes mentioned below, this is also partly fulfilled by the provision of the data required for central bank collateral eligibility (as to which, see below).

3.2.4 Despite the fact that in respect of public transactions this obligation is generally fulfilled in practical terms by complying with other disclosure obligations, the imposition of this additional general disclosure obligation creates uncertainty because it lacks clear limits to the information required to be disclosed in this context.[17] A claim, for example, by an investor that it requires further information in order to be able to "conduct comprehensive and well informed stress tests" would at least need to be carefully considered by an originator or sponsor subject to the CRR given the potential consequences of failing to comply with a regulatory obligation of this kind. Equally, given the lack of further technical guidance,[18] it would be open to the EBA or national competent authorities to require further information to be made available, either as a general matter or (possibly) on a case by case basis as requested by investors.

3.3 AIFMR

3.3.1 Articles 51 to 56 of the AIFMR contain similar rules to Articles 404 to 410 of the CRR, but in respect of alternative investment fund managers ("**AIFMs**"). Accordingly, as the FMLC understands, AIFMs have recently begun carrying out

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16 Commission Delegated Regulation (EU) 231/2013 and Commission Delegated Regulation (EU) 2015/35 respectively.

17 The FMLC understands that a practical consensus has emerged among market practitioners that the obligation under Article 409 of the CRR does not require any further information beyond that typically provided in the prospectus, the investor reports and any applicable loan-level data disclosure obligations (especially under the BoE and ECB regimes described below), but this remains, so far as the FMLC is aware, untested.

18 Cf. the Prospectus Directive, where the general disclosure obligation is elaborated via the annexes to the Prospectus Regulation specifying particular information to be disclosed. Likewise, there are regulatory technical standards in respect of Article 8b of the Credit Rating Agencies Regulation that specify what information must be disclosed to meet the disclosure obligations thereunder. The Bank of England and ECB schemes each have very specific disclosure requirements, including templates for loan-level data disclosure. The guidance available in respect of the obligation under Article 409 of the CRR (in Articles 22 and 23 of Commission Delegated Regulation (EU) No 625/2014) is extremely limited.

regulatory due diligence in order to satisfy their obligations under Articles 52 and 53 of AIFMR especially. The ongoing nature of the due diligence required under Article 53 combined with the requirement in Article 52(f) of AIFMR to ensure originators and sponsors "grant readily available access to all…relevant data necessary for the AIFM to comply with the requirements laid down in Article 53" and the importance of AIFMs as investors in securitisations, potentially creates an additional open-ended disclosure obligation with uncertain content on originators and sponsors of securitisations that is similar (but not identical) to the one articulated under Article 409 of the CRR. It should be evident that sponsors and originators may be reluctant to give broad, open-ended undertakings to provide information of uncertain content, as such undertakings can be onerous to comply with. While the FMLC understands that this is the case, securitisers do give undertakings to provide information, although they are the subject of substantial negotiation as to their scope. It is difficult to reconcile their reluctance with AIFMs' need to ensure they are meeting their regulatory obligations and in practice this can give rise to conflict in the securitisation markets.

3.3.2 Further, the AIFMR is administered by ESMA whereas the equivalent provisions of the CRR are administered by EBA.[19] These disparate regulatory responsibilities make it harder to achieve a co-ordinated approach to the legislation. This lack of uniformity makes it harder for securitisation parties to ensure that they have discharged their obligations under both sets of legislation.

3.4 Solvency II

3.4.1 Solvency II contains similar due diligence and information requirements on insurance and reinsurance undertakings (collectively, "**insurers**") to those imposed on AIFMs

[19] The FMLC notes that Article 56 of AIFMR should be helpful in this respect. It requires that:

> [i]n the absence of specific interpretation given by ESMA […], the provisions of [Articles 51-55] shall be interpreted in a consistent manner with the corresponding provisions of [the CRR and relevant guidance].

This is less helpful than it may initially appear, however, because not all relevant provisions of the CRR are reproduced in the AIFMR, so there is no "corresponding provision" to interpret in a "consistent manner". This is to say nothing of the fact that "consistent" does not mean "identical" and ESMA anyway is free to apply a specific interpretation that differs from the interpretation applied by the EBA to the CRR provisions.

under AIFMR.[20] Article 256(3)(d), in particular, requires insurance undertakings to ensure that the originator, sponsor or original lender grants "ready access to all relevant data necessary" for the insurer to carry out its ongoing due diligence obligations. As with AIFMR, the Solvency II test is subjective and therefore constitutes another open-ended disclosure obligation on originators and sponsors with uncertain content.

3.4.2 Also similar to AIFMR, the FMLC understands that Solvency II is proving contentious in the securitisation markets in terms of balancing the information sponsors and originators consider reasonable to provide with the information insurers need to comply with their obligations under Solvency II.

3.5 Central bank collateral requirements

3.5.1 One important factor contributing to the marketability of a public securitisation transaction is the eligibility of the bonds issued as collateral for the various monetary framework operations of central banks. Eligibility of the securitisation bonds as collateral for these purposes allows bank investors to take on economic exposure to the investment in the securitisation bond but preserve liquidity by using the bonds as collateral in their transactions with central banks. Given the commercial importance of this eligibility to bank investors and the importance of banks as investors in securitised products, eligibility as collateral for the purposes of at least one of the BoE or the ECB is in practical terms a requirement for most public securitisation transactions in eligible asset classes and transactions are frequently structured to comply with both sets of requirements so as to appeal to the broadest investor base possible. The eligibility requirements of the ECB and BoE are set out further in Annex 2. They each include detailed transparency requirements which, although broadly overlapping, are not perfectly aligned, nor identical to the regime under Article 8(b) of the Credit Rating Agencies Regulation.

3.6 Credit Rating Agencies Regulation ("CRA Regulation")[21]

3.6.1 Article 8b of the CRA Regulation requires:

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[20] As above, they are similar but not identical. In the case of Solvency II, many of the provisions of the CRR and AIFMR are reproduced, but not all. These differences reflect a more fundamental legal uncertainty about the degree to which the risk retention requirements for insurers are intended to track those for other investors, including EU-regulated credit institutions, investment firms and AIFMs. One aspect of this issue is whether CRR risk retention RTS applies equally under Solvency II—unlike the AIFMR, there is no clear statement in Solvency II that it is to be interpreted consistently with the CRR risk retention requirements (including the relevant regulatory technical standards). Other aspects have been address in an FMLC report on The Solvency II Directive published in June 2013 (available at http://www.fmlc.org/uploads/2/6/5/8/26584807/150.pdf). These issues are beyond the scope of this paper.

[21] Regulation (EC) 1060/2009.

> the issuer, the originator and the sponsor of a [securitisation bond] established in the Union [to], on the website set up by ESMA […], jointly publish information on the credit quality and performance of the underlying assets of the [securitisation bond], the structure of the securitisation transaction, the cash flows and any collateral supporting a securitisation exposure as well as any information that is necessary to conduct comprehensive and well-informed stress tests on the cash flows and collateral values supporting the underlying exposures.

3.6.2 Before considering the substance of the disclosure obligations imposed under Article 8b, it is worth considering its scope of application, which is extremely broad. Certain aspects of this broad scope may lead to confusion. Article 8b will apply to any securitisation bond where any of the originator, the sponsor or issuer is established in the EU. As such, the US branch of a European bank, securitising assets originated in the US with US obligors via a US issuer and offered exclusively to US investors would nonetheless be subject to a requirement to publish transparency information on an ESMA website because the originator would be taken to be "established" in the EU. Conversely, the European branch of a US bank securitising assets originated in Europe with European obligors and bonds listed on an EU regulated market and offered to EU investors would not be caught, so long as the issuer was also established outside the EU. In addition to the obvious extraterritorial concerns raised by this scope of application (which could lead to considerable uncertainty in themselves), it is difficult to reconcile this approach with the aim of the disclosure obligations, which is to provide transparency for European investors.

3.6.3 The Article 8b obligations are further specified by a set of regulatory technical standards (the "**RTS**").[22] Under the RTS, the data provider (be it the issuer, originator, sponsor, or another party appointed by them) will be required from 1 January 2017 to upload the following information to a publicly accessible website to be established by ESMA:[23]

(a) loan level data, to be provided at least quarterly for all common types of ABS according to a template set out in the RTS; ESMA is required to produce technical

[22] Commission Delegated Regulation (EU) 2015/3.

[23] It is currently unclear whether the disclosure requirements in the RTS will be used in their entirety for private and bilateral transactions or whether they need to be adapted to the specificities of these transactions. See the ESMA Call for Evidence: The extension of the disclosure requirements to private and bilateral transactions for Structured Finance Instruments, 20 March 2015.

specifications by 1 July 2016 that will set out more operational matters such as the file format for reporting;

(b) the transaction documents, including a detailed description of the payment waterfall, provided without delay following the issuance of the bonds;

(c) where a prospectus has not been published in respect of a transaction, a transaction summary containing specified information, provided without delay following the issuance of the bonds;

(d) investor reports, to be provided at least quarterly and within a month of the interest payment date, containing specified information;

(e) where Article 17 of MAR applies, any disclosure of information pursuant thereto, provided without delay following disclosure under MAR; and

(f) where Article 17 of the MAR does not apply, any significant change or event fulfilling certain specified characteristics, provided without delay following the significant change or event.

3.6.4 This overlaps very largely with the transparency requirements established by the ECB and BoE for eligible collateral. The data reporting templates, however, are different. Indeed, even though the data templates set out in the RTS are largely inspired by the data templates for ECB reporting, the final forms are even slightly different from the ECB's final form templates. In addition, where the MAR requires disclosure via certain channels, the RTS requires disclosure of that information again, but in the form of uploading it to the website ESMA is required to establish.

3.6.5 Article 8b is also notable for its similarity in wording to the obligation imposed under Article 409 of the CRR. If it is similar in wording to the CRR, however, it is not similar in administration or content. The CRA Regulation is administered by ESMA, whereas the CRR is administered by the EBA. The Article 8b obligations are further specified by the RTS whereas (as mentioned above) the CRR obligations are open-ended and the subject of uncertainty. Interestingly, although the CRR requires information on the "*individual* underlying exposures" (emphasis added) where the CRA Regulation requires information simply on the "underlying assets", the CRR is generally understood not to require loan level data to be provided in all cases. The RTS, on the other hand, makes it clear that Article 8b requires loan level data for all asset classes where a disclosure template is available. For example, there is a broad

market understanding, recently underpinned by a regulatory technical standard,[24] that Article 409 of the CRR does not always require the provision of loan level data (e.g. credit card receivable securitisations, where the underlying assets are so granular and revolve so quickly that it is deemed more useful to provide pool level data). The RTS and the ECB scheme (but not the BoE scheme), however, still require loan level data for all asset classes, thereby currently including credit cards.[25]

3.7 Market Abuse regime

3.7.1 Issuers are under an obligation pursuant Article 17 of the MAR to inform the public as soon as possible of inside information which directly concerns the issuer unless there is a safe harbour from the obligation to disclose.[26] Harmonisation of the event-based disclosure requirements under the CRA Regulation disclosure regime with the Market Abuse disclosure regime was attempted, but with mixed results.[27]

3.7.2 Securitisation bonds in respect of which the MAR disclosure obligation applies will have to post their information multiple times: publication under Article 17 of the MAR, filing in the officially appointed mechanism under Article 21 of the Transparency Directive where applicable and uploading to the ESMA website designated under Article 8b of the CRA Regulation.

3.7.3 Securitisation bonds in respect of which Article 17 of the MAR does not apply, on the other hand, will be subject to a similar (but non-identical) regime set out in the RTS which has no safe harbours. The FMLC notes that this regime has a different (possibly lower) threshold for disclosure. The reasons for this difference are not

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[24] Article 23(2)(c) of Commission delegated Regulation (EU) No 625/2014 clarifies Article 409 and states that:

> In order for data to be considered materially relevant with regard to the individual underlying exposures, it shall, in general, be provided on a loan-by-loan basis, however there are instances where the data may be provided on an aggregate basis. In assessing whether aggregate information is sufficient, factors to be taken into account shall include the granularity of the underlying pool and whether the management of the exposures in the pool is based on the pool itself or on a loan-by-loan basis.

[25] In the case of the BoE scheme, the BoE's approach to underlying loan data on credit cards has historically never required loan by loan data (as is also the case under US regulation). The FMLC understands that this may be reconsidered in the light of the requirement of the ECB to provide this level of detail, but no change has yet been made nor, so far as the FMLC is aware, is any change imminent.

[26] "[I]nside information" is a term defined in Article 7 of the MAR. For these purposes it is sufficient to consider that it means, "information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments".

[27] The event-based disclosure requirements imposed under Article 5(2)(b) of the RTS were originally intended to apply to all securitisation bonds. Following ESMA's consultation on the draft RTS, securities in respect of which Article 17 of MAR applied were exempted from that requirement. The does not achieve full harmonisation, however, because additional disclosures are needed to be filed in different places and incoherence remains; unlisted securities are arguably subject to more stringent requirements than listed securities.

entirely clear in the light of the fact that their issuer is outside the regulatory scope of MAR—by definition—because it has not requested or approved of their admission to trading on a regulated market, a multilateral trading facility or an organised trading facility.[28]

3.8 The cross-border angle: overlaying the complexities

3.8.1 In addition to the European disclosure regimes mentioned above, other disclosure regimes may also be relevant to a European securitisation transaction. To emphasise the numerous, potentially overlapping and/or conflicting disclosure regimes applicable to securitisation parties, it is helpful to consider two other disclosure regimes by way of example and explore how they would interact with the European regimes on a transaction and affect securitisation parties. This paper therefore looks at the corresponding regimes in the US and Japan and highlights how inter-regional differences exacerbate the already complex European disclosure regime.

4. THIRD COUNTRY REGIMES: US AND JAPANESE EXAMPLE

4.1 The United States also has a multitude of disclosure regimes applicable to securitisations, a number of which are the equivalents of European disclosure regimes described above, both being local implementations of the IOSCO disclosure principles. The primary source of disclosure requirements applicable to ABS in the United States is federal securities law administered by the US Securities and Exchange Commission ("**SEC**"), mainly the Securities Act of 1933, as amended (the "**Securities Act**"), the Securities Exchange Act of 1934, as amended (the "**Exchange Act**") and the rules and regulations promulgated under each. By way of context, the FMLC has endeavoured to set out the US disclosure regimes in considerable detail in Annex 3.

4.2 As mentioned in paragraph 3.8.1 above, this is not an issue confined to the US. Many third countries have disclosure regimes which can also be relevant to European securitisation transactions. Japan also has a variety of disclosure regimes applicable to securitisations, some of which are similar to the US and European disclosure regimes described in this paper. These regimes are outlined in Annex 4 to set the context.

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[28] Multilateral trading facilities (MTFs) and organised trading facilities (OTF) are different categories of trading venues regulated under the Markets in Financial Instruments Directive (2014/65/EU).

4.3 In order to understand the practical impact of these different disclosure regimes on the securitisation markets, it is useful to examine the case study set out in Annex 1. The case study seeks to demonstrate the far from remote possibility that securitisation parties could be subject to *multiple* inter-regional disclosure regimes, which all have differing standards and requirements.

4.4 The broad point which the FMLC would like to make by way of this cross-border example is that the substantial differences between disclosure regimes are causing complexity and a great deal of operational difficulty and legal confusion for market participants undertaking cross-border securitisation activity. While there is overlap and conflict *intra* Europe in terms of securitisation disclosure regimes, this is overlaid by further overlap and conflict in the context of cross-border securitisation transactions where securitisation disclosure regimes *outside* Europe also apply.

5. CONCLUSION

5.1 In the view of the FMLC, there is a case to be made for the rationalisation of securitisation disclosure regimes and for the establishment of a single repository for regulatory disclosures. As illustrated by the case study in Annex 1, legal and operational certainty would be greatly enhanced by greater coordination and by the setting of regulatory principles or guidelines relating to transparency and disclosure at an international level, and thereafter, by mutual recognition of national or regional disclosure regimes implementing the coordinated approach. The single repository for regulatory disclosures would assist all market participants. Issuers and securitisers would benefit from a reduction in the number of times and formats in which they have to disclose the same information and investors would have a "one-stop shop" for conducting their due diligence.

5.2 Focussing on the EU, for the purposes of answering question 6B of the Securitisation CP and in consideration of the wider aims of the CMU project, the FMLC would recommend better coordination of the multiple different European disclosure regimes identified in this paper so that, at least on a transaction by transaction basis, parties can look to a single standard for information to be disclosed at the stage of an initial offering, and a single standard for ongoing disclosure. This would reduce the burden on originators and issuers and benefit investors by consolidating all information relating to a given transaction in a single place.

ANNEX 1

CASE STUDY

1. BACKGROUND AND ASSUMPTIONS

1.1 This case study uses the example of an offering of RMBS admitted to trading on a regulated market in the EU. The main investors are banks, insurers and hedge funds both in Europe and in the United States, with offers to US persons being made in reliance on Rule 144A. In addition, this case study assumes that the RMBS are also offered to investors in Japan and therefore subject to the initial disclosure requirements under the FIEA, but not traded on a regulated market in Japan. This case study assumes all of the above disclosure regimes have come into force, which they are expected to do by 1 January 2017 and that the originator is the FDIC-insured US branch of an EU-established credit institution.

1.2 The FMLC understands that a transaction with these features would be unusual in some ways, including that offerings in the US, the EU and Japan are not normally carried out simultaneously. This case study nonetheless serves to illustrate the extent of the different disclosure regimes applicable to a securitisation transaction. Despite the fact that the modification of any of the features of the case would change (and likely modestly reduce) the applicable disclosure regimes, the extent of disclosure, even after such a modest reduction, is still onerous and many times more complex than it needs to be in order to ensure investors have appropriate information at their disposal to make enlightened investment decisions.

1.3 Neither does this uncoordinated approach to the regulation of securitisation disclosure assist investors, who will need to check multiple sources to ensure they have a complete picture of each securitisation bond in which they have or are considering an investment.

2. CASE STUDY: INTERACTION OF EUROPEAN, US AND JAPANESE REGIMES

2.1 In this context, and solely in relation to the initial offering, the originator would have to consider the following:

2.1.1 The general obligation to disclose all material information, defined seven different ways, as interpreted by five different regulators:

(a) under the EU Prospectus Directive (ESMA);

(b) under US Rule 10b-5 (SEC)

(c) under Article 409 of the CRR (EBA);

(d) under Article 406 of the CRR (EBA);

(e) under Articles 52 and 53 of AIFMR (ESMA);

(f) under Article 256 of Solvency II (EIOPA); and

(g) under Article 4, Paragraph 1 of the FIEA (LFB).

2.1.2 Compliance with four different detailed sets of rules for what information must be included in a prospectus, being:

(a) the EU Prospectus Regulation administered by ESMA;

(b) the US prospectus disclosure rules under Regulation AB, as amended by Regulation AB II, administered by the SEC;[29]

(c) any further disclosures required to ensure safe harbour treatment by the FDIC; and

(d) Cabinet Office Ordinance on Disclosure of Information, etc. on Specified Securities for which the J-FSA is responsible.

2.1.3 The provision of detailed loan by loan data three times in addition to asset disclosure in the prospectus, each in separate places and in separate formats:

[29] Note that, as described above, this is a matter of avoiding potential liability under Rule 10b-5 rather than a strict regulatory requirement.

(a) for the purposes of the BoE in their format to ensure BoE collateral eligibility, normally accomplished by uploading this data to the originator's website;

(b) to the European Datawarehouse in ECB format to ensure ECB collateral eligibility; and

(c) to the ESMA-established website in ESMA format to comply with the requirements of the CRA Regulation and the RTS.

2.1.4 The uploading or filing of further initial transaction information to five different websites, being:

(a) all information required by the BoE (transaction documents, transaction summary and cash flow model) for collateral eligibility, normally uploaded to originator's website;

(b) the transaction documents (including detailed payment waterfall description) uploaded to the ESMA-established website under the CRA Regulation;

(c) all information provided for rating purposes to any NRSRO uploaded to the website required under Rule 17g-5;

(d) the required SEC form with the findings and conclusions of any third party due diligence reports, to be filed with the SEC at least five business days before the first sale in the offering under Rule 15Ga-2; and

(e) a security registration statement to be filed with LFB through EDINET in a specific format to comply with the J-FSA-established EDINET specifications including detailed formality requirements (e.g. XBRL and Taxonomy).

2.2 Once the initial offering is complete, the ongoing disclosure obligations would involve:

2.2.1 The obligation to provide quarterly loan by loan data three times, each in separate places and in separate formats:

(a) for the purposes of the BoE in their format to ensure BoE collateral eligibility normally accomplished by uploading to the originator’s website;

(b) to the European Datawarehouse in ECB format to ensure ECB collateral eligibility;

(c) to the ESMA-established website in ESMA format to comply with the requirements of the CRA Regulation and the RTS; and

(d) to the LFB through EDINET in a specific format to comply with the Cabinet Office Ordinance on Disclosure of Information, etc. on Specified Securities as well as the J-FSA-established EDINET specifications including detailed formality requirements (e.g. XBRL and Taxonomy).

2.2.2 The filing of further or updated transaction information to five different standards and to at least four different websites, being:

(a) all information required by the BoE for collateral eligibility, normally uploaded to originator's website;

(b) any amendments to the transaction documents uploaded to the ESMA-established website under the CRA Regulation;

(c) all information provided for rating purposes to any NRSRO uploaded to the website required under Rule 17g-5;

(d) all further information required to ensure safe harbour treatment by the FDIC; and

(e) to the LFB through EDINET in a specific format to comply with the Cabinet Office Ordinance on Disclosure of Information, etc. on Specified Securities as well as the J-FSA-established EDINET specifications including detailed formality requirements (e.g. XBRL and Taxonomy).

2.2.3 The general requirement to ensure all information is made available to investors for ongoing due diligence and assessment of the asset pool to five different standards administered by four separate regulators:

(a) Article 409 of the CRR (EBA);

(b) Article 406 of the CRR for credit institution and investment firm investors (EBA);

(c) Articles 52 and 53 of the AIFMR for AIFM investors (ESMA);

(d) Article 256 of Solvency II for insurance and reinsurance undertaking investors (EIOPA); and

(e) J-FSA Policies.

2.2.4 The timely disclosure of any inside information in three different ways:

(a) to the public generally under Article 17 of the EU MAR;

(b) to the officially appointed mechanism under Article 21 of the Transparency Directive; and

(c) to the ESMA-established website under the EU CRA Regulation.

2.2.5 Quarterly repurchase activity reporting required under Rule 15Ga-1.

ANNEX 2

BOE AND ECB REQUIREMENTS

1. BOE REQUIREMENTS

1.1 The eligibility requirements for the purposes of the BoE's Sterling Monetary Framework operations vary according to collateral category and the type of investment, but all ABS collateral is required to meet the transparency requirements of the BoE. These transparency requirements include the following:

1.1.1 the provision of loan level data;

1.1.2 the transaction documents must be made freely and publicly available (including updates to those documents);

1.1.3 a transaction summary in standardised format for any new issuance must be made freely and publicly available;

1.1.4 standardised monthly investor reports must be provided containing specified information; and

1.1.5 a cash flow model must be made freely and publicly available by or on behalf of the originator/issuer.

The BoE also reserves for itself the right to require further information.

1.2 The BoE states in its market notice relating to the introduction of the transparency requirements that its "intention is to be consistent wherever possible with the requirements of other authorities" in the area of loan level data formats.[30] Despite this, the templates for loan level data disclosure are not aligned to those for either the ECB regime or the regime under Article 8b of the CRA Regulation.

[30] Available at http://www.bankofengland.co.uk/markets/Documents/marketnotice100719a.pdf (accessed 21 April 2015).

2. ECB REQUIREMENTS

2.1 Similar to the BoE requirements for eligible collateral under the Sterling Monetary Framework, the ECB sets out requirements in order for collateral to be eligible for Eurosystem credit operations. These fulfil a broadly similar function to the Sterling Monetary Framework operations, but for the euro rather than the pound sterling. Nonetheless, transactions are frequently structured to comply with both sets of eligibility requirements so as to appeal to the broadest investor base possible.

2.2 As with the BoE requirements, the ECB's eligibility requirements include the provision of loan level information at least quarterly, within one month of the interest payment date of the instrument in question. Loan level data must be submitted on the ECB's specified template and in their specified format. It is then processed and disseminated as necessary by the European Datawarehouse.

2.3 The file format and data reporting template required to meet the ECB requirements for loan level data are similar to (but not the same as) the equivalent BoE requirements.

ANNEX 3

US SECURITISATION DISCLOSURE REGIMES

1. DISCLOSURE REQUIREMENTS

1.1 US federal securities law imposes significant disclosure obligations on an issuer and other parties involved in offerings of ABS to US investors, whether publicly offered or privately placed. There is no central and overarching disclosure obligation of the type contained in the EU Prospectus Directive, but pursuant to Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder, US federal securities law imposes civil liability on issuers and other distribution participants for material misstatements and omissions contained in any offering document circulated to prospective investors or otherwise made (orally or in writing) in connection with any securities offering. This has the practical outcome of requiring disclosure if there is a substantial likelihood that a reasonable investor would attach importance to a given piece of information in determining whether to purchase the security or if that information would be viewed by a reasonable investor as having significantly altered the total mix of information available to the investor.

1.2 Regulation AB (which is being significantly amended, as to which see below section on Regulation AB II) provides more specific disclosure requirements in relation to SEC-registered public offerings of ABS. Pursuant to Regulation AB, the offering document for a public offering of ABS must include:

1.2.1 terms and conditions of the securities;

1.2.2 risk factors associated with the securities;

1.2.3 information about the issuer;

1.2.4 information on other parties to the transaction, such as the originator, sponsor, depositor, arranger, any credit support providers, liquidity providers and swap counterparties, and certain affiliates of those parties; and

1.2.5 extensive disclosure of so-called "static pool" data, which is data on the securitised loan or asset pool, including historical comparisons to similar pools (if the pool is

dynamic/managed, extensive disclosure is required regarding the asset manager and the criteria for adding and removing assets to and from the asset portfolio).

1.3 Pool asset disclosure requirements include:

1.3.1 detailed tabular presentations;

1.3.2 static pool data;

1.3.3 "dynamic" historical data about similar assets, as appropriate;

1.3.4 disclosure regarding material concentrations of pool assets; and

1.3.5 delinquency information.

1.4 In addition, non-US issuers are required to disclose any pertinent governmental, legal, regulatory, tax, economic, fiscal, monetary or other similar factors in the applicable home jurisdiction that could materially affect the ABS.

1.5 In the US, many private placements of ABS rely on Rule 144A for an exemption from the statutory obligation to register offerings with the SEC. Although the vast majority of the disclosure rules in the US – including those under Regulation AB – apply only to registered offerings (that is, an offer that does not rely on any exemption from the obligation to register the securities under the Securities Act), in practice the disclosure rules applicable to registered offerings are highly influential and are followed in many respects for offerings on a private placement basis as well. This is because a requirement to disclose specific information in respect of a registered transaction is taken as strong persuasive evidence that that information is material, and therefore its disclosure is necessary to avoid liability under Rule 10b-5 (which does formally apply to private placements as well as registered offerings) even in the context of a private placement. Compliance with the disclosure requirements applicable to SEC-registered public offerings of ABS is also relevant in that it is needed to qualify for the safe harbour treatment of the Federal Deposit Insurance Corporation discussed below.

2. ON-GOING DISCLOSURE REQUIREMENTS UNDER THE SECURITIES AND EXCHANGE ACT

2.1 After making an SEC-registered public offering of ABS, issuers are subject to ongoing reporting obligations. SEC-registered ABS issuers (both US and non-US issuers) are required to report periodic distribution and pool performance information within 15 days after each required distribution date (predominantly monthly) on the ABS.

2.2 In addition, SEC-registered ABS issuers (both US and non-US issuers) are subject to annual reporting, including disclosure regarding:

2.2.1 financial information for any significant obligor of pool assets;

2.2.2 financial information for any entity providing significant credit enhancement or other support;

2.2.3 financial information for any significant derivative instruments counterparty;

2.2.4 specified legal proceedings;

2.2.5 affiliations and related party transactions that are material to an investor's understanding of the ABS; and

2.2.6 a servicer's statement of compliance with its servicing obligations.

2.3 They must also make event-based disclosures within four business days of specified events, such as amendments to material agreements, performance triggers or changes in key transaction parties.

3. REGULATION AB II

3.1 The SEC recently adopted enhanced disclosure requirements applicable to SEC-registered public offerings of ABS by amending Regulation AB (known as "**Regulation AB II**"). Compliance with these enhanced disclosure requirements will be required from 23 November 2015, except for the requirement to provide asset-level information for specified asset classes, which will be required from 23 November 2016. To the extent these changes affect initial offering disclosures, it is expected that they will be implemented as a matter of fact in respect of private placements in order

to avoid liability under Rule 10b-5. To the extent these relate to ongoing disclosure requirements, it is expected that there will be no legal requirement to implement these disclosure rules in respect of private placements, though they may be reflected as a matter of contract in response to investor demand or expectation.

3.2 Regulation AB II will require asset-level disclosures in registration statements and subsequent distribution reports for ABS backed by:

3.2.1 residential mortgage loans ("**RMBS**");

3.2.2 commercial mortgage loans ("**CMBS**");

3.2.3 auto loans and leases;

3.2.4 debt securities; and

3.2.5 resecuritisations of ABS.

3.3 No asset-level disclosure requirements have been adopted for ABS backed by equipment loans or leases, student loans, credit cards or floorplan loans, and an exemption is provided for resecuritisations of ABS issued prior to the compliance date.

3.4 Asset-level information will need to be provided in a specified format and containing detailed information specified according to the asset class. Although specific data requirements vary by asset class, the new asset-level disclosures generally will include information about:

3.4.1 the credit quality of obligors;

3.4.2 the collateral related to each asset; and

3.4.3 the cash flows related to a particular asset, such as the terms, expected payment amounts, and whether and how payment terms change over time.

3.5 In addition, the SEC recently adopted the following amendments related to prospectus disclosure requirements for ABS offerings:

3.5.1 expanded disclosure about transaction parties, including disclosure about a sponsor's retained economic interest in an ABS transaction and financial information about parties obligated to repurchase assets;

3.5.2 statistical information regarding whether pool assets were originated in conformity with (or as exceptions to) disclosed underwriting / origination criteria, or modified after origination;

3.5.3 a description of the provisions in the transaction agreements about modification of the terms of the underlying assets; and

3.5.4 a requirement to file the transaction documents in connection with shelf takedowns by the date of the final prospectus.

4. REPURCHASE ACTIVITY REPORTING

4.1 The SEC requires public disclosure in periodic filings of information on repurchase activity relating to outstanding ABS for which the underlying transaction agreements contain a covenant to repurchase or replace an underlying asset for breach of a representation or warranty. This reporting requirement generally applies to issuers of ABS offered to US investors, whether SEC-registered or privately placed (e.g., pursuant to Rule 144A). Pursuant to Rule 15Ga-1 under the Exchange Act, an ABS issuer is required to provide specified data in tabular format concerning the securitised assets securitised that were the subject of a demand to repurchase or replace for breach of the representations and warranties during the reporting period. After making an initial filing, if there is no repurchase activity in a quarter, quarterly filing requirements are suspended until a demand occurs (while annual filing requirements continue). A "securitizer" who organizes and initiates an ABS transaction by selling or transferring assets to the ABS issuer may make this filing in lieu of the issuer.

5. FDIC SAFE HARBOUR FOR SECURITISATIONS

5.1 For securitisations that are accounted for under US GAAP as sales (not as financings) by insured depositary institutions regulated by the US Federal Deposit Insurance Corporation ("**FDIC**") and that otherwise meet specified requirements, the FDIC has provided "safe harbour" assurance that it would not, as conservator or receiver of the institution, use its statutory powers to reclaim securitised financial assets if the related transfer satisfies specified conditions. The availability of the safe harbour (set forth in 12 C.F.R. 360.6(b)) is subject to a number of conditions, including the following:

5.1.1 disclosure at the security level and the financial asset or pool level that at least complies with Regulation AB or any successor disclosure requirement (even if the ABS was issued in a private placement), disclosure regarding the structure of the transaction, periodic reporting obligations, disclosure regarding compensation to and loss retention by (as applicable) the originator, sponsor, rating agency, third-party advisor, mortgage or other broker and any servicer; and

5.1.2 for RMBS, disclosure of loan level information, affirmation of compliance with origination standards, disclosure of any third-party due diligence report on compliance with (a) origination standards and (b) applicable representations and warranties, and disclosure of any ownership interest of the servicer or any affiliate in other whole loans secured by the same real property that secures a pool asset (intended to expose conflicts of interest).

6. RULE 17G-5 UNDER THE EXCHANGE ACT

6.1 Pursuant to Rule 17g-5, the SEC requires a nationally recognized statistical rating organization ("**NRSRO**") that is hired to rate ABS, among other things, to:

6.1.1 obtain from the issuer, sponsor or underwriter of the ABS a written representation that it will, among other things, post to a password-protected internet website all the information it provides to the hired NRSRO for the purpose of its initial and ongoing credit rating activities in relation to the ABS; and

6.1.2 arrange for free and unlimited access to such password-protected internet website to any other NRSRO that provides a specified certification.

6.2 Effective 15 June 2015, any executed certification provided by a third party due diligence services provider under Regulation 15Ga-2 should also be posted to the password-protected website.

6.3 Since the introduction of Rule 17g-5, the SEC has repeatedly issued orders temporarily exempting certain transactions from its application for a period, provided they meet the following criteria:

6.3.1 the issuer is not a US person; and

6.3.2 the NRSRO has a reasonable basis to conclude that the structured finance product will be offered and sold upon issuance, and that any arranger linked to the structured finance product will effect transactions of the structured finance product after issuance, only in transactions that occur outside the US.

6.4 The SEC's most recent order providing an exemption for such transactions from the requirement to have a password-protected website expires on 2 December 2015. The effect of this is that Rule 17g-5 applies to registered and privately placed transactions in the United States, and will apply even to non-US transactions rated by an NRSRO if the SEC does not continue to provide an exemption after 2 December 2015.

7. RULE 15GA-2 UNDER THE EXCHANGE ACT

7.1 From 15 June 2015, any issuer or underwriter of a public or private Exchange Act ABS that is to be rated by an NRSRO will be required to make publicly available the findings and conclusions of any third-party due diligence report. The disclosure must present the full findings and conclusions expressed in a third party due diligence report. Pursuant to Rule 15Ga-2, this disclosure must be made to the SEC at least five business days prior to the first sale in the offering to which it relates.

7.2 Any report that contains the findings and conclusions of any due diligence services performed by a third party is subject to this requirement. For these purposes, "due diligence services" means a review of underlying assets for the purpose of making findings with respect to:

7.2.1 the accuracy of the information or data about the assets provided by the securitiser or originator of the assets;

7.2.2 whether the origination of the assets conformed to stated underwriting or credit extension guidelines, standards, criteria, or other requirements;

7.2.3 the value of collateral securing the assets;

7.2.4 whether the originator of the assets complied with applicable law or regulation; or

7.2.5 any other factor or characteristic of the assets that would be material to the likelihood that the issuer of the asset-backed security will pay interest and principal in accordance with applicable terms and conditions.

7.3 The first four categories cover due diligence typically conducted for RMBS offerings. The fifth is a catch-all category for other asset classes. The SEC has clarified that "due diligence services" are intended to cover reviews of the underlying assets that are commonly understood in the securitisation market to be third-party due diligence services. The adopting release specifically identifies a comparison of data on a loan tape to a sample of loan files in connection with auditors' agreed-upon procedures letters as a type of review that would fall into this category but states that procedures primarily performed to verify the accuracy of asset related data in the prospectus would not be.

7.4 The SEC exempts non-US offerings from these due diligence related requirements so long as the following conditions are met:

7.4.1 the offering is not registered (and is not required to be registered) under the Securities Act;

7.4.2 the ABS issuer is not a US person; and

7.4.3 the ABS will be offered and sold only in transactions outside the United States (meaning that private placements within the United States, e.g. under Rule 144A would be affected).

8. RULE 17G-10 UNDER THE EXCHANGE ACT

8.1 In addition to the requirements under Rule 15Ga-2, pursuant to Rule 17g-10, a third-party hired to provide due diligence services in connection with an ABS offering will be required from 15 June 2015 to deliver a certification to any NRSRO that produces a rating to which their due diligence services relate. A written certification for this purpose must disclose:

8.1.1 who paid for the due diligence services;

8.1.2 a detailed description of the manner and scope of the due diligence provided; and

8.1.3 a summary of the findings and conclusions of the due diligence.

9. PRACTICAL IMPACT: CASE STUDY

The above contains a great deal of detail. In order to understand the practical impact on the securitisation markets, it is useful to examine the case study set out in Annex 1.

ANNEX 4

JAPANESE SECURITISATION DISCLOSURE REGIMES

1. THE FINANCIAL INSTRUMENTS AND EXCHANGE ACT ("FIEA")

1.1 The FIEA contains disclosure rules applicable to initial offerings and any subsequent offerings by issuers of securitised products (e.g. ABS). When offering securities to the public, the issuer is, except in certain limited cases, required to file with the relevant local finance bureau ("**LFB**") (via an electronic filing system called EDINET) a securities registration statement under the FIEA.[31] Once an offering of financial instruments has triggered an initial disclosure requirement, ongoing disclosure rules would also become applicable to the issuer.[32]

1.2 An issuer subject to the disclosure rules above must disclose information on the underlying portfolio. An issuer of ABS may be required to disclose certain detailed portfolio-level information which is not required for the issuer of other securities. For example, where the underlying assets are loans, terms of underlying loan agreements (e.g. maturity of loans, interest rates and accompanying collateral arrangements) would be subject to the mandatory disclosure requirements.[33]

2. J-FSA SUPERVISORY POLICIES ("J-FSA Policies")[34]

2.1 Under the J-FSA Policies, certain financial institutions licensed in Japan may not overly rely on external credit ratings when acquiring exposure to securitisation products and are required to obtain information on such products including information on underlying assets, leverage and details of credit events. They are also required to monitor the capabilities of the relevant originators and asset managers as well as the level of risks retained by the originators.

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31 Article 4, Paragraph 1 of the FIEA.

32 Chapter 2 of the FIEA.

33 Cabinet Office Ordinance on Disclosure of Information, etc. on Specified Securities: Cabinet Office Ordinance on the Disclosure of Corporate Affairs, etc.

34 J-FSA Supervisory Policies referred to in this paper include, among others, Comprehensive Guidelines for Supervision of Major Banks, etc. and Comprehensive Guidelines for Supervision of Financial Instruments Business Operators, etc.

2.2 In addition, the J-FSA Policies require licensed banks to disclose information on their exposure to securitisation products (including information on the breakdown of underlying assets), as part of disclosure requirements regarding regulatory capital.

2.3 The J-FSA enhanced this supervisory framework by amending the J-FSA Policy on 30 April 2015. According to the amendment to the J-FSA Policies, banks are required to collect information on the securitised products including information on risk retention by originators and quality of underlying assets, when retaining exposure to securitisation products.

3. CREDIT RATING AGENCIES ("CRAs")

3.1 Under the FIEA and its subordinate order, registered credit rating agencies ("CRAs") are required to establish internal mechanisms through which: (a) CRAs publish material information on credit ratings in order to enable third parties to verify the appropriateness of credit ratings;[35] (b) CRAs require originators, issuers or other related parties to disclose information on the products to the public; and (c) CRAs publish how the related parties have responded to such request.[36]

4. INVESTMENT MANAGERS AND INSURANCE COMPANIES

4.1 Where a fund managed by an investment manager is an issuer of financial instruments, it may be subject to the disclosure requirements set out in paragraphs 1.1 and 1.2 above. In addition, investment managers registered under the FIEA would be required to deliver periodical investment reports to the investors in such funds.[37] Such investment reports must contain certain information on the portfolio as well as the counterparties of the trades which the manager entered into on behalf of the funds.

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35 According to the book entitled "Shōsetsu kakuzuke kaisha kisei ni kansuru seido" (Shoji Homu, 2011) written by the authors including the J-FSA officers who were in charge of drafting the amendment to the FIEA in relation to this disclosure requirement, CRAs should consider referring to the Standardised Information Reporting Package developed by the Japan Securities Dealers Association. See paragraph 7.3 below for further details.

36 Article 66-33, Paragraph 1 of the FIEA and Article 306, Paragraph 1, Item 9 of the Cabinet Office Ordinance Concerning Financial Instrument Trading Business.

37 Article 42-7 of the FIEA and Article 134 of the Cabinet Office Ordinance Concerning Financial Instrument Trading Business.

4.2 Insurance companies are required to deliver investment reports which are equivalent to those delivered by an investment manager in respect of certain insurance products with the nature of investment management.[38]

5. MARKET ABUSE LEGISLATION

5.1 Securitisation products listed on a regulated market are subject to market abuse regulations, such as the prohibition of market manipulation.[39] Certain securitisation products traded on a regulated market are also subject to insider dealing regulations pursuant to which insiders are prohibited from trading related securities until the issuer (or the manager) discloses price sensitive or material non-public information.[40] This disclosure obligation can be met by way of the ongoing disclosure requirements set out in paragraph 1.1 above or timely disclosure under the relevant stock exchange rules.

6. MARKETING OF SECURITISATION PRODUCTS: DEALERS AND INTERMEDIARIES

6.1 A supervisory regime applies to the marketing of securitisation products. Under the J-FSA Policies, dealers and intermediaries registered in Japan are required to obtain information on the underlying assets rather than solely relying on external credit ratings, when marketing securitisation products to investors. The J-FSA Policies also require such dealers and intermediaries to convey information on the underlying assets to investors upon demand.

6.2 According to the recent amendment to the J-FSA Policies mentioned above, registered dealers and intermediaries are required to collect information on securitised products including, among others, level of leverage and details of credit events embedded in the securitisation products, when marketing securitisation products.

6.3 Further, a self-regulatory organisation, the Japan Securities Dealers Association ("**JSDA**") has established an enhanced disclosure regime applicable to dealers and

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38 Article 105 of the Insurance Business Act (No.105 of 1995).

39 Article 159 of the FIEA.

40 Articles 166, 167 and 167-2 of the FIEA.

intermediaries which are JSDA members consisting of most registered dealers and intermediaries in Japan. In particular, the Standardised Information Reporting Package developed by JSDA defines the scope of information on the underlying assets which should be conveyed to investors, when dealers or intermediaries market certain securitisation products (e.g. RMBS, ABS, collateralised loan obligations and CMBS).

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