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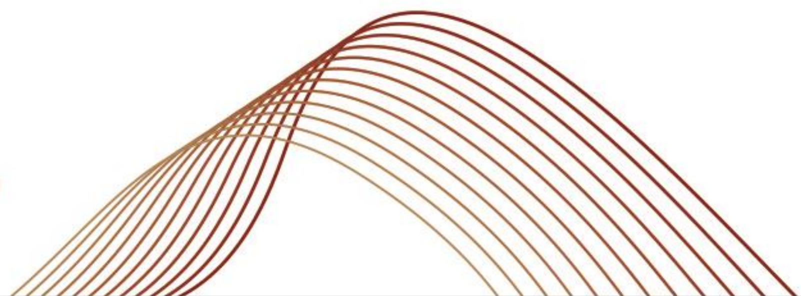

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ESAs provide (some) relief from new reporting obligations for CLOs

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Today, the ESA[1]s (the EBA[2], ESMA[3] and EIOPA[4]) provided some relief to the CLO industry from the new reporting obligations that are due to come into force in January 2019. The ESAs have stated that they expect the relevant competent authorities (the national regulators) to take into account the type and extent of information already provided by industry until the ESMA reporting templates are finalised

Background

On 22 August 2018 ESMA published its final report on the reporting obligations under Article 7 of the Securitisation Regulation[5] (the "**Final Report**"). Article 7 of the Securitisation Regulation requires disclosure of quarterly portfolio level disclosure, quarterly deal level information, any inside information relating to the securitisation that the reporting entity is obliged to make public under the Market Abuse Regulation, and any significant events. In addition, the rule requires certain information to be made available "prior to pricing", including final form transaction documents and a transaction summary. The provisions of the Securitisation Regulation apply to any securitisation that is issued from 1 January 2019 (including CLOs and CLO warehouses and fund leverage deals that are structured as securitisations).

The Final Report follows on from ESMA's consultation paper dated 19 December 2017 and consists of draft regulatory technical standards and draft implementing technical standards. The Final Report includes detailed disclosure templates that are required to be completed with respect to all of the ongoing information that is required to be made available under Article 7 of the Securitisation Regulation. In the Final Report, ESMA has recommended to the European Commission that a transition period of 15-18 months be granted for the implementation of the disclosure requirements. Until today, the CLO industry did not have any formal insight as to whether any transition period would be granted.

The ESA Position

Today, the ESAs have stated that they "*expect CAs[6] to generally apply their supervisory powers in their day-to-day supervision and enforcement of applicable legislation in a proportionate and risk-based manner. This approach entails that CAs can, when examining reporting entities' compliance*

[1] The European Supervisory Authorities, being the EBA, ESMA and EIOPA.
[2] The European Banking Authority
[3] The European Securities and Markets Authority
[4] The European Insurance and Occupational Pensions Authority
[5] Regulation (EU) 2017/2402
[6] CAs refers to national competent authorities

with the disclosure requirements of the Securitisation Regulation (which will apply from 1 January 2019, albeit in a non-standardised manner), take into account the type and extent of information already being disclosed by reporting entities." They go on to state that "*this approach does not entail general forbearance, but a case-by-case assessment by the CAs of the degree of compliance with the Securitisation Regulation*."

In providing this statement the ESAs acknowledged that they do not have the legislative authority to provide for the disapplication of the requirements of Article 7 of the Securitisation Regulation. Rather, they have reinforced the fact that in supervising this aspect of the Securitisation Regulation the various competent authorities should take a proportionate approach. The ESAs also noted that they expect that difficulties with compliance will be solved with the final adoption of the ESMA disclosure templates. As such, this statement from the ESAs should be viewed as a temporary measure.

With only a month to go until the formal application of the rules, the ESAs seem to have sought to provide some level of certainty so that securitisation issuance may continue. It should be noted that the statement from the ESAs does not preclude the possibility that the European Commission may adopt a transition period similar to that recommended by ESMA (15-18 months).

Application to CLOs

Transactions that close from 1 January 2019 will need to comply with all of the provisions of the Securitisation Regulation, including Article 7. However, with the ESAs' announcement today, managers and issuers may be able to rely on the existing CLO disclosure regime until the ESMA templates are formalised (subject to any transition period that may be granted by the European Commission). In so doing, during this interim period it may be possible to conclude that the existing regime of CLO payment date reports and monthly reports are sufficient. However, as a strict legal matter, the reliance on the existing CLO disclosure regime only would not satisfy the ongoing reporting obligations required by Article 7 of the Securitisation Regulation.

In addition, as CLOs are already subject to the requirements regarding inside information in the Market Abuse Regulation, the requirements of Article 7 with respect to inside information and significant events should be satisfied. However, we would suggest that information that is required to be disclosed "prior to pricing" should be provided for transactions that close from 1 January 2019. The ESAs' statement was limited only to the reporting templates, not all of the obligations under Article 7 of the Securitisation Regulation.

It is important to note that today's announcement does not "grandfather" transactions that are issued after 1 January 2019 but before the ESMA templates are formally adopted. Rather, such transactions will need to comply with the final regime once it is adopted (again, subject to any transition period that may be granted by the European Commission). As such, we would suggest that such transactions should be structured in a manner that would allow them to comply with the final regime once it's adopted without the need for any subsequent amendments. As such, careful consideration of the contractual matrix required to support compliance should be considered.

The Paul Hastings team will continue to monitor developments closely and will update our clients in relation to any further developments.

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