



One Firm Worldwide<sup>SM</sup>



## WHITE PAPER

March 2018

### The European Securitisation Regulation: The Countdown Continues...

#### **Draft Regulatory Technical Standards on Content and Format of the STS Notification**

Regulation (EU) 2017/2402, which lays down a general framework for securitisation and creates a specific framework for simple, transparent and standardised securitisation ("Regulation"), came into force on 18 January 2018 and will apply to European credit institutions, insurance companies and pension funds as well as alternative investment fund managers from 1 January 2019 onwards. The Regulation tasks the three European supervisory authorities with developing regulatory technical standards and implementation technical standards for a number of key areas addressed in the Regulation.

This Jones Day *White Paper* summarizes the draft technical standards on content and format of the STS notification under the Regulation as proposed by ESMA in its Consultation Paper of 19 December 2017 (ESMA33-128-33).

## TABLE OF CONTENTS

LEGAL BACKGROUND AND TIMETABLE .....	1
CONTENT OF STS NOTIFICATION .....	1
General Information .....	2
Compliance with STS Criteria .....	2
FORMAT OF STS NOTIFICATIONS .....	3
ENDNOTES .....	4
LAWYER CONTACTS .....	4

Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation (“Regulation”) came into force on 18 January 2018. It promotes two purposes: first, the harmonisation and consolidation of certain key elements in the European securitisation market across the financial industries and, second, the creation of a specific legal framework for simple, transparent and standardised (“STS”) securitisations. The concept of STS securitisations has been introduced following the strong request of market participants for a recalibrated risk weighting regime that distinguishes between “normal” securitisations and securitisations that meet certain quality standards. The Regulation will apply to credit institutions, insurance companies and pension funds as well as alternative investment fund managers from 1 January 2019 onwards.

The Regulation tasks the three European supervisory authorities, the European Securities and Markets Authority (“ESMA”), the European Banking Authority (“EBA”) and the European Insurance and Occupational Pensions Authority (“EIOPA”) with developing regulatory technical standards and implementation technical standards for a number of key areas.

In a series of Jones Day *White Papers* we will provide an overview of the various consultation papers and the status of the draft technical standards published by the mandated European supervisory authorities. In two previous Jones Day *White Papers* we focused on the draft technical standards (i) on disclosure requirements to be fulfilled by originators, sponsors and securitisation special purpose entities in securitisations<sup>1</sup> as well as (ii) on operational standards for securitisation repositories data collection, data aggregation and comparison, data access, and procedures to verify completeness and consistency of information<sup>2</sup>.

This Jones Day *White Paper* focuses on ESMA’s consultation paper (ESMA Consultation Paper of 19 December 2017 - ESMA33-128-33) for draft regulatory technical standards on content and format of the STS notification under the Regulation (“Consultation Paper”).

## LEGAL BACKGROUND AND TIMETABLE

Article 27(1) of the Regulation requires the originators and sponsors to jointly<sup>3</sup> notify ESMA where a securitisation transaction

seeks to demonstrate its compliance with the criteria for simple, transparent and standardised securitisations, namely for non-ABCP securitisations the criteria set forth in Articles 20 to 22, and for ABCP securitisations the criteria set forth in Articles 24 to 26 of the Regulation (“STS Notification”). The STS Notification shall include an explanation by the originator and sponsor of how each of the STS criteria has been complied with. To ensure compliance of the STS Notification with the requirements set out in Article 27(1) of the Regulation, ESMA has been tasked with the development of (i) draft regulatory technical standards on content and format of the STS Notification (“Draft RTS”) and (ii) draft implementation standards establishing the templates to be used for the STS Notification (“Draft ITS”).

It is important to note that the Draft RTS focus on the form and content of the STS Notification and are not designed to provide guidance on the interpretation and application of the various STS criteria. According to Articles 19(2) and 23(3) of the Regulation it is the responsibility of EBA (in cooperation with ESMA and EIOPA) to provide guidance on these items by 18 October 2018. Therefore, the Draft RTS are limited to the specification of the information that the originator, the sponsor and the SSPE are required to provide in order to comply with Article 27(1) of the Regulation.

The deadline for the submission of the final Draft RTS and Draft ITS to the European Commission is 18 July 2018. The feedback period for the Consultation Paper ends on 19 March 2018.

## CONTENT OF STS NOTIFICATION

In order to take into account the peculiarities of non-ABCP securitisations and ABCP securitisations and to ensure their proper identification, the Draft RTS provide for two different notification forms (attached as Annex I and Annex II to the Draft RTS). Each notification form is divided into:

- A general part containing general information required for identifying the securitisation including its compliance status with STS requirements in the Regulation and
- A compliance part containing detailed information about the compliance of the securitisation with the STS criteria as set out in Articles 20 to 22 of the Regulation for non-ABCP securitisations and Articles 24 to 26 of the Regulation for ABCP securitisations.

## General Information

The general information contains 22 fields providing for certain basic details that describe the securitisation and the issued securities, such as the securitisation name, the name and establishment of the seller and originator, the legal entity identifier, the ISIN codes, the issue date and the asset class. This allows (potential) investors to quickly obtain a general overview of the securitisation transaction and the related parties.

Whereas in other areas the Regulation distinguishes between public securitisations and private securitisations (i.e., securitisations for which no prospectus has to be prepared in compliance with Directive 2003/71/EC<sup>4</sup>), Article 27 of the Regulation does not make such distinction. However, in order to strike a balance between the bespoke and confidential nature of private securitisations, on the one hand, and the proper fulfilment of the notification requirements according to Article 27 of the Regulation, on the other hand, Article 2(2) of the draft RTS suggests that originators and sponsors of private securitisations should submit to ESMA two separate general parts of STS Notifications: one general part that is retained by ESMA and that contains all general information requested to be disclosed, and one general part that discloses only a limited number of disclosure items to be published by ESMA on its website.

It should be noted that ESMA's approach to private securitisations is limited to the general part of the STS Notification, but does not apply to the compliance part. Hence, originators, sponsors and SSPEs must be careful to ensure that the confidentiality is also maintained in the "public" compliance part.

## Compliance with STS Criteria

As stated above, ESMA is not taking responsibility for providing guidance on the interpretation and application of the STS criteria. Instead, the Draft RTS are designed to specify the information that the originator, sponsor and SSPE are required to provide in order to comply with the STS notification requirements. The information provided in the STS Notification is designed to enable (potential) investors to determine whether and how the STS criteria are satisfied.

**Categorisation of STS Criteria.** Taking into consideration the varying nature and complexity of the STS criteria, ESMA has adopted a "proportionate approach". According to ESMA this means that "the extent of detail to be provided about how the

securitisation complies with the STS requirements reflects the complexity of the specific STS criteria"<sup>5</sup>. Annex I and Annex II of the Draft RTS allocate each STS criteria to one of the following three categories:<sup>6</sup>

- Self-explanatory/straightforward criteria that require a "simple" confirmation that the requirement is met; this includes, for example, a confirmation as to no active portfolio management, no resecuritisation and compliance with the risk retention requirements;
- STS criteria that due to their nature cannot be confirmed by a "yes", but require a short and concise explanation, including by means of cross-references to the documentation. Listed examples are an explanation regarding the true sale requirement and any claw-back risks, the representations regarding the assignment of the underlying exposures as well as evidencing the servicer expertise; and
- STS criteria that are subject to interpretation and guidance by EBA (e.g., the EBA guidelines on the harmonised interpretation and application of the STS criteria or the regulatory technical standards on the homogeneity of the underlying exposures) require a detailed explanation, based on which investors can determine whether and how compliance with the STS criteria is being achieved. This list includes, for example, a detailed description of the application of sound underwriting criteria, the homogeneity of the underlying exposures and the proven expertise of the servicer.

**Cross-Reference to Prospectus or Other Documentation.** In addition to the content to be reported in the notification forms (Annex I and II of the Draft RTS), ESMA considers it mandatory that, where a prospectus has been prepared for a securitisation transaction, cross-references to such prospectus should be included in the relevant text fields of the notification form to demonstrate compliance with the STS criteria. Therefore, Article 3 of the Draft RTS requires originators and sponsors to provide references to the relevant sections of the prospectus as part of the notification. ESMA's idea is based on the so-called checklists set forth in Annexes VII and VIII of the Commission Regulation (EC) No 809/2004<sup>7</sup>, used in connection with the approval process for public prospectuses. This means that for each STS criteria the notification form needs to refer to the relevant page number and paragraph of the related prospectus. Furthermore, where the requested information is not

disclosed in the text fields of the notification form, a reference to the place in the prospectus where such information can be found shall be included.

Finally, Article 3(3) of the Draft RTS requires that where a prospectus does not contain information or where the information set out in the prospectus is not detailed enough to confirm or explain specific STS criteria, the originators and sponsors shall indicate (i) the reasons why the required information is not included therein and (ii) where the relevant information can be found in the securitisation documentation that is to be disclosed pursuant to Article 7(1)(b) of the Regulation.

Those who have submitted checklists to listing authorities in connection with the prospectus approval process will be reminded of the tedious and lengthy annotation process.

**Striking the Balance.** At first sight and on the face of the Consultation Paper the proportionate explanation approach and the prospectus cross-reference approach taken by ESMA seems clear and relatively straightforward. From a practical and advisory point of view, however, when looking at the different categories in more detail one may find it very difficult to distinguish between those STS criteria that require a concise explanation and those STS criteria that require a detailed explanation. The notification forms set forth in Annex I and Annex II of the Draft RTS do not provide for greater clarity and it can be expected that originators, sponsors and SSPEs (or third parties on their behalf) will provide lengthy explanations that are not simple and transparent, but inevitably contain substantial reservations and qualifications (in particular where STS criteria are subject to interpretation). Moreover, in the absence of an established market standard different originators and sponsors will, in all likelihood, use different language and explanations that (potential) investors (or their advisers) may find incoherent and confusing rather than helpful. It is not only beneficial to the STS securitisation market, but also in the interest of both originators and sponsors, on the one hand, and (potential) investors, on the other hand, to have short,

concise and to-the-point explanations regarding compliance with the STS criteria. To achieve this, the explanations to be set out in Annex I and Annex II of the Regulation should be limited to two categories, namely the confirmatory group (“yes”) and the concise explanation group (i.e., the detailed explanation group should be removed), and should not require cross-references to disclosure and other transaction documents. It is then up to the originators, sponsors and third parties assisting in the preparation of the STS Notification to expedite the STS Notification process by developing model explanations that can be used by market participants in a coherent and comprehensive way.

In the interest of a transparent, standardised and (most importantly) growing securitisation market, ESMA should aim at simplifying the STS Notifications and make them what they are designed to be: notifications.

## FORMAT OF STS NOTIFICATIONS

Article 27(6) of the Regulation requests ESMA develop Draft ITS establishing the templates to be used for the STS Notification.

The Draft ITS require the use of XML-format templates in accordance with the ISO 20022 methodology as a common format for the submission of the completed notification forms to ESMA. The ISO 20022 format is already employed in the respective MiFID II<sup>8</sup>, EMIR, and SFTR<sup>9</sup> delegated acts (as well as being used in SEPA and the T2S settlements system) and is therefore familiar to many market participants. According to ESMA, receiving STS notifications in a standardised format supports ESMA's ability to process data submissions before making them available on its website.

In the next Jones Day *White Paper* we will take a closer look at EBA's Consultation Paper regarding draft regulatory technical standards on the homogeneity of the underlying exposures in securitisations under Art. 20(14) and 24(21) of the Regulation<sup>10</sup>.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com/contactus/](http://www.jonesday.com/contactus/).

### Ulf Kreppel

Frankfurt  
+49.69.9726.3939  
[ukreppel@jonesday.com](mailto:ukreppel@jonesday.com)

### Andrés Lorrío

Madrid  
+34.91.520.3945  
[alorrío@jonesday.com](mailto:alorrío@jonesday.com)

### Michelle Taylor

Hong Kong  
+852.3189.7347  
[mtaylor@jonesday.com](mailto:mtaylor@jonesday.com)

### Vinicio Trombetti

Milan  
+39.02.7645.4001  
[vtrombetti@jonesday.com](mailto:vtrombetti@jonesday.com)

### Christine Van Gallebaert

Paris  
+33.1.56.59.39.39  
[cvangallebaert@jonesday.com](mailto:cvangallebaert@jonesday.com)

### Dr. Nick Wittek

Frankfurt  
+49.69.9726.3917  
[nwittek@jonesday.com](mailto:nwittek@jonesday.com)

## ENDNOTES

- 1 ESMA Consultation Paper of 19 December 2017 - ESMA33-128-107, see [<http://www.jonesday.com/the-european-securitisation-regulation-the-countdown-continues-03-02-2018/>]
- 2 ESMA Consultation Paper of 19 December 2017 - ESMA33-128-107, see [<http://www.jonesday.com/the-european-securitisation-regulation-the-countdown-continues-03-02-2018/>]
- 3 In ABCP securitisations the obligation to notify ESMA is only with the sponsor.
- 4 Also known as Prospectus Directive.
- 5 Paragraph 18 of the Consultation Paper.
- 6 See also paragraphs 32, 34 and 36 of the Consultation Paper.
- 7 To be replaced by Annexes 10 and 11 of the draft Technical Advice on Prospectus Regulation, which comes into force on 21 July 2019.
- 8 Directive 2014/65/EU of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast)
- 9 Securities Financing Transactions Regulation
- 10 EBA Consultation Paper of 15 December 2017 (EBA/CP/2017/21)

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our “Contact Us” form, which can be found on our website at [www.jonesday.com](http://www.jonesday.com). The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.