

The Securitisation Regulation and its Impact on UCITS and AIFs

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The Securitisation Regulation (Regulation EU 2017/2402) will be directly applicable across the EU from 1 January 2019. It will replace existing sector-specific rules with a new framework that will apply to securitising entities and institutional investors in all European securitisations, including UCITS management companies and alternative investment fund managers (“AIFMs”). The Securitisation Regulation will impose harmonised requirements on due diligence, risk retention and disclosure applying to all securitisations.

Scope

The Securitisation Regulation defines “securitisation” to capture any transaction or scheme where the credit risk associated with an exposure or pool of exposures is tranching. The regulation applies to “institutional investors” which are defined to include AIFMs and UCITS management companies and internally managed UCITS.

Currently, the securitisation requirements applicable to AIFMs are set out in article 17 of the Alternative Investment Fund Managers Directive (“AIFMD”) and apply to EU AIFMs managing or marketing EU or non-EU AIFs. There are no corresponding securitisation provisions in the UCITS Directive.

The Securitisation Regulation will harmonise the securitisation requirements applicable to investments in securitisations by AIFs and by UCITS. Article 17 of AIFMD will be replaced with a new provision stating that, where AIFMs are exposed to securitisation positions which do not meet the requirements of the Securitisation Regulation, the AIFM must take corrective action. An identical provision will be inserted into the UCITS Directive.

Risk Retention Rules

Replicating the current sector-specific requirement, the Securitisation Regulation requires institutional investors to ensure that the originator, sponsor or original lender of a securitisation retains at least a 5% net economic interest in the securitisation. The new framework also imposes direct risk retention requirements on originators, sponsors and original lenders. This new direct approach means that an EU securitising entity needs to comply with the new requirements even where there is no corresponding due diligence requirement on the investor to verify before investing whether or not the securitising entity has retained risk, for example where the investors are non-EU entities.

Due Diligence

The existing due diligence requirements set out in the various pieces of sector-specific legislation will be repealed and replaced by the Securitisation Regulation provisions which require institutional

investors to undertake due diligence processes before becoming exposed to a securitisation and on an ongoing bases as long as they remain exposed to a securitisation.

Disclosure

Originators, sponsors and original lenders must make available to investors certain information on the transaction and underlying exposures within investor reports, which should enable institutional investors to comply with their ongoing due diligence obligations.

Transitional Provisions

The Securitisation Regulation applies to securitisations the securities of which are issued on or after 1 January 2019 or which create new securitisation positions on or after that date. Pre-existing securitisations will continue to be subject to the existing applicable sector specific risk retention and due diligence requirements.

Next Steps

The European Banking Authority (“EBA”) and European Securities and Markets Authority (“ESMA”) are in the process of developing technical standards and guidance to provide more detail with respect to certain aspects of the framework established by the Securitisation Regulation. In August 2018, ESMA issued a set of draft regulatory and implementing technical standards (“RTS” and “ITS”) under the Securitisation Regulation specifying the details of a securitisation to be made available by the originator or sponsor as well as the format and templates for doing so. The RTS / ITS have been submitted to the European Commission for endorsement.

Full details of the Asset Management and Investment Funds Group, together with further updates, articles and briefing notes written by members of the Asset Management and Investment Funds team can be accessed at www.matheson.com.

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